Supplement and Amendment to Imperial Irrigation District's Form of "Decree of Court" as Heretofore and Herewith Submitted, Arizona v. California, No. 8 Original, 1963 Term (U.S. filed Dec. 18, 1963).

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

IN THE

Supreme Court of the United States

October Term, 1963
No. 8 Original

STATE OF ARIZONA,

Complainant,

vs.

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

Defendants,

UNITED STATES OF AMERICA and STATE OF NEVADA,

Interveners,

STATE OF NEW MEXICO and STATE OF UTAH,

Parties.

Supplement and Amendment to Imperial Irrigation District's Form of "Decree of Court" as Heretofore and Herewith Submitted.

HARRY W. HORTON,
Special Counsel,

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

JAMES H. CARTER,
Assistant Counsel,

HORTON, KNOX, CARTER & RUTHERFORD,

895 Broadway,
El Centro, California,

Attorneys for Imperial Irrigation District.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

INDEX

TO

SUPPLEMENT AND AMENDMENT

IN THE

Supreme Court of the United States

October Term, 1963
No. 8 Original

STATE OF ARIZONA,
Complainant,

vs.

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

UNITED STATES OF AMERICA and STATE OF NEVADA,
Interveners,

STATE OF NEW MEXICO and STATE OF UTAH,
Parties.

Supplement and Amendment to Imperial Irrigation District's Form of "Decree of Court" as Heretofore and Herewith* Submitted.

Supplement and Amendment.

This supplement and amendment to Imperial Irrigation District's draft of "Decree of Court" is occasioned by and results from conferences held in Washington, D.C., November 19th and 20th, 1963.

At or prior to said conferences California, Arizona, the United States and Imperial Irrigation District had

*See yellow covered "Decree of Court as submitted by Imperial Irrigation Dictrict" with explanatory statement; (Pages a and b) and Index (Pages i and ii) with references to pleadings, issues, reference, trial and Master's Report; (Pages 1-8) and "Decree" (Pages 9-52) with definitions, injunctive provisions, directions and reservations of jurisdiction (Pages 52-62).

exchanged suggested drafts. These drafts, except Imperial's, followed in general the style and scope of the Master's recommended Decree[1] attached to his Report. Imperial, for reasons stated in its Explanatory Statement[2] and reasons hereinafter stated, submitted not only material on the Master's Draft[3] but additional material covering matters determined by the Master and this Court and not covered in the Master's form of Decree.

As all parties hereto, including the Solicitor General and his staff, have participated in the conferences, substantial acquiescence has been reached upon the language of many matters. For convenient reference, in the main, the parties in their various drafts have adopted the Master's use of Roman numerals for his topic heads, capital letters and Arabic numerals for subtopics, and have in general followed as closely as possible the Master's structure[4].

It has been tentatively agreed that, for the convenience of all parties hereto and the Court, there will be submitted by the Solicitor General a draft of the items agreed upon, leaving those items not agreed upon or additional items, to be presented by the parties so desiring.

Imperial's Amendments.

Imperial, in drafting its "Decree of Court" as heretofore submitted, did so in compliance with and in deference to the Opinion of this Court, or the Master's

---

[1]See Pages 345-361 M.R.

[2]See Page *a* at front of material submitted.

[3]See Pages 52-62 of Imperial's proposed "Decree."

[4]Master's form, Pages 345-361 M.R. Imperial's draft of "Decree", Pages 52-62 thereof.

Report consistent therewith on matters not covered in the Opinion. For instance,—language in Imperial's draft of "Decree" relative to such questions as whether the Compact was or is now relevant or controlling[5] and whether the Compact dealt or now deals with only the main stream as distinguished from the Colorado River System[6] and whether or not tributary uses in the Lower Basin are or can remain uncharged to the states of use[7] and whether Secretarial discretion as distinguished from western water law of priority and equitable apportionment should prevail[8]—do not state and should not be taken as a statement of Imperial's or California's position in the matter but merely as a paraphrase of the Opinion or Report.

Imperial wishes to make it clear that, consistent with due respect and deference to this Court and its Opinion herein, it wishes to reserve the right in further proceedings herein or in other cases or proceedings upon the subject, to urge its contentions that may be at variance with its language in Imperial's draft of "Decree."

