Petition for Rehearing 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, September 16, 1963, Arizona v. California, No. 8 Original, 1963 Term (U.S.).

Landmark decision:
Arizona v. California, 373 U.S. 546 (1963).

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.

PETITION FOR REHEARING

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

SEPTEMBER 16, 1963

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PETITION FOR REHEARING

The State of California, joined by The Metropolitan Water District of Southern California, the City of Los Angeles, the City of San Diego, the County of San Diego, Coachella Valley County Water District, and Palo Verde Irrigation District, respectfully petition under Rule 58 for rehearing of the Court's decision of

June 3, 1963,[1] with respect to errors of fact and law specified below.

SPECIFICATIONS OF ERROR

I. THE "STATUTORY APPORTIONMENT SCHEME"

The Court erred in holding (1) that the Boulder Canyon Project Act effected a mandatory "statutory apportionment" among Arizona, California, and Nevada instead of determining that the Act merely required California to enact a ceiling upon California appropriations (including those made pursuant to contracts with the United States); and (2) that Congress delegated to the Secretary of the Interior (a) power to originate and impose upon the states a formula for the interstate allocation of shortages, in displacement of this Court's powers to resolve such shortages by exercise of its doctrine of equitable apportionment, and (b) power to allocate waters within a state without regard to state law.

II. EXCLUSION OF THE TRIBUTARIES FROM THE LOWER BASIN ACCOUNTING, IF THEY ARE INCLUDED IN THE COLORADO RIVER COMPACT'S INTERBASIN ACCOUNTING

Unless the Court intended to agree with Arizona "that the Compact apportions between basins only the waters of the mainstream, not the mainstream and the tributaries" (p. 568), it should have held that uses which Arizona and Nevada make from the tributaries, to the extent that they reduce the total quantities of water that the lower basin may appropriate from the main stream within the "ceilings" imposed on the lower basin by the Colorado River Compact, likewise reduce

[1] 373 U.S. 546. All page references herein to the opinion of June 3, 1963, are to the preliminary print of the official report, *e.g.* (p. 546).

the quantities that Arizona and Nevada may take from the main stream as against California.

PRELIMINARY STATEMENT

The Court's opinion discloses a paradox and is founded upon a pair of serious factual misconceptions.

1. The Paradox

On the one hand: The Court construes the Project Act as making a "statutory apportionment" among Arizona, California, and Nevada, characterized by five features favorable to Arizona: (1) It not only excludes the Gila River from the fund of water to be divided, which Arizona wanted, but it also excludes the tributaries above Hoover Dam, which Senator Hayden, the leading Arizona spokesman, said Arizona did not seek (see p. 41, *infra*); (2) it gives Arizona 2,800,000 acre-feet of *consumptive use* (diversions minus return flow) from the main stream, whereas Senator Hayden told the Senate Arizona sought only 2,800,000 acre-feet of *diversions*, without credit for 948,000 acre-feet of return flow; it thus gives Arizona 948,000 acre-feet more than Senator Hayden said that Arizona asked (see p. 38, *infra*); (3) it makes this division a mandatory one, whether the states ever agree to it or not, which is far more coercive than Senator Hayden's proposal (which the Senate rejected), to condition the effectiveness of the Act on an agreement between Arizona and California (see pp. 14-15, *infra*); (4) it conceivably amended or construed the Colorado River Compact to exclude all lower basin tributaries, most of which are in Arizona (see p. 30, *infra*); and (5) it delegates to the Secretary of the Interior the power, which every opponent and proponent of the Swing-Johnson bills proclaimed Congress itself lacked, to

allocate water among the states and to satisfy Arizona's 2,800,000 acre-feet of consumptive use in disregard of the uses of water by California's existing projects, the very projects whose priorities Arizona feared (see pp. 14-24, *infra*).

On the other hand: If Congress really did all this, why did the Arizona delegation, Senators Hayden and Ashurst and Congressman Douglas, vote against the bill? Why did Senator Hayden vigorously oppose the initial appropriation to build Hoover Dam? Why did Arizona sue to have such a favorable statute declared unconstitutional and its enforcement enjoined? Why did Arizona call out her militia to stop the construction of Parker Dam, from which her Central Arizona aqueduct would now divert? Why did she sue here in 1935 for an equitable apportionment? Why did Arizona refuse to ratify the Compact for 15 years after passage of the Project Act?

The answer is that the Court's new construction of the Project Act conflicts with the plain language of the Act, with its legislative history, and with its construction by the Secretary of the Interior and the states for three decades.

2. The First Factual Misconception: The Magnitude of the Gila and Its Usefulness Outside Arizona

The Court apparently believes that when the Project Act was enacted the outflow of the Gila into the Colorado (1) was insignificant, and (2) was so located as not to be of much usefulness to anyone outside Arizona.[2]

Each of these assumptions is mistaken.

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[2] Pp. 568-69: "Inclusion of the tributaries in the Compact was natural in view of the upper States' strong feeling that the Lower Basin tributaries should be made to share the burden of any

a. As to the magnitude of the Gila

In a state of nature the Gila contributed to the Colorado about a million acre-feet per annum—as much water as is now in dispute between Arizona and California.[3] The Gila was not, as the Court believes, "reduced virtually to a trickle," it did not "virtually evaporate," before reaching the Colorado. Of course it does now, but only because Arizona and New Mexico are using most of it. The Court's assertion begs the question: Shall Arizona be accountable, against her share of the waters of the Colorado River system, for the benefits she now receives from her depletion of an

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obligation to deliver water to Mexico which a future treaty might impose. But when it came to an apportionment among the Lower Basin States, the Gila, by far the most important Lower Basin tributary, would not logically be included, since Arizona alone of the States could effectively use that river."

Again, p. 569 n. 40: "Not only does the Gila enter the Colorado almost at the Mexican border, but also in dry seasons it virtually evaporates before reaching the Colorado."

Again, pp. 573-74: "Arizona's claim was supported by the fact that only she and New Mexico could effectively use the Gila waters, which not only entered the Colorado River too close to Mexico to be of much use to any other State but also was [*sic*] reduced virtually to a trickle in the hot Arizona summers before it [*sic*] could reach the Colorado."

[3] The Bureau of Reclamation in its 1953 "Memorandum Supplement" to its 1952 "Report on Water Supply of the Lower Colorado River Basin" reported that the average annual long-term virgin flow (the flow that would have occurred absent depletions by man) of the Gila River at its mouth was about 1,200,000 to 1,400,000 acre-feet. Ariz. Ex. 77-B, Table G (p. 33). Congress, in 1928, had before it the Bureau's "Fall-Davis Report" (S. Doc. No. 142, 67th Cong., 2d Sess. (1922)), which showed that during the period 1903-1920, the Gila contributed to the main stream about 1 million acre-feet average annual flow. Ariz. Ex. 45, at 219. See also *Hearings on H.R. 6251 and H.R. 9826 Before the House Committee on Irrigation and Reclamation*, 69th Cong., 1st Sess. 209-10 (1926) (Delph E. Carpenter).

asset that was a common asset of the lower basin when the Project Act was passed?[4]

b. The Gila as a common lower basin asset, useful to California

California physically diverted, for 40 years, the outflow of the Gila River into the Alamo Canal and used the waters so diverted in Imperial Valley. Imperial's diversion point, from 1901 to 1941, was below the mouth of the Gila. The Court's assertion that the Gila entered the Colorado River too close to Mexico to be of much use to any other state is simply not so.[5] Congress knew that. Senator Phipps of Colorado, chairman of the committee that reported this bill,

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[4] Neither in her pleadings filed with the Court in this case nor in any of her previous suits here did Arizona contend for the windfall that the Court may have given her, complete exoneration from accounting for the Gila as against her share of the waters of the lower basin. She contended, instead, that she should be charged only with the use of the million acre-feet that would have reached the Colorado if the flow of the Gila, which is nearly 2 million acre-feet in the Phoenix area, had not been consumed there. See Ariz. Bill of Complaint, par. XXII (2), p. 26.

