Arizona v. California, A STATUTORY CONSTRUCTION CASE

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The litigation involving the water available from the Colorado River to the lower basin of that river has been generally regarded as a case primarily involving the application of principles of water law. Actually, while a commodity, water, was the prize over which the conflict raged, principles of statutory construction and constitutional law provided the weapons which resolved the battle.

The concept that Congress might have the power to allocate the water of a navigable stream among competing states has been characterized as "... a new, and to some, a startling doctrine."[1]

The Supreme Court of the United States, at least a majority of the Justices, in *Arizona v. California*,[2] agreed with Special Master Simon H. Rifkind that Congress had this power and that, in enacting the Boulder Canyon Project Act,[3] Congress had done just that.

This concept should not be regarded as either new or startling. This holding was foreshadowed by a long line of Supreme Court decisions dealing with the powers of Congress over navigable water under the Commerce Clause of the United States Constitution.[4]

Before considering these cases and their application to *Arizona v. California*, a general review of the causes, history and background of the litigation involving the lower basin's share of this third largest of all United States rivers is in order.

An understanding of the geography and economy of the basin of the Colorado River is essential to an understanding of the forces which shaped the Colorado River Compact and the Boulder Canyon Project Act and the meaning to be read therein, for as Judge Learned Hand once observed: "Words are chameleons which reflect the color of their environment."[5] An understanding of the Compact and the Project Act is essential to an understanding of the decision of the United States Supreme Court June 3, 1963, in the case of *Arizona v. California*.

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[1] THE SUPREME COURT REVIEW 137 (1963).

[2] 373 U.S. 546 (1963).

[3] 45 Stat. 1057 (1928), 43 U.S.C. § 617 (1958).

[4] Art. I, § 8, cl. 2.

[5] Commissioner v. National Carbide Corp., 167 F.2d 304 (1948).

The basin of the Colorado River is, as the negotiators of the Colorado River Compact recognized, in reality two basins with widely differing climate, economic and topographical features. The Colorado is the third longest river in the United States, exceeded in length only by the Mississippi and the Rio Grande. Its drainage area of 242,000 square miles in the United States equals about one-twelfth of the area of the continental United States exclusive of Alaska. The basin in Arizona makes up 107,242 square miles of the entire basin followed in area within each state by Utah, Colorado, New Mexico, Wyoming, Nevada and California in that order.[6]

A canyon stretch of the river approximately 1,000 miles long in southern Utah and northern Arizona divides the basin of the Colorado River system into two natural parts, known as the upper and lower basins, respectively. In both basins most kinds of agriculture can be practiced successfully only by irrigation because of prevailing arid and semi-arid conditions. The important geographical and climatic differences between the two basins and the significance to be attached thereto will be discussed hereafter.

River systems tributary to the Colorado exist in every basin state except California; and the most important of these in the lower basin are the Little Colorado in Arizona and New Mexico; the Bill Williams in Arizona; the Gila in Arizona and New Mexico; and the Virgin in Nevada, Utah and Arizona.

The confluence of the Gila with the Colorado occurs between Laguna Dam and Yuma, Arizona, south of existing diversion structures in the United States. Water discharging from the Gila into the Colorado has not been diverted or used in California since completion of the All American Canal in 1940. Prior thereto, discharge from the Gila could be used by California through the Alamo Canal, but for various reasons its value to California was minimal and in times of flood its heavy silt load was a distinct nuisance.

For many years before 1922, when the Compact was negotiated, the flow of the Colorado River was unpredictable and erratic. Flood flows seriously menaced the lower basin, particularly in the Imperial Valley and to a much lesser extent the Yuma area, where such floods threatened lives and property. Flood control by storage was essential to protect the lower basin.

Because of this erratic flow, the water supply from the main stream in the lower basin was at times undependable for irrigation and during periods of low flow was often wholly insufficient for existing demands. There was thus immediate need for storage in the lower basin to control the river's flow in order to assure a regulated water supply to meet existing

[6] 11 REPORT OF THE PRESIDENT'S WATER RESOURCES POLICY COMMISSION, *Ten Rivers in America's Future.*

needs and to make further development possible. Further, the Colorado River carried a large amount of silt, estimated to exceed 100,000 acre-feet annually at Yuma, which damaged irrigation works and agricultural lands, making silt control essential to protection and development of the lower basin, particularly of Imperial Valley.[7]

In addition, the Alamo Canal carrying water from the river to Imperial Valley in California lay throughout most of its length in Mexico, which route was chosen, of necessity, because of the sand dunes lying west of Yuma in southeastern California. It was maintained under a concession granted in 1904 by Mexico, which required that not to exceed one-half of the water passing through the canal be made available for irrigation in Mexico. In addition, complications arising by reason of requirements of the laws of Mexico were most vexatious and, for that matter, productive of considerable unnecessary expense to Imperial Valley. A canal wholly within the United States carrying water to Imperial Valley was recognized as essential to eliminate these complications and to free Colorado River water from the burden of the Mexican concession.

The clamor for control of the Colorado by a large storage dam brought about by reason of these circumstances occasioned apprehension in the upper basin states, namely, Colorado, New Mexico, Utah and Wyoming, which recognized that agricultural expansion and other development in the upper basin would be slower than in the lower. These upper basin states feared that construction of storage facilities on the main stream of the Colorado River for the benefit of the lower basin would permit uses of water in the lower basin to expand rapidly and form the basis for possible claims of rights which would interfere with or actually defeat full development in the upper basin.

These fears were heightened by the decision of the United States Supreme Court in *Wyoming v. Colorado*,[8] holding that appropriative rights would be recognized and applied in an interstate water right adjudication.

Necessity of, and hope for, adjustment of the conflicting interests of the two basins without litigation had long been recognized before 1922. In August, 1920, the League of the Southwest, an organization for promotion of western development, convened at Denver. Arizona, California, Colorado, Nevada, New Mexico, Wyoming and Utah were represented. Upper versus lower basin storage sites and possibility of an inter-state compact were discussed. A resolution was adopted that present and future rights of states within the drainage area of the Colorado

[7] Fall-Davis Report, S. Doc. No. 142, 67th Cong., 2d Sess.; DEP'T OF THE INTERIOR, THE COLORADO RIVER, A COMPREHENSIVE REPORT ON THE DEVELOPMENT OF THE WATER RESOURCES OF THE COLORADO RIVER BASIN FOR IRRIGATION, POWER PRODUCTION AND OTHER BENEFICIAL USES. (1946).

[8] 259 U.S. 419 (1922).

