IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 8 Original

STATE OF ARIZONA,
Complainant,

v.

STATE OF CALIFORNIA, PALO VERDE IRRIGATION DISTRICT, IMPERIAL IRRIGATION DISTRICT, COACHELLA VALLEY COUNTY WATER DISTRICT, THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, CITY OF LOS ANGELES, CITY OF SAN DIEGO, AND COUNTY OF SAN DIEGO,
Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,
Interveners,

STATE OF NEW MEXICO and STATE OF UTAH,
Impleaded Defendants.

PROPOSALS FOR ARTICLES I(G), (H), II(B)(2), II(B)(4), II(B)(7) OF DECREE

Submitted by

STATE OF CALIFORNIA

In Which Join The Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, County of San Diego, Coachella Valley County Water District, and Palo Verde Irrigation District

DECEMBER 18, 1963

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INTRODUCTION

The State of California, Palo Verde Irrigation District, Coachella Valley County Water District, The Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, and County of San Diego (but not Imperial Irrigation District) submit the following provisions for the decree in response to the Court's invitation contained in the final paragraph of its Opinion of June 3, 1963, and subsequent action of the Court in extending the time for submission of proposals. Counsel for Imperial Irrigation District have furnished us copies of their separate submission.

This document supplements the portions of a decree being submitted by the Solicitor General, which embodies agreement of the parties on those portions.[1] We propose language to fill the four omissions indicated in the Solicitor General's document, which result from lack of agreement by the parties on those points (Articles I(G) and (H); II(B)(2); II(B)(4); II(B)(7)). His draft and this document, together, constitute a complete decree.

The problems on which the parties are in disagreement, although few in number, are of great magnitude. We earnestly ask that the Court provide opportunity for oral argument to resolve these differences.

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[1] "Agreed Provisions for Proposed Final Decree", hereinafter cited as "Agreed Provisions."

ARTICLE I(G)[2]

Proposed by California:

(G) "Present perfected rights" as that expression is used in Article II(B)(3), Article II(D), and Article VI means (1) water rights reserved for Indians or other federal establishments by the creation of a reservation before June 25, 1929, which, having vested before the effective date of the Project Act, are "present perfected rights" and as such are entitled to priority under the Act; and (2) all other rights that were vested prior to that date, their priorities and magnitudes to be determined, in the absence of further direction by Congress, in the manner provided in Article VI;

Comment: This proposed paragraph uses the definition of an Indian perfected right from p. 600 of the Opinion. As to non-Indian rights, it requires that they, too, be "vested" before June 25, 1929, but looks to the procedure stated in Article VI[3] (in the absence of direction by Congress) to determine what rights were "vested" and in what quantities. The subject of "present perfected rights" is referred to at several places in the Opinion: pp. 566, 581, 582, 583, 584, 594, 600. The Master's definition, which restricts the right to the quantity used prior to June 25, 1929 (Report p. 364), is not consistent with some of the Court's language and is unduly restrictive.

A water right established under state law, pursuant to which works had been constructed or were in process of construction with due diligence as of a specified date, was as completely vested, on that date, as an Indian right created by a reservation prior thereto even though neither of them used, until later, the full quantities established by the right. The sensible dividing line, intended by the reference to "present perfected

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[2] Agreed Provisions, p. 5.

[3] *Id.* at 17.

rights" in Article VIII of the Compact,[4] as taken over into Section 6 of the Project Act, is the distinction between (1) actual projects whose rights would have been recognized in the interbasin litigation that the Compact intended to forestall by transmuting these into claims against stored water, and (2) "paper appropriations."[5] See, for a more detailed statement, California's exceptions to the Master's Report,

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[4] "ARTICLE VIII

"Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

"All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate."

[5] The Court's reference to Los Angeles' appropriation (373 U.S. 582 n. 83), appears to recognize this distinction:

> "[83] 70 Cong. Rec. 168 (1928). Other statements by Senator Johnson are less damaging to California's claims. For example, the Senator at another point in the colloquy with Senator Walsh said that he doubted if the Secretary either would or could disregard Los Angeles and contract with someone having no appropriation. *Ibid.* It is likely, however, that Senator Johnson was talking about present perfected rights, as a few minutes before he had argued that Los Angeles had taken sufficient steps in perfecting its claims to make them protected. See *id.*, at 167. Present perfected rights, as we have observed in the text, are recognized by the Act. § 6."

$2,859,678 had been spent between 1924 and 1932 on the Colorado River Aqueduct (Metropolitan Water District's Proposed Findings, MWD: 104 (p. MWD 8), April 1, 1958).