[5] See Calif. Op. Br. 96-98. The Court appears to be under a general misapprehension about the Imperial Valley diversion. At p. 553 it speaks of the "more or less primitive diversions made from the mainstream of the Colorado," and speaks of the time "after the Mexican canal provided a more dependable water supply." From the beginning the Alamo Canal constituted the only diversion and the only water supply for Imperial Valley. It diverted in the United States at a point below the mouth of the Gila, just north of the Mexican boundary, and followed the natural contour through Mexico and back into the United States to irrigate the Imperial Valley, which lies below sea level and drains into the Salton sea depression. The All-American Canal diverts above the mouth of the Gila, parallels the boundary by cutting through the sand dunes that the Alamo Canal went around. The outflow of the Gila, greatly reduced by Arizona uses, is now diverted by Morelos Dam into canals serving Mexico.

reported on the Senate floor how he had seen Gila River water flow into the California canal. He estimated its contribution to the Colorado as over 1 million acre-feet, citing an Arizona witness, and argued that California was entitled to have the Gila counted in as being part of the basic supply of water. 70 Cong. Rec. 335 (1928).

The mouth of the Gila is above Mexico and the Gila represents part of the common supply available to satisfy the senior treaty claims of Mexico. This is why the upper basin was insistent that it bear its share of the Mexican burden, as the Court acknowledges (pp. 568-69).

If the tributaries are in the Compact accounting at all, then, to the extent that Arizona consumes the Gila, the right of the lower basin (including California) to require the upper division states to deliver water for Mexico under Article III(c) is diminished. (Pp. 36-37, *infra*.) Therefore, if the flow of the Gila was a big enough contribution to the Mexican burden to be significant to the upper basin (pp. 568-69), it was big enough to have precisely the same significance to the lower basin, hence to California.

No one seeks to deprive Arizona of the "sole use of the Gila, upon which her existing economy depended" (p. 573). The question is simply: *If* the quantity that the lower basin may use out of the main stream under the Compact is diminished because Arizona uses the Gila, which state—Arizona or California—shall bear the burden of the resulting reduction in the quantity that the lower basin may use out of the main stream?

3. The Second Factual Misconception: Attempted Equation of the Flow of the Stream With Consumptive Use

The Court treats section 4(a) of the Project Act as a palimpsest, from which it erases the plain words "apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact" and writes over the erasure "the first 7,500,000 acre-feet of .... mainstream water" (p. 565); but this in turn is blurred, if not erased, by relating it to a proposal of the upper state governors at a convention in 1927 (pp. 569-70; 572-73), that is wholly inconsistent with both of the other readings.

The governors proposed a division among Arizona, California, and Nevada of the *flow of the stream*, the minimum quantity that the upper division is required by Article III(d) of the Compact to let down at Lee Ferry (p. 570). This is 75 million acre-feet in each series of 10 years. Congress did not accept this concept; it stated the limitation instead in terms of *consumptive use*, measured by diversions less returns, for use in California. *Consumptive use of water and flow of water are different measuring sticks—as different as cubic feet and square feet.*

Here the Court recreates the ambiguity that has plagued the Colorado River for nearly four decades, which the Master clearly saw, and we thought had laid to rest. As the Master made clear, delivery of 75 million acre-feet per decade at Lee Ferry could not alone support 7.5 million acre-feet per year of consumptive use (Rep. 144). It would fail to do so by as much as two million acre-feet. (P. 9, *infra.*) The Master pointed out that Senator Pittman was con-

fused in failing to realize the difference between the governors' proposal and what the Senate was doing.[6]

The Court now cements that confusion into the statute. Shall the decree be written in harmony with the governors' concept, which speaks in terms of the flow of the stream at Lee Ferry assured by Article III(d), or in tune with Article III(a), which speaks in terms of consumptive use? Suppose "III(a)" in the Project Act is rewritten, as the Court does, to mean 7.5 million acre-feet of consumptive use from the main stream, not the system: How can 7.5 million acre-feet of consumptive use (diversions less returns) possibly be supplied from a main stream whose gross income is the inflow of that same quantity at Lee Ferry (since all the lower basin tributary inflow may be withheld—"leaving each State its tributaries" (p. 565)), (1) from which nature's attrition exacts more than a million acre-feet of losses in transit (Rep. 124-25), and (2) from which, finally, another million acre-feet of return flow from Arizona's boundary projects into Mexico must be subtracted?

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[6] The Master concludes that "Congress never clearly understood" the governors' recommendation (Rep. 189). After quoting Senator Pittman's report on the governors' conference, the Master observes:

"This report by Senator Pittman did not adopt, or perhaps failed to grasp, that portion of the governors' resolution which expressly found the source of the allocated waters in the Article III(d) obligation of the Upper Division. Instead Senator Pittman related the limitation to Article III(a), not III(d) . . . ." (Rep. 189.)

"Thus Senator Pittman used Article III(a) to define the area against which the limitation was to operate. He did this in apparent misunderstanding of the governors' recommendation. All subsequent discussion in the Senate flowed in the same channel." (Rep. 190.)

ARGUMENT

I. THE "STATUTORY APPORTIONMENT SCHEME"

The Court erred in holding (1) that the Boulder Canyon Project Act effected a mandatory "statutory apportionment" among Arizona, California, and Nevada, instead of determining that the Act merely required California, as a condition precedent to the Act's effectiveness, to agree to a ceiling upon her appropriations (including those made pursuant to contracts with the United States); and (2) that Congress delegated to the Secretary power (a) to originate and impose upon the states a formula for allocation of shortages, in displacement of this Court's powers to resolve such shortages by exercise of its doctrine of equitable apportionment, and (b) to allocate waters within a state without regard to state law.

A. The Court Ignores Its Previous Decisions Holding That the Project Act Did Not Make Any Statutory Apportionment

The Court's decision scarcely reveals that the Colorado River controversy has been before the Court on four previous occasions and that in all four cases the Court construed the Project Act in a manner wholly at variance with the present decision.

1. If the Court now is right in holding that Congress made a "complete statutory apportionment" (p. 560) of the waters of the main stream, fixing California's share at 4.4 million, Arizona's at 2.8 million, and Nevada's at 300,000, leaving to each state its tributaries (p. 565), the Court was wrong in 1931 in deciding, in *Arizona* v. *California,* 283 U.S. 423, that Congress had done no such thing.

In that suit the Court rejected Arizona's contention "that the mere existence of the act will invade quasi-

sovereign rights of Arizona by preventing the State from exercising its right to prohibit or permit under its own laws the appropriation of unappropriated water flowing within or on its borders" (*id.* at 458), holding as follows (*id.* at 464):

> "As we hold that . . . the Boulder Canyon Project Act does not purport to abridge the right of Arizona to make, or permit, additional appropriations of water flowing within the State or on its boundaries, and that there is no threat by Wilbur, or any of the defendant States, to do any act which will interfere with the enjoyment of any present or future appropriation, we have no occasion to consider other questions which have been argued."

If the Court is correct now, the "mere existence" of the Project Act had cut off all rights of appropriation both interstate and intrastate because it had made a "complete statutory apportionment" of all of the main stream waters. If so, ironically enough, it should have dismissed Arizona's case in 1931, not because she was not yet injured, but because she had already won in the Project Act more than she then claimed.

