

## BOULDER CANYON PROJECT ACT

An act to provide for the construction of works for the protection and development of the Colorado River Basin, for the approval of the Colorado River compact, and for other purposes. (Act of December 21, 1928, ch. 42, 45 Stat. 1057)

[**Sec. 1. Dam at Black or Boulder Canyon for flood control, improving navigation, and for storage and delivery of water—Main canal to supply water for Imperial and Coachella Valleys—Power plant—All works in conformity with Colorado River compact.**]—For the purpose of controlling the floods, improving navigation and regulating the flow of the Colorado River, providing for storage and for the delivery of the stored waters thereof for reclamation of public lands and other beneficial uses exclusively within the United States, and for the generation of electrical energy as a means of making the project herein authorized a self-supporting and financially solvent undertaking, the Secretary of the Interior, subject to the terms of the Colorado River compact hereinafter mentioned, is hereby authorized to construct, operate, and maintain a dam and incidental works in the main stream of the Colorado River at Black Canyon or Boulder Canyon adequate to create a storage reservoir of a capacity of not less than twenty million acre-feet of water and a main canal and appurtenant structures located entirely within the United States connecting the Laguna Dam, or other suitable diversion dam, which the Secretary of the Interior is hereby authorized to construct if deemed necessary or advisable by him upon engineering or economic considerations, with the Imperial and Coachella Valleys in California, the expenditures for said main canal and appurtenant structures to be reimbursable, as provided in the reclamation law, and shall not be paid out of revenues derived from the sale or disposal of water power or electric energy at the dam authorized to be constructed at said Black Canyon or Boulder Canyon, or for water for potable purposes outside of the Imperial and Coachella Valleys: *Provided, however,* That no charge shall be made for water or for the use, storage, or delivery of water for irrigation or water for potable purposes in the Imperial or Coachella Valleys; also to construct and equip, operate, and maintain at or near said dam, or cause to be constructed, a complete plant and incidental structures suitable for the fullest economic development of electrical energy from the water discharged from said reservoir; and to acquire by proceedings in eminent domain, or otherwise, all lands, rights of way, and other property necessary for said purposes. (45 Stat. 1057; 43 U.S.C. § 617)

### EXPLANATORY NOTES

**Hoover Dam.** The dam on the Colorado River in Black Canyon had been designated Hoover Dam by instructions of the Secretary of the Interior dated September 17, 1930. The dam was redesignated Boulder Dam by order of the Secretary dated May 8, 1933. The name Hoover Dam was restored by the Act of April 30, 1947, 61 Stat.

56. The Act appears herein in chronological order.

**Supplementary Provision: Boulder Canyon Project Adjustment Act.** The Boulder Canyon Project Act was amended and supplemented by the Boulder Canyon Project Adjustment Act of July 19, 1940, 54 Stat. 774. This Act and notes hereunder should

be considered in the light of the Adjustment Act, which appears herein in chronological order.

**Reference Source.** An extensive compilation and review of the Boulder Canyon Project Act, the Colorado River Compact, the Mexican Water Treaty, contracts, liti-

gation, and other documents relating to the Colorado River is found in *Hoover Dam Documents* (Wilbur and Ely), H. Doc. No. 717, 80th Cong., 2d Sess. (1948). It brings up to date an earlier work entitled *The Hoover Dam Contracts* (Ely), U.S. Department of the Interior (1933).

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#### 1. Constitutionality

The Boulder Canyon Project Act was passed in exercise of Congressional power to control navigable water for purposes of flood control, navigation, power generation, and other objects, and is equally sustained by power of Congress to promote the general welfare through projects for reclamation, irrigation, and other internal improvements. *Arizona v. California*, 373 U.S. 546, 587 (1963).

The Court judicially knows, from the evidence of history, that a large part of the Colorado River south of Black Canyon was formerly navigable and that the main obstacles to navigation have been accumulations of silt and irregularity in flow. *Arizona v. California*, 283 U.S. 423, 453 (1931).

Inasmuch as the grant of authority under the Boulder Canyon Project Act to build the dam and reservoir is valid as the constitutional power of Congress to improve navigation, it is not necessary to decide whether the authority might constitutionally be conferred for other purposes. *Arizona v. California*, 283 U.S. 423, 457 (1931).

#### 2. Purpose—Generally

The whole point of the Boulder Canyon Project Act was to replace erratic, undependable, often destructive natural flow of the Colorado River with regular, dependable release of waters conserved and stored by the project, and thereunder, Congress made it clear that no one should use main-stream waters save in strict compliance with the scheme set up by the Act. *Arizona v. California*, 373 U.S. 546, 579 (1963).

#### 3. River regulation

The release of water through the California Sluiceway at Imperial Dam in

order to transport sediment load downstream is appropriate to accomplish river regulation. The United States has, under the contract with Imperial Irrigation District and within the limitations provided, a prior right to release water for this purpose as compared with the diversion of water for generation of power at Pilot Knob. Also, Mexico cannot, under the Mexican Water Treaty, insist as a matter of right that all or substantially all of the water allotted to it under the Treaty be delivered via the All-American Canal; nor can Mexico require that the United States assume responsibility either for the quality of the water delivered to it or for disposal of sediment load. Memorandum of Associate Solicitor Fisher, October 17, 1956.

#### 4. Municipal water supplies

The Secretary of the Interior has authority under sections 1 and 5 of the Boulder Canyon Project Act to provide increased capacity in the All-American Canal to carry water to the City of San Diego for the beneficial consumptive use of the city. Solicitor Margold Opinion, 54 I.D. 414 (1934).

#### 10. Limitations

The provision in section 1 of the Boulder Canyon Project Act empowering the Secretary of the Interior to construct a main canal connecting the Laguna Dam "or other suitable diversion dam" with the Imperial and Coachella Valleys does not authorize the building of or in any respect apply to the Parker Dam proposed to be constructed 70 miles upstream from Laguna Dam and canal without specific Congressional authorization as required by section 9 of the Act of March 3, 1899. *United States v. Arizona*, 295 U.S. 174 (1935). (Editor's Note: The Parker Dam was subsequently authorized by the Act of August 30, 1935. Extracts from both Acts, including the relevant sections, appear herein in chronological order.)

