Chapter IV

THE BOULDER CANYON PROJECT ACT

(The Swing-Johnson Act)

A. Major Objectives of the Boulder Canyon Project Act

This complex statute attempted to bring into balance two major forces: those seeking the construction of a storage reservoir and of an All-American Canal, and those seeking an interstate agreement for the protection of upper-basin water users if the proposed works should be built in the lower basin.

To these ends the act accomplished the following major objectives, in addition to providing for a number of important but subordinate ones. The major features were:

(1) *Authorization of construction of a storage dam in Boulder or Black Canyon*, for the declared purposes (sec. 1) 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. * * *

(2) *Authorization of construction of the All-American Canal*, to connect a diversion dam on the Colorado River with the Imperial and Coachella Valleys, the canal and structures to be located entirely within the United States (sec. 1).

(3) *Ratification of the Colorado River Compact* (sec. 13 (a)), with the added provision that in the event that only six States should ratify the agreement, the compact should become effective as a six-State compact, if California should be one of the ratifying States, and if California should limit her use of water for the benefit of the other six States, by a formula stated in the Project Act (sec. 4 (a)).

The act also authorized a subordinate compact among the three States of the lower division, Arizona, California, and Nevada, for division of the water allocated to the lower basin by the compact (sec. 4 (a)); authorized in more general terms other agreements among the seven States (sec. 19); and authorized the Secretary of the Interior to make an investigation and report as to a comprehensive plan of development of the Colorado River (sec. 15).

The act contained also important financial and administrative provisions, discussed infra, which have come to be the identifying features of this project.

B. Conditions Precedent

The statute stated certain conditions precedent which should be met before the act should take effect for any purpose. It stipulated a second group which, after the effective date of the act, must be met before any appropriations should be obtainable under its authorizations. These two groups were as follows:

(1) *Conditions precedent to the effectiveness of the Project Act.*—Section 4 (a) stipulated that—

> 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 appurtenant to such works or structures unless and until—

one or the other of two alternate conditions should be met: (1) Ratification by all seven States of the Colorado River Compact and declaration thereof by the President in a public proclamation; or (2) if seven States should have failed to ratify within 6 months from the date of the passage of the act, then until six of the States, including California, should have ratified it, waiving the requirement of article XI of the compact which stipulates seven-State approval; accompanied, in this second alternative, by enactment by California of a statute in prescribed terms, limiting her use of water; and proclamation by the President of six-State ratification.

(2) *Conditions precedent to appropriations under the authorization of the Project Act.*—Section 4 (b) stipulated that before any money should be appropriated for the construction of the dam or power plant or any construction work done or contracted for, the Secretary of the Interior should make provision for revenues by contract adequate in his judgment to assure repayment of all expenses of operation and maintenance and the repayment of the Federal investment within 50 years from the date of completion of such works, together with interest thereon made reimbursable under the act.

As to the All-American Canal, section 4 (b) stipulated that before money was appropriated for construction, or any construction work done, the Secretary of the Interior should make provision for revenues "by contract or otherwise" adequate in his judgment to assure payment of all expenses of construction, operation, and maintenance in the manner provided in the reclamation law.

C. Financial Structure

As indicated by the conditions precedent referred to supra, a characteristic of the act was its insistence on self-liquidation of the investment. To implement this, the statute provided the following mechanics:

(1) *Creation of the Colorado River Dam fund.*—All revenues flowing from the Treasury for construction of the project, and all income flowing back from its operation, were required to pass through the Colorado River Dam fund (sec. 2 (a), 2 (b)). Appropriations were required for advances from the Treasury to the fund (sec. 2 (b)), as well as for expenditures out of the fund, including those for operation and maintenance (sec. 2 (c)). Appropriations to the fund of $165,000,000 were authorized (sec. 2 (b)).

(2) *Separation of financing of irrigation and power features.*—Although the Colorado River Dam fund was established as a common financial channel for the Hoover Dam expenditures and revenues and the All-American Canal expenditures and revenues (sec. 2), the financing of the two project features was sharply segregated. No part of the power revenues of Hoover Dam could be used to reimburse the cost of the All-American Canal (sec. 1); these costs were required to be reimbursed in full under the reclamation law, i. e., by the lands benefited (sec. 1); but these lands, having vested rights to natural flow, were not to be charged for storage (sec. 1).

