THE LAW OF THE COLORADO RIVER

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An overview on the law of the Colorado River, with emphasis on the California, Arizona and Nevada basins.
EXHIBIT B
Colorado River Basin

Drainage Area  244,000 square miles  
1/12 the area of the contiguous United States

Rivers Length  1440 miles

Storage Capacity (million acre-feet)

- Fontenelle 0.34
- Flaming Gorge 3.75
- Crystal 0.018
- Morrow Point 0.12
- Blue Mesa 0.83
- Navajo 1.70
- Lake Powell 24.6
- Lake Mead 26.1
- Lake Mohave 1.77
- Lake Havasu 0.62

Total Basin Storage  60 million acre-feet  
85 percent of which are in Lakes Powell and Mead

Corps of Engineers Flood Control Dams

- Alamo Dam on Bill Williams River  1.04 maf
- Painted Rock Dam on Gila River  2.40 maf
EXHIBIT C
As Watermaster for the lower Colorado River, the Secretary is responsible for the delivery of Colorado River water to about 1 million acres of land for agricultural irrigation and to 14 million people for municipal and industrial use in the lower Colorado River basin. In Mexico, lower Colorado River treaty water is delivered to over 400,000 acres of land for agriculture use and to over 1 million people. The most comprehensive list of documents that collectively comprise the "Law of the River" is found in the publications *Hoover Dam Documents, 1948* and *Updating Hoover Dam Documents, 1978*. The following list includes documents covered by those publications plus other laws, contracts, and documents that contribute to the "Law of the River."

The River and Harbor Act, March 3, 1899.
The Reclamation Act of June 17, 1902.
Reclamation of Indian Lands in Yuma, Colorado River, and Pyramid Lake Indian Reservations. Act of April 21, 1904.
Yuma Project authorized by the Secretary of the Interior on May 10, 1904, pursuant to section 4 of the Reclamation Act of June 17, 1902.
Patents and Water-Right Certificates Acts of August 9, 1912 and August 26, 1912.
Availability of Money for Yuma Auxiliary Project Act of February 11, 1918.
The Colorado River Compact, 1922.
The Boulder Canyon Project Act of December 21, 1928.
The California Limitation Act of March 4, 1929.
The California Seven Party Agreement of August 18, 1931.
The Rivers and Harbors Act of August 30, 1935.
The Parker Dam Power Project Appropriation Act of May 2, 1939.
The Reclamation Project Act of August 4, 1939.
The Boulder Canyon Project Adjustment Act of July 19, 1940.
Mexican Water Treaty, February 3, 1944.
The Upper Colorado River Basin Compact of October 11, 1948.
Consolidate Parker Dam Power Project and Davis Dam Project Act of May 28, 1954.
Boulder City Act of September 2, 1958.
United States Supreme Court Decree, Arizona v. California, March 9, 1964.
Supplemental Irrigation Facilities, Yuma Division, Act of September 25, 1970.
United States Supreme Court Supplemental Decrees, Arizona v. California, January 9, 1979, and April 16, 1984.
The Numerous Colorado River Water Delivery and Project Repayment Contracts with the States of Arizona and Nevada, cities, water districts, and individuals.
Hoover and Parker-Davis Power Marketing Contracts.
Colorado River Compact, 1922

The States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, having resolved to enter into a compact under the Act of the Congress of the United States of America approved August 19, 1921 (42 Statutes at Large, page 171), and the Acts of the Legislatures of the said States, have through their Governors appointed as their Commissioners:

W.S. Norviet for the State of Arizona,
W.F. McClure for the State of California,
Delph E. Carpenter for the State of Colorado,
J.G. Scrugham for the State of Nevada,
Stephen B. Davis, Jr., for the State of New Mexico,
R.E. Caldwell for the State of Utah,
Frank C. Emerson for the State of Wyoming,

who, after negotiations participated in by Herbert Hoover appointed by The President as the representative of the United States of America, have agreed upon the following articles:

ARTICLE I

The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River System; to establish the relative importance of different beneficial uses of water, to promote interstate comity; to remove causes of present and future controversies; and to secure the expeditious agricultural and industrial development of the Colorado River Basin, the storage of its waters, and the protection of life and property from floods. To these ends the Colorado River Basin is divided into two Basins, and an apportionment of the use of part of the water of the Colorado River System is made to each of them with the provision that further equitable apportionments may be made.

ARTICLE II

As used in this compact—

(a) The term “Colorado River System” means that portion of the Colorado River and its tributaries within the United States of America.

(b) The term “Colorado River Basin” means all of the drainage area of the Colorado River System and all other territory within the United States of America to which the waters of the Colorado River System shall be beneficially applied.

(c) The term “States of the Upper Division” means the States of Colorado, New Mexico, Utah, and Wyoming.

(d) The term “States of the Lower Division” means the States of Arizona, California, and Nevada.

(e) The term “Lee Ferry” means a point in the main stream of the Colorado River one mile below the mouth of the Paria River.

(f) The term “Upper Basin” means those parts of the States of Arizona, Colorado, New Mexico, Utah, and Wyoming within and from which waters naturally drain into the Colorado River System above Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System above Lee Ferry.

(g) The term “Lower Basin” means those parts of the States of Arizona, California, Nevada, New Mexico, and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System below Lee Ferry.

(h) The term “domestic use” shall include the use of water for household, stock, municipal, mining, milling, industrial, and other like purposes, but shall exclude the generation of electrical power.
APPENDIX I

ARTICLE III

(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.

(e) The States of the Upper Division shall not withheld water, and the States of the Lower Division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses.

(f) Further equitable apportionment of the beneficial uses of the waters of the Colorado River System unapportioned by paragraphs (a), (b), and (c) may be made in the manner provided in paragraph (g) at any time after October first, 1963, if and when either Basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b).

(g) In the event of a desire for a further apportionment as provided in paragraph (f) any two signatory States, acting through their Governors, may give joint notice of such desire to the Governors of the other signatory States and to The President of the United States of America, and it shall be the duty of the Governors of the signatory States and of The President of the United States of America forthwith to appoint representatives, whose duty it shall be to divide and apportion equitably between the Upper Basin and Lower Basin the beneficial use of the unapportioned water of the Colorado River System as mentioned in paragraph (f), subject to the legislative ratification of the signatory States and the Congress of the United States of America.

ARTICLE IV

(a) Inasmuch as the Colorado River has ceased to be navigable for commerce and the reservation of its waters for navigation would seriously limit the development of its Basin, the use of its waters for purposes of navigation shall be subservient to the uses of such waters for domestic, agricultural, and power purposes. If the Congress shall not consent to this paragraph, the other provisions of this compact shall nevertheless remain binding.

(b) Subject to the provisions of this compact, water of the Colorado River System may be impounded and used for the generation of electrical power, but such impounding and use shall be subservient to the use and consumption of such water for agricultural and domestic purposes and shall not interfere with or prevent use for such dominant purposes.

(c) The provisions of this article shall not apply to or interfere with the regulation and control by any State within its boundaries of the appropriation, use, and distribution of water.

ARTICLE V

The chief official of each signatory State charged with the administration of water rights, together with the Director of the United States Reclamation Service and the Director of the United States Geological Survey shall cooperate, ex-officio:
(a) To promote the systematic determination and coordination of the facts as to flow, appropriation, consumption, and use of water in the Colorado River Basin, and the interchange of available information in such matters.

(b) To secure the ascertainment and publication of the annual flow of the Colorado River at Lee Ferry.

(c) To perform such other duties as may be assigned by mutual consent of the signatories from time to time.

ARTICLE VI

Should any claim or controversy arise between any two or more of the signatory States: (a) with respect to the waters of the Colorado River System not covered by the terms of this compact; (b) over the meaning or performance of any of the terms of this compact; (c) as to the allocation of the burdens incident to the performance of any article of this compact or the delivery of waters as herein provided; (d) as to the construction or operation of works within the Colorado River Basin to be situated in two or more States, or to be constructed in one State for the benefit of another State; or (e) as to the diversion of water in one State for the benefit of another State; the Governors of the States affected, upon the request of one of them, shall forthwith appoint Commissioners with power to consider and adjust such claim or controversy, subject to ratification by the Legislatures of the States so affected.

Nothing herein contained shall prevent the adjustment of any such claim or controversy by any present method or by direct future legislative action of the interested States.

ARTICLE VII

Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.

ARTICLE VIII

Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre-feet shall have been provided on the main Colorado River within or for the benefit of the Lower Basin, then claims of such rights, if any, by appropriators or users of water in the Lower Basin against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with Article III.

All other rights to beneficial use of waters of the Colorado River System shall be satisfied solely from the water apportioned to that Basin in which they are situate.

ARTICLE IX

Nothing in this compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, for the protection of any right under this compact or the enforcement of any of its provisions.

ARTICLE X

This compact may be terminated at any time by the unanimous agreement of the signatory States. In the event of such termination all rights established under it shall continue unimpaired.

ARTICLE XI

This compact shall become binding and obligatory when it shall have been approved by the Legislatures of each of the signatory States and by the Congress of the United States. Notice of approval by the Legislatures shall be given by the Governor of each signatory State to the Governors of the other signatory States and to
the President of the United States, and the President of the United States is requested to give notice to the Governors of the signatory States of approval by the Congress of the United States.

IN WITNESS WHEREOF, the Commissioners have signed this compact in a single original, which shall be deposited in the archives of the Department of State of the United States of America and of which a duly certified copy shall be forwarded to the Governor of each of the signatory States.

DONE at the City of Santa Fe, New Mexico, this twenty-fourth day of November, A.D. One Thousand Nine Hundred and Twenty-two.

W. S. NORVIEL
W. F. McCLURE
DELFH E. CARPENTER
J. G. SCRUGHAM
STEPHEN G. DAVIS, JR.
R. E. CALDWELL
FRANK C. EMERSON

Approved:

HERBERT HOOVER

NOTES

Congressional consent to negotiations.—The Act of August 19, 1921 (42 Stat. 171), gave Congress' consent to the negotiation by the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming of "a compact or agreement not later than January 1, 1923, providing for an equitable division and apportionment among said States of the water supply of the Colorado River and of the streams tributary thereto." Provision was made in the Act for appointment by the President of a person to participate in the negotiations "as the representative of and for the protection of the interests of the United States." It was also provided that no compact so negotiated should become effective "unless and until the same shall have been approved by the legislature of each of said States and by the Congress of the United States."

Congressional consent to compact.—By section 13, subsection (a), of the Boulder Canyon Project Act (45 Stat. 1057, 1064), the Congress "approved" the Colorado River Compact and waived the provision of Article XI requiring that it be ratified by the legislatures of all seven States. In so doing, it provided that the Congress' approval should "become effective when the State of California and at least five of the other States mentioned, shall have approved or may hereafter approve said compact * * * and shall consent to such waiver * * *." Section 4, subsection (a), of the same Act provided, among other things, that the Act should not be effective until the compact had been ratified by all seven States or until it had been ratified by California and five other States and "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." For the Act of the California legislature agreeing to this condition, see its Act of March 4, 1929, Cal. Stats. 1929, p. 38. For the President's proclamation of June 25, 1929, declaring that the conditions of the Boulder Canyon Project Act had been fulfilled, see 46 Stat. 3000.

The evolution of the Boulder Canyon Project Act can be traced in the following bills and the hearings, committee reports and floor debate thereon indicated:

H. R. 11449, 67th Congress (Hearings before House Committee on Irrigation of Arid Lands, 1922-23).
H. R. 2903, 68th Congress (Hearings before House Committee on Irrigation of Arid Lands, 1923, and before House Committee on Irrigation and Reclamation, 1923-24).
S. 727, 68th Congress (Hearings before Senate Committee on Irrigation and Reclamation, 1924-25).
BOULDER CANYON PROJECT ACT

[Public—No. 642—70th Congress]
[H. R. 5773]

AN ACT To provide for the construction of works for the protection and development of the Colorado River Basin, for the approval of the Colorado River compact, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking, the Secretary of the Interior, subject to the terms of the Colorado River compact hereinafter mentioned, is hereby authorized to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water and a main canal and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam, which the Secretary of the Interior is hereby authorized to construct if deemed necessary or advisable by him upon engineering or economic considerations, with the Imperial and Coachella Valleys in California, the expenditures for said main canal and appurtenant structures to be reimbursable, as provided in the reclamation law, and shall not be paid out of revenues derived from the sale or disposal of water power or electric energy at the dam authorized to be constructed at said Black Canyon or Boulder Canyon, or for water for potable purposes outside of the Imperial and Coachella Valleys: Provided, however, That no charge shall be made for water or for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella Valleys; also to construct and equip, operate, and maintain at or near said dam, or cause to be constructed, a complete plant and incidental structures suitable for the fullest economic development of electrical energy from the water discharged from said reservoir; and to acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, and other property necessary for said purposes.

SEC. 2. (a) There is hereby established a special fund, to be known as the "Colorado River Dam fund" (hereinafter referred to as the "fund"), and to be available, as hereafter provided, only for carrying out the provisions of this Act. All revenues received in carrying out the provisions of this Act shall be paid into and expenditures shall be made out of the fund, under the direction of the Secretary of the Interior.

(b) The Secretary of the Treasury is authorized to advance to the fund, from time to time and within the appropriations therefor, such amounts as the Secretary of the Interior deems necessary for carrying out the provisions of this Act, except that the aggregate amount of such advances shall not exceed the sum of $165,000,000. Of this amount the sum of $25,000,000 shall be allocated to flood control and shall be repaid to the United States out of 62½ per centum of revenues, if any, in excess of the amount necessary to meet periodical payments during the period of amortization, as provided in section 4 of this Act. If said sum of $25,000,000 is not repaid in full during the period of amortization, then 62½ per centum of all net revenues shall be applied to payment of the remainder. Interest at the rate of 4 per centum per annum accruing during the year upon the amounts so advanced and remaining unpaid shall be paid annually out of the fund, except as herein otherwise provided.
UPDATING THE HOOVER DAM DOCUMENTS

(c) Moneys in the fund advanced under subdivision (b) shall be available only for expenditures for construction and the payment of interest, during construction, upon the amounts so advanced. No expenditures out of the fund shall be made for operation and maintenance except from appropriations therefor.

(d) The Secretary of the Treasury shall charge the fund as of June 30 in each year with such amount as may be necessary for the payment of interest on advances made under subdivision (b) at the rate of 4 per centum per annum accrued during the year upon the amounts so advanced and remaining unpaid, except that if the fund is insufficient to meet the payment of interest the Secretary of the Treasury may, in his discretion, defer any part of such payment, and the amount so deferred shall bear interest at the rate of 4 per centum per annum until paid.

(e) The Secretary of the Interior shall certify to the Secretary of the Treasury, at the close of each fiscal year, the amount of money in the fund in excess of the amount necessary for construction, operation, and maintenance, and payment of interest. Upon receipt of each such certificate the Secretary of the Treasury is authorized and directed to charge the fund with the amount so certified as repayment of the advances made under subdivision (b), which amount shall be covered into the Treasury to the credit of miscellaneous receipts.

SEC. 3. There is hereby authorized to be appropriated from time to time, out of any money in the Treasury not otherwise appropriated, such sums of money as may be necessary to carry out the purposes of this Act, not exceeding in the aggregate $165,000,000.

SEC. 4. (a) 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 provided 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 (5) that the State of California shall and will further mutually agree with the States of Arizona and Nevada that none of said three States shall withhold water and none shall require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses, 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, and (7) said agreement to take effect upon the ratification of the Colorado River compact by Arizona, California, and Nevada.

(b) Before any money is appropriated for the construction of said dam or power plant, or any construction work done or contracted for, the Secretary of the Interior shall make provision for revenues by contract, in accordance with the provisions of this Act, adequate in his judgment to insure payment of all expenses of operation and maintenance of said works incurred by the United States and the repayment, within fifty years from the date of the completion of said works, of all amounts advanced to the fund under subdivision (b) of section 2 for such works, together with interest thereon made reimbursable under this Act.

Before any money is appropriated for the construction of said main canal and appurtenant structures to connect the Laguna Dam with the Imperial and Coachella Valleys in California, or any construction work is done upon said canal or contracted for, the Secretary of the Interior shall make provision for revenues, by contract or otherwise, adequate in his judgment to insure payment of all expenses of construction, operation, and maintenance of said main canal and appurtenant structures in the manner provided in the reclamation law.

If during the period of amortization the Secretary of the Interior shall receive revenues in excess of the amount necessary to meet the periodical payments to the United States as provided in the contract, or contracts, executed under this Act, then, immediately after the settlement of such periodical payments, he shall pay to the State of Arizona 18% per centum of such excess revenues and to the State of Nevada 18 3/4 per centum of such excess revenues.

SEC. 5. That the Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this Act, will in his judgment cover all expenses of construction, operation, and maintenance of said main canal and appurtenant structures in the manner provided in the reclamation law.

After the repayments to the United States of all money advanced with interest, charges shall be on such basis and the revenues derived therefrom shall be kept in a separate fund to be expended within the Colorado River Basin as may hereafter be prescribed by the Congress.

General and uniform regulations shall be prescribed by the said Secretary for the awarding of contracts for the sale and delivery of electrical energy, and for renewals under subdivision (b) of this section, and in making such contracts the following shall govern:

(a) No contract for electrical energy or for generation of electrical energy shall be of longer duration than fifty years from the date at which such energy is ready for delivery.

Contracts made pursuant to subdivision (a) of this section shall be made with a view to obtaining reasonable returns and shall contain provisions whereby at the end of fifteen years from the date of their execution and every ten years thereafter, there shall be readjustment of the contract, upon the demand of either
party thereto, either upward or downward as to price, as the Secretary of the Interior may find to be justified by competitive conditions at distributing points or competitive centers and with provisions under which disputes or disagreements as to interpretation or performance of such contract shall be determined either by arbitration or court proceedings, the Secretary of the Interior being authorized to act for the United States in such readjustments or proceedings.

(b) The holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations, unless the property of such holder dependent for its usefulness on a continuation of the contract be purchased or acquired and such holder be compensated for damages to its property, used and useful in the transmission and distribution of such electrical energy and not taken, resulting from the termination of the supply.

(c) Contracts for the use of water and necessary privileges for the generation and distribution of hydroelectric energy or for the sale and delivery of electrical energy shall be made with responsible applicants therefor who will pay the price fixed by the said Secretary with a view to meeting the revenue requirements herein provided for. In case of conflicting applications, if any, such conflicts shall be resolved by the said Secretary, after hearing, with due regard to the public interest, and in conformity with the policy expressed in the Federal Water Power Act as to conflicting applications for permits and licenses, except that preference to applicants for the use of water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy, or for delivery at the switchboard of a hydroelectric plant, shall be given, first, to a State for the generation or purchase of electric energy for use in the State, and the States of Arizona, California, and Nevada shall be given equal opportunity as such applicants.

The rights covered by such preference shall be contracted for by such State within six months after notice by the Secretary of the Interior and to be paid for on the same terms and conditions as may be provided in other similar contracts made by said Secretary: Provided, however, That no application of a State or a political subdivision for an allocation of water for power purposes or of electrical energy shall be denied or another application in conflict therewith be granted on the ground that the bond issue of such State or political subdivision, necessary to enable the applicant to utilize such water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy or the electrical energy applied for, has not been authorized or marketed, until after a reasonable time, to be determined by the said Secretary, has been given to such applicant to have such bond issue authorized and marketed.

(d) Any agency receiving a contract for electrical energy equivalent to one hundred thousand firm horsepower, or more, may, when deemed feasible by the said Secretary, from engineering and economic considerations and under general regulations prescribed by him, be required to permit any other agency having contracts hereunder for less than the equivalent of twenty-five thousand firm horsepower, upon application to the Secretary of the Interior made within sixty days from the execution of the contract of the agency the use of whose transmission line is applied for, to participate in the benefits and use of any main transmission line constructed or to be constructed by the former for carrying such energy (not exceeding, however, one-fourth the capacity of such line), upon payment by such other agencies of a reasonable share of the cost of construction, operation, and maintenance thereof.

The use is hereby authorized of such public and reserved lands of the United States as may be necessary or convenient for the construction, operation, and maintenance of main transmission lines to transmit said electrical energy.

SEC. 6. That the dam and reservoir provided for by section 1 hereof shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power. The title to said dam, reservoir, plant, and incidental works shall forever remain in the United States, and the United States shall, until otherwise provided by Congress, control, manage, and operate the same, except as
herein otherwise provided: Provided, however, That the Secretary of the Interior may, in his discretion, enter
into contracts of lease of a unit or units of any Government-built plant, with right to generate electrical energy,
or, alternatively, to enter into contracts of lease for the use of water for the generation of electrical energy as
herein provided, in either of which events the provisions of section 5 of this Act relating to revenue, term,
renewals, determination of conflicting applications, and joint use of transmission lines under contracts for the
sale of electrical energy, shall apply.

The Secretary of the Interior shall prescribe and enforce rules and regulations conforming with the re-
quirements of the Federal Water Power Act, so far as applicable respecting maintenance of works in condi-
tion of repair adequate for their efficient operation, maintenance of a system of accounting, control of rates
and service in the absence of State regulation or interstate agreement valuation for rate-making purposes,
transfers of contracts, contracts extending beyond the lease period, expropriation of excessive profits, recap-
ture and/or emergency use by the United States of property of lessees, and penalties for enforcing regula-
tions made under this Act of penalizing failure to comply with such regulations or with the provisions of this
Act. He shall also conform with other provisions of the Federal Water Power Act and of the rules and regula-
tions of the Federal Power Commission, which have been devised or which may be hereafter devised, for the
protection of the investor and consumer.

The Federal Power Commission is hereby directed not to issue or approve any permits or licenses under
said Federal Water Power Act upon or affecting the Colorado River or any of its tributaries, except the Gila
River, in the States of Colorado, Wyoming, Utah, New Mexico, Nevada, Arizona, and California until this
Act shall become effective as provided in section 4 herein.

SEC. 7. That the Secretary of the Interior may, in his discretion, when repayments to the United States of
all money advanced, with interest, reimbursable hereunder, shall have been made, transfer the title to said
canal and appurtenant structures, except the Laguna Dam and the main canal and appurtenant structures
down to and including Syphon Drop, to the districts or other agencies of the United States having a beneficial
interest therein in proportion to their respective capital investments under such form of organization as may
be acceptable to him. The said districts or other agencies shall have the privilege at any time of utilizing by
contract or otherwise such power possibilities as may exist upon said canal, in proportion to their respective
contributions or obligations toward the capital cost of said canal and appurtenant structures from and in-
cluding the diversion works to the point where each respective power plant may be located. The net proceeds
from any power development on said canal shall be paid into the fund and credited to said districts or other
agencies on their said contracts, in proportion to their rights to develop power, until the districts or other
agencies using said canal shall have paid thereby and under any contract or otherwise an amount of money
equivalent to the operation and maintenance expense and cost of construction thereof.

SEC. 8. (a) The United States, its permittees, licensees, and contractees, and all users and appropriators of
water stored, diverted, carried, and/or distributed by the reservoir, canals, and other works herein author-
ized, shall observe and be subject to and controlled by said Colorado River compact in the construction,
management, and operation of said reservoir, canals, and other works and the storage, diversion, delivery,
and use of water for the generation of power, irrigation, and other purposes, anything in this Act to the con-
trary notwithstanding, and all permits, licenses, and contracts shall so provide.

(b) Also the United States, in constructing, managing, and operating the dam, reservoir, canals, and other
works herein authorized, including the appropriation, delivery, and use of water for the generation of power,
irrigation, or other uses, and all users of water thus delivered and all users and appropriators of waters stored
by said reservoir and/or carried by said canal, including all permittees and licensees of the United States
or any of its agencies, shall observe and be subject to and controlled, anything to the contrary herein not-
withstanding, by the terms of such compact, if any, between the States of Arizona, California, and Nevada,
or any two thereof, for the equitable division of the benefits, including power, arising from the use of water
accruing to said States, subsidiary to and consistent with said Colorado River compact, which may be
negotiated and approved by said States and to which Congress shall give its consent and approval on or
before January 1, 1929; and the terms of any such compact concluded between said States and approved
and consented to by Congress after said date: Provided, That in the latter case such compact shall be subject to all contracts, if any, made by the Secretary of the Interior under section 5 hereof prior to the date of such approval and consent by Congress.

SEC. 9. All lands of the United States found by the Secretary of the Interior to be practicable of irrigation and reclamation by the irrigation works authorized herein shall be withdrawn from public entry. Thereafter, at the direction of the Secretary of the Interior, such lands shall be opened for entry, in tracts varying in size but not exceeding one hundred and sixty acres, as may be determined by the Secretary of the Interior, in accordance with the provisions of the reclamation law, and any such entryman shall pay an equitable share in accordance with the benefits received, as determined by the said Secretary, of the construction cost of said canal and appurtenant structures; said payments to be made in such installments and at such times as may be specified by the Secretary of the Interior, in accordance with the provisions of the said reclamation law, and shall constitute revenue from said project and be covered into the fund herein provided for: Provided, That all persons who served in the United States Army, Navy, Marine Corps, or Coast Guard during World War II, the War with Germany, the War with Spain, or in the suppression of the insurrection in the Philippines, and who have been honorably separated or discharged therefrom or placed in the Regular Army or Naval Reserve, shall have the exclusive preference right for a period of three months to enter said lands, subject, however, to the provisions of subsection (c) of section 4 of the Act of December 5, 1924 (43 Stat. 672, 702; 43 U.S.C., sec. 433); and also, so far as practicable, preference shall be given to said persons in all construction work authorized by this chapter: Provided further, That the above exclusive preference rights shall apply to veteran settlers on lands watered from the Gila canal in Arizona the same as to veteran settlers on lands watered from the All-American canal in California: Provided further, That in the event such entry shall be relinquished at any time prior to actual residence upon the land by the entryman for not less than one year, lands so relinquished shall not be subject to entry for a period of sixty days after the filing and notation of the relinquishment in the local land office, and after the expiration of said sixty-day period such lands shall be open to entry, subject to the preference in the section provided.\(^1\)

SEC. 10. That nothing in this Act shall be construed as modifying in any manner the existing contract, dated October 23, 1918, between the United States and the Imperial Irrigation District, providing for a connection with Laguna Dam; but the Secretary of the Interior is authorized to enter into contract or contracts with the said district or other districts, persons, or agencies for the construction, in accordance with this Act, of said canal and appurtenant structures, and also for the operation and maintenance thereof, with the consent of the other users.

SEC. 11. That the Secretary of the Interior is hereby authorized to make such studies, surveys, investigations, and do such engineering as may be necessary to determine the lands in the State of Arizona that should be embraced within the boundaries of a reclamation project, heretofore commonly known and hereafter to be known as the Parker-Gila Valley reclamation project, and to recommend the most practicable and feasible method of irrigating lands within said project, or units thereof, and the cost of the same; and the appropriation of such sums of money as may be necessary for the aforesaid purposes from time to time is hereby authorized. The Secretary shall report to Congress as soon as practicable, and not later than December 10, 1931, his findings, conclusions, and recommendations regarding such project.

SEC. 12. “Political subdivision” or “political subdivisions” as used in this Act shall be understood to include any State, irrigation or other district, municipality, or other governmental organization.

“Reclamation law” as used in this Act shall be understood to mean that certain Act of the Congress of the United States approved June 17, 1902, entitled “An Act appropriating the receipts from the sale and disposal of public land in certain States and Territories to the construction of irrigation works for the reclamation of arid lands,” and the Acts amendatory thereof and supplemental thereto.

\(^1\)As amended by act of March 6, 1946 (60 Stat. 36).
“Maintenance” as used herein shall be deemed to include in each instance provision for keeping the works in good operating condition.

“The Federal Water Power Act,” as used in this Act, shall be understood to mean that certain Act of Congress of the United States approved June 10, 1920, entitled “An Act to create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto; and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes,” and the Acts amendatory thereof and supplemental thereto.

“Domestic” whenever employed in this Act shall include water uses defined as “domestic” in said Colorado River compact.

SEC. 13. (a) The Colorado River compact signed at Santa Fe, New Mexico, November 24, 1922, pursuant to Act of Congress approved August 19, 1921, entitled “An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes,” is hereby approved by the Congress of the United States, and the provisions of the first paragraph of article 11 of the said Colorado River compact, making said compact binding and obligatory when it shall have been approved by the legislature of each of the signatory States, are hereby waived, and this approval shall become effective when the State of California and at least five of the other States mentioned, shall have approved or may hereafter approve said compact as aforesaid and shall consent to such waiver, as herein provided.

(b) The rights of the United States in or to waters of the Colorado River and its tributaries howsoever claimed or acquired, as well as the rights of those claiming under the United States, shall be subject to and controlled by said Colorado River compact.

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

(d) The conditions and covenants referred to herein shall be deemed to run with the land and the right, interest, or privilege therein and water right, and shall attach as a matter of law, whether set out or referred to in the instrument evidencing any such patent, grant, contract, concession, lease, permit, license, right-of-way, or other privilege from the United States or under its authority, or not, and shall be deemed to be for the benefit of and be available to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, and the users of water therein or thereunder, by way of suit, defense, or otherwise, in any litigation respecting the waters of the Colorado River or its tributaries.

SEC. 14. This Act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided.

SEC. 15. The Secretary of the Interior is authorized and directed to make investigation and public reports of the feasibility of projects for irrigation, generation of electric power, and other purposes in the States of Arizona, Nevada, Colorado, New Mexico, Utah, and Wyoming for the purpose of making such information available to said States and to the Congress, and of formulating a comprehensive scheme of control and the improvement and utilization of the water of the Colorado River and its tributaries. The sum of $250,000 is hereby authorized to be appropriated from said Colorado River Dam fund, created by section 2 of this Act, for such purposes.
SEC. 16. In furtherance of any comprehensive plan formulated hereafter for the control, improvement, and utilization of the resources of the Colorado River system and to the end that the project authorized by this Act may constitute and be administered as a unit in such control, improvement, and utilization, any commission or commissioner duly authorized under the laws of any ratifying State in that behalf shall have the right to act in an advisory capacity to and in cooperation with the Secretary of the Interior in the exercise of any authority under the provisions of sections 4, 5, and 14 of this Act, and shall have at all times access to records of all Federal agencies empowered to act under said sections, and shall be entitled to have copies of said records on request.

SEC. 17. Claims of the United States arising out of any contract authorized by this Act shall have priority over all others, secured or unsecured.

SEC. 18. Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or other interstate agreement.

SEC. 19. That the consent of Congress is hereby given to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming to negotiate and enter into compacts or agreements, supplemental to and in conformity with the Colorado River compact and consistent with this Act for a comprehensive plan for the development of the Colorado River and providing for the storage, diversion, and use of the waters of said river. Any such compact or agreement may provide for the construction of dams, headworks, and other diversion works or structures for flood control, reclamation, improvement of navigation, division of water, or other purposes and/or the construction of power houses or other structures for the purpose of the development of water power and the financing of the same; and for such purposes may authorize the creation of interstate commissions and/or the creation of corporations, authorities, or other instrumentalities.

(a) Such consent is given upon condition that a representative of the United States, to be appointed by the President, shall participate in the negotiations and shall make report to Congress of the proceedings and of any compact or agreement entered into.

(b) No such compact or agreement shall be binding or obligatory upon any of such States unless and until it has been approved by the legislature of each of such States and by the Congress of the United States.