Neither the Boulder Canyon Project Act nor the Reclamation laws generally authorize the Secretary of the Interior to establish a Federal reservation, in connection with the construction of the dam and power-plant, over which the United States would have exclusive jurisdiction pursuant to a Nevada statute generally ceding jurisdiction

over lands acquired by the United States for public buildings. *Six Companies, Inc. v. De-Vinney, County Assessor*, 2 F. Supp. 693 (D. Nev. 1933).

The distribution system for Coachella Valley is not an "appurtenant structure" to the main canal within the meaning of section 1 of the Boulder Canyon Project Act. Solicitor White Opinion, M-34900 (March 27, 1947) in re flood protection work in Coachella Valley.

#### 11. State laws

Where the government has, as here, exercised its right to regulate and develop the river and has undertaken a comprehensive project for improvements of the river and for the orderly and beneficial distribution of water, there is no room for inconsistent state law. *Arizona v. California*, 373 U.S. 546, 587 (1963).

The privilege of the States through which the Colorado River flows and their inhabitants to appropriate and use the water is subject to the paramount power of the United States to control it for the purpose of improving navigation. *Arizona v. California et al.*, 298 U.S. 558, 569 (1936), rehearing denied, 299 U.S. 618 (1936).

The Secretary of the Interior is under no obligation to submit the plans and specifications for the dam and reservoir to the State Engineer as required by Arizona law because the United States may perform its functions without conforming to the police regulations of a State. *Arizona v. California*, 283 U.S. 423, 451 (1931).

#### 12. Judicial review

All of the powers granted to the Secretary of the Interior by this Act are subject to judicial review. *Arizona v. California*, 373 U.S. 546, 584 (1963).

#### 13. United States as party

The action of the Secretary of the Interior in reducing by ten per cent the amount of Colorado River water which irrigation and drainage district might order during the balance of 1964 was the action of the sovereign, and, the sovereign not having consented thereto, could not be enjoined, or otherwise made the subject of any court proceedings. *Yuma Mesa Irr. and Drainage Dist. v. Udall*, 253 F. Supp. 909 (D.D.C. 1965).

The United States is an indispensable party to an action by Arizona against California and the five other States of the Colorado River Basin praying for an equitable division of the unappropriated water of the river. *Arizona v. California, et al.*, 298 U.S. 558 (1936), rehearing denied, 299 U.S. 618 (1936).

#### 14. Colorado River Compact

The declarations in sections 1, 8(a), 13 (b), and 13(c) of the Boulder Canyon Project Act that the Secretary of the Interior and the United States shall be subject to and controlled by the Colorado River Compact were made only to show that the Act and its provisions were in no way to upset, alter, or affect the Compact's congressionally approved division of water between the Upper and the Lower Basins. They were not intended to make the compact and its provisions control or affect the Act's allocation among and distribution of water within the States of the Lower Basin. *Arizona v. California*, 373 U.S. 546, 567 (1963).

In construing the Boulder Canyon Project Act, the Court would look to the Colorado River Compact for the limited purposes of interpreting compact terms specifically incorporated in the Act—such as the reference to satisfaction of "present perfected rights" in section 6, and the definition of "domestic" in section 12—and of resolving disputes between the Upper and Lower Basins. *Arizona v. California*, 373 U.S. 546, 566 (1963).

#### 15. Costs, allocation and reimbursement of

For discussion of numerous legal problems involved in allocation and reimbursement of costs of All-American Canal and related works see Memoranda of Chief Counsel Fisher of April 1, 1953, and October 23, 1952.

Investigation costs incurred by the United States under contracts of 1918, 1920, 1929 and 1933 in connection with the All-American Canal are reimbursable by the Imperial Irrigation District. Nothing in the Kinkaid Act of May 18, 1920, or its legislative history implies that the expenses under the 1920 contract paid by the United States were to be a gift to the District, and the fact that the District contributed two-thirds the cost of the study does not imply that the one-third paid by the United States was to be nonreimbursable. Nor does the fact that study funds advanced by the District under the 1929 and 1933 contracts were later refunded imply that U.S. costs to the amount of the refunds were to be nonreimbursable. Memorandum of Chief Counsel Fisher, November 18, 1953.

#### 16. Leases and permits

Both the National Park Service and the Bureau of Reclamation, in administering their respective areas withdrawn under the first form in connection with the Boulder Canyon project, may grant leases for land and permits to engage in business activities to private individuals without advertising for proposals or securing competitive bids

Solicitor Margold Opinion, M-28694 (October 13, 1936).

#### 17. Excess lands

The Coachella Valley County Water District lands are subject to the excess land provisions of the Federal reclamation law. Solicitor Harper Opinion, M-33902 (May 31, 1945).

Privately-owned lands in the Imperial Valley Irrigation District, even those

assumed to have vested Colorado River water rights, are subject to the excess land laws. Solicitor Barry Opinion, 71 I.D. 496 (1964), *reversing* Letter of Secretary Wilbur, February 24, 1923.

Administrative practice in failing to apply excess land laws to private lands in Imperial Irrigation District, no matter of how long standing, is not controlling where it is clearly erroneous. Solicitor Barry Opinion, 71 I.D. 496, 513-17 (1964).

**Sec. 2. [(a) Colorado River Dam fund established. (b) Secretary of Treasury to advance amounts necessary up to \$165,000,000. \$25,000,000 to be allocated to flood control, to be repaid. (c) No expenditures for operation and maintenance except from appropriations. (d) Secretary of Treasury to charge fund for payment of interest. (e) Secretary of Interior to certify to Treasury amount of money in fund in excess of that necessary for construction, etc.]—(a)** There is hereby established a special fund, to be known as the "Colorado River Dam fund" (hereinafter referred to as the "fund"), and to be available, as hereafter provided, only for carrying out the provisions of this act. All revenues received in carrying out the provisions of this act shall be paid into and expenditures shall be made out of the fund, under the direction of the Secretary of the Interior.

