United States Supreme Court

373 U.S. 546

ARIZONA v. CALIFORNIA (373 U.S. 546)

Argued: Nov. 13 and 14, 1962. --- Decided: June 3, 1963

Mr. Justice DOUGLAS, dissenting.

This case, I think, has been haunted by several irrelevancies. First, is the fact that the only points from which California can take the water of the Colorado River System are on the mainstream above Laguna Dam, there being no tributaries in that State. This fact, I think, leads the Court to the inference that the tributaries which come in below Laguna Dam contain waters to which California has no rights. The controversy does concern the waters of the lower tributaries, but only indirectly. California does not seek those waters. She merely seeks to have them taken into consideration in the formula that determines the allocation between her and Arizona.

Another irrelevancy is the fact that only 2 1/2% of the Colorado River drainage basin is in California although 90% of the water which California appropriates leaves the basin never to return. If we were dealing with problems of equitable apportionment, as we were in Nebraska v. Wyoming, 325 U.S. 589, 65 S.Ct. 1332, 89 L.Ed. 1815, that factor would be relevant to our problem. And it would be relevant in case we were dealing with litigation concerning waters in excess of the amount granted California under the Project Act. But it is irrelevant here because the only justiciable question that involves the volume of water is one that concerns the source of supply out of which California's 4,400,000 acre-feet will be satisfied-a matter which I think Congress resolved differently than has the Court.

Third, is a mood about the controversy that suggests that here, as in the cases involving multipurpose federal dams, federal control of navigable streams controls this litigation. The right of the Federal Government to the flow of the stream is not an issue here. We deal with a very unique feature of the irrigation laws of the 17 Western States.

The question is not what Congress has authority to do, but rather the kind of regime under which Congress has built this and other irrigation systems in the West. Heretofore those regimes have been posited on the theory that state law determines the allotment of waters coming through the irrigation canals that are fed by the federal dams.

Much is written these days about judicial lawmaking; and every scholar knows that judges who construe statutes must of necessity legislate interstitially, to paraphrase Mr. Justice Cardozo. Selected Writings (1947 Hall ed.), p. 160. The present case is different. It will, I think, be marked as the baldest attempt by judges in modern times to spin their own philosophy into the fabric of the law, in derogation of the will of the legislature. The present decision, as Mr. Justice HARLAN shows, grants the federal bureaucracy a power and command over water rights in the 17 Western States that it never has had, that it always wanted, that it could never persuade Congress to grant, and that this Court up to now has consistently refused to recognize. Our rulings heretofore have been consistent with the principles of reclamation law established by Congress both in nonnavigable streams (Ickes v. Fox, 300 U.S. 82, 94-96, 57 S.Ct. 412, 416-417, 81 L.Ed. 525) and in navigable ones. Nebraska v. Wyoming, 325 U.S. 589, 612, 65 S.Ct. 1332, 1348, 89 L.Ed. 1815. The rights of the United States as storer of waters in western projects have been distinctly understood to be simply that of 'a carrier and distributor of the water.' Ickes v. Fox, Supra, 300 U.S., p. 95, 57 S.Ct. p. 417. As we stated in Nebraska v. Wyoming, supra, 325 U.S. p. 614, 65 S.Ct. p. 1349:

'The property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals. The water right is appurtenant to the land, the owner of which is the appropriator.

The water right is acquired by perfecting an appropriation, i.e., by an actual diversion followed by an application within a reasonable time of the water to a beneficial use.'

And that result was reached even though under those other projects, as under the present one, the Secretary had broad powers to make contracts governing the use and disposition of the stored water. See, e.g., 43 U.S.C. §§ 389, 440.

