

Chapter XIII

LITIGATION

Four cases involving the Colorado River have been brought in the United States Supreme Court as original actions. The issues involved, and their disposition, are summarized below.

All of these cases were decided on the allegations of the bill of complaint, no answer being filed and no testimony taken.

A. Arizona v. California (283 U. S. 423, 1931): the "Injunction Case" (Appendix 1301)

Arizona filed an original bill of complaint on October 13, 1930, against Ray Lyman Wilbur and six States of the basin.

The Court stated the issues as follows (283 U. S. 423, 449):

On October 13, 1930, Arizona filed this original bill of complaint against Ray Lyman Wilbur, Secretary of the Interior, and the states of California, Nevada, Utah, New Mexico, Colorado, and Wyoming. It charges that Wilbur is proceeding in violation of the laws of Arizona to invade its quasi-sovereign rights by building at Black Canyon on the Colorado River a dam, half of which is to be in Arizona, and a reservoir to store all the water of the river flowing above it in Arizona, for the purpose of diverting part of these waters from Arizona for consumptive use elsewhere, and of preventing the beneficial consumptive use in Arizona of the unappropriated water of the river now flowing in that state; that these things are being done under color of authority of the Boulder Canyon Project Act; that this act purports to authorize the construction of the dam and reservoir, the diversion of the water from Arizona, and its perpetual use elsewhere; that the act directs and requires Wilbur to permit no use or future appropriation of the unappropriated water of the main stream of the Colorado river, now flowing in Arizona and to be stored by the said dam and reservoir, except subject to the conditions and reservations contained in the Colorado River Compact; and that the act thus attempts to enforce as against Arizona, and to its irreparable injury, the compact which it has refused to ratify. The bill prays that the compact and the act "and each and every part thereof, be decreed to be unconstitutional, void, and of no effect; that the defendants and each of them be permanently enjoined and restrained from enforcing or carrying out said compact or said act, or any of the provisions thereof, and from carrying out the three pretended contracts hereinabove referred to, or any of them, or any of their provisions, (meaning certain contracts executed by Wilbur on behalf of the United States for the use of the stored water and developed power after the project shall have been completed) and from doing any other act or thing pursuant to, or under color of, said Boulder Canyon Project Act."

The contracts referred to were the water contract of the Metropolitan Water District of April 24, 1930 (appendix 1007), the energy

contract of the district, dated April 26, 1930 (appendix 3, first edition), and the lease of the City of Los Angeles and the Southern California Edison Co. (appendix 2, first edition).

Arizona's bill of complaint alleged the effect of the Colorado River Compact upon her as follows (art. XIV, p. 16):

Said Colorado River Compact is grossly inequitable, unjust, and unfair to the state of Arizona, for the reasons and in the respects following, to wit:

(1) Said compact attempts to apportion to said Upper Basin more, and to said Lower Basin less, than an equitable share of the water of said Colorado River System. Said compact attempts to apportion to each of said basins the same quantity of water, to wit, 7,500,000 acre-feet annually, but said Lower Basin needs and can put to beneficial use more than twice the quantity of water which is needed or can be put to beneficial use in said Upper Basin. That part of said Lower Basin which is in Arizona needs and can put to beneficial use more than the total quantity of water which said compact attempts to apportion to said entire Lower Basin. Said Lower Basin includes practically all of Arizona. None of the water of said Colorado River System can be put to beneficial use in that part of Arizona which is in said Upper Basin. The 7,500,000 acre-feet of water which said compact attempts to apportion to each of said basins includes all water necessary to supply existing rights, which means all water heretofore appropriated and now being used. In said Lower Basin such appropriations amount to 6,500,000 acre-feet of water annually, whereas in said Upper Basin they amount to only 2,500,000 acre-feet annually. Thus said compact attempts to apportion to said Lower Basin only 1,000,000 acre-feet of unappropriated water, whereas it attempts to apportion to said Upper Basin 5,000,000 acre-feet of unappropriated water annually. Under said compact, said 5,000,000 acre-feet of unappropriated water could not, nor could any part of it, be appropriated in said Lower Basin. Thus said compact attempts to deprive the State of Arizona, its citizens, inhabitants, and property owners, of their right to appropriate said 5,000,000 acre-feet of unappropriated water, all of which is now subject to appropriation in Arizona.

