MEMORANDUM

CONCERNING PROPOSED TREATY BETWEEN THE UNITED STATES AND MEXICO

Over Use of the

Waters of the Border Streams

BY

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Introduction

IN order to make a worthwhile appraisal of the position which should be taken with regard to the ratification of the proposed treaty with Mexico it is necessary to consider (1) the question of the necessity for, or desirability of, making any treaty with Mexico at this time; (2) the question of the amount of water which the United States, with proper regard for the situation both in this country and Mexico, should agree to permit to flow into Mexico; (3) the question of the propriety and adequacy of the method of controlling and administering the stream at the boundaries so as to give effect to the treaty and protect the rights of the two nations.

The objections to the proposed treaty have come almost entirely from those interested in the Colorado River and accordingly this memorandum will consider only the general provisions of the treaty and those special provisions affecting the Colorado River.

A Fair Approach To the Problem Can Only Be Made Upon the Basis That Mexico Is Entitled To A Share Of the Flow Of the Colorado River

The Colorado River Basin comprises 242,000 square miles in the United States and 2,000 square miles in Mexico. In the United States, portions of the states of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming are drained by the Colorado River and its tributaries. The basin area in each of the states is as follows:

Arizona	103,000	square	miles
California	6,000	"	"
Colorado	39,000	"	"
Nevada	12,000	"	"
New Mexico	23,000	"	"
Utah	40,000	"	"
Wyoming	19,000	"	"
Total	242,000	"	"

The average annual virgin run-off of the Colorado River system at the Mexican boundary has been made up of contributions by the states in the following percentages of the total:

Arizona	7.8%
California	0.0%
Colorado	64.5%
Nevada	1.1%
New Mexico	1.7%
Utah	13.3%
Wyoming	11.6%

Obviously, the right of Mexico to water cannot be determined upon the basis of the amount of drainage basin area within that nation or of the amount of contribution to the stream. If either basis is applied, the use of the same formula in determining the rights of California would be unfair to that state.

A determination of the rights of Mexico either on the basis of the power of the United States to deny to Mexico all water because of the superior might of the United States and the possibility of controlling and using the entire flow of the stream in the United States, or on the basis of unrestrained generosity to Mexico occasioned by a misconception of the "good neighbor" policy, is entirely unacceptable. The problem must be treated realistically with a view of recognizing the right of Mexico to a fair share of water and, at the same time, safeguarding in the most satisfactory manner possible the rights of the United States and its citizens.

To understand the problem, it is necessary to have regard for the compacts, laws, and contracts which now exist in the United States with reference to the Colorado River.

The first and most important of these is the Colorado River Compact, which was signed by the representatives of the seven basin states in 1922 and which has now been approved by the legislatures of all of those states. This Compact was the result of the desire of the lower basin states to secure the construction of works along the Colorado River for the prevention of flood damage and for the development of facilities for the use of water for domestic purposes, irrigation, and electrical power. The program of the lower basin states was opposed by the upper basin states, largely because of the fear that the greater population and greater wealth of the lower basin would result in the prior use of water in the lower basin to an extent that would jeopardize the rights of the upper basin where the conditions were such that development would be slower. In other words, the upper basin declined to approve the plans of the lower basin until there was some definition of the rights of the two basins which would protect the upper basin against any claims of the lower basin based upon the priority of the use of water and the resulting economic development. In taking such position, the upper basin was cognizant of decisions of the United States Supreme Court having the effect of protecting and preserving existing economic development in controversies over the use of waters of interstate streams.

In this connection it may be well to point out that the controversy now existing between the United States and Mexico over the use of waters of the Colorado River is, in some respects, comparable to that which confronted the states prior to the Colorado River Compact. By reason of the regulation of stream flow made possible by Boulder and Parker Dams and the inability of the lower basin to use at the present the entire amount of water available, the stream flow into Mexico has become more usable for irrigation in that nation; and, very naturally, the irrigated acreage and the use of water have both expanded. If this situation should continue and the Mexican development progress, a condition would exist in Mexico similar to that which the upper basin states feared would take place in southern California. Thus, the same reason which motivated the upper basin states in signing the Colorado River Compact is the impelling reason for a treaty with Mexico. This means that the right of Mexico to receive a fixed but limited amount of water must be recognized, just as the upper basin states recognized the right of the lower basin to a specific quantity of water.

The Colorado River Compact expressly recognizes that the United States may, by agreement, fix the right of Mexico to the use of waters of the Colorado River system. Article III (c) of the Compact provides thus:

> "If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River system, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b);* and if such surplus shall prove insufficient for this purpose, then the burden of such deficiency shall be equally borne by the upper basin and the lower basin, and whenever necessary the States of the upper division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d)."

*For explanation of a and b, see third paragraph on page 6.

All of the states of the basin have now approved the Colorado River Compact.

The consent of the Congress of the United States to the Colorado River Compact was given by the Boulder Canyon Project Act (Act of December 21, 1928, Ch. 42, 45 Stat. 1057). Section 20 of that Act provides as follows:

> "Nothing in this act shall be construed as a denial or recognition of any rights, if any, in Mexico to the use of the waters of the Colorado River system."