The men who wrote the Project Act were familiar with western water law. Wyoming v. Colorado, 259 U.S. 419, 42 S.Ct. 552, 66 L.Ed. 999, had recently been decided, holding that priority of appropriation was the determining factor in reaching an equitable apportionment between two Western States. Id., 259 U.S. at 470, 42 S.Ct. at 559. Yet, S.Rep.No. 654, 69th Cong., 1st Sess. 26-27, contains no suggestion that Congress, by § 5, was displacing a doctrine as important to these Western States as the doctrine of seizin has been to the development of Anglo-American property law. Instead, only 25 lines of that report are devoted to § 5, and those lines clearly support Mr. Justice HARLAN's conclusion that the section was designed primarily as a financial tool.

The principle that water priorities are governed by state law is deep-seated in western reclamation law. In spite of the express command of § 14 of the Project Act, which makes the system of appropriation under state law determine who has the priorities, the Secretary of the Interior is given the right to determine the priorities by administrative fiat. Now one can receive his priority because he is the most worthy Democrat or Republican, as the case may be.

The decision today, resulting in the confusion between the problem of priority of water rights and the public power problem, has made the dream of the federal bureaucracy come true by granting it, for the first time, the life-and-death power of dispensation of water rights long administered according to state law.

At issue on the other main phase of the case is the meaning of the California limitation contained in § 4(a) of the Project Act. The Court, however, does not use the present litigation as an occasion to determine Arizona's and California's rights under that Act, but as a vehicle for making a wholly new apportionment of the waters in the Lower Basin and turning over all unresolved problems to the Secretary of the Interior. The Court accomplishes this by distorting both the history and language of the Project Act.

The Court relies heavily on the terms and history of a proposed tri-state compact, authorized by § 4(a) but never adopted by the States concerned, viz., Arizona, California and Nevada. The proposed tri-state compact provided for a division of tributary waters identical to that made by the Court, insofar as the Gila is awarded to Arizona. The Court is reality enforces its interpretation of the proposed tri-state compact and imposes its terms upon California.

The Court, however, cannot find in the proposed tri-state compact (the one that was never approved) an allocation of the tributaries other than the Gila; and in order to justify their allocation to Arizona it is forced to turn to the terms of 'proposals and counterproposals over the years,' instead of to the language of the Project Act. The result is the Court's not that of Congress, whose intent we have been called upon to discover and effectuate. The congressional intent is expressed in § 4(a), which provides that California shall be limited to the use of 4,400,000 acre-feet 'of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact' (the compact that was approved) and to not more than half of 'any excess or surplus waters unapportioned by said compact.' [1] These waters are defined in the Colorado River Compact as system waters, and not as waters in the mainstream. Yet the Court restricts California to mainstream waters. That is the essence of the difference between us.

As I read the Colorado River Compact and § 4(a) of the Project Act, California is entitled to add all uses of system waters by Lower Basin States in the tributaries to those waters available in the mainstream to determine (1) how much water she can take out of the first 7,500,000 acre-feet apportioned to the Lower Basin States by Article III(a), and (2) whether there are excess or surplus

system waters, including Article III(b) waters, of which California has a right to no more than one-half.

I disagree with the Court's conclusion that § 4(a) of the Project Act refers only to the water flowing in the mainstream below Lee Ferry. The Project Act speaks clearly, and only, in terms of the waters apportioned to the Lower Basin States by Article III(a) of the Compact, viz., California may take no more than 4,400,000 acre-feet 'of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact.' Article III(a) of the Compact apportions 'from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum.' The term 'Colorado River System' is defined in Article II(a) as including the entire mainstream and the tributaries. [2]

There is, moreover, not a word in Senate Report No. 592, 70th Cong., 1st Sess., reporting the Project Act, that indicates, suggests, or implies that the Colorado River is to be divided and California or any other Lower Basin State restricted to mainstream water. The Report indeed speaks of 'enthroning the Colorado River compact' (id., p. 16), which embraces the entire river system in the United States, not just the mainstream. See Article II(a). Arizona's fears that California would take 5,400,000 acre-feet from the first 7,500,000 acre-feet, if the entire system were used as the source, are, I think, unfounded. Out of the first 7,500,000 acre-feet of system water, California would be entitled only to 4,400,000 acre-feet. Out of the balance or 3,100,000 acre-feet, California would be excluded.

