Petition of Imperial Irrigation District for Rehearing—With Supporting Material, Arizona v. California, No. 8 Original, 1963 Term (U.S. filed Sept. 11, 1963).

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

IN THE

Supreme Court of the United States

No. 8 Original
October Term, 1963

STATE OF ARIZONA,
Complainant,

vs.

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

THE UNITED STATES OF AMERICA and STATE OF NEVADA,
Interveners,

STATES OF UTAH and NEW MEXICO,
Impleaded Defendants.

Petition of Imperial Irrigation District for Rehearing—With Supporting Material.

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PETITION FOR REHEARING.

The State of California and defendant California Agencies having moved this Court for an extension of time to file a Petition or Petitions for rehearing on behalf of the State of California or any of the California defendant Agencies and the Court having considered the matter and extended the time within which to file such Petition or Petitions for rehearing to September 16, 1963,

Now, Therefore, the Imperial Irrigation District, a defendant herein, makes and files this Petition for Rehearing on the Decision of this Court rendered herein May 2, 1963, and for clarification of said Decision on the following grounds.

GROUNDS FOR REHEARING.

1. **Lower Basin Tributary Uses Above Hoover Dam "Deplete the Lower Basin Allocation,—Upset the Whole Plan of Apportionment Arrived at by Congress to Settle—the Dispute in the Lower Basin"—the Same as Diversions Directly From the Main Stream From Lee Ferry to Hoover Dam[1a]**

1. The Opinion holds that diversions and uses from the main stream between Lee Ferry and Lake Mead are to be charged pro tanto to the states of use as against a state's entitlement to uses available in the Lower Basin. The Master is reversed on his holding such diversions and uses not chargeable[1].

The Opinion states, in substance, that Congress in the Project Act was providing for an apportionment among the Lower Basin States of the water allocated to that Basin by the Compact. That if uses between Lee Ferry and the damsite (Hoover Dam) on the main stream were not chargeable pro tanto, it would allow individual states, by making such diversions to deplete the Lower Basin's allocation and to upset the whole plan of apportionment arrived at by Congress to settle the long-standing dispute in the Lower Basin—and prevent California from getting the share Congress intended her to have[2].

The Opinion, however, holds that diversions and uses from the Lower Basin tributaries flowing into the main stream above the damsite (Lake Mead) are not chargeable pro tanto[3], thus upholding the Master's

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[1a]Op. Pg. 41.
[1]Op. Pg. 41.
[2]Op. Pg. 41.
[3]Op. Pg. 41.

ruling that notwithstanding the agreement of Arizona[4] and Nevada[5] to pro tanto reduction, such provisions charging tributary uses are invalid[6].

The ruling herein that tributary uses above Lake Mead are not chargeable, it is respectfully submitted, permits depletion of the main stream, and the Lower Basin's allocation and upsets the whole plan arrived at by Congress and prevents California from getting her share intended by Congress equally as much as would direct diversions and uses from the main stream above Lake Mead. This was fully recognized by the Secretary and Nevada and Arizona when the above mentioned pro tanto deduction provisions were put in said states' contracts[4, 5] and agreed to.

If distinction is made between *supply* at *Lee Ferry* of, say, 7,500,000 a.f.per a.[6] and the 7,500,000 a.f.per a. of beneficial consumptive *uses,* apportioned to the Lower Basin by the Compact paragraph (a) of Article III[7] for uses at points of delivery and uses far below Lake Mead[8], it is at once apparent that *supply* and

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[4]Ariz. Contract Section 7(d) at Pg. 401 M.R.

[5]Nev. Contract January 3, 1944, Sec. 4 amending Article 5 of Nevada Contract of March 30, 1942. See Pg. 420 M.R.

[6]See Article III(d) Compact, Pg. 373 M.R.

[7]See Pg. 373 M.R.

[4]Ariz. Contract Section 7(d) at Pg. 401 M.R.

[5]Nev. Contract January 3, 1944, Sec. 4 amending Article 5 of Nevada Contract of March 30, 1942. See Pg. 420 M.R.

[6]Pg. 237 M.R.

[8]All the contracts provide that the quantities contracted are to be delivered at points of diversion of the contractee (Section 8 Arizona Contract, Pgs. 403-4 M.R. and Sections (6) and (8) Palo Verde Contract, Pgs. 424 and 429 M.R. Article 17 Imperial Contract, Pgs. A605-6 Ely D., Pgs. 75-76 Int. D., Art. 6 Metropolitan Contract, Sept. 28, 1931, Pg. A508 Ely D., Pg. 60 Int. D.

use quantities are far different and far more water for use at points of diversion is needed than that quantity of supply at Lee Ferry[9], some 500 to 650 miles away[10]. It is to be remembered that it is 354 miles from Lee Ferry to Hoover Dam[10] and that the Lake Mead reservoir has a length of 115 miles upstream from the dam[11]. The channel and reservoir losses in this 354 miles are very large, about 650,000 a.f.per a.[12]. Channel and reservoir evaporation loss below Hoover Dam are about 1,000,000 a.f.per a.[13]. Thus unless all tributary uses above Lake Mead are a pro tanto charge to the states of *use* as against the Article III(a) *uses* allowed to the Lower Basin at sites of use, the main stream below Lee Ferry would be depletable and this Court's apportionment theory destroyed[14].

It is respectfully submitted the Arizona Contract[10],

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[9]That Articles III(d) (Supply at Lee Ferry) and III(a) first 7,5000,00 a.f.per a. of uses permitted to Lower Basin are not correlative and vastly different was recognized and found by the Master Report at Page 144.

[10]For distances between Lee Ferry, Lake Mead and points below see Arizona Ex. 113 Tr. 412. This is a U.S. map clearly showing the course of the Colorado River, its tributaries, reservoirs—with distances and areas to scale. It is quite helpful to an understanding of the matter.

[11]Pg. 32 M.R.

[12]See Pg. 144 M.R. Also Tr. 11,744 and Pg. V-19 Vol. I, Cal. Findings.

[13]Reservoir losses at Davis and Parker are about 800,000 a.f.per a. (See Tr. 11,760, 11,764 and Cal. Ex. 2211) and channel losses Hoover Dam to Mexican Border are about 700,000 a.f. per a. (See Tr. 11,763 and Cal. Ex. 2213).

[14]It makes little difference whether tributary waters are used directly from the tributary or taken after reaching the main stream above Lake Mead. The result is the same. Witness the Dixie Project termed by the Master as no threat (Supp. 319 M.R.) and now approved by the Secretary.

[10]See Section 7(a) of Arizona Contract at Pgs. 400-401 M.R.

The identity of the Lower Basin tributaries above Lake Mead and their importance to the main stream supply as well as permitted uses are detailed by the Master[15] and can well be visualized from a U.S. Operational Diagram from Lee Ferry to the Gulf of California[16].

2. The Arizona Contract[1] as Interpreted in the Opinion Herein[2] Does Not Conform to the Project Act "Guide Lines" Said in the Opinion to Have Been Set Down by Congress With Limitations on the Secretary's Power,[3] i.e., Does Not Conform to the Project Act.

2. The Opinion herein is emphatic that the Project Act "was a complete statutory apportionment[1] giving the Secretary the power by Contracts to make the apportionment" though not agreed to by the three states[2]. That the Secretarial Contracts made the intended apportionment[3], apportioning to Arizona 2,800,000 a.f. per a. from Lake Mead[4] of the first 7,500,000 a.f. per a. of main stream water[5] plus Arizona's tributary uses[6].

The Opinion is also emphatic that the Secretarial Contracts are subject to the Congressional "guide

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[15]See Pgs. 11, 71-75, 76-79, 97-98, M.R.

[16]See Ariz. Ex. 113 Tr. 412.

[1]For Contract see Pg. 399 M.R. Also see Section 7(a) at Pgs. 400-401 M.R.

[2]Op. Pg. 15.

[3]Op. Pgs. 34-35.

[1]Op. Pgs. 10, 15, 16.

[2]Op. Pg. 29.

[3]Op. Pgs. 12, 34.

[4]Op. Pgs. 12, 15.

[5]Op. Pgs. 15, 18, 23, 34.

[6]Op. Pgs. 15, 18, 41.

lines"[7] and limitations contained in the Project Act[7] and the apportionment of said 2,800,000 a.f. per a. is provided for in the second paragraph of Section 4(a) of the Project Act[8] and that the Secretary can do nothing in the Contracts to upset or encroach upon the Compact's allocation of "Colorado River water" between the Upper and Lower Basins[9].

It is respectfully submitted the Arizona Contract[10], especially as interpreted by this Court, (allowing Arizona the full 2,800,000 a.f. per a. from the main stream at Lake Mead, plus tributary uses) does not conform to the "guide lines" of the Project Act and does upset and encroach upon the Compact allocation to the Lower Basin.

With respect to the asserted Congressional apportionment to Arizona in the second paragraph of Section 4(a) of the Project Act, it provides:

(1) "That of the 7,500,000 acre-feet annually apportioned to the Lower Basin by paragraph (a) of Article III of the Colorado River Compact, there shall be apportioned to—Arizona 2,800,000 acre-feet for exclusive beneficial consumptive use in perpetuity,-"[11].

Neither the second paragraph of Section 4(a) of the Act nor Section 5 of the Act, which requires the Secretarial Contracts to conform to Section 4(a)[12], provide that the 2,800,000 a.f. per a. is mainstream or Lake Mead water or even refer to the main stream

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[7]Op. Pgs. 34-35.

[8]Op. Pgs. 15, 23, 34.

[9]Op. Pg. 35.

[10]See Section 7(a) of Arizona Contract at Pgs. 400-401 M.R.

[11]See Pgs. 382-383 M.R. for second paragraph Section 4(a) of Act.

or Lake Mead[11]. Said second paragraph of Section 4(a) does specifically refer to the 7,500,000 a.f. per a. apportioned by the Compact and specifically to that apportioned by paragraph (a) of Article III of the Compact.[12a]

Both the Opinion herein and the Master's Report recognize that the uses apportioned to the Lower Basin by Article III(a) of the Compact include tributary uses[13]. The only uses referred to in said second paragraph of Section 4(a) of the Act relative to said 2,800,000 a.f. per a. to Arizona are Article III(a) uses of the Compact[11].

It would seem that the language above discussed would clearly demonstrate that the reference to 2,800,000 a.f. per a. as to Arizona is clearly System as distinguished from main stream. The Compact so provides[14].

The Master's Report and the Opinion are both premised on the position that the Project Act is controlling[15] and the Compact irrelevant in the matter under discussion[16]. That the Compact merely made a division between Basins[17] and did not determine each Lower Basin state's share of the uses available thereto[17].

While seemingly correct in some of the foregoing, it is submitted that the very language of Section 4(a)

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[12]See Pgs. 384-385 M.R., Op. Pg. 12.

[12a]See Pgs. 382-3 M.R.

[13]Op. Pg. 8; M.R. Pgs. 142-143, 171.

[14]See Articles II(a) and III(a) Compact at Pgs. 372 and 373 M.R.

[15]See Pg. 151 M.R., Op. Pgs. 10, 15, 16.

[16]See Pg. 138 M.R., Op. Pgs. 15-16.

[17]Op. Pgs. 7, 8, 16. However, see separate ground "Applicability of Compact" Pg. 43.

of the Act so heavily relied on for the complete and full apportionment, from Lake Mead of the first 7,-500,000 a.f. per a. of uses between California 4,400,-000, Nevada 300,000 and Arizona 2,800,000 fails to find any support for the main stream theory[18] and the very language of Section 4(a) of the Act[19] and the provisions of 8(a)[20] and 13(b), (c) and (d)[21] and Sections 15 and 16[22] completely negative the basis of the decision herein.

In the first place, the main stream theory falls of its own weight so far as Section 4(a) is concerned.

California is limited to 4,400,000 a.f. per a. of uses from the Colorado River, says the Opinion[23]. But of what waters? The first paragraph of Section 4(a) as to California says—"of the waters apportioned to the Lower Basin States by paragraph (a) of Article III of the Colorado River Compact—"[24]—not main stream or Lake Mead.

The second paragraph of Section 4(a), as to the first 7,500,000 a.f. per a. of uses apportioned to the Lower Basin, does not even mention the main stream or Lake Mead. It does say that "—of the 7,500,000 a.f. per a. apportioned to the Lower Basin by paragraph (a) of Article III of the Colorado River Compact—" the three states may agree on 300,000 a.f. per a. to Nevada and 2,800,000 a.f. per a. to Arizona[25].

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[18]Op. Pg. 17.
[19]See Pgs. 382-383 M.R.
[20]See Pg. 389 M.R.
[21]See Pgs. 393-394 M.R.
[22]See Pgs. 394-395 M.R.
[23]Op. Pg. 19.
[24]See Pg. 382 M.R., first paragraph Section 4(a) Act.
[25]See Pgs. 328-3 M.R. second paragraph Section 4(a) Act.

While geographically California is so located as to use water only directly from the main stream[26], this is not true of any other Lower Basin State[27].

The Project Act not only makes specific and unmistakable reference in both paragraphs of Section 4(a) to, and deals only with, the uses apportioned in paragraph (a) of Article III of the Colorado River Compact[29] but Section 5 of the Act requires the Secretarial Contracts conform to Section 4(a) of the Act[30]. It is submitted that the reference to California uses in the first paragraph of Section 4(a) of the Act, if in anywise limited to the main stream as relied on in the Opinion[31], is negatived as to source by specific limitation (as to 4.4 a.f. per a.) to the waters apportioned by paragraph (a) of Article III of the Compact, i.e., System—and made subject always to the Compact[32]. As to Nevada and Arizona, there is no reference whatsoever to main stream and, on the contrary, the reference is to III(a) uses, i.e., System[33].

Reference is made in the Opinion to Section 8(b) of the Act[34]. Section 8(a) of the Act is recognized as making the Secretarial Contracts subject to the Compact[35], at least to the extent that the United States

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[26]Though diverting only from the main stream, California used and diverted tributary waters entering the main stream including Gila River water. See Gila topic herein.

[27]Utah and New Mexico use only tributary waters and Nevada and Arizona use both main stream and tributary waters.

[29]See Pgs. 383-384 M.R.

[30]See Pg. 385 M.R.

[31]See Op. Pg. 19.

[32]Pg. 382 M.R.

[33]Second paragraph Section 4(a) Act, Pgs. 382-383 M.R. As to .3 and 2.8 of 7.5 a.f. per a.

[34]Op. Pgs. 12, 29, 30.

[35]Op. Pgs. 34-35.

and contractees—can do nothing to upset or encroach upon the Compact's allocation of Colorado River water between the Upper and Lower Basins[36]. However, indeed, that is just what the Opinion and this Court's interpretation of the Nevada and Arizona Contract do. The Compact allocation of the first 7,500,000 a.f. per a. of beneficial consumptive uses to the Lower Basin is System and not merely main stream uses[37]. This Opinion gives to California (4.4), Nevada (.3) and Arizona (2.8), i.e., the full 7,500,000 a.f. per a. not from the System but from the main stream and allows Utah, New Mexico, Nevada and Arizona about 2,000,-000 a.f. per a. of uses on tributaries in addition, or a total of 9,500,000 a.f. per a.[38].

Neither the Nevada or Arizona Contracts are written that way. The Nevada Contracts provide for pro tanto deduction from the 300,000 a.f. per a. for tributary uses[39]. The Arizona Contract has several provisions at variance with the Court's interpretation of the case. Arizona's 2,800,000 a.f. per a. is subject to availability to Arizona[40]. Tributary uses above Lake Mead are pro tanto deducted[41]. Arizona's Contract is subject to the rights of Utah and New Mexico to equitable shares of the Lower Basin uses apportioned and unap-

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[36]Op. Pgs. 34-35.