For instance, if this Court's Decree provides that tributary uses, including the Gila, are not chargeable to the states of use[9] as between Lower Basin States and holds that issues or disputes between Basins, including the application of the Compact, are not involved herein[10], Imperial respectfully reserves the right, de-

---

[5]For example: Topic 8, Pg. 26 Imperial "Decree."

[6]For example: Topic 11, Pg. 31, Imperial "Decree."

[7]For example: Topics 9 and 13-15, inc. Pgs. 27, 32-36 Imperial "Decree."

[8]For example: Topic 28, Pgs. 47-48 Imperial "Decree."

[9]Op. Pgs. 15-16, 18-19, 23, 25, 34, 40-41.

[10]Op. Pgs. 16 and 17.

spite any language placed in its suggested "Decree," to take such positions before this or other Courts in proper proceedings as may protect the Lower Basin against reduction of its mainstream uses in any accounting of the Lower Basin beneficial consumptive uses of 7,500,000 or 8,500,000 a.f. per a. or accounting in the application of the Mexican Treaty burden.

The position taken by Imperial Irrigation District is set forth in its own separate Closing Brief (October 2, 1961) before this Court and its separate Petition for Rehearing herein.

Imperial's Supplements to "Decree."

As pointed out in the "Explanatory Statement" to Imperial's submitted "Decree of Court,"[1] the mere adoption of a Decree in the general form and scope of the Master's recommended Decree, attached as it is as a part of the Report, leaves several of its legal conclusions stated in the Report as not settled or referred to in the Decree[2]. The Opinion herein holds that so-called salvaged water may not be used without accounting or charge as claimed by United States[3]. This and some other items are of vital importance in the administration of the waters of the Colorado River and the contracts. Imperial has made an effort to point out some of these matters decided in the Opinion or consistent with the Opinion in the Master's Report, and has supplied by footnote the documentation thereon.

---

[1]Page *a* of yellow covered material submitted by Imperial.

[2]For example. The Master holds evaporation loss is not to be charged as a beneficial use but treated as non-existent water. (See Pgs. 187 and 313 M.R.)

[3]See Op. Pg. 52.

Imperial, therefore, lists the following items as matters of law in the case it feels should be included in the Decree in addition to the "agreed" language as to so-called non-disputed items, the list of which is to be furnished to this Court subject to each party's suggestions as to additional or disputed items.

Imperial has no particular preference as to language on the following topics but merely calls this Court's attention to the topics or items of law with reference to its submitted "Decree" and documentation thereon.

1. Evaporation and Losses in Transit.

This was an issue in the pleadings in the case, plead as such by Arizona as a matter of some 700,000 a.f. per a. magnitude on the mainstream[4]. This issue was specifically joined by the United States asking the issue be resolved.[5] The Master resolved the question by holding such losses to be not chargeable to California or others and to be treated as non-existent water or diminution of supply[6].

It is submitted that this ruling should be a part of the Decree[7].

2. Salvage Water Chargeable.

The United States claimed that it should be permitted to use without accounting therefor any water salvaged. This Court rejected the claim and held

[4]Ariz. Bill of Complt. paragraph XXII(3) Pg. 26 and item 6, Ariz. prayer Pg. 31, Bill of Complt.

[5]U.S. Pet. in Intervention paragraph XXX Pgs. 32-33.

[6]M.R. Pgs. 187 and 313.

[7]See Item 18 Pgs. 37-38 Imperial "Decree."

salvaged water use to be chargeable[8]. This is not covered by the suggested "Decree" form of the Master being submitted to this Court.

3. Surplus or Excess.

The question of whether the additional 1,000,000 a.f. per a. of water the Lower Basin is allowed to put the beneficial use under the provisions of Article III(b) of the Compact is to be considered apportioned or unapportioned, i.e., whether as excess or surplus above the 7,500,000 of such uses permitted by Article III(a) of the Compact was a much contested issue in the case. Arizona claimed that it was not surplus or excess to which California had any right of use[9]. The United States also raised this issue specifically and asked that it be resolved[10]. The Master resolved this issue by holding that under the Project Act and Limitation Act his so-called III(b) use is excess or surplus to which California is entitled one-half thereof and Arizona to its share thereof as surplus or excess[11]. The short form type Decree being submitted is silent on the subject and we submit for consideration Item 20, Pages 39-40 of Imperial's draft of "Decree."