How much of this 3,100,000 acre-feet should go to Arizona and how much to Nevada, New Mexico, and Utah cannot be determined on this record, the relevant findings not being made in light of the construction which has been given to the Project Act, the Compact, and the Limitation Act. We cannot take as a guide the provisions in the second paragraph of § 4(a) of the Project Act, viz., the 300,000 acre-feet proposed for Nevada and the 2,800,000 acre-feet proposed for Arizona, because those provisions come into play only if Arizona, California, and Nevada enter a compact, which to date they have not done. The division of 3,100,000 acre-feet should, I think, be made among Arizona, Nevada, New Mexico, and Utah pursuant to the principles of equitable apportionment. Nebraska v. Wyoming, 325 U.S. 589, 65 S.Ct. 1332, 89 L.Ed. 1815.

The evidence is clear that the dependable Lower Basin supply does not exceed 8,000,000 acre-feet if the river system is taken as a whole. By Article III(b) of the Compact the Lower Basin States can increase their beneficial use by 1,000,000 acre-feet, if additional water is available. By § 4(a) of the Project Act California is entitled to not more than one-half of any excess that is 'unapportioned by said compact.' The amount apportioned to the Lower Basin States by the Compact is 8,500,000 acre-feet, viz., Article III(a) waters in the amount of 7,500,000 'in perpetuity' plus Article III(b) waters, which are highly contingent. After the Upper Basin is given its 7,500,000 acre-feet, the 'unapportioned' excess described in Article III(b) (b) would be available. As noted, the present permanent supply for the Lower Basin would not exceed 8,000,000 acre-feet from the mainstream and the tributaries. As I read the Compact and the Project Act, California would get out of the 8,000,000 acre-feet 4,400,000 acre-feet plus not more than one-half of Article III(b) waters, which, under the foregoing assumption, would amount to one-half of 500,000 acre-feet. If there is a further surplus (either in the sense of Article III(b) or in the more remote sense in which § 4(a) of the Project Act uses that word), [3] the division between the Lower Basin States should follow the principles of equitable apportionment which we applied in Nebraska v. Wyoming, 325 U.S. 589, 65 S.Ct. 1332, 89 L.Ed. 1815. If § 4(a) is to be read as referring to system waters, California's total rights in available Lower Basin waters would amount to not more than 4,650,000 acre-feet annually (4,400,000 plus 250,000). She would also have a right, albeit highly contingent, to any additional Article III(b) waters that become available to the Lower Basin and to such share of the waters in both Basins over 16,000,000 acre-feet (7,500,000 to Upper Basin, 7,500,000 to Lower Basin under Article III(a), plus 1,000,000 to Lower Basin under Article III(b)) as is equitable. Nebraska v. Wyoming, supra.

Under the Court's reading of § 4(a), however, a far different division is made. The Court says that the language of § 4(a) limiting California to 4,400,000 acre-feet 'of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact' (7,500,000 acre-feet per annum) is just a 'shorthand' way of saying that California is limited to 4,400,000 acre-feet of the water available in the mainstream. According to the Court, California has no rights in system waters, as this would include rights in the tributaries, and the Court has decided that the tributaries belong exclusively to Arizona. Thus, if California is to obtain any 'excess or surplus' waters, the surplus must be flowing in the mainstream. That is, California can assert her right to 'surplus' waters only when the flow of the mainstream is more than 7,500,000 acre-feet per year. But if, as the evidence shows, the dependable Lower Basin supply of system waters is only 8,000,000 acre-feet per annum, 2,000,000 of which are in the tributaries, California can look only to 6,000,000 acre-feet in the mainstream. Thus, California will never be entitled to any of the additional Article III(b) waters (500,000 acre-feet) in the Lower Basin system. Those 'surplus' waters would necessarily be in the tributaries, and under the Court's interpretation they belong exclusively to Arizona, § 4(a) to the contrary notwithstanding.