II(c)(4), item 1, p. 14 (Feb. 27, 1961).[6] Moreover, water rights in the highly variable western streams are established in terms of cubic feet per second of maximum diversion capacity (which the natural flow, unregulated by storage, may support for a short time or a long one, depending on whether the year is a dry one or a wet one), not acre-feet per annum of consumptive use. The duration of maximum use of diversion capacity in a given year or series of years may be shortened by drought or unlawful upstream diversions, thus restricting the total number of acre-feet per annum, but the priority and magnitude of the right are not diminished thereby. The decree should make possible the submission of proof upon various standards. See Art. VI[7] for the procedure proposed by the Special Master for determining magnitudes and priorities of present perfected rights. This machinery is well adapted to the purpose proposed here.

Two other examples illustrate the inconsistency between the Master's definition and the kinds of rights that Article VIII of the Compact, hence Section 6 of the Act, intended to protect. These are (1) water

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[6] "4. That (1) "present perfected rights," as that expression is used in section 6 of the Project Act, are not limited to the quantities of water actually applied to use prior to June 25, 1929, but extend to the quantities of water capable of use from the natural flow by works constructed or in process of construction with due diligence prior to the effective date of the Colorado River Compact, and theretofore or thereafter put to use by the exercise of due diligence, pursuant to appropriations which were initiated under state law or pursuant to reservations which were established under federal law, prior to said effective date; . . ."

[7] Agreed Provisions, p. 17.

rights of towns such as Needles (California), Topock, Ehrenberg, Parker, Somerton, and Gadsden (Arizona), and (2) the riparian rights of private landowners along the Colorado River in California.

As to the towns, some very old, their water rights are clearly vested property rights, which, if the water used was that of the Colorado, attached to the natural flow of the river before passage of the Boulder Canyon Project Act,[8] and, like the rights of Los Angeles (373 U.S. 582 n. 83), were not disturbed by the Act. Cities' rights, to be useful, must necessarily vest from the beginning in quantities greatly in excess of initial uses, in order to provide for expanding populations, just as it takes a long time for agricultural projects to develop to the full use of their works. This is the reason for the doctrine of "relation back," which measures the magnitude of the right by the quantity ultimately put to use (within the quantity appropriated), not by the quantity initially used. This doctrine was recognized in all seven of the compact states prior to 1929, as it is now. All western water economies are built upon that foundation. There is no support for any contention that either Article VIII or Section 6 intended to strip the protection of this salutary doctrine from projects that existed in 1929, such as these old communities, or were actually under construction in 1929, such as Los Angeles' work on the Colorado River Aqueduct, as contrasted with mere paper hopes.

As to private riparian rights, these, in 1929, were "perfected" in every conceivable sense of that word,

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[8] Uses of some of these not only antedated the coming of the railroads, but have greatly increased since 1929, and presumably will continue to do so.

clearly as much so as were federally "reserved" rights as of that date. A riparian right is not created by use, nor lost by non-use.

In short, the Act established a new system for acquiring new rights, but did not destroy old ones by subtracting essential elements from them.

ARTICLE I(H)[9]

Proposed by California:

(H) "Present perfected rights," as the term is used in the water storage and delivery contract between the United States and Arizona, and for purposes of Article II(B)(7) of this decree, means rights of the character defined in Article I(G) existing as of February 24, 1944, the effective date of that contract, to be determined under the procedure set forth in Article VI;

Comment: Article 7(*l*) of the Arizona water contract (Rep. 403) provides: "Present perfected rights to the beneficial use of waters of the Colorado River system are unimpaired by *this contract.*" (Emphasis added.) "Present," in this instance, means February 24, 1944, not June 25, 1929.[10] The Secretary has here exercised the discretion that the Court finds that he possesses (Op. 594), to recognize interstate priorities in the event of shortage.

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[9] Agreed Provisions, p. 5.

[10] See California Exceptions, II-C-4, item 3, p. 15 (Feb. 27, 1961):

> ". . . (3) 'present perfected rights,' as that expression is used in article 7(*l*) of the 1944 Arizona contract (Report, p. 403), extend to the quantities of water capable of use by works in California, actually constructed or in process of construction with due diligence prior to February 24, 1944, and theretofore or thereafter put to use by the exercise of due diligence, pursuant to appropriations initiated, federal reservations established, or federal water storage and delivery contracts executed, prior to February 24, 1944."

ARTICLE II(B)(2)[11]

Proposed by California:

Add: "provided, however, that if the United States so contracts with Nevada, then 46% of such surplus shall be apportioned for use in Arizona and 4% for use in Nevada;"

Comment: We support Nevada's position that this language proposed by the Master (Rep. 347) be restored. We perceive no reason to omit this provision, based on the Arizona contract of 1944 to which Arizona agreed by Act of its Legislature (Rep. 402, 406).

ARTICLE II(B)(4)[12]

Proposed by California:

Add: "except that consumptive use of water released specifically for flood control, river regulation, or generation of power, in excess of the quantities specifically released for consumptive use need not be so charged if the Secretary determines that it is necessary to exempt such use from charge in order to avoid waste of water or in order to promote conservation;"

Comment: Evidence submitted by California[13] and Arizona is in agreement that the recorded flows of the Colorado River during the period 1909-56 could not have been fully regulated and conserved, even if all of the reservoirs now existing or even authorized had been in existence during all of that time, and even if the Upper Basin uses had been much greater than they now are. This is because the floods came in such magnitude and sequence that they could not have been

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[11] Agreed Provisions, p. 6.