[37]Art. III(a), Pg. 373 and Art. II(a), Pg. 372 M.R.

[38]Op. Pgs. 10-11, 12, 15, 23, 29.

[39]Nevada Contract, Ariz. Ex. 44, January 3, 1944, Section 4 amending Section 5 of Contract of March 30, 1942. Note. In footnote 39 at Page 18 of the Opinion it is stated that "California would reduce Nevada's share of the main stream waters from 300,000 acre-feet to 120,500 acre-feet." Nevada by her contract of 1944 did this—not California.

[40]See Section 7(a) Arizona Contract, Pgs. 400-401 M.R.

[41]See Section 7(d) Arizona Contract, Pg. 401 M.R. Also Section 7(l), Pg. 403 M.R.

portioned by the Compact[42]. It is subject to present perfected rights in System uses[43]. It is made on the express condition with the express covenant that all rights of Arizona and her water users to the use of the waters, not merely of the main stream, but of "the Colorado River and its tributaries" shall be subject to and controlled by the Colorado River Compact[44].

If the Nevada and Arizona and California Contracts are interpreted as written and all tributary uses are accountable, the uses of Utah, New Mexico, Nevada, Arizona and California will harmonize with the Compact, the uses allowed by the Compact to the Lower Basin, the administration of the Mexican Treaty burden and the Project works can be administered as a unit in the Colorado River System as provided for in Section 16 of the Act[45] and the provisions of the Act making the Compact controlling can be honored[46]. Without such a uniform administration there is bound to be unending controversy and chaos[47].

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[42]See Section 7(g) Arizona Contract, Pg. 402 M.R.

[43]See Section 7(l) Pg. 403 M.R.

[44]See Section 13 at Pg. 406 M.R.

[45]Pg. 394 M.R.

[46]Sections 8(a) and 13(b),(c) and (d) of Act, Pgs. 389,-393-4 M.R.

[47]1. Controversy between Basins if Lower Basin tributary uses are not charged against 7,500,000 III(a) uses or 8,500,000 total Lower Basin uses—when totals reached.

2. Controversy between Basins as to impact of Mexican Treaty burden and where burden falls first, in view of Lower Basin tributary uses as against 8,500,000 a.f. per a.

3. When and where existing rights have been satisfied out of first 7,500,000 a.f. per a. of uses as provided in III(a) of Compact (Pg. 373 M.R.) and last paragraph of Article VIII of Compact (Pg. 376 M.R.) held by Master to be of interstate and not merely interbasin application. See Pg. 143 M.R.

4. What is to be done interstate in Lower Basin and also interbasin when and if tributary uses diminish main stream supply.

There were and are very good reasons why those contracts were so drawn to conform to what Congress did, not what it talked about or might have done, and to conform to the administrative interpretation and the interpretation and understanding of all the litigants herein even down to the pleadings and trial herein. This is covered under a separate ground herein. See Applicability of Compact, Pages 43 and 72.

3. **To Interpret the Project Act as Authorizing or Permitting the Lower Basin States to Have the Beneficial Consumptive Use of the First 7,500,000 a.f. per a. and 1,000,000 a.f. per a. of Excess or Surplus—Not at Points of Use Throughout the Lower Basin but From Lake Mead or the Main Street in the Lower Basin—Plus 2,000,000 a.f. per a. of Lower Basin Tributary Uses, i.e., as Authorizing in Perpetuity 10,500,000 a.f. per a. of Such Uses in the Lower Basin—Upsets and Encroaches Upon the Compact's Allocation of Colorado River Water Between the Upper and Lower Basins—Said by This Court Not to Be Permitted.[1]**

3. The Opinion recites the provisions of Article II(a) and Article III of the Compact[2] and recognizes that the 7,500,000 a.f. per a. of uses apportioned to the Lower Basin is Colorado River *System* water defined in Article II(a) as from the Colorado River and its *tributaries* in the United States of America[2]. Also, that the Lower Basin is given the right to increase its beneficial consumptive use of *such* waters by 1,000,000 a.f. per a.[2] That as to further appor-

[1]Op. Pgs. 34-35.

[2]Op. Br. Pg. 8. See Articles II and III Compact, Pgs. 373-2 M.R., also see Pgs. 142-3 M.R.

tionment of uses above, 8,500,000 a.f. per a. to the Lower Basin and water for Mexico[3], provision is made for initiation of such by further Compact[4].

The Master held the foregoing to be "limits" on appropriation or appropriative rights[5] and beneficial consumptive uses[6].

The Opinion, while stating that Secretarial contracts and contractees are subject to the Colorado River Compact and can therefore do nothing to upset or encroach upon the Compact's allocation between the Upper and Lower Basins[7], holds that by the Project Act Congress intended to and did divide the first 7,500,000 a.f. per a. by giving California 4,400,000 a.f. per a.—Arizona 2,800,000 a.f.per a. and Nevada 300,000 a.f.per a., and Arizona and California each one-half of any surplus not from the System but solely from the main stream[8].

This is done despite the uncontrovertible fact that under the Compact said first 7,500,000 a.f. per a. is III(a), i.e., System[9] and surplus is III(b) to extent of 1,000,000 a.f. per a. of such waters[10].

To do this the Opinion adopts the Master's concept that only the Project Act is controlling[11] and the Project Act deals only with main stream water[12] leaving

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[3]Article III(c) Compact, Pg. 373 M.R., Op. Pg. 8.
[4]Op. Pg. 8, Article III(f) and (g), Pg. 374 M.R.
[5]M.R. Pgs. 148-9.
[6]M.R. Pg. 148.
[7]Op. Pgs. 34-35.
[8]Op. Pg. 15.
[9]M.R. Pgs. 142-3, Op. Pg. 8.
[10]M.R. Pgs. 194-196.
[11]M.R. Pgs. 138, 151, Op. Pgs. 10, 15, 29.
[12]M.R. Pgs. 151, 183, Op. Pgs. 12-13, 15, 25.

the tributaries to each state with their uses unaccounted for and not chargeable to the states of use[13].

Arizona made the argument that the Compact dealt only with the main stream[14]. This the Master rejected[15]. The Opinion says it is not necessary to reach or decide that question[16].

It is respectfully submitted that the Opinion does reach and decide that issue and encroaches upon the Compact allocation to the Lower Basin both as between Basins and as between Lower Basin States.

The Opinion allows to three of the five Lower Basin States the full first 7,500,000 a.f. per a. of the uses allowed to the five Lower Basin States (III(a) uses) plus to two of the five Lower Basin States all of the permitted 1,000,000 a.f. per a. of surplus (III(b) uses) plus some 2,000,000 a.f. per a. of tributary uses to the Lower Basin States or a total of 10,500,000 a.f. per a.[17]. This is done on the basis that this is what may be inferred from the Project Act as the intent of Congress[18].

The following, it is submitted, is what the Opinion does by way of upsetting, altering, or affecting the so-called division of water between Basins:

1. If Lower Basin tributary uses of, say, 2,000,000 a.f. per a. are not accountable, then the Lower Basin uses of 10,500,000 a.f. per a. are approved. If approved at all, they are approved

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[13]M.R. Pgs. 226-7, 237, Op. Pgs. 15, 18, 19, 23, 25.
[14]M.R. Pg. 142, Op. Pg. 18.
[15]M.R. Pgs. 142-144.
[16]Op. Pg. 18.
[17]Op. Pgs. 15, 16, 18, 29.
[18]Op. Pgs. 15, 25, 29, 34.

as against the Compact ceiling on the Lower Basin uses of 8,500,000 a.f. per a. which would:

(a) Alter the Compact division between Basins.

(b) Upset as between Basins the application of the Mexican burden under Article III(c) of the Compact.

(c) Affect the application of the Mexican burden as among the Lower Basin States as to when and where that burden fell upon surplus above 8,500,000 and when and where the deficiency burden therefore occurred.

2. If the nonaccounting for tributary uses in the Lower Basin is applicable only as between states of the Lower Basin and not between Basins, a very complex dual system of beneficial use accounting would have to exist and the problem of the application of the Mexican burden would be given added uncertainty among other matters as follows:

(a) When and where as between states would the applicable accounting call a halt on a given state's uses treatywise first as to quantities above the 8,500,000 a.f. per a. figure and again when there exists a deficiency.

While as to the Upper Basin States a decision herein on this matter may be said not to be res adjudicata, it would be stare decisis and leave this Court in an embarrassing situation. Also, as indicated by the Master, existing projects and contracts cannot be administered and new projects cannot be developed without settlement of these issues[19]. To unilaterally exclude

[19]M.R. Pgs. 133-135.

tributaries from accounting in the Lower Basin is to create an interbasin issue altering and upsetting the Compact at least as between Basins and create Lower Basin interstate problems. The Opinion in this regard creates but does not settle issues.

The Opinion recognizes that the Project Act makes the Compact controlling[20] and says that such provisions of the Act were to show that the Act and its provisions were "in no way to upset, alter or affect the Compact's congressionally approved division of water between the Basins."[21]

Are tributary uses unaccountable or not chargeable in both Basins or only in the Lower Basin, and if only in the Lower Basin, is it interbasin or only interstate? If only interstate, is there separate accounting for uses interbasin, interstate and interstate treatywise? Are there separate accountings on III(a) and also III(b) and also on other uses? These are actual basic operating problems that have to have an answer.

4. **The Opinion Is Premised Upon a Failure to Realize the Vast Difference Between Contracts or Rights to Beneficial Consumptive Uses Throughout the Lower Basin at Points of Use of 7,500,000 a.f. per a. or 8,500,000 a.f. per a. on the One Hand and a Supply at Lee Ferry or Even at Lake Mead of 7,500,000 a.f. per a. or 8,500,000 a.f. per a.**

4. Arizona contended that uses permitted to the Lower Basin by Compact Article III(a) were correlative

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[20]See Sections 8(a),13(b),(c) and (d), Pgs. 389 and 393-4, M.R.

[21]Op. Pg. 17. Note. As to the provisions of the Act making the Compact applicable in the Lower Basin see separate grounds re Project Act making Compact controlling re total lower Basin uses at Page 43 herein.

to the provisions of Article III(d), i.e., that the 7,500,000 a.f. per a. of *uses* allowed by Article III(a) multiplied by ten equaled the 75,000,000 a.f. per a. of Lee Ferry *Supply* in Article III(d).

This the Master properly rejected[1]. The confusion between *supply* quantities and quantities for beneficial consumptive *use* at places of use has and still does lead to misunderstanding. That a *supply* of 7,500,000 a.f. per a. at Lee Ferry will provide a considerably smaller amount of beneficial consumptive *use* at scattered places of use throughout the Lower Basin is pointed out by the Master[2].

It is to be remembered that Lee Ferry is over 350 miles above Hoover Dam[3] and channel and reservoir evaporation losses there are about 650,000 a.f. per a.[4]. Below Hoover Dam are Davis Dam, Parker Dam, Headgate Rock Dam, Palo Verde Weir and Imperial Dam at distances of 67, 155, 170, 212 and 303 miles below Hoover[5]. That the various diversion points for uses of water released from above both in California and Arizona are at or below Parker Dam[6]. That channel and reservoir losses below Hoover Dam are about 1,000,000 a.f. per a.[7]

Therefore, it is easy to see that *supply* of 7,500,000 a.f. per a. at Lee Ferry can't possibly furnish water

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[1]M.R. Pg. 144.
[2]M.R. Pgs. 144-145.
[3]See Arizona Exhibit 113, U.S. Map.
[4]See Page V-19 of Vol.I Cal. Findings for detail and supporting data.
[5]M.R. Pgs. 33-36.
[6]M.R. Pgs. 35-36. Also M.R. Pgs. 50-71.
[7]See Cal. Exs. 2211 and 2213, T.R. 11,760-11,764.

enough for that quantity of *uses* at or near points of diversion 500 to 800 miles below Lee Ferry.

However, the figure of 7,500,000 a.f. per a. of *supply* at Lee Ferry has continuously been confused with the figure of 7,500,000 a.f. per a. of beneficial consumptive *uses* so far distant below. That confusion continues[8].

The question that naturally arises is this. With this in view, how could the Lower Basin have the beneficial consumptive use on a permanent basis[9] of 8,500,000 a.f. per a. with the Upper Basin obligated to supply only 75,000,000 a.f. in each consecutive ten-year period on a permanent basis?[9, 10] The answer is supplied by Arizona in a previous suit against California et al. in 1933. There Arizona, claiming under the Project Act, claimed that because the tributaries including the Gila River uses were included in the 8,500,000 a.f. per a. of uses permtted to the Lower Basin, Section 4(a) of the Act excluded California from any of the so-called III(b) (1,000,000 a.f. per a.) uses and Arizona was to have the full amount of the III(b) uses to compensate for the inclusion of the Gila uses within the 8,500,000 a.f. per a.[11]. There the Court said that Articles III(a) and (b) deal with System uses including all tributaries as to the 8,500,000 a.f. per a. of uses allowed to the Lower Basin, and though the Compact did not apportion between states in the

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[8]Op. Pgs. 20, 26, 27-28.

[9]Permanent service is required by Section 5 of the Act. Pg. 385 M.R.

[10]Article III(d), Pg. 373 M.R.

[11]Arizona vs. Cal., 292 U.S. 341 at 348-356 (1933), 78 L.Ed. 1298 at 1301-1305.

Lower Basin, it did apportion to that Basin and Arizona being one of those states, any water useful to her is by that fact useful to the Lower Basin[12].

The Lower Basin tributaries of importance are listed by the Master[13]. Those above Hoover Dam are detailed[14] and in the pleadings[15] and at the trial the uses and claims thereon were the subject of exhaustive evidence. These tributaries above Hoover Dam and below Lee Ferry have a range of net inflow to the main stream, after consumptive uses of 200,000 a.f. per a. on said tributaries of from in excess of 700,000 to 900,000 a.f. per a.[16] The Gila safe annual yield is about 1,750,000 a.f. per a.[17]. Thus, considering the Lee Ferry supply—the evaporation and transit losses and the tributary uses and supplies, it just about makes available to the Lower Basin a possible use of 8,500,000 a.f. per a.

As to the ground of the tributaries, including the Gila River, being necessarily included not only by the Compact but as to the Project Act, see Pages 2, 24 and 29 herein.

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[12]Arizona vs. Cal., 292 U.S. 341 at 358; 78 L.Ed. 1298 at 1306.

[13]M.R. Pg. 11.

[14]M.R. Pgs. 71-73, 76, 97-98.

[15]See Nev. Pet. Par. VI pg. 12. Utah Complt. Pars. I, II and III, Pgs. 2-3 and New Mexico Claim Par. VI(2) Pg. 4.

[16]See Cal. Ex. 2207 Tr. 11,738 and Pg. V-18 Vol. I Cal. Findings.

[17]See Pgs. V38-39, Vol. I Cal. Findings for supporting data.

5. The Master Based His Report in His Assumption as a Moral Certainty That There Would Be an Abundance of Main Stream Supply for All Generations to Come. The Opinion, if Not Premised on the Master's Assumption[1] Is so Greatly Influenced by It as to Arrive at an Unworkable Formula and Determination.