River and rights of the United States to use the water of the river and its tributaries should be settled by agreement between those states and the United States, with the consent of Congress, and that the state legislatures be requested to authorize appointment of commissioners to negotiate such a compact.[9]

In early 1921 the seven Colorado River basin states by legislation authorized appointment of commissioners to negotiate a compact for apportionment of the water supply of the river and its tributaries. Later that year Congress consented[10] that the states might negotiate and conclude a compact which would equitably apportion the water of the Colorado River and its tributaries among such states, on condition that a representative of the United States be appointed by the President to participate in the negotiations and report to Congress on the proceedings and any compact that might result.[11]

The Colorado River Commission, consisting of commissioners appointed by the seven Colorado River basin states and the representative of the United States, Mr. Herbert Hoover, convened on January 26, 1922, and continued to meet until November 24, 1922, when the agreement they negotiated was signed as the Colorado River Compact.[12]

The Commission had early abandoned all efforts to allocate the entire water supply among all the basin states due to the excessive demands of each state, and, at Chairman Hoover's suggestion, turned to an allocation of water to each basin.[13]

In general, the Compact defines the "Colorado River Basin" as "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." The basin is divided into two basins, called the "Upper Basin" and the "Lower Basin," respectively. The dividing point between the two basins is fixed at Lee Ferry, Arizona, a "point in the main steam of the Colorado River one mile below the mouth of the Paria River."

The Compact defines the Upper Basin as those parts of Arizona, Colorado, New Mexico, Utah and Wyoming within and from which waters naturally drain into the Colorado River System above Lee Ferry, and all parts of those states located without the drainage area of the system then or thereafter beneficially served by waters diverted from the system above Lee Ferry.

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[9] OLSON, THE COLORADO RIVER COMPACT.

[10] 42 Stat. 171 (1921).

[11] WILBER & ELY, HOOVER DAM DOCUMENTS (1948).

[12] OLSON, THE COLORADO RIVER COMPACT.

[13] *Report of Frank C. Emerson, Commissioner for Wyoming,* WILBER & ELY, HOOVER DAM DOCUMENTS, app. 214 (1948); *Hearings on H.R. 2903,* Part VIII, at 1750, May 15, 1924 (testimony of A. P. Davis).

The Lower Basin is defined as those parts 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 those states located without the drainage area of the system then or thereafter beneficially served by waters diverted from the system below Lee Ferry.

The Compact defines the Colorado River System as "that portion of the Colorado River and its tributaries within the United States of America." Only a part of the water of the system is apportioned, and the apportionment is made between basins and not among the several states within each basin as defined in the Compact.

Article III of the Compact makes the apportionment of water inter-basin and provides in material part as follows:

> (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 not exist.
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> (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.
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> (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).
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> (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.
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> (e) The States of the Upper Division shall not withhold 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.

The Compact by its terms was not to become binding until approved by the legislatures of the seven signatory states and by Congress.

In 1923 the legislatures of the Colorado River Basin states except Arizona approved the Compact. In 1925 those states, except Arizona, by legislation waived the requirement that seven states ratify and agreed that the Compact become effective whenever six of the signatory states and Congress should ratify.

California conditioned its waiver upon (a) Congressional authorization for construction of a dam in the main stream of the Colorado River at or below Boulder Canyon adequate to create a storage reservoir with not less than 20,000,000 acre-feet capacity; and (b) Congressional action making the Compact binding and effective as to the water of the river.[14]

In 1922-1927 three bills were successively introduced by Representative Phil Swing and Senator Hiram Johnson, both of California, commonly referred to as the "Swing-Johnson Bills," which would have authorized construction of an All-American canal and a dam at or near Boulder Canyon. All failed of enactment, largely because of the concern of Upper Basin States as to their own future water development.[15]

During 1925-1927 negotiations between Arizona, California and Nevada for a lower basin compact dividing among them the water apportioned to the lower basin by the Compact were unsuccessful. In 1927 the Governors of the seven Colorado River Basin states met at Denver, Colorado, to devise means to bring about seven-state ratification of the Compact. By resolution the Governors of the upper division states suggested that out of the average annual delivery of water to be provided by those states at Lee Ferry under the Compact there be apportioned to Nevada 300,000 acre-feet; to Arizona 3,000,000 acre-feet; and to California 4,200,000 acre-feet; and they further recommended that each of the lower basin states should have exclusive use of all water of Colorado River tributaries within their boundaries before it empties into the main stream.[16]

The proposals of the Governors' Conference failed of acceptance primarily because of California's demand that, of the water apportioned to the lower basin by Article III(a) of the Compact, it should be allotted 4,600,000 acre-feet and Arizona's insistence that California be limited to 4,200,000 acre-feet of such water.[17]

The 4th Swing-Johnson Bill, authorizing construction of the All-American Canal and of a dam at or near Boulder Canyon, was introduced in December, 1927, was passed by the House with amendments and went to the Senate in May, 1928. Senate action in the first session of the Seventieth Congress was prevented by an Arizona-inspired filibuster. In December, 1928, the Senate resumed consideration of the Bill, which

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[14] WILBER & ELY, THE HOOVER DAM DOCUMENTS 35 (1948).
[15] *Id.* at 32.
[16] 70 CONG REC. 172, 70th Cong., 2d Sess. (1928).
[17] *Ibid.*; 69 CONG. REC. 10259 (1928).

then passed both Houses. It was approved by the President on December 21, 1928, and by its terms was called the "Boulder Canyon Project Act."[18]

By the Project Act, subject to its prescribed conditions and limitations, Congress approved the Compact and authorized, after compliance with those conditions, construction of a dam in the main stream of the Colorado River at Black Canyon or Boulder Canyon (Hoover Dam) adequate to create a storage reservoir having a capacity of at least 20,000,000 acre-feet and construction of the All-American Canal from the Colorado River to Imperial and Coachella Valleys of California.[19]

The Project Act, however, expressly was not to take effect until (1) ratification of the Compact within six months from the date of passage of the Act by the seven Colorado River Basin states, or in the alternative, if all seven states should fail so to ratify, then (2) ratification by six states, including California, and a waiver by each of the Compact requirement of seven-state ratification.

More important still, the Act was not to be effective in the event of either six- or seven-state ratification[20] until California by Act of its legislature should strictly limit its use of Colorado River water in accordance with the terms of such limitation clearly spelled out in the Act.

The Compact was not ratified by the seven Colorado River Basin states within six months from passage of the Project Act, but there was six-state ratification within that period.

On March 4, 1929, the California legislature enacted the Limitation Act, whereby California agreed:

> . . . irrevocably and unconditionally with the United States and for the benefit of the states of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming as an express covenant and in consideration of the passage of the said "Boulder canyon project act" that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California including all uses under contracts made under the provisions of said "Boulder canyon project act" and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the water apportioned to the lower basin states by paragraph (a) of article three of the said Colorado river compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact.[21]

On June 25, 1929, the President proclaimed the Project Act effective.