(3) *Repayment of the investment in Hoover Dam.*—The entire investment in Hoover Dam, power plant, and appurtenant structures was made reimbursable (sec. 2 (b), sec. 4 (b)). No part of the investment was written off, but $25,000,000 was allocated to flood control, to be repaid out of 62½ percent of the surplus revenues during the amortization period (sec. 2 (b)). This period was set as 50 years from the date when energy was first ready for delivery (sec. 4 (b)). No provision was made for holding any part of the investment in suspense, although it was contemplated that the generating units would be installed over a period of several years. The investment in the dam, power plant, and appurtenant structures was required to be repaid with 4-percent interest, the interest to be included in the calculation of the power rates received by the fund (sec. 4 (b)), and to be paid over by the fund to the Treasury (sec. 4 (d)). The accounting practice later employed by the Reclamation Bureau on other projects, of collecting an interest component in the power rates but accounting for it to the Treasury as available for retirement of capital, was impossible under the Boulder Canyon Project Act.

(4) *Repayment of the investment in the All-American Canal.*—The entire investment in the All-American Canal was required to be repaid under the reclamation law, i. e., in 40 years without interest (sec. 4 (b)). In addition, the Imperial Irrigation District was required (sec. 10) to continue to pay the balance of $1,600,000 which it had agreed to pay toward the cost of Laguna Dam under its contract of

October 23, 1918 (appendix 1103), although it never in fact utilized that structure as a diversion work.

(5) *Disposition of surplus power revenues.*—In the event that the power revenues should exceed the amortization requirements of the act, three provisions were made:

(*a*) Current application of 62½ percent of such excess revenues to the retirement of the $25,000,000 flood-control allocation (sec. 2 (b)).

(*b*) Current payment of 37½ percent of such excess revenues to the States of Arizona and Nevada, one-half to each (sec. 4 (b)), in lieu of taxes which these States might have collected from the project if built by private capital.

(*c*) After repayment of all the interest-bearing debt, the revenues were to be kept in a separate fund to be expended in the Colorado River Basin as the Congress might direct (sec. 5).

(6) *Requirement of revenue contracts in advance of appropriations.*—Unlike statutes controlling certain other projects, which simply require that repayment contracts be obtained before water is delivered, the project act required that revenue contracts adequate to liquidate the investment, both in the dam and All-American Canal, be obtained in advance of construction and indeed in advance of appropriations (sec. 4 (b)). Such contracts were thus to be based necessarily on the Secretary of the Interior's judgment as to what the costs of construction would be and what revenues could be anticipated over a protracted period commencing after completion of construction. As noted infra, this construction period was about 7 years in the case of Hoover Dam; the All-American Canal is still incomplete, 16 years after execution of the first repayment contract. The requirement of firm revenue contracts, to remain executory until after completion of a long construction period, thus imposed extraordinary responsibilities on both the Secretary and the managements of the contracting agencies, as noted in more detail in chapter VI.

These contracts were, moreover, subject to a number of other controls, outlined below.

D. Provisions Controlling Power Contracts

(1) *Construction and operation of power plant.*—The act provided three alternatives for the installation and operation of the power plant. The Secretary of the Interior was authorized—

> (*a*) To "construct and equip, operate, and maintain" the plant (sec. 1), and "control, manage, and operate the same" (sec. 6); or
>
> (*b*) To "construct and equip" the plant (sec. 1), and "enter into contracts of lease of a unit or units of any Government-built plant, with right to generate electrical energy" (sec. 6); or

(*c*) To "enter into contracts of lease for the use of water for the generation of electrical energy" (sec. 6), in which case the lessees would install the machinery.

In any case, the United States was required to retain title to the "dam, reservoir", and also to the "plant, and incidental works" (sec. 6).

And in either of the three alternatives, section 6 required that energy was to be disposed of only by contract, under the controls provided by section 5 (infra).