As a practical matter, the only place California can get system waters is from the mainstream, there being no tributaries of the Colorado River in California. The question to be decided is whether or not under § 4(a) of the Project Act California can take into consideration Arizona's uses on her tributaries in determining her (California's) right to divert water from the mainstream. The Court says California cannot, because when the Project Act refers to her rights in system waters as the measuring rod, it really means her rights in mainstream waters. With due respect, the majority achieves that result by misreading the Colorado River Compact, the Project Act, and by misreading the legislative history leading up to the California Limitation Act. An analysis of the legislative history will show, as already noted, that the Court's analysis is built mainly upon statement made by the various Senators in arguing the terms of a proposed tristate compact that was never made.

The Project Act needs the Compact to achieve a settlement of the issue of the apportionment of water involved in this case. It is argued that an apportionment, constitutionally, can be achieved only in one of two ways-by an interstate compact or by a decree of equitable apportionment. That proposition need not, however, be resolved here, because (apart from a contingency not relevant here) the Project Act by the express terms of § 4(a) is dependent on the ratification of the Compact. [4] If the Compact is ratified, it and the Project Act are to supply the measure of waters which California may claim. [5]

The overall accounting of the waters is provided for in Article III of the Compact. By Article III(a) 'the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum' is apportioned 'in perpetuity to the Upper Basin and to the Lower Basin, respectively,' meaning that each basin gets 7,500,000 acre-feet. By Article III(b) the Lower Basin is given the right to increase its beneficial consumptive use by 1,000,000 acre-feet per annum. By Article III(c) any deficiency owed Mexico 'shall be equally borne by the Upper Basin and the Lower Basin.' The Lower Basin by definition includes California. Article II(g). Tributary uses in Arizona diminish California's right under Article III(c) to require the Upper Basin States to supply water to satisfy Mexico. California is to be charged with water from the Gila when the accounting is made with Mexico. That is, California is presumed to enjoy the waters from the Lower Basin tributaries for purposes of Article III(c) of the Compact. It is manifestly unfair to charge her with those waters under Article III(c) of the Compact and to say that she is entitled to none of them in computing the 4,400,000 acre-feet which the Limitation Act and the Project Act give her out of the waters of Article III(a) of the Compact.

Section 1 of the Project Act authorizes the Secretary of the Interior to construct and operate the Boulder Dam 'subject to the terms of the Colorado River compact.' By § 4(a) the Project Act is not to be operative unless and until the seven States 'shall have ratified the Colorado River compact'; and if they do not, then 'the provisions of the first paragraph of Article XI of said compact' must be waived. Moreover, the 4,400,000 acre-feet allotted to California by § 4(a) are described in terms 'of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact.' Section 4(a) describes the 'excess or surplus' waters in terms of those 'unapportioned by

said compact'; and it makes all 'uses always to be subject to the terms of said compact.' The compact is, indeed, the underpinning of the Project Act.

The Compact apportions the waters 'from the Colorado River System,' which by definition includes the mainstream and its tributaries in the United States. And California's Limitation Act, containing the precise language of the allocation of waters in § 4(a) of the Project Act, describes the 4,400,000 acre-feet in terms 'of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado river compact.' [6]

So it seems that the Compact is the mainspring from which all rights flow. The 7,500,000 acre-feet of water apportioned by Article III(a) of the Compact 'from the Colorado River System' to the Lower Basin is the supply out of which California's 4,400,000 acre-feet is to be taken.

To repeat, the words 'excess or surplus waters unapportioned by said compact,' as used in § 4(a) of the Project Act, mean, in my view, all waters available in the Lower Basin in excess of the first 7,500,000 acre-feet covered by Article III(a) of the Compact. [7]

The additional 1,000,000 acre-feet described in Article III(b) was added to the Compact 'to compensate for the waters of the Gila River and its tributaries being included within the definition of the Colorado River System.' Arizona v. California, 292 U.S. 341, 350-351, 54 S.Ct. 735, 739, 78 L.Ed. 1298. And though Arizona has long claimed those 1,000,000 acre-feet as hers, that construction of Article III(b) of the Compact was rejected long ago. Arizona v. California, supra, 292 U.S. p. 358, 54 S.Ct. p. 742.