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

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

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

(e) The Secretary of the Interior shall certify to the Secretary of the Treasury, at the close of each fiscal year, the amount of money in the fund in excess of the

amount necessary for construction, operation and maintenance, and payment of interest. Upon receipt of each such certificate the Secretary of the Treasury is authorized and directed to charge the fund with the amount so certified as repayment of the advances made under subdivision (b), which amount shall be covered into the Treasury to the credit of miscellaneous receipts. (45 Stat. 1057; 43 U.S.C. § 617a)

## EXPLANATORY NOTE

**Supplementary Provision: Interest Rate.** Section 6 of the Boulder Canyon Project Adjustment Act, approved July 19, 1940, provides that: "Whenever by the terms of the Project Act or this Act payment of interest is provided for, and whenever interest

shall enter into any computation thereunder, such interest shall be computed at the rate of 3 per centum per annum, compounded annually". The Act appears herein in chronological order.

## NOTES OF OPINIONS

Advances 1  
Economy Act deductions 4  
Flood control 2  
School purposes 3

## 1. Advances

Interest, at the rate of 4 percent, prescribed by section 2(d), could not be remitted on funds advanced to the Colorado River Dam fund, placed to the credit of the Interior Department but later returned to the Treasury unexpended. Dec. Comp. Gen., A-46044 (February 28, 1933).

## 2. Flood control

The language of section 2(b) shows clearly that Congress did not regard the \$25,000,000 thereby allocated to flood control as falling within the amortization plan embodied in section 4(b). The \$25,000,000 allocated to flood control must be regarded as falling outside of the words "all amounts advanced to the fund under subdivision (b) of section 2 for such works" in section 4(b). It is my opinion that the Secretary of the Interior is not required, in fixing the sale rates for power to be generated at Boulder Dam, to make provision for the amortization within the 50 years of the \$25,000,000 allocated by the act to flood control. 36 Op. Atty. Gen. 121 (1929).

It does not seem reasonable to suppose that Congress intended to make the payment of interest on the \$25,000,000 allocated to flood control an absolute charge during the 50 years when it left the payment of the principal to the chance that there might be excess earnings during that period. Interest should be ultimately paid on the \$25,000,000 from the same source as is provided for the payment of the principal, to wit: out of 62½ per cent of the excess earnings during the 50-year period and out of 62½ per cent of the net earn-

ings thereafter. 36 Op. Atty. Gen. 121 (1929).

## 3. School purposes

On September 29, 1931, the Comptroller General held that there is no authority to use the Colorado River Dam fund for the construction of school buildings, transportation of pupils, or construction of swimming pools. Upon request for reconsideration the Comptroller General, under date of October 17, 1931, stated that in view of the further representations made to the effect that the construction of the Boulder Dam was being delayed by lack of school facilities and that "the erection of school buildings is necessary to carry out the purposes of the project act", no objection would be interposed to the use of the Colorado River Dam fund for the construction of *temporary* buildings in which schools may be conducted during the current school year, provided the contractor will bear the expense of maintaining and operating the schools unless and until otherwise specifically provided for by law. Dec. Comp. Gen., A-38343 (October 17, 1931).

## 4. Economy Act deductions

The amount of Economy Act deductions from the total compensation of employees who are paid out of the Colorado River Dam fund is required to be advanced from appropriated funds as a part of the cost of construction in the same manner as the remainder of the compensation of the employees and is subject to 4 percent interest charges provided by section 2(b) of the Act of December 21, 1928 (45 Stat. 1057), on all advances from the general fund to the special fund. The impounding of Economy Act deductions from the total compensation of employees who are paid out of the Colorado River Dam fund should be directly from such special fund to the impounded

fund. Dec. Comp. Gen., A-42691 (February 13, 1933).

Economy deductions under sections 110 and 203 of the Act of June 30, 1932, and under section 4(d) of the Act of March 20, 1933, are a part of the construction cost of the Boulder Canyon project, and the impounding and deposit of same to the sur-

plus fund of the Treasury do not constitute a return or repayment of these amounts within the purview of the Boulder Canyon Project Act of December 21, 1928. Interest on said amounts must continue until repayment has been made in accordance with the terms of said Act. Dec. Comp. Gen., A-56169 (July 2, 1934).

**Sec. 3. [Appropriation not exceeding \$165,000,000 authorized.]**—There is hereby authorized to be appropriated from time to time, out of any money in the Treasury not otherwise appropriated, such sums of money as may be necessary to carry out the purposes of this act, not exceeding in the aggregate \$165,000,000. (45 Stat. 1058; 43 U.S.C. § 617b)

#### NOTES OF OPINIONS

##### 1. Availability of appropriations

Section 320 of the Economy Act of June 30, 1932, relative to restriction on construction and rental of buildings is applicable to section 3 of the Boulder Canyon Project Act. Dec. Comp. Gen., A-42691 (July 25, 1932).

Boulder Canyon project funds may be used to purchase land title abstracts or certificates with or without insurance payment to be made under the appropriation available for the purchase price, if such

abstracts or certificates are necessary to enable the Secretary of the Interior, or such of his subordinates as he may designate, to determine the validity of the title to the land to be acquired. Dec. Comp. Gen., A-39589 (January 29, 1932).

The Boulder Dam appropriation is available for payment for placing and designing of panels, tablets, and inscriptions, award to be made on competitive designs by known artists. Dec. Comp. Gen., A-61595 (May 24, 1935).