5. While the Master holds that supply cannot be determined with necessary accuracy[1] and that California's contentions as to shortage would raise grave apprehension if correct[2], the Master did state the basis of his unusual concept of the case. At a hearing on his Draft Report August 1960, the Master referred to the Compact provision (Article III(e), Pg. 373 M.R.) to the effect that the Upper Basin could not withhold water not needed for use there and stated that he had not seen or heard of Upper Basin projects to use 6,500,000 a.f. per a. of its 7,500,000 a.f. per a.[3] Upon having his attention called to the effect of a shortage on the Metropolitan Water District with its low priority in the California Contracts, the Master stated:

> "—I am morally certain that neither in my lifetime, nor your lifetime, nor the lifetime of your children and great-grandchildren will there be an inadequate supply of water for the Metropolitan Project."
>
> "I am morally certain—that not within the span of the ages indicated there will be any diminution either in the present uses of the Metro-

[1]M.R. Pg. 115.
[1]M.R. Pg. 103.
[2]M.R. Pg. 102.
[3]See Pg. 23,081 Transcript August 17-19, 1960.

politan Aqueduct or its contemplated expansion[4]."

And again with respect to a Metropolitan shortage he stated:

"—if I believed any such thing I would have strained every legal document to try to prevent that—."[5]

It would appear from the Opinion herein that the main stream theory of three states having not only all of the first 7,500,000 a.f. per a. and two states having all the surplus—all from the main stream, would have to be predicated on the theory of Upper Basin nonuse and a theory of abundance at Lee Ferry. If this is not the Court's view, then how could there be available at Lake Mead the full 8,500,000 a.f. per a. of uses allowable to the Lower Basin? If more Lower Basin System uses than 8,500,000 a.f. per a. are permitted on a permanent basis by the Opinion, it violates the Compact as to the Upper Basin[6].

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[4]See Pg. 23,084 Transcript August 17-19, 1960.

[5]See Pg. 23,092 Transcript August 17-19, 1960.

[6]Section 5 of the Act requires the Secretarial Contracts to be for permanent service, Pgs. 384-385 M.R. Surplus uses of System water above 17,500,000 a.f. per a., i.e., 7,500,000 III(a) to each Basin, 1,000,000 a.f. per a. Lower Basin III(b) and 1,500,000 a.f. per a. to Mexico III(c) are subject to further apportionment after October 1, 1963, if and when either Basin shall have reached its full uses set out in paragraphs (a) and (b) of Article III of the Compact (see Pg. 374 M.R.). In the meantime such uses of surplus, if any such surplus was available, were to be subject to the western water law of appropriation subject to recognition under western water law after October 1, 1963 (see Arizona Ex. 53 Tr. 260, Question 10 Pg. A36 Sp. M. Ex. 4 Ely D) by a designated procedure for division between Basin (Sec. III(g) of Compact, Pg. 374 M.R.)

6. The Opinion and Decision Herein Do Decide, Upset and Encroach Upon Interbasin Relations and Rights and Obligations.

6. The Opinion states that the Compact made a division of water between the two Basins, leaving to each Basin its internal allocations[1]. That the Compact is by the Project Act made relevant to a limited extent[1]. That the Act in approving the Compact thereby fixed a division of waters between Basins that must be respected[1]. That provisions in the Act making the United States and its contracts subject to and controlled by the Compact are to show that the Act and its provisions are in no way to upset, alter or affect the Compact's congressionally approved division of water between the Basins[2]. That we look to the Compact to resolve disputes, if any, between the Basins and none are herein involved[2].

The Opinion overlooks what the Compact did as between Basins, i.e., what was divided The Master held that Compact did not apportion or divide *supply* in Articles III(a) and (b)[3]. That supply is dealt with in Articles III(e) and (d)[4]. That Article III(a) apportions *use* and not *supply* and includes tributary uses.[5] The use apportioned by Article III(a) is beneficial consumptive use[6] not supply. The use apportioned there is of the System,—not the main stream[7]. III(b)

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[1]Op. Pg. 16.
[2]Op. Pg. 17.
[3]M.R. Pg. 149.
[4]M.R. Pgs. 144-145, 149.
[5]M.R. Pgs. 144 and 149.
[6]M.R. Pgs. 147, 373.
[7]Article III(a), Pg. 373 M.R.

is 1,000,000 a.f. per a. of "such" waters[8]. Article III(a) also says that the 7,500,000 of uses there referred to shall include all water necessary for the supply of any right which may now exist[9].

It would therefore seem safe to say that the Compact in Articles III(a) and (b) deals with uses of System and not merely main stream water[10]. That the supply for such uses includes tributary waters as well as Lee Ferry and main stream[11]. That III(a) is a ceiling or limit on the Lower Basin in favor of the Upper Basin as to Lower Basin uses of System water as is III(b)[12].

Thus the Opinion by its main stream theory approves and allows to the Lower Basin States the full 7,500,000 a.f. per a. of III(a) uses plus all the surplus—from the main stream and in addition 2,000,000 a.f. per a. of tributary uses or a total of at least 10,500,000 a.f. per a. as against the Compact ceiling of 8,500,000 from the System[13].

To say that there is no dispute on this as between Basins is to assume that the Upper Basin agrees to the Lower Basin use of 8,500,000 a.f. per a. out of the main stream and 2,000,000 a.f. per a. of uses out of the Lower Basin tributaries. This is very unlikely. If there was no dispute between Basins the holding regarding this unaccounted for tributary use is sure to create one.

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[8]Article III(b), Pg. 373 M.R.

[9]Article III(a) Pg. 373 M.R. See separate grounds on Existing Rights at Page 48 herein.

[10]M.R. Pgs. 142, 144, 147.

[11]M.R. Pgs. 142, 144.

[12]M.R. Pgs. 142, 147.

[13]Op. Pgs. 18, 19, 23, 41.

7. **The Opinion Holds That Tributary Uses Are Left to Each State[1] for Their Exclusive Use[2] and That This Included the Gila River as Only Arizona Could Effectively Use That River.[3] That the Compact Is Not Controlling[4] and Merely Made an Interbasin Division of Uses[4] and the Project Act Deals Only With the Main Stream.[5]**

These Holdings Do "—Upset, Alter and Affect the Compact's" So-Called "Congressionally Approved Division of Water Between Basins"[6] and Violate Both the Compact and Project Act.

7. Both the Master's Report and the Opinion recognized that so far as the Compact is concerned in its division between Basins[7] the Colorado River and its tributaries in the United States were both included in the quantities of beneficial consumptive uses allotted[8].

The Master held[9] and the Opinion holds that the Project Act set up in Section 4(a) thereof a complete statutory scheme for the division between the Lower Basin States of the uses available under the Compact to that Basin[10]. That Congress by the second paragraph of Section 4(a) authorized California, Nevada and Arizona to make a Tri-State Compact in effect

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[1]Op. Pg. 15.

[2]Op. Pg. 18.

[3]Op. Pgs. 19, 24. See re Gila River ground number 8 herein at Page 29 hereof.

[4]Op. Pg. 16.

[5]Op. Pg. 18.

[6]Op. Pg. 17.

[7]Op. Pg. 16.

[8]M.R. Pgs. 142-144, Op. Pg. 8. See Articles III(a) and (b), Pg. 373 M.R.

[9]M.R. Pg. 151 et seq.

[10]Op. Pg. 29.

giving 4,400,000 a.f. per a. to California, 2,800,000 a.f. per a. to Arizona and 300,000 a.f. per a. to Nevada and half of the surplus to California and half of the surplus to Arizona[11]. That Section 4(a) related only to the main stream and left each Lower Basin State its tributary uses uncharged as against such state's uses thereof[12]. That Congress made sure that if these states did not so agree the Secretary could by contracts make the apportionment on the same terms[13] although the Secretary would be subject to guide lines and limitations in the Project Act[14] and could not upset, alter or affect the Compact's congressionally approved division of waters between the Basins[15].

Outside of reference to the Gila River and its tributaries referred to in the second paragraph of Section 4(a) of the Act[16] we can find no language in the Project Act in anywise giving any Lower Basin State its tributary uses or limiting the suggested Lower Basin division to the main stream.

To support the Opinion's main stream theory, resort is had to proposals and counterproposals between the states in 1925 and 1927 and discussions in Congress about the proposed Bill which became the Project Act[17]. It seems clear that the conclusion that Section 4(a) as passed related only to the main stream is due to repeated references to the 7,500,000 a.f. per a. to

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[11]Op. Pgs. 11-12.
[12]Op. Pgs. 15, 18, 25.
[13]Op. Pg. 29.
[14]Op. Pg. 34.
[15]Op. Pg. 17.
[16]See Pg. 383 M.R. Note. See separate ground, number 8 herein relative to the Gila River as a tributary at Page 29 hereof.
[17]See Op. Pgs. 9-10, 21-24, 25-29.

be delivered at Lee Ferry[18] and the confusion that then and now exists in not recognizing the difference between *supply* at Lee Ferry and beneficial consumptive *uses* at *places of use*[19].

In any event, whatever may have gone before when Congress passed the Project Act it left in Section 4(a) of the Act specific language of exactly the opposite to main stream apportionment[20]. Section 4(a) would have authorized a Compact giving Arizona and Nevada 2,800,000 and 300,000 a.f. per a. "—of the 7,500,000 a.f. per a. apportioned to the lower basin by paragraph (a) of Article III of the Colorado River Compact"[21], i.e., of the uses of System water apportioned by Article III(a) of the Compact[21]—not main stream.

Congress also put into the Project Act unmistakable requirements that, notwithstanding anything contained in the Act, the Compact is to control[22] and all contracts are subject thereto and must so state[22] and that the rights of the United States and those claiming under the United States in and to the waters of the Colorado River *and* its *tributaries* shall be subject to and controlled by the Compact.[23] Section 13(c)

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[18]Op. Pgs. 9, 15, 21, 22, 26, 27, 28.

[19]See ground number 4 herein at Page 16 hereof.

[20]See Ground No. 2 herein at Page 5 hereof for analysis of Section 4(a) and Arizona Contract.

[21]See (1) of second paragraph of Section 4(a) of Act, Pg. 382 M.R.

[22]See Section 8(a) of Act, Pg. 389 M.R.

[23]See Sections 13(b),(c) and (d), Pgs. 393-4 M.R. Also see separate ground herein re Compact Controlling in Lower Basin at Pg. 43 herein.

also provides that all contracts of the United States necessary or convenient for the use of the waters of the Colorado River *or* its *tributaries shall* be subject to and controlled by the Compact.[23]

The Opinion overlooks the provisions of Sections 13(b), (c) and (d) but does refer to Section 8(a) which makes the United States, its contractees and all users and appropriators of water distributed from Lake Mead subject to and controlled by the Compact in the operation of the Project works anything in the Act to the contrary notwithstanding[25]. The Opinion says the Section 8(a) reference is merely to show the Act and its provisions were in no way to upset, alter or affect the Compact's congressionally approved division of water between the Basins[26].

It is submitted that the main stream theory, leaving the tributaries to each state[27] unaccounted for as a pro tanto use in the Lower Basin does, at least as between Basins, upset, alter and affect the Compact's—division between Basins by allowing the Lower Basin 10,500,000 a.f. per a. of beneficial consumptive uses instead of 8,500,000[28].

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[25]See 8(a) Pg. 389 M.R.

[26]Op. Pg. 17.

[27]Op. Pgs. 15, 18, 25.

[28]2,000,000 a.f. per a. of tributary uses plus 7,500,000 main stream plus both halves of surplus from mainstream. For the affect of the main stream theory, (exclusion of tributary uses from accounting) on the Mexican Treaty matter interbasin and interstate, see Ground No. 9 herein at Page 40 hereof. As to interbasin and interstate accounting see Ground No. 12 herein at Page 55 hereof. As to the Gila River see Ground No. 8

As indicated by the Master, as to existing projects and as to projects yet to be developed, the claims of the parties should be decided in a way to remove controversies[29]. The exclusion of tributary uses from Lower Basin accounting as against the Lower Basin's permitted uses does not remove controversy. It creates controversy. The holding is adverse to the Upper Basin and adverse to the Compact allocation to the Lower Basin and as between Basins. To paraphrase a statement of this Court in an earlier case of Arizona vs. California it may be stated thusly. Although no Decree rendered in the absence of the Upper Basin States can bind or affect those states, that fact is not an inducement for this Court to decide the rights of the parties before it by a Decree which because of the absence of the Upper Basin States could have no finality[30].

There can be no finality to a Decree that excludes a single tributary from accounting. If the tributary uses are accountable the Upper Basin can have no quarrel. That is what the Compact requires.

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herein at Page 29 hereof. As to Utah and New Mexico tributary uses see Ground No. 13 herein at Page 60 hereof.

[29]M.R. Pgs. 133-135.

[30]Arizona vs. California et al., 298 U.S. 558 at 572 (1933), 80 L.Ed. 1331 at 1339.

8. **The Opinion, With Reference to the Gila River, Is Based, at Least in Part, on a Mistake of the Master,[1] Geographically and Factually, Carried Into the Opinion.[2] While Recognizing That the Gila River Is Included as a Tributary in the Compact,[3] the Opinion Recites That Only Arizona and New Mexico Could Effectively Use the Gila[3] Because the Gila Entered the Colorado Too Close to Mexico to Be of Much Use to Any Other States and Was Reduced to a Mere Trickle in the Hot Arizona Summers Before It Could Reach the Colorado.[4]**

These Statements Are Grossly in Error and Directly Contrary to Arizona's Proof[5] and Pleadings[6] and the Geography of the Area.[7] The Gila Was and Is of Importance Not Only to the Upper Basin but to All Other Lower Basin States.

8. In dealing with the Compact and the Project Act we are dealing with a Compact and Act of Con-

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[1]Pgs. 179 Note 38, 184 and Note 46; 229; 315.

[2]Op. Pgs. 19 and 24.

[3]Op. Pg. 19.

[4]Op. Pg. 24.

[5]See Ariz. Ex. 45 Pg. 2 thereof showing Gila River discharge to Colorado for years prior to 1922 to have averaged over 1,000,000 a.f. per a. and to be one-sixth of all tributary contributions to the main stream.

[6]See Arizona Complaint Par. XXII Page 26, alleging Gila uses exceed 1,000,000 a.f. per a. Also see Arizona Reply to California Answer paragraph 8 at Page 17 where Arizona alleges uses in excess of 1,000,000 a.f. per a. and that to extent of 1,000,000 a.f. per a. the uses are chargeable as III(b) uses and uses in excess of 1,000,000 a.f. per a. are chargeable as III(a) uses.

[7]See U.S. Diagram Map of Colorado River and tributaries from Lee Ferry to Gulf, Arizona Ex. 113 Tr. 412. Note that the Gila enters the Colorado River above Yuma, Arizona, while the Imperial Irrigation District diversion gate at Rockwood Heading is considerably below Yuma.

gress passed and approved in 1928 and proclaimed operative by the President in 1929. They dealt with the physical situation as of that time.

In considering the Gila River as a tributary to the Colorado River the Master has made some grave mistakes. The Report states that California can have no claim to Gila River water as against Arizona to reduce Arizona's claim to the main stream because California users had no appropriative right to waters of the Gila River as California's points of diversion are all upstream from the confluence of the Gila with the Colorado[8]. In this the Master is badly mistaken.

California appropriations for Imperial Valley made before and about 1900 were for diversion at Hanlon Heading[9], to wit, at what is marked on Arizona Exhibit 113 as "Rockwood Heading—Imperial Intake."

These appropriations antedate many Arizona Gila River uses.