2. The present decision also collides with the Court's rejection in 1934 of Arizona's suit to perpetuate testimony of witnesses to show that in the Project Act and the California Limitation Act the Gila River was intended to be identified with the waters referred to in Article III(b) of the Compact, from which Arizona said the Limitation Act excluded California. *Arizona* v. *California,* 292 U.S. 341 (1934). The Court rejected this interpretation of the Compact and the Act, saying, *inter alia* (*id.* at 357):

> "But *the Act does not purport to apportion* among the states of the lower basin the waters to which the lower basin is entitled under the Compact. The Act

> *merely places limits* on California's use of waters under Article III(a) and of surplus waters; and it is 'such' uses which are 'subject to the terms of said compact.'" (Emphasis added.)

In each respect the Court now reverses what it said then: the Act, it now says, *did* apportion waters among three of the states of the lower basin and did *not* merely place limits on California's uses; the waters which it now says the Act apportioned are not Article III(a) waters as defined by the Compact, but are solely the waters of the main stream of the Colorado River, exclusive of the tributaries which feed it and which then provided and now provide the supply upon which California's projects in large measure depend.

3. In 1934 Arizona sent her militia to stop by force the construction of Parker Dam (a curious operation to prevent the building of part of the "vast, interlocking machinery" (p. 589) designed to effectuate the Project Act, if the Act did what the Court now holds that it did for Arizona). The United States sued to enjoin this interference and lost, because the Secretary lacked statutory authority to build the dam. *United States* v. *Arizona,* 295 U.S. 174 (1935). The Court reaffirmed its view that the Project Act had not abrogated either the doctrine of equitable apportionment or Arizona's jurisdiction over her equitable share of the river (*id.* at 183):

> "Arizona owns the part of the river bed that is east of the thread of the stream. . . . Her jurisdiction in respect of the appropriation, use and distribution of an equitable share of the waters flowing therein is unaffected by the [Colorado River] Compact or federal reclamation law.'"[7]

[7] The Court had defined the "reclamation law" as including the Project Act (*id.* n. 2).

If the Project Act had made an interstate apportionment, Arizona (and California) had lost "jurisdiction in respect of the appropriation . . . of an equitable share," and if Congress had delegated to the Secretary authority to make intrastate allocations, those States had also lost their jurisdiction with respect to "use and distribution."[8]

4. In 1935 Arizona sued in this Court for an equitable apportionment, asking to have water reserved for her future appropriation. In *Arizona* v. *California,* 298 U.S. 558 (1936), the Court declined leave to file on the ground that the United States was an indispensable party, and had not consented to be sued. If the Court lacked jurisdiction to make a new apportionment because Congress had already made one—a lack that consent to sue would not cure—it did not then notice it.

The Court's present 180-degree turn from the course it plotted for the development of the lower basin in 1931, 1934, 1935, and 1936 is more than an academic change in a blueprint. More than a half billion dollars has been invested in California projects between the dates of those decisions and the present one. These projects, serving more than 8 million people, have put to use water that California was plainly entitled to appropriate under the Project Act as it was then construed by the Court but which could be taken from her under the present decision.

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[8] Congress subsequently authorized construction of Parker and Headgate Rock dams in the Act of August 30, 1935, 49 Stat. 1039. That Act refers to "waters . . . appropriated under the works hereby authorized" and later to "such . . . appropriation"—curious language if appropriative rights had all been cut off June 25, 1929, by the Project Act.

B. Congress Did Not Impose a Statutory Apportionment on the States or Authorize the Secretary of the Interior To Do So

The Court concludes that Congress intended to impose "its own comprehensive scheme for the apportionment among California, Arizona, and Nevada of the mainstream waters of the Colorado River" (p. 565).

If Congress really intended to impose such a scheme irrespective of the acquiescence of the states, then why did it make the whole Act contingent upon the ratification by seven states, or by six states, of the Colorado River Compact? Why condition the very launching of this great statute upon the concurrent judgment of six state legislatures? Why require, in the event that only six states ratified the Compact, that California's legislature enact a self-limitation act? Why not simply legislate the limitation by act of Congress alone? Why even delay effectiveness of the Act for six months to see what the states did? Why authorize a tri-state compact? Why provide (§18) that nothing in the Act should interfere "with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders"? Does it seem likely that a Congress so obviously sensitive to the wishes of the states intended to impose upon them an apportionment which would have exactly the same effect whether they followed the elaborately prescribed ritual of state legislation or did not?

The answer, which the majority wholly ignores, is in the most pointed exchange in the whole legislative history, when Senator Hayden, at Senator Pittman's urging, abandoned his effort to require California, as a condition to the effectiveness of the Act, to agree to a mandatory apportionment formula, and converted it

into a mere permission to compact. The exchange was this (70 Cong. Rec. 472):

> "MR. JOHNSON. . . . [W]hat I want to make clear is that this amendment shall not be construed hereafter by any of the parties to it or any of the States as being the expression of the will or the demand or the request of the Congress of the United States.
> "MR. PITTMAN. Exactly, not.
> "MR. JOHNSON. Very well, then.
> "MR. PITTMAN. It is not the request of Congress.
> "MR. JOHNSON. I accept the amendment, then."

The formula stated in "this amendment" is the very one that the Court now fastens upon California as a "Congressional scheme of apportionment" (p. 567) as though every statement and answer in that crucial exchange that preceded Senator Johnson's acquiescence had been exactly the reverse of what was said. It is difficult to understand how a decision which overturns the plain language of a statute (the specific reference in section 4(a) to paragraph (a) of Article III of the Colorado River Compact) by reference to confused legislative history should reject the plain and decisive assurance which Pittman gave Johnson, and which alone got the Hayden amendment into the bill.[9]

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[9] The Master, who decided against us on other grounds, rejected Arizona's contention, which the Court now accepts, that the Act imposed a mandatory apportionment (Rep. 163): "But the second paragraph of Section 4(a) is plain in that it merely *authorizes* a tri-state compact for the division of water; it does not compel it; nor does it condition approval of the Colorado River Compact upon acceptance of the proposed tri-state compact. Indeed, the second paragraph was specifically amended on the floor of the Senate to make the suggested division permissive rather than mandatory. . . ."

See also Rep. 202: "I have rejected the contention that the second paragraph of Section 4(a) of the Act established a mandatory formula governing the amount of water Arizona must receive."

1. The Court's Reliance on Statements of Senator Hayden and Other Opponents of the Project Act Is Misplaced

The Court relies largely on utterances of three opponents of the bill, Senator Hayden and Representative Douglas of Arizona and Representative Colton of Utah, albeit with a footnote explaining that although "Statements of opponents of a bill may not be authoritative . . . they are nevertheless relevant and useful, especially where, as here, the proponents of the bill made no response to the opponents' criticism" (p. 583 n. 85).[9a]

Aside from the majority's failure to suggest why it need look to the statements of opponents of the bill to interpret section 5 in disregard of the assurances of Delph Carpenter, its draftsman, that "it has nothing to do with the interstate relations between Arizona and California" and the similar statements of Representative Swing, author of the bill, and a host of other proponents of the measure,[10] its reliance on the opponents' comments is unwarranted for at least two reasons.

First, the majority's reliance on Senator Hayden's remarks is truly misplaced. Senator Hayden never shared the views of federal power and omnicompetence that apparently underlie the majority opinion. Second, the Court mistakenly assumes that the comments of Representatives Colton and Douglas and other opponents of the bill were not answered by the bill's proponents. They were vigorously denied.

[9a] Shall the same reasoning apply to statements by a Court's minority to which the majority opinion makes no response?

[10] See, *e.g.*, Justice Harlan's dissenting opinion, pp. 604-05, 618-20.

a. Senator Hayden did not believe that the Project Act made a statutory apportionment

Senator Hayden stated his own views and the congressional consensus as follows:

> "There are only two ways in which this controversy can be settled. Either the States can agree upon an equitable apportionment of waters of the Colorado River or, in the absence of a compact, the Supreme Court of the United States can determine what the rights of the various States are on that stream. . . .
>
> ". . . . *Arizona denies that it is within the power of Congress to apportion the waters of an interstate stream among the States.*" [11] (Emphasis added.)