(2) *Basic authority for power contracts.*—The act provided (sec. 5) for disposition of energy by the Secretary of the Interior, under general and uniform regulations (a phrase frequently repeated), at the switchboard (sec. 5), to "responsible applicants therefor who will pay the price fixed by the said Secretary with a view to meeting the revenue requirements herein provided for" (sec. 5 (c)). The applicants were required to execute contracts (sec. 5). In the event of conflicting applications, the act established standards of preferences (sec. 5 (c)), as noted below. It provided a maximum duration for any contract of 50 years from the date when energy was first ready for delivery thereunder (sec. 5 (a)), but provided that the holder, if not in default, should be entitled to a renewal under the laws and regulations existing at such time (sec. 5 (a)). It directed the Secretary to prescribe regulations conforming as nearly as possible to the regulations of the Federal Power Commission in stated respects, and to conform to the Commission's rules in others (sec. 6). And the Secretary and his contractors were subjected in their operations to the Colorado River compact (sec. 8 (a), 8 (b), 13 (b), 13 (c), 13 (d)). These compact requirements are referred to again, infra.

Because of their importance in the formulation of the power contracts, referred to in Chapter VI, the provisions relating to preferences, rate determination, and transmission are amplified below.

(3) *Preferences.*—The act provided for preferences to public bodies in the initial disposition of energy, in the event of conflicting applications. All contractors, preferred or otherwise, were required to "pay the price fixed by the said Secretary" (sec. 5 (c)). The conflicts were to be resolved by the Secretary "after hearing, with due regard to the public interest" (sec. 5 (c)), and "in conformity with the policy expressed in the Federal Water Power Act as to conflicting applications for permits and licenses" (sec. 5 (c)). However, preference was to be given first to a State, provided that it exercised its preference by contract made within 6 months after notice by the Secretary "and on the same terms and conditions as may be provided in other similar contracts made by said Secretary" (sec. 5). A reasonable time, to be fixed by the Secretary, was to be allowed for marketing of necessary bond issues by public agencies (sec. 5). However, once the energy

was allocated, no distinction was provided for in the terms of contracts, as between public and private agencies, either as to duration, price, renewal, or other terms, the regulations governing the awarding and renewal of contracts to be "general and uniform" (sec. 5).

(4) *Determination of rates.*—The act contained provisions of three general classes bearing on rates:

(*a*) Those governing the initial rate determination;

(*b*) Those governing periodic readjustments;

(*c*) Those bearing on rates to prevail after the investment was amortized.

These are discussed below.

(*a*) INITIAL DETERMINATION: In general, it will be noted that the standard (1) for the initial determination was self-liquidation of the investment; (2) on periodic readjustment, a competitive level; and (3) after completion of amortization, such basis as Congress might then determine.

The first two of these situations, however, were cut across by the act's references to "excess revenues," to be applied in part to the retirement of the flood-control allocation (sec. 2 (b)), and in part to payments to Arizona and Nevada (sec. 4 (b)), and by the provision in section 5 (a) that contracts "shall be made with a view to obtaining reasonable returns," leaving some uncertainty, from an administrative standpoint, as to both the floor and the ceiling applicable to rate determinations. As noted later, the Boulder Canyon Project Adjustment Act of 1940 (appendix 801) was designed in part to remove these uncertainties.

(*b*) READJUSTMENT: Section 5 (a) required that power contracts 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 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 this contract shall be determined either by arbitration or court proceedings * * *

This was a major feature in which the Project Act was amended by the Boulder Canyon Project Adjustment Act (appendix 801), which substituted the "amortization standard" for the standard of "competitive conditions," and defined and restricted the field of arbitration.

(*c*) RATES AFTER THE AMORTIZATION PERIOD: Section 5 provided that after the repayments to the United States of all money advanced with interest—

charges shall be on such basis * * * as may hereafter be prescribed by the Congress.

(5) *Transmission.*—The Project Act did not authorize the construction of transmission lines by the United States. The provisions of the act relating to transmission all had reference to the transmission lines of the customers; i. e., a provision in section 5 (d) that a holder of a contract for more than 100,000 horsepower might be required to transmit power for a purchaser of less than 25,000 horsepower (sec. 5 (d)), a grant of rights-of-way for transmission lines (sec. 5 (d)), compensation to a contractor for property used for transmission in the event his contract should not be renewed (sec. 5 (b)); etc.