It is fundamental western water law that a main stream appropriator prior in time to an upstream tributary user has a better and prior right to the continued tributary contributions to the main stream[10].

The Imperial Irrigation District used Rockwood Heading as its exclusive source of water until 1942[11].

The next error of the Master in the Gila matter is evidenced by the second paragraph of footnote 38 on Page 179 of the Report. There it is stated that as

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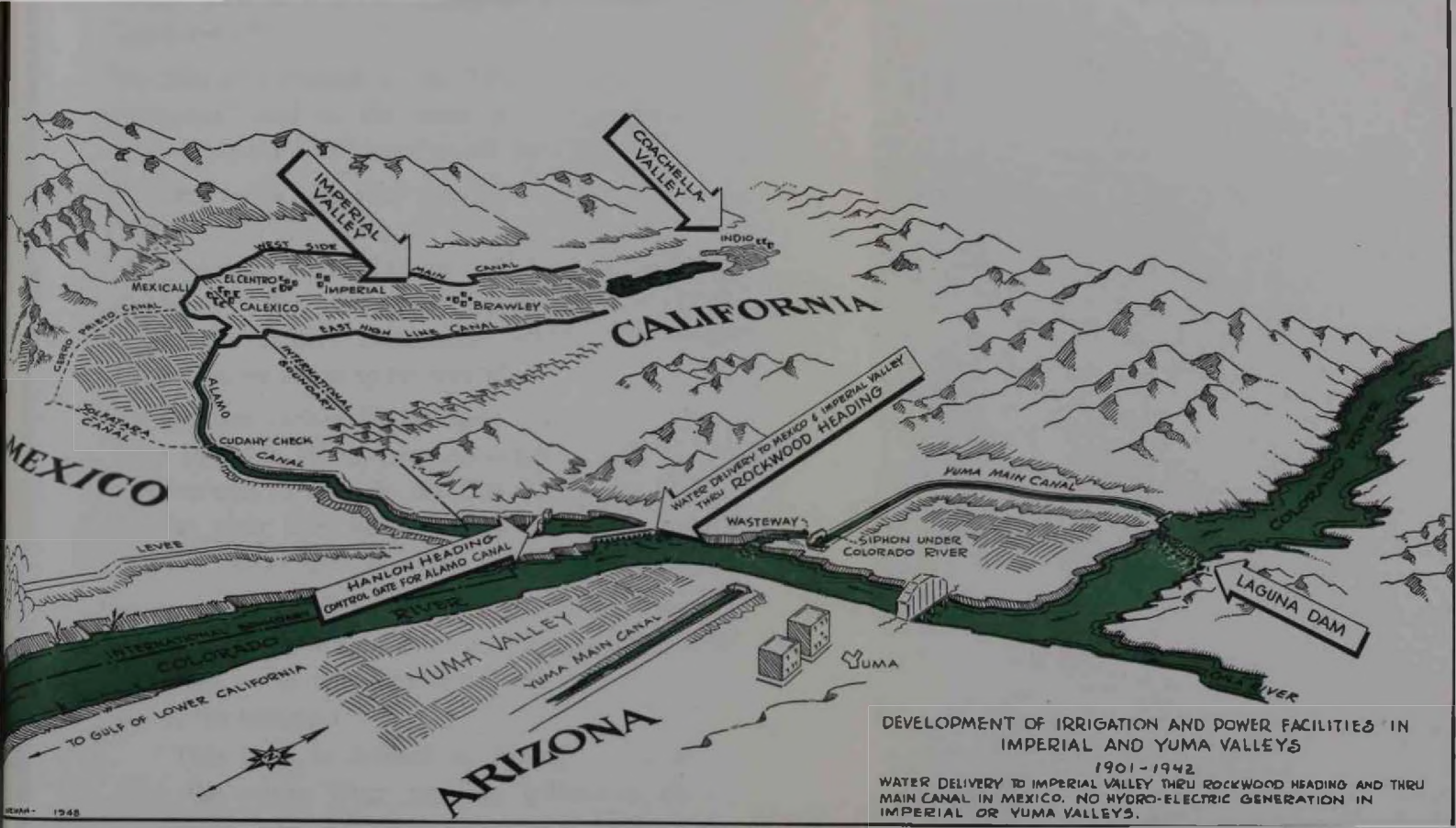
[8]M.R. Pg. 229.

[9]For convenience see Chart Cal. Ex. 66A, Tr. 6893, 7178 and for sample of Notices see Cal. Ex. 71, Tr. 7175 and list of assigned appropriations see Cal. Ex. 70, Tr. 7884.

[10]See citations where Master so holds, M.R. Pg. 316.

[11]Tr. Pg. 6918 lines 19-23.



DEVELOPMENT OF IRRIGATION AND POWER FACILITIES IN IMPERIAL AND YUMA VALLEYS

1901 - 1942

WATER DELIVERY TO IMPERIAL VALLEY THRU ROCKWOOD HEADING AND THRU MAIN CANAL IN MEXICO. NO HYDRO-ELECTRIC GENERATION IN IMPERIAL OR YUMA VALLEYS.

RMM - 1948

gress passed and approved in 1928 and proclaimed operative by the President in 1929. They dealt with the

and for sample of Notices see Cal. Ex. 71, Tr. 7175 and list of assigned appropriations see Cal. Ex. 70, Tr. 7884.

[10]See citations where Master so holds, M.R. Pg. 316.

[11]Tr. Pg. 6918 lines 19-23.

of 1928 California had no works capable of diverting Gila River water and, therefore, only Arizona could use Gila River water[12]. As above stated, Imperial did have the diversion works for and did divert all the water used in Imperial Valley at Rockwood Heading until 1942[12a].

The Master's concept of the Gila is carried out in the Opinion[13] and as the error is twice repeated it must have had some influence on the decision.

It seems to be conceded by the Master that interbasin and under the Compact, the Gila River is a part of the Colorado River System and that the Compact allotment of water uses is of and from the System, not the main stream alone, and includes the Gila[14]. This the Opinion seems to recognize[15].

The Opinion recites the repeated efforts of Arizona to have the Gila River uses excluded[16]. The reason for the refusal to exclude the Gila River uses and to insist that their uses be accounted for as a part of the Lower Basin uses is aptly put in the following.

In Arizona's Exhibit 55, Tr. 260 in an answer of Herbert Hoover to Representative Hayden of Arizona, Hoover said, as to why "System" was used in Article III(a) of the Compact:

> "This term is defined in Article II as covering the entire river and its tributaries in the

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[12]The same error is found in footnote 46 page 184 of Report.

[12a]Tr. Pg. 6918 lines 19-23.

[13]Op. Pg. 19 and footnote 40 and Pg. 24.

[14]M.R. Pgs. 142-143.

[15]Op. Pg. 8.

[16]Op. Pgs. 8-9, 10, 19, 24.

> United States. No other term could be used, as the duty of the commission was to divide all the water of the river. It serves to make it clear that this was what the commission intended to do and prevents any state from contending that since a certain tributary rises and empties within its boundaries and is therefore not an interstate stream, it may use its waters without reference to the terms of the Compact. The plan covers all the waters of the river and all its tributaries, and the term referred to leaves that situation beyond doubt."[17]

Frank Emerson, one of the Compact Commissioners, who became Governor of Wyoming and as such took part in the so-called Governors' Conferences[18], testified before the Senate Committee on the Project Act Bill—in answer to questions by Arizona Senator Ashurst:[19]

> "I am not able to see your argument in regard to the Gila River—I think it is as much a part of the Colorado River System as our Green River (in Wyoming)."
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> "As a witness here before your Committee I shall have to assert again that the Gila River is just as much a tributary of the Colorado River as are the various other small tributaries."

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[17]For convenience see Page A33, Sp. M.Ex. 4, Ely D.

[18]Op. Pg. 9.

[19]Hearings 69th Cong. 1st Session Page 765 (1925) to S. Res. 320 before Senate Committee on Irrigation and Reclamation.

Delph Carpenter, considered as the father of the Compact and representing Colorado stated the Gila situation as follows[20]:

"The inclusion of the words 'and tributaries' would make the Act effective off the main stem of the river. The words 'and tributaries' may be something of surplusage. The use of the word 'river' probably includes its tributaries. But lest some hyper-technical person bobs up and says that tributaries are not affected, we have included the words 'and tributaries'."

"I am utterly unable to comprehend the peculiar viewpoint of the people of the State of Arizona in that respect.—Secondly, the Gila and every other river mentioned contributes, if uninterrupted, its water supply to the main river above the largest diversion canal in America—the Imperial Valley Canal heading now below Yuma. Gila water is of importance to the Imperial Valley Canal. The canal naturally looks to the more stable flow from the main river, but I am informed that Gila water is frequently diverted, and it has been my privilege to see water coming from the Gila River and flowing into the Colorado and down into the Imperial Valley Canal. That water is just as wet and just as serviceable as the water of the Green River in Utah. The waters of the Gila River are waters of the Colorado River just as much as the waters of the Green River. So that when you look at these facts squarely you are brought to the proposition that there is not a single tributary

[20]Hearing House Committee on H.R. 6251 and H.R. 9826, 69th Cong. 1st Session, Pgs. 208-210 (1926).

of the entire Colorado River that does not enter the river above Yuma, and the greatest diverter from this River, or from any river in America, or in the world, is the canal of the Imperial Valley, located below Yuma."

The flow of the Gila into the Colorado from 1903 to 1920 by month was introduced by Arizona[21] and shows during that time total annual run-off ranging as high as 3,670,000 a.f. and for six years in excess of 1,000,000 a.f. per a. and with usable supplies every month except possibly June. The average annual flow into the Colorado was 1,060,000 a.f. per a.[22] and this after Gila uses above.

Turning now to the Project Act and the second paragraph of Section 4(a) thereof, the position is taken in the Opinion that the Gila would not logically be included (1929) since Arizona alone of the states could effectively use that river[23]. It is submitted the foregoing and physical facts refute this. But that is not the only point. It is not merely a question of which state could use the Gila waters but that, at least interbasin, its uses are a part of the maximum uses permitted to the Lower Basin[24].

The concept that Arizona may have the unaccounted for use of the Gila River because only she could effectively use the Gila waters and therefore it would not be logical to include the Gila[25] is based upon an erroneous idea of the division between Basins. No

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[21]Ariz. Ex. 45. Fall Davis Report Pg. 219.
[22]Ariz. Ex. 45, Pg. 219 and Pg. 2.
[23]Op. Pg. 19.
[24]M.R. Pgs. 140, 141, 142-143.
[25]Op. Pg. 19.

better statement of the division could be made than that of this Court in Arizona vs. California in which this Court said relative to the Gila:[26]

> "Arizona is one of the states of the lower basin and any waters useful to her are by that fact useful to the lower basin."

It is submitted that it is beneficial consumptive uses that are divided—not supply[27].

It is submitted that Congress did not and the Secretary cannot by contract, or otherwise, upset or alter the Compact allocation of 8,500,000 a.f. per a.[28] of *uses* to the Lower Basin by excluding from accounting the Gila and other tributaries' uses and thus allowing the Lower Basin 10,500,000 a.f. per a. of uses.

The asserted congressional intent of 1928 to leave each state its tributaries[29] and especially the Gila to Arizona[30] is said to have support in the second paragraph of Section 4(a) of the Act[31]. There in item (3)[32] is language that Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said state and in (4) that Gila River waters are not to be taken for Mexico[32].

The Opinion holds that Section 4(a) indicates Congress itself was making the indicated apportionment to

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[26]Arizona vs. California, 292 U.S. 341 at 358 (1933).

[27]Article III(a), Pg. 373 M.R. Section 4(a) Project Act, Pgs. 382-383 M.R. Also see M.R. Pg. 149.

[28]Op. Pg. 17.

[29]Op. Pgs. 15, 18, 19, 24.

[30]Op. Pgs. 19, 24.

[31]M.R. Pgs. 382-383.

[32]Pg. 383 M.R.

the Lower Basin States independent of and making the Compact irrelevant, except possibly as between Basins[33] by authorizing a Tri-State Compact and that Congress made sure that if the states did not agree the Secretary would carry out the indicated apportionment[34].

The Opinion points out that Arizona bitterly fought the inclusion of tributaries and in particular the Gila River[35] and that Governors of the Basin States[36] and congressional debates indicate that Congress intended to divide the main stream among the three states[37] and made sure the Secretary would carry it out even if the states disagreed[38].

The Opinion overlooks a very important congressional item. While the second paragraph of Section 4(a) (containing the Gila language of items (3) and (4)) was being considered by Congress, Senator Johnson refused to accept the language until amended to make it purely permissive to the three states[39].

The Opinion states that all the leaders in the congressional debates, including Senator Phipps, understood the Act as purely a main stream matter excluding the Gila and tributaries[40]. This is inaccurate. In debate with Hayden relative to the Gila being in-

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[33]Op. Pgs. 15, 16-17, 18, 23, 25.
[34]Op. Pg. 29.
[35]Op. Pg. 10.
[36]Op. Pgs. 9, 19-23.
[37]Op. Pg. 25.
[38]Op. Pg. 29.
[39]70 Cong. Record 472.
[40]Op. Pgs. 22-23.

cluded, Senator Phipps stated that the Act was tied to the Compact and to which Hayden agreed, and Phipps further stated:

> "But I do not think that the waters 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."[41]

We are all, therefore, faced with the influence to be given to the second paragraph of Section 4(a) of the Act. As pointed out elsewhere, it does not apportion main stream uses but if it apportions anything, it is uses permitted by Article III(a) of the Compact, i.e., System uses[42]. As to the Gila, said second paragraph was accepted as merely permissive[39]. It can hardly be said to give to the Lower Basin uses in addition to the allotment of the Compact of 8,500,000 a.f. per a.[43]

More persuasive, however, is the conduct of Arizona immediately after 1929 and even in her pleadings herein.

If, as indicated in the Opinion, Congress understood and intended to give Arizona the Gila unaccounted for as to use (plus 2,800,000 and one-half of surplus from main stream) it would seem that Arizona's representatives and Arizona would have so understood. Their conduct is to the contrary. In 1930 Arizona filed suit against California et al. to have the Act declared unconstitutional[44]. In 1933 Arizona again sued California

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[41]70 Cong. Record 335. Phipps Chairman Senate Committee on Irrigation and Reclamation.

[42]See Ground No. 2 at Page 5 hereof.

[39]70 Cong. Record 472.

[43]See Ground No. 3 at Page 12 hereof.

[44]Arizona vs. California, 283 U.S. 423 at 449, 75 L.Ed. 1154 at 1162.

and others, this time claiming under the Project Act that the 1,000,000 a.f. per a. allowed the Lower Basin by Article III(b) of the Compact was entirely for Arizona under the Act because the Gila uses were included in the total Lower Basin uses allowed to the Lower Basin. Also that Section 4(a) of the Act was intended to exclude California from III(b) surplus uses and give it to Arizona as compensation for the inclusion of the Gila in the Lower Basin permitted uses[45]. This Court held, however, that the uses alloted or permitted to the Lower Basin by Articles III(a) and (b) of the Compact were System uses, including all tributaries in the Lower Basin, and that while the Compact does not apportion between states of the Lower Basin, Arizona being one of those states, any waters useful to her are useful to the Lower Basin[46]. In 1934 Arizona sued for an equitable apportionment decree by this Court[47].