4. Validation of Contracts.

Arizona put in issue the validity or invalidity of the California contracts[12] and the validity of its

---

[8]Op. Pg. 52. See Topic 21 Pg. 40 Imperial "Decree."

[9]See Ariz. Bill of Complt. Paragraph XXII, Pg. 25.

[10]See U.S. Intervention Paragraph XXXII, Pgs. 29-30.

[11]M.R. Pgs. 200, 305-306, 382-383.

[12]Ariz. Bill of Complt., Paragraph XI, Pgs. 16-17; XII(c) Pgs. 18-19; XXIII Pgs. 26-27.

own contract[13], and California plead the validity of the California contracts[14]. The United States plead the validity of all of said contracts, including the Nevada contracts—all as valid, binding covenants[15]. The Master passed on these issues and held the contracts all valid, including the Arizona and Nevada contracts, except that Article 7(d) of the Arizona contract and Article 5(a) of the Nevada contract were held invalid[16]. Otherwise, the Master held water delivery contracts "valid and binding both on the United States and the other contracting parties."[17]. Arizona's contentions of invalidity of other provisions of Section 7 of her contract were rejected by the Master[18]. The Opinion disagrees with the Master as to the contracts only with respect to uses from the mainstream above Lake Mead[19]. The proposed short form Decree is silent on the validity of these contracts. Imperial refers to its suggestions in its items or topics 7 a, b, c, and d, Pgs. 23-26 and item 10, Pgs. 28-31. It is imperative that these contracts and their terms, so forcefully contested as to validity and passed on by the Master be included in the Decree herein. A simple statement in the Decree supporting the United States' stand,

---

[13]Ariz. Bill of Complt. Paragraph XIII Pg. 19; XVII Pg. 21; XXIII Pgs. 26-27.

[14]Cal. Answer to Arizona Complt., Paragraphs 29-37, Pgs. 30-38.

[15]See U.S. Intervention Paragraph XXXI, Pgs. 27-28. Also see Paragraphs XV through XX, Pgs. 14-18 do.

[16]M.R. Pgs. 201, 207, 237-247, 210.

[17]M.R. Pgs. 201, 207, bottom Pg. 208, 210.

[18]M.R. Pg. 202.

[19]Op. Pg. 41.

i.e., the contracts are all "valid and binding covenants"[20] and as the Master held — "valid and binding both on the United States and the other contracting parties"[21] would possibly suffice.[22]

5. Use Distinguished From Supply.

A matter that has lead to, and still does, give rise to great confusion herein and that language used in the Opinion, leads to further confusion is the repeated reference to the 7,500,000 a.f. per a. of beneficial consumptive *uses* apportioned to the Lower Basin by Article III(a) of the Compact as being the same as and to be satisfied "out of the *average annual delivery* of water at *Lee Ferry* required by the Compact."[23]

Arizona contended that the obligation of the Upper Basin to deliver 75,000,000 a.f. in each consecutive 10-year period under III(d) of the Compact, herein in the Opinion referred to as average annual delivery of 7,500,000 a.f., was correlative with III(a) which relates to *uses* and not *supply*. This the Master repudiated and clearly distinguished between *supply* and beneficial consumptive *use*[24]. This is highly important as the difference may be as much as 1,500,000 a.f. per a. Its clarification could be done, possibly by a definition pointing out the distinction. See Item 17, Page 37, Imperial draft of "Decree."

---

[20]U.S. Intervention Paragraphs XXXI, Pgs. 27-28.

[21]M.R. Pg. 201.

[22]The California contracts in the aggregate for 4.4 of III(a) and one-half excess.

[23]Op. Pgs. 9, 15, 18-19, 20, 34.

[24]M.R. Pgs. 144 and 149.

6. Present Perfected Rights.

This subject relates to the proposed definition designated as I(g) in the proposed short form Decree.

The Master attempted a definition at Page 346 of his Report and Recommended Decree. The attempted definition contains two conflicting statements, (1) a right acquired in accordance with state law, and (2) exercised by the actual diversion of a specific quantity of water that has been applied to a defined area or use.