While the legislative history of the California limitation contained in § 4(a) looks several ways, much of it is legislative history made with a view to its favorable use in the future-a situation we have noticed on other occasions. See Schwegmann Bros. v. Calvert Corp., 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035, 19 A.L.R.2d 1119. I think an objective reading of that history shows that the tristate compact authorized by § 4(a) of the Project Act (a compact never made) was the one and only way visualized by that Act through which Arizona could get the exclusive use of the waters of the Gila River. For the second paragraph of § 4(a) of the Project Act states that the tristate compact, if made, shall give Arizona 'the exclusive beneficial consumptive use of the Gila River and its tributaries' within the boundaries of Arizona. Fears that this appropriation would injure New Mexico are not relevant to our problem, since the proposed tri-state compact would not hurt New Mexico unless she agreed to it. The legal rights of States not parties to the Compact would be unimpaired, as Arizona v. California, 283 U.S. 423, 462, 51 S.Ct. 522, 529, 75 L.Ed. 1154, holds. The same applies to any concern that Upper Basin rights would be imperiled by the tri-state compact.

After much discussion, the amendment allocating 4,400,000 acre-feet to California by § 4(a) of the Project Act was finalized by Senator Phipps, Chairman of the Committee on Irrigation and Reclamation, who identified those 4,400,000 acre-feet as system waters. He made it unmistakably clear by adding to § 4(a) the words 'by paragraph (a) of Article III' of the Compact which in his words 'show that that allocation of water refers directly to the seven and one-half million acre-feet of water' described by Article III(a) of the Compact. 70 Cong.Rec. 459. That amendment was agreed to without a roll call. 70 Cong.Rec. 473. Prior to that time Senator Phipps had proposed that California receive 4,600,000 acre-feet. Id., p. 335.

'MR. HAYDEN. Under the circumstances I should like to inquire of the Senator from Colorado how he arrives at the figure 4,600,000 acre-feet of water instead of 4,200,000 acre-feet as proposed in my amendment?

'Mr. PHIPPS. It was just about as difficult for me to arrive at 4,600,000 acre-feet as it would have been to arrive at 4,200,000 acre-feet. The arguments pro and con have been debated in the committee for quite a period of time. The contentions made by the Senators from Arizona have not been conclusive to my mind. For instance, I will refer to the fact that Arizona desires to eliminate entirely all waters arising in the watershed and flowing out of the Gila River.

'Mr. HAYDEN. There is nothing of that kind in the Senator's amendment.

'Mr. PHIPPS. There is nothing of that kind in the Senator's amendment, but that has been one of the arguments advanced by California as being an offset to the amount to which Arizona would try to limit California.

'Mr. HAYDEN. If the Senator thought there was force in that argument, I should think that he would have included in his amendment a provision eliminating the waters of the Gila River and its tributaries, as my amendment does.

'Mr. PHIPPS. I do not consider it necessary because the bill itself, not only the present substitute measure but every other bill on the subject, ties this question up with the Colorado River compact.

'Mr. HAYDEN. My amendment does that.

'Mr. PHIPPS. Yes; that is true, but under estimates of engineers-one I happen to recall being made, I think, by Mr. La Rue-notwithstanding all of the purposes to which water of the Gila may be put by the State of Arizona, at least 1,000,000 acre-feet will return to the main stream. Yet Arizona contends that that water is not available to California; whereas to-day and for years past at least some of the waters from the Gila River have come into the canal which is now supplying the Imperial Valley.