Arizona refused to ratify the Compact for many years. In 1952 this suit was filed by Arizona. In her pleadings herein her position was—that subject to availability under the Compact and Project Act—and subject to the rights of New Mexico and Utah, Arizona had the right to divert—from the Colorado River *System* so much water as needed for beneficial consumptive use of 3,800,000 a.f. per a. made up of 2,800,000 of the 7,500,000 a.f. per a. apportioned to the Lower Basin by Article III(a) of the *Compact* and

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[45]Arizona vs. California, 1933, 292 U.S. 341 at 352, 355, 356, 78 L. Ed. 1298 at 1303-1305.

[46]Arizona vs. California, 1933, 292 U.S. 385, 78 L. Ed. at 1306.

[47]Arizona vs. California, 1933, 298 U.S. 558 at 559, 80 L. Ed. 1331 at 1333.

1,000,000 a.f. per a. apportioned by Article III(b) of the Compact[48]. That Gila uses by Arizona are chargeable as against III(b) uses to extent of 1,000,000 a.f. per a. and as to uses in excess of 1,000,000 a.f. per a. to III(a) Compact uses[49].

It is submitted this conduct is strange if it was ever considered that the second paragraph of Section 4(a) had any effect as the basis of Lower Basin apportionment leaving the Gila out of accounting.

To say that Arizona might have the exclusive use of the waters of the Gila River is one thing. To say she is to have the exclusive use unaccounted for is a far different and additional matter. Arizona's conduct and pleadings refute this.

Arizona by an intense dam building program on the Gila River and its tributaries has accomplished nearly a complete impounding in Central Arizona of the Gila supply. She has accomplished its removal from the Mexican supply by so impounding the supply at distant points in Central Arizona.

The idea that the Gila supply is negligible is refuted and explained by her dams capable of impounding over 3,000,000 a.f. of water in Central Arizona and shutting off its flow to the Colorado. These dams were built commencing with 1909 and continued after the 1920's and through 1943 and recently as to the dam at Painted Rock on the Lower Gila. Thirteen of them are described by the Master[50].

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[48]See Paragraph XVII, Pg. 21 Arizona Complt.

[49]See paragraph 8 at Pg. 17, Arizona Reply to California Answer.

[50]Pgs. 39-43 M.R.

9. The Opinion and Decision Herein Violates the Treaty Provisions of the Compact[1] and Violates the Interbasin and Interstate Relations and Rights and Obligations Relative to the Mexican Treaty Burden by Sanctioning Lower Basin Uses of 9,500,000 or 10,500,000[2] a.f. per a. Instead of 8,500,000 a.f. per a. as Permitted by the Compact.[3]

9. Article III(c) of the Compact provides that in the event of a treaty with Mexico for use of waters of the Colorado River System such waters shall be supplied first from surplus above the 7,500,000 a.f. per a. of uses to each Basin and as to the Lower Basin above the additional use of 1,000,000 a.f. per a. of uses and if there is an insufficient surplus, then the burden is to be borne equally by the two basins and the Upper Basin will deliver enough water at Lee Ferry to supply its half in addition to its III(d) obligation[4].

In 1944 such a Treaty was reached[5] by which Mexico is guaranteed from the Colorado River from any and all sources a quantity of 1,500,000 a.f. per a.,[6] to be delivered at the limitrophe section of the Colorado River[7].

It seems clear from Article III(c) that uses in the Lower Basin of the waters of the Colorado River

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[1]Article III(c) Compact at Pg. 373 M.R.
[2]First 7,500,000 a.f. per a. III(a) plus excess or surplus of 1,000,000 III(b) plus 2,000,000 Lower Basin tributary uses. See Op. Pgs. 15, 18.
[3]Articles III(a) and (b) Compact, Pg. 373 M.R.
[4]Articles III(a) and (b), Pg. 373 M.R.
[5]Ariz. Ex. 4, Tr. 220 Pgs. 1276-1306 Int. D. Sp. M. Ex. 2 and Pgs. A831-A881 Ely D. Sp. M. Ex. 4.
[6]Article 10, Pg. 851 Ely D. and Pg. 1288-9 Int. D.
[7]Article 11, Pg. A852-3 Ely D, Pg. 1289 Int. D.

System, including tributaries and also including the Gila River, have to be totaled annually, as will have to be done in the Upper Basin, to determine when each Basin's total permitted uses have been reached in order to apply and administer the Treaty.

If the Upper Basin's uses have not reached 7,500,000 a.f. per a. and some of the Upper Basin's unused share of the III(a) uses pass Lee Ferry[8] and assuming adequate supply in the main stream for 8,500,000 a.f. per a. or even 7,500,000 supplied in any part by unused Upper Basin water—it seems because of the 2,000,000 a.f. per a. of tributary uses in the Lower Basin all Upper Basin unused water being used in the Lower Basin must be cut back for treaty purpose by up to 2,000,000 a.f. per a. Treatywise between Basins the Upper Basin in self defense would have to contend that the Lower Basin cannot use 2,000,000 a.f. per a. from the tributaries, including the Gila, and use 7,500,000 a.f. per a. from the main stream and any surplus III(b) water from the main stream—also.

In the instance of no unused Upper Basin waters reaching Lee Ferry and the Lower Basin's use of 2,000,000 a.f. per a. on the tributaries including the Gila, the Upper Basin would undoubtedly contend that the Lower Basin could only use 6,500,000 from the main stream and if the Lower Basin total uses, including

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[8]The whole basis of the Master's Report and theory of plenty for all for generations. See M.R. Pg. 102 and Transcript August 17-19, 1960, Pgs. 23081, 23084 and 23092.

tributaries, equaled or exceeded 8,500,000 a.f. per a., it would have to start cutting its Lower Basin uses to meet the Treaty obligation before the Upper Basin could be called upon for its contribution.

As between states of the Lower Basin, it would appear to be to the advantage of the Lower Basin to have Lower Basin tributary uses, including especially the Gila, excluded from accounting. The trouble is that interbasin it could not be done and this illustrates that the Compact is relevant and applicable between Lower Basin States. Each state in the Lower Basin—all of them—has the right to call for a Compact accounting, i.e., System uses, in order to have each state's total uses determined to find when the Lower Basin as a whole has reached 8,500,000 a.f. per a. of uses—of System—not merely main stream uses—all to see when and where the burden of the Mexican Treaty falls.

We can be sure the Upper Basin will be requiring each Lower Basin State to so account and each Lower Basin State is adverse to the other Lower Basin States as to the total permitted Lower Basin uses and the consequent application of the Treaty burden.

It is submitted that the provisions of the Act making the Compact controlling are of particular significance here.[9]

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[9]Sections 8(a) and 13(b),(c) and (d) of the Act, Pgs. 389 and 393-394. See Ground No. 10 herein at Pg. 43 hereof as to Compact being controlling on Project Act interbasin.

10. The Opinion Holds the Compact Not Controlling in This Case.[1] That It Merely Made a Division of Water Between Basins.[2] That the Project Act Created an Apportionment of Main Stream Water Only Among California, Nevada and Arizona,[3] and Congress Made Sure That if the Three States Did Not Agree by Tri-State Compact the Secretary Would Carry Out the Proposed Compact.[4]

The Opinion Recognizes That the Project Act by Reference Made the Compact "Relevant[5] as in Reference to Present Perfected Rights[6] and That the Act Made Secretarial Contracts and His Contractees Subject to the Compact.[7] The Opinion Terms Other Project Act Provisions, Making the Compact Controlling, as Merely to Show the Act Did Not Upset, Alter or Affect the Interbasin Division of Water.[8] It Is Respectfully Submitted This Is an Erroneous Limitation on Repeated Provisions of the Act Clearly Designed to Make the Compact Limitations of 7,500,000 III(a) Uses and 1,000,000 III(b) Uses Inclusive of All Main Stream and Tributary Uses in the Lower Basin[9] as Well

[1]Op. Pg. 16.

[2]Op. Pg. 16.

[3]Op. Pgs. 15, 25.

[4]Op. Pg. 29.

[5]Op. Pg. 16.

[6]Op. Pg. 17, Section 6 of Act, Pg. 387 M.R.

[7]Op. Pgs. 34-35 Section 8(a) Act, Pg. 389 M.R.

[8]Op. Pg. 17. See Sections 13(b),(c) and (d) at Pgs. 393-4 M.R.

[9]See Sections 8(a) of Act, Pg. 389 M.R. making U.S. and all its contractees subject to the Compact notwithstanding anything in the Act to the contrary and requiring all contracts to so provide. Also see Section 13(b) Pg. 393 M.R. making the rights of U.S. and those claiming under the U.S. in and to

as Requiring All Existing Rights as of 1929 to Be Satisfied Out of the First 7,500,000 of System Water.[10]

10. That the Project Act does not operate independent of the Compact and that the Compact is controlling on the Project Act is a basic proposition herein.

The Master held the Compact irrelevant as between Lower Basin States[11] and to be purely interbasin[12]. The Opinion holds that all the Compact did was to make a division between Basins[13] but does hold the Compact relevant to a limited extent[13]. The Opinion also holds that some provisions of the Act do relate to the allocation between states of the Lower Basin, such as Section 6[14]. Reference is also made to Sections 8(a), 13(b) and (c) with the statement that this subjugation of the Act to the control of the Com-

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the waters of the Colorado River and its tributaries subject to and controlled by the Compact.

Also see Section 13(c) making all contracts from the U.S. for use of waters of the Colorado River or its tributaries subject to and controlled by the Compact. Then see Section 13(d) making these several provisions to run for the benefit of the seven Colorado Basin States and their users of water of the Colorado River or its tributaries in any litigation and making those conditions run with the land and attach thereto whether so provided by contract or not.

[10]The provisions of Article III(a) provide that the 7,500,000 a.f. per a. apportioned shall include all water necessary for the supply of any rights which may now exist, Page 373 M.R. Also the last paragraph of Article VIII, held by the Master to be not merely of interbasin but interstate application requires all other (nonperfected rights) to be satisfied solely from waters apportioned to that Basin in which situated. For Master's ruling see Page 143 M.R. For Article VIII see Page 376 M.R.

[11]M.R. Pg. 138.

[12]M.R. Pg. 139 bottom page.

[13]Op. Pg. 16.

[14]Protecting as between states "present perfected rights" Pg. 387 M.R.

pact is merely to show that the provisions of the Act in nowise upset, alter or affect the Compact's congressionally approved division[15].

It is submitted that too slight weight and application are given to those and other sections of the Act making the Compact controlling.

Section 8(a) provides that with respect to the Project Act works the United States and its contractees and all users and appropriators of water distributed by the works shall be subject to and controlled by the Compact—*anything in the Act to the contrary notwithstanding* and all contracts shall so provide[16].

Section 8(b) is to the same effect as to any Tri-State Compact if made[17].

This above language, especially the underscored, is strong language and must be given some significance. As it applies to the use of the Project works and United States contracts in relation to its use, it is submitted that, among other things, it must mean that United States contracts cannot violate the Compact, i.e., notwithstanding the provisions of Section 4(a) the total Lower Basin allocation from System as distinguished from main stream cannot be exceeded as a matter of contract for permanent supply[18].

But when we turn to Section 13(b) we come to more extended provisions. There the rights of the United States as well as those claiming under the United States *in and to waters of the Colorado River*

[15]Op. Pg. 17.
[16]Pg. 389 M.R.
[17]Pgs. 389-390 M.R.
[18]See Section 5 with reference to Section 4(a) Pgs. 384-385 and 382-383 M.R.

and its tributaries shall be subject to and controlled by the Colorado River Compact.[19]

The Opinion says 8(a) and 13(b) and other provisions are merely to show that the Compact division between Basins is not to be upset or altered[20]. But this Section 13(b) includes *tributaries*. Therefore, it is submitted as clear that you cannot increase the Lower Basin permitted uses by excluding from accounting the tributary uses.

Then, apparently to make it even firmer, 13(c) provides that all contracts, etc., from the United States or under its authority necessary or convenient for the use of water from the Colorado River *or its tributaries*, shall be upon the express condition and covenant that the rights of the holders or water users of the waters of the river *or its tributaries* or for the use thereof shall be subject and controlled by said Colorado River Compact[21]. Why all this repetition if not to make it clear that all tributary uses are subject to the Compact, and if not, then to what purpose?

Then, as if not satisfied as to the interstate application of said provisions, 13(d) provides that those conditions and covenants referred to shall run with the land and the water rights shall attach as a matter of law, whether set out in a contract, etc., or not, and shall be deemed for the benefit of and be available to the seven Colorado River Basin States and the *water users in those states* in any litigation respecting the waters of the Colorado River or its *tributaries*[22]. If the provisions making the Compact con-

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[19]M.R. Pg. 393.
[20]Op. Pg. 17.
[21]M.R. Pg. 393.
[22]M.R. Pgs. 393-394.

trolling do not deal in more than the mere interbasin division, they at least mean that each user in each state, let alone each Lower Basin State is entitled to resort to the Compact for the enforcement of the Compact provisions notwithstanding anything contained in the Act.

We submit these provisions are too emphatic to permit the Project Act to have the effect of enlarging the Lower Basin permitted uses by exclusion of tributary uses from accounting.

But this is not all. Section 15 authorizes further studies for the control and utilization of the Colorado River *and its tributaries*[23]. Section 16 provides that to the end that the Project authorized in the Act may constitute and be administered as a unit in the control and utilization of the resources of the Colorado River *System,* the States are to cooperate with the Secretary in indicated ways in the exercise of any authority under Sections 4, 5 and 14 of the Act[24]. How could the Project works constitute and be administered as a part or unit in the resources of the Colorado River *System* if the full Lower Basin allotment is taken from the main stream and if Lower Basin tributaries are excluded?

As to the right of each Lower Basin State to an accounting from each other Lower Basin State and each state's right to have its rights existent as of 1929 served first, see Ground Nos. 11 and 12 herein at Pages 48 and 55 hereof.

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[23]M.R. Pg. 394.

[24]M.R. Pgs. 381-384, 384-387 and 394. Section 14 makes the Act a supplement to the Reclamation Act.

11. **Existing Rights in the Lower Basin as of 1929 Are Required to Be Satisfied Out of Waters Apportioned to That Basin.[1] Rights as May Now Exist, as of June 1929 Are to Be Satisfied Out of the First 7,500,000 a.f. per a. of Uses in That Basin.[2]**

This Means That Any Right Existent in Utah, New Mexico, Nevada, California, and Arizona as of June 25, 1929, in and to Colorado River System Uses, as Distinguished From Main Stream Only, Had and Have a Right to Have Those Existing Use Rights Satisfied Out of the First 7,500,000 of System Water Before Any New Right Could Attach by Further Appropriation or Contract. The Correlative Is That Any User of System Water, as Distinguished From Main Stream Water, Had and Has to Account for Such Existing Right Uses in Order for the Total, Interbasin and Interstate in the Lower Basin, to Be Arrived at in Determination of the Lower Basin's Total Uses and in Application of the Mexican Treaty Burden.

11. Assuming that the Project Act references to the Compact as being controlling, are, among other things, to provide that the Compact division between Basins is not to be upset, altered or affected by the Act[3] notwithstanding anything in the Act to the contrary,—reference is made to Compact language that has far greater significance than given to it in the Opinion. It was the basis of the pleadings of all the states and parties and was the basis upon which the case was tried. It has been largely ignored.

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[1]Article VIII last paragraph, Pg. 376 M.R.
[2]Article III(a), Pg. 373 M.R.
[3]Op. Pg. 17, Sections 8(a), 13(b),(c) and (d) of Act.