SEC. 20. Nothing in this Act shall be construed as a denial or recognition of any rights, if any, in Mexico to the use of the waters of the Colorado River system.

SEC. 21. That the short title of this Act shall be “Boulder Canyon Project Act.”

Approved, December 21, 1928.
BOULDER CANYON PROJECT
AGREEMENT
REQUESTING APPORTIONMENT OF CALIFORNIA'S SHARE OF THE WATERS OF THE COLORADO RIVER AMONG THE APPLICANTS IN THE STATE

August 18, 1931

THIS AGREEMENT, made the 18th day of August, 1931, by and between Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego and County of San Diego;

WITNESSETH:

WHEREAS the Secretary of the Interior did, on November 5, 1930, request of the Division of Water Resources of California, a recommendation of the proper apportionments of the water of and from the Colorado River to which California may be entitled under the provisions of the Colorado River Compact, the Boulder Canyon Project Act and other applicable legislation and regulations, to the end that the same could be carried into each and all of the contracts between the United States and applicants for water contracts in California as a uniform clause; and

WHEREAS the parties hereto have fully considered their respective rights and requirements in cooperation with the other water users and applicants and the Division of Water Resources aforesaid;

NOW, THEREFORE, the parties hereto do expressly agree to the apportionments and priorities of water of and from the Colorado River for use in California as hereinafter set out and respectfully request the Division of Water Resources to, in all respects, recognize said apportionments and priorities in all matters relating to State authority and to recommend the provisions of Article I hereof to the Secretary of the Interior of the United States for insertion in any and all contracts for water made by him pursuant to the terms of the Boulder Canyon Project Act, and agree that in every water contract which any party may hereafter enter into with the United States, provisions in accordance with Article I shall be included therein if agreeable to the United States.

ARTICLE I.

The waters of the Colorado River available for use within the State of California under the Colorado River Compact and the Boulder Canyon Project Act shall be apportioned to the respective interests below named and in amounts and with priorities therein named and set forth, as follows:

SECTION 1. A first priority to Palo Verde Irrigation District for beneficial use exclusively upon lands in said District as it now exists and upon lands between said District and the Colorado River, aggregating (within and without said District) a gross area of 104,500 acres, such waters as may be required by said lands.

SECTION 2. A second priority to Yuma Project of United States Bureau of Reclamation for beneficial use upon not exceeding a gross area of 25,000 acres of land located in said project in California, such waters as may be required by said lands.

SECTION 3. A third priority (a) to Imperial Irrigation District and other lands under or that will be served from the All American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the "Lower Palo Verde Mesa", adjacent to Palo Verde...
Irrigation District, for beneficial consumptive use, 3,850,000 acre feet of water per annum less the beneficial consumptive use under the priorities designated in Sections 1 and 2 above. The rights designated (a) and (b) in this section are equal in priority. The total beneficial consumptive use under priorities stated in Sections 1, 2 and 3 of this article shall not exceed 3,850,000 acre feet of water per annum.

SECTION 4. A fourth priority to the Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the Coastal Plain of Southern California, 550,000 acre feet of water per annum.

SECTION 5. A fifth priority, (a) to The Metropolitan Water District of Southern California and/or the City of Los Angeles, for beneficial consumptive use, by themselves and/or others, on the Coastal Plain of Southern California, 550,000 acre feet of water per annum and (b) to the City of San Diego and/or County of San Diego, for beneficial consumptive use, 112,000 acre feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

SECTION 6. A sixth priority (a) to Imperial Irrigation District and other lands under or that will be served from the All American Canal in Imperial and Coachella Valleys, and (b) to Palo Verde Irrigation District for use exclusively on 16,000 acres in that area known as the "Lower Palo Verde Mesa," adjacent to Palo Verde Irrigation District, for beneficial consumptive use, 300,000 acre feet of water per annum. The rights designated (a) and (b) in this section are equal in priority.

SECTION 7. A seventh priority of all remaining water available for use within California, for agricultural use in the Colorado River Basin in California, as said basin is designated on Map No. 23000 of the Department of the Interior, Bureau of Reclamation.

SECTION 8. So far as the rights of the allottees named above are concerned, The Metropolitan Water District of Southern California and/or the City of Los Angeles shall have the exclusive right to withdraw and divert into its aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said District and/or said City (not exceeding at any one time 4,750,000 acre feet in the aggregate) by reason of reduced diversions by said District and/or said City; provided, that accumulations shall be subject to such conditions as to accumulation, retention, release and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other states without distinction in priority, and to determine the correlative relations between said District and/or said City and such users resulting therefrom.

SECTION 9. In addition, so far as the rights of the allottees named above are concerned, the City of San Diego and/or County of San Diego shall have the exclusive right to withdraw and divert into an aqueduct any water in Boulder Canyon Reservoir accumulated to the individual credit of said County and/or said County (not exceeding at any one time 250,000 acre feet in the aggregate) by reason of reduced diversions by said City and/or said County; provided, that accumulations shall be subject to such conditions as to accumulation, retention, release and withdrawal as the Secretary of the Interior may from time to time prescribe in his discretion, and his determination thereof shall be final; provided further, that the United States of America reserves the right to make similar arrangements with users in other states without distinction in priority, and to determine the correlative relations between the said City and/or said County and such users resulting therefrom.

SECTION 10. In no event shall the amounts allotted in this agreement to the Metropolitan Water District of Southern California and/or the City of Los Angeles be increased on account of inclusion of a supply for both said District and said City, and either or both may use said apportionments as may be agreed by and between said District and said City.
APPENDIX I

SECTION 11. In no event shall the amounts allotted in this agreement to the City of San Diego and/or to the County of San Diego be increased on account of inclusion of a supply for both said City and said County, and either or both may use said apportionments as may be agreed by and between said City and said County.

SECTION 12. The priorities hereinbefore set forth shall be in no wise affected by the relative dates of water contracts executed by the Secretary of the Interior with the various parties.

ARTICLE II.

That each and every party hereto who has heretofore filed an application or applications for a permit or permits to appropriate water from the Colorado River requests the Division of Water Resources to amend such application or applications as far as possible to bring it or them into conformity with the provisions of this agreement; and each and every party hereto who has heretofore filed a protest or protests against any such application or applications of other parties hereto does hereby request withdrawal of such protest or protests against such application or applications when so amended.

ARTICLE III.

That each and all of the parties to this agreement respectively request that the contract for delivery of water between The United States of America and The Metropolitan Water District of Southern California under date of April 24, 1930, be amended in conformity with Article I hereof.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed by their respective officers thereunto duly authorized, the day and year first above written. Executed in seven originals.

Recommended for Execution:

PALO VERDE IRRIGATION DISTRICT,
By Ed J. Williams,
Arvin B. Shaw, Jr.

IMPERIAL IRRIGATION DISTRICT,
By Mark Rose,
Chas. L. Childers,
M. J. Dowd.

COACHELLA VALLEY COUNTY WATER DISTRICT,
By Thos. C. Yager.

METROPOLITAN WATER DISTRICT
OF SOUTHERN CALIFORNIA,
By W. B. Matthews,
C. C. Elder.

WATER CONTRACTS

CITY OF LOS ANGELES,
By W. W. Hurlbut,
C. A. Davis.

CITY OF SAN DIEGO,
By C. L. Byers,
H. N. Savage.

COUNTY OF SAN DIEGO,
By H. N. Savage,
C. L. Byers.
COLORADO RIVER STORAGE PROJECT—AUTHORITY TO CONSTRUCT, OPERATE AND MAINTAIN

See Legislative History, p. 1526

CHAPTER 203—PUBLIC LAW 485 [S. 500]

An Act to authorize the Secretary of the Interior to construct, operate, and maintain the Colorado River storage project and participating projects, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That:

In order to initiate the comprehensive development of the water resources of the Upper Colorado River Basin, for the purposes, among others, of regulating the flow of the Colorado River, storing water for beneficial consumptive use, making it possible for the States of the Upper Basin to utilize, consistently with the provisions of the Colorado River Compact, the apportionments made to and among them in the Colorado River Compact and the Upper Colorado River Basin Compact, respectively, providing for the reclamation of arid and semiarid land, for the control of floods, and for the generation of hydroelectric power, as an incident of the foregoing purposes, the Secretary of the Interior is hereby authorized (1) to construct, operate, and maintain the following initial units of the Colorado River storage project, consisting of dams, reservoirs, powerplants, transmission facilities and appurtenant works: Curecanti, Flaming Gorge, Navajo (dam and reservoir only), and Glen Canyon: Provided, That the Curecanti Dam shall be constructed to a height which will impound not less than nine hundred and forty thousand acre-feet of water or will create a reservoir of such greater capacity as can be obtained by a high waterline located at seven thousand five hundred and twenty feet above mean sea level, and that construction thereof shall not be undertaken until the Secretary has, on the basis of further engineering and economic investigations, reexamined the economic justification of such unit and, accompanied by appropriate documentation in the form of a supplemental report, has certified to the Congress and to the President that, in his judgment, the benefits of such unit will exceed its costs; and (2) to construct, operate, and maintain the following additional reclamation projects (including power-generating and transmission facilities related thereto), hereinafter referred to as participating projects: Central Utah (initial phase); Emery County, Florida, Hammond, La Barge, Lyman, Paonia (including the Minnesota unit, a dam and reservoir only), and Glen Canyon: Provided, That the Curecanti Dam shall be constructed to a height which will impound not less than nine hundred and forty thousand acre-feet of water or will create a reservoir of such greater capacity as can be obtained by a high waterline located at seven thousand five hundred and twenty feet above mean sea level, and that construction thereof shall not be undertaken until the Secretary has, on the basis of further engineering and economic investigations, reexamined the economic justification of such unit and, accompanied by appropriate documentation in the form of a supplemental report, has certified to the Congress and to the President that, in his judgment, the benefits of such unit will exceed its costs; and (2) to construct, operate, and maintain the following additional reclamation projects (including power-generating and transmission facilities related thereto), hereinafter referred to as participating projects: Central Utah (initial phase); Emery County, Florida, Hammond, La Barge, Lyman, Paonia (including the Minnesota unit, a dam and reservoir on Muddy Creek just above its confluence with the North Fork of the Gunnison River, and other necessary works), Pine River Extension, Seedskadee, Silt and Smith Fork:

Sec. 2. In carrying out further investigations of projects under the Federal reclamation laws in the Upper Colorado River Basin, the Secretary shall give priority to completion of planning reports on the Gooseberry, San Juan-Chama, Navajo, Parshall, Troublesome, Rabbit Ear, Eagle Divide, San Miguel, West Divide, Bluestone, Battlement Mesa, Tomichi Creek, East River, Ohio Creek, Fruitland Mesa, Bostwick Park, Grand Mesa, Dallas Creek, Savery-Pot Hook, Dolores, Fruit Growers Extension, Animas-La Plata, Yellow Jacket, and Sublette participating projects. Said reports shall be completed as expeditiously as funds are made available therefor and shall be submitted promptly to the affected States, which in the case of the San Juan-Chama project shall include the State of Texas, and thereafter to the President and the Congress: Provided,
That with reference to the plans and specifications for the San Juan-Chama project, the storage for control and regulation of water imported from the San Juan River shall (1) be limited to a single offstream dam and reservoir on a tributary of the Chama River, (2) be used solely for control and regulation and no power facilities shall be established, installed or operated thereat, and (3) be operated at all times by the Bureau of Reclamation of the Department of the Interior in strict compliance with the Rio Grande Compact as administered by the Rio Grande Compact Commission. The preparation of detailed designs and specifications for the works proposed to be constructed in connection with projects shall be carried as far forward as the investigations thereof indicate is reasonable in the circumstances.

The Secretary, concurrently with the investigations directed by the preceding paragraph, shall also give priority to completion of a planning report on the Juniper project.

Sec. 3. It is not the intention of Congress, in authorizing only those projects designated in section 1 of this Act, and in authorizing priority in planning only those additional projects designated in section 2 of this Act, to limit, restrict, or otherwise interfere with such comprehensive development as will provide for the consumptive use by States of the Upper Colorado River Basin of waters, the use of which is apportioned to the Upper Colorado River Basin by the Colorado River Compact and to each State thereof by the Upper Colorado River Basin Compact, nor to preclude consideration and authorization by the Congress of additional projects under the allocations in the compacts as additional needs are indicated. It is the intention of Congress that no dam or reservoir constructed under the authorization of this Act shall be within any national park or monument.

Sec. 4. Except as otherwise provided in this Act, in constructing, operating, and maintaining the units of the Colorado River storage project and the participating projects listed in section 1 of this Act, the Secretary shall be governed by the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto): Provided, That (a) irrigation repayment contracts shall be entered into which, except as otherwise provided for the Paonia and Eden projects, provide for repayment of the obligation assumed thereunder with respect to any project contract unit over a period of not more than fifty years exclusive of any development period authorized by law; (b) prior to construction of irrigation distribution facilities, repayment contracts shall be made with an "organization" as defined in paragraph 2(g) of the Reclamation Project Act of 1939 (53 Stat. 1187) which has the capacity to levy assessments upon all taxable real property located within its boundaries to assist in making repayments, except where a substantial proportion of the lands to be served are owned by the United States; (c) contracts relating to municipal water supply may be made without regard to the limitations of the last sentence of section 9(c) of the Reclamation Project Act of 1939, and (d), as to Indian lands within, under or served by any participating project, payment of construction costs within the capability of the land to repay shall be subject to the Act of July 1, 1932 (47 Stat. 564); Provided further, That for a period of ten years from the date of enactment of this Act, no water from any participating project authorized by this Act shall be delivered to any water user for the production of any basic agricultural commodity, as defined in the Agricultural Act of 1949, or any amendment thereof, if the total supply of such commodity for the marketing year in which the bulk of the crop would normally be marketed is in excess of the normal supply as defined in section 301(b) (10) of the Agricultural Adjustment Act of 1938, as amended, unless the Secretary of Agriculture calls for an increase in production of such commodity in the interest of national security. All units and participating projects shall be subject to the apportionments of the use of water between the Upper and Lower Basins of the Colorado River and among the States of the Upper Basin fixed in the Colorado River Compact and the Upper Colorado River Basin Compact, respectively, and to the terms of the treaty with the United Mexican States (Treaty Series 994).
Sec. 5. (a) There is hereby authorized a separate fund in the Treasury of the United States to be known as the Upper Colorado River Basin Fund (hereinafter referred to as the Basin Fund) which shall remain available until expended, as hereafter provided, for carrying out provisions of this Act other than section 8.

(b) All appropriations made for the purpose of carrying out the provisions of this Act, other than section 8, shall be credited to the Basin Fund as advances from the general fund of the Treasury.

(c) All revenues collected in connection with the operation of the Colorado River storage project and participating projects shall be credited to the Basin Fund, and shall be available, without further appropriation, for (1) defraying the costs of operation, maintenance, and replacements of, and emergency expenditures for, all facilities of the Colorado River storage project and participating projects, within such separate limitations as may be included in annual appropriation acts: Provided, That with respect to each participating project, such costs shall be paid from revenues received from such project; (2) payment as required by subsection (d) of this section; and (3) payment as required by subsection (e) of this section. Revenues credited to the Basin Fund shall not be available for appropriation for construction of the units and participating projects authorized by or pursuant to this Act.

(d) Revenues in the Basin Fund in excess of operating needs shall be paid annually to the general fund of the Treasury to return—

(1) the costs of each unit, participating project, or any separable feature thereof which are allocated to power pursuant to section 6 of this Act, within a period not exceeding fifty years from the date of completion of such unit, participating project, or separable feature thereof;

(2) the costs of each unit, participating project, or any separable feature thereof which are allocated to municipal water supply pursuant to section 6 of this Act, within a period not exceeding fifty years from the date of completion of such unit, participating project, or separable feature thereof;

(3) interest on the unamortized balance of the investment (including interest during construction) in the power and municipal water supply features of each unit, participating project, or any separable feature thereof, at a rate determined by the Secretary of the Treasury as provided in subsection (f), and interest due shall be a first charge; and

(4) the costs of each storage unit which are allocated to irrigation pursuant to section 6 of this Act within a period not exceeding fifty years.

(e) Revenues in the Basin Fund in excess of the amounts needed to meet the requirements of clause (1) subsection (c) of this section, and to return to the general fund of the Treasury the costs set out in subsection (d) of this section, shall be apportioned among the States of the Upper Division in the following percentages:

Colorado, 46 per centum; Utah, 21.5 per centum; Wyoming, 15.5 per centum; and New Mexico, 17 per centum; Provided, That prior to the application of such percentages, all revenues remaining in the Basin Fund from each participating project (or part thereof), herein or hereinafter authorized, after payments, where applicable, with respect to such projects, to the general fund of the Treasury under subparagraphs (1), (2), and (3) of subsection (d) of this section shall be apportioned to the State in which such participating project, or part thereof, is located.

Revenues so apportioned to each State shall be used only for the repayment of construction costs of participating projects or parts of such projects in the State to which such revenues are apportioned and shall not be used for such purpose in any other State without the consent, as expressed through its legally constituted authority, of the State to which such revenues are apportioned. Subject to such requirement, there shall be paid annually into the general fund of the Treasury from the revenues apportioned to each State (1) the costs of each participating project herein authorized (except Paonia) or any separable feature thereof, which are allocated to irrigation pursuant to section 6 of this Act, within a period not exceeding fifty years, in addition to any development period authorized by law, from the date of completion of such participating project or separable feature thereof, or, in the case of Indian lands, payment in accordance with section 4 of this Act; (2) costs of the Paonia project, which are beyond the ability of the water users to repay, within a period prescribed in the Act of June 25, 1947 (61 Stat. 181); and (3) costs in connection with the irrigation features of the Eden project as specified in the Act of June 28, 1949 (63 Stat. 277).

(f) The interest rate applicable to each unit of the storage project and each participating project shall be determined by the Secretary of the Treasury as of the time the first advance is made for initiating construction of said unit or project. Such interest rate shall be determined by calculating the average yield to maturity on
the basis of daily closing market bid quotations during the month of June next preceding the fiscal year in
which said advance is made, on all interest-bearing marketable public debt obligations of the United States
having a maturity date of fifteen or more years from the first day of said month, and by adjusting such average
annual yield to the nearest one-eighth of 1 per centum.

(g) Business-type budgets shall be submitted to the Congress annually for all operations financed by the
Basin Fund.

Sec. 6. Upon completion of each unit, participating project or separable feature thereof, the Secretary shall
allocate the total costs (excluding any expenditures authorized by section 8 of this Act) of constructing said
unit, project or feature to power, irrigation, municipal water supply, flood control, navigation, or any other
purposes authorized under reclamation law. Allocations of construction, operation and maintenance costs to
authorized nonreimbursable purposes shall be nonreturnable under the provisions of this Act. In the event
that the Navajo participating project is authorized, the costs allocated to irrigation of Indian-owned tribal or
restricted lands within, under, or served by such project, and beyond the capability of such lands to repay,
shall be determined, and, in recognition of the fact that assistance to the Navajo Indians is the responsibility
of the entire nation, such costs shall be nonreimbursable. On January 1 of each year the Secretary shall report
to the Congress for the previous fiscal year, beginning with the fiscal year 1957, upon the status of the
revenues from, and the cost of, constructing, operating, and maintaining the Colorado River storage project
and the participating projects. The Secretary's report shall be prepared to reflect accurately the Federal invest
ment allocated at that time to power, to irrigation, and to other purposes, the progress of return and repay-
ment thereon, and the estimated rate of progress, year by year, in accomplishing full repayment.

Sec. 7. The hydroelectric power plants and transmission lines authorized by this Act to be constructed,
operated, and maintained by the Secretary shall be operated in conjunction with other Federal powerplants,
present and potential, so as to produce the greatest practicable amount of power and energy that can be sold
at firm power and energy rates, but in the exercise of the authority hereby granted he shall not affect or in-
terfere with the operation of the provisions of the Colorado River Compact, the Upper Colorado River Basin
Compact, the Boulder Canyon Project Act, the Boulder Canyon Project Adjustment Act and any contract
lawfully entered unto under said Compacts and Acts. Subject to the provisions of the Colorado River Com-
pact, neither the impounding nor the use of water for the generation of power and energy at the plants of the
Colorado River storage project shall preclude or impair the appropriation of water for domestic or agricultural
purposes pursuant to applicable State law.

Sec. 8. In connection with the development of the Colorado River storage project and of the participating
projects, the Secretary is authorized and directed to investigate, plan, construct, operate, and maintain (1)
public recreational facilities on lands withdrawn or acquired for the development of said project or of said par-
ticipating projects, to conserve the scenery, the natural, historic, and archaeologic objects, and the wildlife on
said lands, and to provide for public use and enjoyment of the same and of the water areas created by these
projects by such means as are consistent with the primary purposes of said projects; and (2) facilities to
mitigate losses of, and improve conditions for, the propagation of fish and wildlife. The Secretary is author-
ized to acquire lands and to withdraw public lands from entry or other disposition under the public land laws
necessary for the construction, operation, and maintenance of the facilities herein provided, and to dispose of
them to Federal, State, and local governmental agencies by lease, transfer, exchange, or conveyance upon
such terms and conditions as will best promote their development and operation in the public interest. All
costs incurred pursuant to the section shall be nonreimbursable and nonreturnable.

Sec. 9. Nothing contained in this Act shall be construed to alter, amend, repeal, construe, interpret,
modify, or be in conflict with the provisions of the Boulder Canyon Project Act (45 Stat. 1057),87 the Boulder

87 43 U.S.C.A. § 617 et seq.
Canyon Project Adjustment Act (54 Stat. 774), the Colorado River Compact, the Upper Colorado River Basin Compact, the Rio Grande Compact of 1938, or the Treaty with the United Mexican States (Treaty Series 994).

Sec. 10. Expenditures for the Flaming Gorge, Glen Canyon, Curecanti, and Navajo initial units of the Colorado River storage project may be made without regard to the soil survey and land classification requirements of the Interior Department Appropriation Act, 1954.

Sec. 11. The Final Judgment, Final Decree and stipulations incorporated therein in the consolidated cases of United States of America v. Northern Colorado Water Conservancy District, et al., Civil Nos. 2782, 5016 and 5017, in the United States District Court for the District of Colorado, are approved, shall become effective immediately, and the proper agencies of the United States shall act in accordance therewith.

Sec. 12. There are hereby authorized to be appropriated, out of any moneys in the Treasury not otherwise appropriated, such sums as may be required to carry out the purposes of this Act, but not to exceed $760,000,000.

Sec. 13. In planning the use of, and in using credits from, net power revenues available for the purpose of assisting in the pay-out of costs of participating projects herein and hereafter authorized in the States of Colorado, New Mexico, Utah, and Wyoming, the Secretary shall have regard for the achievement within each of said States of the fullest practicable use of the waters of the Upper Colorado River system, consistent with the apportionment thereof among such States.

Sec. 14. In the operation and maintenance of all facilities, authorized by Federal law and under the jurisdiction and supervision of the Secretary of the Interior, in the basin of the Colorado River, the Secretary of the Interior is directed to comply with the applicable provisions of the Colorado River Compact, the Upper Colorado River Basin Compact, the Boulder Canyon Project Act, the Boulder Canyon Project Adjustment Act, and the Treaty with the United Mexican States, in the storage and release of water from reservoirs in the Colorado River Basin. In the event of the failure of the Secretary of the Interior to so comply, any State of the Colorado River Basin may maintain an action in the Supreme Court of the United States to enforce the provisions of this section, and consent is given to the joinder of the United States as a party in such suit or suits, as a defendant or otherwise.

Sec. 15. The Secretary of the Interior is directed to continue studies and to make a report to the Congress and to the States of the Colorado River Basin on the quality of water of the Colorado River.

Sec. 16. As used in this Act—

The terms “Colorado River Basin”, “Colorado River Compact”, “Colorado River System”, “Lee Ferry”, “States of the Upper Division”, “Upper Basin”, and “domestic use” shall have the meaning ascribed to them in article II of the Upper Colorado River Basin Compact;

The term “States of the Upper Colorado River Basin” shall mean the States of Arizona, Colorado, New Mexico, Utah, and Wyoming;

The term “Upper Colorado River Basin” shall have the same meaning as the term “Upper Basin”; The term “Upper Colorado River Basin Compact” shall mean that certain compact executed on October 11, 1948 by commissioners representing the States of Arizona, Colorado, New Mexico, Utah, and Wyoming, and consented to by the Congress of the United States of America by Act of April 6, 1949 (63 Stat. 31);
APPENDIX IX

SUPREME COURT OF THE UNITED STATES

No. 8, ORIGINAL

STATE OF ARIZONA, PLAINTIFF

v.

STATE OF CALIFORNIA, ET AL., DEFENDANTS

DECREE.—MARCH 9, 1964.

It is ORDERED, ADJUDGED AND DECREED that

1. For purposes of this decree:
   (A) "Consumptive use" means diversions from the stream less such return flow thereto as is available for consumptive use in the United States or in satisfaction of the Mexican treaty obligation;
   (B) "Mainstream" means the mainstream of the Colorado River downstream from Lee Ferry within the United States, including the reservoirs thereon;
   (C) Consumptive use from the mainstream within a state shall include all consumptive uses of water of the mainstream, including water drawn from the mainstream by underground pumping, and including but not limited to, consumptive uses made by persons, by agencies of that state, and by the United States for the benefit of Indian reservations and other federal establishments within the state;
   (D) "Regulatory structures controlled by the United States" refers to Hoover Dam, Davis Dam, Parker Dam, Headgate Rock Dam, Palo Verde Dam, Imperial Dam, Laguna Dam and all other dams and works on the mainstream now or hereafter controlled or operated by the United States which regulate the flow of water in the mainstream or the diversion of water from the mainstream;
   (E) "Water controlled by the United States" refers to the water in Lake Mead, Lake Mohave, Lake Havasu and all other water in the mainstream below Lee Ferry and within the United States;
   (F) "Tributaries" means all stream systems the waters of which naturally drain into the mainstream of the Colorado River below Lee Ferry;
   (G) "Perfected right" means a water right acquired in accordance with state law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works, and in addition shall include water rights created by the reservation of mainstream water for the use of federal establishments under federal law whether or not the water has been applied to beneficial use;
   (H) "Present perfected rights" means perfected rights, as here defined, existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act;
   (I) "Domestic use" shall include the use of water for household, stock, municipal, mining, milling, industrial, and other like purposes, but shall exclude the generation of electrical power;
   (J) "Annual" and "Year," except where the context may otherwise require, refer to calendar years;
II. The United States, its officers, attorneys, agents and employees be and they are hereby severally enjoined:

(A) From operating regulatory structures controlled by the United States and from releasing water controlled by the United States other than in accordance with the following order of priority:

1. For river regulation, improvement of navigation, and flood control;
2. For irrigation and domestic uses, including the satisfaction of present perfected rights; and
3. For power;

Provided, however, that the United States may release water in satisfaction of its obligations to the United States of Mexico under the treaty dated February 3, 1944, without regard to the priorities specified in this subdivision (A);

(B) From releasing water controlled by the United States for irrigation and domestic use in the States of Arizona, California and Nevada, except as follows:

1. If sufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy 7,500,000 acre-feet of annual consumptive use in the aforesaid three states, then of such 7,500,000 acre-feet of consumptive use, there shall be apportioned 2,800,000 acre-feet for use in Arizona, 4,400,000 acre-feet for use in California, and 300,000 acre-feet for use in Nevada;

2. If sufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy annual consumptive use in the aforesaid states in excess of 7,500,000 acre-feet, such excess consumptive use is surplus, and 50% thereof shall be apportioned for use in Arizona and 50% for use in California; provided, however, that if the United States so contracts with Nevada, then 46% of such surplus shall be apportioned for use in Arizona and 4% for use in Nevada;

3. If insufficient mainstream water is available for release, as determined by the Secretary of the Interior, to satisfy annual consumptive use of 7,500,000 acre feet in the aforesaid three states, then the Secretary of the Interior, after providing for satisfaction of present perfected rights in the order of their priority dates without regard to state lines and after consultation with the parties to major delivery contracts and such representatives as the respective states may designate, may apportion the amount remaining available for consumptive use in such manner as is consistent with the Boulder Canyon Project Act as interpreted by the opinion of this Court herein, and with other applicable federal statutes, but in no event shall more than 4,400,000 acre-feet be apportioned for use in California including all present perfected rights;

4. Any mainstream water consumptively used within a state shall be charged to its apportionment, regardless of the purpose for which it was released;

5. Notwithstanding the provisions of Paragraphs (1) through (4) of this subdivision (B), mainstream water shall be released or delivered to water users (including but not limited to, public and municipal corporations and other public agencies) in Arizona, California, and Nevada only pursuant to valid contracts therefor made with such users by the Secretary of the Interior, pursuant to Section 5 of the Boulder Canyon Project Act or any other applicable federal statute;

6. If, in any one year, water apportioned for consumptive use in a state will not be consumed in that state, whether for the reason that delivery contracts for the full amount of the state’s apportionment are not in effect or that users cannot apply all of such water to beneficial uses, or for any other reason, nothing in this decree shall be construed as prohibiting the Secretary of the Interior from releasing such apportioned but unused water during such year for consumptive use in the other states. No rights to the recurrent use of such water shall accrue by reason of the use thereof;

(C) From applying the provisions of Article 7 (d) of the Arizona water delivery contract dated February 9, 1944, and the provisions of Article 5 (a) of the Nevada water delivery contract dated March 30, 1942, as amended by the contract dated January 3, 1944, to reduce the apportionment or delivery of mainstream water to users within the States of Arizona and Nevada by reason of any uses in such states from the tributaries flowing therein;

(D) From releasing water controlled by the United States for use in the States of Arizona, California, and Nevada for the benefit of any federal establishment named in this subdivision (D) except in accordance with
the allocations made herein; provided, however, that such release may be made notwithstanding the provisions of Paragraph (5) of subdivision (B) of this Article; and provided further that nothing herein shall prohibit the United States from making future additional reservations of mainstream water for use in any of such States as may be authorized by law and subject to present perfected rights and rights under contracts theretofore made with water users in such State under Section 5 of the Boulder Canyon Project Act or any other applicable federal statute:

(1) The Chemehuevi Indian Reservation in annual quantities not to exceed (i) 11,340 acre feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 1,900 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of February 2, 1907;

(2) The Cocopah Indian Reservation in annual quantities not to exceed (i) 2,744 acre feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 431 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of September 27, 1917;

(3) The Yuma Indian Reservation in annual quantities not to exceed (i) 51,616 acre feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 7,743 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with a priority date of January 9, 1884;

(4) The Colorado River Indian Reservation in annual quantities not to exceed (i) 717,148 acre feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 107,588 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, with priority dates of March 3, 1865, for lands reserved by the Act of March 3, 1865 (13 Stat. 541, 559); November 22, 1873, for lands reserved by the Executive Order of said date; November 16, 1874, for lands reserved by the Executive Order of said date, except as later modified; May 15, 1876, for lands reserved by the Executive Order of said date; November 22, 1915, for lands reserved by the Executive Order of said date;

(5) The Fort Mohave Indian Reservation in annual quantities not to exceed (i) 122,648 acre feet of diversions from the mainstream or (ii) the quantity of mainstream water necessary to supply the consumptive use required for irrigation of 18,974 acres and for the satisfaction of related uses, whichever of (i) or (ii) is less, and, subject to the next succeeding proviso, with priority dates of September 18, 1890, for lands transferred by the Executive Order of said date; February 2, 1911, for lands reserved by the Executive Order of said date; provided, however, that lands conveyed to the State of California pursuant to the Swamp and Overflowed Lands Act [9 Stat. 519 (1850)] as well as any accretions thereto to which the owners of such land may be entitled, and lands patented to the Southern Pacific Railroad pursuant to the Act of July 27, 1866 (14 Stat. 292) shall not be included as irrigable acreage within the Reservation and that the above specified diversion requirement shall be reduced by 6.4 acre feet per acre of such land that is irrigable; provided that the quantities fixed in this paragraph and paragraph (4) shall be subject to appropriate adjustment by agreement or decree of this Court in the event that the boundaries of the respective reservations are finally determined;

(6) The Lake Mead National Recreation Area in annual quantities reasonably necessary to fulfill the purposes of the Recreation Area, with priority dates of March 3, 1929, for lands reserved by the Executive Order of said date (No. 5105), and April 25, 1930, for lands reserved by the Executive Order of said date (No. 5339);

(7) The Havasu Lake National Wildlife Refuge in annual quantities reasonably necessary to fulfill the purposes of the Refuge, not to exceed (i) 41,839 acre feet of water diverted from the mainstream or (ii) 37,339 acre feet of consumptive use of mainstream water, whichever of (i) or (ii) is less, with a priority date of January 22, 1941, for lands reserved by the Executive Order of said date (No. 8647), and a priority date of February 11, 1949, for land reserved by the Public Land Order of said date (No. 559);

(8) The Imperial National Wildlife Refuge in annual quantities reasonably necessary to fulfill the purposes of the Refuge not to exceed (i) 28,000 acre feet of water diverted from the mainstream or (ii) 23,000 acre feet of consumptive use of mainstream water, whichever of (i) or (ii) is less, with a priority date of February 14, 1941;
IX-30 UPDATING THE HOOVER DAM DOCUMENTS

(9) Boulder City, Nevada, as authorized by the Act of September 2, 1958, 72 Stat. 1726, with a priority date of May 15, 1931;

Provided further, that consumptive uses from the mainstream for the benefit of the above-named federal establishments shall, except as necessary to satisfy present perfected rights in the order of their priority dates without regard to state lines, be satisfied only out of water available, as provided in subdivision (B) of this Article, to each state wherein such uses occur and subject to, in the case of each reservation, such rights as have been created prior to the establishment of such reservation by contracts executed under Section 5 of the Boulder Canyon Project Act or any other applicable federal statute.