The inclusion of such a provision in the Boulder Canyon Project Act constitutes a Congressional recognition of the possibility of a future determination that Mexico is entitled to rights to the use of Colorado River water.

The Boulder Canyon Project Act specifically requires that in all contracts for the use of water in the Colorado River or for the generation of electrical energy generated by means of such waters, the rights of the recipients or holders shall be subject to and controlled by the Colorado River Compact. Section 13 (c) of the Act reads as follows:

> "Also all patents, grants, contracts, concessions, leases, permits, licenses, rights of way, or other privileges from the United States or under its authority, necessary or convenient for the use of waters of the Colorado River or its tributaries, or for the generation or transmission of electrical energy generated by means of the waters of said river or its tributaries, whether under this act, the Federal water power act, or otherwise, shall be upon the express condition and with the express covenant that the rights of the recipients or holders thereof to waters of the river or its tributaries, for the use of which the same are necessary, convenient, or incidental, and the use of the same shall likewise be subject to and controlled by said Colorado River compact."

Section 1 of the Act, authorizing the construction of works, uses this language:

> "That for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses *exclusively within the United States*, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking, the Secretary of the Interior, subject to the terms of the Colorado River compact hereinafter mentioned, is hereby authorized to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon * * * * * * * * *."

The authorization is for the construction of these works for the beneficial use of the water "exclusively within the United States." The suggestion has been made that because of this phrase the United States may not make any treaty with Mexico which affords to that nation any benefit resulting from stream regulation by facilities constructed pursuant to the Boulder Canyon Project Act. It is believed that entirely too much emphasis has been placed upon the quoted phrase. Attention is directed to the fact that by the language quoted above the Secretary of the Interior is required to act "subject to the terms of the Colorado River Compact." This is in accordance with the provisions of Section 13 (c) as has been quoted above. Attention is further directed to the provisions of Section 8 (a), which reads as follows:

> "The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried and/or distributed by the reservoir, canals, and other works herein authorized, shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation of said reservoir, canals, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, *anything in this act to the contrary notwithstanding*, and all permits, licenses, and contracts shall so provide."

It is apparent from the foregoing that in both the Colorado River Compact and the Boulder Canyon Project Act there is express recognition of the possibility of Mexico obtaining, at some future date, a specific right to the use of a portion of the waters of the Colorado River. Since Boulder Dam, Parker Dam, and Imperial Dam are all located across the channel of the Colorado River, it is being unrealistic to say that the rights of Mexico remain unaffected by the conditions resulting from the construction of these channel dams. Virgin-flow conditions no longer exist along the lower Colorado.

Pursuant to the Boulder Canyon Project Act, the Secretary of the Interior has entered into numerous contracts for the use of Colorado River water. These contracts all contain the provision that the use of the water mentioned therein is "subject to the availability thereof for use * * * * * under the Colorado River Compact and the Boulder Canyon Project Act;" and that:

> "this contract is made upon the express condition and with the express understanding that all rights hereunder shall be subject to and controlled by the Colorado River compact, being the compact or agreement signed at Santa Fe, N. Mexico, November 24, 1922, pursuant to act of Congress approved August 19, 1921, entitled 'An act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes,' which compact was approved in section 13 (a) of the Boulder Canyon Project Act." (See Metropolitan Water District Contract, Articles 6 and 16; Imperial Irrigation District Contract, Articles 17 and 29; San Diego Contract, Articles 7 and 17; Arizona Contract, Sections 7 and 13; Nevada Contract, Sections 5 and 14.)

Another feature of the situation should be emphasized. The Colorado River Compact by Article III (a) apportions to the upper basin and to the lower basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water annually. Article III (b) permits the lower basin to increase its annual beneficial consumptive use by 1,000,000 acre-feet. While there are some expressions of doubt as to the character of this III (b) water, this provision was most certainly designed for the protection of Arizona in its use of Gila River water. Article III (c), as quoted above, provides that if the recognized Mexican right cannot be supplied out of surplus over III (a) and III (b), then the deficiency shall be equally borne by the upper and lower basins. Article III (f) provides that water unapportioned by (a), (b), and (c) may be apportioned on October 1, 1963, if and when either basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b).

At the time of the passage of the Boulder Canyon Project Act Arizona had not ratified the Compact. It was provided that the Act would go into effect if six of the states, including California, should ratify the Compact and if the state of California should (Project Act, Sec. 4)

> "agree irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in consideration of the passage of this act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact."

Thereafter, California passed what is called its Self-Limitation Statute in accordance with the requirements of the Boulder Canyon Project Act and established a system of priorities of rights to

the use of Colorado River water in California. This system of priorities and the California water contracts cover the following amounts of water:

	Acre-feet	
1. Palo Verde Irrigation District 104,500 acres.		
2. Yuma Project of U. S. Bureau of Reclamation 25,000 acres.		
3. (a) Imperial Irrigation District and lands under the All-American Canal in the Imperial and Coachella Valleys.		
(b) Palo Verde Irrigation District in "Lower Palo Verde Mesa" 16,000 acres.		
Total for 1, 2, and 3	3,850,000	
4. Metropolitan Water District of Southern California and the City of Los Angeles	550,000	
Total III (a) water		4,400,000
5. (a) Metropolitan Water District of Southern California and the City of Los Angeles	550,000	
(b) City and County of San Diego	112,000	
6. (a) Imperial Irrigation District and lands under the All-American Canal in the Imperial and Coachella Valleys.		
(b) Palo Verde Irrigation District in "Lower Palo Verde Mesa"—16,000 acres.		
Total for 6 (a) and 6 (b)	300,000	
Total Surplus Water		962,000
Total		5,362,000