**Sec. 4. (a) [When Act effective—Ratification of Colorado River compact—Proclamation by President—Agreement by California required—Agreement authorized by Arizona, California, and Nevada—Apportionment of waters—Consumptive use of Gila River by Arizona—Water for domestic and agricultural use.]**—This act shall not take effect and no authority shall be exercised hereunder and no work shall be begun and no moneys expended on or in connection with the works or structures provided for in this act, and no water rights shall be claimed or initiated hereunder, and no steps shall be taken by the United States or by others to initiate or perfect any claims to the use of water pertinent to such works or structures unless and until (1) the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have ratified the Colorado River compact, mentioned in section 13 hereof, and the President by public proclamation shall have so declared, or (2) if said States fail to ratify the said compact within six months from the date of the passage of this act then, until six of said States, including the State of California, shall ratify said compact and shall consent to waive the provisions of the first paragraph of Article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven States signatory thereto, and shall have approved said compact without conditions, save that of such six-State approval, and the President by public proclamation shall have so declared, and, further, until the State of California, by act of its legislature, shall agree irrevocably and unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico,

Utah, and Wyoming, as an express covenant and in consideration of the passage of this act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact.

The States of Arizona, California, and Nevada are authorized to enter into an agreement which shall provide (1) that of the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact, there shall be apportioned to the State of Nevada 300,000 acre-feet and to the State of Arizona 2,800,000 acre-feet for exclusive beneficial consumptive use in perpetuity, and (2) that the State of Arizona may annually use one-half of the excess or surplus waters unapportioned by the Colorado River compact, and (3) that the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State, and (4) that the waters of the Gila River and its tributaries, except return flow after the same enters the Colorado River, shall never be subject to any diminution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico but if, as provided in paragraph (c) of Article III of the Colorado River compact, it shall become necessary to supply water to the United States of Mexico from waters over and above the quantities which are surplus as defined by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply, out of the main stream of the Colorado River, one-half of any deficiency which must be supplied to Mexico by the lower basin, and (5) that the State of California shall and will further mutually agree with the States of Arizona and Nevada that none of said three States shall withhold water and none shall require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses, and (6) that all of the provisions of said tri-State agreement shall be subject in all particulars to the provisions of the Colorado River compact, and (7) said agreement to take effect upon the ratification of the Colorado River compact by Arizona, California, and Nevada. (45 Stat. 1058; 43 U.S.C. § 617c(a))

#### EXPLANATORY NOTES

**Presidential Proclamation: Effective Date of Act.** On June 25, 1929, 46 Stat. 3000, President Hoover issued the following proclamation:

"Pursuant to the provisions of section 4(a) of the Boulder Canyon project act approved December 21, 1928 (45 Stat. 1057), it is hereby declared by public proclamation:

(a) That the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming have not ratified the Colorado River compact mentioned in section 13(a) of said act of December 21, 1928, within 6 months from the date of the passage and approval of said act.

"(b) That the States of California, Colorado, Nevada, New Mexico, Utah, and

Wyoming have ratified said compact and have consented 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 that each of the States last named has approved said compact without condition, except that of six-State approval as prescribed in section 13(a) of said act of December 21, 1928.

"(c) That the State of California has in all things met the requirements set out in the first paragraph of section 4(a) of said act of December 21, 1928, necessary to render said act effective on six State approval of said compact.

"(d) All prescribed conditions having been fulfilled, the said Boulder Canyon project act approved December 21, 1928, is hereby declared to be effective this date.

"In testimony whereof I have hereunto set my hand and caused the seal of the

United States of America to be affixed.

"Done at the city of Washington this 25th day of June, in the year of our Lord one thousand nine hundred and twenty-nine, and of the Independence of the United States of America the one hundred and fifty-third."

**California Limitation Act.** The California Limitation Act (Stats. Cal. 1929, ch. 16), was enacted by California in fulfillment of the requirement with respect to an act of its legislature set forth in the second half of subsection 4(a). The California Act provides that in consideration of the passage of the Boulder Canyon Project Act that the aggregate annual consumptive use (diversions less returns to the river) by California of the water of the Colorado River shall not exceed 4,400,000 acre-feet of the waters apportioned to the lower basin States by the Colorado River Compact, plus not more than one-half of any surplus or excess waters unapportioned by the Compact.

#### NOTES OF OPINIONS

#### Apportionment of waters 1

#### Desert land entries 2

#### State Acts 3

#### 1. Apportionment of waters

In passing the Boulder Canyon Project Act, Congress intended to, as shown clearly by the legislative history, and did, create its own comprehensive scheme for the apportionment among California, Arizona, and Nevada of the Lower Basin's share of the mainstream waters of the Colorado River, leaving each State her own tributaries. It decided that a fair division of the first 7,500,000 acre-feet of such mainstream waters would give 4,400,000 acre-feet to California, 2,800,000 to Arizona, and 300,000 to Nevada, and that Arizona and California should each get one-half of any surplus. Congress gave the Secretary of the Interior adequate authority to accomplish this division by giving him power to make contracts for the delivery of water and by providing that no person could have water without a contract. The limitation of California to 4,400,000 acre-feet, together with the Secretary's contracts with Arizona for 2,800,000 acre-feet and with Nevada for 300,000 acre-feet, effect a valid apportionment in keeping with the Congressional plan. *Arizona v. California*, 373 U.S. 546, 564-90, 592 (1963); Decree, 376 U.S. 340 (1964).

Where Congress has exercised its constitutional power over waters, providing its own methods for allocating water to which States are entitled, courts have no power to substitute their own notions of an equitable

apportionment for that chosen by Congress. *Arizona v. California*, 373 U.S. 546, 565 (1963).