Article III(a) of the Compact is said to be a division of uses between Basins[4]. It has significant language with respect to rights that existed as of 1929[5]. Article III(a) also provides that there is apportioned from the *System* in perpetuity—to the Lower Basin—the exclusive beneficial consumptive use of 7,500,000 a.f. per a. "*—which shall include all water necessary for the supply of any rights which may now exist.*"[6]

Article VIII, which, has three sentences, has in the last sentence provisions which the Master holds to be not merely of interbasin application but of interstate application in the Lower Basin[7]. This is held by the Master to not only apply to present perfected rights but to "all other rights to beneficial use of waters of the Colorado River *System—*" which the sentence states "—shall be satisfied solely from the water apportioned to that Basin in which they are situate."[8]

Scant attention has been paid to these provisions relative to "rights which may now exist." It is submitted that these provisions have always, until the Master's Report, been considered as the key to the relative rights and obligations of the Lower Basin States as between themselves as well as interbasin as evidenced by the following[9].

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[4]Op. Pg. 16.
[5]Op. Pg. 12, M.R. Pgs. 152, 161, 234.
[6]M.R. Pg. 373.
[7]M.R. Pg. 143.
[8]Article VIII, Pg. 376 M.R.
[9]Also on this ground see Ground Nos. 11 and 13 at Pgs. 48 and 60 hereof relative to interbasin and interstate accounting and as to recognition of rights of Utah, New Mexico and Nevada as tributary users.

In 1944 when the second Nevada Contract was executed[10] the necessity of recognition of and accounting for tributary uses was given special attention by the amendment of Article 5(a) of the 1942 Nevada Contract[11] and the increasing of the Nevada Contract from 100,000 to 300,000 a.f. per a.[12]

In 1944 when the Arizona Contract was executed, necessity for recognition of and accounting for these uses in Utah and New Mexico was written into the Arizona Contract both as to apportioned and unapportioned uses of the Compact[13]. These uses were entirely tributary uses[14]. Likewise, the Arizona Contract recognized not only the right of Nevada to her increased use to 300,000 a.f. per a. but to participate to extent of 1/25th of any excess or surplus (III(b)) and further equitable apportionment under Articles III(f) (g) of the Compact[15]. Recognition of California's Contracts was also made in the Arizona Contract[16]. The Arizona Contract also recognized the obligation for accounting for uses on tributaries above Lake Mead by Arizona[17]. The Arizona Contract is silent on the Arizona Gila River uses[18]. As elsewhere stated, the Arizona and other contracts are upon

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[10]Ariz. Ex. 44 Tr. 254, Pg. 419 M.R.

[11]Pg. 420 M.R. for amendment and Pgs. 410-411 for original 5(a) of 1942.

[12]Article II 1944 Nevada Contract, Pg. 420 M.R. As to Nevada tributary uses see Pgs. 71-73 M.R.

[13]See Section 7(g) Arizona Contract at Pg. 402 M.R.

[14]Pg. 5 M.R. As to New Mexico see Pgs. 76-79 M.R. As to Utah see Pgs. 97-98 M.R. As to Lower Basin tributaries see Pg. 11 M.R.

[15]See Section 7(f) of the Arizona Contract at Pg. 402 M.R.

[16]See Section 7(h) Pg. 402 M.R.

[17]See Section 7(d) Pg. 401 M.R.

[18]Arizona Contract, Pgs. 399-407 M.R.

specific and express conditions and by special covenant made subject to and controlled by the Compact as to the uses of waters of the Colorado River *and its tributaries*[19]. The Arizona Contract also recognizes that her right to uses of water are subject to availability under the Compact as well as the Project Act[20].

In 1952 when Arizona filed her complaint herein she even then recognized her rights were subject to *availability,* not simply under the Act but also *under the Compact* and were subject to the rights of New Mexico and Utah—all as to System as distinguished from main stream uses and that Arizona's rights related to 2,800,000 a.f. per a. out of the 7,500,000 a.f. per a. of uses apportioned by Article III(a) and she stated she was entitled to all of the uses permitted by III(b) of the Compact[21]. Again, in her Reply to California's Answer, Arizona recognized that all existing uses of 1929 were protected and accounting therefore required by so alleging and alleging the Gila uses to the extent of 1,000,000 a.f. per a. to be III(b) uses and uses in excess of 1,000,000 a.f. per a. therefrom to be III(a) uses and that Arizona's existing Gila uses as of June 25, 1929, were approximately 960,000 a.f. per a.[22]

The Nevada,[23] Utah[24] and New Mexico[25] pleadings herein were all based on rights on tributaries and pro-

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[19]Section 13 Arizona Contract, Pg. 406 M.R.
[20]Section 7(a) Pg. 400 M.R.
[21]See Paragraph XVII Pg. 21 Arizona Complaint.
[22]See Paragraph 8 at Pg. 17 Arizona Reply to Calif. Answer.
[23]See Paragraph XIV Pgs. 12, 17-18 Nevada Complaint.
[24]See Paragraphs II Pg. 2 Utah Complaint.
[25]See Paragraphs V Pgs. 2-3 and VII and VIII Pgs. 4-6, New Mexico Complaint.

tection of existing rights out of the uses allotted to the Lower Basin.

The United States asserted claims to the waters, not only of the main stream, but also from the tributaries sufficient to satisfy all legal demands[26] and in regard to the Arizona claim that her 1944 contract does not require accounting for or apply to Gila River uses, the United States did not take the position that the Arizona Contract excludes the Gila but instead alleged the United States is in grave doubt[27].

These pleadings were followed by an extended trial in which the bulk of the time was spent on evidence relative to the tributary uses of Arizona[28], Nevada[29], New Mexico[30] and Utah[31] and in great detail.

It is submitted that the contracts, and especially the Arizona Contract, as well as the pleadings and including the conduct of the trial were all based on the one and only concept that permits of an harmonious administration of the Colorado River System on the main stream, as a part thereof, in keeping with the Compact's interbasin division and also in keeping with the Compact provisions of Article III(a) and VIII that existing rights as of June 25, 1929, are to be served out of the 7,500,000 a.f. per a. of uses apportioned to the Lower Basin.

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[26]See Paragraph XXX Pg. 25 U.S. Complaint.

[27]See Paragraph XXXVI Pg. 37 U.S. Complaint.

[28]As to Arizona Gila uses see Pgs. 39-43 and 45-50 and as to other Arizona uses see Pgs. 50-53 and Pgs. 83-84, 86, 88-93 M.R.

[29]As to Nevada uses see Pgs. 71-72 for existing tributary uses and 73-75 for main stream uses and expected uses.

[30]As to New Mexico see Pgs. 76-79, 82 M.R.

[31]As to Utah see Pgs. 97-98 M.R.

Unless it is recognized and accepted that all existing rights in the Lower Basin as of June 25, 1929, are entitled to participate in the apportionment of *System* uses as distinguished from *main stream* uses, there is bound to be chaos in the administration of the System and the Project works. The Opinion claims to find support for the main stream theory with the assertion that if the System claim prevailed, Utah and New Mexico would be excluded from Lower Basin participation in the Compact allocation to the Lower Basin[32].

It is submitted the above review of the contracts, the pleadings and the basis all parties understood to prevail throughout the trial negatives any such idea. Also, it shows not only administrative interpretation to the contrary, as in the Arizona and Nevada Contracts and a System and not main stream understanding of all parties to the lawsuit. Otherwise, their pleadings and trial conduct would hardly conform to any other view.

The right of each state's existing right holders to the use of their existing right share, as of June 25, 1929, of the first 7,500,000 a.f. per a. of uses from the System as apportioned by the Compact makes sense and logic when viewed on a System basis including all Lower Basin uses on tributaries as well as main stream for this reason. It protects all Lower Basin states in their uses as of June 25, 1929, and cares for New Mexico and Utah. The contracts, pleadings and trial are all so premised. Articles III(a) and the last sentence in Article VIII so provide.

It is the only concept that makes sense out of the provisions of the Project Act and the Limitation Act

[32]Op. Pg. 23.

and Arizona Contract as to California and Arizona each having one-half of the surplus or excess held by the Master to include III(b) uses[33]. Unless tributary uses are counted there could be no excess or surplus in the main stream for California or Arizona to divide as per Section 4(a) of the Act, the Limitation Act and the Arizona Contract[34]. Section 4(a) is limited to uses apportioned by Article III(a) of the Compact as to the use of the first 7,500,000 a.f. per a.[35].

If it is recognized that existing right users in the Lower Basin as of June 25, 1929, have a right to their respective shares of the III(a) uses on tributaries as well as main stream so as to be able to participate in that apportionment to the Lower Basin as provided in said Articles III(a) and VIII and it is also recognized that this right has the correlative obligation to account for all such uses in order that the total of such apportioned uses be determined, not only interbasin but as between states of the Lower Basin, we have a completely workable formula, interbasin and interstate and Treatywise. If Sections 8(a) and 13(b), (c) and (d) do not require this, they are meaningless.

To say that all the "existing rights" language in Articles III(a) and VIII of the Compact means is that all such existing rights must be served out of the first 7,500,000 of III(a) uses permitted to the Lower Basin is to make the point. This is because it puts every existing right use in the several states

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[33]M.R. Pg. 194.
[34]M.R. bottom Pgs. 192 and 195.
[35]M.R. Pgs. 382-384.

in competition with such in each other Lower Basin State to come within the total of 7,500,000 a.f. per a. System uses. This means a right to use and a duty to account for System uses as against III(a) uses in all Lower Basin States.

It conforms to interbasin accounting and gives all the Lower Basin States their June 25, 1929, use protection and a uniform administrative pattern.

12. **The Interbasin and Lower Basin Interstate Accounting Must Be the Same.**

Whatever the Apportionment Method May Be Between States of the Lower Basin It Is Submitted That There Must Be an Accounting of Beneficial Consumptive Uses—the Measure of Uses Herein.[1] The Opinion Refers to the Matter as Uses "Being Charged Against Their Apportionment."[2]

12. There can be no doubt that, as between Basins, uses in the Lower Basin must be charged or accounted for. The question is as to what. The Master says that it is not *supply* that is apportioned but *use*[3]. Article III(a) of the Compact says there is apportioned—to the Lower Basin—the beneficial consumptive *use* of 7,500,000 a.f. per a.—from the Colorado River *System*[4]. Therefore as between Basins the accounting must be of all Lower Basin *System* as distinguished from main stream *uses*. But why the accounting at all? It is not simply to know how much passes from

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[1]Op. Pg. 8 footnote 23, Pgs. 104, 185 M.R.

[2]Op. Pg. 13.

[3]See Ground No. 4 herein at Pg. 16 hereof as to distinction between supply and use, Pg. 144 M.R.

[4]Pg. 373 M.R.

Lake Mead because that is not where the uses are measured[5] as it is beneficial consumptive uses that are charged. Interbasin the obvious reason for accounting is to determine when the total Lower Basin uses of any and all *System uses* permitted by the Compact are reached, first as to the first 7,500,000 a.f. per a. permit by Article III(a) and then as to when "*such*" uses are increased by an additional 1,000,000 a.f. per a. permitted by Article III(b) of *System uses.*

Interbasin a reason for this accounting is not only a determination of the total of such uses but for a determination with respect to the Mexican Treaty burden of 1,500,000 a.f. per a. to be delivered in the limitrophe section of the Colorado River from any and all sources[6]. Under the Compact this burden is to come first from surplus over Lower Basin *System uses* of 8,500,000 a.f. per a. and Upper Basin uses of 7,500,000 of System uses—and if there is a deficiency, then one-half from each Basin[7]. Obviously, the Upper Basin will demand an accounting and have a right thereto as to all Lower Basin uses—regardless of supply—before contributing to the Mexican Treaty burden where their obligation is to deliver enough additional water at Lee Ferry so as to furnish one-half at the limitrophe section of the Colorado River[7].

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[5]See Arizona Contract Section 8, Pgs. 403-404 M.R., i.e., points of diversion for use in Arizona. See Palo Verde Contract Section 8, Pg. 429 M.R. at Palo Verde Intake. See Imperial Contract Ariz. Ex. 34, Pg. 65 Int. D. at Pg. 75 Article 17, Ely D. Pg. A595 Article 17 at Pg. A605 etc.

[6]See Mexican Treaty Ariz. Ex. 4, Tr. 220 Pg. 1279 Int. D at Pgs. 1288-1289, Ely D. Pg. A831 at Pgs. 851-853 Articles 10-11.

[7]Article III(c) Pg. 373 M.R.

If, as the Master holds, the Compact is a ceiling on the rights of the Lower Basin to *System uses,* is not each state an adverse user as against all other Lower Basin States? Does not each state have a right to an accounting of the other states' *uses* to see that the total of all Lower Basin States' uses do not exceed the Lower Basin permitted uses? Is this not also true with respect to the application of the Treaty burden with or without the deficiency feature?

As a practical and administrative problem it is submitted that the proposed dual accounting system that would have to result from the Opinion is unworkable and not intended. As recognized in the Opinion, all these vast works—could function efficiently only under unitary management, able to formulate and supervise a coordinated plan that could take account of the diverse often conflicting interests of people and communities of the Lower Basin[8]. To try and do this on a dual accounting basis is not possible as a practical matter and obviously was not intended, as is clear from the Act's provisions providing that with respect to the Colorado River *System* development the Project works shall constitute and be administered as a unit thereof[9] not independent of the System and as a main stream deal only.

That the accounting must include recognition and priority protection of present perfected rights is held by the Master[10] and the Opinion[10]. That the ac-

[8]Op. Pgs. 39-40.

[9]Act Section 16 Pg. 394 M.R.

[10]M.R. Pgs. 152, 161, 307, 311-313, Op. Pgs. 17, 31, 35. Note: The Master recognizes that a "perfected right is one recognized" under the applicable state law yet he attempts to define the right M.R. 307-309. It is submitted that as the Mas-

counting must also be made in recognition of the Article III(a) and VIII provisions of the Compact[11] relative to "rights which may now exist" as of June 25, 1929, which uses shall be satisfied solely from water apportioned to the Lower Basin is evident from the requirements of Sections 8(a), 13(b), (c) and especially 13(d) of the Act[12]. These provisions of Article VIII are held by the Master to be of interstate application in the Lower Basin[13].

As to present perfected rights as of June 25, 1929, which interstate in Lower Basin are protected not only as to III(a) uses but as to all other surplus available to the Lower Basin and as to all other rights existing as of June 25, 1929, that are to be satisfied from III(a) uses, one of two things must exist.

Either the uses and rights on the *System* in the Lower Basin, including *all* tributaries, are protected and accountable or the whole plan of the Project Act as well as the Compact falls apart. Unless these early tributary uses, as well as main stream uses, are accountable first against the first 7,500,000 a.f. per a. of III(a) uses and then as against the additional 1,000,000 a.f. per a. of III(b) uses, there can never be within the 8,500,000 a.f. per a. of uses permitted and

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ter's proposed Decree suggests a two-year period for furnishing a list of priorities as "present perfected" with ultimate determination of the issue by this Court on the basis of such listing and facts surrounding them, no definition of present perfected rights should be included in any Decree herein. Also, Utah and New Mexico are entitled to present their present perfected rights.

[11]M.R. Pg. 373 and last sentence of Article VIII Pg. 376.

[12]M.R. Pgs. 389 and 393-394.