III. The States of Arizona, California and Nevada, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, and County of San Diego, and all other users of water from the mainstream in said states, their officers, attorneys, agents and employees, be and they are hereby severally enjoined:

(A) From interfering with the management and operation, in conformity with Article II of this decree, of regulatory structures controlled by the United States;

(B) From interfering with or purporting to authorize the interference with releases and deliveries, in conformity with Article II of this decree, of water controlled by the United States;

(C) From diverting or purporting to authorize the diversion of water from the mainstream the diversion of which has not been authorized by the United States for use in the respective states; and provided further that no party named in this Article and no other user of water in said states shall divert or purport to authorize the diversion of water from the mainstream the diversion of which has not been authorized by the United States for its particular use;

(D) From consuming or purporting to authorize the consumptive use of water from the mainstream in excess of the quantities permitted under Article II of this decree.

IV. The State of New Mexico, its officers, attorneys, agents and employees, be and they are after four years from the date of this decree hereby severally enjoined:

(A) From diverting or permitting the diversion of water from San Simon Creek, its tributaries and underground water sources for their irrigation of more than a total of 2,900 acres during any one year, and from exceeding a total consumptive use of such water, for whatever purpose, of 72,000 acre feet during any period of ten consecutive years; and from exceeding a total consumptive use of such water, for whatever purpose, of 8,220 acre feet during any one year;

(B) From diverting or permitting the diversion of water from the San Francisco River, its tributaries and underground water sources for the irrigation within each of the following areas of more than the following number of acres during any one year:

<table>
<thead>
<tr>
<th>Area</th>
<th>Acres</th>
</tr>
</thead>
<tbody>
<tr>
<td>Luna Area</td>
<td>225</td>
</tr>
<tr>
<td>Apache Creek-Aragon Area</td>
<td>316</td>
</tr>
<tr>
<td>Reserve Area</td>
<td>725</td>
</tr>
<tr>
<td>Glenwood Area</td>
<td>1,003</td>
</tr>
</tbody>
</table>

and from exceeding a total consumptive use of such water for whatever purpose, of 31,870 acre-feet during any period of ten consecutive years; and from exceeding a total consumptive use of such water, for whatever purpose, of 4,112 acre-feet during any one year;

(C) From diverting or permitting the diversion of water from the Gila River, its tributaries (exclusive of the San Francisco River and San Simon Creek and their tributaries) and underground water sources for the irrigation within each of the following areas of more than the following number of acres during any one year:

<table>
<thead>
<tr>
<th>Area</th>
<th>Acres</th>
</tr>
</thead>
<tbody>
<tr>
<td>Upper Gila Area</td>
<td>287</td>
</tr>
<tr>
<td>Cliff-Gila and Buckhorn-Duck Creek Area</td>
<td>5,314</td>
</tr>
<tr>
<td>Red Rock Area</td>
<td>1,456</td>
</tr>
</tbody>
</table>

and from exceeding a total consumptive use of such water (exclusive of uses in Virden Valley, New Mexico), for whatever purpose, of 136,620 acre feet during any period of ten consecutive years; and from exceeding a
total consumptive use of such water (exclusive of uses in Virden Valley, New Mexico), for whatever purpose, of 15,895 acre feet during any one year;

(D) From diverting or permitting the diversion of water from the Gila River and its underground water sources in the Virden Valley, New Mexico, except for use on lands determined to have the right to the use of such water by the decree entered by the United States District Court for the District of Arizona on June 29, 1935, in United States v. Gila Valley Irrigation District, et al. (Globe Equity No. 59) (herein referred to as the Gila Decree), and except pursuant to and in accordance with the terms and provisions of the Gila Decree; provided, however, that:

(1) This decree shall not enjoin the use of underground water on any of the following lands:

<table>
<thead>
<tr>
<th>Owner</th>
<th>Owner</th>
<th>Sec.</th>
<th>Twp.</th>
<th>Rng.</th>
<th>Acreage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Marvin Arnett and J. C. O'Dell.</td>
<td>Part Lot 3</td>
<td>6</td>
<td>19S</td>
<td>21W</td>
<td>33.84</td>
</tr>
<tr>
<td></td>
<td>Part Lot 4</td>
<td>6</td>
<td>19S</td>
<td>21W</td>
<td>52.33</td>
</tr>
<tr>
<td></td>
<td>NW 1/4 SW 1/4</td>
<td>5</td>
<td>19S</td>
<td>21W</td>
<td>38.36</td>
</tr>
<tr>
<td></td>
<td>SW 1/4 SW 1/4</td>
<td>5</td>
<td>19S</td>
<td>21W</td>
<td>39.80</td>
</tr>
<tr>
<td></td>
<td>Part Lot 1</td>
<td>7</td>
<td>19S</td>
<td>21W</td>
<td>50.68</td>
</tr>
<tr>
<td></td>
<td>NW 1/4 NW 1/4</td>
<td>8</td>
<td>19S</td>
<td>21W</td>
<td>38.03</td>
</tr>
<tr>
<td>Hyrum M. Pace, Ray Richardson, Harry Day and N. O. Pace, Est.</td>
<td>SW 1/4 NE 1/4</td>
<td>12</td>
<td>19S</td>
<td>21W</td>
<td>8.00</td>
</tr>
<tr>
<td></td>
<td>SW 1/4 NE 1/4</td>
<td>12</td>
<td>19S</td>
<td>21W</td>
<td>15.00</td>
</tr>
<tr>
<td></td>
<td>SE 1/4 NE 1/4</td>
<td>12</td>
<td>19S</td>
<td>21W</td>
<td>7.00</td>
</tr>
<tr>
<td>C. C. Martin</td>
<td>S. part SE 1/4 SW 1/4 SE 1/4</td>
<td>1</td>
<td>19S</td>
<td>21W</td>
<td>0.93</td>
</tr>
<tr>
<td></td>
<td>W 1/2 W 1/2 W 1/2 NE 1/4 NE 1/4</td>
<td>12</td>
<td>19S</td>
<td>21W</td>
<td>0.51</td>
</tr>
<tr>
<td></td>
<td>NW 1/4 NE 1/4</td>
<td>12</td>
<td>19S</td>
<td>21W</td>
<td>18.01</td>
</tr>
<tr>
<td>A. E. Jacobson</td>
<td>SW part Lot 1</td>
<td>6</td>
<td>19S</td>
<td>21W</td>
<td>11.58</td>
</tr>
<tr>
<td>W. LeRoss Jones</td>
<td>E. Central part: E 1/2 E 1/2 E 1/2 NW 1/4 NW 1/4</td>
<td>12</td>
<td>19S</td>
<td>21W</td>
<td>0.70</td>
</tr>
<tr>
<td></td>
<td>SW part NE 1/4 NW 1/4</td>
<td>12</td>
<td>19S</td>
<td>21W</td>
<td>8.93</td>
</tr>
<tr>
<td></td>
<td>N. Central part: N 1/2 NW 1/2 NW 1/4 SE 1/4 NW 1/4</td>
<td>12</td>
<td>19S</td>
<td>21W</td>
<td>0.51</td>
</tr>
<tr>
<td>Conrad and James R. Donaldson</td>
<td>N 1/2 N 1/2 N 1/2 SE 1/4</td>
<td>18</td>
<td>19S</td>
<td>20W</td>
<td>8.00</td>
</tr>
<tr>
<td>James D. Freestone</td>
<td>Part W 1/4 NW 1/4</td>
<td>33</td>
<td>18S</td>
<td>21W</td>
<td>7.79</td>
</tr>
<tr>
<td>Virgil W. Jones</td>
<td>N 1/2 SE 1/4 NW 1/4; SE 1/4 NE 1/4 NW 1/4</td>
<td>12</td>
<td>19S</td>
<td>21W</td>
<td>7.40</td>
</tr>
<tr>
<td>Darrell Brooks</td>
<td>SE 1/4 SW 1/4</td>
<td>32</td>
<td>18S</td>
<td>21W</td>
<td>6.15</td>
</tr>
<tr>
<td>Floyd Jones</td>
<td>Part N 1/2 SE 1/4 NE 1/4</td>
<td>13</td>
<td>19S</td>
<td>21W</td>
<td>4.00</td>
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<td></td>
<td>Part NW 1/4 SW 1/4 NW 1/4</td>
<td>18</td>
<td>19S</td>
<td>20W</td>
<td>1.70</td>
</tr>
</tbody>
</table>
or on lands or for other uses in the Virden Valley to which such use may be transferred or substituted on retirement from irrigation of any of said specifically described lands, up to a maximum total consumptive use of such water of 838.2 acre-feet per annum, unless and until such uses are adjudged by a court of competent jurisdiction to be an infringement or impairment of rights confirmed by the Gila Decree; and

(2) This decree shall not prohibit domestic use of water from the Gila River and its underground water sources on lands with rights confirmed by the Gila Decree, or on farmsteads located adjacent to said lands, or in the Virden Townsite, up to a total consumptive use of 265 acre feet per annum in addition to the uses confirmed by the Gila Decree, unless and until such use is adjudged by a court of competent jurisdiction to be an infringement or impairment of rights confirmed by the Gila Decree;

(E) Provided, however, that nothing in this Article IV shall be construed to affect rights as between individual water users in the State of New Mexico, nor shall anything in this Article be construed to affect possible superior rights of the United States asserted on behalf of National Forests, Parks, Memorials, Monuments and lands administered by the Bureau of Land Management; and provided further that in addition to the diversions authorized herein the United States has the right to divert water from the mainstream of the Gila and San Francisco Rivers in quantities reasonably necessary to fulfill the purposes of the Gila National Forest with priority dates as of the date of withdrawal for forest purposes of each area of the forest within which the water is used.

(F) Provided, further, that no diversion from a stream authorized in Articles IV (A) through (D) may be transferred to any of the other streams, nor may any use for irrigation purposes within any area on one of the streams be transferred for use for irrigation purposes to any other area on that stream.

V. The United States shall prepare and maintain, or provide for the preparation and maintenance of, and shall make available, annually and at such shorter intervals as the Secretary of the Interior shall deem
necessary or advisable, for inspection by interested persons at all reasonable times and at a reasonable place or places, complete, detailed and accurate records of:

(A) Releases of water through regulatory structures controlled by the United States;

(B) Diversions of water from the mainstream, return flow of such water to the stream as is available for consumptive use in the United States or in satisfaction of the Mexican treaty obligation, and consumptive use of such water. These quantities shall be stated separately as to each diverter from the mainstream, each point of diversion, and each of the States of Arizona, California and Nevada;

(C) Releases of mainstream water pursuant to orders therefor but not diverted by the party ordering the same, and the quantity of such water delivered to Mexico in satisfaction of the Mexican Treaty or diverted by others in satisfaction of rights decreed herein. These quantities shall be stated separately as to each diverter from the mainstream, each point of diversion, and each of the States of Arizona, California and Nevada;

(D) Deliveries to Mexico of water in satisfaction of the obligations of Part III of the Treaty of February 3, 1944, and, separately stated, water passing to Mexico in excess of treaty requirements;

(E) Diversions of water from the mainstream of the Gila and San Francisco Rivers and the consumptive use of such water, for the benefit of the Gila National Forest.

VI. Within two years from the date of this decree, the States of Arizona, California, and Nevada shall furnish to this Court and to the Secretary of the Interior a list of the present perfected rights, with their claimed priority dates, in waters of the mainstream within each state, respectively, in terms of consumptive use, except those relating to federal establishments. Any named party to this proceeding may present its claim of present perfected rights or its opposition to the claims of others. The Secretary of the Interior shall supply similar information, within a similar period of time, with respect to the claims of the United States to present perfected rights within each state. If the parties and the Secretary of the Interior are unable at that time to agree on the present perfected rights to the use of mainstream water in each state, and their priority dates, any party may apply to the Court for the determination of such rights by the Court.

VII. The State of New Mexico shall, within four years from the date of this decree, prepare and maintain, or provide for the preparation and maintenance of, and shall annually thereafter make available for inspection at all reasonable times and at a reasonable place or places, complete, detailed and accurate records of:

(A) The acreages of all lands in New Mexico irrigated each year from the Gila River, the San Francisco River, San Simon Creek and their tributaries and all of their underground water sources, stated by legal description and component acreages and separately as to each of the areas designated in Article IV of this decree and as to each of the three streams;

(B) Annual diversions and consumptive uses of water in New Mexico, from the Gila River, the San Francisco River and San Simon Creek and their tributaries, and all their underground water sources, stated separately as to each of the three streams.

VIII. This decree shall not affect:

(A) The relative rights inter sese of water users within any one of the states, except as otherwise specifically provided herein;

(B) The rights or priorities to water in any of the Lower Basin tributaries of the Colorado River in the States of Arizona, California, Nevada, New Mexico and Utah except the Gila River System;

(C) The rights or priorities, except as specific provision is made herein, of any Indian Reservation, National Forest, Park, Recreation Area, Monument or Memorial, or other lands of the United States;

(D) Any issue of interpretation of the Colorado River Compact.

IX. Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

MR. JUSTICE DOUGLAS dissents.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART dissent to the extent that the decree conflicts with the views expressed in the dissenting opinion of MR. JUSTICE HARLAN, 373 U.S. 546, 603.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.
EXHIBIT I
§ 1552. Criteria for long-range operation of reservoirs

(a) Promulgation by Secretary; order of priorities

In order to comply with and carry out the provisions of the Colorado River Compact, the Upper Colorado River Basin Compact, and the Mexican Water Treaty, the Secretary shall propose criteria for the coordinated long-range operation of the reservoirs constructed and operated under the authority of the Colorado River Storage Project Act [43 U.S.C.A. § 620 et seq.], the Boulder Canyon Project Act [43 U.S.C.A. § 617 et seq.], and the Boulder Canyon Project Adjustment Act [43 U.S.C.A. § 616 et seq.]. To effect in part the purposes expressed in this paragraph, the criteria shall make provision for the storage of water in storage units of the Colorado River storage project and releases of water from Lake Powell in the following listed order of priority:

1. Releasing water to supply one-half of the deficiency described in article III(c) of the Colorado River Compact, if any such deficiency exists and is chargeable to the States of the Upper Division, but in any event such releases, if any, shall not be required in any year that the Secretary makes the determination and issues the proclamation specified in section 1512 of this title;

2. Releases to supply one-half of the deficiency described in article III(d) of the Colorado River Compact, less such quantities of water delivered into the Colorado River below Lee Ferry to the credit of the States of the Upper Division from other sources; and

3. Storage of water not required for releases specified in clauses (1) and (2) of this subsection to the extent that the Secretary, after consultation with the Upper Colorado River Commission and representatives of the three Lower Division States and taking into consideration all relevant factors (including, but not limited to, historic stream-flows, the most critical period of record, and probabilities of water supply), shall find this to be reasonably necessary to assure deliveries under clauses (1) and (2) without impairment of annual consumptive uses in the upper basin pursuant to the Colorado River Compact, Provided: That water not so required to be stored shall be released from Lake Powell: (i) to the extent that it can be reasonably applied in the States of the Lower Division to the uses specified in article III(c) of the Colorado River Compact, but no such releases shall be made when the active storage in Lake Powell is less than the active storage in Lake Mead, (ii) to maintain, as nearly as practicable, active storage in Lake Mead equal to the active storage in Lake Powell, and (iii) to avoid anticipated spills from Lake Powell.

(b) Submittal of criteria for review and comment; publication; report to Congress

Not later than January 1, 1970, the criteria proposed in accordance with the foregoing subsection (a) of this section shall be submitted to the Governors of the seven Colorado River Basin States and to such other parties and agencies as the Secretary may deem appropriate for their review and comment. After receipt of comments on the proposed criteria, but not later than July 1, 1970, the Secretary shall adopt appropriate criteria in accordance with this section and publish the same in the Federal Register. Beginning January 1, 1972, and yearly thereafter, the Secretary shall transmit to the Congress and to the Governors of the Colorado River Basin States a report describing the actual operation under the adopted criteria for the preceding compact water year and the projected operation for the current year.

As a result of actual operating experience or unforeseen circumstances, the Secretary may thereafter modify the criteria to better achieve the purposes specified in subsection (a) of this section, but only after correspondence with the Governors of the seven Colorado River Basin States and appropriate consultation with such State representatives as each Governor may designate.

(c) Powerplant operations

Section 7 of the Colorado River Storage Project Act [43 U.S.C.A. § 620f] shall be administered in accordance with the foregoing criteria.

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(c) The report shall be submitted to the Committees on Appropriations and Interior and Insular Affairs of the House of Representatives and the Committees on Appropriations and Energy and Natural Resources of the Senate within three years of the appropriation of funds authorized by section 1617.

SEC. 1617. AUTHORIZATION OF APPROPRIATIONS.

There is authorized to be appropriated for fiscal years beginning after September 30, 1992, $4,000,000 to carry out the study authorized by section 1616.

TITLE XVII—IRRIGATION ON STANDING ROCK INDIAN RESERVATION, NORTH DAKOTA

SEC. 1701. IRRIGATION ON STANDING ROCK INDIAN RESERVATION.

(a) Section 5(e) of Public Law 89—108, as amended by section 8 of the Garrison Diversion Unit Reclamation Act of 1986 (Public Law 99–294), is amended by striking "Fort Yates" and inserting "one or more locations within the Standing Rock Indian Reservation".

(b) Section 10 of Public Law 89—108, as amended by section 8 of Public Law 99–294, is further amended by adding subsection (e) as follows:

"(e) The portion of the $61,000,000 authorized for Indian municipal, rural, and industrial water features shall be indexed as necessary to allow for ordinary fluctuations of construction costs incurred after October 1, 1986, as indicated by engineering costs indices applicable for the type of construction involved. All other authorized cost ceilings shall remain unchanged."

TITLE XVIII—GRAND CANYON PROTECTION

SEC. 1801. SHORT TITLE.

This Act may be cited as the "Grand Canyon Protection Act of 1992".

SEC. 1802. PROTECTION OF GRAND CANYON NATIONAL PARK.

(a) IN GENERAL.—The Secretary shall operate Glen Canyon Dam in accordance with the additional criteria and operating plans specified in section 1804 and exercise other authorities under existing law in such a manner as to project, mitigate adverse impacts to, and improve the values for which Grand Canyon National Park and Glen Canyon National Recreation Area were established, including, but not limited to natural and cultural resources and visitor use.

(b) COMPLIANCE WITH EXISTING LAW.—The Secretary shall implement this section in a manner fully consistent with and subject to the Colorado River Compact, the Upper Colorado River Basin Compact, the Water Treaty of 1944 with Mexico, the decree of the Supreme Court in Arizona v. California, and the provisions of the Colorado River Storage Project Act of 1956 and the Colorado River Basin Project Act of 1968 that govern allocation, appropriation, development, and exportation of the waters of the Colorado River Basin.

(c) RULE OF CONSTRUCTION.—Nothing in this title alters the purposes for which the Grand Canyon National Park or the Glen Canyon National Recreation Area were established or affects the
authority and responsibility of the Secretary with respect to the management and administration of the Grand Canyon National Park and Glen Canyon National Recreation Area, including natural and cultural resources and visitor use, under laws applicable to those areas, including, but not limited to, the Act of August 25, 1916 (39 Stat. 535) as amended and supplemented.

SEC. 1602. INTERIM PROTECTION OF GRAND CANYON NATIONAL PARK.

(a) INTERIM OPERATIONS.—Pending compliance by the Secretary with section 1804, the Secretary shall, on an interim basis, continue to operate Glen Canyon Dam under the Secretary's announced interim operating criteria and the Interagency Agreement between the Bureau of Reclamation and the Western Area Power Administration executed October 2, 1991 and exercise other authorities under existing law, in accordance with the standards set forth in section 1802, utilizing the best and most recent scientific data available.

(b) CONSULTATION.—The Secretary shall continue to implement Interim Operations in consultation with—

1. appropriate agencies of the Department of the Interior, including the Bureau of Reclamation, United States Fish and Wildlife Service, and the National Park Service;
2. The Secretary of Energy;
3. The Governors of the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming;
4. Indian Tribes; and
5. The general public, including representatives of the academic and scientific communities, environmental organizations, the recreation industry, and contractors for the purchase of Federal power produced at Glen Canyon Dam.

(c) DEVIATION FROM INTERIM OPERATIONS.—The Secretary may deviate from Interim Operations upon a finding that deviation is necessary and in the public interest to—

1. comply with the requirements of Section 1804(a);
2. respond to hydrologic extremes or power system operation emergencies;
3. comply with the standards set forth in Section 1802;
4. respond to advances in scientific data; or
5. comply with the terms of the Interagency Agreement.

(d) TERMINATION OF INTERIM OPERATIONS.—Interim operations described in this section shall terminate upon compliance by the Secretary with section 1804.

SEC. 1604. GLEN CANYON DAM ENVIRONMENTAL IMPACT STATEMENT; LONG-TERM OPERATION OF GLEN CANYON DAM.

(a) FINAL ENVIRONMENTAL IMPACT STATEMENT.—Not later than 2 years after the date of enactment of this Act, the Secretary shall complete a final Glen Canyon Dam environmental impact statement, in accordance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(b) AUDIT.—The Comptroller General shall—

1. audit the costs and benefits to water and power users and to natural, recreational, and cultural resources resulting from management policies and dam operations identified pursuant to the environmental impact statement described in subsection (a); and
2. report the results of the audit to the Secretary and the Congress.
(c) ADOPTION OF CRITERIA AND PLANS.—(1) Based on the findings, conclusions, and recommendations made in the environmental impact statement prepared pursuant to subsection (a) and the audit performed pursuant to subsection (b), the Secretary shall—

(A) adopt criteria and operating plans separate from and in addition to those specified in section 602(b) of the Colorado River Basin Project Act of 1968; and

(B) exercise other authorities under existing law, so as to ensure that Glen Canyon Dam is operated in a manner consistent with section 1802.

(2) Each year after the date of the adoption of criteria and operating plans pursuant to paragraph (1), the Secretary shall transmit to the Congress and to the Governors of the Colorado River Basin States a report, separate from and in addition to the report specified in section 602(b) of the Colorado River Basin Project Act of 1968 on the preceding year and the projected year operations undertaken pursuant to this Act.

(3) In preparing the criteria and operating plans described in section 602(b) of the Colorado River Basin Project Act of 1968 and in this subsection, the Secretary shall consult with the Governors of the Colorado River Basin States and with the general public, including—

(A) representatives of academic and scientific communities;

(B) environmental organizations;

(C) the recreation industry; and

(D) contractors for the purchase of Federal power produced at Glen Canyon Dam.

(d) REPORT TO CONGRESS.—Upon implementation of long-term operations under subsection (c), the Secretary shall submit to the Congress the environmental impact statement described in subsection (a) and a report describing the long-term operations and other reasonable mitigation measures taken to protect, mitigate adverse impacts to, and improve the condition of the natural, recreational, and cultural resources of the Colorado River downstream of Glen Canyon Dam.

(e) ALLOCATION OF COSTS.—The Secretary of the Interior, in consultation with the Secretary of Energy, is directed to reallocate the costs of construction, operation, maintenance, replacement and emergency expenditures for Glen Canyon Dam among the purposes directed in section 1802 of this Act and the purposes established in the Colorado River Storage Project Act of April 11, 1956 (70 Stat. 170). Costs allocated to section 1802 purposes shall be nonreimbursable. Except that in fiscal year 1993 through 1997 such costs shall be nonreimbursable only to the extent to which the Secretary finds the effect of all provisions of this Act is to increase net offsetting receipts; Provided, That if the Secretary finds in any such year that the enactment of this Act does cause a reduction in net offsetting receipts generated by all provisions of this Act, the costs allocated to section 1802 purposes shall remain reimbursable. The Secretary shall determine the effect of all the provisions of this Act and submit a report to the appropriate House and Senate committees by January 31 of each fiscal year, and such report shall contain for that fiscal year a detailed accounting of expenditures incurred pursuant to this Act, offsetting receipts generated by this Act, and any increase or reduction in net offsetting receipts generated by this Act.
SEC. 1805. LONG-TERM MONITORING.

(a) IN GENERAL.—The Secretary shall establish and implement long-term monitoring programs and activities that will ensure that Glen Canyon Dam is operated in a manner consistent with that of section 1802.

(b) RESEARCH.—Long-term monitoring of Glen Canyon Dam shall include any necessary research and studies to determine the effect of the Secretary's actions under section 1804(c) on the natural, recreational, and cultural resources of Grand Canyon National Park and Glen Canyon National Recreation Area.

(c) CONSULTATION.—The monitoring programs and activities conducted under subsection (a) shall be established and implemented in consultation with—

(1) the Secretary of Energy;

(2) the Governors of the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming;

(3) Indian tribes; and

(4) the general public, including representatives of academic and scientific communities, environmental organizations, the recreation industry, and contractors for the purchase of Federal power produced at Glen Canyon Dam.

SEC. 1806. RULES OF CONSTRUCTION.

Nothing in this title is intended to affect in any way—

(1) the allocations of water secured to the Colorado Basin States by any compact, law, or decree; or

(2) any Federal environmental law, including the Endangered Species Act (16 U.S.C. 1531 et seq.).

SEC. 1807. STUDIES NONREIMBURSABLE.

All costs of preparing the environmental impact statement described in section 1804, including supporting studies, and the long-term monitoring programs and activities described in section 1805 shall be nonreimbursable. The Secretary is authorized to use funds received from the sale of electric power and energy from the Colorado River Storage Project to prepare the environmental impact statement described in section 1804, including supporting studies, and the long-term monitoring programs and activities described in section 1805, except that such funds will be treated as having been repaid and returned to the general fund of the Treasury as costs assigned to power for repayment under section 6 of the Act of April 11, 1956 (70 Stat. 170). Except that in fiscal year 1993 through 1997 such provisions shall take effect only to the extent to which the Secretary finds the effect of all the provisions of this Act is to increase net offsetting receipts; Provided, That if the Secretary finds in any such year that the enactment of this Act does cause a reduction in net offsetting receipts generated by all provisions of this Act, all costs described in this section shall remain reimbursable. The Secretary shall determine the effect of all the provisions of this Act and submit a report to the appropriate House and Senate committees by January 31 of each fiscal year, and such report shall contain for that fiscal year a detailed accounting of expenditures incurred pursuant to this Act, offsetting receipts generated by this Act, and any increase or reduction in net offsetting receipts generated by this Act.
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SEC. 1806. AUTHORIZATION OF APPROPRIATIONS.
There are authorized to be appropriated such sums as are necessary to carry out this title.

SEC. 1807. REPLACEMENT POWER.
The Secretary of Energy in consultation with the Secretary of the Interior and with representatives of the Colorado River Storage Project power customers, environmental organizations and the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming shall identify economically and technically feasible methods of replacing any power generation that is lost through adoption of long-term operational criteria for Glen Canyon Dam as required by section 1804 of this title. The Secretary shall present a report of the findings, and implementing draft legislation, if necessary, not later than two years after adoption of long-term operating criteria. The Secretary shall include an investigation of the feasibility of adjusting operations at Hoover Dam to replace all or part of such lost generation. The Secretary shall include an investigation of the modifications or additions to the transmission system that may be required to acquire and deliver replacement power.

TITLE XIX—MID-DAKOTA RURAL WATER SYSTEM

SEC. 1901. SHORT TITLE.
This title may be cited as the "Mid-Dakota Rural Water System Act of 1992".

SEC. 1902. DEFINITIONS.
For purposes of this title—

(1) the term "feasibility study" means the study entitled "Mid-Dakota Rural Water System Feasibility Study and Report" dated November 1988 and revised January 1989 and March 1989, as supplemented by the "Supplemental Report for Mid-Dakota Rural Water System" dated March 1990 (which supplemental report shall control in the case of any inconsistency between it and the study and report), as modified to reflect consideration of the benefits of the water conservation programs developed and implemented under section 1905 of this title;

(2) the term "pumping and incidental operational requirements" means all power requirements incident to the operation of intake facilities, pumping stations, water treatment facilities, reservoirs, and pipelines up to the point of delivery of water by the Mid-Dakota Rural Water System to—

(A) each entity that distributes water at retail to individual users; or

(B) each rural use location;

(3) the term "rural use location" includes a water use location—

(A) that is located in or in the vicinity of a municipality identified in appendix A of the feasibility report, for which municipality and vicinity there was on December 31, 1988, no entity engaged in the business of distributing water at retail to users in that municipality or vicinity; and

(B) that is one of no more than 40 water use locations in that municipality and vicinity;
DEPARTMENT OF THE INTERIOR
Bureau of Reclamation
43 CFR PART 415
[RIN 1006-AA24]
REGULATIONS FOR ADMINISTERING ENTITLEMENTS TO COLORADO RIVER WATER IN
THE LOWER COLORADO RIVER BASIN
AGENCY: Bureau of Reclamation, Interior.
ACTION: Notice of proposed rulemaking
SUMMARY: This proposed rule sets forth formal written procedures,
guidelines, and criteria that define rights and responsibilities for the
use of Colorado River water in the States of Nevada, Arizona, and
California. Because demand for this scarce resource will likely surpass
available supplies in the near future, efficient use should be
encouraged and unauthorized uses must be eliminated to ensure this
valuable resource is used most effectively. This proposed rule would
have two functions: (1) provide the the United States the legal
framework to enforce actions to eliminate unauthorized uses; and (2)
provide maximum flexibility for entitlement holders to negotiate
voluntary water transfers for the resolution of local water resource
problems and demands.
DATES: Comments must be submitted on or before [Insert date 90 days
after date of publication in the Federal Register]. The Bureau of
Reclamation (Reclamation) will schedule public meetings during the
comment period at dates, times, and locations to be announced later.
ADDRESSES: Written comments must be submitted to Mr. V. LeGrand Neilson, Regional Supervisor of Water, Land, and Power, Lower Colorado Region, Bureau of Reclamation, P.O. Box 61470, Boulder City, Nevada 89006-1470.