The power of the Secretary of the Interior to apportion and distribute Colorado River water among and within the Lower Basin States through the execution of contracts for its use is subject to a number of standards and limits in the Boulder Canyon Project Act. These include (1) the limitation in § 4(a) of 4,400,000 acre-feet on California's consumptive uses out of the first 7,500,000 acre-feet of mainstream water, leaving 3,100,000 acre-feet which the Secretary properly has apportioned by contract in the quantities of 300,000 acre-feet to Nevada and 2,800,000 to Arizona; (2) the provision in § 6 setting out in order the purposes for which the Secretary must use the dam and reservoir; (3) the § 4(b) requirement for revenue provisions in the contracts adequate to ensure the recovery of the expenses of construction, operation and maintenance of the dam and other works within 50 years after their construction; (4) the directive in § 5 that water contracts for irrigation and domestic use shall be only for "permanent service"; (5) the recognition given in § 8(a) to the Colorado River Compact, which means that the Secretary and his permittees, licensees and contractees can do nothing to upset or encroach on the Compact's allocation of water between the Upper and Lower Basins; (6) the application by § 14 of general reclamation law except as the Act otherwise provides; and (7) the protection given in



§ 6 to "present perfected rights." *Arizona v. California*, 373 U.S. 546, 583-85 (1963).

In case of a shortage of mainstream water in the Lower Basin, the Secretary is not bound to require a pro rata sharing of shortages among the Lower Basin States. He must follow the standards set out in the Act; but unless and until Congress enlarges or reduces the Secretary's power, he is free to choose among the recognized methods of apportionment or to devise reasonable methods of his own, since Congress has given him full power to control, manage and operate the Government's Colorado River works and to make contracts for the sale and delivery of water on such terms as are not prohibited by the Act. *Arizona v. California*, 373 U.S. 546, 592-94 (1963).

Section 4(a) of the Boulder Canyon Project Act, providing that the State of California shall have, each year, for beneficial consumptive use not to exceed 4,400,000 acre-feet of water from the lower basin of the Colorado River, considered in connection with Article III (a) of the Colorado River Compact, must be interpreted as forbidding the Secretary of the Interior to enter into a contract with the State of Arizona for the storage of water in the contemplated reservoir, which might, as for example in years when there is less than 7,500,000 acre-feet available, interfere with the apportionment to California of its specified annual amount. Solicitor Margold Opinion, 54 I.D. 593 (1934).

## 2. Desert land entries

In exercise of the discretionary authority vested in the Secretary under section 7 of the Taylor Grazing Act, as amended, public land in the Imperial Valley, California, may be classified as not proper for disposition under the Desert Land Act, 19 Stat. 377, as amended, on the grounds that it would be contrary to the public interest at this time to increase the pressure on the inadequate water supply available for use in California from the Colorado River. *Hugh S. Ritter, Thomas M. Bunn*, 72 I.D. 111 (1965). See also *Stephen H. Clarkson*, 72 I.D. 138 (1965).

By a notice of December 2, 1965, the Secretary of the Interior repealed the suspension of a large number of desert land

entries in Imperial and Riverside Counties, California, that had been pending for a number of years in anticipation of obtaining irrigation water from the Colorado River. The suspensions had been granted under the decision in *Maggie L. Havens*, A-5580 (October 1, 1923). The Secretary stated in the notice that it would be contrary to the public interest to increase the pressure on the inadequate water supply available for use in California from the Colorado River by permitting additional federally owned lands to be developed under the desert land laws unless clear eligibility exists or unless clear grounds for relief are shown.

In certain circumstances desert land entries in Imperial and Riverside Counties affected by the notice of December 2, 1965, repealing the suspension under *Maggie L. Havens*, A-5580 (October 11, 1923), which have been reclaimed or are in the process of being reclaimed, will be considered in accordance with the principles of equity and justice as authorized by 43 U.S.C. § 1161, even though development was not completed within the statutory life remaining in the entry after March 4, 1952. *Clifton O. Myll*, A-29920 (Supp. II), 72 I.D. 536 (1965), *vacating* 71 I.D. 458 (1964), as supplemented by 71 I.D. 486 (1964).

## 3. State Acts

The Act of the California Legislature of March 4, 1929 (Stats. 1929, ch. 16) embodies the express agreement required of the State of California by the Act of December 21, 1928, with respect to the use of the waters apportioned to the lower basin States, effective when six States comply with the requirements and conditions of paragraph 2, section 4 (a) of the Act of December 21, 1928. Solicitor's Opinion, M-25151 (April 24, 1929).

The ratification of the Colorado River Compact by the State of Utah conforms to the requirements of the applicable provisions of the Boulder Canyon Project Act. Chapter 31 of the 1929 Laws of Utah, approved March 6, 1929, clearly shows that the legislature intended the ratification by that State to be "without condition save that of six-State approval." 36 Op. Atty. Gen. 72 (1929).

(b) [Contracts required for revenues to insure payment of expenses of operation and maintenance, etc., and repayment of construction within 50 years, before any money is appropriated—Work on main canal contingent on provision to insure payment of expenses—Payments to Arizona and Nevada.]—Before any money is appropriated for the construction of said dam or power plant, or any construction work done or contracted for, the Secretary of the Interior shall make provision for revenues by contract, in accordance with the

provisions of this act, adequate in his judgment to insure payment of all expenses of operation and maintenance of said works incurred by the United States and the repayment, within fifty years from the date of the completion of said works, of all amounts advanced to the fund under subdivision (b) of section 2 for such works, together with interest thereon made reimbursable under this act.

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

If during the period of amortization the Secretary of the Interior shall receive revenues in excess of the amount necessary to meet the periodical payments to the United States as provided in the contract, or contracts, executed under this act, then, immediately after the settlement of such periodical payments, he shall pay to the State of Arizona 18¾ per centum of such excess revenues and to the State of Nevada 18¾ per centum of such excess revenues. (45 Stat. 1059; 43 U.S.C. § 617c(b)).

#### NOTES OF OPINIONS

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##### 1. Conditions precedent

The Contract for Lease of Power Privilege with the City of Los Angeles, its department of water and power and the Southern California Edison Co., Ltd., is a valid agreement binding upon the city and its department to the extent to which funds are available under the provisions of the department's charter, and is in full compliance with section 4(b) of the Boulder Canyon Project Act, since the revenues which it will provide out of such funds are, in the judgment of the Secretary of the Interior, adequate to meet the requirements of that section. 36 Op. Atty. Gen. 270 (1930).