(2) Said compact does not apportion or attempt to apportion all of the water of said Colorado River System, but attempts to apportion only 15,000,000 acre-feet thereof, and leaves unapportioned the remaining water of said system, aggregating 3,000,000 acre-feet annually. Said unapportioned water is a part of the unappropriated water of said Colorado River System. Said compact attempts to withdraw said unapportioned water from appropriation and to prohibit the appropriation thereof. This said compact attempts to do by providing that Mexican rights shall be supplied from said unapportioned water, and that said unapportioned water shall be subject to apportionment after October 1, 1963. Thus said compact attempts to deprive the State of Arizona, its citizens, inhabitants, and property owners, of their right to appropriate said 3,000,000 acre-feet of unappropriated water, all of which is now subject to appropriation in Arizona.

(3) Said compact defines the term "Colorado River System" so as to include therein the Gila River and its tributaries, of which the total flow, aggregating 3,000,000 acre-feet of water annually, was appropriated and put to beneficial use prior to June 25, 1929. The State of New Mexico has but a slight interest, and the States of California, Nevada, Utah, Colorado, and Wyoming have no interest whatever in said water. Since said compact provides that the water apportioned thereby shall include all water necessary to supply existing rights, the effect of including the Gila River and its tributaries as a part of said system would be to reduce by 3,000,000 acre-feet annually the quantity of water now subject to appropriation in Arizona.

The Court's opinion (283 U. S. 423, 464) (appendix 1301) denied the relief sought, saying:

As we hold that the grant of authority to construct the dam and reservoir is a valid exercise of congressional power, that the Boulder Canyon Project Act does not purport to abridge the right of Arizona to make, or permit, additional appropriations of water flowing within the State or on its boundaries, 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, we have no occasion to consider other questions which have been argued. The bill is dismissed without prejudice to an application for relief in case the stored water is used in such a way as to interfere with the enjoyment by Arizona, or those claiming under it, of any rights already perfected or with the right of Arizona to make additional legal appropriations and to enjoy the same.

The full text of the opinion appears herein as appendix 1301.

***B. Arizona v. California (292 U. S. 341, 1934): the
"Perpetuation of Testimony Case" (Appendix 1302)***

On February 14, 1934, Arizona moved for leave to file an original bill, naming the Secretary of the Interior and the six States of the basin as defendants, to perpetuate the testimony of the negotiators of the Colorado River Compact, for use in an action which Arizona said she would bring at some future time. The proposed testimony was said to relate to the meaning of article III (b) of the Colorado River compact. The language of the bill of complaint, in part, was (p. 13):

It was agreed between all of the representatives of the various States and the representative of the United States, negotiating said compact, that said one million acre-feet apportioned by subdivision (b) of Article III of said compact was intended for and should go to the State of Arizona to compensate for the waters of the Gila River and its tributaries being included within the definition of the Colorado River system and the allocations of said compact, and that said one million acre-feet was to be used exclusively by and for the State of Arizona, that being the approximate amount of water then in use within the State of Arizona from the Gila River and its tributaries, and it was agreed that in view of the fact that no appropriation or allocation of water had otherwise been made by said compact directly to any State, the one million acre-feet for the State of Arizona should be included in said compact by an allocation for the Lower Basin. And it was further agreed that a supplemental compact between the States, California, Nevada and Arizona should be adopted and that such supplemental compact should so provide.

The Court said, at page 349 of its opinion, that Arizona—

* * * claims that this paragraph, which declares: "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 1,000,000 acre-feet per annum."

means:

"that the waters apportioned by Article III (b) of said compact are for the sole and exclusive use and benefit of the State of Arizona."