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[18] WILBER & ELY, THE HOOVER DAM DOCUMENTS.

[19] 45 Stat. 1057 (1928), 43 U.S.C. § 617(a) (1958).

[20] The language of the Project Act is not clear as to whether the Limitation Act was required of California only in the event of six-state ratification or whether it was required in any event. The question is moot.

[21] WILBUR & ELY, THE HOOVER DAM DOCUMENTS 231 (1948).

His proclamation declared (a) there had not been seven-state ratification of the Compact within six months of the passage and approval of the Project Act; (b) there had been six-state ratification of the Compact and waiver by the six ratifying states of the requirement for seven-state ratification; (c) California had met the requirements of Section 4(a) of the Project Act necessary to render the Act effective; and (b) all prescribed conditions for effectiveness of the Compact had been fulfilled.[22]

Arizona did not ratify the Compact until 1944.[23] Controversy raged over the question of ratification. W. S. Norveil, Arizona's Compact Commissioner, was a Republican appointed by Governor Campbell, also a Republican. When the Compact came before the Legislature for ratification, George W. P. Hunt, a Democrat, had defeated Campbell and the Democrats had returned to power.

What reasons motivated the members of the Legislature is now immaterial. Ratification was rejected by Arizona; and Arizona, alone, of the seven basin states, remained out of the Compact. Arizona's intransigence, then soundly condemned in some quarters, was probably a most fortunate thing; for, had Arizona ratified and become bound by the Compact, the upper basin states would have had no impelling reason for insisting that California be restricted in her use of water apportioned to the lower basin by the Compact prior to passage of the Boulder Canyon Project Act.

Senator Pittman thus explained the upper basin position and fears:

> Now, unless there was an agreement as to exactly how much water should go to the lower States out of the 7,500,000 acre-feet that went down to them, what might be the result? If Arizona stays out of the agreement she would have her legal right to appropriate as much water as she could put to beneficial use. On the other hand, California would only be restricted by the 7,500,000 acre-feet that went down, with the result that there would be nothing in the compact to prevent California from using the entire 7,500,000 acre-feet and there would be nothing in the compact to prevent Arizona from using the 7,500,000 acre-feet if she never went into the compact.
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> So the upper states said: "We have got to be assured that there is not used in the lower basin more than the 7,500,000 acre-feet because, if there is more used, then when we get ready to use it in the future it will not exist under the law of appropriation that applies in that section of the country." Consequently, in view of the fact that Arizona might never go into the compact, might never be bound by the compact, might be perfectly free to exercise her equal right and put to use as much as she could

[22] *Id.* at 233.
[23] Ch. 4, Seventeenth Arizona Legislature, 1st Sp. Sess., 1944.
[24] MANN, THE POLITICS OF WATER IN ARIZONA (1963).

> put to beneficial use, it was said in the committee, "If Arizona does not come in and if it is limited to six States only, then we must be assured that California will not take the full 7,500,000 acre-feet and then Arizona take some more." So the Senator from Wyoming (Mr. Kendrick) offered an amendment in committee, to which the committee agreed, and that amendment provided that California should never consumptively use of the Colorado River over 4,600,000 acre-feet.[25]

Accordingly, Senator Hayden had firm allies in his fight to preserve to Arizona a share of the lower basin apportionment chiefly because the upper basin Senators felt that unless a fair share of the apportionment to the lower basin was protected for appropriation by Arizona, California might use it all and Arizona might, to supply her needs, appropriate some of the 7,500,000 acre-feet reserved for upper basin use each year. It was not until Congress considered that California had been effectively limited in her use of Colorado River water and that a fair share had been set aside to Arizona that the Project Act became law.

Arizona, however, either did not recognize that her future water supply had been protected, chiefly through the patient negotiation and legislative skill of Senator Hayden, or feared that the "Mexican burden" might require that "the gates of Roosevelt Lake be opened to satisfy it"; for, on October 13, 1930, Arizona filed an original Bill of Complaint in the Supreme Court of the United States seeking a determination that the Project Act was unconstitutional chiefly as an invasion of her quasi-sovereignty since one end of the dam would be anchored on Arizona soil and as an invasion of her right to prohibit or permit appropriation under Arizona's laws of unappropriated water flowing within the state.

In dismissing the Complaint, the Supreme Court, in an opinion by Justice Brandeis, rejected these claims, holding that the Colorado was a navigable river and that Congress had the undoubted power for the purpose of "improving navigation" to construct the dam and that "there is now no threat by Wilbur, or any of the defendant states, to do any act which will interfere with the enjoyment of any present or future appropriation" (in Arizona).[26]

Again on February 14, 1934, Arizona moved for leave to file an original Bill of Complaint to perpetuate the testimony of persons who participated in Compact negotiations claiming that there was an oral understanding that Article III(b) of the Compact was for the sole benefit of Arizona and was intended to compensate Arizona for the inclusion of the Gila River and its tributaries within the Compact apportionment and provisions.

Again Justice Brandeis dismissed, holding among other things that

[25] 70 CONG. REC. 385 (1928).
[26] 283 U.S. 423 (1931).

the testimony would be inadmissible as being oral and not communicated to any of the ratifying states or the Congress. The language of his decision in dismissing was to rise to haunt Arizona in future litigation.[27]

When construction of Parker Dam was commenced, Governor Moeur of Arizona threatened to halt construction by military force, whereupon the United States sued in the Supreme Court to enjoin this interference by Arizona. Finding no statutory authorization for the dam in the navigable stream the Court dismissed the suit,[28] whereupon Congress promptly authorized the construction.[29]

Again, in 1935, Arizona filed a petition for leave to file a Bill of Complaint against the other basin states seeking a decree equitably apportioning the water of the Colorado River among the basin states. Again the Court dismissed, holding the United States to be an indispensable party; and since the United States could not be sued without its consent, which was not given, the case would not be accepted by the Court.[30]

On February 9, 1944, the State of Arizona, acting by and through its Colorado River Commission, executed a contract with the United States of America, acting by and through Harold L. Ickes, Secretary of the Interior, for the delivery ". . . 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 for irrigation and domestic uses in Arizona, of a maximum of 2,800,000 acre-feet."[31] The First Special Session of the Sixteenth Legislature speedily ratified the contract[32] and on the same day ". ... unconditionally ratified, approved and confirmed the Colorado River Compact executed at Santa Fe, New Mexico, November 24, 1922, . . ."[33]

Thereafter, the United States Bureau of Reclamation, in cooperation with Arizona, began active investigation and planning of what is known as the Central Arizona Project, designed to bring supplemental water from the main stream of the Colorado River to a portion of the central Arizona area suffering from inadequate water supply. On September 16, 1948, the Secretary of the Interior reported to Congress that this project was feasible and that there was urgent need in central Arizona for water from the Colorado River which the project would make avail-

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[27] 292 U.S. 341 (1934).