All the requirements of the said section which are made conditions precedent to the appropriation of money, the making of contracts, and the commencement of work for the construction of a dam and power plant have been fully met and performed by the Secretary of the Interior in securing contracts with the city and company. 36 Op. Atty. Gen. 270 (1930). *Accord*, Dec. Comp. Gen., A-32702 (October 10, 1930).

Inasmuch as the Coachella Valley County Water District had filed appeal in the Su-

preme Court of California from decision of the lower court validating the contract of Dec. 1, 1932, with the Imperial Irrigation District for the construction of the All-American Canal, no funds may be expended for construction until the contract has been found valid by the court of last resort. Dec. Comp. Gen., A-32702 (December 6, 1933). (Ed. note: By stipulation of the parties, the appeal was dismissed by the Supreme Court on February 26, 1934.)

The power of the Secretary of the Interior to apportion and distribute Colorado River water among and within the Lower Basin States through the execution of contracts for its use is subject to a number of standards and limits in the Boulder Canyon Project Act. These include (1) the limitation in § 4 (a) of 4,400,000 acre-feet on California's consumptive uses out of the first 7,500,000 acre-feet of mainstream water, leaving 3,100,000 acre-feet which the Secretary properly has apportioned by contract in the quantities of 300,000 acre-feet to Nevada and 2,800,000 to Arizona; (2) the provision in § 6 setting out in order the purposes for which the Secretary must use the dam and reservoir; (3) the § 4(b) requirement for revenue provisions in the contracts adequate to ensure the recovery of the expenses of construction, operation and maintenance of the dam and other works within 50 years after their construction; (4) the directive

in § 5 that water contracts for irrigation and domestic use shall be only for "permanent service"; (5) the recognition given in § 8(a) to the Colorado River Compact, which means that the Secretary and his permittees, licensees and contractees can do nothing to upset or encroach on the Compact's allocation of water between the Upper and Lower Basins; (6) the application by § 14 of general reclamation law except as the Act otherwise provides; and (7) the protection given in § 6 to "present perfected rights." *Arizona v. California*, 373 U.S. 546, 583-85 (1963).

### 2. Flood control

The language of section 2(b) shows clearly that Congress did not regard the \$25,000,000 thereby allocated to flood control as falling within the amortization plan embodied in section 4(b). The \$25,000,000 allocated to flood control must be regarded as falling outside of the words "all amounts advanced to the fund under subdivision (b) of section 2 for such works" in section 4(b). The Secretary of the Interior is not required, in fixing the sale rates for power to be generated at Boulder Dam, to make provision for the amortization within the 50 years of the \$25,000,000 allocated by the Act to flood control. 36 Op. Atty. Gen. 121 (1929).

### 3. Municipal water supply

The Secretary of the Interior is authorized to contract with the City of San Diego for the repayment within 40 years without interest of the costs of added capacity in the All-American Canal needed to carry water for the beneficial consumptive use of the city. Solicitor Margold Opinion, 54 I.D. 414 (1934).

### 4. Reclamation laws

Sections 1 and 4(b) of the Boulder Canyon Project Act which require the costs of the main canal connecting with Imperial Valley and appurtenant structures to be repaid pursuant to reclamation law, carry into effect the excess land provisions of section 46 of the Omnibus Adjustment Act of 1926. Solicitor Barry Opinion, 71 I.D. 496, 500-01 (1964), in re application of excess land laws to private lands in Imperial Irrigation District.

Advances from the general Treasury to the Colorado River Dam fund, used solely in the construction, operation, and main-

tenance of the All-American Canal and its diversion dam, and disbursements from the Colorado River Dam fund for such purposes, are not intended by the act to be interest bearing, but are intended to fall within the policy of the general reclamation law, *i.e.*, the Act of May 25, 1926 (44 Stat. 636), providing for a period of repayment of 40 years without interest. Solicitor's Opinion, August 3, 1929.

The omission of any mention of interest in the second paragraph of section 4(b), in contradistinction to the express mention thereof in the first paragraph, is significant, and strongly indicative of an intention of Congress that interest upon the construction cost of the All-American Canal should not be charged against lands benefited. The main canal was singled out and treated as a purely reclamation project, the expenditures for which were to be reimbursable in the same manner as those for other projects administered under the reclamation law. 36 Op. Atty. Gen. 121 (1929).

### 5. Upstream projects

Appropriations for the Colorado River Storage project are authorized to be expended to meet costs of deficiencies in the generation of energy at the Hoover Dam powerplant occasioned by the necessity to fill Colorado River Storage project reservoirs, if the Secretary of the Interior concludes that such a step is appropriate to maintaining a reasonable schedule in meeting the statutory payout requirements of both Hoover Dam and Glen Canyon Dam imposed by the Boulder Canyon Project Act, the Boulder Canyon Project Adjustment Act, and the Colorado River Storage Project Act. Memorandum of Associate Solicitor Weinberg, July 17, 1962.

If an upstream project, such as the proposed Central Arizona project and Bridge Canyon project in the Lower Colorado River Basin, interferes with the statutory responsibility of the Secretary to recover the costs of Hoover Dam by June 1, 1987, or to recover the costs of Davis and Parker Dams within a reasonable period of time, then the cost of such interference should be included as one of the "costs" of the new upstream development under section 9(a) of the Reclamation Project Act of 1939. Memorandum of Chief Counsel Fix, October 9, 1947.

Sec. 5. [Contracts for storage of water and its delivery, and for generation and sale of electrical energy—Congress to prescribe basis of charges—Revenues to be in separate fund. (a) Time limit of 50 years on contracts for electrical energy—Contracts to be made with view of returns—Readjustment of contracts upon demand. (b) Renewal of electrical energy contracts. (c) Contracts

to be made with responsible applicants for meeting revenues required—**Adjustment of conflicting applications. (d) Contracting agencies for electrical energy may be required to share in benefits.**]—The Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this act and the payments to the United States under subdivision (b) of section 4. 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.