[12] *Id.* at 7.

[13] California Proposed Findings 5A:101 (p. V-3), 5C:104 (p. V-15), 5D:105 (Table, p. V-23, comparing estimates of California and Arizona experts).

fully caught and retained in storage for use in subsequent dry years. Some water had to be "spilled," either concurrently with the flood, or in anticipation of it, to provide reservoir space to contain an otherwise disastrous flood. Such "spills" would waste to the sea unless intercepted by downstream diversion works. There is no reason to expect nature to behave more favorably in the future. Water will inevitably be released for flood control purposes, and perhaps for other purposes, in excess of concurrent consumptive use requirements. The question is: Shall the decree require its waste, or encourage its conservation?

Some mainstream water users will have excess capacity in their diversion works during the cooler months of the year when their diversions are not at peak. These periods may correspond with months (usually in the spring or autumn) in which flood-control releases in excess of consumptive use orders are made from storage reservoirs. These water users may thus have the ability to divert and use such excess releases, which otherwise would waste to the Gulf of California, or store the conserved water in underground reservoirs (as the Metropolitan Water District now does). They should be encouraged to do so. But they may be unable to do this unless the provision here proposed by California is added. This is because (1) if the excess release comes in the spring, the water users cannot run the risk of diverting it if such use will diminish their contract entitlement, which will be needed during the ensuing summer; (2) if the excess release comes in the fall, the potential diverters may have already used up too much of their contract entitlements to leave enough margin to conserve the wasting flood.

This proposal has a purpose similar to that of Article II(b)(6), which permits the Secretary to release water for use in a State in excess of its apportionment if another State is not thereby injured.

The provision thus proposed by California does not compel the Secretary to do anything. It releases him from a compulsion to waste water—something no Court to date has ever knowingly compelled.

ARTICLE II(B)(7)[14]

Proposed by California:

The Secretary of the Interior shall give effect to valid provisions for the allocation of shortages appearing in water delivery contracts heretofore entered into by the United States under the authority of the Boulder Canyon Project Act;

Comment: This proposal relates to Art. 7(*l*) of the Arizona contract, which provides: "Present perfected rights to the beneficial use of waters of the Colorado River system are unimpaired by this contract." ("Present" means the effective date of that contract, February 24, 1944. *Supra,* p. 7) See also the schedule of intrastate priorities in each California contract, *e.g.,* Palo Verde Art. 6 (Rep. 424-29), and the recognition of priorities of other Arizona contractors in the City of Yuma contract. Projects can only be constructed and operated on the basis of settled priorities in time of shortage. This basic truism is embodied in the statutory mandate in section 5 of the Project Act that contracts shall be for "permanent service."

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[14] Agreed Provisions, p. 8.

RE ARTICLE VIII

The Master proposed a decree which enumerated in Article VIII three matters not affected by the decree. The Agreed Provisions retain this list, modified and expanded to four.

Article VIII is not to be construed as implying that all matters not therein mentioned are adjudicated. To the contrary, many matters are not specifically covered by the decree, and may necessitate future recourse to the jurisdiction reserved by Article IX.[15]

Re Draft Submitted by Imperial Irrigation District

The draft of decree separately submitted by Imperial Irrigation District mistakenly states (p. 31; cf. 26-27) that it is California's contention that the Colorado River Compact includes lower basin tributaries. California does not now so contend, in the light of the Court's Opinion. The Court's declaration on that question is (373 U.S. at 568):

> "Arizona argues that the Compact apportions between basins only the waters of the mainstream, not the mainstream and the tributaries. We need not reach that question, however, for we have concluded that whatever waters the Compact apportioned the Project Act itself dealt only with water of the mainstream."

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[15] E.g., the allocation of the Mexican treaty burden among the Lower Basin States; rights of mainstream users against junior users on upstream tributaries; rights to compensation for water rights taken; problems of water users who have no contracts but who may have present perfected rights; and the special problem of the City of Needles. The Needles water supply is obtained from the ground adjacent to the Colorado River. Pumps were first installed in the early 1880's. The extent to which this groundwater is supplied from the Colorado River, or from tributary inflow, is not determined. Needles water rights are not adjudicated here.

California would contend, if the issue were presented for adjudication, that the construction of the Colorado River Compact must be consistent with the Court's construction of the Project Act, and that lower basin tributaries, because the Court has held them to be not included in the waters encompassed by the reference in section 4(a) of the Project Act to Article III(a) of the Compact, must likewise be held to be excluded from the waters encompassed by the Compact itself as approved by that Act. *Cf. Petty* v. *Tennessee-Missouri Bridge Comm'n,* 359 U.S. 275 (1959).

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