[28] 295 U.S. 174 (1935).

[29] 49 Stat. 1039 (1935).

[30] 298 U.S. 338 (1936).

[31] WILBER & ELY, THE HOOVER DAM DOCUMENTS, app. 1016 (1948).

[32] Ch. 4, Sixteenth Arizona Legislature, 1st Sp. Session, 1943.

[33] Ch. 5, Sixteenth Arizona Legislature, 1st Sp. Session, 1943.

able. The secretary also reported that California challenged Arizona's claims to the water which the Central Arizona Project would divert and that if California's contentions were correct there would be no dependable water supply available from the Colorado River for diversion to central Arizona.[34]

During the 79th and succeeding Congresses through the 82nd Congress, Arizona sought Congressional authorization for construction of the Central Arizona Project and met with vigorous resistance by the California defendants, who claimed Arizona had not shown there was any water of the Colorado River system legally available for use in Arizona in addition to that in use or required for Arizona projects already authorized.

The Senate approved this legislation in the 81st and 82nd Congresses. However, on April 18, 1951, the House of Representatives Committee on Interior and Insular Affairs adopted a resolution that consideration of bills relating to the Central Arizona Project "be postponed until such time as use of the water in the Lower Colorado River Basin is either adjudicated or binding or mutual agreement as to the use of the water is reached by the states of the Lower Colorado River Basin."[35]

In 1952 Arizona made a motion for leave to file its Bill of Complaint which was granted on January 19, 1953,[36] and the Bill of Complaint was filed that day.

Jurisdiction was asserted as arising in the United States Supreme Court under authority of Article III, Section 2, Clause 2 of the Constitution of the United States.

The only defendants named in the Bill of Complaint in addition to the State of California were various California municipalities and Irrigation Districts having contracts for stored water with the Secretary.

Essentially, Arizona's position as pleaded in the Bill of Complaint was as follows:

1. The Colorado River Compact apportioned to the lower basin the consumptive use of 7,500,000 acre-feet of water annually from the Colorado River System by Article III(a) and an additional 1,000,000 acre-feet from the system by Article III(b).

2. California, by her Limitation Act, restricted her use from the lower basin apportionment to 4,400,000 acre-feet annually from the Article III(a) apportionment. Since the Project Act specifically makes all water uses subject to the compact and since under Article III(f) there may not be a further apportionment until after October 1, 1963, California's claim of right to use surplus water is invalid.

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[34] H.R. Doc. No. 136, 81st Cong., 1st Sess. (1949).

[35] MANN, THE POLITICS OF WATER IN ARIZONA 88, 89 (1963).

[36] 344 U.S. 919 (1953).

3. Since by her Limitation Act California has excluded herself from use of III(b) water, this 1,000,000 acre-feet is available to Arizona and with her contract with the Secretary for 2,800,000 acre-feet from storage, gives Arizona title to 3,800,000 acre-feet annually from the System.

4. In measuring Arizona's consumptive use from the Gila, as part of the System, Arizona is to be charged only with the amount of water which would have been discharged into the main stream of the Colorado at Dome (Yuma) but for Arizona's uses. Since the Gila was a losing stream, Arizona asserted the right to use, without being charged therefor, the sum total of water which she, in effect, salvaged by using it in Central Arizona.

5. The California defendants, by resisting Arizona's claims, have in effect clouded her title and frustrated her projects designed to bring and put to use Arizona's share of the lower basin apportionment.

Arizona prayed:

1. Her title to annual beneficial consumptive use of 3,800,000 acre-feet of water from the System be quieted.

2. That the title of California to annual beneficial consumptive use of water of the System apportioned to the lower basin be forever limited to 4,480,000 acre-feet.

3. For injunctive relief implementing the decision.

4. For additional relief not material to our discussion of the case.

California answered, denying some of the allegations, and pleading several affirmative defenses. The United States, pursuant to leave granted, intervened.[37] Nevada too obtained leave to intervene.[38]

After pleadings were exchanged among the parties, the Court, on June 1, 1954, appointed George I. Haight, Esq., of Chicago, Illinois, as Special Master. The order directed him to find the facts specially and state separately his conclusions of law thereon, and to submit them to the Court together with a draft of a recommended decree.[39]

Thereafter, California moved to have Colorado, New Mexico, Utah and Wyoming joined as necessary parties. The Court, following receipt of a report from the Special Master pursuant to a reference, denied the motion to join Colorado and Wyoming and granted the motion to join Utah and New Mexico only to the extent of their capacity as lower basin states.[40]

Thereupon, Utah filed a pleading called a "Complaint and Answer" and New Mexico filed an "Appearance and Statement." The last pleading was filed by Nevada on March 19, 1956.

The trial of the case began in San Francisco June 14, 1956, before

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[37] *Ibid.*
[38] 347 U.S. 985 (1954).
[39] *Id.* at 986.
[40] 350 U.S. 114 (1955).

Simon H. Rifkind, Special Master, who had been appointed to succeed Special Master Haight upon his death,[41] and ended August 28, 1958, with numerous intervening recesses. On May 5, 1960, the Special Master circulated among the parties a preliminary Draft Report and filed his formal Report with the Supreme Court December 5, 1960. The Court's opinion was announced June 3, 1963, after the case was twice argued to the Court.

During the course of the trial at San Francisco, Arizona, on August 5, 1957, filed and distributed to the parties an "Amended and Supplemental Statement of Position" in which Arizona repudiated "certain legal conclusions and arguments set forth in its various pleadings filed herein ... as unsound and not supported in the law." On August 13, 1958, Arizona tendered amended pleadings reflecting theories quite at variance with the original pleadings. The Special Master, after argument, took the matter under advisement and in his Report found it unnecessary to receive them since,

> Close inspection reveals that the proposed changes are intended to accomplish two purposes: (1) to conform the pleadings to the proof; and (2) to state legal theories different from those espoused in the original pleadings.

Relying upon *Kansas v. Colorado*,[42] he found "in a litigation of this character it would be strange to hold the parties strictly to their pleadings."