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

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

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

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

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

electrical energy and not taken, resulting from the termination of the supply.

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

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

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

The use is hereby authorized of such public and reserved lands of the United States as may be necessary or convenient for the construction, operation and maintenance of main transmission lines to transmit said electrical energy (45 Stat. 1060; 43 U.S.C. § 617d)

## EXPLANATORY NOTE

Reference in the Text. The Federal Water Power Act, referred to in the text, is the

Act of June 10, 1920, 41 Stat. 1063. The Act appears herein in chronological order.

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## 1. Water—Apportionment

In passing the Boulder Canyon Project Act, Congress intended to, as shown clearly by the legislative history, and did, create its own comprehensive scheme for the apportionment among California, Arizona, and Nevada of the Lower Basin's share of the mainstream waters of the Colorado River, leaving each State her own tributaries. It decided that a fair division of the first 7,500,000 acre-feet of such mainstream waters would give 4,400,000 acre-feet to California, 2,800,000 to Arizona, and 300,000 to Nevada, and that Arizona and California should each get one-half of any surplus. Congress gave the Secretary of the Interior adequate authority to accomplish this division by giving him power to make contracts for the delivery of water and by providing that no person could have water without a contract. The limitation of California to 4,400,000 acre-feet, together with the Secretary's contracts with Arizona for 2,800,000 acre-feet and with Nevada for 300,000 acre-feet, effect a valid apportionment in keeping with the Congressional plan. *Arizona v. California*, 373 U.S. 546, 564-90, 592 (1963); Decree, 376 U.S. 340 (1964).

All uses of mainstream Colorado River water within a Lower Basin State are to be charged against that State's apportionment, which, of course, includes uses by the United States. *Arizona v. California*, 373 U.S. 546, 601 (1963); Decree, 376 U.S. 340, 346 (1964).

No matter what waters are apportioned by the Colorado River Compact between the Upper and Lower Basins, the negotiations between the States and the congressional debate leading to the passage of the Boulder Canyon Project Act show that the water apportioned therein among the Lower

Basin States is mainstream water, reserving to each State the exclusive use of the waters of her own tributaries. *Arizona v. California*, 373 U.S. 546, 567-75 (1963).

The Secretary may charge Arizona and Nevada with diversions from the mainstream of the Colorado River anywhere below Lee Ferry, whether above or below Hoover Dam. *Arizona v. California*, 373 U.S. 546, 590-91 (1963).

In case of a shortage of mainstream water in the Lower Basin, the Secretary is not bound to require a pro rata sharing of shortages among the Lower Basin States. He must follow the standards set out in the Act; but unless and until Congress enlarges or reduces the Secretary's power, he is free to choose among the recognized methods of apportionment or to devise reasonable methods of his own, since Congress has given him full power to control, manage and operate the Government's Colorado River works and to make contracts for the sale and delivery of water on such terms as are not prohibited by the Act. *Arizona v. California*, 373 U.S. 546, 592-94 (1963).

## 2. —Rights of United States

Under its broad powers to regulate navigable waters under the Commerce Clause and to regulate government lands under Art. IV, § 3, of the Constitution, the United States has power to reserve water rights for its reservations and its property. *Arizona v. California*, 373 U.S. 546, 597-98 (1963).

The United States intended to reserve water sufficient for the future requirements of the Lake Mead National Recreational Area, the Havasu Lake National Wildlife Refuge, the Imperial National Wildlife Refuge and the Gila National Forest. *Arizona v. California*, 373 U.S. 546, 601 (1963); Decree, 376 U.S. 340, 345-46 (1964).

When the United States created the Chemehuevi, Cocopah, Yuma, Colorado River and Fort Mohave Indian Reservations in Arizona, California and Nevada, or added to them, whether by Act of Congress or by Executive Order, it reserved not only the land but also the use of enough water from the Colorado River to irrigate the irrigable portions of the reserved lands. Enough water was intended to be reserved to irrigate, now or in the future, all the practicably irrigable acreage on the reservations, which the Master found to be about 1,000,000 acre-feet of water to be used on about

135,000 irrigable acres of land. These water rights, having vested before the Act became effective in 1929, are "present perfected rights" and as such are entitled to priority under the Act. *Arizona v. California*, 373 U.S. 546, 595-601 (1963); Decree, 376 U.S. 340, 343-45 (1964).

The United States is not entitled to the use, without charge against its consumption, of any Colorado River waters that would have been wasted but for salvage by the Government on its wildlife preserves. *Arizona v. California*, 373 U.S. 546, 601 (1963).

### 3. —Rights of others

The reservation of Colorado River water for Boulder City, as authorized by the Boulder City Act of 1958, has a priority date of May 15, 1931. Decree entered in *Arizona v. California*, 376 U.S. 340, 346 (1964).

### 4. —Contracts with Secretary

The power of the Secretary of the Interior to apportion and distribute Colorado River water among and within the Lower Basin States through the execution of contracts for its use is subject to a number of standards and limits in the Boulder Canyon Project Act. These include (1) the limitation in § 4(a) of 4,400,000 acre-feet on California's consumptive uses out of the first 7,500,000 acre-feet of mainstream water, leaving 3,100,000 acre-feet which the Secretary properly has apportioned by contract in the quantities of 300,000 acre-feet to Nevada and 2,800,000 to Arizona; (2) the provision in § 6 setting out in order the purposes for which the Secretary must use the dam and reservoir; (3) the § 4(b) requirement for revenue provisions in the contracts adequate to ensure the recovery of the expenses of construction, operation and maintenance of the dam and other works within 50 years after their construction; (4) the directive in § 5 that water contracts for irrigation and domestic use shall be only for "permanent service"; (5) the recognition given in § 8(a) to the Colorado River Compact, which means that the Secretary and his permittees, licensees and contractees can do nothing to upset or encroach on the Compact's allocation of water between the Upper and Lower Basins; (6) the application by § 14 of general reclamation law except as the Act otherwise provides; and (7) the protection given in § 6 to "present perfected rights." *Arizona v. California*, 373 U.S. 546, 583-85 (1963).