(6) *Summary of provisions controlling power contracts.*—The provisions of the Boulder Canyon Project Act governing power contracts, outlined above, were much more rigid than those of the large Federal projects which followed later. Among the distinctive features of the act in this respect were—

(*a*) The requirement that power contracts be executed in advance of appropriations and construction;

(*b*) The requirement that these contracts produce revenues adequate to amortize the entire investment;

(*c*) The absence of any write-offs whatsoever, the flood-control allocation offering relief only to the extent of possible deferment if revenues were inadequate to retire this allocation within 50 years;

(*d*) Provision for added payments, in lieu of taxes, to Arizona and Nevada;

(*e*) Provision for the retention of revenues, after amortization, in a fund for the development of the basin;

(*f*) Specific accounting procedure between the project and the Treasury, through a separate fund, to assure repayment to the Treasury of principal plus interest;

(*g*) The requirement that the customers build their own transmission lines;

(*h*) Provision for the operation of the power plant by the customers at their own expense;

(*i*) General provisions for preferences to public bodies, and particular provisions for preferences to States, as customers;

(*j*) After determination of preferences and allocation of energy, general and uniform treatment of all customers as to rates, duration of their contracts, and renewals.

E. Provisions Controlling Water Contracts

(1) *Basic authority.*—The basic authority of the Secretary of the Interior to contract for the storage and delivery of water for irrigation and domestic uses is contained in section 5 of the act, although important provisions appear elsewhere. Section 5, with respect to water contracts, reads:

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 * * * contracts respecting water for irrigation and domestic uses 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.

(2) *Subjection to Colorado River Compact.*—All water contracts were subjected to the Colorado River Compact. These provisions are discussed in chapter IV (G).

(3) *Subjection to lower basin compact.*—The lower-division States were authorized to enter into a compact, and the Government's contracts were to be subject thereto, under certain circumstances. These provisions are developed in chapter IV (H).

F. Provisions Relating Specifically to the All-American Canal

(1) *Construction.*—Section 1 of the Project Act authorized the Secretary of the Interior to construct a main canal and appurtenant structures, to be located entirely within the United States, connecting Laguna Dam, or other diversion dam to be constructed, with the Imperial and Coachella Valleys. The investment was to be reimbursable as provided in the reclamation law, i. e., without interest. No charge was to be made for the storage and delivery of water, i. e. on account of Hoover Dam, but the All-American Canal debt was not to be paid out of Hoover Dam power or water revenues. Section 4 (b), discussed supra, required that, before money was appropriated or construction commenced, the Secretary should make provisions for revenues adequate in his judgment to insure payment of all expenses of construction, operation, and maintenance, under the reclamation law (which at that time required payment within 40 years, without interest).

(2) *Authorization for contract with Imperial Irrigation District.*—Section 10, while preserving the existing contract of October 23, 1918 (appendix 1103), between the United States and Imperial Irrigation District, which obligated the district to pay $1,600,000 of the cost of Laguna Dam, authorized the Secretary to contract with the district for the construction of the canal and appurtenant structures and for the operation and maintenance thereof.

(3) *Status of contracts as water storage and repayment contracts.*—Section 5 authorized the Secretary to contract for the storage of water behind Hoover Dam, and for the delivery thereof "at such points on the river and on said canal as may be agreed upon." Such contracts, like the other storage contracts, were to be for "permanent service." No charge was to be made for such storage (sec. 1), as this area already

had a recognized right to natural flow, which was to be satisfied out of storage.[1] Section 6 of the act directed that the dam and reservoir be used, among other purposes, for "satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River Compact," an article which provided that present perfected rights should "attach to and be satisfied" from water stored "not in conflict with Article III."

The All-American Canal contracts thus were to be dual in character: (1) Water-storage contracts under section 5, and (2) repayment contracts under section 4 (b) and related sections. With respect to the latter function, the contracts were governed by several special provisions, infra.

(4) *Title.*—Section 7 authorized the Secretary, in his discretion, after repayment "of all money advanced, with interest" (i. e., after repayment of the advances for Hoover Dam), to transfer the title of the canal and appurtenant structures (except Laguna Dam) down to and including Syphon Drop, to the districts or agencies having "a beneficial interest therein," under some form of organization satisfactory to the Secretary, in proportion to their capital investments.

(5) *Power utilization.*—Section 7 of the act provided that—

> 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 including the diversion works to the point where each respective power plant may be located.[2]

(6) *Application of power revenues.*—Section 7 of the act provided that—

> * * * The net proceeds from any power development on said canal shall be paid into the fund (Colorado River Dam 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.[3]

(7) *Withdrawal of public lands.*—Section 9 directed the withdrawal from public entry of all public lands of the United States found by the Secretary to be practicable of irrigation. The Secretary was thereafter authorized to open them for entry in tracts not exceeding 160 acres, giving preference to persons who had served in the Army, Navy, or Marine Corps.