As shown above, California water contracts exceed the amount of III (a) water to which California is entitled by the Boulder Canyon Project Act and its Self-Limitation Act by 962,000 acre-feet of water. California is fearful that its contract rights to this 962,000 acre-feet of water are jeopardized by the proposed treaty with Mexico. Here, it must be observed that, if there is any instability in these junior California rights, that instability existed at the time of the execution of the contracts therefor. These contracts were all made subject to the availability of the water under the Colorado River Compact and subject to the provisions of that Compact and of the Boulder Canyon Project Act. Since under the Compact there may be no allocation of surplus until after October 1, 1963, these junior contracts cannot be made firm until after that date. It is entirely possible that, at the present rate of increase of use by California, some other users, such as Arizona, might be using the surplus before California.

The possibility of a recognition of a right in Mexico to Colorado River water was contained in both the Compact and the Project Act. California must be charged with familiarity with the pertinent provisions; and, hence, at the time these junior contracts were made, it was obvious that they might be subject to any right of Mexico, which by the plain language of Article III (c) would be satisfied first out of surplus. Thus, it is clear that California knew at the time these contracts were made that they could be satisfied only out of III (f) water. Without granting that there is any infirmity in these junior California contracts, it is a fair observation that any infirmity which does exist was present at the time the contracts were made, and is not the result of anything which has happened since. Indeed, it would seem that the best possible method of giving validity to these junior contracts is the execution of a treaty with Mexico which, by defining the extent of the Mexican right, will make certain the priorities which must be satisfied before water will become available as surplus.

Any delay in the making of such a treaty carries with it the hazard of a continued increase in use by Mexico and a resulting economic development, which in all probability will be recognized and protected by any arbitration board or any international court. There can be no question about this if we are to grant that the controversy is not to be decided upon the basis of the relative might of the two nations.

The Amount of Water Which the Proposed Treaty Allocates To Mexico Is Fair and Equitable

It goes without saying that the most important provisions of the treaty, so far as the Colorado River is concerned, are those which relate to the amount of water to be delivered to Mexico. By Article 10 there is allotted to Mexico a guaranteed annual quantity of 1,500,000 acre-feet of water with the further understanding that in any year when, as determined by the United States Section of the International Boundary Commission, there exists a surplus of water in the river, the United States will undertake to deliver a total quantity of 1,700,000 acre-feet with the proviso that Mexico shall acquire no right to any water whatsoever in excess of 1,500,000 acre-feet annually. Article 10 contains the following provision:

> "In the event of extraordinary drought or serious accident to the irrigation system in the United States, thereby making it difficult for the United States to deliver the guaranteed quantity of 1,500,000 acre-feet (1,850,234,000 cubic meters) a year, the water allotted to Mexico under subparagraph (a) of this Article will be reduced in the same proportion as consumptive uses in the United States are reduced."

This water may come "from any and all sources" and, with the exceptions hereinafter noted, may be delivered wherever the water may arrive in the bed of the limitrophe section of the river. By Article 11 (b) it is stated that the United States will deliver to Mexico, wherever such water may arrive in the limitrophe section, 1,000,000 acre-feet annually from the time the Davis Dam is put in operation until 1980, and thereafter, 1,125,000 acre-feet annually, except that Mexico may request the delivery of 25,000 acre-feet, or more if it is mutually agreed upon, at a point on the international land boundary near San Luis, Sonora, in which event quantities deliverable in the limitrophe section shall be reduced by the amount of the deliveries near San Luis.

Article 11 (c) provides that after Davis Dam is put into operation and until 1980, United States shall deliver to Mexico annually 500,000 acre-feet and after January 1, 1980, 375,000 acre-feet annually at the international boundary line by means of the All-American Canal and a canal connecting the lower end of the Pilot Knob Wasteway with the Alamo Canal. Article 15 permits Mexico to schedule deliveries within certain limitations.

Particular attention has been directed to the fact that the allotment to Mexico of the waters of the Colorado River is "from any and all sources;" and the statement has been made that this language will permit the regulation of tributaries within the interior of the United States. Such assertion serves only to divert attention from the true meaning of this provision. It seems obvious that this language is employed in order that there may be no doubt as to the right of the United States to secure credit for return and seepage water appearing in the river. It is to the great advantage of the United States to receive credit for all return flow and seepage water which gets into the stream. Indeed, it may be observed that the representatives of the United States should be commended highly for securing such a desirable provision in the treaty.