Similarly, he assured Senator King, author of section 18 of the Act, that Senator Hayden's proposed amendment (later rejected by the Senate) even though it then required California to ratify a tri-state compact as a condition precedent to the effectiveness of the Act, did not nullify the priority principles long established under state law (69 Cong. Rec. 169):

> "Mr. HAYDEN. . . . The only thing required in this bill is contained in the amendment that I have offered, that there shall be apportioned to each State its share of the water. Then, who shall obtain that water in relative order of priority may be determined by the State courts.
>
> "Mr. KING. If the Senator means by his statement that the Federal Government may go into a stream, whether it be the Colorado River, the Sacramento River, or a river in the State of Montana, and put its powerful hands down upon the

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[11] *Hearings on H.R. 9826 Before the House Committee on Rules*, 69th Cong., 2d Sess. 75, 76 (1927).

> stream and say, 'This is mine; I can build a dam there and allocate water to whom I please, regardless of other rights, either suspended, inchoate, or perfected,' I deny the position which the Senator takes.
>
> "Mr. HAYDEN. *The amendment that I have offered contemplates no such possibility.*" (Emphasis added.)

With reference to this exchange, the majority suggests that since Senator Hayden was "so knowledgeable in western water law," his remark "makes sense only if one understands that the 'order of priority' being talked about was the order of present perfected rights" (p. 582 n. 84).[11a] But Senator King had just referred to "suspended, inchoate *or* perfected" rights (emphasis added). Senator Hayden's assurances that his coercive condition did not contemplate federal preemption of the only existing body of law for the determination of water rights on the Colorado River could only have referred to appropriative water rights which "users or appropriators of water stored" (section 8(a)) might either "initiate *or* perfect" (section 4(a); emphasis added) under the Project Act.

The acid test, however, is what Senator Hayden *did*—not merely what he said: If Congress in the Project Act had abrogated priorities in the lower basin and had apportioned lower basin waters or authorized the Secretary to ignore the priorities of California projects and dedicate water now used by California to new projects

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[11a] The Court at n. 83, speaking of present perfected rights, mentions Los Angeles' appropriation, but it does not define the term "present perfected rights". We take it that this is one of the "questions on which we have not ruled" (p. 602), to be considered in connection with the proposed decree.

in Arizona, Senator Hayden should have announced a great Arizona victory. He did no such thing. He voted against the bill. Moreover, in 1930 he pleaded with Congress not to appropriate funds for the construction of Hoover Dam, explaining why the negotiation of an interstate compact dividing lower basin waters was still necessary to Arizona after the Project Act had been enacted:[12]

> "Senator GLASS. Do you construe the provision of the law which you have just read so as to make the whole plan contingent upon the completion of the agreement?[13]
>
> "Senator HAYDEN. No. I say to you, Senator, very frankly, that that is not true. It could not be true, because *the Congress of the United States does not possess the power to divide the waters of rivers among States. That is a result which could only be accomplished by the States through compacts.*
>
> "Senator MCKELLAR. Senator Hayden, suppose the agreement is not made; suppose Arizona and Nevada and California are unable to agree. Then what happens?
>
> "Senator HAYDEN. What will happen is that the waters of the Colorado River will be impounded in the Boulder Canyon Reservoir and made available for use; large quantities of water will be taken out of the Colorado River into the great all-American canal; over 1,000,000 acre-feet will be further taken out of the river by a pumping plant, and taken over into the coastal plain of California in

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[12] *Hearings on H.R. 12902 Before a Subcommittee of the Senate Committee on Appropriations,* 71st Cong., 2d Sess. 170-71 (1930).

[13] (Footnote ours.) Senator Hayden had just read the language of the second paragraph of § 4(a) of the Project Act, authorizing a tri-state compact among Arizona, California, and Nevada.

the vicinity of Los Angeles; *they will be put to beneficial use; and, once having acquired a prior right to its use, no other State can obtain the use of those waters.*

"Senator McKellar. What are the chances of an agreement? How far apart are you?

"Senator Hayden. That is why I asked Colonel Donovan to come here to testify regarding the negotiations between the States of Arizona and California.

"In answer to the question asked by Senator Glass—and then I shall ask Colonel Donovan to proceed—you will remember that the Senators from Arizona strenuously opposed the enactment of the Boulder Canyon project act. After many days of discussion we were approached, principally through the Senator from Wyoming, Mr. Kendrick, who said to us, 'If we can work out in this bill a fair division of the waters of the lower Colorado River Basin, will you cease your opposition?' Senator Ashurst and I answered, 'That is exactly what it is all about. If you can do that, we are ready to quit right now.' The Senator from Wyoming said, 'I shall see what can be done.' *Senator Kendrick afterwards came back and reported to us that it was impossible for Congress to make such an apportionment, because it is not within the power constitutional [sic] of Congress to divide waters.* The Senator, however, said, 'We will come the nearest thing to it. Congress will limit California to 4,400,000 acre-feet of water out of the primary apportionment of lower basin water, and will *indicate* in advance the kind of an agreement which ought to be made by the three lower basin States in dividing the water among them.'

"That is what was done in the Boulder Canyon project act. It was thoroughly understood at the time that there was no legal way of imposing such

> *an agreement on the three States by an act of Congress.*" (Emphasis added.)

Senator Hayden later restated this analysis in debates on the Senate floor, repeating that "constitutional lawyers in this body said that it was impossible for the Congress of the United States to divide the waters of rivers." 72 Cong. Rec. 11770 (1930).

Similarly, he told the Senate (*id.* at 11755):

> "[I]f the dam shall be built at Boulder Canyon and if Congress shall appropriate the money to build the all-American canal, and the cities of southern California do divert the water, as they contemplate doing, out of the Colorado River over on to the coastal plain—if those things shall be done first without an agreement between Arizona and California, California will acquire a *prior vested right* to the greater and an unfair proportion of the waters of the Colorado River." (Emphasis added.)

Senator Hayden's statement provides the conclusive explanation of his vote against the Project Act, his efforts to block the initial appropriations for the building of Hoover Dam, Arizona's attempt to have the Act declared unconstitutional, and Arizona's calling out its militia to halt the building of Parker Dam, the diversion structure for California's Colorado River aqueduct (and of the proposed Central Arizona Project). It reveals the consensus of contemporary understanding that the Act did not effect a statutory apportionment scheme, as the Court now finds in the Act. The basic reasons, pointed out in Justice Harlan's dissent but unanswered in the majority opinion, are evident. First, Congress, almost to a man, considered that it lacked the power to allocate waters among the

states. Second, the basic principles of equitable apportionment—priority of appropriation and protection of existing uses—were to be preserved and applied to both kinds of rights on which section 4(a) proposed that California enact a quantitative ceiling: (1) "All uses under contracts made under the provisions of this Act," and (2) "all water necessary for the supply of any rights which may now exist." Senator Hayden recognized the limited purpose of the Act then; this Court recognized it in its four earlier decisions; and four Secretaries of the Interior have consistently recognized it in administering the Act.[14] A majority of this Court now refuses to so read the statute.

b. The charges of the opponents of the bill were refuted by the bill's proponents

The majority's assertion that the criticisms of the opponents were not challenged is demonstrably wrong, as we detailed at length in appendix B of the legislative history appendixes accompanying the California reply brief. Mr. Colton's charges were refuted by Mr. White of Colorado, a proponent of the bill (and,

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[14] *Cf.* article 10 of Arizona's 1944 water delivery contract, which provides in part (Rep. app. 405):

"Neither Article 7, nor any other provision of this contract, shall impair the right of Arizona and other states and the users of water therein to maintain, prosecute or defend any action respecting, and is without prejudice to, any of the respective contentions of said states and water users as to . . . (5) what limitations on . . . relative priorities exist as to the waters of the Colorado River system . . . ."