[13]M.R. Pgs. 143, 311, 312, 348(5) and 349(6). Note: Existing rights protection is limited to the first 7,500,000 of Lower Basin uses. Present perfected rights are not so limited as between Lower Basin States.

limited to the Lower Basin any surplus or excess as referred to and set up in the Project Act (Section 4(a)) and the Arizona Contract (Section 7(b), Pg. 401 M.R.) or in the Limitation Act (Pg. 398 M.R.). If the tributary uses are accountable, then within the 8,500,000 a.f. per a. of uses there could be 1,000,000 a.f. per a. of surplus or excess within III(b) uses on the main stream of which California and Arizona could each get one-half. That this was intended by the language of the Project Act, the Limitation Act and the Arizona Contract seems beyond question. Unless so held, the "surplus or excess" provisions mentioned are meaningless and as an operating matter will be meaningless unless this Court is prepared to rule as follows:

That the tributaries in the Lower Basin are not chargeable or accountable, not only interstate but inter-basin—and that the Upper Basin is not only obligated to a minimum of 75,000,000 a.f. per a. of deliveries at Lee Ferry but must, as claimed by Arizona, deliver at Lee Ferry additional water to supply the additional 1,000,000 a.f. per a. of III(b) uses to the Lower Basin.[14] Also, that as to the Treaty the Lower Basin may use 2,000,000 a.f. per a. of tributary uses, plus 8,500,000 a.f. per a. of main stream uses before the burden of the Mexican Treaty falls on the Lower Basin, thus making III(c) read 10,500,000 of uses in the Lower Basin instead of 8,500,000 a.f. per a.[15]

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[14]M.R. Pgs. 146-147.
[15]Article III(c) Compact, Pg. 373 M.R.

13. Utah, New Mexico and Nevada Tributary Uses Should Be but Are Not Protected by the Decision.

13. It would seem, on first impression, that Utah, New Mexico and Nevada tributary uses are protected by the holding that such tributary uses are not chargeable[1]. Under the main stream theory and the Court interpretations of the contracts to the effect that Arizona, California and Nevada are entitled to sufficient water from Lake Mead to furnish 8,500,000 a.f. per a. of uses, one of two things results. Interbasin either tributary uses of Utah, New Mexico and Nevada from the System tributaries are charged against the main stream uses of California, Arizona and Nevada and reduce their entitlement, or the tributary uses of New Mexico, Utah and Nevada are cut off as they, plus the 8,500,000 main stream uses, interbasin would exceed the Lower Basin permitted uses.

But even more difficult, the "present perfected" and "existing rights" provisions which are held applicable interstate in the Lower Basin[2] cannot be administered without taking into account the tributary uses of those states. The protection and determination of "existing rights" claims under Articles III(a) and VIII are limited to first 7,500,000 a.f. per a. of Lower Basin uses[3]. Therefore, these must be protected as against other uses not qualifying as "existing rights". The protection afforded present perfected rights is not so limited[4] and the older uses on these tributaries are

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[1]Op. Pgs. 15, 16, 18, 19.
[2]M.R. Pg. 143.
[3]M.R. Pg. 307.
[4]M.R. Pg. 307.

entitled to protection as against other junior Lower Basin use rights. Interbasin the total Lower Basin *uses* are for all practical purposes limited to 8,500,000 if available[5].

By holding intrabasin the tributaries not to be accountable, the Opinion cannot as to the Compact or interbasin apportionment give those tributary uses the protection they are entitled to and that the Arizona Contract as signed was designed to give.

As between Basins and as to the application of the Mexican burden these tributary uses in Utah and New Mexico and other states have to be charged and accounted for as against the total Lower Basin permitted uses.

Therefore, unless treated as accountable and held to be protected as existing rights or present perfected rights as of June 25, 1929, and entitled to their part of the total of the Lower Basin's allowable uses before impact of the Compact and Treaty, there is no protection. That such was understood and intended as Compactwise, Project Actwise and administrativewise is demonstrated by the Arizona Contract[6].

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[5]Compact limitation on *uses* by Articles III(a) and (b) and Mexican Treaty obligation III(c). Note. Re Treaty matter and its application see Ground No. 9 herein at Pg. 40 hereof. As to administrative and Arizona Contract recognition of and protection of New Mexico and Utah, see Ground No. 13 herein at Pg. 60 hereof.

[6]Ariz. Ex. 32, Section 7(g), Pg. 402 M.R.

14. The Secretarial Powers and Discretion to Disregard Established Principles of Water Law Are Unprecedented and Do Not Find Support in the Project Act.

14. The Opinion holds that Congress created an apportionment between California, Nevada and Arizona of the full first 7,500,000 a.f. per a. of beneficial consumptive uses—all from the main stream—leaving to each state its tributaries—(uses unaccounted for)[1]. That if by Tri-State Compact the three states did not accept this so-called Congressional apportionment, Congress made sure the Secretary by contracts could proceed to make the said interstate allocation despite non-agreement of the states[2].

Also, that the Secretary was not only given this unusual, if Constitutional power (to force a Compact on the three states and ignore the other Lower Basin States as to their share of the first 7,500,000 a.f. per a. of III(a) uses)[3] which would divide up from the main stream and among only three states the total uses permitted to the whole Lower Basin by Articles III(a) and (b) of the Compact,[4] but is said to have authority to ignore the established law of over one hundred years in the states in question and coin new standards[5]. This is said to be because Congress provided a statutory scheme[6] which would permit a governmental agency to choose among recognized methods

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[1]Op. Pg. 15.

[2]Op. Pg. 29.

[3]Ignores the rights of Utah and New Mexico to participate in the first 7,500,000 a.f. per a.

[4]Op. Pgs. 15, 29.

[5]Op. Pg. 44.

[6]Op. Pg. 44, first paragraph.

of apportionment in case of shortage, or to devise reasonable methods of his own and the choice is not that of the Court[7]. That the Secretary is under no obligation to follow the established rules of priority of appropriation[8] though he may "lay stress" thereon[8].

It is further held that the Act and contracts do not require the use of any particular formula in case of shortage[9] though the Secretary must follow the Standards set out in the Act[9].

Among "guide lines" or standards that the Secretary must follow, as recognized in the Opinion, are these:

1. The Secretary is required to satisfy present perfected rights.[10] This requires the strict application of the law of prior appropriation under western water law and that as between states of the Lower Basin those having junior rights must give up water from that state's share to states having senior rights.[11]

2. That the United States and the Secretary and his contracts in the construction and operation of the Project works are subject to and controlled by the Compact[12] notwithstanding anything in the Act and all contracts shall so provide[13] and the Secretary can do nothing to upset or encroach upon the Compact's interbasin allocation.[14]

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[7]Op. Pg. 43.
[8]Op. Pg. 44.
[9]Op. Pg. 43.
[10]Section 6 of Act, Pg. 387 M.R., Article VIII Compact, Op. Pgs. 17, 31, 34-35.
[11]M.R. Pgs. 152, 234, 311.
[12]Op. Pgs. 17, 35, Section 8(a) of Act, Pg. 389 M.R.
[13]Section 8(a) of Act, Pg. 389 M.R.
[14]Op. Pg. 35.

3. All of the powers granted are to be exercised by the Secretary and are—responsible to Congress—.[15]

Congress provided in the Act that not only as to the Project works[16] but as to the rights of the United States, its contractees and all users of water of the Colorado River and its *tributaries*—all shall be subject to and controlled by the Compact[17].

Congress also provided that these conditions and covenants shall be deemed to run with the land and the rights and water rights shall attach as a matter of law and be deemed for the benefit of and available to all seven states and water users therein in any litigation respecting the waters of the Colorado River or its tributries[18]. This is language taken from the western water law of appropriation[19]. This Section was apparently not considered in the Opinion[20].

Section 18 recognizes the continued existence of the law of appropriation and provides that nothing in the Act shall be construed to interfere with such rights as the states "now" have with respect to use and appropriation of waters within their borders except as modified by the Compact[21]. Section 18 is disposed of in the Opinion by reference to the Ivanhoe case to the effect

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[21]Sec. 18 at Pg. 395 M.R.

[15]Op. Pg. 35.

[16]Section 8(a) Act, Pg. 389 M.R.

[17]Sections 13(b) and (c) Act, Pg. 393 M.R.

[18]Sec. 13(d) Pgs. 393-394 M.R.

[19]See Hutchins California Law of Water Rights 1956 at Page 124. See Hutchins Texas Law of Water Rights 1961 at Page 223.

[20]The Opinion does make reference to Sections 8(a) and 13(b) and (c). See Pg. 17 and footnote 38, and holds those Sections where used only to show that the Act was not to upset or alter the interbasin division, Pg. 17.

that Congress may impose conditions on the use of federal works[22] and that Section 18 merely preserves such rights as the states had at the time the Act was passed,[23] which right is said to be subject to the right for regulations of the river.[23] Section 18 is virtually nullified.[24]

Section 6 of the Act makes specific reference to present perfected rights, i.e., an appropriative right,[25] and Sections 8(a) and 8(b) both specifically refer to appropriation of water as being controlled, as to the United States and the appropriators, by the Compact, notwithstanding anything in the Act even to the contrary—as to the Project works and the storage or delivery of water therefrom[26].

Section 13(c) provides, among other things, that all land patents from the United States shall as to the rights to use of water from the River or its tributaries be subject to and controlled by the Compact[27]. Some 400,000 acres of land in Imperial Valley had been patented by the United States on the basis of the appropriative right to the use of Colorado River System water at Rockwood Gate under early appropriations when a valid appropriative right was a prerequisite to desert entries and patents therefor[28].

The Compact not only protects present perfected rights[29] as of June 25, 1929, but existing rights[30]

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[22]Op. Pgs. 36-37.
[23]Op. Pg. 37.
[24]Op. Pg. 38.
[25]Sec. 6, Pg. 387 M.R.
[26]Sections 8(a) and (b), Pgs. 389-390 M.R.
[27]Pg. 393 M.R.
[28]See Cal. Exs. 4000-4044. See in particular Ex. 4021, Pgs. 3-8 and Exs. 4011, 4013 and 4015 as samples of patents.
[29]Article VIII first sentence Pg. 376 M.R.
[30]Articles III(a) and VIII last sentence. Also see Ground No. 11 herein at Page 48 hereof.

as of that date up to 7,500,000 a.f. per a. and provides for cooperation between state water rights authorities on the one hand and Federal Reclamation and Geological Survey on the other hand as to determination and coordination of—appropriation and use of waters in the Colorado River Basin.[31] Section 14 of the Act makes the Act a supplement to the reclamation law.[32]

Despite all of the foregoing, the Opinion recites that it is the Act and the Secretary's Contracts that control apportionment in the Lower Basin and make the law of prior appropriation inapplicable[33] despite the Compact and prior law of the Court.[34] This seems to be upon the basis that as to times of shortage the Act and contracts do not require any particular formula and the matter is thus left to the discretion of the Secretary.[35] The Opinion, however, does say the Secretary must follow the standards of the Act[36] and may in no way upset, alter or affect the Compact division between Basins[37] though Congress did not intend to fetter the Secretary's discretion[38].

The Opinion points to no language in the Act to abolish the law of appropriation or to vest in the Secretary the unprecedented and unusual powers said to be created by the Act, except the fact the Act authorizes the Secretary to make contracts and that Section 4(a),

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[31]Article V Compact, Pg. 375 M.R.
[32]Pg. 394 M.R., Op. Pg. 35.
[33]Op. Pg. 36.
[34]Op. Pgs. 6-7, M.R. Pgs. 140-141.
[35]Op. Pg. 43.
[36]Op. Pg. 43.
[37]Op. Pg. 17.
[38]Op. Pg. 31.

second paragraph, contains a formula[39] intended to be permissive and optional with the states. The Opinion says no phrase or provision of the Act indicates that the law of appropriation was to survive, prevail or be followed in the Secretarial Contracts[40]. If the law of appropriation was the interstate rule and prevailed under the Compact, as held by the Master[41] and this Court[42] may it not well be asked what "phrase or provision" is there in the Act to put such a drastic and unprecedented power in the Secretary[42] and to abolish over 100 years of existing statutory and case law. If Congress had had any such intent it could have easily said so. Congress would not have left it to implication if such a drastic move had been intended. That Congress did not so intend and at the time and since has had no such intention is clear from the history of congressional conduct in the matter.

Since 1866 Congress has recognized the western water law of appropriation[43]. This Court had specifically recognized that law with its priority principle as ap-

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[39]Op. Pgs. 23, 25, 29.

[40]Op. Pg. 31.

[41]M.R. Pgs. 140-141, Op. Pgs. 36-37.

[42]The Opinion seeks to find support in the removal of the Act, in its formative stages, of a provision that all contracts of the Secretary would be subject to all prior appropriations. If such a prevision had remained in the Act it would have permitted appropriations subsequent to the passage of the Act and before the Secretary could get around to his contracts to come ahead of any contract right—an obvious unintended situation—therefore withdrawn. Not withdrawn, however, was Section 6 as to present perfected rights and no language was put in the Act to negative existing rights under the Compact provisions of Articles III(a) and VIII being applicable under the repeated Act references to the Compact being controlling, especially Section 13(d) which deals specifically with appropriative rights.

[43]14 Stat. 253, 30 U.S.C. 51.

plicable in the western states.[44] A series of Congressional Acts made appropriate rights and state law of appropriation applicable from 1866 to 1920[45]. This series of Acts making the state law of appropriation applicable on federal projects continued thereafter as evidenced by Section 18 of the Project Act[46] and a continuing series of Acts to the same effect thereafter[47]. Noticeable among these is the Boulder Canyon Project Adjustment Act of 1940[48] which in Section 14 thereof reaffirmed the policy of Congress that as to the Boulder Canyon Project Act works and the Colorado River System state rights were readopted and Sections 13(b),

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[44]*Atcheson vs. Peterson, 20 Wall 507 at 513-514; 22 L.Ed. 414 at 416 (1874); Broder vs. Natoma Water Co., 11 Otto 274 at 276; 25 L. Ed. 790 at 791 (1879).*

[45]16 Stat. 218, 30 U.S.C. 52 (1870)
19 Stat. 377 as amended in 43 U.S.C. 321 (1877)
26 Stat. 1101 as amended in 43 U.S.C. 946 (1891).
29 Stat. 599, 43 U.S.C. 664 (1897).
29 Stat. 603 (1897)
30 Stat. 36—16 U.S.C. 481 (1897)
32 Stat. 390, Sec. 8 Rec. Act, 43 U.S.C. 372, 383 (1902)
33 Stat. 224 (1904)
33 Stat. 628—16 U.S.C. 524 (1905)
33 Stat. 1020 (1905)
34 Stat. 375 (1906)
34 Stat. 1035 (1907)
35 Stat. 560 (1908)
35 Stat. 812 (1909)
36 Stat. 926—43 U.S.C. 524 (1911)
38 Stat. 250 Sec. 11 (1913)
41 Stat. 1068—16 U.S.C. 802(b) and 821 (1920).

[46]45 Stat. 1065 Sec. 18 Project Act, 43 U.S.C. 617q (1928).

[47]48 Stat. 1271, 43 U.S.C. 315b (1934)
50 Stat. 870, 16 U.S.C. 590u (1937)
Sec. 14 Project Adjustment Act, 54 Stat. 779, 43 U.S.C. 618m, 1940, again making state law of appropriation applicable and reaffirming Sections 13(b), (c) and (d) of the Project Act of 1928.
54 Stat. 1121, 16 U.S.C. 590z—L(b)(1940)
58 Stat. 888-9 as amended 33 U.S.C. 701-1 (1944)
Many other Acts as late as 1959.

[48]54 Stat. 779, 43 U.S.C. 618m.