In substance, in briefs before the Special Master and in the Supreme Court, Arizona argued (1) that the Colorado River Compact had no impact upon water rights of users in the lower basin *inter sese;* it simply governed the amount of water which would be available at Lee Ferry each year, on the average, for consumptive use in the lower basin; (2) that since the Colorado River is a navigable stream the Federal Government has a dominant servitude over all the water of the stream under the Commerce Clause; (3) that the Congress of the United States in enacting the Boulder Canyon Project Act exercised its powers in storing, controlling and directing the use of the stored water for improvement of navigation, river regulation and flood control, thereby effectively preempting the flow of the stream as against the demands of any existing rights and uses; (4) that in the Project Act Congress dealt only with main stream water and did not attempt to affect or interfere with uses on any tributaries; (5) that by Sections 4 and 5 of the Project Act Congress effectively apportioned among Arizona, California and Nevada the first 7,500,000 acre-feet of water available for consumptive use each year in the main stem of the Colorado in the lower basin, to Arizona 2,800,000 acre-feet, to California 4,400,000 acre-feet and to Nevada 300,000 acre-feet with one-half of any surplus to California and one-half to

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[41] 350 U.S. 812 (1955).

[42] 185 U.S. 125 (1902).

Arizona; (6) that the Secretary's contract with Arizona gave Arizona good title to 2,800,000 acre-feet of main stem lower basin water plus one-half of any surplus and that, in addition, Arizona was entitled to complete use of her tributary water without charge against her main stream rights.

California in substance argued that the reference in Section 4 of the Project Act and in her Limitation Act to Article III(a) of the compact demonstrated that Congress was limiting and requiring California to limit her use to 4,400,000 acre-feet of Lower Basin *System* water; not water let down at Lee Ferry. In other words, when California in the California Limitation Act ". . . agree[d] irrevocably and unconditionally . . . as an express covenant . . . that the aggregate annual consumptive use (diversions less return) of water of and from the Colorado River . . . shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin by paragraph (a) of article three . . . ," California was limiting her use to that amount of water from the System—hence tributary water and uses was to be counted. The Special Master accurately analyzed California's claims:

> The crux of her case lies in the view that the Project Act adopts and applied the Compact method of accounting. Thus California would total all uses of System water in the Lower Basin until the sum of 7,500,000 has been reached, after which she would assign all remaining uses to "excess or surplus water unapportioned by said compact." There being no tributaries in California, the effect of this thesis is, of course, to exhaust the 7,500,000 apportionment with the help of tributary uses outside of California and to leave a large supply of mainstream water which California shares as surplus. The effect of California's accounting system is disclosed in Part XII of her Proposed Findings and Conclusions. The California position is there revealed as follows:
>
> 1. Art. III(a) of the Compact apportioned 7,500,000 acre-feet of uses to the Lower Basin;
> 2. Congress limited California to not more than 4,400,000 acre-feet of uses from this apportionment;
> 3. California is using all of the 4,400,000 acre-feet;
> 4. Thus, 3,100,000 acre-feet of uses remain for other Lower Basin states out of the III(a) apportionment;
> 5. The 3,100,000 acre-feet of uses are exhausted in other states, as follows:
>
> | | |
> |---|---|
> | (1) Gila River | 1,750,000 |
> | (2) Other tributaries | 200,000 |
> | (3) Mainstream, other than California | 1,500,000 |
> | Total | 3,100,000; |
>
> 6. Any water remaining in the *mainstream* in excess of 5,550,000 acre-feet (4,400,000 for California and 1,150,000 for others) is surplus, of which California may take as much as one-half.

Under this hypothesis California argues that she is privileged to take as surplus up to 978,000 acre-feet from the mainstearm in addition to taking 4,400,000 acre-feet, also from the mainstream, out of what she interprets to be the Article III(a) System apportionment. The effect of this argument is to give California 5,378,000 acre-feet out of the first 7,500,000 acre-feet available from the mainstream, leaving only 2,122,000 acre-feet for Arizona and Nevada.

Nothing in the words of the legislative history of Section 4(a) lends countenance to this hypothesis. The second paragraph of Section 4(a) contemplates that Arizona could receive 2,800,000 acre-feet of the 7,500,000 acre-feet *in addition* to the exclusive use of the Gila River within her boundaries. Under the California hypothesis, over one-half of Arizona's 2,800,000 acre-feet is used up by appropriations on the Gila.

One of the most difficult hurdles to surmount, in urging Arizona's claims, was the language of Justice Brandeis in deciding *Arizona v. California*.[43] There he said:

Nor does Arizona show that article III(b) of the compact is relevant to an interpretation of section 4(a) of the Boulder Canyon Project Act upon which she bases her claim of right. It may be true that the Boulder Canyon Project Act leaves in doubt the apportionment among the states of the lower basin of the waters to which the lower basin is entitled under article III(b). *But the act does not purport to apportion among the states of the lower basin the waters to which the lower basin is entitled under the compact. The act merely places limits on California's use of waters under article III(a) and of surplus waters; and it is "such" uses which are "subject to the terms of said compact."*

The considerations to which Arizona calls attention do not show that there is any ambiguity in article III(b) of the compact. Doubtless the anticipated physical sources of the waters which combine to make the total of 8,500,000 acre-feet are as Arizona contends, *but neither article III(a) nor (b) deal with the waters on the basis of their source. Paragraph (a) apportions waters "from the Colorado River system,"* i.e., *the Colorado and its tributaries,* and (b) permits an additional use "of such waters." The compact makes an apportionment only between the upper and lower basin; the apportionment among the states in each basin being left to later agreement. . . .

. . . *Congress apparently expected that a complete apportionment of the waters among the states of the lower basin would be made by the subcompact which it authorized Arizona, California and Nevada to make.* If Arizona's rights are in doubt, it is, in large part, because she has not entered into the Colorado River Compact or into the suggested subcompact. (Emphasis added.)

[43] 292 U.S. 341 (1934).

The conclusions voiced by so eminent a jurist were indeed troublesome. But for the clear legislative history to the contrary doubtless these views would have presented an insurmountable obstacle to acceptance of Arizona's positon. The case was decided on the pleadings without the taking of testimony. Had Justice Brandeis had the benefit of this legislative history we have no doubt his opinion would have been otherwise than as stated in this decision. It is most probable that this language served for many years to obscure the true meaning and purpose of Sections 4(a), 5 and 8 of the Project Act.

Section 4(a) consists of two paragraphs, the first of which forbids an action by the Secretary to implement the Act until the conditions enumerated, *supra*, had been met. The second authorizes and approves in advance a tri-party compact between Arizona, California and Nevada dividing the lower basin water among the three states.