Since the United States is entitled to credit for return flows, an important question is the extent to which the deliveries in the limitrophe section may be satisfied by return flows. As may be expected, engineering estimates vary as to this amount. The extent of the return flows will be determined in large measure by future irrigation developments, particularly in the state of Arizona. In addition to the return flow, there will be available for delivery to Mexico the water used for desilting purposes. Here, again, estimates of the available amount vary. A competent irrigation engineer, Mr. Royce J. Tipton, who has devoted much time to the study of the Colorado River problem, estimates that under conditions of ultimate development the return flows and desilting water will be in such amounts that 600,000 acre-feet represent the maximum burden that will be placed annually on the river above Imperial Dam to satisfy the obligations of the United States to Mexico under the terms of the proposed treaty. What this means is that under such ultimate conditions, the entire obligation, imposed upon the United States by the treaty, will be satisfied by return flow and desilting water except an average annual amount of 600,000 acre-feet. This is possible because the treaty allots to Mexico water "from any and all sources."

Those who oppose ratification of the treaty argue that the amount, 1,500,000 acre-feet, is too much because it represents an amount greatly in excess of that which was used by Mexico prior to the construction of Boulder Dam. The assertion is made that the Mexican uses before Boulder Dam went into operation did not exceed 750,000 acre-feet annually. No good purpose would be served by speculating as to the amount of water which Mexico could have used under natural flow conditions as they existed before the construction of Boulder Dam and before the beginning in 1931 of the ten-year low water period. What is important is that Mexico has plans which will require considerably more than 1,500,000 acre-feet a year and in 1943 actually diverted and used more than 1,800,000 acre-feet. It is true that of this 1,800,000 acre-feet substantial quantities were taken through the Rockwood heading of the Alamo Canal. Opponents of the treaty assert that if the use of this facility, which is located in the United States, was denied to Mexico, then Mexico could not use more than the 750,000 acre-feet annually which it used prior to the regulation of the stream by Boulder Dam. This involves an engineering question as to the ability of Mexico to divert through gravity headings or pumps within its own borders. There is somewhat naturally a diversity of engineering opinion. However, the fact is certain that in other places substantial diversions are made under conditions which are just as adverse. Examples may be found along the Rio Grande, another international stream.

It is well to bear in mind that during the five year period 1939-1943 inclusive the average annual releases from Boulder Dam were approximately 12,000,000 acre-feet and the average annual flow of the stream past the Yuma gaging station, and below all important United States diversions, was approximately 8,300,000 acre feet. With such amounts of water passing to Mexico it must be expected that engineering ingenuity will evolve a method of diversion, particularly since there is desirable land in Mexico upon which the water can be used.

Attention is directed to the fact that under the contract for the Alamo Canal concession Mexico had a right to use up to one-half of the water carried by the Alamo Canal. In the thirteen-year period immediately preceding the placing in operation of Boulder Dam the average annual diversions through the Alamo Canal were approximately 3,000,000 acre-feet. Under the terms of the concession, Mexico was entitled to one-half or approximately 1,500,000 acre-feet annually.

No technical knowledge is required to understand that the treaty provisions, by which the United States is credited with return flows and desilting water, impose a much less severe obligation than existed under the provisions of the Alamo Canal Concession.

Reference has also been made that in 1929 the American Section of the International Boundary Commission suggested that after Boulder Dam was built, 750,000 acre-feet per year be delivered to Mexico according to a schedule, plus an amount of water sufficient to compensate for main canal losses. It is said that the amount guaranteed by the proposed treaty is double the 1929 offer. This is not correct. The 1929 offer would have necessitated deliveries either to the Alamo Canal by the present heading or through the All-American Canal and the Pilot Knob Wasteway. In either case, Mexico would have received, in addition to the 750,000 acre-feet, an estimated 200,000 or 300,000 acre-feet to compensate for canal losses, and all desilting water and all return water accruing to the river below the diversion point. The sum of these quantities might have exceeded the amount guaranteed by the proposed treaty. In any event, it is clear that the 750,000 acre-feet to have been delivered by the All-American Canal far exceeds the amount that Mexico will receive from such source under the present treaty, which requires the United States to deliver through such facility only 500,000 acre-feet annually from the time of the completion of the Davis Dam until 1980 and 375,000 acre-feet annually thereafter.

In discussing the propriety of the amount of water guaranteed to Mexico by the proposed treaty, it is proper to direct attention to the situation regarding the proposed Pilot Knob power plant. The All-American Canal is constructed with a capacity of 15,000 second-feet down to Syphon Drop; from there to Pilot Knob, a capacity of 13,000 second-feet. Beyond Pilot Knob, the capacity is 10,000 second-feet. Proposals have been made by California interests for the construction of a power

plant at Pilot Knob. Water which would be used for power generation at such a plant would be returned to the river below any point from which the water could be rediverted to irrigate lands in the United States. The excess capacity over 10,000 second-feet in the All-American Canal from Syphon Drop to Pilot Knob was for the purpose of furnishing a water supply for the proposed Pilot Knob plant. The running of 3,000 second-feet daily through a power plant at Pilot Knob would result in the return to the stream at a point so low as to prohibit rediversion in the United States of more than 2,000,000 acre-feet of water annually. Such an amount of water would be available for use only in Mexico—not in the United States. No comment is necessary on the attitude of those who in one breath advocate the construction and operation of the Pilot Knob plant and in the next breath condemn the proposed treaty as being too generous to Mexico in its apportionment of water.