'It is not a definite fixed fact that with the enactment of this proposed legislation the all-American canal is going to be built within the period of seven years; as a matter of fact, it may not be built at all; we do not know as to that. But I do not think that the water from the Gila River, one of the main tributaries of the Colorado, should be eliminated from consideration. I think that California is entitled to have that counted in as being a part of the basic supply of water.' (Italics added.)

It is plain from this colloquy that Senator Phipps thought that his amendment, limiting the amount California can claim, 'ties this question up with the Colorado River compact' and that the Gila River (below Lake Mead) should be 'counted in as being a part of the basic supply of water' which California is entitled to have included in the computations for the Lower Basin States.

The word of Senator Phipps, who was chairman of the committee and who offered the amendment, is to be taken as against those in opposition or those who might be making legislative history to serve their ends. Schwegmann Bros. v. Calvert Corp., supra, 341 U.S. pp. 394-395, 71 S.Ct. pp. 750-751: 'The fears and doubts of the opposition are no authoritative guide to the construction of legislation. It is the sponsors that we look to when the meaning of the statutory words is in doubt.'

If California were restricted by the Project Act to the use of 4,400,000 acre-feet out of the mainstream, it is difficult to believe that Senator Ashurst of Arizona would have expressed his bitter minority views in the Report on the Project Act. S. Rep. No. 592, 70th Cong., 1st Sess., pt. 2. He said that the bill 'sedulously and intentionally proposes to sever Arizona's jugular vein' (id., p. 3), that 'the amount of water apportioned to California * * * is not warranted in equity, law, justice, or morals' (id., p. 4), that the bill is 'a reckless and relentless assault upon Arizona.' Id., p. 38. He apparently never imagined that the proposed legislation would confine California to mainstream water. He indeed charged that the bill 'authorizes California, which comprises only 2 1/2 per cent of the Colorado River Basin and contributes no water, to appropriate * * * over 38 per cent of the estimated constant water supply available in the main Colorado River for all seven States in the basin and for Mexico.' Id., p. 5.

Like Senator Ashurst and like the Chairman of the Senate Commitee, Senator Phipps, I too read the Project Act to speak in terms of the entire Colorado River System in the United States.

APPENDIX TO OPINION OF MR. JUSTICE DOUGLAS.

Section 4(a) of the Project Act provides in relevant part:

'This Act shall not take effect and no authority shall be exercised hereunder and no work shall be begun and no moneys expended on or in connection with the works or structures provides for in this Act, and no water rights shall be claimed or initiated hereunder, and no steps shall be taken by the United States or by others to initiate or perfect any claims to the use of water pertinent to such works

or structures unless and until (1) the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have ratified the Colorado River compact, mentioned in section 13 hereof, and the President by public proclamation shall have so declared, or (2) if said States fail to ratify the said compact within six months from the date of the passage of this Act then, until six of said States, including the State of California, shall ratify said compact and shall consent to waive the provisions of the first paragraph of Article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven States signatory thereto, and shall have approved said compact without conditions, save that of such six-State approval, and the President by public proclamation shall have so declared, and, further, until the State of California, by act of its legislature, shall agree irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in consideration of the passage of this Act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this Act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact.

'The States of Arizona, California, and Nevada are authorized to enter into an agreement which shall provide (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 the State of Nevada 300,000 acre-feet and to the State of Arizona 2,800,000 acre-feet for exclusive beneficial consumptive use in perpetuity, and (2) that the State of Arizona may annually use one-half of the excess or surplus waters unapportioned by the Colorado River compact, and (3) that the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State, and (4) that the waters of the Gila River and its tributaries, except return flow after the same enters the Colorado River, shall never be subject to any diminution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico but if, as provided in paragraph (c) of Article III of the Colorado River compact, it shall become necessary to supply water to the United States of Mexico from waters over and above the quantities which are surplus as defined by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply, out of the main stream of the Colorado River, one-half of any deficiency which must be supplied to Mexico by the lower basin, and * * * (6) that all of the provisions of said tri-State agreement shall be subject in all particulars to the provisions of the Colorado River compact * * *.'