Section 5 authorizes the Secretary to contract for the storage and delivery of water from Lake Mead. It specifically provides:

> Contracts respecting water for irrigation and domestic use shall be for permanent service and shall conform to paragraph (a) of Section 4 of this Act. 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) provides the Secretary shall "observe and be subject to" the terms of such compact, if any, entered into between Arizona, California and Nevada, "or any two thereof" as may be executed prior to January 1, 1929, and by the terms of any such compact thereafter entered into between said states and approved by Congress; "provided, that in the latter case [compact subsequent to January 1, 1929] such compact shall be subject to all contracts, if any, made by the Secretary of the Interior under Section 5 hereof . . . ."

The second paragraph of Section 4(a) of the Project Act as originally proposed by Senator Hayden *required* the three states to enter into the compact authorized thereby. Senator Pittman in debate expressed the thought that a sovereign state should not be coerced into in effect making a treaty or compact with another state. He stated "If they do not enter into that agreement, then we have the bill as it stands." He then went on to say: "*We have already decided* as to the division of the water, and we say *that if the states wish they can enter into a subsidiary agreement confirming that. . . .*"[44]

In other words, Congress had provided by statutory language for a division of the water made effective by Secretarial contracts. This division would be subject, possibly to vested rights, to change or revision by Congress. If the states desired to formalize the division beyond further

[44] 70 CONG. REC. 468 (2nd Sess. 1928).

Congressional supervision such privilege was granted, but if they did not desire to do so, "we have the bill as it stands."

That Congress considered it had divided the water by interaction of Sections 4(a) and 5 is clear when the provisions of Section 8(b) are reviewed. There Congress contemplated a compact between the three states or any two of them. This can only mean that each state had its share of water apportioned to it by the Project Act, for unless this be true two of the states would not be in a position to deal between themselves not knowing what the rights were of any of the three interested parties.

More important, however, is the fact that Congress required as to a compact made pursuant to Section 8(b) subsequent to January 1, 1929, that Secretarial water contracts made prior to such compact take precedence over such a compact. *But with respect to the Compact authorized by Section 4(a) there was no such requirement.* Certainly the Congress knew that Arizona, California and Nevada, in the light of the long history of controversy between Arizona and California, might be years in concluding a Section 4(a) compact. Yet Congress set no deadline as against which the states must labor if the compact was to be effective without further Congressional approval. Nor did Congress exempt Secretarial contracts made in the interim from the governing effect of such a compact. Logic compels the conclusion that this could only be because Congress regarded the Secretary as bound by the requirement that his contracts must conform to the division made by paragraph (a) of Section 4 of this Act and hence would not be in conflict with the terms of the compact authorized by 4(a), if subsequently agreed to by the three states.[45]

Arizona had concluded her case in chief before the change in legal

[45] Delph Carpenter, Colorado's Compact Commissioner and an outstanding water authority who was most active in shaping the Project Act to protect the upper basin testified, with respect to the time limit in Section 8(b) within which a compact could be entered into pursuant to its provisions, superseding the Secretary's contractual authority as follows:

> I think it is the intent of the framers of the amendment that the compact when entered into and approved by Congress should be controlling upon the works herein authorized, but they wish to fix a reasonable time within which to arrive at a compact to deal with the waters with perfect freedom, knowing that if the Secretary of the Interior enters into contracts for disposition of water and power to be generated, that any compact between the three states would confront those contracts, and the three lower states might be put in a position of recognizing those contracts irrespective of their effect upon any one state. It was the thought of the framers of the amendment to stay the hand of the Secretary of the Interior in any such contracts for such a time as may be necessary for the three lower states to conclude a compact. That is the reason for inclusion of the date.
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> *Hearings on H.R. 9826 Before a House Committee on Irrigation and Reclamation* at 204 (1926).

position above discussed had occurred. Since, in essence, Arizona's position was that Congress, acting primarily pursuant to its reserved power over a navigable river had preempted and stored the flow of the river and had then apportioned the stored water among Arizona, Nevada and California and that Arizona's tributaries were not even involved in the case (except as between Arizona and New Mexico), needs, supply and shortages were legally irrelevant. Indeed, without appearing to concede weakness Arizona could not afford to contest strongly California's and Nevada's claims in these respects.

At the same time, while confident of her position, Arizona could not concede these claims, particularly those of California, since the Special Master or the Supreme Court might be swayed by her claims of shortage and needs of her existing projects. Accordingly, Arizona in her rebuttal case generally restricted her testimony and exhibits to attacking specific California claims and exhibits bearing upon claims of needs and shortages, taking the position that while legally irrelevant, her claims and exhibits were untrue and misleading.

To meet the claims of Imperial Irrigation District that the water wasted into the Salton Sea was, in fact, drain water from her underground farm drain system required to leach out the salts from the soil, Arizona had carried on a sampling procedure over a long period of time through which samples were taken from actual outflows of a representative number of drains and also from the discharge into the Salton Sea. Analysis of the drain samples and the Salton Sea inflow disclosed, with reasonable accuracy, that this inflow into the Salton Sea of in excess of 1,200,000 (average 1951-55 period) feet a year was made up of in excess of 81% surface runoff and less than 20% drainage effluent. In fact, this water was of quality comparable to water used for irrigated farming in some areas of Arizona. This testimony was admitted by the Special Master.

Extensive geophysical tests were made by Arizona on a reconnaissance basis and proof was offered that Imperial Valley and particularly East Mesa had large stores of good ground water, available for use through pumping as is done in the Salt River Valley, thereby recapturing and using water lost to the underground.

Studies were made which computed the water lost through seepage from canals, laterals and ditches and which demonstrated it was economically feasible to save this water through lining these water conduits with cement or related materials. This evidence was received. Finally Arizona presented tables taken from California's own exhibits that her total requirements per annum for existing projects, including 481,500 acre-feet for Metropolitan Water District, were actually only 3,485,000 acre-feet and that with reasonable conservation practices this figure could be reduced to less than 3,000,000 acre-feet per annum.

The time, effort and expense which went into this testimony and evidence proved well spent. Following the circulation of the Master's Draft Report, in which he largely sustained Arizona's and the United States's position as to the controversy between Arizona and California, California loosed a barrage of irresponsible and inflammatory statements and charges which, in effect, indicated Southern California was about to become a wasteland for want of water. In the oral argument on the Draft Report which the Master heard for three days in New York City, California pressed these charges so harshly that the Special Master added a footnote to his formal Report specifically finding that ". . . a great deal of water has been wasted, as is apparent, for example, from the very large unused runoff each year into the Salton Sea. . . ."