In approving that contract, Secretary of the Interior Ickes issued a decision concluding that article 10 "is plain and unequivocal and adequately reserves all questions of interpretation of the . . . [Boulder Canyon Project Act]." Calif. Ex. 7607 for iden.

in effect, by Mr. Colton himself), in the following colloquy (69 Cong. Rec. 9648):

> "MR. COLTON. Congress can not allocate water. . . .
>
> ". . . .
>
> "MR. WHITE of Colorado. A while ago the gentleman stated that he doubted whether or not Congress had the power at this late date to nullify, abrogate, or change the doctrine of priority in the use of the water.
>
> "MR. COLTON. I think they have not that power.
>
> "MR. WHITE of Colorado. *There is no attempt to do anything of that kind by this bill. . . .*" (Emphasis added.)

Shortly before the quoted exchange between Mr. Colton and Mr. White, similar assertions by Mr. Colton were denied by Mr. Bankhead who also favored the fourth Swing-Johnson bill (69 Cong. Rec. 9648 (1928)):

> "MR. COLTON. . . . You are saying that you are going to take it [control] away from the States and place it in the Federal Government, and section 5 of this bill asserts that very principle. It provides that the Secretary of the Interior shall have control of all of the water stored in the reservoir and its delivery to any part of the river below. We deny that in principle and say it is against the very contract that this country has entered into with our Western States and contrary to the decisions of the United States Supreme Court.
>
> "MR. BANKHEAD. As I understand, the whole theory of this bill is predicated on the recognition of the right that the gentleman is now asserting, for the reason that nothing can be done by Congress under this bill until the States acting through this compact shall determine what their respective rights are in reference to this matter."

Mr. Swing of California, the House author, responded as follows to Mr. Douglas (69 Cong. Rec. 9635):

> "I only wish I had the time to go fully into each and every one of the contentions made by the gentleman from Arizona [Mr. Douglas]. They ought to be answered. They can be answered. *They have been answered in the investigations made of the project and in the hearings held on this bill.* No project has ever been presented to Congress which has been so thoroughly studied." (Emphasis added.)

Mr. Swing was correct; the contentions made by Mr. Douglas on the floor were repetitions of those made earlier, and which had been challenged and thoroughly refuted in detailed hearings held over a period of five years on the four Swing-Johnson bills. See Calif. Legis. Hist. App. Accompanying the Calif. Reply Brief, app. B, pp. 58-61.

2. The Court Has Overlooked the Legislative History of Section 18 and This Court's Previous Construction of That Section

Section 18 of the Project Act provides:

> "Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control and use of waters within their borders, except as modified by the Colorado River Compact or other interstate agreement."

The present opinion concedes (p. 588):

> "Section 18 plainly allows the States to do things not inconsistent with the Project Act or with federal control of the river, for example, regula-

> tion of the use of tributary water and protection of present perfected rights. What other things the States are free to do can be decided when the occasion arises. But where the Secretary's contracts, as here, carry out a congressional plan for the complete distribution of waters to users, state law has no place."

Section 18 went into the Act as an amendment offered by Senator King of Utah (70 Cong. Rec. 593) to remove any possible inference that the Secretary of the Interior or any other federal official would be authorized by the Project Act to do what the Court now concludes the Act did empower the Secretary to do. Senator King's fiery speech evidencing these views is quoted at pages 17-18, *supra.*

In *Arizona* v. *California,* 283 U.S. 423 (1931), this Court emphatically interpreted section 18 in accordance with Senator King's intent, holding that it negatived any idea of federal supersedure of state law relating to the acquisition and regulation of water rights, both interstate and intrastate (*id.* at 462):

> "The Act does not purport to affect any legal right of the State, or to limit in any way the exercise of its legal right to appropriate any of the unappropriated 9,000,000 acre-feet which may flow within or on its borders. On the contrary, section 18 specifically declares that nothing therein 'shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of water within their borders, except as modified' by interstate agreement. As Arizona has made no such agreement, the Act leaves its legal rights unimpaired."

The language of section 18 was reenacted as section 14 of the Boulder Canyon Project Adjustment Act of July 19, 1940, 54 Stat. 779, 43 U.S.C. § 618m (1958).

3. There Is No Present or Potential Conflict Between the Principles of Equitable Apportionment or State Law and Effective Implementation of the Objectives of the Project Act

The Court justifies its reading of section 8 of the reclamation law and section 18 of the Project Act on the ground that (p. 590):

> "Subjecting the Secretary to the varying, possibly inconsistent, commands of the different state legislatures could frustrate efficient operation of the project and thwart full realization of the benefits Congress intended this national project to bestow."

With due respect, this is not the point; the point is that Congress, as a matter of "*federal* statutory law," and this Court, as a matter of "*federal* interstate common law," both have adopted as the basic element the salutary principle which all of the arid states have stated in their own jurisprudence: the law of prior appropriation (upon which this Court has superimposed certain other features—primarily the protection of existing uses). Both section 8 of the reclamation law and section 18 of the Project Act are part of an unbroken series of at least 36 federal statutes, spanning the period 1866 to 1958, in which Congress has affirmed that, as a matter of federal law, the distribution of waters from federally constructed and operated projects by federal officials should conform to the appropriative principles of state law, and denied to such officials power to substitute their own discretion to

allocate water.[15] Is it logical to believe that Congress, in this one statute, intended to go in the opposite direc-

[15] § 9 of the Act of July 26, 1866, 14 Stat. 253, 30 U.S.C. § 51 (1958); § 17 of the Act of July 9, 1870, 16 Stat. 218, 30 U.S.C. § 52 (1958); § 1 of the Desert Land Act of March 3, 1877, 19 Stat. 377, as amended, 43 U.S.C. § 321 (1958); § 18 of the Act of March 3, 1891, 26 Stat. 1101, as amended, 43 U.S.C. § 946 (1958); Act of Feb. 26, 1897, 29 Stat. 599, 43 U.S.C. § 664 (1958); Act of March 2, 1897, 29 Stat. 603; Act of June 4, 1897, 30 Stat. 36, 16 U.S.C. § 481 (1958); § 8 of the Reclamation Act of 1902, 32 Stat. 390, 43 U.S.C. §§ 372, 383 (1958); § 25 of the Act of April 21, 1904, 33 Stat. 224; § 4 of the Act of Feb. 1, 1905, 33 Stat. 628, 16 U.S.C. § 524 (1958); Act of March 3, 1905, 33 Stat. 1020; Act of June 21, 1906, 34 Stat. 375; Act of March 1, 1907, 34 Stat. 1035; Act of May 30, 1908, 35 Stat. 560; Act of March 3, 1909, 35 Stat. 812; § 2 of the Warren Act of Feb. 21, 1911, 36 Stat. 926, 43 U.S.C. § 524 (1958); § 11 of the Act of Dec. 19, 1913, 38 Stat. 250; Federal Power Act of June 10, 1920, 41 Stat. 1068, 1077, 16 U.S.C. §§ 802(b), 821 (1958); § 18 of the Boulder Canyon Project Act of Dec. 21, 1928, 45 Stat. 1065, 43 U.S.C. § 617q (1958); § 3 of the Taylor Grazing Act of June 28, 1934, 48 Stat. 1271, 43 U.S.C. § 315b (1958); § 4 of the Act of Aug. 28, 1937, 50 Stat. 870, 16 U.S.C. § 590u (1958); § 14 of the Boulder Canyon Project Adjustment Act of July 19, 1940, 54 Stat. 779, 43 U.S.C. § 618m (1958); § 3(b) of the Great Plains Water Conservation and Utilization Projects Act of Oct. 14, 1940, 54 Stat. 1121, 16 U.S.C. § 590z-1(b) (1958); § 1 of the Flood Control Act of Dec. 22, 1944, 58 Stat. 888-89, as amended, 33 U.S.C. § 701-1 (1958); Reservation (c) to the Mexican Water Treaty, U.S. Treaty Ser. No. 994, 59 Stat. 1265 (1945); National Parks Act of Aug. 7, 1946, 60 Stat. 885, 16 U.S.C. § 17j-2 (1958); § 208 of the Act of July 10, 1952, 66 Stat. 560, 43 U.S.C. § 666(a) and (c) (1958); § 3(e) of the Submerged Lands Act of May 22, 1953, 67 Stat. 31, 43 U.S.C. § 1311(e) (1958); § 3(c) of the Act of July 28, 1954, 68 Stat. 577-78; § 4 of the Act of Aug. 4, 1954, 68 Stat. 667 (as amended by 70 Stat. 1088 (1956)), 16 U.S.C. § 1004 (1958); §4(b) of the Act of July 23, 1955, 69 Stat. 368-69, 30 U.S.C. § 612(b) (1958); Act of Aug. 4, 1955, 69 Stat. 491; § 7 of the Colorado River Storage Project Act of April 11, 1956, 70 Stat. 110, 43 U.S.C. 620f (1958); § 4 of the Act of July 2, 1956, 70 Stat. 484, 43 U.S.C. § 485h-4 (1958); § 4(b) of the Small Reclamation Projects Act of Aug. 6, 1956, 70 Stat. 1045, 43 U.S.C. § 422d(b) (1958); § 202 of the Act of Aug. 28, 1958, 72 Stat. 1059.