FOR FURTHER INFORMATION CONTACT: Mr. Dale Ensminger, Division of Water, Land, and Power, Lower Colorado Region, Bureau of Reclamation, P.O. Box 61470, Boulder City, Nevada 89006-1470.

SUPPLEMENTARY INFORMATION:

General purpose.

The purpose of this notice is to provide the public with the opportunity to review and comment on proposed regulations that will govern water uses within the Lower Basin of the Colorado River (Lower Basin) in the States of Nevada, Arizona, and California. The proposed regulations set forth rules, procedures, guidelines, and criteria consistent with relevant Federal law and the Secretary of the Interior's (Secretary) trust responsibility to Indian tribes, which the Secretary and his or her subordinate agencies will follow in administering entitlements to Colorado River water, and with which water users are expected to comply in utilizing water from the mainstream of the Colorado River within the Lower Basin.

Background.

The proposed regulations are being advanced as a proposed rule to provide a uniform system of structure and control in managing water entitlements within the Lower Basin and to help eliminate prohibited uses. The proposed regulations, except for imposition of fees to fund the cost of reimbursable services provided by Reclamation, are not new
requirements but rather comprise a formal, written statement of existing management and operational requirements and guidelines. They will apply to the administration of all entitlements to Colorado River mainstream water within the Lower Basin, regardless of how such entitlements were or are obtained, except where expressly provided otherwise.

Statutory Authority.

The Secretary is responsible for managing the Colorado River in the Lower Basin and administering entitlements for the delivery of water within the Lower Basin pursuant to the Boulder Canyon Project Act, and the 1963 Supreme Court Opinion and 1964 Decree and 1979 supplemental decree in Arizona v. California, et al. Reclamation acts as the Secretary’s representative in performing many of the Secretary’s responsibilities in this area and therefore many of the provisions in the proposed regulations will be enforced or carried out by the Regional Director of Reclamation’s Lower Colorado Region.

Summary of major provisions.

The proposed regulations document existing criteria for obtaining an entitlement to and making beneficial consumptive use of Colorado River water. Entitlements to Colorado River water, except for holders of Federal entitlements, are available only by contract with the Secretary, and the proposed regulations set forth the process by which a person or entity may obtain or increase an entitlement under contract with the Secretary. The proposed regulations are not intended to imply that a water entitlement is available to an applicant or that a proposed use will be recommended by the appropriate state authority or approved by
the United States. Some of the major provisions of the proposed regulations are as follows:

A. Elimination of prohibited uses.

Pursuant to the Supreme Court's 1979 Decree, all Colorado River water put to consumptive use is required to be used for beneficial purposes. In accordance with the 1922 Colorado River Compact and various water service contracts, the proposed regulations add a requirement, except where expressly provided otherwise, that beneficial use must be reasonable, which means that use must be in an amount not to exceed that reasonably required for the purpose for which water is being used. This additional limitation, beyond the beneficial use requirement, is intended to recognize that the Lower Basin is largely a desert environment, water is in short supply relative to increasing demands, and a reasonable use of water by all entitlement holders will extend the supply of this scarce resource.

The proposed regulations also describe the circumstances that can lead to a finding of prohibited use of an entitlement, which includes such conditions as unreasonable use, nonuse, nonbeneficial use, unauthorized use, or reporting violations. The proposed regulations specify the consequences that may result if the United States makes a determination that a water user has not used an entitlement, or has made an unreasonable, nonbeneficial, or unauthorized use of an entitlement, or has committed a reporting violation. The consequences for prohibited use of an entitlement vary with different prohibited uses, but may include cease and desist orders, reductions of diversions, requirements
to develop and implement more effective water management plans, and in extreme cases may include reductions in entitlements.

B. Determining the source of water pumped from wells.

The proposed regulations establish criteria for determining whether water withdrawn from wells adjacent to the Colorado River is Colorado River water and therefore subject to regulation by the Secretary. The Lower Basin is the principal source of water for users in the river valley that extends from Lee's Ferry to the Southern International Boundary with Mexico in the vicinity of San Luis, Mexico. Water is stored in surface reservoirs and in an aquifer of permeable sediments and sedimentary rocks in the river valley and is pumped from the river and from wells on the floodplain, on adjacent alluvial slopes, and in interconnected tributary valleys. Although precipitation in surrounding mountains and inflow from tributary valleys contribute some water to the aquifer, it is estimated that more than 97 percent of the annual water supply to the river valley originates from the river.

The Geological Survey, in cooperation with Reclamation, developed a method to identify wells that yield water that originates from the river. The method employs a presumption that all water beneath the lower Colorado River floodplain and an extensive area below Imperial Dam is mainstream Colorado River water; and an accounting surface beneath hydrologically connected areas adjacent to the lower Colorado River floodplain which represents the water table that would exist if the only source of water to these areas was the river. The accounting surface includes an area that is defined on the land areas away from the river by geologic boundaries that pose a barrier to subsurface flow. The
accounting surface was generated by using river profiles of the Colorado River, water elevations in the reservoirs, lakes, marshes, wetlands, and drainage ditches that comprise the "mainstream" of the Colorado River, and water level elevations in wells. The accounting surface will be used to identify the wells in hydrologically connected areas adjacent to the lower Colorado River floodplain that yield water that originates from the Colorado River and are therefore subject to these regulations. Well users identified as mainstream Colorado River water users will be required to have an entitlement for Colorado River water and, except where expressly provided otherwise, will be required to enter into a contract with the Secretary if water is available. If such a water user cannot obtain a legal entitlement to Colorado River water, Reclamation will take legal action pursuant to the proposed regulations to end the unauthorized diversions.

C. Due process right to appeal adverse action.

The proposed regulations provide a means for a water user to receive due process through appeal of a finding of nonuse, unreasonable use, nonbeneficial use, unauthorized use, or inaccurate reporting of water use before the United States takes action to remedy the condition. The proposed regulations also provide a means for a water user to appeal a determination that a well is drawing Colorado River water, following an opportunity to present evidence on the nature of the underground diversion.

D. Voluntary water transfers.

The proposed regulations promote more efficient water use by authorizing voluntary arrangements whereby entitlement holders may
transfer, lease, exchange, or bank-market water under stipulated conditions. The measure of an entitlement holder's right to enter into such arrangements will be the average of the entitlement holder's beneficial consumptive use for the previous 5 years, or other appropriate period as determined by the United States. Transfers, leases, exchanges, and banking-marketing transactions must be approved by the Regional Director before they can be implemented, and review of the proposed arrangements by the United States will include consideration of such factors as relevant law, potential impacts on other entitlement holders, mitigation of third-party impacts, and comments from interested parties, particularly parties that may be affected by the proposed action.

E. Banking and marketing of banked water.

The proposed regulations include provisions that will permit an entitlement holder to store conserved water in Lake Mead and will specifically recognize extraordinary conservation measures or land falling as a beneficial consumptive use chargeable against the entitlement of the conserving entity and the apportionment of the State where and in the year the conservation activity occurs. Water that is conserved and banked shall be considered to be non-Colorado River water and may be used by the entitlement holder that conserved and banked the water to repay any unintentional excess use that may occur, or the entitlement holder may market the banked water. Water saved through verifiable conservation measures will not subject the entitlement holder to forfeiture or loss of entitlement due to nonuse for a reasonable time while the conserving entitlement holder attempts to market or put the
conserved water to beneficial use. Banked water will be considered "top water" in Lake Mead and is subject to release before Colorado River water for flood control purposes.

F. Fees.

The proposed regulations provide for the assessment of fees to cover costs of providing Government services to those who use Colorado River water in the Lower Basin. Among the fees assessed will be a general user fee that is designed to recover the cost of ongoing activities that benefit users of those services. Some of the activities for which Reclamation will be reimbursed by this fee are listed in § 415.21, and include such activities as maintenance of waterways and diversion facilities, scheduling water deliveries, and monitoring and forecasting water demand and use. Reclamation will publish notice in the Federal Register and will consult with entitlement holders prior to establishing or revising the fee.

G. Off-reservation leasing or marketing of Indian reserved water rights.

The proposed regulations provide for two types of new marketing transactions: (1) the direct leasing of entitlements (§ 415.8); and (2) the banking-marketing of entitlements (§ 415.23). The direct leasing section allows for the leasing of historically used entitlement water on an annual basis or for a period of years. The banking-marketing section allows entitlement holders to "bank" conserved water in available storage capacity and then use the banked water in later years or enter into marketing transactions for the banked water with other water users within the Lower Basin. Both types of transactions
will be facilitated by characterizing extraordinary conservation measures or land fallowing in conjunction with direct leasing or banking-marketing as beneficial consumptive uses.

The proposed regulations recognize that Indian tribes with decreed Federal reserved water rights\(^1\) are entitled to participate in the direct leasing and banking-marketing systems. Such transactions would be limited to the temporary use of decreed Indian water entitlements on and off the reservations. There would be no permanent transfer of such entitlements.

The primary issue associated with the inclusion of the Indian entitlements in the direct leasing and banking-marketing systems is whether the off-reservation use of Indian reserved right water, via regulated market transactions, is authorized under existing law. The Department's decision on this issue will apply to both direct leasing transactions (§ 415.8) and banking-marketing transactions (§ 415.23), since both types of transactions may result in the off-reservation use of Indian entitlement water. This issue is addressed below in order to facilitate appropriate public comment.

The Department of Interior (Department) appreciates that off-reservation use of Indian entitlement water presents complex legal

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\(^1\) In *Arizona v. California*, 373 U.S. 546 (1963), the Chemehuevi, Cocopah, Colorado River, Fort Mojave, and Quechan Tribes were awarded approximately 900,000 acre-feet of water annually from the Colorado River with priority dates corresponding with the dates of the establishment of the reservations. The tribes' rights are based on the doctrine of Indian reserved rights first enunciated by the Supreme Court in *Winters v. United States*, 207 U.S. 564 (1908). The court in *Arizona v. California*, not only adopted the Winters doctrine, but also ruled that the tribes are entitled to water to satisfy future as well as present needs in a quantity measured by the amount of water needed to irrigate the "practically irrigable acreage" on the reservations. 373 U.S. at 600.
issues which have not yet been completely resolved in judicial decisions. Accordingly, the Department invites public comment on this aspect of the proposed regulations so as to gain an understanding of the various positions held by the states, Indian tribes, and other water users. To facilitate comment, we set forth below our preliminary legal conclusions on the issues related to the off-reservation use of Indian entitlement water within the context of the law of the Colorado River.

For several years, it has been the policy of the Department to facilitate water marketing proposals between willing buyers and sellers. This policy was most recently set forth in the "Principles Governing Voluntary Water Transactions That Involve or Affect Facilities Owned or Operated by the Department of the Interior" (December 16, 1988). The Principles recognize that water transfers are an increasingly important means of meeting western water needs and that the Department can assist in meeting these needs through the operation of Federal water projects. Tribal involvement in such transfers is anticipated and specifically included as part of the Department's policy. The criteria for implementing the Principles included a discussion of the opportunities presented for an Indian tribe or community to benefit economically from the lease or transfer of water rights secured under a settlement with the Federal Government or non-Federal parties. This discussion concluded that the water rights of the Indian tribes represent a significant portion of their resource base that often cannot be put to immediate use. In such circumstances, the leasing of tribal water resources can be a mutually beneficial transaction between a tribe and its non-Indian neighbors.
In this regard, the Department's policy follows the direction charted by then Solicitor Coldiron in a March 23, 1983, letter responding to an inquiry from the Association of California Water Agencies regarding off-reservation Indian water marketing:

Once the Indian water right has been quantified ... we believe for a variety of reasons that the Indians should not be restricted in putting their water to beneficial use. In the first place, supporting Indian efforts to apply their water rights beneficially both on and off the reservation is consistent with ... efforts to strengthen tribal economies and governments by giving the Indians more control over and benefits from their natural resources. Marketing of Indian water off the reservation can generate substantial income to capitalize reservation development and provide the tribes with needed flexibility in their resource development and planning. We see no reason why the Indians should not be permitted to reap the maximum benefit from their water resources just as they would from any other tribal resource ... Finally, we see no insuperable legal bar to marketing of Indian water rights off the reservation.

Against the backdrop of this policy, it is the Department's preliminary conclusion that in the context of the Lower Basin it is permissible, without additional authority from Congress, to allow for the use of Indian reserved right water off the reservations. Several reasons support the conclusion.

1. The initial point of inquiry is whether 25 U.S.C. 177 presents a legal barrier to the off-reservation temporary transfer of Indian reserved right water. Section 177 provides in relevant part:

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

The Department has long recognized that section 177 was enacted to protect Indian tribes from dispositions or alienations of their real
property rights without the appropriate consent of Congress. Section 177 reflects Federal policy that restraints on alienation are necessary to preserve the tribal land base which is essential to the continued existence of tribal society and culture. One question which has not been definitively answered, however, is whether the 25 U.S.C. 177 prohibition extends to tribal reserved water rights in transactions which are independent of the land base.

Our review of this matter supports the notion that Indian water rights are interests in real property subject to the limitations contained in section 177. Accordingly, the relevant question is whether Congress has consented to off-reservation conveyances of Indian reserved water rights in this situation.

2. Our preliminary conclusion is that there is sufficient congressional authorization for this aspect of the proposed regulations. The authority exists under: (a) 25 U.S.C. 415, (b) 25 U.S.C. 2 and 9, and (c) relevant portions of the law of the Colorado River.

a. 25 U.S.C. 415. Section 415 is a general statute giving tribes broad authority to lease their lands with the approval of the Secretary.

It provides in relevant part:

Any restricted Indian lands, whether tribally, or individually owned, may be leased by the Indian owners, with the approval of the Secretary of the Interior, for public, religious, educational, recreational, residential, or business purposes, including the development or utilization of natural resources in connection with operations under such leases, for grazing purposes, and for those farming purposes which require the making of a substantial investment in the improvement of the land for the production of
specialized crops as determined by the Secretary.

Section 415 also allows tribes to convey their water rights in connection with leases of reservation lands. See Skeem v. United States, 273 F. 93 (9th Cir. 1921); Solicitor's Opinion, February 1, 1964, 2 "Op. Sol. on Indian Affairs" 1930 (U.S.D.I. 1979).

Section 415 should be liberally construed to accomplish its purpose of benefitting Indian tribes by facilitating the development of reservation resources and economies. If the term "land" is read as including the incident of water rights, section 415 alone may provide authority for leasing water rights.

Although the applicability of section 415 to off-reservation use of Indian water rights may not be free from doubt, the Department has relied upon that authority on a number of occasions to provide the necessary consent to such transactions. For example, approval has been granted for a coal mining lease on the Navajo and Hopi reservations where water extracted from the lease properties is used to slurry coal to an off-reservation site where the water is then used for power generation purposes. The Department also relied upon section 415 in providing approval of a 1970's agreement between the Gila River Indian Community (Community) and the Kennecott Copper Company, where the agreement was viewed as permitting an off-reservation use of the Community's reserved right water.

b. 25 U.S.C. 2 and 9. 25 U.S.C. 2 and 9 provide broad authority for the Department's supervision and management of Indian affairs, and particularly for the protection of trust resources. See Armstrong v. United States, 306 F.2d 520 (10th Cir., 1962). Courts have relied upon
sections 2 and 9 to uphold Secretarial authority to agree to a sharing of water resources between Indians and non-Indians. See United States v. Ahtanum, 236 F.2d 321 (9th Cir., 1956), cert. denied, 352 U.S. 988 (1958). Given this background, and the broad general authority provided in these statutes, it is the Department's view that, when combined with 25 U.S.C. 415 and the relevant portions of the law of the Colorado River, sections 2 and 9 provide additional support for this aspect of the proposed regulations.

c. Boulder Canyon Project Act. Finally, relevant portions of the law of the Colorado River bear upon this issue and add to other authority of the Secretary in this situation. The foundation for the Secretary's broad authority within the Lower Basin is the Boulder Canyon Project Act of 1928, 43 U.S.C. 617 et seq. Among other things, the Boulder Canyon Project Act provided authority for the Secretary to:

(i) carry out the apportionment of the river among the three states by entering into contracts; (ii) recognize pre-1929 present perfected water rights; and (iii) provide for the comprehensive management and control of the Lower Basin river system in regard to flood control, power generation, and the distribution and use of the developed water resources.

The Secretary's authority under the Boulder Canyon Project Act was addressed in detail by the Supreme Court in its decision in Arizona v. California, 373 U.S. 546 (1963). Some relevant portions of that decision are as follows:

373 U.S. at 589-590.

In undertaking this ambitious and expensive project for the welfare of the people of the Lower Basin
States and of the Nation, the United States assumed the responsibility for the construction, operation, and supervision of Boulder Dam and a great complex of other dams and works. Behind the dam were stored virtually all the waters of the main river, thus impounding not only the natural flow but also the great quantities of water previously allowed to run waste or to wreak destruction. The impounding of these waters, along with their regulated and systematic release to those with contracts, has promoted the spectacular development of the Lower Basin. Today, the United States operates a whole network of useful projects up and down the river, including the Hoover Dam, Davis Dam, Parker Dam, Headgate Rock Dam, Palo Verde Dam, Imperial Dam, Laguna Dam, Morelos Dam, and the All-American Canal System and many lesser works. It was only natural that the United States, which was to make the benefits available and which had accepted the responsibility for the project's operation, would want to make certain that the waters were effectively used. All this vast, interlocking machinery -- a dozen major works delivering water according to congressionally fixed priorities for home, agricultural, and industrial uses to people spread over thousands of square miles -- 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 the people and communities of the Lower Basin States. Recognizing this, Congress put the Secretary of the Interior in charge of these works and entrusted him with sufficient power, principally the § 5 contract power, to direct, manage, and coordinate their operation. Subjecting the Secretary to the varying, possibly inconsistent, commands of the different state legislatures could frustrate efficient operation of the project and thwart full realization of the benefits Congress intended this national project to bestow. We are satisfied that the Secretary's power must be construed to permit him, within the boundaries set down in the Act, to allocate and distribute the waters of the mainstream of the Colorado River.

373 U.S. at 594.

Finally, as the Master pointed out, Congress still has broad powers over this navigable international stream. Congress can undoubtedly reduce or enlarge the Secretary's power if it wishes. Unless and until it does, we leave in the hands of the Secretary, where Congress placed it, full power to control, manage, and
operate the Government's Colorado River works and to make contracts for the sale and delivery of water on such terms as are not prohibited by the Project Act.

The proposed Lower Basin regulations are designed to bring comprehensive management and structure to the Secretary's supervision and control of water uses within the Lower Basin. The proposed direct leasing and banking-marketing provisions will add much-needed flexibility to the system while facilitating the development of a water market within the confines of the decree. It is our view that the Secretary's comprehensive management in this area, growing out of his broad authority set forth in the Boulder Canyon Project Act and the interpretation of that act by the Supreme Court in its Arizona v. California decision, authorizes inclusion of Indian water rights as a component of the direct leasing and banking-marketing opportunities.

The Department's authority to permit off-reservation marketing of Indian reserved rights is further supported by the Supreme Court's characterization of the nature of Indian reserved water rights. Although the Supreme Court determined that Indian rights were measured by the amount of water needed to irrigate all the "practically irrigable acreage" on the five reservations, the court made it plain in its 1979 Supplemental Decree that such "reference to a quantity of water necessary to supply the consumptive use required for irrigation . . . shall not constitute a restriction of the usage of [water rights] to irrigation or other agricultural application." Arizona v. California, 429 U.S. 419, 422 (1979). Accord, Solicitor's Opinion, February 1, 1964, 2 "Op. Sol. on Indian Affairs" 1930, 1931 (U.S.D.I. 1979) ("We know of no reason for holding that the Indian's water rights must be
used for agriculture any more than for holding that their lands themselves must be so used."). The court's explicit recognition that the tribes are free to change the use of their water rights to any purpose necessary to accomplish the underlying purpose of making their reservations permanent homelands, is a manifestation of the tribes' authority to make full use of their vested property rights by putting such rights to use on the reservations or marketing them off-reservation in order to obtain the highest economic benefit.2

In summary, it is the Department's preliminary conclusion that it is appropriate to include Indian reserved water rights in the direct leasing and banking-marketing provisions of the proposed regulations based on the authorities outlined above. In this regard, we note that most of the legal commentators who have considered the subject of Indian water marketing have agreed that Indian reserved rights are transferable property rights which have the potential to generate not only financial benefits, but also to create jobs, increase services, and stimulate reservation economic growth. Joseph R. Membrino, "Indian Reserved Water Rights, Federalism and the Trust Responsibility," 17 Land and Water L. Rev. 1 (1992). John E. Echohawk, "Implementing the Winters Doctrine of Indian Reserved Water Rights: Producing Indian Water and Economic

2 The court's holding agrees with Special Master Rifkind's conclusion that while the tribes' water rights are measured by the PIA standard, the "deed establishes a property right which the United States may utilize or dispose of for the benefit of the Indians as the relevant law may allow." Master's Report at 266. The Master's decision has been pointed to as facilitating the best economic use of Indian water rights. Charles J. Meyers, The Colorado River, 19 Stan. L. Rev. 1, 71 (1966). It has been suggested that by calling attention to essential characteristics of a marketable property right--transferability, freedom of use, and quantification--the Master "opened the door" to the marketing of such Indian water rights. Id.

Finally, although not provided for in the proposed regulations, the Department anticipates that the issue of deferral agreements will arise in the context of direct leasing and banking-marketing transactions, whether involving Indian or non-Indian entitlements. Accordingly, the Department invites comments and materials on the viability and legality of deferral agreements and whether the proposed regulations should be revised to address such transactions.

The Department suggests that a deferral agreement would be a transaction where an entitlement holder would agree to limit its water use for a period of time so as to ensure increased water deliveries to junior entitlement holders. In other words, such an agreement would
simply take advantage of the decree-like priority system on the river, particularly in California, so that non-use by the deferring entity would guarantee water to a junior user in need of additional water. The deferring entity's agreement not to use a fixed portion of its entitlement would have to be for a set period of years and would be subject to verification by the Secretary.

It should also be noted that deferral agreements may not benefit from the beneficial use characterizations provided for in the proposed regulations for both direct leasing and banking-marketing transactions. For those transactions, the proposed regulations provide that extraordinary conservation measures or land fallowing in conjunction with direct leasing or banking-marketing will constitute beneficial consumptive uses within that state and will be so recorded in the decree accounting. However, at this stage the Department has not determined whether an agreement not to use water pursuant to a deferral arrangement could effectively and appropriately be characterized as a beneficial consumptive use for decree accounting purposes. If it cannot, it may then be necessary to obtain the consent of other users, with intervening priority positions, in order to ensure that a call on the unused water by a senior entitlement holder does not disrupt the deferral arrangement.

H. Criteria for Evaluating Water Conservation Plans

Given the arid environment in the Lower Basin and the increasing demands for water within all three States, it is critical for all entitlement holders to employ reasonable conservation practices. In order to prevent waste, the works, systems, and operation and management
practices employed by entitlement holders in the diversion, delivery, and use of Colorado River water must be subject to appropriate regulation by the Regional Director. The proposed regulations implement the authorities and directives within the Reclamation Reform Act and the Water Supply Act of 1958.

(1) Section 210(b) of the Reclamation Reform Act of 1982, as amended (RRA), requires districts which have entered into repayment or water service contracts with the Bureau of Reclamation (Reclamation) pursuant to Federal Reclamation law or the Water Supply Act of 1958, as amended, to "... develop a water conservation plan which shall contain definite goals, appropriate water conservation measures, and a time schedule for meeting the water conservation objectives."

Section 210(a) of the RRA further states that:

The Secretary [of the Interior] shall ... encourage the full consideration and incorporation of prudent and responsible water conservation measures in the operations of non-Federal recipients of irrigation water from Federal reclamation projects, where such measures are shown to be economically feasible for such non-Federal recipients.

In light of these statutory authorities, Reclamation has promulgated rules and regulations (43 CFR 426.19(b)) which state, in part, that districts:

...shall develop and submit to ... Reclamation a water conservation plan which contains definite objectives which are economically feasible and a time schedule for meeting those objectives. In the event the contractor also has provisions for the supply of M&I [municipal and industrial] water under the authority of the Water Supply Act of 1958 or has invoked a provision of that act, the water conservation plan shall address both the irrigation and M&I water supply activities.

"Guidelines for the Development of Irrigation Water Conservation Plans" were issued by the Commissioner of Reclamation (Commissioner) under
cover of a January, 1985, policy memorandum. Subsequently, an October 31, 1989, policy memorandum from the Commissioner set forth new policy for the evaluation, approval, and monitoring of water conservation plans.

Further, the Regional Director has existing authority under Title 43 CFR part 417, entitled "Procedural Methods for Implementing Colorado River Water Conservation Measures with Lower Basin Contractors and Others." Under 43 CFR 417.2, the Regional Director may consult with each Contractor as the Regional Director deems appropriate to make annual recommendations relating to water conservation measures and operating practices in the diversion, delivery, distribution and use of Colorado River water. Under this regulation the Regional Director also makes annual determinations of each Contractor's estimated water requirements for the ensuing calendar year to the end that deliveries of Colorado River water to each contractor will not exceed those reasonably required for beneficial use.

The "Criteria for Water Conservation Plans" (Criteria) attached as an appendix to these regulations under §415.19 provide for the development of the data needed for consultations under 43 CFR 417, and supersede and replace the 1985 and 1989 policy memoranda for use of Lower Colorado River water.

The water management practices outlined in the Criteria represent both structural approaches (devices, equipment, or facilities) and nonstructural approaches (policies, programs, practices, rules, regulations, and/or ordinances) to improved water management, and are identified as those practices that need to be addressed by non-tribal
entitlement holders in developing what Reclamation considers to be an "adequate" water conservation plan.

The Criteria identify practices that are considered to be either "commonly applicable" (and therefore, to be included in all plans), or "potentially applicable" (and therefore subject to appropriate analysis by each non-tribal entitlement holder for inclusion or exclusion) to accomplish more efficient water management. The "commonly applicable" practices (Section 6A) represent those practices that all non-tribal entitlement holders are expected to implement by way of an existing, modified, or planned program to be considered to have an "adequate" water conservation plan and program. The "potentially applicable" practices (Sections 6B & 6C) represent those that non-tribal entitlement holders are expected to implement unless the non-tribal entitlement holder demonstrates that the practice does not make sense for the non-tribal entitlement holder to implement.

The Criteria have been developed to ensure that non-tribal entitlement holders are provided with sufficient knowledge, information, and assistance to develop and maintain adequate water conservation plans. They are intended to support an "appraisal level" planning process that provides a level of technical and environmental assessment that appropriately anticipates future implementation requirements and potential impacts. It is recognized that the level of detail required to adequately address each of the defined water conservation plan categories will need to be appropriately adapted to each individual non-tribal entitlement holder's situation. Some of the practices identified in the Criteria may be able to be analyzed and implemented based upon
"appraisal level" studies, while others may require more detailed analysis (including full NEPA compliance) at a level of detail beyond the scope of the water conservation plan.

The Criteria recognize the differences between non-tribal entitlement holders and have been written to be flexible enough to allow each non-tribal entitlement holder to develop and implement the types of programs that will best accomplish improved water management within its boundaries. In some cases, non-tribal entitlement holders may choose to pool resources and prepare a joint plan with joint programs. The Criteria not only allow, but encourage, joint efforts toward plan preparation and program implementation. It is recommended that non-tribal entitlement holders with mutual or complementary needs work together to develop agreements to prepare and/or implement their non-tribal entitlement holder plans.

Water management in general, and water conservation planning, in particular, is an on-going process that does not stop with the preparation of a comprehensive plan. The purpose of preparing a plan is for non-tribal entitlement holders to implement the programs developed during the planning process. Implementation of programs identified in the plan is critical to the success of improved water management by the non-tribal entitlement holder. The Criteria address not only what constitutes an adequate plan, but also the implementation of the programs described in that plan.

Non-tribal entitlement holders are encouraged to contact Reclamation with any questions regarding the Criteria or the assistance available in the preparation, review, and update of water conservation plans.
Reclamation's technical assistance program is available to entitlement holders on an advisory basis. Some non-tribal entitlement holders may prefer to use a private consultant.

2) Title 43 CFR 417.5(a) provides in part that the Commissioner of Indian Affairs (herein termed "Commissioner - Indian Affairs") will engage in consultations with various tribes and other water users on the Indian Reservations listed in Article II(D) of said Supreme Court Decree, similar to those engaged in by the Regional Director with regard to Contractors as provided in § 417.2. After consideration of all comments and suggestions advanced by said tribes and other water users on said Indian Reservations concerning water conservation measures and operating practices in the diversion, delivery, distribution and use of Colorado River water, the Commissioner - Indian Affairs shall, within the limits prescribed in said decree, make a determination as to the estimated amount of water to be diverted for use on each Indian Reservation covered by the above decree. Section 415.19(e) clarifies this obligation of the Commissioner - Indian Affairs to provide for the identification of prudent and feasible water conservation measures that can be implemented at Federal irrigation facilities operated for the benefit Indian entitlement holders.

Public Participation.

It is the policy of the Department, whenever practicable, to afford the public an opportunity to participate in the rulemaking process. Accordingly, written comments may be sent to the address noted at the beginning of this rule.
Comments on the proposed rule are invited from state authorities, local government entities, Indian tribes, water users, and other interested parties. Comments will be analyzed by the Regional Director and the Department and thereafter regulations will be published in the Federal Register as a final rule.

Collection of information.

The collections of information contained in this rule are being submitted to the Office of Management and Budget for approval as required by 44 U.S.C. 3501 et seq. The collection of this information will not be required until it has been approved by the Office of Management and Budget.

Public reporting burden for this collection of information is estimated to vary from 1 to 4 hours per response, with an average of 2 hours per response, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information to the bureau clearance office, Publications and Records Management Branch, Code D-7920, Bureau of Reclamation, P.O. Box 25007, Denver, Colorado 80225-0007, and the Office of Information and Regulatory Affairs, Paperwork Reduction Project (1006****), Office of Management and Budget, Washington DC 20503.

Other regulatory procedure requirements.