The Court's opinion (292 U. S. 341) (appendix 1302), held that the Court had jurisdiction to order the perpetuation of testimony, but the Court declined leave to file the bill on the ground that the testimony, if taken, would be inadmissible on various grounds.

C. United States v. Arizona (295 U. S. 174, 1935): the "Parker Dam Case" (Appendix 1303)

In January 1935 the United States brought an original action in the United States Supreme Court against the State of Arizona to enjoin interference by that State with the construction of Parker Dam by the United States under its cooperative agreement with the Metropolitan Water District, dated February 10, 1933 (appendix 1201). Arizona had threatened the use of military force, and had physically prevented continuance of construction. The Court held (appendix 1303) that the complaint failed to show that the construction of the dam was authorized by statute, and that there was no ground for the granting of the injunction. The complaint was dismissed.

Subsequently, in the act of August 30, 1935 (49 Stat. 1039) (appendix 1202), Congress reauthorized the construction of Parker Dam, work was resumed, and the structure was completed and placed in operation. (See text, ch. XII.)

D. Arizona v. California et al. (298 U. S. 558, 1936): the "Equitable Apportionment Case" (Appendix 1304)

In November 1935 Arizona moved for leave to file a bill of complaint in an original action in the United States Supreme Court, naming the other six States of the basin as defendants.

The Court stated the issues as follows (298 U. S. 558, 559):

The relief sought is: (1) That the quantum of Arizona's equitable share of the water flowing in the Colorado River, subject to diversion and use, be fixed by this Court, and that the petitioner's title thereto be quieted against adverse claims of the defendant states. (2) That the State of California be barred from having or claiming any right to divert and use more than an equitable share of the water flowing in the river, to be determined by the Court, and not to exceed the limitation imposed upon California's use of such water by the Boulder Canyon Project Act [December 21, 1928], 45 Stat. L. 1057, ch. 42, U. S. C. A. title 43, sec. 617 and the Act of the California Legislature of March 4, 1929, ch. 16, Calif. Stat. 1929, p. 38. (3) That it be decreed that the diversion and use by any of the defendant states of any part of the equitable share of the water decreed to Arizona pending its diversion and use by her shall not constitute a prior appropriation or confer upon the appropriating state any right in the water superior to that of Arizona. (4) That any right of the Republic of Mexico to an equitable share in any increased flow of water in the Colorado River, made available by works being constructed by or for California, shall be supplied from California's equitable share of the water, and that neither petitioner nor the defendant states other than California shall be required to contribute to it from their equitable shares as adjudicated by the Court.

With respect to the California water contracts, Arizona's bill of complaint alleged (pp. 25-27):

The net virgin flow of the Colorado River and its tributaries is the sum of the undepleted flows of said river at Imperial Dam and of the Gila at its confluence with the main stream at Yuma. By deducting from the net flow so obtained the waters apportioned by the Colorado River Compact we obtain the "excess or surplus waters unapportioned by said compact" within the meaning of Section 4 (a) of the Boulder Canyon Project Act and the Act of the Legislature of California, approved March 4, 1929. The unapportioned water is computed in the following manner:

Virgin flow Colorado River at Imperial Dam.....	16, 840, 000
Virgin flow Gila at confluence with the Colorado River....	1, 331, 000
Net virgin flow Colorado River.....	18, 171, 000
Less water apportioned by Compact.....	16, 000, 000
Surplus waters unapportioned.....	2, 171, 000

Therefore the maximum quantity of Colorado River water which California may legally divert and consumptively use is:

Of water apportioned by par. (a), Art. III, Compact.....	4, 400, 000
One-half waters unapportioned.....	1, 085, 500
California's maximum legal rights.....	5, 485, 500

The foregoing quantities are in acre-feet per year and are based upon average annual discharges of the Colorado and Gila for the last thirty-seven years for which records are available.