The question of the amount of water which should be allotted to Mexico under any treaty should not be confused with the desire of any interests to secure a financial return from the delivery of water to Mexico. It has been asserted that the Imperial Irrigation District, and perhaps other interests, have hoped to secure a financial return from a delivery of water to Mexico through such facilities as the All-American Canal and the Pilot Knob Wasteway. It is a truism that, in the arid and semi-arid West, water is more valuable than money. Money can be secured through the activities of man; the forces of nature, which are uncontrolled by man, are the only source of water. It follows that in determining the amount of water which the United States shall permit to go to Mexico it is vastly more important to reduce the amount of water to the lowest possible figure than it is to work out a method of delivery which will give a financial return to a particular interest. Despite the charges which have been made by zealous opponents of the treaty, it is utterly unreasonable to believe that California's sister states would prefer to favor Mexican over Californian interests. The situation is that those basin states which favor the treaty are more concerned with the diminution of the amount of water guaranteed to Mexico than they are with a method of delivery, which, while it will enhance California pocketbooks, will jeopardize the ultimate rights of the other states.

It is very apparent that the hopes and aspirations of Colorado River basin states for future development, depending upon the availability and use of Colorado River water, comprehend an ultimate requirement for more water than is, or will be, available in the basin. This fact has been urged as an objection to the treaty. Rather than being an objection, it is in reality a powerful argument favoring ratification of the treaty. Under Article III (c) of the Colorado River Compact, any right of Mexico to water must be satisfied first out of surplus over and above III (a) and III (b) water, and then any remaining deficiency must come half from the lower basin and half from the upper basin. As long as there is uncertainty as to the extent of the Mexican right, all development depending upon waters of the Colorado River system is beclouded by the Mexican claim. A determination of the Mexican right will remove this cloud.

Finally, in considering the question of the amount of water Mexico should receive, some thought must be given to the Mexican attitude. Those who are active in the negotiations of the treaty assert that the amounts of water agreed upon as representing the share of Mexico constitute the lowest possible figures to which Mexico will agree. Unless we are to charge the representatives of the United States with either incompetence or bad faith, we must accept their report in this regard. This being true, it is a waste of time to discuss an agreement with Mexico based upon a smaller amount of water. The question resolves itself to a determination of whether it is better to accept the proposed treaty or to reject it. If the treaty is accepted, development can go forward in the United States portion of Colorado River Basin without the threat of Mexican demands and Mexican rights appearing to raise doubts as to the amount of water available for such developments. If the treaty is rejected, then it is but reasonable to expect that Mexican uses will continue to increase and that eventually the rights of the two countries will be determined by some arbitration board or international tribunal. Thus, the question is narrowed to one of whether or not it is reasonable to expect the obligation imposed upon the United States by the proposed treaty to be less severe than would result from arbitration.

It is now known what can be obtained through a treaty. What can be obtained through arbitration or future treaty negotiation is conjectural. Common sense would indicate that a settlement upon the terms now presented should be accepted.

The Treaty Provisions Relating to the Necessary Facilities For, and the Administrative Methods of, Enforcement Are Proper and Adequate and Fairly Protect Rights of United States Interests

For the proposed treaty to be effective, it is most obviously necessary that proper facilities be provided for carrying it into effect and that some responsible administrative body be set up to enforce its provisions. Those who are attacking the ratification of the treaty have placed more emphasis on its administrative provisions than on any other of its features. This method of attack has had the purpose and effect of drawing attention away from the desirability of making a treaty at this time and from the substantive provisions of the treaty.

It must always be remembered that the proposed treaty is between two sovereign nations. This fact is unaffected by the disparity in size, population, wealth, and military potential existing between the United States and Mexico. In any dealings between two sovereigns, the obligations and duties imposed upon or accepted by one nation must be performed by that nation. Such duties and obligations may not be delegated to private interests or local governmental subdivisions. Hence, it would be impossible for the state of California, or any of its political subdivisions, or any of its private interests, to receive or assume the responsibility of the United States in the performance of the proposed treaty. This is clearly a function of the United States to be carried out through some appropriate agency. A refusal to recognize this simple fact is probably the cause of much of the California opposition to the treaty.

As an administrative agency, the treaty adopts the International Boundary Commission, the name of which has been changed to "International Boundary and Water Commission, United States and Mexico." The International Boundary Commission had its origin in Article 2 of the Convention of 1882, where it was created as a joint surveying party to run the international boundary and set monuments. The International Boundary Convention of 1889 by its Article 2 provided specifically for an International Boundary Commission composed of one Commissioner from each country, appointed respectively by the President of that country in accordance with its constitutional provisions. The Commission was given definite powers in connection with boundaries and with works constructed in the Rio Grande and in the Colorado River in violation of the treaties of 1853 and 1884. The term of the Commission was five years. This was extended several times and by the Convention of 1900 was extended indefinitely with a provision for termination by either party on six months' notice. The proposed treaty now before the Senate changes the name of the Commission as indicated above and continues the 1889 Convention indefinitely.

The Commission is entirely a creature of the treaties mentioned and of the proposed treaty. There are no other authorizations for its existence. It has no general powers. The powers which it has are those which are particularly delegated to it. The American member receives and holds his office in accordance with laws of the United States. There is nothing to prevent any change in such laws which Congress may deem wise and necessary.