(c) and (d) of the original Project Act were reaffirmed. In the Flood Control Act of 1944 as to waters west of the 98th meridian, navigation was made subservient to beneficial consumptive uses[49]. In 1956 Congress in the Colorado River Storage Project Act provided that subject to the provisions of the Colorado River Compact neither the impounding nor use of the water for power should impair the appropriation of water for domestic or agricultural purposes under state law[50].

The foregoing and many other Acts of Congress show a consistent and continuous recognition of the western water law of appropriation and its required observance and application under state law.

It seems hardly logical to say, in the light of the foregoing, that by implication or indirection or by inference Congress could at this time be said to have in 1928 as to the Project works or Colorado River System or any part of it so departed from its traditionally expressed recognition of the law of appropriation binding the Secretary of Interior and other federal officials to the observance of state law. If such had been the purpose or intent, it would seem certain to have been so expressed in clear language directly to the point. No such vast powers have ever been extended to the Secretary and have many times been denied.

So far as case law is concerned the Opinion recognizes that in 1922, and only four months after the Fall Davis Report (Ariz. Ex. 45) and immediately before the drafting of the Compact, this Court, follow-

[49]Sec. 1(b), 58 Stat. 888-889.
[50]70 Stat. 110—43 U.S.C. 620f, Section 7.

ing a long line of cases approving and applying the law of priority of appropriation, held the rule to be of interstate application[51] as did the Master[52]. Many cases by this Court followed also holding the law of prior appropriation applicable and several applicable interstate[53].

These Acts of Congress and these Decisions of this Court take us through the cycle of the making of the Compact, the passage of the Project Act and the signing of the various contracts herein. As hereinbefore stated[54] the California contracts were drawn and executed on the basis of the application of the law of priority of appropriation and recognition of appropriative rights, either perfected or existent, as of June 1929, as were the Nevada and Arizona Contracts[55].

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[51]Op. Pg. 6.

[52]M.R. Pgs. 140-141.

[53]*Arizona vs. California,* 283 U.S. 423 at 459 (1930); 75 L.Ed. 1154 at 1168-9. *Wyoming vs. Colorado,* 286 U.S. 494 at 503 (1931); 76 L.Ed. 1254 at 1259. *Nebraska vs. Wyoming,* 295 U.S. 40 at 42 (1934); 79 L.Ed. 1289 at 1290-91. *Calif-Oregon Power Co. vs. The Beaver-Cement Co.,* 295 U.S. 142 at 154 (1934); 79 L.Ed. 1356 at 59. *United States vs. Arizona,* 295 U.S. 174 at 183 (1934); 79 L.Ed. 1371 at 1377-78. *Washington vs. Oregon,* 297 U.S. 517 at 527 (1935); 80 L.Ed. 837 at 838-43. *Arizona vs. California,* 298 U.S. 558 at 565 (1935); 80 L.Ed. 1331 at 1336. *Ickes vs. Fox,* 300 U.S. 82 at 94 (1936); 81 L.Ed. 525 at 529. *Hinderlider vs. LaPalata et al.,* 304 U.S. 92 at 101 (1937); 82 L.Ed. 1202 at 1208. *Wyoming vs. Colorado,* 309 U.S. 572 at 576 (1939); 84 L.Ed. 954 at 957. *Nebraska vs. Wyoming,* 325 U.S. 589 at 599 (1944); 89 L.Ed. 1815 at 1821.

[54]See Ground No. 15 herein at Page 72 hereof.

[55]California contracts based on priority schedule under California and western water law. Arizona Contract drafted in recognition of Utah and New Mexico existing rights (Arizona Contract Section 7(g) Pg. 402 M.R.) and Nevada rights (Section 7(f) Arizona Contract Pg. 402 M.R.) and California rights (Section 7(h) Arizona Contract Pg. 402 M.R.) subject to pro tanto deductions (Sections 7(d) and (l) Pgs. 401 and 403 M.R.

The concept that the Secretary was bound to respect the law of appropriation, within California's limitations, and as to all states in the Lower Basin, not only as to present perfected rights but as to all other rights, has prevailed administratively and among all the parties from 1922 down to and including the filing of this case in 1952 and during the trial. It was tried on that basis.

A question of vast and far-reaching importance exists in this case, in addition to the question of water. It is this. Consider for a moment the position, not only of counsel in advising a client about to undertake a vast project, but the responsibility of local state agencies in planning such projects. Again consider the bond purchasers and then the population and industry dependent on what we have been taught to rely on—precedent. If an attorney or group of attorneys and their agency clients charged with the responsibility of supplying water to such vast areas are no longer entitled to rely on the Decisions of Courts as precedent, the very foundation and sanctity of our system of government is threatened. How to plan and what to rely upon becomes too much of an unknown factor.

It is respectfully submitted that judicial precedent and congressional action over this entire period of time negatives the vesting in the Secretary of unknown and untried powers or the abolition of priority of appropriation, a tried and tested method, for an unknown system.

15. There Is an Harmonious Interpretation of All the Contracts and the Project Act and Compact That Does Not Upset, Alter or Affect the Interbasin Division of the Compact. The Opinion Creates Conflict.

15. A Decision herein that will not create but avoid a conflict with the Upper Basin and enable all the contracts to be approved is possible. Not only possible but was and is the basis upon which the Act was passed as interpreted and provided in the contracts.

The California contracts were all drafted on the basis of observance of the law of prior appropriation[1]. The Secretary required this as his then interpretation of the Act[2]. California by the Limitation Act[3] and the first paragraph of Section 4(a) of the Act[4] was and is limited to 4,400,000 a.f. per a. of beneficial consumptive uses of the first 7,500,000 a.f. per a. of such uses—of System water plus one-half of the excess or surplus above 7,500,000 of Lower Basin *System* uses. The California Contracts provide that this water is to be released from storage at Boulder Canyon Reservoir for delivery at delivery points below, subject to pro tanto deduction for all other waters diverted from the Colorado River for that agency's uses,[5] but subject to availability to California under the Compact and Project Act[6]. The California Contracts total 5,362,000 a.f. per

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[1]See sample in Palo Verde Contract Section 6 at Pg. 424 M.R.

[2]See Ariz. Ex. 27 Tr. 242, Pg. A479 Ely D., Sp.M. Ex. 4.

[3]Pgs. 397-398 M.R.

[4]Pg. 382 M.R.

[5]See sample of contracts on this in Palo Verde Contract in Section 6 thereof at Pg. 424 M.R.

[6]See bracketed part at bottom Pg. 424 and top 425 M.R.

a. of such uses in California. This is, of course, subject to the above limitation on California and subject to protection as to present perfected rights[7] and controlled by the Compact[7].

The Nevada Contracts of 1942[8] and 1944[9] are premised likewise and when Nevada's quantity was raised from 100,000 a.f. per a. to 300,000 a.f. per a. the Secretary in 1944[10] required the System contract of accounting for Nevada tributary uses as pro tanto deductions from the increased amount[14] and also made the contract subject to availability[12] and specifically subject to the Compact[13]. Thus again a System contract.

The Arizona Contract executed shortly after the Nevada Contract, if interpreted in the light of the requirements of the Compact as to interbasin division and if in the light of a workable and harmonious formula to make it a unit in the Colorado River System as provided in the Act[14] and to recognize the rights of all Lower Basin States as to the interbasin allocations[15] of System *uses* as distinguished from supply[16] and

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[7]See Palo Verde Contract Section 12, Page 428 M.R.

[8]Ariz. Ex. 43, Tr. 253, Pg. 409, M.R.

[9]Ariz. Ex. 44, Tr. 254, Pg. 419 M.R.

[10]Immediately preceding the Arizona Contract of 1944, Nevada Contract January 3, 1944, Arizona, February 9, 1944.

[11]See Section 4 of 1944 contract amending Section 5 of 1942 contract, Pg. 420 M.R.

[12]See Section 5, 1942 contract, Pg. 410 M.R. and Section 4 of 1944 contract, Pg. 420 M.R.

[13]Section 14, Pg. 414 M.R.

[14]Section 16 Act, Pg. 394 M.R.

[15]Articles III(a) and (b) uses of System and existing rights (Article III(a) and last sentence of Article VIII) and present perfected rights (first sentence Article VIII).

[16]See Ground No. 4 herein at Pg. 16 hereof.

comply with the Act[17]—then the Arizona Contract fits into the previously established pattern.

The Arizona Contract may be declared valid and fit an overall pattern harmonious interbasin and interstate, by the following interpretations.

It is to be noted that the Secretary had this in mind in executing the Arizona Contract.

The Arizona Contract recognizes that in apportioning the III(a) and (b) *uses,* Utah and New Mexico are entitled to their share out of the III(a) and (b) uses though they are tributary uses only[18]. Thus no conflict interbasin or interstate and on a System basis.

The Arizona Contract recognizes the rights of Nevada to III(a) uses and a part of surplus[19]. The Nevada Contract already existed provided for pro tanto deduction of tributary uses[20]. Thus again no interstate or interbasin conflict and a System—not main stream deal.

The Arizona Contract recognizes the California Contracts within the first paragraph of Section 4(a) of the Act.[21] Still no conflict interbasin or interstate.

The Arizona Contract also recognizes that Arizona is chargeable for and subject to pro tanto reduction for all tributary uses above Lake Mead[22]. Again no

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[17]Section 4(a) second paragraph deals with System — not main stream *uses* and Act makes Compact controlling (Sections 8(a) and 13(b), (c) and (d)

[18]Section 7(g), Arizona Contract Pg. 402, M.R.

[19]Section 7(f), Arizona Contract Pg. 402 M.R.

[20]Section 4 (amending Sec. 5) of Nevada Contract at Pg. 420 M.R.

[21]Arizona Contract Section 7(h) Pg. 402 M.R.

[22]Arizona Contract Section 7(d) Pg. 401 M.R.

conflict and System recognition. Also all uses below Lake Mead from the main stream as well as all uses from Lake Mead[23].

The Arizona Contract also recognizes that the Arizona uses are subject to availability[24] under the Compact.[25]

The Arizona Contract also recognizes and agrees that present perfected rights to *System* uses are unimpaired by her contract[26].

Section 4(a) of the Act provides that the uses to be available to Arizona of 2,800,000 a.f. per a. of uses from the first 7,500,000 a.f. per a. are of III(a) uses, i.e., System uses[27]. Still no conflict and a System matter—not main stream.

It is only when the Master and the Opinion hold the Arizona Contract to be main stream only and giving all Arizona tributary uses to Arizona on a nonaccountable basis that a conflict between the Lower Basin States and also interbasin arises. This holding is contrary to Sections 7(g), 7(f), 7(h), 7(d) and 7(l) of the Arizona Contract[28].

The Arizona Contract does not mention the Gila River uses as accountable or not accountable. The United

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[23]Arizona Contract Section 7(l) Pg. 403 M.R.

[24]Arizona Contract Section 7(a) Pg. 400 M.R.

[25]Arizona Contract Section 13 Pg. 406 M.R.

[26]Arizona Contract Section 7(l) Pg. 403 M.R. (last sentence).

[27]Second paragraph Section 4(a) Act, Pgs. 382-383 M.R.

[28]The contract recognizes that of the total apportionment between Lower Basin States of the first 7,500,000 a.f. per a. of III(a) uses you have to include Utah and New Mexico (7(g)) Nevada tributary uses (7(f)) and Section 4 amending Section 5 of the Nevada Contract and Arizona tributary uses above Lake Mead (7(d)) and California uses (7(h)) and Arizona main stream uses below Lake Mead. (7(l)).

States alleges it is in doubt as to whether chargeable or not[29]. Arizona alleges the Gila uses are chargeable only to extent of 1,000,000 a.f. per a.[30] and then as III(b) uses and uses above 1,000,00 a.f. per a. to be chargeable as III(a) uses[31]. Nevada alleges the Gila uses chargeable as III(a) uses[32].

The case was tried on a System—not a main stream basis.

Therefore, if the Arizona Contract is interpreted as written[33] and Arizona is charged with her Gila uses as a part of the first 7,500,000 a.f. per a. of III(a) uses, there is no conflict interstate or interbasin. If this is not done and Arizona is not charged for her Gila uses as a part of III(a) uses, a conflict interbasin is created. The Upper Basin States cannot recognize such a holding as other than upsetting, altering and affecting the interbasin division[34].

For all the contracts to be approved in toto and to be in harmony with the interbasin division and fit into a complete Lower Basin pattern is for the Arizona Contract to be interpreted as requiring accounting for Gila uses and all other parties to be entitled to tributary uses as part of their share of III(a) uses apportioned

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[29]See U.S. Petition paragraph XXXVI, Pgs. 36-37.

[30]Arizona Complt., paragraph XXII Pg. 26.

[31]Arizona Reply to Cal. Answer paragraph 8 Pgs. 16-17.

[32]Nevada Petition paragraph XIV Pg. 18.

[33]Section 7(d) tributary uses above Lake Mead deducted. Utah and New Mexico to participate in the first 7,500,000 a.f. per a. of uses and be charged therefor, (7(g)) Nevada tributary uses deducted according to her contract (Section 4 of 1944 contract, Pg. 420 M.R.

[34]Arizona's Gila uses for the greater part are pre-1929 uses. Her safe annual uses therefrom were established as 1,750,000 a.f. per a. (See Pg. V-35 California Findings Vol. I).

to the Lower Basin but also chargeable therewith as against said ceiling. This enables honoring the interbasin division, the Compact, present perfected rights, existing rights to be satisfied from the first 7,500,000 and automatically recognizes priority as the basic rule of the west and applicable herein.

The Pleadings Set Forth This Case Upon This Basis.

This Is the Basis Upon Which the Case Was Tried.

The Evidence Is Complete Upon This Basis as to All Uses, Including Utah, New Mexico, Nevada and Arizona Tributary Uses.

This Basis Needs No Further Trial or Proceedings—Only a Decree Herein.

If the Gila and other tributary uses are not chargeable, there can be little finality to a Decision herein, and there is certain to be interbasin conflict and almost unlimited administrative multiple problems.

To say that charging tributary uses or a System concept is a scheme of California to get more water at Arizona's expense[35] and that California would reduce Nevada's to 120,500 a.f. per a. is hardly in keeping with the record. The charging of tributary uses was done by the Secretary in 1944.[36] The Gila is the only matter not settled in the Secretarial Contract with Arizona in 1944 and adversely to the Opinion herein.

California may justly be accused of self interest, as may all parties hereto. But the Act required a complete underwriting of all United States costs, including

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[35]Op. Pgs. 13, 18.

[36]Nevada reduced herself by Sec. 4 of 1944 contract, Pg. 420 M.R., Arizona agreed to tributary accounting above Lake Mead (Section 7(d)) Arizona Contract, Pg. 401 M.R.

interest, on the Project works at Lake Mead[37]. California agencies guaranteed and underwrote all this. Metropolitan furnished its own finances for its works.

This petitioner respectfully requests its Petition be granted and an opportunity, not heretofore had, for oral argument in support of its Petition and for clarification of the proposed Decree.

Respectfully submitted,

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Special Counsel,

R. L. KNOX, JR.,
Chief Counsel,

JAMES CARTER,
Associate Counsel,

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Attorneys for Imperial Irrigation District.

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[37]Section 4(b) of Act.

Certificate.

I, Harry W. Horton, one of the attorneys for the Imperial Irrigation District, a defendant herein, certify that the above Petition for Rehearing is presented in good faith and not for delay.

HARRY W. HORTON

This Petition is supplemental to the Petition of other California Defendants.

Service of the within and receipt of a copy thereof is hereby admitted this.....day of September, A. D. 1963.

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9-10-63—500