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[1] See ch. I (D).

[2] Eight power plants are planned on the All-American Canal: Syphon Drop (constructed), Pilot Knob (proposed; see ch. XIV), and two constructed and four proposed on the canal west of Pilot Knob.

[3] Cf. art. 14 (b) of the Mexican water treaty, appendix 1405, and correspondence of Imperial Irrigation District and the State Department (appendixes 1410, 1411, 1412).

G. Provisions Relating to the Colorado River Compact

(1) *Status at the time of enactment of the Project Act.*—As of the date of passage of the Boulder Canyon Project Act, December 21, 1928, the record on action by the States stood as follows:

The compact had been ratified as a seven-State document by California, Colorado, Nevada, New Mexico, Utah, and Wyoming.[4]

The compact had been ratified as a six-State compact by Colorado,[5] Nevada,[6] New Mexico,[7] and Wyoming.[8]

Utah's ratification as a six-State agreement [9] had been repealed.[10]

California's ratification [11] as a six-State document was conditional upon authorization by Congress of a 20,000,000 acre-foot reservoir.

Thus at the time of consideration of the Project Act only four of the seven States had firmly committed themselves to approval of the compact as a six-State agreement.

(2) *Approval of the Colorado River compact as a six- or seven-State agreement.*—Section 13 (a) of the act stated that the Colorado River Compact signed at Santa Fe on November 24, 1922—

> * * * 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.

Section 4 (a) stipulated that the Project Act should not take effect and no authority be exercised thereunder 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, in the alternative—

> (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

[4] Appendixes 215 to 220, inclusive.
[5] Appendix 222.
[6] Appendix 223.
[7] Appendix 224.
[8] Appendix 226.
[9] Appendix 225.
[10] Utah Laws 1927, p. 1.
[11] Appendix 221.

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 right 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 proclamation of June 25, 1929 (appendix 503), announced completion of the second of these alternatives, and the failure of the first.

(3) *Subjection of operations to the compact.*—The act repeatedly subjected all operations thereunder to the Colorado River Compact; thus, as to construction of works (sec. 1), as to the effective date of the act (sec. 4 (a)), as to operation of reservoirs, canals, and other works (sec. 8 (a)), as to the rights of the United States and those claiming under it to the waters of the river (sec. 13 (b)), and as to rights-of-way, etc., for water or power (sec. 13 (c)). Section 13 (d) subjected all uses to the Colorado River Compact, stipulating that the "conditions and covenants" referred to in the act—

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 * * * or not * * * and shall be deemed to be for the benefit of and available to [each of the seven named States of the basin] 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.[12]

H. Provisions Relating to a Lower Basin Compact

(1) *Authorization.*—Section 4 (a) of the act authorized the States of Arizona, California, and Nevada to enter into an agreement with respect to the waters available to the lower basin. The agreement so authorized, if ratified by the three States in the prescribed terms, would not require further action by Congress, differing in this respect from the usual authorization for negotiation of a compact subject to approval by the Congress after ratification by the States.[13] The compact authorized by section 4 (a) was spelled out in some detail, as follows:

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[12] This provision originated with L. Ward Bannister, Special Counsel, City of Denver.

[13] Credit for the initial suggestion of a compromise along similar lines was given by Senator Pittman to Francis C. Wilson, Colorado River Commissioner for New Mexico (Congressional Record, 70th Cong., 1st sess., p. 10259, May 28, 1928). As to the character of the consent given here, see remarks of Senator Pittman, Congressional Record, December 12, 1928, p. 471. Cf. discussion of congressional consent to interstate compacts in Ely, "Oil Conservation Through Interstate Agreement" (1933), ch. VII, p. 166 et seq.

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 might 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.

The quoted provision was inserted in the Boulder Canyon Project Act during debate in the Senate.[14]

[14] For the legislative history of sec. 4 (a), see testimony of Northcutt Ely (p. 63), Hon. Carl Hayden (p. 233) and Hon. E. W. McFarland, (p. 248) hearings of the House Committee on the Judiciary on H. J. Res. 225 (80th Cong., 2d sess.). The principal amendments and references to debate on this provision are as follows (all references, except where noted, being to pages of the Congressional Record 70th Cong.):

(*a*) As reported by the Senate Committee on Irrigation and Reclamation, 1st sess., p. 5025.