Executive Order 12866

It has been determined that this proposed rule is "significant" under the terms of Executive Order 12866 because the rule has
application to a widespread geographic area involving three States and approximately 240 water user organizations. Further, it provides that (1) action may be taken to reduce entitlements for nonuse, nonbeneficial use, unreasonable use, unauthorized use, or unreported use of entitlements; and (2) imposes user fees on entitlement holders, which include State, local and tribal governments.

Executive Order 12612

Federal action in apportioning Colorado River water among the States in the Lower Basin and a continuing Federal role in managing this resource is necessary because the States are unable to agree on a division of the Colorado river water in the Lower Basin. The Secretary is authorized and obligated by the 1964 Supreme Court decree in Arizona v. California et al. to manage the Colorado River in the Lower Basin. The Secretary annually determines how much water is available for release to satisfy consumptive use in the Lower Basin States. The Secretary is obligated, when insufficient mainstream Colorado River water is available to satisfy consumptive use in the Lower Basin States, to satisfy certain water rights (present perfected rights), without regard to State lines. Although all Colorado River water apportioned to a Lower Basin State and consumed in that State must be used in that same year, the Secretary may release apportioned but unused water for the use in other Lower Basin States. The inability of the Lower Basin States to reach agreement on these interstate issues dictates a Federal role.

Executive Order 12778

The Office of the Solicitor, in the course of its legal review will determine whether the proposed rule meets the standards identified in
Executive Order 12778. The proposed rule is intended to have preemptive effect with respect to any State or local jurisdictions in the determination of: (1) whether a water user who withdraws water from wells subject to the rule is an unauthorized user of Colorado River water; (2) the determination and consequences of nonuse, nonbeneficial use, unreasonable use, unauthorized use, or unreported use of entitlements; and (3) minimum conservation requirements. No retroactive effect will be given to the proposed rule. The administrative procedures specified in § 415.22 of this proposed rule must be exhausted prior to the judicial challenge of the application of the provisions of the proposed rule.


The appropriate level of compliance with NEPA will be completed prior to the time the final regulations are published in the Federal Register. In addition, appropriate compliance with NEPA and other relevant environmental laws, acts, and procedures will be accomplished for individual administrative actions taken pursuant to these regulations, including, but not limited to, assignment, transfer, lease, exchange of water entitlements, or changes in type of use or point of diversion.

Endangered Species Act of 1973, as Amended (16 U.S.C. 1531 et seq.).

Compliance with the Endangered Species Act will be completed through appropriate informal and/or formal consultation with the Fish and Wildlife Service to insure that any action authorized, funded, or carried out by the Secretary under the regulations does not jeopardize
the continued existence of any endangered or threatened species or
result in the destruction or adverse modification of critical habitat of
such species. The results of that consultation will be included in the
final regulations. In addition, the appropriate section 7 consultation
will be completed on future actions that are proposed under these
regulations on a case by case basis.
List of Subjects in 43 CFR Part 415.
Administration of entitlements, administrative practice and
procedure, reporting and recordkeeping requirements, penalties, user
fees, and voluntary water transfers.
PART 415 — REGULATIONS FOR ADMINISTERING ENTITLEMENTS TO COLORADO RIVER WATER IN THE LOWER COLORADO RIVER BASIN

Subpart A — General Provisions

Sec.

415.1 Purpose.

415.2 Applicability and Severability.

415.3 Authority.

415.4 Definitions.

Subpart B — Regulations to Establish and Regulate Entitlements to Colorado River Water in the Lower Colorado River Basin

415.5 Written contract or agreement requirements.

415.6 New contracts; amendments of contracts; assignments.

415.7 Changes in type of use or point of diversion; transfers of entitlements; exchanges.

415.8 Leasing of entitlements.

415.9 Reasonable beneficial use of entitlements.

415.10 Unauthorized use of Colorado River water.

415.11 Criteria for determining if water withdrawn from a well is Colorado River water.

415.12 Nonbeneficial use of entitlements.

415.13 Nonuse of entitlements.

415.14 Reporting requirements.

415.15 Unused apportionments; surplus water; water ordered but not diverted.
Subpart C - General Management Regulations

415.16 Water operations and accounting.
415.17 Water quality.
415.18 Wheeling water.
415.19 Water conservation.
415.20 Environmental compliance.
415.21 Fees.
415.22 Procedures for final determinations of unreasonable use, unauthorized use, nonbeneficial use, nonuse, and unreported use of Colorado River water and appeals therefrom.
415.23 Water banking and marketing of banked water.

Appendix Criteria for Water Conservation Plans.

Authority.

MEMORANDUM

TO: Technical Committee

FROM: Karen L. Tachiki, Gary D. Weatherford and William H. Swan

DATE: September 7, 1995

SUBJECT: Legal Framework for Interstate Transfers Within the Lower Basin

I. Background Discussion

A. Scope of the Paper

At the time of the enactment of the Boulder Canyon Project Act (BCPA) in 1928, "interstate water marketing", i.e., the transfer of some or all of a water user's water right to a user in another state for monetary compensation, was unheard of (and remains a frontier concept yet today). Consequently, Congress did not address interstate transfers at all in the Act and clearly did not foresee their implications for the apportionments to Arizona, California and Nevada which the Supreme Court later found to have been authorized by the BCPA and to have been effected by the Secretary of the Interior's (Secretary) contracts. See Arizona v. California, 373 U.S. 546 (1963) (opinion). Similarly, the issue of interstate transfers largely escaped Special Master Simon H. Rifkind and the parties who helped frame the subsequent decree in that case. See Arizona v. California, 376 U.S. 340 (1964) (decree).2

However, the Special Master and the parties did foresee the desirability of enabling the Secretary to make a state's unused apportionment available for use in the other states without disrupting the decree's accounting system, which charges uses in each state

1 David E. Lindgren, Jerome C. Muys and Douglas Noble, although not members of the Technical Committee (as expanded to include lawyers), are additional co-authors of this memorandum. The views expressed herein are those of the authors and do not necessarily represent the views of the principals within California and Nevada or the views of the United States.

2 The decree is found at 376 U.S. 340-53. Because the decree is referenced so frequently in this paper, this paper omits further parallel citations to the United States reports.
against that state's apportionment. Thus Article II(B)(6) of the decree, which authorizes the use of a state's unused apportionment in another state on an annual basis, expressly exempts such deliveries from the provisions of the decree which might otherwise result in the Secretary delivering water in violation of Article II(B)(1).3 Unfortunately, the Special Master's prescience did not extend to the situation where an individual water user might want to transfer a portion of its use right ("entitlement"), either perfected intrastate by previous actual beneficial use or as of yet not put to beneficial use, directly to a user in another state.

Our committee has been asked to examine, and this paper considers, whether legal means exist for facilitating interstate transfers, specifically multi-year transfers,4 and if not, what actions might be taken to establish such mechanisms. We have not considered the legal authority of the Secretary to provide "banking" of water involved in such transfers.

B. Water Eligible for Transfer

As a preliminary matter, it should be noted that an issue exists as to the type of water that should be eligible for transfer.5 That is, should any water subject to a specific

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3 As noted infra, Article II(B)(1) enjoins the Secretary from delivering water for use in a state in excess of its apportionment. The exculpatory language in Article II(B)(6) provides that "nothing in this decree shall be construed as prohibiting the Secretary" from releasing unused apportionment for use in other states.

Other provisions of the decree constrain water usage by the states and their water users. Thus, Article III(D) enjoins states and water users within states from consuming "water from the mainstream in excess of the quantities permitted under Article II of this decree." However, the incorporation of Article II in its entirety into Article III(D) automatically eliminates any possibility that consumption of one state's unused apportionment in another state would constitute a violation of the decree by the other state or its water users.

4 For purposes of this paper, the term "interstate transfer" refers not to a permanent assignment of a part or all of the water subject to an entitlement, but to a lease, agreement to forbear use, exchange or other means of allowing a consumptive use to occur in one state under color of an entitlement located in a different state for a period that is less than the duration of the entitlement.

5 The Lower Colorado River Basin Technical Committee reported in its Progress Report No. 4, dated June 1, 1995, that:

To facilitate its discussions the TC identified three types of entitlements to use of Colorado River water: Type I is entitlement that has a recent history of legal, reasonable and beneficial use by the entitlement holder; Type II is
entitlement be transferrable, or should transfers be limited to water which previously has been put to beneficial use? The issue is particularly sensitive because some entities in the lower basin (notably Metropolitan) have used unused apportionment water pursuant to Article II(B)(6) for many years. A different, but equally important, sensitivity arises from the fact that rights of Indian tribes cover a considerable quantity of presently unused water, giving them a substantial stake in how both previously used and never used water is treated for purposes of transfers. Resolution of these issues is also of considerable interest to some potential transferees.

This paper does not attempt to consider the many ramifications of this issue, or to assess the equities of those affected by the issue, or to resolve the underlying question: should previously unused entitlement be transferrable and, if so, under what conditions.

The examples used in this paper to illustrate the legal issues associated with interstate transfers assume the water to be transferred has been used previously and is made available either (1) by the entitlement holder ceasing a use (e.g., land fallowing), with the forborne water being available for transfer, or (2) by conservation employed by the entitlement holder, with the conserved water being available for transfer. Similarly, some of the amendments to the decree considered by this paper are limited to "water previously put to beneficial consumptive use." This approach defers consideration of the legal, equitable, and political implications attendant to the transfer of entitlement which has not been used by the entitlement holder but which has been used by another as unused apportionment.

C. Summary of Options Considered

Our review leads to the conclusion that, theoretically, there are seven options worthy of examination and consideration. Two involve administrative actions by the Secretary under the existing decree, one using the "unused apportionment" transfer authority of Article II(B)(6), the other being the characterization of the conservation and marketing of water as a beneficial consumptive use under Article I(A)(1) for purposes of Article II(B)(4). Four other options involve amendments to the decree, namely amendments to Article I(A)(1) (definition of "consumptive use"), Article II(B)(4) (consumptive uses charged against state apportionments), or Article II(B)(6) (unused apportionments), or addition of an entirely new Article II(B)(7) that explicitly authorizes interstate transfers. The seventh option is federal legislation explicitly authorizing interstate transfers.

entitlement that does not have a recent history of legal, reasonable and beneficial use by the entitlement holder but is expected to be put to such use in the future; and Type III is entitlement which has not been put to legal, reasonable and beneficial use by the entitlement holder and is not expected to be put to such use in the future.
D. Evaluation Criteria

Each of these seven options should be evaluated to determine the extent to which it is (1) likely to secure, with certainty sufficient for a major commercial transaction, the benefits of interstate water transfers, and (2) practicable to achieve. We believe such an evaluation should include consideration of the following criteria:

1) the extent to which each option's mechanism is susceptible to legal challenge, including (i) if it is susceptible, the time necessary for final resolution of this issue, and (ii) the likelihood that the legality of the option's mechanism will be sustained;

2) the Pandora's box inquiry, i.e. whether the number and interests of players necessary to achieve such certainty and enforceability trigger a process likely to provide a discrete solution or one that only gives rise to other issues and problems;

3) the political acceptability among the states and water users of the option's mechanism; and

4) the transaction/implementation costs of the solution.

This paper considers only the first two criteria.

E. Source of the Legal Problem

The main barrier which prevents interstate transfers on the mainstream of the Colorado River within the lower basin is a combination of Articles I(A)(1), II(B)(4), II(B)(1), and III(D) of the decree. Article I(A)(1) defines "consumptive use" as:

diversions from the stream less such return flow thereto as is available for consumptive use in the United States or in satisfaction of the Mexican treaty obligation.

Article II(B)(4) provides as follows:

(4) Any mainstream water consumptively used within a State shall be charged to its apportionment, regardless of the purpose for which it was released.

Article II(B)(1) provides as follows:

The United States . . . [is] enjoined: (B) From releasing water . . . except as follows: (1) [When the Secretary determines that 7,500,000 acre-feet of consumptive use is available in a given year] . . . there shall be apportioned 2,800,000 acre-feet for use
in Arizona, 4,400,000 acre-feet for use in California, and 300,000 acre-feet for use in Nevada . . . .

Article III(D) provides as follows:

The States of Arizona, California and Nevada, Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, and all other users of water from the mainstream in said states . . . are hereby severally enjoined: . . . (D) From consuming or purporting to authorize the consumptive use of water from the mainstream in excess of the quantities permitted under Article II of this decree.

The plain language of these articles appears to prohibit the Secretary from delivering water to a water user pursuant to an interstate transfer of water and to the consumption of that water by the water user if the use of such transferred water would result in the State to which the transfer is made exceeding its basic apportionment.6 This is illustrated by the following example. Assume that the Colorado River Indian Tribes in Arizona agreed to transfer 30,000 a/f of water per year for 50 years to the Southern Nevada Water Authority. If the State of Nevada was using close to its full annual apportionment of 300,000 a/f, the additional 30,000 a/f would cause that apportionment to be exceeded. Since Article II(B)(1) of the 1964 decree is worded in an injunctive fashion as against the Secretary and Article III(D) is worded in an injunctive fashion as against the water user, the Secretary is not authorized to release more than 300,000 a/f per year to Nevada and therefore the proposed transfer would be precluded apart from the Article II(B)(6) mechanism.

II. Analysis of the Options

A. Problems Inherent in all Transfer Options

It is important to note that transfers of water made available either by conservation or by forbearance of use have several problems in common. The first is that long-term commitments of non-use by non-federal water users - particularly those having Secretarial contract entitlements - could lead to issues of abandonment or forfeiture of their water rights. Section 8 of the 1902 Reclamation Act (43 U.S.C. § 372) provides in part as

6 Article III(C) provides that "no party named in this Article and no other user of water in said states shall divert or purport to authorize the diversion of water from the mainstream the diversion of which has not been authorized by the United States for its particular use . . . ." This paper addresses mechanisms by which the Secretary might be empowered, or might exercise power, to execute a contract with a transferee under an entitlement in order to allow diversion of the transferred water.
follows: ". . . beneficial use shall be the basis, the measure, and the limit of the right." The BCPA, of course, is a supplement to that Act, 43 U.S.C. § 617m, and all contract entitlements are limited to "reasonable beneficial use."

These provisions thus present the issue of whether non-use by the entitlement holder creates a potential for loss or reduction of the entitlement, an issue of concern to both potential transferors and potential transferees. This situation could be a significant disincentive to participation for non-federal entitlement holders unless, by Secretarial regulation, amendment of the decree, or otherwise sufficient legal certainty is provided that forbearance of use shall not effect a forfeiture or abandonment of the transferred water.

Second, there may be disagreements over the role of the states in the transfer process, i.e., may individual holders of Secretarial contracts and present perfected rights enter into such transfer arrangements with a user in another state without having to obtain the state of origin's approval? For example, in the discussion of its water bank proposal, Arizona states that:

Although the Secretary also has contracts with individual users within Arizona, he is contractually obligated to Arizona to provide the full amount of water specified in the Contract. An agreement between the Secretary and an individual user within Arizona for the user to forbear from using Colorado River water would not diminish the obligation owed by the Secretary to Arizona. Therefore, any forbearance agreements must have the concurrence of the State of Arizona.

7 The issue exists because of the law's beneficial use requirements irrespective of whether it has been clearly established that the Secretary has the power to reduce contract entitlements as a result of non-use.

8 Federal and Indian "reserved" water rights have been held not to be lost by non-use. This memorandum does not address the implications of non-use for non-federal holders of present perfected rights under the decree.

9 Precedent for this exists in California law. California Water Code section 1011 provides that "[w]hen any person entitled to the use of water . . . fails to use all or any part of the water because of water conservation efforts, cessation or reduction in the use of such . . . water shall be deemed equivalent to a reasonable beneficial use of water to the extent of such cessation or deduction of use. No forfeiture of the . . . right to the water conserved shall occur . . . ."

Thus, Arizona claims a right to veto any proposed interstate transfer of an Arizona entitlement, apparently relying on its 1944 contract with the Secretary by which the Secretary apportioned 2.8 million afy to the state. We have serious doubts about the merits of Arizona’s claim in light of the Supreme Court’s rejection of a somewhat analogous claim by Nevada in Arizona v. California.11

However, even if Arizona possessed as to the Colorado River the traditional powers of a state over waters within its boundaries, without a Congressional exercise of commerce clause power to the contrary Arizona could restrict such exports only on rather narrow grounds. Sporhase v. Nebraska, 458 U.S. 941 (1982). The existence of any state veto power over the transfer of the waters of the mainstream of the lower Colorado River which Congress has entrusted to the exclusive, plenary authority of the Secretary is very doubtful. Nevertheless, the existence of Arizona’s unresolved claim may inhibit interstate transfers.

Arizona’s perceived need for a veto over transfers, however, might be abated if the Secretary were to administratively adopt a ceiling (either an absolute annual quantity or a percentage of a state’s apportionment) on the aggregate transfers from any state that would be approved. While such a ceiling would protect the state’s interest in preserving its apportionment, it would also create two classes of entitlement holders within each state: those allowed to engage in an interstate transfer because the ceiling had not yet been exceeded and those precluded from doing so once transfers aggregating the ceiling had been effected. It is

11 Nevada had claimed that, under its Secretarial contract for Nevada’s 300,000 afy apportionment (a contract similar to Arizona’s), Nevada had the right to subcontract with Nevada water users for Nevada’s apportionment. The Court noted that acceptance of Nevada’s argument

would transfer from the Secretary to Nevada a large part, if not all, of the Secretary’s power to determine with whom he will contract and on what terms. We have already held that the contractual power granted the Secretary cannot be diluted in this manner. 373 U.S. at 573. The Court most likely would react similarly to Arizona’s claim of a veto right.

Also of note is the fact that the Special Master previously had characterized the basin apportionments made by the Colorado River Compact as "ceilings on appropriations", not as block grants of a property interest of some kind to the two basins. Report of Special Master Simon H. Rifkind (December 5, 1960) at page 140.

We also note that the State of California does not have an apportionment contract with the Secretary.
not clear whether the limitation on the entitlements of those in the latter category would withstand the Supreme Court's scrutiny.  

Third, any transfer must be structured so that no water user in the state from which the transfer occurs will be able to assert a successful claim to the water under a Secretarial contract that is junior to the entitlement being transferred.

Finally, if a transfer framework involves only a present commitment by the parties to the solution to enter into subsequent forbearance agreements whenever necessary to effectuate a particular future transfer, an issue exists as to whether the promise to enter into such agreements would be enforceable. Any transfer framework that lacked such enforceable commitments, however, would be disqualified from being considered a "solution."

B. Options 1 and 2: Administrative Determinations Under the Existing Decree

The first two options involve administrative determinations by the Secretary under language of the present decree. While the assumption underlying these options is that they do not require authorization by either the Supreme Court or Congress, nonetheless they will, if undertaken, likely be subject to legal challenge and must therefore be analyzed not only for their effectiveness but also in terms of the time and resources required to defend them in court and the likelihood of success in so doing.

The pivotal question is whether the Secretary has the authority to administratively establish a mechanism or regime under which long-term interstate transfers can occur. This question raises two issues about the Secretary's authority: what authority the Secretary has under the BCPA and what authority the Secretary has under the decree. As to the first, under fairly well understood precepts of administrative law discussed below, it is clear the Secretary has considerable latitude in exercising his responsibilities under the BCPA. Resolution of the Secretary's authority under the decree, on the other hand, is more problematic.

Section 5 of the BCPA authorizes the Secretary "under such general regulations as he may prescribe, to contract for the storage of water in [Lake Mead] and for the delivery thereof at such points . . . as may be agreed upon, for irrigation and domestic uses . . . ." 43 U.S.C. § 617d. Under this authority the Secretary has stored water at Lake Mead and made it available to individual public and private entities in the Lower Division States of Arizona, California and Nevada pursuant to contracts with these entities. In addition, the Secretary recently has proposed to construct an administrative system to permit the interstate transfer between individual water users of water made available by conservation

But compare Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) (interstate compact apportionment limits the water rights of water users within compacting state).
or forbearance of use. The latest version of that proposal is the Bureau of Reclamation's draft regulations circulated in May 1994, but initiation of proposed rulemaking on them currently remains in abeyance while Arizona, California, Nevada, the Secretary and the Indian Tribes pursue agreement on a "regional solution." How long the Secretary will defer such rulemaking is unclear.

Because Congress did not address the specific issues of interstate transfers or chargeability of uses thereunder, it seems likely that the Court would defer to any reasonable Secretarial construction of his authority under the BCPA to accommodate interstate transfers to the interstate allocation system created by the Act. Under long accepted principles of statutory construction and administrative law, a statute authorizing a federal program impliedly authorizes the administering agency to utilize any "necessary and proper" procedures appropriate to implement or fill gaps in its express management authority conferred by the Act that are not inconsistent with its basic purpose or other provisions. Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837, 843, 44 (1984); Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980). In such a situation, the prevailing rule is as follows:

If the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute . . . . In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.

Chevron, 467 U.S. at 843-44.

Application of Chevron and its progeny to our problem, however, does not necessarily lead to the conclusion that the Secretary may exercise discretionary administrative power to create a regime for interstate transfers. The constraint on the Secretary's actions is as much (and perhaps more) the Arizona v. California decree than it is the BCPA, particularly in view of the fact that the decree is essentially an injunction limiting how the Secretary may exercise his powers and authority under the BCPA. Our object here, however, is not to definitively describe the Secretary's authority to construe the decree (in light of the lack of law in this area), but to note that the issue presents different considerations than are pertinent to assessing the Secretary's powers under the BCPA.

It is against this legal backdrop that the administrative alternatives must be assessed.

1. Unused Apportionments (Article II(B)(6))
   a. Background and Description of the Option

Article II(B)(6) provides as follows (emphasis added):
If, in any one year, water apportioned for consumptive use in a State will not be consumed in that State, whether for the reason that delivery contracts for the full amount of the State’s apportionment are not in effect or that users can not apply all of such water to beneficial uses, or for any other reason, nothing in this decree shall be construed as prohibiting the Secretary from releasing such apportioned but unused water during such year for consumptive use in the other States. No rights to the recurrent use of such water shall accrue by reason of the use thereof.

Unused apportionment can occur in three ways: (1) a prior use can be halted or made more efficient, making the previously used water available. (2) a water user may not have yet put its entire entitlement to use, with the result that the unused quantity is available, or (3) a state’s apportionment may not have been fully committed, either as a present perfected right or by contract with the Secretary. The Secretary currently annually assesses the availability of unused apportionment water on the mainstream and then authorizes the use of that water in another state by an entity that holds a contract covering the delivery and use of unused apportionment. At the present time only the Metropolitan Water District of Southern California and Coachella Valley Water District in California and the Southern Nevada Water Authority have such contracts.

Returning to our example, under this option the Colorado River Indian Tribes in Arizona would agree to fallow enough land to free up 30,000 a/f of water per year and would agree to continue this practice for 50 years. This water would become unused apportionment water and could then be authorized for use in Nevada by the Secretary pursuant to Article II(B)(6).

b. Advantages

The principal advantage of reliance on Article II(B)(6) is that it requires neither amendment of the decree nor interpretation of the decree by the Secretary. Article II(B)(6) provides that "nothing in this decree shall be construed as prohibiting the Secretary from releasing" a State’s unused apportionment for use in another state (emphasis added), clearly bypassing the Article II(B)(4) mandate requiring the consumptive use of such water to be charged to the receiving state’s apportionment. This mechanism has been employed previously to approve the interstate groundwater storage/exchange program in which Metropolitan, the Central Arizona Water Conservation District (CAWCD), and the Southern Nevada Water Authority are participants. Indeed, the State of Arizona asserts that an Article II(B)(6) transfer is the only form of transfer that is totally consistent with the decree.

c. Difficulties

There are several issues associated with this option. First, even thought Article II(B)(6) contains references to "any year", "such year", and a declaration that "no rights to the recurrent use of such water shall accrue by reason of the use thereof", the
(B)(4) to charge "water consumptively used within a state" to that state’s apportionment by (1) equating the conservation of water as the "constructive" consumptive use of such water in that same year in the state where the water was conserved, and (2) not again charging the subsequent "actual" use of the conserved water to the transferee user or state (on the ground that it would constitute "double counting" of the conserved water).

Returning to our previous example, if the Colorado River Indian Tribes in Arizona agreed to fallow enough land to free up 30,000 a/f of water per year for sale to the Southern Nevada Water Authority for use in Nevada, those two actions could jointly be viewed by the Secretary as a beneficial use of water in Arizona each year. Thus, under the consumptive use accounting required by Article II(B)(4), even though the water made available would be physically used in Nevada, the Secretary would not violate the injunction of Article II(B)(1) of the decree because the constructive beneficial consumptive use occurred in Arizona and would be counted as a part of Arizona’s apportionment in that year.

b. Advantages

One particular advantage of this approach is that it would allow for the creation of a special category of "new" unused water in the mainstream, which either could be used in that year under some transfer arrangement, or could be banked for later use or transfer without running afoul of the annual limitation in Article II(B)(6). In other words, since the water will have been "used" for decree accounting purposes in the year in which it was conserved, the Secretary could provide for the management of this special category of new water in a fashion that included multi-year banking in Lake Mead, assuming authority exists under which the Secretary could authorize banking of water conserved or not used by forbearance.

c. Difficulties

A chief difficulty is: What law controls the determination of beneficial consumptive use. There is no agreement in the lower basin as to whether the Secretary is obligated to follow state law with respect to conservation of "mainstream" water or whether he may devise an independent federal rule in light of the federal authority vested in him by the BCPA. On the one hand, Arizona v. California recognizes the BCPA gave the Secretary broad powers over the Colorado River. On the other hand, the BCPA is a supplement to the Reclamation law, and section 8 of the Reclamation Act subjects Reclamation projects to state law unless such is manifestly inconsistent with Congressional directives. California v. United States, 438 U.S. 645, 675 (1978). While the California Court acknowledged the special status of the Boulder Canyon Project and the BCPA, it also quoted Arizona v. California to the effect that the BCPA "plainly allows the States to do things not inconsistent with the Project Act or with federal control of the river." 438 U.S. at 675, n. 29, quoting 373 U.S. at 588.
Consequently, because the Secretary would be interpreting the Court’s decree and not the BCPA, the critical question is whether under its *Chevron* rule, *supra*, the Court would defer to the Secretary’s construction of "consumptive use." Even if the Court applied the deference rule, the fact that the Secretary’s approach requires treating "non-use" (forbearance or conservation) as "use" in the year and place it is effected and "use" in the year and place of actual physical use as "non-use", might give the Court some pause. It also should be noted that the Central Arizona Water Conservation District objected to the same rationale with respect to the Bureau’s justification of its proposed regulations for interstate leasing of "conserved water."\(^{14}\)

Thus, while this approach may solve the problem presented by Article II(B)(4) and may be legally defensible, it seems likely at this point that it will be challenged in court and lead to significant litigation costs and delay. Moreover, it provides no clear authority to transfer conserved water, however defined, as does Article II(B)(6) and one of the decree amendment options next discussed.

C. **Amending the Decree**

Three of the next four options involve amending some of the provisions of the present decree; the fourth involves adding one new provision. While this may seem, at first glance, to be more difficult of accomplishment than the administrative options, any decree change, once achieved through Supreme Court action, will have the advantage of immediate judicial finality. While any party may initiate the process, the more support among the parties, the greater the likelihood of success. Amending the decree would provide the certainty and enforceability that administrative determinations cannot. Although some parties might seek to add other amendments to the decree, this approach seems less susceptible to the Pandora’s box danger inherent in the legislative option discussed *infra*. There are four possible decree amendment options.

1. **Amendment of Article I(A)(1) (definition of "consumptive use")**

   a. **Background and Description of the Option**

   Article I(A)(1) defines "consumptive use" as "diversions from the stream less such return flow thereto as is available for consumptive use in the United States or in satisfaction of the Mexican treaty obligation." This definition could be amended to make it clear that "consumptive use" must be both "beneficial" and "reasonable" (as the Secretary’s regulations (43 CFR § 417) and water delivery contracts already require), and to include

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\(^{14}\) Letter of July 15, 1994 from CAWCD Board President Samuel P. Goddard, Jr. to Secretary of the Interior Babbitt.
within the concept the acts of forbearing the use of or conserving water for contemporaneous or subsequent interstate transfer and use, as follows (additions underlined):

(A) Beneficial consumptive use" means:

1) Diversions from the stream for a beneficial purpose in an amount reasonably necessary for such purpose less such return flow thereto as is available for consumptive use in the United States or in satisfaction of the Mexican treaty obligation;

2) The conservation of water, previously put to beneficial consumptive use, pursuant to the application of water conservation technology, not to exceed the amount of additional water that would have been used by the conserving water user absent the application of such technology; and

3) The forbearance of the use of water, previously put to beneficial consumptive use, pursuant to an agreement by which the forbearing water user transfers the right to use such water to another water user, not to exceed the amount of additional water that would have been used by such water user absent such forbearance.

b. Advantages

This amendment would allow the use of transferred water to be charged against the transferor state's apportionment pursuant to Article II(B)(4) and thus avoid the proscription of Article II(B)(1). It thus implicitly would allow multi-year interstate water transfers without explicitly providing such authority.

c. Difficulties

The described advantage of this option is, at the same time, its chief disadvantage; it does not explicitly provide for multi-year interstate transfers.

2. Amendment of Article II(B)(4) (consumptive uses charged against State apportionments)

a. Background and Description of the Option

Since Article II(B)(4) is the main barrier to interstate water transfers (in that it provides the mechanism by which the injunctive provisions are triggered), its amendment may be the most direct and effective way of dealing with the problem short of an express authorization of interstate transfers (the fourth possible amendment). As noted earlier, Article II(B)(4) presently provides that "[a]ny mainstream water consumptively used within a State shall be charged to its apportionment, regardless of the purpose for which it was
released." It could be amended to explicitly authorize interstate transfers by adding the following language:

\[\ldots\text{except that in the case of an interstate transfer of water based on the forbearance of use or conservation of water in one state for use in another, such use shall be deemed to have been made in the state from which the transfer was made and shall be charged to its apportionment.}\]

b. **Advantages**

This approach provides certainty and enforceability and clearly expresses its intent.

c. **Difficulties**

This direct approach, like the Secretary’s administrative characterization to the same effect, will probably provoke Arizona’s opposition, but could be made more palatable by placing, or authorizing the Secretary to place, a quantity or percentage cap on the amount of any state’s apportionment that can be transferred (i.e. if approximately 10 to 15 percent of the Lower Division’s 7.5 mafy apportionment were available for long-term leasing, the needs of Metropolitan and the Southern Nevada Water Authority likely could be met through the next century).

3. **Amendment of Article II(B)(6) (unused apportionments)**

a. **Background and Description of the Option**

Article II(B)(6) could be amended to allow advance commitments to be made by the Secretary covering more than one year, as follows (deletions stricken, additions underlined):

(6) (a) If, in any one year or series of years, the Secretary determines that water apportioned for consumptive use in a State will not be consumed in that State, whether for the reason that delivery contracts for the full amount of the State’s apportionment are not in effect or that users cannot or have not agreed not to apply all of such water to beneficial uses, or for any other reason, nothing in this decree shall be construed as prohibiting the Secretary of the Interior from releasing such apportioned but unused water during such year.