tion, without saying so, by implication, in a one-sentence requirement that water users must have federal contracts, which it had been requiring right along under the federal reclamation law even of water users who individually owned their water rights?

Congress, in section 5, did not intend to substitute a paper contract right for the requirement in section 8 of the reclamation law, incorporated in the Project Act by section 14, that "beneficial use shall be the basis, the measure, and the limit of the right." Instead, it enthroned as federal law this essential principle of the states' laws of priority of appropriation. This decision shatters that principle.

II. THE EXCLUSION OF THE TRIBUTARIES

A. The Court's Five Reasons for Rejecting the Plain Language of Section 4(a), and the Answers to Them

The question here is whether Congress expected that the consumptive use of the 7.5 million acre-feet which is identified in the first paragraph of section 4(a) of the Project Act by reference to paragraph (a) of Article III of the Compact should be supplied by the main stream alone, or by the Colorado River system, including its lower basin tributaries as well as the main stream.

Arizona has contended that the Compact was construed by the Project Act as encompassing only the main stream in the lower basin, excluding the tributaries (p. 568). See *Petty* v. *Tennessee-Missouri Bridge Com.*, 359 U.S. 275 (1959). California has contended that both section 4(a) of the Act and Article III(a) of the Compact, which it incorporates, include the tributaries. If either of these two constructions were adopted, there would be equilibrium and not conflict between the Compact and the Project Act with

respect to quantities that the lower basin may appropriate from the main stream within the "ceiling on appropriations" (the Master's term) imposed by Article III(a) of the Compact.

Thus:

If the Compact, as construed by the Project Act, excludes the lower basin tributaries (Arizona's contention), then Arizona, California, and Nevada may appropriate from the main stream, within the III(a) ceiling, that full 7.5 million if it is physically available. California may use 4.4 million of it, and Arizona and Nevada 3.1 million.

Or:

If the Compact includes the tributaries (as California has contended), then Arizona, California, and Nevada may appropriate within that same III(a) ceiling only 5.5 million from the main stream,[16] because the lower basin must account for some 2 million acre-feet of consumptive use on the tributaries. Of this 5.5 million, California may use 4.4 million, and Arizona and Nevada 1.1 million.[17]

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[16] Article III(b) permits the use of an additional million.

[17] The Master construed the reference in section 4(a) to additional "excess or surplus waters unapportioned" by the Compact, of which California might use one-half, Arizona one-half, as including the additional million acre-feet referred to in Article III(b). If that extra million is physically available (which we doubt), and if the lower basin may appropriate up to the III(a) and (b) ceiling from the main stream alone, California may use altogether 4.9 million (4.4 under III(a) plus one-half of 1 million under III(b)), and Arizona and Nevada may use 3.6 million (3.1 plus one-half of that 1 million). Similarly, if the tributaries' 2 million is encompassed by the Compact and section 4(a), California may use 4.9 million (4.4 plus one-half million), and Arizona and Nevada 3.6 million, but since 2 million of this is used on their tributaries, they may claim only 1.6 million from the main stream.

In either event, the supply available to the Secretary under the Compact is in balance with the demand he is expected to recognize under the Project Act.

But the Court, without reaching Arizona's contention as to the meaning of the Compact (p. 568), construes the Project Act itself as dealing only with the main stream, *i.e.*, that Congress expected Arizona, California, and Nevada to use 7.5 million acre-feet from the main stream, which means 9.5 million from the System[18] (including 2 million from the tributaries). Of this 9.5 million, California is limited to 4.4 million, and Arizona and Nevada were expected by Congress to consume 5.1 million (3.1 million from the main stream plus 2 million from the tributaries).

Manifestly, if Article III(a) of the Compact is construed as including 2 million acre-feet of uses on the tributaries, thereby limiting the lower basin to the appropriation of a residual 5.5 million acre-feet from the main stream under Article III(a), but section 4(a) is construed as expecting Arizona, California, and Nevada to use 7.5 million from the main stream alone, Congress either (1) intended that the Compact ceiling should not be enforced against the lower basin, or (2) legislated a built-in shortage into what the Court calls the "statutory apportionment scheme."[19]

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[18] Note that this is 1 million in excess of the 8.5 million "aggregate of the quantities specified in paragraphs (a) and (b)" of Article III, hence encroaches on the supply that Article III(c) dedicates to Mexico before the upper basin may be called upon for contribution to the Mexican burden.

[19] As a practical matter, if consumptive use of 7.5 million acre-feet from the main stream is to be made, this will necessitate the delivery of more than 95 million acre-feet per decade at Lee Ferry,

This mischief follows from the severance of section 4(a) of the Project Act from Article III(a) of the Compact which it purports to incorporate. The Court gives five reasons for doing this.

1. *The Court's first reason:* that the California limitation is on "water of and from the Colorado River," not of and from the "Colorado River System" (p. 568).

This is true, but irrelevant. Section 19 of the Project Act authorizes subsidiary compacts among Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming for a comprehensive plan for the development of the "Colorado River," not the "System." But New Mexico and Wyoming do not touch the Colorado River, are traversed only by tributaries. Obviously, this does not exclude them from the scope of section 19.

2. *The Court's second reason:* that while inclusion of the tributaries in the Compact was natural in view of the upper states' strong feeling that the lower basin tributaries should be made to share the burden of any obligation to deliver water to Mexico which a future treaty might impose, when it came to an apportionment among the lower basin states, the Gila would not logically be included, since Arizona alone of the states could effectively use that river (pp. 568-69).