* * * * *

The Secretary of the Interior, pursuant to the provisions of Section 5 of the Boulder Canyon Project Act, during the years 1931 and 1933 entered into contracts with the California corporations named below for the storage in Boulder Reservoir and the delivery of Colorado River water for domestic and irrigation purposes in California, in acre-feet per year, as follows:

Metropolitan Water District.....	1, 100, 000
Imperial Valley and others.....	3, 850, 000
City of San Diego.....	112, 000
Palo Verde.....	300, 000
Total.....	5, 362, 000

Plaintiff alleges that the total of the waters for the storage and delivery of which it was so contracted is substantially the entire amount which may legally be diverted from said river and consumptively used in the State of California under the terms of said statutory contract between the State of California and the United States, and is far in excess of California's equitable share of said waters.

The Court held that the United States was a necessary party, and denied leave to file the proposed bill, the opinion concluding (p. 572):

The petition to file the proposed bill of complaint is denied. We leave undecided the question whether an equitable division of the unappropriated water of the river can be decreed in a suit in which the United States and the interested States are parties. Arizona will be free to assert such rights as she may have acquired, whether under the Boulder Canyon Project Act and California's undertaking to restrict her own use of the water or otherwise, and to challenge, in any appro-

private judicial proceeding, any act of the Secretary of the Interior or others, either states or individuals, injurious to it and in excess of their lawful authority.

E. Remaining Issues

In reporting on House Joint Resolution 225, Eightieth Congress, a joint resolution to authorize commencement of an action by the United States to determine interstate water rights in the Colorado River, Acting Secretary of the Interior Oscar Chapman on May 14, 1948, summarized the major issues presented by section 4 (a) of the Boulder Canyon Project Act as follows: ¹

(1) Are the 1,000,000 acre-feet of water for which provision is made in article III (b) of the Colorado River compact "surplus" or "apportioned" within the meaning of section 4 (a) of the Boulder Canyon Project Act? That is, is or is not California entitled to share in the use of III (b) water?

(2) Is the flow of the Gila River, for purposes of determining the water supply of the Colorado River Basin, to be measured at the mouth of the stream or elsewhere? And, as another aspect of the same problem: Is beneficial consumptive use by Arizona of the waters of the Gila to be measured in terms of diversions from the Gila River less returns to that river or in terms of the depletion of the virgin flow of that river at its mouth?

(3) Is the water required for delivery to Mexico under the treaty with that nation to be deducted from "surplus" water prior to determination of the amount available for use in California under section 4 (a) of the Boulder Canyon Project Act, or is California entitled to use a full one-half of the "surplus" diminished only by so much of the Mexican requirements as cannot be supplied from the other half?

(4) Is the burden of evaporation losses at such reservoirs as Lake Mead to be borne by California and Arizona in proportion to the waters stored there for each of them, or is the burden of these losses to be fixed in some other fashion?

Secretary Chapman stated the effect of these issues as follows: ²

I have not attempted to examine the merits of the contentions made by the spokesmen for Arizona and California on these questions. Assuming, however, that there is some merit to both sides on all four of the major questions, it is obvious that there are many answers, in terms of the number of acre-feet of water which California may use under section 4 (a) of the Boulder Canyon Project Act that might conceivably be given. Using the long-run average flows shown in this Department's report on the Colorado River basin as a basis for computations, the answers might range from as much as 6,250,000 acre-feet per year to approximately 4,000,000 acre-feet. Likewise, there is a great range in the amount of water from the Colorado River system which might be found available for use in Arizona. The maximum might be somewhat over 3,500,000 acre-feet, the minimum nearly as little as 2,250,000 acre-feet.

Extensive hearings were held on House Joint Resolution 225 ³ and an identical Senate measure, Senate Joint Resolution 145, ⁴ in the Eightieth Congress, but no action was taken.

¹ Hearings of the House Judiciary Committee on H. J. Res. 225, 80th Cong., 2d sess., p. 24.

² Id., p. 26.

³ Cited under note 1, *supra*.

⁴ Hearings of the Senate Committee on Interior and Insular Affairs on S. J. Res. 145, 80th Cong., 2d sess.