The International Boundary Commission has functioned for over half a century. It has worked satisfactorily in the handling of international boundary matters. Its past success indicates that there may be a reasonable expectation of its ability to handle the additional duties imposed by the treaty now up for ratification.

The jurisdiction of the Commission is specifically and clearly defined in Article 2 of the treaty:

> "The jurisdiction of the Commission shall extend to the limitrophe parts of the Rio Grande (Rio Bravo) and the Colorado River, to the land boundary between the two countries, and to works located upon their common boundary, each Section of the Commission retaining jurisdiction over that part of the works located within the limits of its own country. Neither Section shall assume jurisdiction or control over works located within the limits of the country

of the other without the express consent of the Government of the latter. The works constructed, acquired or used in fulfillment of the provisions of this Treaty and located wholly within the territorial limits of either country, although these works may be international in character, shall remain, except as herein otherwise specifically provided, under the exclusive jurisdiction and control of the Section of the Commission in whose country the works may be situated."

Part V of the treaty provides that the Commission shall have certain definite powers and duties. Since these relate to the carrying into effect of the other provisions of the treaty, it is well, before considering them, to outline just what are the obligations of this nation with reference to the Colorado River. This analysis will not be made as to the Rio Grande, as it is believed that those interested in the Rio Grande are uniformly supporting the treaty.

It is noteworthy that Articles 10 and 11, which make the allotment and provide for the delivery of water to Mexico, impose the delivery obligation upon the *United States*. In other words, the duty of satisfying treaty requirements is a definite duty of this nation, and not of the Commission or any other agency. It is true that Article 11 (d) provides that deliveries shall be made subject to provisions of Article 15, which permits the scheduling of deliveries by Mexico and the presentation of such schedules to the Commission. Article 15 does not change the effect of Articles 10 and 11, which impose the obligation of delivery upon the *United States*.

The assertion has been made that the Commission "may go anywhere in that (Colorado River) system, even into the tributaries, and regulate and take water to make or assure deliveries to Mexico;" and it has been said that this results from the provisions of Articles 10 and 11, alloting waters "from any and all sources."

No such power is given the Commission anywhere in the treaty.

The Commission has only those powers specifically given to it. Nowhere in the treaty is there any provision from which can be spelled out a power of the Commission to regulate, control, or administer the entire stream for the benefit of Mexico. If, for any reason in the future, there is such an administration of the stream by the duly empowered state and federal agencies as to make unavailable for Mexico the amounts of water requisite to satisfy the treaty provisions, all the Commission could do would be to request the appropriate state or federal agency to make the necessary amounts of water available; and in the event of a failure to do so, to bring some appropriate court action. The suggestion that the Commission might regulate Boulder Dam or Parker Dam or might control diversions and uses in upstream areas results only from a desire to misconstrue and misrepresent the treaty.

Reference should also be made to the assertion that the treaty makes the rights and interests of the United States subject to Mexican rights and interests. In so far as this statement is intended to mean that the United States must comply with the water delivery provisions of the treaty, it is true. Mexico is the down-stream user. As California and all other down-stream users well know, the only satisfactory protection they can have is the imposition of an obligation on the up-stream area to pass down a certain amount of water to them. In no other way could Mexico be protected.

With reference to the construction of works, consideration must be given to Articles 12 and 13. The treaty proposes that the following works be constructed:

1. A main diversion dam below the northern boundary shall be constructed, maintained, and operated by Mexico at its expense;

2. Simultaneously with the construction of the main diversion dam referred to in number 1, there shall be constructed levees and other works to protect lands within the United States against damage from flooding and seepage caused by such structure, and these protective works shall be constructed, operated, and maintained at the expense of Mexico;

3. The United States within five years from the effective date of the treaty shall construct and thereafter operate and maintain at its own expense the Davis Dam, a part of the capacity of which shall be used to make possible the regulated deliveries to Mexico required by Article 15;

4. The United States shall construct or acquire in its own territory the works necessary to convey water to the Mexico diversion points on the international land boundary, including (a) the canal and other works from the lower end of the Pilot Knob Wasteway to the international boundary and, (b) if requested by Mexico, a canal connecting the main diversion structure referred to in number 1 to the international boundary near San Luis, Sonora. All these works shall be constructed or acquired and operated and maintained at the expense of Mexico;

5. Stream gaging stations and water measuring devices shall be constructed, operated, and maintained in the limitrophe section of the river and on all facilities used for the delivery of water to Mexico;

6. Flood-control works on the lower Colorado between Imperial Dam and the Gulf of Mexico shall be constructed as recommended by the Commission and approved by the two Governments.

The foregoing itemization includes all the works which the proposed treaty provides for construction in the Colorado River Basin. The Commission is given no power to construct any other works whatsoever. This fact must be borne in mind when considering the general provisions contained in Part V of the treaty. It is simply not true to state that the United States Commissioner has power under the treaty "to acquire title to, control, and where not constructed, to construct and operate all water, flood control, and hydroelectric power projects on these river systems in the United States to the extent he deems such works connected with or affecting the carrying out of the treaty." The Commission has no powers other than those specifically given it by the treaty, and the treaty does not give to the Commission or either Commissioner the power to do those things mentioned in the above quotation.