Earlier in the same paragraph, the Court has declined to rule on Arizona's contention that the Com-

not merely the 75 million referred to in Article III(d) (Rep. 124, 125, 144-45). This is because of intervening losses and the requirements of the Mexican Treaty, quite aside from the legal question of whether use of 7.5 million from the main stream exceeds the "ceiling on appropriations" established by Article III(a) and (b).

pact apportions only the waters of the main stream, not the main stream and the tributaries. But later, the Court seems to construe the Compact as encompassing the tributaries. Which is the holding? That the Compact includes the tributaries, or that the Court leaves this question open? This is of the utmost importance to all seven states of the basin, particularly to California, with respect to the Mexican burden. See pp. 28-30, *supra* and pp. 36-37, *infra.*

3. *The Court's third reason:* that the governors of the upper division states, at a conference in 1927, proposed allocations to Arizona, California, and Nevada out of "the average annual delivery of water to be provided by the states of the upper division at Lees Ferry, under the terms of the Colorado River Compact" (p. 570), and that this was the starting point for the debate in the Senate (pp. 569-73).[20]

The Special Master answered this argument conclusively: the 7.5 million acre-feet per annum of *consumptive use (diversions less returns)* under Article III(a) cannot be equated with the 7.5 million acre-feet per annum of *flow* at Lee Ferry under Article III(d). See pp. 8-9, *supra.*

4. *The Court's fourth reason:* That the legislative history of the first paragraph of section 4(a) shows that the limitation on California of 4.4 million acre-feet was

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[20] The Master said (Rep. 188-89): "The recommendations of the governors' conference designated a body of water out of which the allocation would be made by reference to the contemplated deliveries derived from the Upper Division performance of its obligation under Article III(d) of the Compact.

"However, Congress never clearly understood this, and, indeed, never seems to have considered the relationship of the limitation on California to some actual body of water."

intended to relate to the main stream, notwithstanding its incorporation of Article III(a), from which the inference is drawn that the residue of 3.1 million acre-feet from which California was excluded was also intended to relate to the main stream (pp. 570-71).

This is answered by the decisive amendment of Senator Phipps of Colorado, chairman of the Senate Committee which reported the bill:

The Court says (p. 567): ". . . we look to the Compact for terms specifically incorporated in the Act. . . ." But it refuses to do so with respect to the most specific incorporation in the whole Act, made in the one place where it counted most, by the chairman of the committee in charge of the bill, and with the explanation of why he was doing this. We refer to Senator Phipps' perfecting amendment to his limitation on California, which previously read "four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by the Colorado River Compact . . . ." His perfecting amendment added, as the following emphasis shows, "by *paragraph (a) of Article III of* the Colorado River compact." He introduced it, and secured its adoption, after Senators Hayden and Pittman had shown that they were not clear as to whether "waters apportioned" meant the III(d) flow at Lee Ferry (the governors' suggestion) or the 7.5 million of consumptive use apportioned by III(a).[21] His explanation was that this would "show that the allocation of waters refers directly to the seven and one-half million acre-feet of water" described by Article III(a) of the Compact (70 Cong. Rec. 459 (1928)), and this, by definition, includes the

[21] Rep. 188-89.

tributaries. Chairman Phipps had already said (*id.* at 335):

> "But I do not think that the water from the Gila River, one of the main tributaries of the Colorado, should be eliminated from consideration. I think that California is entitled to have that counted in as being a part of the basic supply of water."

In the teeth of this history, is it credible that when the Senate unanimously adopted the Phipps' amendment thus perfected it meant "paragraph (a) of Article III of the Colorado River compact, *but excluding the tributaries*" (70 Cong. Rec. 459), while simultaneously contemplating that language in Article III(a) itself would include them? Would an upper basin Senator deliberately create such a possible imbalance between Project Act demand and Compact supply? The Court notes Chairman Phipps' perfecting amendment (p. 571 n. 52) but is silent on its authorship and overlooks its significance. It asserts: "That this change was not intended to cause the States to give up their tributaries may reasonably be inferred from the fact that the amendment was agreed to by Senator Hayden, who was a constant opponent of including the tributaries" (*ibid*). But it is clear that Senator Hayden was one of those who had confused Article III(a) with the Article III(d) delivery,[22] the very point that the Phipps perfecting amendment put at rest.

5. *The Court's fifth reason:* that the second paragraph of section 4(a) authorizes a tri-state compact among Arizona, California, and Nevada, which would divide 7.5 million acre-feet among those three states,

[22] Rep. 188-93.

but does not mention New Mexico and Utah, lower basin states traversed by tributaries, and this implies that the first paragraph, which proposes the limitation on California, must have meant the main stream only.

The answer is quite clear. Senator Hayden, like Senator Pittman, "failed to grasp" (the Master's expression, Rep. 189) that the Phipps perfecting amendment, just adopted, had related the California limitation to Article *III(a)* of the Compact (which Chairman Phipps believed encompassed the tributaries, and is stated in terms of consumptive use, diversions less returns). Senator Hayden went right ahead with an attempt in the second paragraph to divide up the *III(d)* deliveries by the upper division (which includes only the flow of the main stream at Lee Ferry, and is stated in terms of flow, not consumptive use). See p. 34, *supra*. The first and second paragraphs of section 4(a) are thus not the two halves of the same apple. The second paragraph, as the debates show, confuses Article III (a) with the flow at Lee Ferry guaranteed by Article III(d), and this is the reason for failure to mention New Mexico and Utah. Senator Phipps' perfecting amendment cured this confusion in the first paragraph. Senator Hayden nevertheless continued to believe that III(d) and III(a) meant the same water. But his abandonment of his effort to make the second paragraph mandatory and his agreement to make it conditional on California's acceptance of it, coupled with the addition of clause 6, subjecting the tri-state compact to the Colorado River Compact "in all particulars," ended any independent significance of the conflict between the second paragraph and the first. The first paragraph became operative because California agreed

to it as written. The second did not, and could not without rewriting the Colorado River Compact.

B. The Compact's Provisions With Respect to the Mexican Treaty Burden Require That the Tributaries Shall Be Accounted for Between the Two Basins, and Among the States of the Lower Basin, in Precisely the Same Manner. Failure To Do So Not Only Would Produce a Result Grotesquely Unfair to California, But Would Create an Insoluble Administrative Problem for the Secretary of the Interior.

1. The consequences of including the tributaries in the interbasin accounting with respect to the Mexican Treaty burden,[23] while simultaneously excluding them from the allocation of the lower basin's share of the treaty burden among Arizona, California, and Nevada, would be these:

If the tributaries are encompassed by the Compact, then, because of the provisions of Article III(c), to the exact extent that the waters of the Gila are consumed in Arizona, the lower basin's right to require the upper division to supply water to Mexico is diminished. There is nothing in the Project Act that requires California to undertake, nor that relieves Arizona from the responsibility for, the burden thus cast upon the lower basin.

The United States, in its proposed findings, conclusions, and supporting brief before the Master, recognized the inescapable equity of requiring Arizona to account, out of her share of main stream waters, for whatever additional Mexican burden her exclusive benefit from the tributaries may cast upon the lower

[23] Note the possible conflict between the Court's two statements on pages 568-69 of its opinion, as to whether the Compact does this.

basin.[24] Even if the Court adheres to its erroneous ruling that section 4(a) of the Project Act, by its reference to Article III(a) of the Compact, refers solely to main stream water, it is nevertheless true that if the main stream "fund" is to be further diminished in consequence of the added exposure of the lower basin to the Mexican Treaty burden occasioned by Arizona's uses of the tributaries, then Arizona, not California, should bear out of her main stream allocation the added burden so occasioned.

We will invite the Court's attention to the Government's one-time proposal again when the draft decrees are here for consideration.[25]

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[24] The United States proposed in U.S. Conclusion 11.11 (p. 67 of U.S. Op. Br. before the Special Master):

"In case of shortage of water requiring that the States of the Lower Basin contribute from the waters apportioned by the Colorado River Compact for use in that Basin for satisfaction of the Mexican Treaty, each of the States of Nevada, Arizona, and California is obligated to contribute from its contract entitlement to the delivery of stored water a quantity of water which is proportionate to the use within that State of the total Colorado River system water available for use within the three States to the extent such system water could be available for delivery to Mexico if not used within the States."