(*b*) Amendment suggested by Senator Pittman, 1st sess., p. 10259.

(*c*) Amendment proposed by Senator Bratton, printed April 24, 1928 (not reprinted in the Congressional Record).

(*d*) Amendment proposed by Senator Phipps, printed May 19, 1928 (not reprinted in the Congressional Record).

(*e*) Amendment proposed by Senator Ashurst, printed May 29, 1928 (not reprinted in the Congressional Record).

(*f*) Amendment proposed by Senator Hayden, December 5, 1928 (2d sess., p. 162, et seq.).

(*g*) Amendment proposed by Senator Bratton, printed December 8, 1928 (not reprinted in the Congressional Record, but referred to in debate, 2d sess., p. 333 et seq.).

(*h*) Amendment proposed by Senator Phipps, printed December 10, 1928, 2d sess., p. 335, et seq., perfected, p. 339.

(*i*) Withdrawal of Hayden amendment, item (*f*) above, 2d sess., p. 382.

No agreement among the three lower-basin States has been entered into, either in the form specified by section 4 (a), or in any other manner.[15]

This paragraph, while interposed in an enumeration of conditions precedent to the effectiveness of the Project Act, did not make the ratification of the proposed lower-basin compact a condition precedent, stating it simply as an unconditional authorization.[16] The conditions precedent, as pointed out elsewhere, did include a requirement that California, by act of her legislature, agree to a limitation on her uses.[17] The paragraph requiring the California limitation is complementary and reciprocal to the paragraph authorizing the lower-basin compact, and the two must be read together to indicate the settlement proposed by Congress.[18]

(2) *Subjection of United States to operation of lower-basin compact.*—Section 8 (b) provided that the United States—

> in constructing, managing, and operating the dam, reservoir, canals, and other works herein authorized—

and likewise—

> all users of water thus delivered and all users and appropriators of waters stored by said reservoir and/or carried by said canal—

should be controlled by the terms of any compact entered into between the States of Arizona, California, and Nevada or any two thereof—

> for the equitable division of the benefits, including power—

to which Congress might give its consent on or before January 1, 1929. If approved by Congress after that date—

[14] Continued

(*j*) Amendment proposed by Senator Hayden to Phipps amendment, item (*h*) above, 2d sess., p. 383.

(*k*) Amendment proposed by Senator Bratton to Phipps amendment, 2d sess., p. 385.

(*l*) Second amendment proposed by Senator Hayden to Phipps amendment, item (*h*) above, 2d sess., p. 388.

(*m*) Perfecting amendments to the Phipps amendment, item (*h*) above, 2d sess., p. 459.

(*n*) Third amendment proposed by Senator Hayden to the Phipps amendment, item (*h*) above, 2d sess., p. 460.

(*o*) Revision proposed by Senator Pittman to the third Hayden amendment (item (*n*) above), to the Phipps amendment (item (*h*) above), 2d sess., p. 469.

(*p*) Adoption of Phipps amendment as amended, 2d sess., p. 472.

(*q*) Subsequent discussion, 2d sess., p. 576.

[15] See references to lower-basin conferences in chs. III (C) and VI (B).

[16] See colloquy between Senators Pittman and Johnson, Congressional Record, 70th Cong., 2d sess., p. 472.

[17] See ch. IV (G), supra.

[18] Cf. Arizona Laws 1939, ch. 33, containing the text of a proposed lower-division compact, combining the provisions as to California found in sec. 4 (a) of the Project Act with provisions as to Arizona derived from, but modifying, the proposal contained in the last paragraph of that section.

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.

In short, if two of the three States should agree upon a compact with the approval of Congress prior to January 1, 1929, the contracts would be subject to the lower-basin compact; but if the compact should be entered into after the contracts, then the compact itself should be subject to the terms of prior contracts.

As pointed out in chapter VI, negotiation and execution of the power contracts was withheld for a protracted period to enable the States to attempt to work out an agreement among themselves, but none was reached.[19]

I. Provisions for Further Development of the River

(1) *Investigations.*—Section 15 directed the Secretary to make investigations and public reports of the feasibility of projects in the seven States of the basin and to formulate a comprehensive scheme for control and the improvement and utilization of the waters of the river and its tributaries. It authorized the appropriation of $250,000 for that purpose from the Colorado River Dam fund.[20] Section 11 authorized an investigation of the Parker-Gila project in Arizona.