The objectors to the treaty in their criticism of the powers of the Commission refer to Article 24. Section (a) of this Article gives the Commission the power to investigate and develop plans "for the works which are to be constructed or established in accordance with the provision of this and other treaties or agreements in force between the two Governments dealing with boundaries and international waters." It is clear that this authorization of power is restricted to works provided for in the treaties. The Commission may not exceed such powers. So far as the Colorado River is concerned, the works to be constructed are specifically mentioned in Articles 12 and 13 to which reference has already been made. There is no authorization in the treaty for the construction of any other works along the Colorado River.

Section (b) of Article 24 authorizes the Commission to construct, operate and maintain or supervise the construction, operation, and maintenance of "the works agreed upon." It should be recalled that Article 12 contemplates the Commission agreeing upon the works necessary to protect the lands in the United States from flood and seepage damage. Article 13 contemplates the Commission agreeing upon the necessary flood control works between the Imperial Dam and the Gulf of California. There is nowhere in the treaty any provision which authorizes the Commission to agree upon the construction of any other works. Since the authorization is not contained in the treaty, it simply does not exist.

Section (c) of Article 24 authorizes the Commission to exercise "the specific powers and duties entrusted to the Commission" and to prevent the violation of the treaty. Here, again, the Commission is restricted to the specific powers and duties granted to and imposed upon it by the treaties.

Section (d) of Article 24 authorizes the Commission to settle differences with respect to the interpretation or application of the treaty and provides for the procedure in the event the two Commissioners disagree.

Section (e) of Article 24 requires the Commission to furnish certain information.

Section (f) of Article 24 provides for the construction, operation, and maintenance of stream-gaging stations.

Section (g) of Article 24 requires the Commission to report annually to the two Governments.

It is impossible to read Article 24 and come to any other reasonable conclusion than that the powers there granted are limited and restricted to the investigation, planning and construction of the works specifically authorized by other provisions of the treaty and to the enforcement and interpretation of the treaty.

In connection with hydroelectric power, the opponents to the treaty have asserted that the Commission can set up international power projects which will be subject to no control as to rates, operations, fields of service, or use of funds. So far as the Colorado River is concerned, this is an incorrect statement. There is no provision of the treaty which authorizes the construction of any hydroelectric power plant by the Commission in the Colorado River system. That portion of the treaty dealing with the Rio Grande does permit the Commission to investigate and report upon plants for hydroelectric generation of energy in connection with the international storage dams, and the Governments agree to construct such works as may be recommended by the Commission and approved by the two Governments. In this regard it should be noted that the power of the Commission is confined to recommending the works that should be built. There is no absolute obligation on the two Governments to construct the recommended works.

There is no similar provision relative to the Colorado. The only reference to power in Part III of the treaty, which deals with the Colorado River, is found in Article 14 wherein it is provided that revenues from the sale of hydroelectric power, "which may be generated at Pilot Knob," shall be applied in the amortization of the costs of construction of Imperial Dam and the Imperial Dam-Pilot Knob section of the All-American Canal, a portion of which shall be paid by Mexico. The effect of this will possibly be to reduce the cost to Mexico of such facilities. There is absolutely no authorization to the Commission to construct a power plant at Pilot Knob, and without such authorization it could not do so.

In connection with Pilot Knob, one further factor could be considered. It is well known that the Imperial Irrigation District has aspired to obtain revenue through the sale of power to be generated at a plant which might be constructed at Pilot Knob. Article 23 of the treaty provides that:

> "The two Governments recognize the public interest attached to the works required for the execution and performance of this Treaty and agree to acquire, in accordance with their respective domestic laws, any private property that may be required for the construction of the said works, including the main structures and their appurtenances and the construction materials therefor, and for the operation and maintenance thereof, at the cost of the country within which the property is situated, except as may be otherwise specifically provided in this Treaty. * * * * * * * * * * * * * * * * * * *
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> "Each Government shall retain, through its own Section of the Commission and within the limits and to the extent necessary to effectuate the provisions of this Treaty, direct ownership, control and jurisdiction within its own territory and in accordance with its own laws, over all real property—including that within the channel of any river—rights of way and rights *in rem*, that it may be necessary to enter upon and occupy for the construction, operation, or maintenance of all the works constructed, acquired or used pursuant to this Treaty. Furthermore, each Government shall similarly acquire and retain in its own possession the titles, control and jurisdiction over such works."

The effect of this is that the United States shall retain control of the Imperial Dam and the All-American Canal down to Pilot Knob. This will prevent the use of the Pilot Knob site for the purposes planned by the Imperial District. The Imperial District is entitled to compensation from the United States for any property which it owns and which is taken by the United States to carry out the treaty obligations. It must be assumed that our constitutional provisions, relative to the taking of private property for public use, will be followed and that the compensation to be paid to the Imperial District will be in accordance with the constitution and laws of the United States.