In explanation, the United States said, *inter alia* (*id.* at 69):

"In construing the agreement between the Lower Basin States as contained in Article III(c) of the Compact to arrive at the proportionate shares of California, Nevada, and Arizona in the Lower Basin's share of the Mexican Treaty burden, it is necessary to take into account the aggregate use within each contributing State of Colorado River system water to the extent such would be available for delivery to Mexico if not used within the States. Thus, the uses in Arizona from the tributaries below Lake Mead should be included on the same basis as tributary uses above Lake Mead in Arizona and Nevada. For such water, if not used in Arizona, would in part at least be available for delivery to Mexico."

[25] See opinion, p. 571 n. 51: "Arizona's Senators Ashurst and Hayden voted against the bill, which did not exempt the Gila from the Mexican burden. 70 Cong. Rec. 603 (1928)."

2. Must the Secretary keep two sets of books, one accounting for Arizona's uses of the Little Colorado and Gila under the Compact, which will govern the quantity of water he must release from Glen Canyon Dam to flow into Lake Mead, and the other excluding those same uses under the Project Act, which will govern the quantity he must release from Hoover Dam to supply Arizona, California, and Nevada? The Colorado River Storage Project Act, 70 Stat. 105 (1956), 43 U.S.C. §§ 620-620*o* (1958), enacted while this case was being tried, directs the Secretary to operate Glen Canyon and Hoover Dam alike in compliance with the Compact and the Project Act (§ 7 (43 U.S.C. § 620f)), in the obvious belief that the Compact and the Act were compatible and not severable.

C. The Court's Construction of Section 4(a) Gives Arizona 948,000 Acre-feet More Than Senator Hayden Told the Senate That Arizona Asked

Senator Hayden three times told the Senate that he sought from the main stream only 2,800,000 acre-feet of *diversions*, from which the return flow was estimated to be 948,000 acre-feet, to which Arizona made no claim and for which she asked no credit. Thus Arizona's allocation of consumptive use, diversions less returns, would not be 2,800,000 acre-feet but less than 1,900,000. This is the only possible way of harmonizing his second paragraph of section 4(a) with the upper basin governors' proposal to allocate among Arizona, California, and Nevada the III(d) deliveries at Lee Ferry, on which he said his proposal was based.

Senator Hayden, addressing the Senate December 12, 1928, stated:

> "But to get back to the point that I desire to impress upon the Senate, which is that if the State

of Arizona carries out the plan that I have indicated, and we should *divert* 2,800,000 acre-feet of water out of the Colorado River and apply it to beneficial use on this land, according to the estimate of an expert of the United States Geological Survey, Mr. E. C. La Rue, who has devoted his life to studies of conditions on the Colorado River, there will be a return flow from that area sufficient to take care of every demand for water that Mexico now has." (70 Cong. Rec. 464 (1928).)

"I have specified in the amendment which I have offered that the State of Arizona lays no claim to that return flow. We do not ask to have any credit for it after it arrives in the main stream of the Colorado River. It will be surplus and unappropriated waters which Arizona can not use, and that water, and that alone, will be sufficient to supply any demand for water to meet the existing uses in Mexico." (*Ibid.;* emphasis added.)

"I have pointed out to the Senate that estimates made by Mr. La Rue are that if we take out 2,800,000 acre-feet from the Colorado River and use it for irrigation of lands in the lower Gila Valley, 900,000[26] acre-feet of that water will return to the Gila and thence into the Colorado River and that it can not be used anywhere else except in Mexico. That statement I can verify by figures from the tables which Mr. La Rue prepared and which appear upon pages 122 and 123 of the report that I have cited." (70 Cong. Rec. 465.)

The Court, if it now intends Arizona's 2,800,000 acre-feet to be measured by diversions *less* returns, would

[26] At 70 Cong. Rec. 463 the Senator gave a more precise figure, 948,000 acre-feet, as the return flow from a *diversion* of 2,844,000 acre-feet, saying "It is a coincidence that the Senate has fixed 2,800,000 acre-feet as the quantity that may be used in that manner."

thus award Arizona 948,000 acre-feet more than Senator Hayden told the Senate Arizona asked. To give Arizona 2,800,000 acre-feet of consumptive use (diversions less returns) would require the delivery of at least 3,800,000 acre-feet for diversion (*cf.* p. 9, *supra*). Such a quantity is wholly inconsistent with the plan offered by the governors in 1927.[27] *Cf.* pp. 8-9, *supra.*

D. Arizona's Windfall on the Little Colorado

The Court properly rejects the Master's redefinition of the "mainstream" as the waters in Lake Mead and below; properly recognizes the "mainstream," for the purposes of this suit, as the waters in the main river from Lee Ferry to Mexico; properly rejects the Master's holding that the diversions by Arizona and Nevada from the river between Lee Ferry and Lake Mead are not to be charged to their shares. The reason given is (p. 591):

> "If Arizona and Nevada can, without being charged for it, divert water from the river above Lake Mead, then California could not get the share Congress intended her to have."

This being unquestionably so, there is a manifest flaw in the Court's prior holding, about the tributaries that contribute to this stretch of the river an average

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[27] Note that the second paragraph of section 4(a) is consistent with Senator Hayden's explanation that he only asked 2.8 million acre-feet of diversions, not 2.8 million of consumptive use, diversions less returns. The second paragraph would allocate 2.8 million acre-feet, not *of*, but "*for* exclusive beneficial consumptive use" (emphasis added), *i.e.*, for diversion for that purpose.

of a million acre-feet of water a year, for it says of these tributaries (pp. 590-91):

> "We hold that the Master was correct in deciding that the Secretary cannot reduce water deliveries to Arizona and Nevada by the amount of their uses from tributaries above Lake Mead, for, as we have held, Congress in the Project Act intended to apportion only the mainstream, leaving to each State its own tributaries."

There is no rational difference between a diversion from the Little Colorado or Virgin rivers a hundred feet above the point of confluence with the Colorado, and a diversion from the main stream a hundred feet below. Both such diversions impair the quantity available for diversion from the main stream further down.

Indeed, Senator Hayden specifically disclaimed any intent to relieve Arizona from accounting for Arizona's uses from the Little Colorado and all tributaries other than the Gila. In a letter to Governor Dern of Utah which he read to the Senate on May 22, 1928 (69 Cong. Rec. 9455), Senator Hayden proposed that of the water apportioned to the lower basin by the Compact, Arizona would include as her proposed share "all tributaries of the Colorado River above the Laguna Dam, so that the users of water on the Little Colorado, for example, would be in exactly the same position as a water user on any tributary of the Colorado in the upper basin which contributes water to the total supply that is actually capable of division."

But even if uses by Arizona on the tributaries above Lake Mead are not to be charged to her main stream allocation, what has become of the rights preserved

by the Master to California (and other main stream users) to protect existing main stream uses by suit to enjoin junior uses from these same tributaries? The Master correctly held that neither Congress nor California's legislature had intended that California waive her claims against these substantial contributions to the main stream water supply. (Rep. 317.)

POINTS TO BE CONSIDERED IN CONNECTION WITH THE PROPOSED DECREE

At page 602, the Court points out, *inter alia,* that there are some questions upon which it has not ruled, and which apparently are to be considered in connection with the drafts of a decree which the parties are invited to submit. We will accordingly defer discussion of points not ruled upon until the drafts of decree are before the Court.

Respectfully submitted,

[Signatures follow on next page]

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CERTIFICATE

I, Northcutt Ely, counsel for the Petitioning Defendants, certify that the annexed Petition for Rehearing is presented in good faith and not for delay.

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