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\[\textit{Consistent with our example, this option has been drafted to apply only to water previously put to beneficial use. From the legal perspective, however, it may not need to be so restricted, although this memorandum does not address that issue.}\]
period for consumptive use in the other States. No rights to the recurrent use of such water shall accrue by reason of the use thereof.

b. **Advantages**

The advantage of this simple amendment is that it deals with the principal deficiency of Article II(B)(6) and does not require the fiction as to point of use inherent in the administrative characterization of Article II(B)(4) or amending it in the same fashion.

c. **Difficulties**

This option retains many of the problems noted above with respect to administrative determinations by the Secretary under Article II(B)(6). In particular, although this amendment of Article II(B)(6) eliminates any argument that the decree prohibits multiple-year transfers, it does not expressly authorize direct interstate transfers between water users or require the Secretary to allocate resulting unused apportionment in accord with the provisions of a transfer.

4. **Addition of a New Article II(B)(7) (independent authorization for interstate transfers by water users)**

a. **Background and Description of the Option**

As noted earlier, times have changed dramatically since the BCPA was enacted, and water marketing has become a growing, essential part of the reallocation of western water entitlements. We previously have described the legal issues associated with the administrative establishment of a transfer mechanism by the Secretary. A new decree provision, explicitly authorizing interstate transfers along the lines of the following, however, would remove all issues relating to the legality of such a mechanism:

Article II(B)(7). A water user may transfer any portion of its rights to use water to another water user, either within the same state or in another state, but such transfer shall be limited to a renewable term of not to exceed [blank] years and to a quantity not to exceed the maximum amount of water historically put to beneficial use by such user. Such a transfer shall require the approval of the Secretary, who shall consult with the appropriate state agency on the proposed transfer. The Secretary may approve such a transfer under conditions as appropriate. The

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16 Again consistent with our example, this option has been drafted to apply only to water previously put to beneficial use. From the legal perspective, however, it may not need to be so restricted.
Secretary shall deliver water pursuant to approved transfers without regard to the limitations of Article II(B)(1) and the consumptive use shall be deemed to occur in the state from which the transfer was made. No loss or diminishment of a transferor's right shall result from the transferor's failure to put the transferred water to beneficial use during the period of the transfer.

b. Advantages

The advantages of such a new article are that it would (1) eliminate the need to amend the other articles as previously discussed, (2) provide explicit, clear authorization for interstate transfers, and (3) provide a mechanism to account for uses pursuant to a transfer. The amendment could be as "bare bones" as this is or could contain more comprehensive provisions to treat broader interstate transfer issues, i.e. banking, definition of "wet water" and special treatment of Indian rights, rights of joint participation, mitigation, etc.

c. Difficulties

The chief disadvantage of this option is that its frontal approach could provoke more political opposition, at least initially, than many of the other options. Some of this might be diminished, however, by inclusion of provisions to protect perceived state interests, such as the following:

Any proposed transfer that would cause a state's total annual consumptive use of mainstream water pursuant to interstate transfers to affect adversely and significantly the health and welfare of that state, or to exceed ___ percent of that state's annual apportionment of mainstream water, shall require the consent of the appropriate agency of that state.

D. Legislation

Another approach would be amendment of the BCPA to authorize the essential elements of an interstate transfer system.

1. Advantages

The advantage of this approach would be to provide a certain, detailed elaboration of the structure of the system and the criteria for implementing it, as compared to a less comprehensive amendment to the decree requiring regulatory refinement by the Secretary.
2. **Difficulties**

There are several disadvantages to this approach. The principal ones are the vicissitudes of the legislative process and the likelihood that a relatively modest proposal might emerge (if it does emerge at all, given the ability of dissident Senators to stymie legislation) only after having been treated as a "Christmas tree" vehicle on which various amendments have been hung. This "Pandora’s box" risk is a serious one that could unduly delay, wholly frustrate, or significantly alter the proposal.

A second possible disadvantage is that, inasmuch as the field of water marketing policy is currently still evolving, it may be preferable to leave to the Secretary the flexibility to adapt to changing concepts and conditions, rather than locking him into a legislative formula that might be difficult to change if needed.
EXHIBIT L
Appendix 1016

WATER: ARIZONA

CONTRACT OF FEBRUARY 9, 1944 (EFFECTIVE FEBRUARY 24, 1944)

(Act of February 24, 1944; Ch. 4, Seventeenth Legislature; Session Laws of Arizona, 1944, pp. 419-427)

CHAPTER 4

(House Bill No. 2)

An Act ratifying the contract between the United States and the State of Arizona for storage and delivery of water from Lake Mead, and declaring an emergency.

Be it enacted by the Legislature of the State of Arizona:

SECTION 1. RATIFICATION. There is hereby unconditionally ratified, approved, and confirmed, that certain contract for the storage and delivery of water from Lake Mead executed on behalf of the United States by the Honorable Harold L. Ickes, secretary of the Interior, and on behalf of the State of Arizona by its Colorado river commission, bearing date the 9th day of February 1944, as follows:

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION
BOULDER CANYON PROJECT
ARIZONA-CALIFORNIA-NEVADA

CONTRACT FOR DELIVERY OF WATER

This contract made this 9th day of February 1944 pursuant to the Act of Congress approved June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplemental thereto, all of which acts are commonly known and referred to as the Reclamation Law, and particularly pursuant to the Act of Congress approved December 21, 1928 (45 Stat. 1057), designated the Boulder Canyon Project Act, and acts amendatory thereof or supplementary thereto, between THE UNITED STATES OF AMERICA, hereinafter referred to as “United States,” acting for this purpose by Harold L. Ickes, Secretary of the Interior, hereinafter referred to as the “Secretary,” and the STATE OF ARIZONA, hereinafter referred to as “Arizona,” acting for this purpose
by the Colorado River Commission of Arizona, pursuant to Chapter 46 of the 1939 Session Laws of Arizona,

Witnesseth that:

EXPLANATORY RECITALS

2. Whereas for the purpose of controlling floods, improving navigation, regulating the flow of the Colorado River, providing for storage and for the delivery of stored waters for the reclamation of public lands and other beneficial uses exclusively within the United States, the Secretary acting under and in pursuance of the provisions of the Colorado River Compact and Boulder Canyon Project Act, and acts amendatory thereof or supplementary thereto, has constructed and is now operating and maintaining in the main stream of the Colorado River at Black Canyon that certain structure known as and designated Boulder Dam and incidental works, creating thereby a reservoir designated Lake Mead of a capacity of about thirty-two million (32,000,000) acre-feet; and

3. Whereas said Boulder Canyon Project Act provides that the Secretary, under such general rules and regulations as he may prescribe, may contract for the storage of water in the reservoir created by Boulder Dam, and for the delivery of such water at such points on the river as may be agreed upon, for irrigation and domestic uses and provides further that no person shall have or be entitled to have the use for any purpose of the water stored, as aforesaid, except by contract made as stated in said Act; and

4. Whereas it is the desire of the parties to this contract to contract for the storage of water and the delivery thereof for irrigation of lands and domestic uses within Arizona; and

5. Whereas nothing in this contract shall be construed as affecting the obligations of the United States to Indian tribes;

6. Now, therefore, in consideration of the mutual covenants here contained, the parties hereto agree as follows, to wit:

DELIVERY OF WATER

7. (a) Subject to the availability thereof for use in Arizona under the provisions of the Colorado River Compact and the Boulder Canyon Project Act, the United States shall deliver and Arizona, agencies or water users therein, will accept under this contract each calendar year from storage in Lake Mead, at a point or points of diversion on the Colorado River approved by the Secretary, so much water as may be necessary for the beneficial consumptive use of irrigation and domestic uses in Arizona of a maximum of 2,800,000 acre-feet.

(b) The United States also shall deliver from storage in Lake Mead for use in Arizona, at a point or points of diversion on the Colorado River approved by the Secretary, for the uses set forth in subdivision (a) of this Article, one-half of any excess or surplus waters unapportioned by the Colorado River Compact to the extent such water is available for use in Arizona under said compact and said act, less such excess or surplus water unapportioned by said compact as may be used in Nevada, New Mexico, and Utah in accordance with the rights of said states as stated in subdivisions (f) and (g) of this Article.
This contract is subject to the condition that Boulder Dam and Lake Mead shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of perfected rights in pursuance of Article VIII of the Colorado River Compact; and third, for power. This contract is made upon the express condition and with the express covenant that the United States and Arizona, and agencies and water users therein, shall observe and be subject to and controlled by said Colorado River Compact and the Boulder Canyon Project Act in the construction, management, and operation of Boulder Dam, Lake Mead, canals and other works, and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other uses.

(d) The obligation to deliver water at or below Boulder Dam shall be diminished to the extent that consumptive uses now or hereafter existing in Arizona above Lake Mead diminish the flow into Lake Mead, and such obligation shall be subject to such reduction on account of evaporation, reservoir and river losses, as may be required to render this contract in conformity with said compact and said act.

(e) This contract is for permanent service, subject to the conditions stated in subdivision (c) of this Article, but as to the one-half of the waters of the Colorado River system unapportioned by paragraphs (a), (b), and (c) of Article III of the Colorado River Compact, such water is subject to further equitable apportionment at any time after October 1, 1963, as provided in Article III (f) and Article III (g) of the Colorado River Compact.

(f) Arizona recognizes the right of the United States and the State of Nevada to contract for the delivery from storage in Lake Mead for annual beneficial consumptive use within Nevada for agricultural and domestic uses of 300,000 acre-feet of the water apportioned to the Lower Basin by the Colorado River Compact, and in addition thereto to make contract for like use of 1/25 (one twenty-fifth) of any excess or surplus waters available in the Lower Basin and unapportioned by the Colorado River Compact, which waters are subject to further equitable apportionment after October 1, 1963, as provided in Article III (f) and Article III (g) of the Colorado River Compact.

(g) Arizona recognizes the rights of New Mexico and Utah to equitable shares of the water apportioned by the Colorado River Compact to the Lower Basin and also water unapportioned by such compact, and nothing contained in this contract shall prejudice such rights.

(h) Arizona recognizes the right of the State of California to contract for storage and delivery of water from Lake Mead for beneficial consumptive use in California, provided that the aggregate of all such deliveries and uses in California from the Colorado River shall not exceed the limitation of such uses in that State required by the provisions of the Boulder Canyon Project Act and agreed to by the State of California by an act of its Legislature (Chapter 16, Statutes of California of 1929) upon which limitation the State of Arizona expressly relies.

(i) Nothing in this contract shall preclude the parties hereto from contracting for storage and delivery above Lake Mead of water herein contracted for, when and if authorized by law.

(j) As far as reasonable diligence will permit, the water provided for in this contract shall be delivered as ordered and as reasonably
required for domestic and irrigation uses within Arizona. The United States reserves the right to discontinue or temporarily reduce the amount of water to be delivered, for the purpose of investigation, inspection, maintenance, repairs, replacements, or installation of equipment or machinery at Boulder Dam, or other dams heretofore or hereafter to be constructed, but so far as feasible will give reasonable notice in advance of such temporary discontinuance or reduction.

(k) The United States, its officers, agents, and employees shall not be liable for damages when for any reason whatsoever suspensions or reductions in the delivery of water occur.

(l) Deliveries of water hereunder shall be made for use within Arizona to such individuals, irrigation districts, corporations or political subdivisions therein of Arizona as may contract therewith the Secretary, and as may qualify under the Reclamation Law or other federal statutes or to lands of the United States within Arizona. All consumptive uses of water by users in Arizona, of water diverted from Lake Mead or from the main stream of the Colorado River below Boulder Dam, whether made under this contract or not, shall be deemed, when made, a discharge pro tanto of the obligation of this contract. Present perfected rights to the beneficial use of waters of the Colorado River system are unimpaired by this contract.

(m) Rights-of-way across public lands necessary or convenient for canals to facilitate the full utilization in Arizona of the water herein agreed to be delivered will be granted by the Secretary subject to applicable federal statutes.

POINTS OF DIVERSION: MEASUREMENTS OF WATER

8. The water to be delivered under this contract shall be measured at the points of diversion, or elsewhere as the Secretary may designate (with suitable adjustment for losses between said points of diversion and measurement), by measuring and controlling devices or automatic gauges approved by the Secretary, which devices, however, shall be furnished, installed, and maintained by Arizona, or the users of water therein, in manner satisfactory to the Secretary; said measuring and controlling devices or automatic gauges shall be subject to the inspection of the United States, whose authorized representatives may at all times have access to them, and any deficiencies found shall be promptly corrected by the users thereof. The United States shall be under obligation to deliver water only at diversion points where measuring and controlling devices or automatic gauges are maintained, in accordance with this contract, but in the event diversions are made at points where such devices are not maintained, the Secretary shall estimate the quantity of such diversions and his determination thereof shall be final.

CHARGES FOR STORAGE AND DELIVERY OF WATER

9. No charge shall be made for the storage or delivery of water at diversion points as herein provided necessary to supply present perfected rights in Arizona. A charge of 50¢ per acre-foot shall be made for all water actually diverted directly from Lake Mead during the Boulder Dam cost repayment period, which said charge shall be paid by the users of such water, subject to reduction by the Secretary in
the amount of the charge if it is concluded by him at any time during said cost-repayment period that such charge is too high. After expiration of the cost-repayment period, charges shall be on such basis as may hereafter be prescribed by Congress. Charges for the storage or delivery of water diverted at a point or points below Boulder Dam, for users, other than those specified above, shall be as agreed upon between the Secretary and such users at the time of execution of contracts therefor, and shall be paid by such users; provided such charges shall, in no event, exceed 25¢ per acre-foot.

RESERVATIONS

16. Neither Article 7, nor any other provision of this contract, shall impair the right of Arizona and other states and the users of water therein to maintain, prosecute or defend any action respecting, and is without prejudice to, any of the respective contentions of said states and water users as to (1) the intent, effect, meaning, and interpretation of said compact and said act; (2) what part, if any, of the water used or contracted for by any of them falls within Article III (a) of the Colorado River Compact; (3) what part, if any, is within Article III (b) thereof; (4) what part, if any, is excess or surplus waters unapportioned by said Compact; and (5) what limitations on use, rights of use, and relative priorities exist as to the waters of the Colorado River system; provided, however, that by these reservations there is no intent to disturb the apportionment made by Article III (a) of the Colorado River Compact between the Upper Basin and the Lower Basin.

DISPUTES AND DISAGREEMENTS

11. Whenever a controversy arises out of this contract, and if the parties hereto then agree to submit the matter to arbitration, Arizona shall name one arbitrator and the Secretary shall name one arbitrator and the two arbitrators thus chosen shall meet within ten days after their selection and shall select one other arbitrator within fifteen days after their first meeting, but in the event of their failure to name the third arbitrator within thirty days after their first meeting, such arbitrator not so selected shall be named by the Senior Judge of the United States Circuit Court of Appeals for the Tenth Circuit. The decision of any two of the three arbitrators thus chosen shall be a valid and binding award.

RULES AND REGULATIONS

12. The Secretary may prescribe and enforce rules and regulations governing the delivery and diversion of waters hereunder, but such rules and regulations shall be promulgated, modified, revised or extended from time to time only after notice to the State of Arizona and opportunity is given to it to be heard. Arizona agrees for itself, its agencies and water users that in the operation and maintenance of the works for diversion and use of the water to be delivered hereunder, all such rules and regulations will be fully adhered to.
DEFINITIONS

18. Wherever terms used herein are defined in Article II of the Colorado River Compact or in Section 12 of the Boulder Canyon Project Act, such definitions shall apply in construing this contract.

19. In witness whereof the parties hereto have caused this contract to be executed the day and year first above written.

THE UNITED STATES OF AMERICA,

By (s) HAROLD L. ICHEES,
Secretary of the Interior.

STATE OF ARIZONA, acting by and through its COLORADO RIVER COMMISSION,

By (s) HENRY S. WRIGHT, Chairman.

By (s) NELLIE T. BUSH, Secretary.

Approved this 11th day of February 1944:

(s) SIDNEY P. OSBORN,
Governor of the State of Arizona.

SEC. 2. EMERGENCY. To preserve the public peace, health and safety it is necessary that this Act become immediately operative. It is therefore declared to be an emergency measure, to take effect as provided by law.

Approved by the Governor: February 24, 1944.

Filed in the Office of the Secretary of State: February 24, 1944.

1 On copies of this contract furnished by the Department of the Interior, this date appears "7th day of February 1944."
ARIZONA v. CALIFORNIA ET AL.

ON EXCEPTIONS TO SPECIAL MASTER'S REPORT AND RECOMMENDED DECREE.


This original suit was brought in this Court by the State of Arizona against the State of California and seven of its public agencies. Later Nevada, New Mexico, Utah and the United States became parties. The basic controversy is over how much water each State has a legal right to use out of the waters of the Colorado River and its tributaries. A Special Master appointed by the Court conducted a lengthy trial and filed a report containing his findings, conclusions and recommended decree, to which various parties took exceptions. Held:

1. In passing the Boulder Canyon Project Act, Congress intended to, and did, create its own comprehensive scheme for the apportionment among California, Arizona and Nevada of the Lower Basin's share of the mainstream waters of the Colorado River, leaving each State her own tributaries. It decided that a fair division of the first 7,500,000 acre-feet of such mainstream waters would give 4,400,000 acre-feet to California, 2,800,000 to Arizona, and 300,000 to Nevada, and that Arizona and California should each get one-half of any surplus. Congress gave the Secretary of the Interior adequate authority to accomplish this division by giving him power to make contracts for the delivery of water and by providing that no person could have water without a contract. Pp. 546-590.

(a) Apportionment among the Lower Basin States of that Basin's Colorado River water is not controlled by the doctrine of equitable apportionment or by the Colorado River Compact. Pp. 565-567.

(b) No matter what waters the Compact apportioned, the Project Act itself dealt only with water of the mainstream and reserved to each State the exclusive use of the waters of her own tributaries. Pp. 567-565.

(c) The legislative history of the Act, its language and the scheme established by it for the storage and delivery of water show that Congress intended to provide its own method for a complete apportionment of the Lower Basin's share of the mainstream water among Arizona, California and Nevada; and Congress intended the Secretary of the Interior, through his contracts under § 5, both to carry out the allocation of the waters of the main Colorado River among the Lower Basin States and to decide which users within each State would get water. Pp. 575-585.
(d) It is the Act and the contracts made by the Secretary of the Interior under § 5, not the law of prior appropriation, that control the apportionment of water among the States; and the Secretary, in choosing between the users within each State and in settling the terms of his contracts, is not required by §§ 14 and 18 of the Act to follow state law. Pp. 585-586.

(e) Section 8 of the Reclamation Act does not require the United States, in the delivery of water, to follow priorities established by state law; and the Secretary is not bound by state law in disposing of water under the Project Act. Pp. 586-587.

(f) The general saving language of § 18 of the Project Act does not bind the Secretary by state law or nullify the contract power expressly conferred upon him by § 5. Pp. 587-588.

(g) Congress has put the Secretary of the Interior in charge of a whole network of useful projects constructed by the Federal Government up and down the Colorado River, and it has entrusted him with sufficient power, principally the § 5 contract power, to direct, manage and coordinate their operation. This power must be construed to permit him to allocate and distribute the waters of the mainstream of the Colorado River within the boundaries set down by the Act. Pp. 588-590.

2. Certain provisions in the Secretary's contracts are sustained, with one exception. Pp. 590-592.

(a) The Secretary's contracts with Arizona and Nevada are sustained, insofar as they provide that any waters diverted by those States out of the mainstream above Lake Mead must be charged to their respective Lower Basin apportionments; but he cannot reduce water deliveries to those States by the amount of their uses from tributaries above Lake Mead, since Congress intended to apportion only the mainstream, leaving to each State her own tributaries. Pp. 590-591.

(b) The fact that the Secretary has made a contract directly with the State of Nevada, through her Colorado River Commission, for the delivery of water does not impair the Secretary's power to require Nevada water users, other than the State, to make further contracts. Pp. 591-592.

3. In case of water shortage, the Secretary is not bound to require a pro rata sharing of shortages. He must follow the standards set out in the Act; but he is free to choose among the recognized methods of apportionment or to devise reasonable methods of his own, since Congress has given him full power to control, manage and operate the Government's Colorado River works and to make contracts for the sale and delivery of water on such terms as are not prohibited by the Act. Pp. 592-594.

4. With respect to the conflicting claims of Arizona and New Mexico to water in the Gila River, the compromise settlement agreed upon by those States and incorporated in the Master's recommended decree is accepted by this Court. Pp. 594-595.

5. As to the claims asserted by the United States to waters in the main river and some of its tributaries for use on Indian reservations, national forests, recreational and wildlife areas and other government lands and works, this Court approves the Master's decision as to which claims required adjudication, and it approves the decree he recommended for the government claims he did decide. Pp. 595-601.

(a) This Court sustains the Master's finding that, when the United States created the Chemehuevi, Cocopah, Yuma, Colorado River and Fort Mohave Indian Reservations in Arizona, California and Nevada, or added to them, it reserved not only the land but also the use of enough water from the Colorado River to irrigate the irrigable portions of the reserved lands. Pp. 595-597.
(1) The doctrine of equitable apportionment should not be used to divide the water between the Indians and the other people in the State of Arizona. P. 597.

(2) Under its broad powers to regulate navigable waters under the Commerce Clause and to regulate government lands under Art. IV, § 3, of the Constitution, the United States had power to reserve water rights for its reservations and its property. Pp. 597-598.

(3) The reservations of land and water are not invalid though they were originally set apart by Executive Order. P. 598.

(4) The United States reserved the water rights for the Indians effective as of the time the Indian reservations were created, and these water rights, having vested before the Act became effective in 1929, are “present perfected rights” and as such are entitled to priority under the Act. Pp. 598-600.

(5) This Court sustains the Master’s conclusions that enough water was intended to be reserved to satisfy the future, as well as the present, needs of the Indian reservations and that enough water was reserved to irrigate all the practicably irrigable acreage on the reservations, and also his findings as to the various acreages of irrigable land existing on the different reservations. Pp. 600-601.

(b) This Court disagrees with the Master’s decision to determine the disputed boundaries of the Colorado River Indian Reservation and the Fort Mohave Indian Reservation, since it is not necessary to resolve those disputes here. P. 601.

c) This Court agrees with the Master’s conclusions that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreational Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest. P. 601.

(d) This Court rejects the claim of the United States that it is entitled to the use, without charge against its consumption, of any waters that would have been wasted but for salvage by the Government on its wildlife preserves. P. 601.

e) This Court agrees with the Master that all uses of mainstream water within a State are to be charged against that State’s apportionment, which, of course, includes uses by the United States. P. 601.

Mark Wilmer reargued the cause for complainant. With him on the briefs were Chas. H. Reed, William R. Meagher, Burr Sutter, John E. Madden, Calvin H. Udall, John Geoffrey Will, W. H. Roberts and Theodore K很漂亮．


Solicitor General Cox reargued the cause for the United States, intervener. With him on the briefs were John F. Davis, David R. Warner, Walker Kiechel, Jr. and Warren R. Wise.

R. P. Parry reargued the cause for the State of Nevada, intervener. With him on the briefs were Roger D. Foley, Attorney General, W. T. Matheus and Clifford E. Fix.
In 1952 the State of Arizona invoked the original jurisdiction of this Court by filing a complaint against the State of California and seven of its public agencies.1 Later, Nevada, New Mexico, Utah, and the United States were added as parties either voluntarily or on motion.2 The basic controversy in the case is over how much water each State has a legal right to use out of the waters of the Colorado River and its tributaries. After preliminary pleadings, we referred the case to George I. Haight, Esquire, and upon his death in 1955 to Simon H. Rifkind, Esquire, as Special Master to take evidence, find facts, state conclusions of law, and recommend a decree, all "subject to consideration, revision, or approval by the Court."3 The Master conducted a trial lasting from June 14, 1956, to August 28, 1958, during which 340 witnesses were heard orally or by deposition, thousands of exhibits were received, and 25,000 pages of transcript were filled. Following many motions, arguments, and briefs, the Master in a 433-page volume reported his findings, conclusions, and recommended decree, received by the Court on January 16, 1961.4 The case has been extensively briefed here and orally argued twice, the first time about 16 hours, the second, over six. As we see this case, the question of each State's share of the waters of the Colorado and its tributaries turns on the meaning and the scope of the Boulder Canyon Project Act passed by Congress in 1928.5 That meaning and scope can be better understood when the Act is set against its background—the gravity of the Southwest's water problems; the inability of local groups or individual States to deal with these enormous problems; the continued failure of the States to agree on how to conserve and divide the waters; and the ultimate action by Congress at the request of the States creating a great system of dams and public works nationally built, controlled, and operated for the purpose of conserving and distributing the water.

The Colorado River itself rises in the mountains of Colorado and flows generally in a southwesterly direction for about 1,300 miles through Colorado, Utah, and Arizona and along the Arizona-Nevada and Arizona-California boundaries, after which it passes into Mexico and empties into the Mexican waters of the Gulf of California. On its way to the sea it receives tributary waters from Wyoming, Colorado, Utah, Nevada, New Mexico, and Arizona. The river and its tributaries flow in a natural basin almost surrounded by large mountain ranges and drain 242,000 square miles, an area about 900 miles long from north to south and 300 to 500 miles wide from east to west—practically one-twelfth the area of the continental United States excluding Alaska. Much of this large basin is so arid that it is, as it always has been, largely dependent upon managed use of the waters of the Colorado River System to make it productive and inhabitable. The Master refers to archaeological evidence that as long as 2,000 years ago the ancient Hohokam tribe built and maintained irrigation canals near what is now Phoenix, Arizona, and that American Indians were practicing irrigation in that region at the time white men first explored it. In the second half of the nineteenth century a group of people interested in California's Imperial Valley conceived plans to divert water from the mainstream of the Colorado to give life and growth to the parched and barren soil of that valley. As the most feasible route was through...

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1. "The judicial Power shall extend . . . to Controversies between two or more States . . . .

2. "In all Cases . . . in which a State shall be Party, the supreme Court shall have original Jurisdiction." U.S. Const., Art. III, § 2. See also 28 U.S.C. § 1251 (a) (1)


4. Palo Verde Irrigation District, Imperial Irrigation District, Coachella Valley County Water District, Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego, and County of San Diego.


6. The two orders are reported at 347 U.S. 968 (1954), and 350 U.S. 812 (1955).


Mexico, a Mexican corporation was formed and a canal dug partly in Mexico and partly in the United States. Difficulties which arose because the canal was subject to the sovereignty of both countries generated hopes in this country that some day there would be a canal wholly within the United States, an all-American canal.7

During the latter part of the nineteenth and the first part of the twentieth centuries, people in the Southwest continued to seek new ways to satisfy their water needs, which by that time were increasing rapidly as new settlers moved into tis fast-developing region. But none of the more or less primitive diversions made from the mainstream of the Colorado conserved enough water to meet the growing needs of the basin. The natural flow of the Colorado was too erratic, the river of many tributaries was too complex, and the engineering and economic hurdles too great: for small farmers, larger groups, or even States, to build storage dams, construct canals, and install the expensive works necessary for a dependable year-round water supply. Nor were droughts the basin's only problem: spring floods due to melting snows and seasonal storms was a recurring menace, especially disastrous in California's Imperial Valley where, even after the Mexican canal provided a more dependable water supply, the threat of flood remained at least as serious as before. Another troublesome problem was the erosion of land and the deposit of silt which fouled waters, choked irrigation works, and damaged good farmland and crops.