In his original Draft Report the Master had remained silent on this aspect of California's claims.[46]

In substance, the Court's decision, leaning heavily upon legislative history, accepted the argument that the Project Act, enacted by Congress under its reserved commerce clause power over the water of a navigable river, either apportioned the first 7,500,000 acre-feet of water available for consumptive use in the main stem of the river below Lee Ferry or authorized such apportionment by the Secretary, 2,800,000 to Arizona, 4,400,000 to California and 300,000 to Nevada. The Court also held the provisions of the Arizona and Nevada contracts charging the water rights of those states for any uses on their tributaries below Lee Ferry and above Lake Mead to the extent such uses depleted storage in Lake Mead invalid as encroaching upon the allocation made to Arizona and

[46] Again, this "irrelevant" evidence was to prove a great comfort to Arizona. Tables were prepared in preparation for the second argument of the case, some from California's own exhibits which (a) disclosed that under her claims for "existing" projects California had in fact included 216,000 acres of new land (chiefly East and West Mesa lands in Imperial Valley) and that her actual requirements for lands presently cultivated, plus 584,000 acre-feet for Metropolitan Water District, were only 3,587,000 acre-feet annually (b) showed her total agricultural irrigation requirements, giving effect to good conservation practices could be satisfied with 2,430,000 acre-feet annually and (c) that *present* sources of supply, excluding any Colorado River Water, are sufficient for a population of 6,700,000 persons and that by the time her full *present* contractual Feather River water supply is available she will have a supply adequate for over 15,000,000 persons. If her use for the last year of record then available of 584,000 acre-feet of Colorado River water is assumed in 1990 her supply would be adequate for the needs of over 18,000,000 persons. The 1960 population served by the Metropolitan Water District was 7,329,012.

Upon the re-argument, during the course of California's opening argument, the Court evidenced, by numerous questions, its interest in the fact of supply and possible shortages. Concern was felt that Arizona's cause was lost; for if the case was to turn on questions of shortage, supply and needs, this would indicate that the Court was approaching a consideration of the case from the standpoint of equitable rather than legal principles and theories. The tables and computations above described were distributed to the Court at the opening of Arizona's argument and explained in detail and to Arizona's relief, no more than a few casual questions were asked; for the Court, concerned as to whether or not shortages might in fact occur in California, apparently became satisfied that California was merely crying "wolf, wolf."

Nevada. The Court said that tributary water, prior to reaching the main stream, was not dealt with by Congress. Finally, the Court rejected the Master's recommendation that the three states bear shortages pro rata, holding that the Secretary had the power to determine, in the light of conditions then existing, how such shortages should be borne.

Inasmuch as the unregulated river discharged vast quantities of water into the Gulf of California, mainly in its spring flood season, wholly unused and unuseable, fairly elementary principles of water law governing the right to use salvaged water would seem in and of themselves to support the notion that the United States might apportion the water stored which would otherwise have been lost to the sea. Indeed, Senator Walsh in his famous colloquy with Senator Hiram Johnson observed ". . . I always understood that the interest that stores the water has a right superior to prior appropriations that do not store." He then questioned Senator Johnson "That is to say, the Government may dispose of the stored water as it sees fit?" to which Senator Johnson replied "Yes; under the terms of this bill."[47]

As early as 1891, in *Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co.*,[48] the United States Supreme Court had observed:

> . . . But if, in the erection of a public dam for a recognized public purpose, there is necessarily produced a surplus of water, which may properly be used for manufacturing purposes, there is no sound reason why the State may not retain to itself the power of controlling or disposing of such water as an incident of its right to make such improvement. Indeed, it might become very necessary to retain the disposition of it in its own hands, in order to preserve at all times a sufficient supply for the purposes of navigation. If the riparian owners were allowed to tap the pond at different places, and draw off the water for their own use, serious consequences might arise, not only in connection with the public demand for the purposes of navigation, but between the riparian owners themselves as to the proper proportion each was entitled to draw—controversies which could only be avoided by the State reserving to itself the immediate supervision of the entire supply. As there is no need of the surplus running to waste, there was nothing objectionable in permitting the State to let out the use of it to private parties, and thus reimburse itself for the expenses of the improvement.

However, principles of water law need not be turned to in support of the Court's decision. In fact, *Arizona v. California* should be catalogued as a constitutional law, statutory construction case rather than one primarily dealing with water law.

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[47] 70 CONG. REC. 167 (1928).

[48] 142 U.S. 254 (1891).

The Congress in 1890 enacted the Act of Sept. 19, 1890, chapter 907, section 10,[49] which reads in part as follows:

> The creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited. . . .

Subsequent to the enactment of this statute the case of *U.S. v. Rio Grande Dam & Irr. Co.*,[50] which reversed the decision of the Supreme Court of the Territory of New Mexico in the same case,[51] began its troubled course through the courts with the filing by the United States of its Bill of Complaint in the Territorial District Court for an injunction against the Rio Grande Company stopping its construction of a dam on the upper reaches of the Rio Grande River in New Mexico. The action, as filed, was bottomed upon the 1890 statute. The District Court dismissed; the Territorial Supreme Court affirmed, stressing the "in fact" non-navigable character of the river, its historical uses for irrigation and its value for such local uses, etc. The Supreme Court reversed.

In reversing, Justice Brewer for the Court first turned to the Act of July 26, 1866,[52] and held that its effect was to recognize the validity of local customs, laws and decisions of local courts governing appropriations of water, relying principally upon *Broder v. Natoma Water & Mining Co.*,[53] the leading case on this statute. He then turned to the Desert Land Act[54] and cited provisions authorizing appropriations of water for reclaiming desert land and went on to say:

> But whatever may be said as to the true intent and scope of these various statutes, *we have before us the legislation of 1890.* (Emphasis added.)
>
> * * * * *
>
> It is not a prohibition of any obstruction to the navigation, *but any obstruction to the navigable capacity,* and *anything wherever done* or *however done,* within the limits of the jurisdiction of the United States which *tends to destroy the navigable capacity of one of the navigable waters of the United States, is within the terms of the prohibition.* (Emphasis added.)

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[49] 26 Stat. 454 (1890).

[50] 174 U.S. 690 (1899).

[51] 51 Pac. 674, 9 N. Mex. 292 (1898).

[52] 14 Stat. 253 (1866).

[53] 101 U.S. 274 (1879).

[54] 19 Stat. 388 (1877).

The Court concluded that the proposed action of the Rio Grande Dam & Irrigation Co. in damming the upper reaches of the Rio Grande River thereby withholding water necessary to support its navigability was unlawful.

More modern decisions amplify and confirm the *Rio Grande* case.

Numerous decisions of the Supreme Court recognize that the power of the United States to regulate commerce confers plenary power over navigable waters.