By § 1 of the California Limitation Act it was provided that when the seven States approved the Compact and its approval is proclaimed by the President that:

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

Article III of the Compact provides in relevant part:

'(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

'(b) In addition to the apportionment in paragraph (a), the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre-feet per annum.

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

'(d) The States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre-feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.'

Notes[edit]

^1 The relevant provisions of the Project Act, the California Limitation, and, and the Colorado River Compact are set forth in the Appendix, p. 643.

^2 See the Appendix, pp. 645-646, for the relevant portions of Article III.

^3 It is said that the § 4(a) language referring to surplus or excess waters, one-half of which is to go to California, the other to Arizona, is meaningless if read literally. That turns on the meaning of the words 'excess or surplus waters unapportioned' by the Compact. They mean, it is said, all waters unapportioned by Article III(a) and (b), because Article III(c) defines or speaks of surplus in such manner as to indicate that surplus is only that water over and above Article III(a) and (b) water. This is true, at least for the limited purpose of Article III(c). From that premise it is reasoned that § 4(a), literally construed, would allow Arizona and California to split equally all waters over 16,000,000 acre-feet,

that is after 7,500,000 acre-feet went to each of the Basins, and after the Lower Basin received an additional 1,000,000 acre-feet under the provisions of Article III(b). If that is true and if California and Arizona were allowed to divide up the rest, the Upper Basin States would forever be limited to their initial 7,500,000 acre-feet, something not contemplated by Article III(f), which specifically provides for apportionment of waters in excess of 16,000,000 between the Upper and Lower Basins. Thus, it is argued that the words 'excess or surplus waters' as used in § 4(a) are meaningless and in hopeless conflict with the terms of the Compact if read literally.

This interpretation is ill-founded. The first paragraph of § 4(a) contains only a limitation; it apportions no water. The tri-state compact authorized by the second paragraph of § 4(a) has never been made. But, even if it had been made, it could affect only the rights of its signatories vis-a -vis each other. For § 4(a) explicitly provides 'that all of the provisions of said tri-State agreement shall be subject in all particulars to the provisions of the Colorado River compact.'

The words 'excess or surplus waters unapportioned by said compact' mean, I think, Article III(b) waters plus all waters in the entire System in excess of 16,000,000 acre-feet. Not only does this interpretation allow the Project Act and the Colorado River Compact to be construed as a harmonious whole, but is is also compelled by the legislative history. See 70 Cong.Rec. 459-460.

^4 Under § 4(a) of the Project Act it is provided that if all seven States fail to ratify the Compact in six months (which in fact they did fail to do), the Project Act shall not take effect until six of the States, including California, ratify the Compact and waive the provisions of Article XI of the Compact (which required approval of all seven States) and the President has so declared by public proclamation. A further condition was the passage of California's Limitation Act. The Presidential Proclamation is dated June 25, 1929. 46 Stat. 3000; and California's Limitation Act was approved March 4, 1929, and became effective August 14, 1929.

^5 The Colorado River Compact is referred to many times in the Project Act-s 1, § 4(a), § 6, § 8, § 12, § 13, § 18, and § 19.

By § 18 the rights of the States to waters within their borders are not interfered with 'except as modified by the Colorado River compact or other interstate agreement.'

By § 8(a) 'all users and appropriators' of water are 'subject to and controlled by said Colorado River compact * * * anything in this Act to the contrary notwithstanding * * *.'

^6 It was indicated in Arizona v. California, 292 U.S. 341, 357, 54 S.Ct. 735, 741, 78 L.Ed. 1298, that the Limitation Act incorporates the Compact:

'It may be true that the Boulder Canyon Project Act leaves in doubt the apportionment among the states of the lower basin of the waters to which the lower basin is entitled under article III(b)-But the act does not purport to apportion among the states of the lower basin the waters to which the lower basin is entitled under the compact. The act merely places limits on California's use of waters under article III(a) and of surplus waters; and it is 'such' uses which are 'subject to the terms of said compact."