In connection with Article 13 attention is specifically directed to the fact that it applies only to flood control below Imperial Dam. Reference has been made to the provision of this Article whereby the Governments agree to construct such works as may be recommended by the Commission and approved by the two Governments. The rather exaggerated claim has been made that this amounts to blanket authority to the Commission to construct such works as it may see fit. So far as flood control on the Colorado River below Imperial Dam is concerned, the Commission is given power to study, investigate, and prepare plans. Before any works can be constructed the approval of the two Governments will have to be obtained, and in the United States congressional appropriations will have to be secured. Under the treaty provision it would seem plain that there is a definite obligation upon the United States to advance the necessary funds for the construction of the flood-control works recommended by the Commission and approved by the two Governments. This does not mean that the treaty gives the Commission a blank check from the proceeds of which works may be constructed anywhere along the Colorado. Article 13 refers only to flood control below Imperial Dam. On such a matter, it is entirely proper for this nation to delegate much authority and responsibility to the Commission. The situation is comparable to that before the United States Supreme Court in the Great Lakes Drainage case. There it was held that the delegation to the Secretary of War of the power to determine the amount of water that could safely be taken from Lake Michigan involved a peculiarly expert question which Congress could properly delegate to an executive official (see Wisconsin v. Illinois, 278 U. S. 367, 414). The function of determining the desirability and suitability of flood control works falls in the same category. Technical, expert knowledge on these flood-control matters is necessary. It is not to be presumed that the Commission will abuse its powers in this regard. Should it do so, the two Governments would probably not agree and Congress would undoubtedly withhold appropriation of the necessary money.

Those opposing the treaty have made reference to Article 20, which contains this provision:

> "The two Governments shall, through their respective Sections of the Commission, carry out the construction of works allotted to them."

In considering this provision attention has been directed to the following excerpt from Article 2:

> "Wherever there are provisions in this Treaty for joint action or joint agreement by the two Governments, or for the furnishing of reports, studies or plans to the two Governments, or similar provisions, it shall be understood that the particular matter in question shall be handled by or through the Department of State of the United States and the Ministry of Foreign Relations of Mexico."

The argument has been made that by reason of these provisions the Department of State will be authorized to, and can, take over functions which have heretofore been exercised in the United States by such agencies as the Department of Interior and the Corps of Engineers; and the treaty opponents conclude that the treaty represents an endeavor of the State Department to expand its power and authority so as to take over the jurisdiction of the entire Colorado River in the United States. This is another specious argument which affords no base for the conclusion reached. The treaty must be read as a whole. The jurisdiction of the Commission is specifically defined in Article 2 and relates to only the boundary section. In our system of Government the functions and duties of the Department of State, Department of the Interior, and Department of War are well established and clearly recognized. It cannot be assumed that either the Chief Executive or Congress would permit the State Department to seize upon any treaty provision as an excuse or justification for usurpation of power. It must be clear to all reasonable people that the intent of the treaty negotiators was to entrust to the International Water and Boundary Commission control over only those facilities in the United States directly used for delivery of water to Mexico or necessary for stream measurement or for flood-control below Imperial Dam.

It has been said that the treaty operates in perpetuity. This is desirable rather than objectionable. The United States is the up-stream nation. To protect its development, based upon the utilization of the waters of the Colorado River, it is necessary that the Mexican right be defined for all time.

Otherwise, there would be the ever-present possibility of future recognition of a greater right of Mexico to the detriment of all existing development in the United States.

One other exaggerated claim of the treaty opponents should be mentioned. It has been said that "The Treaty enables the complete nationalization of the river systems in question even to the exclusion of states' rights." To any fair minded person a reading of the treaty is a complete answer. Nowhere is there any power granted the Commission to take over the powers or duties of the Bureau of Reclamation, the Corps of Engineers, the Geological Survey, the Federal Power Commission, or any other Federal agency. Insofar as the construction, operation and maintenance of facilities to be used in making deliveries to Mexico, in protecting against flood damage below Imperial Dam, and in protecting United States lands against flooding and seepage occasioned by a main diversion structure constructed by Mexico are concerned the Commission has specific powers defined by the treaty. The Commission supplements, but does not supersede, other Federal Agencies.

The treaty does not, and under our constitutional system could not, infringe upon the jurisdiction of any state of our Union.

What the treaty does is to define the right of Mexico. The United States has the right to use as it sees fit all water flowing within its borders in excess of that which must be permitted to flow to Mexico. The administration, control and use of the United States share of the stream flow will, after the ratification of the treaty, remain as it was before such ratification.

No good purpose would be served by a discussion of each criticism which has been made by treaty opponents in regard to the administrative provisions. It must be recognized that:

(1). Some administrative agency must be furnished.

(2). The choice of the International Boundary Commission as the agency to carry out the treaty, a body which has had over fifty years experience in boundary matters and which has functioned with full satisfaction to both nations. is commendable.

(3). The powers given the Commission are both adequate to give effect to the treaty and sufficiently restricted to protect the rights of interests in the United States dependent upon the use of Colorado River water.

Conclusion

An appraisal of all factors entering into the Colorado River situation justifies the following conclusions:

(1). It is desirable and necessary to have a definition of the extent of Mexican rights to the use of Colorado River water.

(2). The allotment of water to Mexico under the proposed treaty is fair and equitable and may be reasonably assumed to be (a) the smallest amount which Mexico will agree upon and (b) a less amount than would be awarded Mexico in a future arbitration of the controversy or a future treaty negotiation.

(3). The administrative provisions of the treaty are proper and adequate.

It follows that full support should be given the treaty and the Senate of the United States should advise, and consent to, ratification.