(2) *Comprehensive plan: Administration.*—Section 16 of the act directed that in furtherance of any comprehensive plan formulated hereafter and to the end that the Boulder Canyon project might be administered as a unit in such control, improvement, and utilization, any commission or commissioner authorized by a ratifying State should have the right to act in an advisory capacity with the Secretary of the Interior in the exercise of any authority under the provisions of sections 4, 5, and 14 of the act (secs. 4 and 5, dealing with finances and authorization for a lower-basin compact; sec. 5, dealing with power and water contracts; and sec. 14 dealing with the reclamation law) and should at all times have access to records of all Federal agencies empowered to act under those sections.[21]

(3) *Supplemental compacts.*—Section 19 authorized the seven States to enter into compacts supplemental to the Colorado River compact and consistent with the Project 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 * * *

[19] See report of Hon. William J. Donovan, Federal representative in tri-State negotiations, to Secretary of the Interior Wilbur, February 14, 1930 (Congressional Record, June 26, 1930, p. 12202).

[20] For subsequent activity under this authorization, see ch. XII (L).

[21] Cf. art. V of the Colorado River Compact. For references to activities of the "Committee of Fourteen" and "Committee of Sixteen," representing the basin States, see chs. VIII (A) and XIV (C), infra.

Subject, however, to the participation by a Federal representative in the negotiations and conditioned upon subsequent approval by the legislatures of each State and by the Congress. Such compacts were authorized to include the subjects of construction of dams, headworks, and other diversion works or structures for flood control, reclamation, improvement of navigation, division of water, or other purposes, the construction of powerhouses or other structures for the development of water power and the financing of the same and the creation of interstate commissions and corporations, authorities, or other instrumentalities.

No compact under that authorization has been consummated.

(4) *Investigation of Parker-Gila project.*—Section 11 authorized investigation of the proposed Parker-Gila Valley reclamation project in Arizona and authorized appropriations for such purpose.[22]

J. General Provisions

The act contained a number of miscellaneous or general provisions. Thus—

(1) *Regulations.*—The act was explicit in requiring that all operations thereunder be controlled by general regulations, in section 5, with respect to storage and delivery of water and generation and delivery of electrical energy; section 5 (b), with respect to renewals; section 5 (d), authorizing the Secretary to require certain purchasers of electrical energy to transmit energy for others; section 6, as to—

> maintenance of works, * * * maintenance of a system of accounting, control of rates and service in the absence of State regulation or interstate agreement, etc.

(2) *Provisions respecting acquisition or use of property.*—Section 1 of the act authorized the Secretary—

> to acquire by proceedings in eminent domain, or otherwise, all lands, rights-of-way, and other property necessary for said purposes.

Section 5 (d) authorized the use of public and reserved lands of the United States necessary or convenient for the construction, operation, and maintenance of main transmission lines.

(3) *Title.*—Section 6 of the act stipulated that—

> The title to said dam, reservoir, plant, and incidental works shall forever remain in the United States.

Note, however, the authorization in section 7 for transfer of title after repayment, with respect to one portion of the All-American Canal below Syphon Drop.

[22] For subsequent references to this project, see chs. XII (B) and XII (H).

(4) *Claims of the United States.*—Section 17 stipulated that—

Claims of the United States arising out of any contract authorized by this Act shall have priority over all others, secured or unsecured.[23]

(5) *Reference to the reclamation law.*—Section 14 provided that—

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.

(6) *Preservations of rights of the States.*—Section 18 provided that nothing in the act should 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 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.[24]

(7) *Mexico.*—Section 20 of the act directed that—

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.

The following chapter outlines the manner in which the conditions precedent to the effectiveness of the project act were met, and the manner in which the statute was proclaimed to be in operation.

[23] In *Malan* v. *Imperial Irrigation District*, Superior Court, Imperial County, Nos. 15460, 15454, in re the validation of the All-American Canal repayment contract, the Court's opinion, dated May 24, 1933, held that this provision was intended to establish priority over private claims, but not to interfere with the taxing power of the State.

[24] Cf. art. IV (c) of the Colorado River Compact; act of June 17, 1902 (Reclamation Act), sec. 8, 32 Stat. 390; act of July 26, 1866, 14 Stat. 251.