It is not surprising that the pressing necessity to transform the erratic and often destructive flow of the Colorado River into a controlled and dependable water supply desperately needed in so many States began to be talked about and recognized as far more than a purely local problem which could be solved on a farmer-by-farmer, group-by-group, or even state-by-state basis, desirable as this kind of solution might have been. The inadequacy of a local solution was recognized in the Report of the All-American Canal Board of the United States Department of the Interior on July 22, 1919, which detailed the widespread benefits that could be expected from construction by the United States of a large reservoir on the mainstream of the Colorado and an all-American canal to the Imperial Valley.8 Some months later, May 18, 1920, Congress passed a bill offered by Congressman Kinkaid of Nebraska directing the Secretary of the Interior to make a study and report of diversions which might be made from the Colorado River for irrigation in the Imperial Valley.9 The Fall-Davis Report,10 submitted to Congress in compliance with the Kinkaid Act, began by declaring, "The control of the floods and development of the resources of the Colorado River are peculiarly national problems ..."11 and then went on to give reasons why this was so, concluding with the statement that the job was so big that only the Federal Government could do it.12 Quite naturally, therefore, the Report recommended that the United States construct as a government project not only an all-American canal from the Colorado River to the Imperial Valley but also a dam and reservoir at or near Boulder Canyon.13

The prospect that the United States would undertake to build as a national project the necessary works to control floods and store river waters for irrigation was apparently a welcome one for the basin States. But it brought to life strong fears in the northern basin States that additional waters made available by the storage and canal projects might be gobbled up in perpetuity by faster growing lower basin areas, particularly California, before the upper States could appropriate what they believed to be their fair share. These fears were not without foundation, since the law of prior appropriation prevailed in most of the Western States.14 Under that

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7"[The All-American Canal] will end an intolerable situation, under which the Imperial Valley now secures its sole water supply from a canal running for many miles through Mexico ..." S. Rep. No. 592, 70th Cong., 1st Sess. 8 (1928)
8Department of the Interior, Report of the All American Canal Board (1919); 23-33 The three members of the Board were engineers with long experience in Western water problems.
941 Stat. 600 (1920).
11Ibid., at 1.
12The reasons given were:
1. The Colorado River is international.
2. The stream and many of its tributaries are interstate.
3. It is a navigable river.
4. Its waters may be made to serve large areas of public lands naturally desert in character.
5. "Its problems are of such magnitude as to be beyond the reach of other than national solution." Ibid.
13Ibid., at 21.
UPDATING THE HOOVER DAM DOCUMENTS

law the one who first appropriates water and puts it to beneficial use thereby acquires a vested right to continue to divert and use that quantity of water against all claimants junior to him in point of time.13 “First in time, first in right” is the shorthand expression of this legal principle. In 1922, only four months after the Fall-Davis Report, this Court in Wyoming v. Colorado, 259 U.S. 419, held that the doctrine of prior appropriation could be given interstate effect.14 This decision intensified fears of Upper Basin States that they would not get their fair share of Colorado River water.15 In view of California’s phenomenal growth, the Upper Basin States had particular reason to fear that California, by appropriating and using Colorado River water before the upper States, would, under the interstate application of the prior appropriation doctrine, be “first in time” and therefore “first in right.” Nor were such fears limited to the northernmost States. Nevada, Utah, and especially Arizona were all apprehensive that California’s rapid declaration of appropriative claims would deprive them of their just share of basin water available after construction of the proposed United States project. It seemed for a time that these fears would keep the States from agreeing on any kind of division of the river waters. Hoping to prevent “conflicts” and “expensive litigation” which would hold up or prevent the tremendous benefits expected from extensive federal development of the river,16 the basin States requested and Congress passed an Act on August 19, 1921, giving the States consent to negotiate and enter into a compact for the “equitable division and apportionment . . . of the water supply of the Colorado River.”17

Pursuant to this congressional authority, the seven States appointed Commissioners who, after negotiating for the better part of a year, reached an agreement at Santa Fe, New Mexico, on November 24, 1922. The agreement, known as the Colorado River Compact,18 failed to fulfill the hope of Congress that the States would themselves agree on each State’s share of the water. The most the Commissioners were able to accomplish in the Compact was to adopt a compromise suggestion of Secretary of Commerce Herbert Hoover, specially designated as United States representative.19 This compromise divides the entire basin into two parts, the Upper Basin and the Lower Basin, separated at a point on the river in northern Arizona known as Lee Ferry. (A map showing the two basins and other points of interest in this controversy is printed as an Appendix facing p. 602.) Article III (a) of the Compact apportions to each basin in perpetuity 7,500,000 acre-feet of water20 a year from the Colorado River System, defined in Article II (a) as “the Colorado River and its tributaries within the United States of America.” In addition, Article III (b) gives the Lower Basin “the right to increase its beneficial consumptive use21 of such waters by one million acre-feet per annum.” Article III (c) provides that future Mexican water rights recognized by the United States shall be supplied first out of surplus over and above the aggregate of the quantities specified in (a) and (b), and if this surplus is not enough the deficiency shall be borne equally by the two basins. Article III (d) requires the Upper Basin not to deplete the Lee Ferry flow below an aggregate of 75,000,000 acre-feet for any 10 consecutive years. Article III (f) and (g) provide a way for further apportionment by a compact of “Colorado River System” waters at any time after October 1, 1963. While these allocations quieted rivalries between the Upper and Lower Basins, major differences between the States in the Lower Basin continued. Failure of the Compact to determine each State’s share of the water left Nevada and Arizona with their fears that the law of prior appropriation would be not a protection but a menace because California could use that law to get for herself the lion’s share of the waters

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12The doctrine continues to be applied interstate. E.g., Nebraska v. Wyoming, 325 U.S. 589, 617-618 (1945).
13Delph E. Carpenter, Colorado River Commissioner for the State of Colorado, summarized the situation produced by that decision as follows.
14The upper state has but one alternative, that of using every means to retard development in the lower state until the uses within the upper state have reached their maximum. The states may avoid this unfortunate situation by determining their respective rights by interstate compact before further development in either state, thus permitting freedom of development in the lower state without injury to future growth in the upper.
15“...first in right” is the shorthand expression of this legal principle. In 1922, only four months after the Fall-Davis Report, this Court in Wyoming v. Colorado, 259 U.S. 419, held that the doctrine of prior appropriation could be given interstate effect. This decision intensified fears of Upper Basin States that they would not get their fair share of Colorado River water. In view of California’s phenomenal growth, the Upper Basin States had particular reason to fear that California, by appropriating and using Colorado River water before the upper States, would, under the interstate application of the prior appropriation doctrine, be “first in time” and therefore “first in right.” Nor were such fears limited to the northernmost States. Nevada, Utah, and especially Arizona were all apprehensive that California’s rapid declaration of appropriative claims would deprive them of their just share of basin water available after construction of the proposed United States project. It seemed for a time that these fears would keep the States from agreeing on any kind of division of the river waters. Hoping to prevent “conflicts” and “expensive litigation” which would hold up or prevent the tremendous benefits expected from extensive federal development of the river, the basin States requested and Congress passed an Act on August 19, 1921, giving the States consent to negotiate and enter into a compact for the “equitable division and apportionment . . . of the water supply of the Colorado River.”
16Pursuant to this congressional authority, the seven States appointed Commissioners who, after negotiating for the better part of a year, reached an agreement at Santa Fe, New Mexico, on November 24, 1922. The agreement, known as the Colorado River Compact, failed to fulfill the hope of Congress that the States would themselves agree on each State’s share of the water. The most the Commissioners were able to accomplish in the Compact was to adopt a compromise suggestion of Secretary of Commerce Herbert Hoover, specially designated as United States representative. This compromise divides the entire basin into two parts, the Upper Basin and the Lower Basin, separated at a point on the river in northern Arizona known as Lee Ferry. (A map showing the two basins and other points of interest in this controversy is printed as an Appendix facing p. 602.) Article III (a) of the Compact apportions to each basin in perpetuity 7,500,000 acre-feet of water a year from the Colorado River System, defined in Article II (a) as “the Colorado River and its tributaries within the United States of America.” In addition, Article III (b) gives the Lower Basin “the right to increase its beneficial consumptive use of such waters by one million acre-feet per annum.” Article III (c) provides that future Mexican water rights recognized by the United States shall be supplied first out of surplus over and above the aggregate of the quantities specified in (a) and (b), and if this surplus is not enough the deficiency shall be borne equally by the two basins. Article III (d) requires the Upper Basin not to deplete the Lee Ferry flow below an aggregate of 75,000,000 acre-feet for any 10 consecutive years. Article III (f) and (g) provide a way for further apportionment by a compact of “Colorado River System” waters at any time after October 1, 1963. While these allocations quieted rivalries between the Upper and Lower Basins, major differences between the States in the Lower Basin continued. Failure of the Compact to determine each State’s share of the water left Nevada and Arizona with their fears that the law of prior appropriation would be not a protection but a menace because California could use that law to get for herself the lion’s share of the waters

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2322 Stat. 171 (1921).
24The Compact can be found at 70 Cong. Rec. 324 (1928), and U.S. Dept. of the Interior, Documents on the Use and Control of the Waters of Interstate and International Streams 39 (1956).
26An acre-foot of water is enough to cover an acre of land with one foot of water.
27Beneficial consumptive use means consumptive use measured by diversions less return flows, for a beneficial (nonwasteful) purpose.
allotted to the Lower Basin. Moreover, Arizona, because of her particularly strong interest in the Gila, intensely resented the Compact’s inclusion of the Colorado River tributaries in its allocation scheme and was bitterly hostile to having Arizona tributaries, again particularly the Gila, forced to contribute to the Mexican burden. Largely for these reasons, Arizona alone, of all the States in both basins, refused to ratify the Compact.24

Seeking means which would permit ratification by all seven basin States, the Governors of those States met at Denver in 1925 and again in 1927. As a result of these meetings the Governors of the upper States suggested, as a fair apportionment of water among the Lower Basin States, that out of the average annual delivery of water at Lee Ferry required by the Compact—7,500,000 acre-feet—Nevada be given 300,000 acre-feet, Arizona 3,000,000. and California 4,200,000. and that unapportioned waters, subject to reapportionment after 1963, be shared equally by Arizona and California. Each Lower Basin State would have “the exclusive beneficial consumptive use of such tributaries within its boundaries before the same empty into the main stream,” except that Arizona tributary waters in excess of 1,000,000 acre-feet could under some circumstances be subject to diminution by reason of a United States treaty with Mexico. This proposal foundered because California held out for 4,600,000 acre-feet instead of 4,200,00025 and because Arizona held out for complete exemption of its tributaries from any part of the Mexican burden.26

Between 1922 and 1927 Congressman Philip Swing and Senator Hiram Johnson, both of California, made three attempts to have Swing-Johnson bills enacted, authorizing construction of a dam in the canyon section of the Colorado River and an all-American canal.27 These bills would have carried out the original Fall-Davis Report’s recommendations that the river problem be recognized and treated as national, not local. Arizona’s Senators and Congressmen, still insisting upon a definite guaranty of water from the mainstream, bitterly fought these proposals because they failed to provide for exclusive use of her own tributaries, particularly the Gila, and for exemption of these tributaries from the Mexican burden.

Finally, the fourth Swing-Johnson bill passed both Houses and became the Boulder Canyon Project Act of December 21, 1928, 45 Stat. 1057. The Act authorized the Secretary of the Interior to construct, operate, and maintain a dam and other works in order to control floods, improve navigation, regulate the river’s flow, store and distribute waters for reclamation and other beneficial uses, and generate electrical power.28 The projects authorized by the Act were the same as those provided for in the prior defeated measures, but in other significant respects the Act was strikingly different. The earlier bills had offered no method whatever of apportioning the waters among the States of the Lower Basin. The Act as finally passed did provide such a method, and, as we view it, the method chosen was a complete statutory apportionment intended to put an end to the long-standing dispute over Colorado River waters. To protect the Upper Basin against California should Arizona still refuse to ratify the Compact, "§ 4 of the Act as finally passed provided that, if fewer than seven States ratified within six months, the Act should not take effect unless six States including California ratified and unless California, by its legislature, agreed "irrevocably and unconditionally . . . as an express covenant" to a limit on its annual consumption of Colorado River water of "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." Congress in the same section showed its continuing desire to have California, Arizona, and Nevada settle their own differences by authorizing them to make an agreement apportioning to Nevada 300,000 acre-feet, and to Arizona 2,800,000 acre-feet plus half of any surplus waters unapportioned by the Compact. The permitted agreement also was to allow Arizona exclusive use of the Gila River, wholly free

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24 Arizona did ratify the Compact in 1944, after it had already become effective by six-state ratification as permitted by the Boulder Canyon Project Act.

25 Hearings on H. R. 5773 before the House Committee on Irrigation and Reclamation, 70th Cong., 1st Sess. 402-405 (1928).

26 Id., at 30-31. Arizona also objected to the provisions concerning electrical power.


28 Another purpose of the Act was to approve the Colorado River Compact, which had allocated the water between the two basins.

29 The Upper Basin States feared that, if Arizona did not ratify the Compact, the division of water between the Upper and Lower Basins agreed on in the Compact would be nullified. The reasoning was that Arizona’s uses would not be charged against the Lower Basin’s apportionment and that California would therefore be free to exhaust that apportionment herself. Total Lower Basin uses would then be more than permitted in the Compact, leaving less water for the Upper Basin.
from any Mexican obligation, a position Arizona had taken from the beginning. Sections 5 and 8 (b) of the Project Act made provisions for the sale of the stored waters. The Secretary of the Interior was authorized by § 5 "under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses . . . ." Section 5 required these contracts to be "for permanent service" and further provided, "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated." Section 8 (b) provided that the Secretary's contracts would be subject to any compact dividing the benefits of the water between Arizona, California, and Nevada, or any two of them, approved by Congress on or before January 1, 1929, but that any such compact approved after that date should be "subject to all contracts, if any, made by the Secretary of the Interior under section 5 hereof prior to the date of such approval and consent by Congress."

The Project Act became effective on June 25, 1929, by Presidential Proclamation, after six States, including California, had ratified the Colorado River Compact and the California legislature had accepted the limitation of 4,400,000 acre-feet as required by the Act. Neither the three States nor any two of them ever entered into any apportionment compact as authorized by §§ 4 (a) and 8 (b). After the construction of Boulder Dam the Secretary of the Interior, purporting to act under the authority of the Project Act, made contracts with various water users in California for 5,362,000 acre-feet, with Nevada for 300,000 acre-feet, and with Arizona for 2,800,000 acre-feet of water from that stored at Lake Mead.

The Special Master appointed by this Court found that the Colorado River Compact, the law of prior appropriation, and the doctrine of equitable apportionment—by which doctrine this Court in the absence of statute resolves interstate claims according to the equities—do not control the issues in this case. The Master concluded that, since the Lower Basin States had failed to make a compact to allocate the waters among themselves as authorized by §§ 4 (a) and 8 (b), the Secretary's contracts with the States had within the statutory scheme of §§ 4 (a), 5, and 8 (b) effected an apportionment of the waters of the mainstream which, according to the Master, were the only waters to be apportioned under the Act. The Master further held that, in the event of a shortage of water making it impossible for the Secretary to supply all the water due California, Arizona, and Nevada under their contracts, the burden of the shortage must be borne by each State in proportion to her share of the first 7,500,000 acre-feet allocated to the Lower Basin, that is, 4.4 by California, 2.8 by Arizona, and .3 by Nevada, without regard to the law of prior appropriation. 7.5 7.5

Arizona, Nevada, and the United States support with few exceptions the analysis, conclusions, and recommendations of the Special Master's report. These parties agree that Congress did not leave division of the waters to an equitable apportionment by this Court but instead created a comprehensive statutory scheme for the allocation of mainstream waters. Arizona, however, believes that the allocation formula established by the Secretary's contracts was in fact the formula required by the Act. The United States, along with California, thinks the Master should not have invalidated the provisions of the Arizona and Nevada water contracts requiring those States to deduct from their allocations any diversions of water above Lake Mead which reduce the flow into that lake.

California is in basic disagreement with almost all of the Master's Report. She argues that the Project Act, like the Colorado River Compact, deals with the entire Colorado River System, not just the mainstream. This would mean that diversions within Arizona and Nevada of tributary waters flowing in those States would be charged against their apportionments and that, because tributary water would be added to the mainstream in computing the first 7,500,000 acre-feet available to the States, there would be a greater likelihood of a surplus, of which California gets one-half. The result of California's argument would be much more water for California and much less for Arizona. California also argues that the Act neither allocates the Colorado River waters nor gives the Secretary authority to make an allocation. Rather she takes the position that the judicial doctrine of equitable apportionment giving full interstate effect to the traditional western water law of prior appropriation should determine the rights of the parties to the water. Finally, California claims that in any event the Act does not control in time of shortage. Under such circumstances, she says, this Court should

\(^{46}\) Stat. 3000 (1929)

divide the waters according to the doctrine of equitable apportionment or the law of prior appropriation, either of which, she argues, should result in protecting her prior uses.

Our jurisdiction to entertain this suit is not challenged and could not well be since Art. III, § 2, of the Constitution gives this Court original jurisdiction of actions in which States are parties. In exercising that jurisdiction, we are mindful of this Court's often expressed preference that, where possible, States settle their controversies by "mutual accommodation and agreement." Those cases and others make it clear, however, that this Court does have a serious responsibility to adjudicate cases where there are actual, existing controversies over how interstate streams should be apportioned among States. This case is the most recent phase of a continuing controversy over the water of the Colorado River, which the States despite repeated efforts have been unable to settle. Resolution of this dispute requires a determination of what apportionment, if any, is made by the Project Act and what powers are conferred by the Act upon the Secretary of the Interior. Unless many of the issues presented here are adjudicated, the conflicting claims of the parties will continue, as they do now, to raise serious doubts as to the extent of each State's right to appropriate water from the Colorado River System for existing or new uses. In this situation we should and do exercise our jurisdiction.

ALLOCATION OF WATER AMONG THE STATES AND DISTRIBUTION TO USERS.

We have concluded, for reasons to be stated, that Congress in passing the Project Act intended to and did create its own comprehensive scheme for the apportionment among California, Arizona, and Nevada of the Lower Basin's share of the mainstream waters of the Colorado River, leaving each State its tributaries. Congress decided that a fair division of the first 7,500,000 acre-feet of such mainstream waters would give 4,400,000 acre-feet to California, 2,800,000 to Arizona, and 300,000 to Nevada; Arizona and California would each get one-half of any surplus. Prior approval was therefore given in the Act for a tri-state compact to incorporate these terms. The States, subject to subsequent congressional approval, were also permitted to agree on a compact with different terms. Division of the water did not, however, depend on the States' agreeing to a compact, for Congress gave the Secretary of the Interior adequate authority to accomplish the division. Congress did this by giving the Secretary power to make contracts for the delivery of water and by providing that no person could have water without a contract.

A. Relevancy of Judicial Apportionment and Colorado River Compact.—We agree with the Master that apportionment of the Lower Basin waters of the Colorado River is not controlled by the doctrine of equitable apportionment or by the Colorado River Compact. It is true that the Court has used the doctrine of equitable apportionment to decide river controversies between States. But in those cases Congress had not made any statutory apportionment. In this case, we have decided that Congress has provided its own method for allocating among the Lower Basin States the mainstream water to which they are entitled under the Compact. Where Congress has so exercised its constitutional power over waters, courts have no power to substitute their own notions of an "equitable apportionment" for the apportionment chosen by Congress. Nor does the Colorado River Compact control this case. Nothing in that Compact purports to divide water among the Lower Basin States nor in any way to affect or control any future apportionment among those States or any distribution of water within a State. That the Commissioners were able to accomplish even a division of water between the basins is due to what is generally known as the "Hoover Compromise."

"Participants [in the Compact negotiations] have stated that the negotiations would have broken up but for Mr. Hoover's proposal: that the Commission limit its efforts to a division of water between the upper basin and the lower basin, leaving to each basin the future internal allocation of its share."
And in fact this is all the Compact did. However, the Project Act, by referring to the Compact in several places, does make the Compact relevant to a limited extent. To begin with, the Act explicitly approves the Compact and thereby fixes a division of the waters between the basins which must be respected. Further, in several places the Act refers to terms contained in the Compact. For example, §12 of the Act adopts the Compact definition of “domestic.” and §6 requires satisfaction of “present perfected rights” as used in the Compact. Obviously, therefore, those particular terms, though originally formulated only for the Compact’s allocation of water between basins, are incorporated into the Act and are made applicable to the Project Act’s allocation among Lower Basin States. The Act also declares that the Secretary of the Interior and the United States in the construction, operation, and maintenance of the dam and other works and in the making of contracts shall be subject to and controlled by the Colorado River Compact. These latter references to the Compact are quite different from the Act’s adoption of Compact terms. Such references, unlike the explicit adoption of terms, were used only 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. They were not intended to make the Compact and its provisions control or affect the Act’s allocation among and distribution of water within the States of the Lower Basin. Therefore, we look to the Compact for terms specifically incorporated in the Act, and we would also look to it to resolve disputes between the Upper and Lower Basins, were any involved in this case. But no such questions are here. We must determine what apportionment and delivery scheme in the Lower Basin has been effected through the Secretary’s contracts. For that determination, we look to the Project Act alone.

B. Mainstream Apportionment.—The congressional scheme of apportionment cannot be understood without knowing what water Congress wanted apportioned. Under California’s view, which we reject, the first 7,500,000 acre-feet of Lower Basin water, of which California has agreed to use only 4,400,000, is made up of both mainstream and tributary water, not just mainstream water. Under the view of Arizona, Nevada, and the United States, with which we agree, the tributaries are not included in the waters to be divided but remain for the exclusive use of each State. Assuming 7,500,000 acre-feet or more in the mainstream and 2,000,000 in the tributaries, California would get 1,000,000 acre-feet more if the tributaries are included and Arizona 1,000,000 less.

California’s argument that the Project Act, like the Colorado River Compact, deals with the main river and all its tributaries rests on §4 (a) of the Act, which limits 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, plus not more than one-half of any excess or surplus waters unapportioned by said compact . . . .” And Article III (a), referred to by §4 (a), apportioned in perpetuity to the Lower Basin the use of 7,500,000 acre-feet of water per annum “from the Colorado River System,” which was defined in the Compact as “that portion of the Colorado River and its tributaries within the United States of America.”

Arizona argues that the Compact apportionments between basins only the waters of the mainstream, not the mainstream and the tributaries. We need not reach that question, however, for we have concluded that whatever waters the Compact apportioned the Project Act itself dealt only with water of the mainstream. In the first place, the Act, in §4 (a), states that the California limitation, which is in reality her share of the first 7,500,000 acre-feet of Lower Basin water, is on “water of and from the Colorado River,” not of and from the “Colorado River System.” But more importantly, the negotiations among the States and the congressional debates leading to the passage of the Project Act clearly show that the language used by Congress in the Act was meant to refer to mainstream waters only. Inclusion of the tributaries in the Compact was natural in view of the upper States’ strong feeling that the Lower Basin tributaries should be made to share the burden of any obligation to deliver water to Mexico which a future treaty might impose. But when it came to an apportionment among the Lower Basin States, the Gila, by far the most important Lower Basin tributary, would not logically be included, since Arizona alone of the States could effectively use that river. Therefore, with

—DOMESTIC—whenever employed in this Act shall include water uses defined as ‘domestic’ in said Colorado River compact.”

Also, California would reduce Nevada’s share of the mainstream waters from 300,000 acre-feet to 120,500 acre-feet.

Not only does the Gila enter the Colorado almost at the Mexican border, but also in dry seasons it virtually evaporates before reaching the Colorado.
minor exceptions, the proposals and counterproposals over the years, culminating in the Project Act, consistently provided for division of the mainstream only, reserving the tributaries to each State’s exclusive use.

The most important negotiations among the States, which in fact formed the basis of the debates leading to passage of the Act, took place in 1927 when the Governors of the seven basin States met at Denver in an effort to work out an allocation of the Lower Basin waters acceptable to Arizona, California, and Nevada. Arizona and California made proposals, both of which suggested giving Nevada 300,000 acre-feet out of the mainstream of the Colorado River and reserving to each State the exclusive use of her own tributaries. Arizona proposed that all remaining mainstream water be divided equally between herself and California, which would give each State 3,600,000 acre-feet out of the first 7,500,000 acre-feet of mainstream water. California rejected the proposed equal division of the water, suggesting figures that would result in her getting about 4,600,000 out of the 7,500,000. The Governors of the four Upper Basin States, trying to bring Arizona and California together, asked each State to reduce its demands and suggested this compromise: Nevada 300,000 acre-feet, Arizona 3,000,000, and California 4,200,000. These allocations were to come only out of the mainstream, that is, as stated by the Governors, out of “the average annual delivery of water to be provided by the States of the upper division at Lee’s Ferry, under the terms of the Colorado River Compact.” The Governors’ suggestions, like those of the States, explicitly reserved to each State as against the other States the exclusive use of her own tributaries. Arizona agreed to the Governors’ proposal, but she wanted it made clear that her tributaries were to be exempted from any Mexican obligation. California rejected the whole proposal, insisting that she must have 4,600,000 acre-feet from the mainstream, or, as she put it, “from the waters to be provided by the States of the upper division at Lee’s Ferry under the Colorado River compact.” Neither in the States’ original offers, nor in the Governors’ suggestions, nor in the States’ responses was the “Colorado River System”—mainstream plus tributaries—ever used as the basis for Lower Basin allocations; rather, it was always mainstream water, or the water to be delivered by the Upper States at Lee Ferry, that is to say, an annual average of 7,500,000 acre-feet of mainstream water.

With the continued failure of Arizona and California to reach accord, there was mounting impetus for a congressional solution. A Swing-Johnson bill containing no limitation on California’s uses finally passed the House in 1928 over objections by Representatives from Arizona and Utah. When the bill reached the Senate, it was amended in committee to provide that the Secretary in his water delivery contracts must limit California to 4,600,000 acre-feet “of the water allocated to the lower basin by the Colorado River compact . . . and one-half of the unallocated, excess, and/or surplus water . . . .” On the floor, Senator Phipps of Colorado proposed an amendment which would allow the Act to go into effect without any limitation on California if seven States ratified the Compact; if only six States ratified and if the California Legislature accepted the limitation, the Act could still become effective. Arizona’s Senator Hayden had already proposed an amendment reducing California’s share to 4,200,000 acre-feet (the Governors’ proposal), plus half of the surplus, leaving Arizona exclusive use of the Gila free from any Mexican obligation, but this the Senate rejected. Senator Bratton of New Mexico, noting that only 400,000 acre-feet kept Arizona and California apart, immediately suggested an amendment by which they would split the difference. California getting 4,400,000 acre-feet “of the waters apportioned to the lower basin States by the Colorado River compact,” plus half of the surplus. It was this Bratton amendment that became part of the Act as passed, which had been amended on the floor so that the limitation referred to waters apportioned to the

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See 69 Cong. Rec. 9454 (1928).

See 70 Cong. Rec. 172 (1928).


Id., at 402.


70 Cong. Rec. 324 (1928).

Id., at 162.

Id., at 384.

Id., at 385.

45 Stat. 1057 (1928). Arizona’s Senators Ashurst and Hayden voted against the bill, which did not exempt the Gila from the Mexican burden. 70 Cong. Rec. 603 (1928).
Lower Basin "by paragraph (a) of Article III of the Colorado River compact," instead of waters apportioned "by the Colorado River compact." 16

Statements made throughout the debates make it quite clear that Congress intended the 7,500,000 acre-feet it was allocating, and out of which California was limited to 4,400,000, to be mainstream water only. In the first place, the basin Senators expressly acknowledged as the starting point for their debate the Denver Governor's proposal that specific allocations be made to Arizona, California, and Nevada from the mainstream, leaving the tributaries to the States. For example, Senator Johnson, leading spokesman for California, and Senator Hayden, leading spokesman for Arizona, agreed that the Governors' recommendations could be used as "a basis for discussion." 17 Hayden went on to observe that the Committee amendment would give California the same 4,600,000 acre-feet she had sought at Denver. 18 Later, Nevada's Senator Pittman stated that the committee "put the amount in there that California demanded before the four governors at Denver," and said that the Bratton amendment would split the 400,000 acre-feet separating the Governors' figure and the Committee's figure. 19 All the leaders in the debate—Johnson, Bratton, King, Hayden, Phipps, and Pittman—expressed a common understanding that the key issue separating Arizona and California was the difference of 400,000 acre-feet, 20 precisely the same 400,000 acre-feet of mainstream water that had separated the States at Denver. We are to sustain California's argument here that tributaries must be included, California would actually get more than she was willing to settle for at Denver.

That the apportionment was from the mainstream only is also strongly indicated by an analysis of the second paragraph of § 4 (a) of the Act. There Congress authorized Arizona, Nevada, and California to make a compact allocating to Nevada 300,000 acre-feet and to Arizona 2,800,000 plus one-half of the surplus, which, with California's 4,400,000 and half of the surplus, would under California's interpretation of the Act exhaust the Lower Basin waters, both mainstream and tributaries. But Utah and New Mexico, as Congress knew, had interests in Lower Basin tributaries which Congress surely would have protected in some way had it meant for the tributaries of those two States to be included in the water to be divided among Arizona, Nevada, and California. We cannot believe that Congress would have permitted three States to divide among themselves water belonging to five States. Nor can we believe that the representatives of Utah and New Mexico would have sat quietly by and acquiesced in a congressional attempt to include their tributaries in waters given the other three States.

Finally, in considering California's claim to share in the tributaries of other States, it is important that from the beginning of the discussions and negotiations which led to the Project Act, Arizona consistently claimed that she must have sole use of the Gila, upon which her existing economy depended. 21 Arizona's claim was supported by the fact that only she and New Mexico could effectively use the Gila waters, which not only entered the Colorado River too close to Mexico to be of much use to any other State but also was reduced virtually to a trickle in the hot Arizona summers before it could reach the Colorado. In the debates the Senators consistently acknowledged that the tributaries—or at least the waters of the Gila, the only major Arizona tributary—were excluded from the allocation they were making. Senator Hayden, in response to questions by Senator Johnson, said that the California Senator was correct in stating that the Senate had seen fit to give Arizona 2,800,000 acre-feet in addition to all the water in the Gila. 22 Senator Johnson had earlier stated, "[It] is only the main stream, Senators will recall, that has been discussed," and one of his arguments in favor of California's receiving 4,600,000 acre-feet rather than 4,200,000 was that Arizona was going to keep all her tributaries in addition to whatever portion of the main river was allocated to her. 23 Senator Johnson also
argued that Arizona should bear more than half the Lower Basin's Mexican burden because in addition to the 2,800,000 acre-feet allotted her by the Act she would get the Gila, which he erroneously estimated at 3,500,000 acre-feet.\textsuperscript{44} Senator Pittman, who had sat in on the Governors' conference, likewise understood that the water was being allocated from "the main Colorado River."\textsuperscript{41} And other interested Senators similarly distinguished between the mainstream and the tributaries.\textsuperscript{44} While the debates, extending over a long period of years, undoubtedly contain statements which support inferences in conflict with those we have drawn, we are persuaded by the legislative history as a whole that the Act was not intended to give California any claim to share in the tributary waters of the other Lower Basin States.

C. The Project Act's Appportionment and Distribution Scheme.—The legislative history, the language of the Act, and the scheme established by the Act for the storage and delivery of water convince us also that Congress intended to provide its own method for a complete apportionment of the mainstream water among Arizona, California, and Nevada.

First, the legislative history. In hearings on the House bill that became the Project Act, Congressman Arentz of Nevada, apparently impatient with the delay of this much needed project, told the committee on January 6, 1928, that if the States could not themselves allocate the water, "there must be some power which will say to California 'You can not take any more than this amount and the balance is allocated to the other States.'"\textsuperscript{43} Later, May 25, 1928, the House passed the bill,\textsuperscript{44} but it did not contain any allocation scheme.

When the Senate took up that bill in December, pressure mounted swiftly for amendments that would provide a workable method for apportioning the waters among the Lower Basin States and distributing them to users in the States. The session convened on December 3, 1928, on the fifth the Senate took up the bill,\textsuperscript{45} nine days later the bill with significant amendments passed the Senate,\textsuperscript{46} four days after that the House concurred in the Senate's action,\textsuperscript{47} and on the twenty-first the President signed the bill.\textsuperscript{48} When the bill first reached the Senate floor, it had a provision, added in committee, limiting California to 4,600,000 acre-feet,\textsuperscript{49} and Senator Hayden on December 6 proposed reducing that share to 4,200,000.\textsuperscript{50} The next day, December 7, Mr. Pittman, senior Senator from Nevada, vigorously argued that Congress should settle the matter without delay. He said,

"What is the difficulty? We have only minor questions involved here. There is practically nothing involved except a dispute between the States of Arizona and California with regard to the division of the increased water that will be impounded behind the proposed dam; that is all. . . . Of the 7,500,000 acre-feet of water let down that river they have gotten together within 400,000 acre-feet. They have got to get together, and if they do not get together Congress should bring them together."

The day after that, December 8, New Mexico's Senator Bratton suggested an amendment splitting the difference between the demands of Arizona and California by limiting California to 4,400,000 acre-feet.\textsuperscript{51} On the tenth, reflecting the prevailing sense of urgency for decisive action, Senator Bratton emphasized that this was not a dispute limited simply to two States:

"The two States have exchanged views, they have negotiated, they have endeavored to reach an agreement, and until now have been unable to do so. This controversy does not affect those two States alone. It affects other States in the Union and the Government as well.

\textsuperscript{44} Id., at 466-467.
\textsuperscript{45} Id., at 469. See also id., at 232.
\textsuperscript{46} See id., at 463 (Shortridge); id., at 465 (King).
\textsuperscript{47} Hearings on H. R. 5773. supra note 25, at 50.
\textsuperscript{48} 69 Cong. Rec. 9990 (1928).
\textsuperscript{49} 70 Cong. Rec. 67 (1928).
\textsuperscript{50} Id., at 603.
\textsuperscript{51} Id., at 837-838.
\textsuperscript{52} 45 Stat. 1057.
\textsuperscript{53} Id., at 592, 70th Cong., 1st Sess. 2 (1928).
\textsuperscript{54} Id., at 162 (1928).
\textsuperscript{55} Id., at 232.
\textsuperscript{56} Id., at 277, 385.
Without undertaking to express my views either way upon the subject, I do think that if the two States are unable to agree upon a figure then that we, as a disinterested and friendly agency, should pass a bill which, according to our combined judgment, will justly and equitably settle the controversy. I suggested 4,400,000 acre-feet with that in view. I still hold to the belief that somewhere between the two figures we must fix the amount, and that this difference of 400,000 acre-feet should not be allowed to bar and preclude the passage of this important measure dealing with the enormous quantity of 15,000,000 acre-feet of water and involving seven States as well as the Government."

The very next day, December 11, this crucial amendment was adopted, and on the twelfth Senator Hayden pointed out that the bill settled the dispute over Lower Basin waters by giving 4,400,000 acre-feet to California and 2,800,000 to Arizona:

"One [dispute] is how the seven and a half million acre-feet shall be divided in the lower basin. The Senate has settled that by a vote—that California may have 4,400,000 acre-feet of that water. It follows logically that if that demand is to be conceded, as everybody agrees, the remainder is 2,800,000 acre-feet for Arizona. That settles that part of the controversy.""