One of the leading cases on the subject is *U.S. v. Chandler-Dunbar Water Power Co.*,[55] decided in 1913. In that case the Court said:

> This title of the owner of fast land upon the shore of a navigable river to the bed of the river is, at best, a qualified one. It is a title which inheres to the ownership of the shore; and, unless reserved or excluded by implication, passed with it as a shadow follows a substance, although capable of distinct ownership. It is subordinate to the public right of navigation, and however helpful in protecting the owner against the acts of third parties, is of no avail against the exercise of the great and absolute power of Congress over the improvement of navigable rivers. That power of use and control comes from the power to regulate commerce between the states and with foreign nations. It includes navigation and subjects every navigable river to the control of Congress. All means having some positive relation to the end in view which are not forbidden by some other provision of the Constitution are admissible. If, in the judgment of Congress, the use of the bottom of the river is proper for the purpose of placing therein structures in aid of navigation, it is not thereby taking private property for a public use, for the owner's title was in its very nature subject to that use in the interest of public navigation. If its judgment be that structures placed in the river and upon such submerged land are an obstruction or hindrance to the proper use of the river for purposes of navigation, it may require their removal and forbid the use of the bed of the river by the owner in any way which, in its judgment, is injurious to the dominant right of navigation.
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> * * * * *
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> The conclusion to be drawn is, that the question of whether the proper regulation of navigation of this river at the place in question required that no construction of any kind should be placed or continued in the river by riparian owners, and whether the whole flow of the stream should be conserved for the use and safety of navigation, are questions legislative in character; and when Congress determined, as it did by the act of March 3, 1909, that the whole river between the American bank and the international line, as well as all of the upland north of the present ship canal, throughout its entire length, was "necessary for the pur-

[55] 229 U.S. 53 (1913).

pose of navigation of said waters and the waters connected therewith," that determination was conclusive.

In the *Chandler-Dunbar* case, the Court quoted with approval the language from the case of *Kaukauna Water Power Co. v. Green Bay & Miss. Canal Co., supra,* above quoted.

In the case of *United States v. Appalachian Elec. Co.,*[56] the Court made clear that navigability for purposes of public control does not depend solely upon natural and ordinary conditions of a river but that availability for navigation must be considered and that a river is not barred from that classification merely because artificial aids or other improvements are required to make the stream suitable for navigation uses, and also pointed out that absence of such use over long periods of years, because of changed conditions, the coming of the railroad or improved highways, does not affect navigability once established in the constitutional sense.

> The respondent is a riparian owner with a valid state license to use the natural resources of the state for its enterprise. Consequently it has as complete a right to the use of the riparian lands, the water, and the river bed as can be obtained under state law. The state and respondent, alike, however, hold the waters and the lands under them subject to the power of Congress to control the waters for the purpose of commerce. The power flows from the grant to regulate, *i.e.,* to "prescribe the rule by which commerce is to be governed." This includes the protection of navigable waters in capacity as well as use. This power of Congress to regulate commerce is so unfettered that its judgment as to whether a structure is or is not a hindrance is conclusive. Its determination is legislative in character. The Federal Government has domination over the water power inherent in the flowing stream. It is liable to no one for its use or non-use. The flow of a navigable stream is in no sense private property; "that the running water in a great navigable stream is capable of private ownership is inconceivable." Exclusion of riparian owners from its benefits without compensation is entirely within the Government's discretion.
>
> In our view, it cannot properly be said that the constitutional power of the United States over its waters is limited to control for navigation. By navigation respondent means no more than operation of boats and improvement of the waterway itself. In truth the authority of the United States is the regulation of commerce on its waters. Navigability, in the sense just stated, is but a part of this whole. Flood protection, watershed development, recovery of the cost of improvements through utilization of power are likewise parts of commerce control. . . .

[56] 311 U.S. 291 (1940).

In *United States v. Twin City Power Co.*,[57] the Supreme Court said:

> The interest of the United States in the flow of a navigable stream originates in the Commerce Clause. That Clause speaks in terms of power, not of property. But the power is a dominant one which can be asserted to the exclusion of any competing or conflicting one. The power is a privilege which we have called "a dominant servitude," see United States v. Commodore Park, Inc., 324 U.S. 386, 391, 65 S. Ct. 803, 805, 89 L. Ed. 1017; Federal Power Commission v. Niagara Mohawk Power Corp., 347 U.S. 239, 249, 74 S. Ct. 487, 493, 98 L. Ed. 686, or "a superior navigation easement." United States v. Gerlach Live Stock Co., 339 U.S. 725, 736, 70 S. Ct. 955, 961, 94 L. Ed. 1231. . . . We have a different situation here, one where the United States displaces all competing interests and appropriates the entire flow of the river for the declared public purpose.[58]

Congress clearly had the power, in the exercise of its power over navigation and for flood control, to build Hoover Dam and impound Lake Mead; it clearly had the power to apportion and direct the disposition and use of the waters so impounded, both as a side issue, so to speak, of its main navigation and flood control powers and under the general welfare clause of the federal constitution.

When the federal government assumed control of the river, to the extent at least that it intended to and did exercise its dominant servitude over and in the waters of the river, all other rights, howsoever they may be catalogued, ceased. As against the Congress in the exercise of this reserved power the river flowed in a state of nature.

In deciding *Arizona v. California* the Supreme Court said:

> . . . That act [Boulder Canyon Project 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. . . . 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

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[57] 350 U.S. 259 (1956).

[58] See also United States v. Commodore Park, Inc., 324 U.S. 386 (1945); United States v. Chicago, M. St. P. & P.R.R., 312 U.S. 592 (1941); Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936); New Jersey v. New York, 283 U.S. 336 (1931); New Jersey v. Seargent, 269 U.S. 328 (1926); Sanitary Dist. v. United States, 266 U.S. 405 (1925).

> great river and for the orderly and beneficial distribution of water, there is no room for inconsistent state laws. . . .

There are, of course, many aspects of *Arizona v. California* not considered or even touched upon. Only the main thrust of the Arizona position joined in by the United States as against California and the Court's disposition of this central controversy have been considered.

Justice Oliver Wendell Holmes in deciding *Sanitary Drainage Dist. v. United States*[59] observed:

> This brief summary of the pleadings is enough to show the gravity and importance of the case. It concerns the expenditure of great sums and the welfare of millions of men. But cost and importance, while they add to the solemnity of our duty do not increase the difficulty of decision except as they induce argument upon matters that, with less mighty interests, no one would venture to dispute. The law is clear and when it is known the material facts are few.

The same might be even more appropriately said of *Arizona v. California*. "The law is clear and when it is known the *material facts* are few." (Emphasis supplied.)

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[59] 266 U.S. 405, 425. (1925).