The Master also provided in his recommended Decree that the parties, within two years, furnish to this Court and to the Secretary of Interior a list of their respective claims of present perfected rights and their priority dates. That if the parties were not able to agree thereon, any party might apply to the Court for their determination[25].

The difficulty with the Master's suggested definition is the direct conflict between state law under western water law and his requirement of actual application to a defined area. The issue of what state law required was not tried before the Master and he apparently misconceived western water law. There is no such requirement that before a right by appropriation may be protected as against all junior rights, the right is limited to the amount actually applied to a particular area. As long as due diligence, in keeping with the magnitude of the project, is being exercised in its completion, the right to complete the project within

[25]Numeral VI Pg. 359 M.R.

its original plan and claims is protected as a matter of real property right. It is not the purpose here to suggest a precise definition but rather to point out that a precise definition should not be attempted in the Decree. That instead the determination be made on the claims submitted by the parties when the claims can be determined in the light of the facts and circumstances submitted and the law can be submitted on the precise claims.

One example should suffice. If a large U.S. Reclamation or other public agency project costing millions of dollars was 99% complete but water had not yet been turned in or only applied to 10 acres out of a project area of 100,000 acres, under the Master's suggested definition there would be no right herein recognized as protected. Again, this is not the law[26].

As there is no federal statute defining for the states their respective water laws and as the western states and states herein involved do recognize and apply the states' laws of priority of appropriation, it is submitted that the definition of present perfected rights be confined to rights acquired in accordance with western or state water law, leaving until any needed hearing on the claims the determination of what is and what is not a perfected right.

7. Reservation of Jurisdiction.

Paragraphs VIII and IX of the Master's proposed Decree[27] were apparently designed by the

---

[26]See Imperial Irrigation District Brief in Volume III, April 1, 1959, of Cal. Findings and Conclusions, Pgs. IID-B28-53, especially at B49.

[27]M.R. Pg. 360.

Master to reserve jurisdiction in this Court for future consideration of all such matters and issues as this Court desires to consider.

It is submitted that one of two methods be used to protect this Court as well as the parties hereto against the possible claim that this Court may not alter or modify its rulings herein on the basis that the Decree is res adjudicata of the issues sought to be considered or reconsidered.

One method would be to list in general language items not affected by the Decree[28]. The other method is a general reservation broad enough to clearly indicate the Court is not to be bound by any issue of res adjudicata and reserves all jurisdiction necessary to review, amend, reverse or modify its Decree as the Court from time to time may determine as necessary or advisable.

It is submitted that this Court should not desire to find itself embarrassed by a provision in the Decree or ruling if the United States or parties can later convince this Court that this Court's determination has been erroneous or unworkable.

The parties hereto seem to be in agreement that a reserved issue should include any issue of interpretation of the Colorado River Compact[29].

With respect to the issue of tributary uses in the Lower Basin, it is submitted the language reserving jurisdiction should clearly state that any issue concerning Lower Basin tributary uses and

[28]Imperial's Decree at Pgs. 60-62 contains such. Other parties have their preferred language.

[29]See VIII(D) Pg. 61, Imperial and U.S. drafts or comments.

their accountability as against Lower Basin permitted uses or the Mexican Treaty burden are not decided as to the application or effect of the Compact[30]. That the tributary accountability is a reserved issue if found by the Court to be necessarily so. Otherwise, the Court might be found in the embarrassing position of not being able to prevent the Lower Basin being deprived of 2,000,000 a.f. per a. of its mainstream uses, i.e., only able to use 5,500,000 a.f. per a. of the permitted 7,500,000 a.f. per a. if as between the Lower Basin tributary uses remain chargeable, or, in reverse, the Upper Basin compelled to submit 9,500,000 a.f. per a. or 10,500,000 a.f. per a. of beneficial uses in the Lower Basin.

It is respectfully submitted that the non-agreed items are of major importance and Imperial respectfully requests either briefs, conferences with the Court, or oral argument to settle these matters and that Imperial be given an opportunity to participate in either or all through its own counsel.

Respectfully submitted,

HARRY W. HORTON,
Special Counsel,

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

JAMES H. CARTER,
Assistant Counsel,

HORTON, KNOX, CARTER & RUTHERFORD,
Attorneys for Imperial Irrigation District.

---

[30]Op. Pgs. 16, 17, 18.