On the same day, Senator Pittman, intimately familiar with the whole water problem, summed up the feeling of the Senate that the bill fixed a limit on California and "practically allocated" to Arizona her share of the water:

"The Senate has already determined upon the division of water between those States. How? It has determined how much water California may use, and the rest of it is subject to use by Nevada and Arizona. Nevada has already admitted that it can use only an insignificant quantity, 300,000 acre-feet. That leaves the rest of it to Arizona. As the bill now stands it is just as much divided as if they had mentioned Arizona and Nevada and the amounts they are to get . . . .

"As I understand this amendment, Arizona to-day has practically allocated to it 2,800,000 acre-feet of water in the main Colorado River.""

The Senator went on to explain why the Senate had found it necessary to set up his own plan for allocating the water:

"Why do we not leave it to California to say how much water she shall take out of the river or leave it to Arizona to say how much water she shall take out of the river? It is because it happens to become a duty of the United States Senate to settle this matter, and that is the reason.""

Not only do the closing days of the debate show that Congress intended an apportionment among the States but also provisions of the Act create machinery plainly adequate to accomplish this purpose, whatever contingencies might occur. As one alternative of the congressional scheme, § 4 (a) of the Act invited Arizona, California, and Nevada to adopt a compact dividing the waters along the identical lines that had formed the basis for the congressional discussions of the Act: 4,400,000 acre-feet to California, 300,000 to Nevada, and 2,800,000 to Arizona.
2,800,000 to Arizona. Section 8 (b) gave the States power to agree upon some other division, which would have to be approved by Congress. Congress made sure, however, that if the States did not agree on any compact the objects of the Act would be carried out, for the Secretary would then proceed, by making contracts, to apportion water among the States and to allocate the water among users within each State.

In the first section of the Act the Secretary was authorized to "construct, operate, and maintain a dam and incidental works ... adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water..." for the stated purpose of "controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public land and other beneficial uses..." and generating electrical power. The whole point of the Act was to replace the erratic, undependable, often destructive natural flow of the Colorado with the regular, dependable release of waters conserved and stored by the project. Having undertaken this beneficial project, Congress, in several provisions of the Act, made it clear that no one should use mainstream waters save in strict compliance with the scheme set up by the Act. Section 5 authorized the Secretary "under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river... as may be agreed upon, for irrigation and domestic uses..." To emphasize that water could be obtained from the Secretary alone, § 5 further declared, "No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated." The supremacy given the Secretary's contracts was made clear in § 8 (b) of the Act, which provided that, while the Lower Basin States were free to negotiate a compact dividing the waters, such a compact if made and approved after January 1, 1929, was to be "subject to all contracts, if any, made by the Secretary of the Interior under section 5" before Congress approved the compact.

These several provisions, even without legislative history, are persuasive that Congress intended the Secretary of the Interior, through his § 5 contracts, both to carry out the allocation of the waters of the main Colorado River among the Lower Basin States and to decide which users within each State would get water. The general authority to make contracts normally includes the power to choose with whom and upon what terms the contracts will be made. When Congress in an Act grants authority to contract, that authority is no less than the general authority, unless Congress has placed some limit on it.** In this respect it is of interest that in an earlier version the bill did limit the Secretary's contract power by making the contracts "subject to rights of prior appropriators."*** But that restriction, which preserved the law of prior appropriation, did not survive. It was stricken from the bill when the requirement that every water user have a contract was added to § 5.**** Significantly, no phrase or provision indicating that the Secretary's contract power was to be controlled by the law of prior appropriation was substituted either then or at any other time before passage of the Act, and we are persuaded that had Congress intended so to fetter the Secretary's discretion, it would have done so in clear and unequivocal terms, as it did in recognizing "present perfected rights" in § 6.

That the bill was giving the Secretary sufficient power to carry out an allocation of the waters among the States and among the users within each State without regard to the law of prior appropriation was brought out in a colloquy between Montana's Senator Walsh and California's Senator Johnson, whose State had at least as much reason as any other State to bind the Secretary by state laws. Senator Walsh, who was thoroughly versed in western water law and also had previously argued before this Court in a leading case involving the doctrine of prior appropriation,**** made clear what would follow from the Government's impounding of the Colorado River waters when he said, "I always understood that the interest that stores the water has a right superior to prior appropriations that do not store." He sought Senator Johnson's views on what rights the City of Los Angeles, which had filed claims to large quantities of Colorado River water, would have after the Government had built the dam and impounded the waters. In reply to Senator Walsh's specific question whether the Government might "dispose of the stored water as it sees fit," Senator Johnson said,

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**In the debates leading to the passage of the bill, Senator Walsh observed that "to contract means a liberty of contract" and asked if this did not mean that the Secretary could "give the water to them [appropriators] or withhold it from them as he sees fit," to which Senator Johnson answered "certainly." 70 Cong. Rec. 168 (1928).
***See Hearings on H. R. 6251 and 9826 before the Committee on Irrigation and Reclamation, 69th Cong., 1st Sess. 12 (1926).
****See id., at 97, 115.
####See Brown v. Morris, 221 U.S. 485 (1911). This case was relied on by Mr. Justice Van Devanter in Wyoming v. Colorado, 259 U.S. 419, 466 (1922).
“Yes, under the terms of this bill.” Senator Johnson added that “everything in this scheme, plan, or design” was “dependent upon the Secretary of the Interior contracting with those who desire to obtain the benefit of the construction . . . .” He admitted that it was possible that the Secretary could “utterly ignore” Los Angeles’ appropriations.83

In this same discussion, Senator Hayden emphasized the Secretary’s power to allocate the water by making contracts with users. After Senator Walsh said that he understood Senator Johnson to be arguing that the Secretary must satisfy Los Angeles’ appropriations. Senator Hayden corrected him, pointing out that Senator Johnson had qualified his statement by saying that “after all, the Secretary of the Interior could allow the city of Los Angeles to have such quantity of water as might be determined by contract.” Senator Hayden went on to say that “where domestic and irrigation needs conflict, ‘the Secretary of the Interior will naturally decide as between applicants, one who desires to use the water for potable purposes in the city and another who desires to use it for irrigation, if there is not enough water to go around, that the city shall have the preference.’” 84 It is also significant that two vigorous opponents of the bill, Arizona’s Representative Douglas and Utah’s Representative Colton, criticized the bill because it gave the Secretary of the Interior “absolute control” over the disposition of the stored waters.85

The argument that Congress would not have delegated to the Secretary so much power to apportion and distribute the water overlooks the ways in which his power is limited and channeled by standards in the Project Act. In particular, the Secretary is bound to observe the Act’s limitation of 4,400,000 acre-feet on California’s consumptive uses out of the first 7,500,000 acre-feet of mainstream water. This necessarily leaves the remaining 3,100,000 acre-feet for the use of Arizona and Nevada, since they are the only other States with access to the main Colorado River. Nevada consistently took the position, accepted by the other States throughout the debates, that her conceivable needs would not exceed 300,000 acre-feet, which, of course, left 2,800,000 acre-feet for Arizona’s use. Moreover, Congress indicated that it thought this a proper division of the waters when in the second paragraph of § 4 (a) it gave advance consent to a tri-state compact adopting such division. While no such compact was ever entered into, the Secretary by his contracts has apportioned the water in the approved amounts and thereby followed the guidelines set down by Congress. And, as the Master pointed out, Congress set up other standards and placed other significant limitations upon the Secretary’s power to distribute the stored waters. It specifically set out in order the purposes for which the Secretary must use the dam and the reservoir:

“First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power.” § 6.

The Act further requires the Secretary to make revenue provisions in his contracts adequate to ensure the recovery of the expenses of construction, operation, and maintenance of the dam and other works within 50 years after their construction. § 4 (b). The Secretary is directed to make water contracts for irrigation and domestic uses only for “permanent service.” §5. He and his permittees, licensees, and contractees are subject

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83 70 Cong. Rec. 165 (1928). Other statements by Senator Johnson are less damaging to California’s claims. For example, the Senator at another point in the colloquy with Senator Walsh said that he doubted if the Secretary either would or could disregard Los Angeles and contract with someone having no appropriation. Ibid. It is likely, however, that Senator Johnson was talking about present perfected rights, as a few minutes before he had argued that Los Angeles had taken sufficient steps in perfecting its claims to make them protected. See id., at 167. Present perfected rights, as we have observed in the text, are recognized by the Act. § 6.

84 70 Cong. Rec. 169 (1928). At one point Senator Hayden seems to say that the Secretary’s contracts are to be governed by state law: “The only thing required in this bill is contained in the amendment that I have offered, that there shall be apportioned to each State its share of the water. Then, who shall obtain that water in relative order of priority may be determined by the State courts.” Ibid. But, in view of the Senator’s other statements in the same debate, this remark of a man so knowledgeable in western water law makes sense only if one understands that the “order of priority” being talked about was the order of present perfected rights—rights which Senator Hayden recognized, see id., at 167, and which the Act preserves in § 6.

85 69 Cong. Rec. 9623, 9648, 9649 (1928). We recognize, of course, that statements of opponents of a bill may not be authoritative, see Schwengmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-395 (1951), but they are nevertheless relevant and useful, especially where, as here, the proponents of the bill made no response to the opponents’ criticisms.
to the Colorado River Compact, § 8 (a), and therefore can do nothing to upset or encroach upon the Compact's allocation of Colorado River water between the Upper and Lower Basins. In the construction, operation, and management of the works, the Secretary is subject to the provisions of the reclamation law, except as the Act otherwise provides. § 14. One of the most significant limitations in the Act is that the Secretary is required to satisfy present perfected rights, a matter of intense importance to those who had reduced their water rights to actual beneficial use at the time the Act became effective. § 6. And, of course, all of the powers granted by the Act are exercised by the Secretary and his well-established executive department, responsible to Congress and the President, and subject to judicial review.**

Notwithstanding the Government's construction, ownership, operation, and maintenance of the vast Colorado River works that conserve and store the river's waters and the broad power given by Congress to the Secretary of the Interior to make contracts for the distribution of the water, it is argued that Congress in §§ 14 and 18 of the Act took away practically all the Secretary's power by permitting the States to determine with whom and on what terms the Secretary would make water contracts. Section 18 states:

"Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders . . . ."

Section 14 provides that the reclamation law, to which the Act is made a supplement, shall govern the management of the works except as otherwise provided, and § 8 of the Reclamation Act, much like § 18 of the Project Act, provides that it is not to be construed as affecting or interfering with state laws "relating to the control, appropriation, use, or distribution of water used in irrigation . . . ." In our view, nothing in any of these provisions affects our decision, stated earlier, that it is the Act and the Secretary's contracts, not the law of prior appropriation, that control the apportionment of water among the States. Moreover, contrary to the Master's conclusion, we hold that the Secretary in choosing between users within each State and in settling the terms of his contracts is not bound by these sections to follow state law.

The argument that § 8 of the Reclamation Act requires the United States in the delivery of water to follow priorities laid down by State law has already been disposed of by this Court in *Ivanhoe Irr. Dist. v. McCracken*, 357 U.S. 275 (1958) and reaffirmed in *City of Fresno v. California*, 372 U.S. 627 (1963). In *Ivanhoe* we held that, even though § 8 of the Reclamation Act preserved state law, that general provision could not override a specific provision of the same Act prohibiting a single landowner from getting water for more than 160 acres. We said:

"As we read § 8, it merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects. As the Court said in *Nebraska v. Wyoming*, supra, at 615: 'We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system' . . . . We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State." *Id.*, at 291-292.

Since § 8 of the Reclamation Act did not subject the Secretary to state law in disposing of water in that case, we cannot, consistently with *Ivanhoe*, hold that the Secretary must be bound by state law in disposing of water under the Project Act.

Nor does § 18 of the Project Act require the Secretary to contract according to state law. That Act was passed in the exercise of congressional power to control navigable water for purposes of flood control,
navigation, power generation, and other objects, and is equally sustained by the power of Congress to promote the general welfare through projects for reclamation, irrigation, or other internal improvements. Section 18 merely preserves such rights as the States "now" have, that is, such rights as they had at the time the Act was passed. While the States were generally free to exercise some jurisdiction over these waters before the Act was passed, this right was subject to the Federal Government's right to regulate and develop the river. Where the Government, as here, has exercised this power and undertaken a comprehensive project for the improvement of a great river and for the orderly and beneficial distribution of water, there is no room for inconsistent state laws. As in Ivanhoe, where the general provision preserving state law was held not to overrule a specific provision stating the terms for disposition of the water, here we hold that the general saving language of § 18 cannot bind the Secretary by state law and thereby nullify the contract power expressly conferred upon him by § 5. Section 18 plainly allows the States to do things not inconsistent with the Project Act or with federal control or the river, for example, regulation of the use of tributary water and protection of present perfected rights. What other things the States are free to do can be decided when the occasion arises. But where the Secretary's contracts, as here, carry out a congressional plan for the complete distribution of waters to users, state law has no place.

Before the Project Act was passed, the waters of the Colorado River, though numbered by the millions of acre-feet, flowed too haltingly or too freely resulting in droughts and floods. The problems caused by these conditions proved too immense and the solutions too costly for any one State or all the States together. In addition, the States, despite repeated efforts at a settlement, were unable to agree on how much water each State should get. With the health and growth of the Lower Basin at stake, Congress responded to the pleas of the States to come to their aid. The result was the Project Act and the harnessing of the bountiful waters of the Colorado to sustain growing cities, to support expanding industries, and to transform dry and barren deserts into lands that are livable and productive.

In undertaking this ambitious and expansive project for the welfare of the people of the Lower Basin States and of the Nation, the United States assumed the responsibility for the construction, operation, and supervision of Boulder Dam and a great complex of other dams and works. Behind the dam were stored virtually all the waters of the main river, thus impounding not only the natural flow but also the great quantities of water previously allowed to run waste or to wreak destruction. The impounding of these waters, along with their regulated and systematic release to those with contracts, has promoted the spectacular development of the Lower Basin. Today, the United States operates a whole network of useful projects up and down the river, including the Hoover Dam, Davis Dam, Parker Dam, Headgate Rock Dam, Palo Verde Dam, Imperial Dam, Laguna Dam, Morelos Dam, and the All-American Canal System, and many lesser works. It was only natural that the United States, which was to make the benefits available and which had accepted the responsibility for the project's operation, would want to make certain that the waters were effectively used. All this vast, interlocking machinery—a dozen major works delivering water according to congressionally fixed priorities for home, agricultural, and industrial uses to people spread over thousands of square miles—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 the people and communities of the Lower Basin States. Recognizing this, Congress put the Secretary of the Interior in charge of these works and entrusted him with

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Footnotes:

48Nebraska v. Wyoming, 325 U.S. 589 (1945), holds nothing to the contrary. There the Court found it unnecessary to decide what rights the United States had under federal law to the unappropriated water of the North Platte River, since the water rights on which the projects in that case rested had in fact been obtained in compliance with state law.
49See First Iowa Hydro-Elec. Coop. v. Federal Power Comm'n, 328 U.S. 152, 175-176 (1946), where this Court limited the effect of § 27 of the Federal Power Act, which expressly "saved" certain state laws, to vested property rights.
50By an Act of September 2, 1958, 72 Stat. 1726, the Secretary must supply water to Boulder City, Nevada. It follows from our conclusions as to the inapplicability of state law that, contrary to the Master's conclusion, Boulder City's priorities are not to be determined by Nevada law.
sufficient power, principally the § 5 contract power, to direct, manage, and coordinate their operation. Subjecting the Secretary to the varying, possibly inconsistent, commands of the different state legislatures could frustrate efficient operation of the project and thwart full realization of the benefits Congress intended this national project to bestow. We are satisfied that the Secretary’s power must be construed to permit him, within the boundaries set down in the Act, to allocate and distribute the waters of the mainstream of the Colorado River.

A. Diversions above Lake Mead.—The Secretary’s contracts with Arizona and Nevada provide that any waters diverted by those States out of the mainstream or the tributaries above Lake Mead must be charged to their respective Lower Basin apportionments. The Master, however, took the view that the apportionment was to be made out of the waters actually stored at Lake Mead or flowing in the mainstream below Lake Mead. He therefore held that the Secretary was without power to charge Arizona and Nevada for diversions made by them from the 275-mile stretch of river between Lee Ferry and Lake Mead or from the tributaries above Lake Mead. This conclusion was based on the Master’s reasoning that the Secretary was given physical control over the waters stored in Lake Mead and not over waters before they reached the lake.

We hold that the Master was correct in deciding that the Secretary cannot reduce water deliveries to Arizona and Nevada by the amount of their uses from tributaries above Lake Mead, for, as we have held, Congress in the Project Act intended to apportion only the mainstream, leaving to each State its own tributaries. We disagree, however, with the Master’s holding that the Secretary is powerless to charge States for diversions from the mainstream above Lake Mead. What Congress was doing in the Project Act was providing for an apportionment among the Lower Basin States of the water allocated to that basin by the Colorado River Compact. The Lower Basin, with which Congress was dealing, begins at Lee Ferry, and it was all the water in the mainstream below Lee Ferry that Congress intended to divide among the States. Were we to refuse the Secretary the power to charge States for diversions from the mainstream between Lee Ferry and the damsite, we would allow individual States, by making diversions that deplete the Lower Basin’s allocation, to upset the whole plan of apportionment arrived at by Congress to settle the long-standing dispute in the Lower Basin. That the congressional apportionment scheme would be upset can easily be demonstrated. California, for example, has been allotted 4,400,000 acre-feet of mainstream water. If Arizona and Nevada can, without being charged for it, divert water from the river above Lake Mead, then California could not get the share Congress intended her to have.

B. Nevada Contract.—Nevada has excepted to her inclusion in Paragraph II (B) (7) of the Master’s recommended decree, which provides that “mainstream water shall be delivered to users in Arizona, California and Nevada only if contracts have been made by the Secretary of the Interior, pursuant to Section 5 of the Boulder Canyon Project Act, for delivery of such water.” While the California contracts are directly with water users and the Arizona contract specifically contemplates further subcontracts with actual users, it is argued that the Nevada contract, made by the Secretary directly with the State of Nevada through her Colorado River Commission, should be construed as a contract to deliver water to the State without the necessity of subcontracts by the Secretary directly with Nevada water users. The United States disagrees, contending that properly construed the Nevada contract, like the Secretary’s general contract with Arizona, does not exhaust the Secretary’s power to require Nevada water users other than the State to make further contracts. To construe the Nevada contract otherwise, the Government suggests, would bring it in conflict with the provision of § 5 of the Project Act that “No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract [with the Secretary] made as herein stated.” Acceptance of Nevada’s contention here would not only undermine this plain congressional requirement that water users have contracts with the Secretary but would likewise transfer from the Secretary to Nevada a large part, if not

*The location of Hoover Dam is a result of engineering decisions. As Senator Pittman pointed out. “There is no place to impound the flood waters except at the lower end of the canyon.” 68 Cong. Rec. 4413 (1927).*
UPDATING THE HOOVER DAM DOCUMENTS

all, of the Secretary's power to determine with whom he will contract and on what terms. We have already held that the contractual power granted the Secretary cannot be diluted in this manner. We therefore reject Nevada's contention.

III.

APPORTIONMENT AND CONTRACTS IN TIME
OF SHORTAGE

We have agreed with the Master that the Secretary's contracts with Arizona for 2,800,000 acre-feet of water and with Nevada for 300,000, together with the limitation of California to 4,400,000 acre-feet, effect a valid apportionment of the first 7,500,000 acre-feet of mainstream water in the Lower Basin. There remains the question of what shall be done in time of shortage. The Master, while declining to make any findings as to what future supply might be expected, nevertheless decided that the Project Act and the Secretary's contracts require the Secretary in case of shortage to divide the burden among the three States in this proportion: California 4.4 : Arizona 2.8 : Nevada 3. While pro rata sharing of water shortages seems equitable on its face,** more considered judgment may demonstrate quite the contrary. Certainly we should not bind the Secretary to this formula. We have held that the Secretary is vested with considerable control over the apportionment of Colorado River waters. And neither the Project Act nor the water contracts require the use of any particular formula for apportioning shortages. While the Secretary must follow the standards set out in the Act, he nevertheless is free to choose among the recognized methods of apportionment or to devise reasonable methods of his own. This choice, as we see it, is primarily his, not the Master's or even ours. And the Secretary may or may not conclude that a pro rata division is the best solution.

It must be remembered that the Secretary's decision may have an effect not only on irrigation uses but also on other important functions for which Congress brought this great project into being—flood control, improvement of navigation, regulation of flow, and generation and distribution of electric power. Requiring the Secretary to prorate shortages would strip him of the very power of choice which we think Congress, for reasons satisfactory to it, vested in him and which we should not impair or take away from him. For the same reasons we cannot accept California's contention that in case of shortage each State's share of water should be determined by the judicial doctrine of equitable apportionment or by the law of prior appropriation. These principles, while they may provide some guidance, are not binding upon the Secretary where, as here, Congress, with full power to do so, has provided that the waters of a navigable stream shall be harnessed, conserved, stored, and distributed through a government agency under a statutory scheme.

None of this is to say that in case of shortage, the Secretary cannot adopt a method of proration or that he may not lay stress upon priority of use, local laws and customs, or any other factors that might be helpful in reaching an informed judgment in harmony with the Act, the best interests of the Basin States, and the welfare of the Nation. It will be time enough for the courts to intervene when and if the Secretary, in making apportionments or contracts, deviates from the standards Congress has set for him to follow, including his obligation to respect "present perfected rights" as of the date the Act was passed. At this time the Secretary has made no decision at all based on an actual or anticipated shortage of water, and so there is no action of his in this respect for us to review. Finally, as the Master pointed out, Congress still has broad powers over this navigable international stream. Congress can undoubtedly reduce or enlarge the Secretary's power if it wishes. Unless and until it does, we leave in the hands of the Secretary, where Congress placed it, full power to control, manage, and operate the Government's Colorado River works and to make contracts for the sale and delivery of water on such terms as are not prohibited by the Project Act.

**Proportion of shortage is the method agreed upon by the United States and Mexico to adjust Mexico's share of Colorado River water should there be insufficient water to supply each country's apportionment.
APPENDIX IX

IV.

ARIZONA-NEW MEXICO GILA CONTROVERSY.

Arizona and New Mexico presented the Master with conflicting claims to water in the Gila River, the tributary that rises in New Mexico and flows through Arizona. Having determined that tributaries are not within the regulatory provisions of the Project Act the Master held that this interstate dispute should be decided under the principles of equitable apportionment. After hearing evidence on this issue, the Master accepted a compromise settlement agreed upon by the States and incorporated that settlement in his findings and conclusions, and in Part IV (A) (B) (C) (D) of his recommended decree. No exceptions have been filed to these recommendations by any of the parties and they are accordingly accepted by us. Except for those discussed in Part V, we are not required to decide any other disputes between tributary users or between mainstream and tributary users.

V.

CLAIMS OF THE UNITED STATES.

In these proceedings, the United States has asserted claims to waters in the main river and in some of the tributaries for use on Indian Reservations, National Forests, Recreational and Wildlife Areas and other government lands and works. While the Master passed upon some of these claims, he declined to reach others, particularly those relating to tributaries. We approve his decision as to which claims required adjudication, and likewise we approve the decree he recommended for the government claims he did decide. We shall discuss only the claims of the United States on behalf of the Indian Reservations.

The Government, on behalf of five Indian Reservations in Arizona, California, and Nevada, asserted rights to water in the mainstream of the Colorado River.9 The Colorado River Reservation, located partly in Arizona and partly in California, is the largest. It was originally created by an Act of Congress in 1865,10 but its area was later increased by Executive Order.11 Other reservations were created by Executive Orders and amendments to them, ranging in dates from 1870 to 1907.12 The Master found both as a matter of fact and law that when the United States created these reservations or added to them, they reserved not only land but also the use of enough water from the Colorado to irrigate the irrigable portions of the reserved lands. The aggregate quantity of water which the Master held was reserved for all the reservations is about 1,000,000 acre-feet, to be used on around 135,000 irrigable acres of land. Here, as before the Master, Arizona argues that the United States had no power to make a reservation of navigable waters after Arizona became a State; that navigable waters could not be reserved by Executive Orders; that the United States did not intend to reserve water for the Indian Reservations; that the amount of water reserved should be measured by the reasonably foreseeable needs of the Indians living on the reservation rather than by the number of irrigable acres; and, finally, that the judicial doctrine of equitable apportionment should be used to divide the water between the Indians and the other people in the State of Arizona.

The last argument is easily answered. The doctrine of equitable apportionment is a method of resolving water disputes between States. It was created by this Court in the exercise of its original jurisdiction over controversies in which States are parties. An Indian Reservation is not a State. And while Congress has sometimes left Indian Reservations considerable power to manage their own affairs, we are not convinced by Arizona's argument that each reservation is so much like a State that its rights to water should be determined

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9The Reservations were Chemehuevi, Cocopah, Yuma, Colorado River and Fort Mohave.
11See Executive Orders of November 22, 1873, November 16, 1874, and May 15, 1876. See also Executive Order of November 22, 1915. These orders may be found in 1 U.S. Dept. of the Interior, Executive Orders Relating to Indian Reservations 67 (1912); 2 id., at 5-6 (1922).
12Executive Orders of January 9, 1884 (Yuma), September 19, 1890 (Fort Mohave), February 2, 1911 (Fort Mohave), September 27, 1917 (Cocopah). For these orders, see id., at 12-13, 63-64 (1912); 2 id., at 5 (1922). The Chemehuevi Reservation was established by the Secretary of the Interior on February 2, 1907, pending congressional approval.
by the doctrine of equitable apportionment. Moreover, even were we to treat an Indian Reservation like a State, equitable apportionment would still not control since, under our view, the Indian claims here are governed by the statutes and Executive Orders creating the reservations.

Arizona's contention that the Federal Government had no power, after Arizona became a State, to reserve waters for the use and benefit of federally reserved lands rests largely upon statements in Pollard's Lessee v. Hagan, 3 How. 212 (1845), and Shively v. Boulby, 152 U.S. 1 (1894). Those cases and others that followed them gave rise to the doctrine that lands underlying navigable waters within territory acquired by the Government are held in trust for future States and that title to such lands is automatically vested in the States upon admission to the Union. But those cases involved only the shores of and lands beneath navigable waters. They do not determine the problem before us and cannot be accepted as limiting the broad powers of the United States to regulate navigable waters under the Commerce Clause and to regulate government lands under Art. IV, § 3, of the Constitution. We have no doubt about the power of the United States under these clauses to reserve water rights for its reservations and its property.

Arizona also argues that, in any event, water rights cannot be reserved by Executive Order. Some of the reservations of Indian lands here involved were made almost 100 years ago, and all of them were made over 45 years ago. In our view, these reservations, like those created directly by Congress, were not limited to land, but included waters as well. Congress and the Executive have ever since recognized these as Indian Reservations. Numerous appropriations, including appropriations for irrigation projects, have been made by Congress. They have been uniformly and universally treated as reservations by map makers, surveyors, and the public. We can give but short shrift at this late date to the argument that the reservations either of land or water are invalid because they were originally set apart by the Executive.

Arizona also challenges the Master's holding as to the Indian Reservations on two other grounds: first, that there is a lack of evidence showing that the United States in establishing the reservations intended to reserve water for them; second, that even if water was meant to be reserved the Master has awarded too much water. We reject both of these contentions. Most of the land in these reservations is and always has been arid. If the water necessary to sustain life is to be had, it must come from the Colorado River or its tributaries. It can be said without overstatement that when the Indians were put on these reservations they were not considered to be located in the most desirable area of the Nation. It is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind—hot scorching sands—and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised. In the debate leading to approval of the first congressional appropriation for irrigation of the Colorado River Indian Reservation, the delegate from the Territory of Arizona made this statement:

"Irrigating canals are essential to the prosperity of these Indians. Without water there can be no production, no life; and all they ask of you is to give them a few agricultural implements to enable them to dig an irrigating canal by which their lands may be watered and their fields irrigated, so that they may enjoy the means of existence. You must provide these Indians with the means of subsistence or they will take by robbery from those who have. During the last year I have seen a number of these Indians starved to death for want of food." Cong. Globe, 38th Cong., 2d Sess. 1321 (1865).

The question of the Government's implied reservation of water rights upon the creation of an Indian Reservation was before this Court in Winters v. United States, 207 U.S. 564, decided in 1908. Much of the same argument made to us was made in Winters to persuade the Court to hold that Congress had created an Indian Reservation without intending to reserve waters necessary to make the reservation livable. The Court rejected all of the arguments. As to whether water was intended to be reserved, the Court said, at p. 576:

“The lands were arid and, without irrigation, were practically valueless. And yet, it is contended, the means of irrigation were deliberately given up by the Indians and deliberately accepted by the Government. The lands ceded were, it is true, also arid; and some argument may be urged, and is urged, that with their cession there was the cession of the waters, without which they would be valueless, and ‘civilized communities could not be established thereon.’ And this, it is further contended, the Indians knew, and yet made no reservation of the waters. We realize that there is a conflict of implications, but that which makes for the retention of the waters is of greater force than that which makes for their cession.”

The Court in Winters concluded that the Government, when it created that Indian Reservation, intended to deal fairly with the Indians by reserving for them the waters without which their lands would have been useless. Winters has been followed by this Court as recently as 1939 in United States v. Powers, 305 U.S. 527. We follow it now and agree that the United States did reserve the water rights for the Indians effective as of the time the Indian Reservations were created. This means, as the Master held, that these water rights, having vested before the Act became effective on June 25, 1929, are “present perfected rights” and as such are entitled to priority under the Act.

We also agree with the Master’s conclusion as to the quantity of water intended to be reserved. He found that the water was intended to satisfy the future as well as the present needs of the Indian Reservations and ruled that enough water was reserved to irrigate all the practically irrigable acreage on the reservations. Arizona, on the other hand, contends that the quantity of water reserved should be measured by the Indians’ “reasonably foreseeable needs,” which, in fact, means by the number of Indians. How many Indians there will be and what their future needs will be can only be guessed. We have concluded, as did the Master, that the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage. The various acreages of irrigable land which the Master found to be reasonable.

We disagree with the Master’s decision to determine the disputed boundaries of the Colorado River Indian Reservation and the Fort Mohave Indian Reservation. We hold that it is unnecessary to resolve those disputes here. Should a dispute over title arise because of some future refusal by the Secretary to deliver water to either area, the dispute can be settled at that time.

The Master ruled that the principle underlying the reservation of water rights for Indian Reservations was equally applicable to other federal establishments such as National Recreation Areas and National Forests. We agree with the conclusions of the Master that the United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreation Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest.

We reject the claim of the United States that it is entitled to the use, without charge against its consumption, of any waters that would have been wasted but for salvage by the Government on its wildlife preserves. Whatever the intrinsic merits of this claim, it is inconsistent with the Act’s command that consumptive use shall be measured by diversions less returns to the river.

Finally, we note our agreement with the Master that all uses of mainstream water within a State are to be charged against that State’s apportionment, which of course includes uses by the United States.

VI.

DEGREE.

While we have in the main agreed with the Master, there are some places we have disagreed and some questions on which we have not ruled. Rather than adopt the Master’s decree with amendments or append our own decree to this opinion, we will allow the parties, or any of them, if they wish, to submit before September 16, 1963, the form of decree to carry this opinion into effect, failing which the Court will prepare and enter an appropriate decree at the next Term of Court.

It is so ordered.