In choosing between users within each State and in settling the terms of his contracts for the use of stored Colorado River water, the Secretary is not bound, either by

section 18 of the Boulder Canyon Project Act, or by section 8 of the Reclamation Act, to follow State law. Although section 18 allows the States to do things not inconsistent with the Project Act or with Federal control of the river, as for example, regulation of the use of tributary water and protection of present perfected rights, the general saving language of section 18 cannot bind the Secretary by State law and thereby nullify the contract power expressly conferred upon him by section 5. *Arizona v. California*, 373 U.S. 546, 580-90 (1963).

The fact that the Secretary has made a contract directly with the State of Nevada, through her Colorado River Commission, for the delivery of water does not impair the Secretary's power to require Nevada water users, other than the State, to make further contracts. *Arizona v. California*, 373 U.S. 546, 591-92 (1963).

Under the Supreme Court decision in *Arizona v. California*, 373 U.S. 546, 591-2 (1963), and in the absence of specific Federal legislation providing otherwise, neither the Colorado River Commission of Nevada nor any other State agency under the contract of March 30, 1942, as amended, with the United States for the delivery to the State of not to exceed 300,000 acre-feet per year from storage in Lake Mead has authority to grant permits or to approve permits to appropriate stored water from Lake Mead. Water users in Nevada must enter into contracts directly with the United States. Letter of Assistant Secretary Holm to Mr. Ivan P. Head, December 30, 1963.

The action of the Secretary of the Interior in reducing by 10 percent the amount of Colorado River water which an irrigation district might order during the balance of 1964, and at the same time providing that additional water would be made available to meet such individual hardship cases as might develop, was within the Secretary's statutory authority and not a violation of the Secretary's contract with the district to deliver, within stated amounts, so much Colorado River water "as may reasonably be required and beneficially used" by the district. *Yuma Mesa Irr. and Drainage Dist. v. Udall*, 253 F. Supp. 909 (D. D.C. 1966).

### 5. —California allocation contract

The Imperial Irrigation District has authority to enter into the proposed seven-party allocation contract with the Palo Verde Irrigation District, Coachella Valley County Water District, Metropolitan Water District of Southern California, City of Los Angeles, City of San Diego and County of San Diego, to apportion among the parties all of the waters of the Colorado

River to which the State of California may be entitled under the Colorado River Compact, the Boulder Canyon Project Act, and other applicable legislation; and a bill of complaint to enjoin the District from entering into the compact will be dismissed. The contract is a necessary step of all parties to secure the benefit of retained or stored water, to compromise disputes over water rights, and to serve the common good. *Greason, et al. v. Imperial Irr. Dist., et al.*, 59 F. 2d 529 (9th Cir. 1932).

#### 6. —Municipal supplies

The Secretary of the Interior has authority under sections 1 and 5 of the Boulder Canyon Project Act to provide increased capacity in the All-American Canal to carry water to the City of San Diego for the beneficial consumptive use of the city. Solicitor Margold Opinion, 54 I.D. 414 (1934).

#### 11. Power—General

The fixing of financial requirements and rigid examination of the financial status of competing bidders for power is not only within the Secretary's discretion but is an absolute obligation resting upon him. Solicitor Finney Opinion, 53 I.D. 1 (1930).

The Secretary is not required to accept the highest bid if that bid is in excess of the price which can be realized for the power under competitive conditions at competitive centers. The selling standard is to be "reasonable returns," not "all the traffic will bear." The phrase "shall be made with a view to obtaining reasonable returns" was in fact a specific amendment to this section (Cong. Rec. Senate, Dec. 14, 1928, p. 518), and clearly indicates the selling basis deemed to be feasible and most in line with public interest and the equitable distribution of benefits of Boulder Dam power. If the bidder can not sell his power in competition with other sources he is not a desirable source for reimbursement of the Federal expenditure. Solicitor Finney Opinion, 53 I.D. 1 (1930).

The term "public interest," used in the first paragraph of subsection 5(c) is the Government's responsibility, financial and otherwise, to all the people of the United States for the greatest good to be derived from this project; it excludes confinement of the benefits of Boulder Dam power to one locality out of the many which comprise the "region" capable of service. It is a source of broad discretionary power in the Secretary. The "public interest" requires, first, financial security of the United States, and, secondly, equality of access to Boulder Dam power by areas composing the region in proportion to the needs of the applicants. The allocation of power passes from the

realm of the Secretary's discretion into the area of rigid legal rights only after apportionment among the applicants whose demands for power are equally consistent with the public interest. Solicitor Finney Opinion, 53 I.D. 1 (1930).

Public interest includes the necessity for making a good business contract which will guarantee the return of the Federal investment as required by section 4(b). The primary public interest is in the soundness of the contracts and the solvency of the contractor, not in the corporate or municipal character of that contractor. All preferences are subordinate to this public interest. Solicitor Finney Opinion, 53 I.D. 1 (1930).

#### 12. —Preference

The preference provisions of section 5 of the Flood Control Act of 1944 must be read in *pari materia* with the preference provisions of section 5(c) of the Boulder Canyon Project Act (43 U.S.C. §617d(c)), the Tennessee Valley Authority Act (16 U.S.C. §831k), and Section 4 of the Bonneville Project Act (16 U.S.C. §832c(d)). 41 Op. Atty Gen. 236, 245 (1955), in re disposition of power from Clark Hill reservoir project.

Concerning the question whether a municipality or a State has a preference for power which it proposes to sell outside its boundaries as against a bid for power by a privately-owned public utility proposing to sell in the same area outside the boundaries, the "preference" of the municipality is a preference in consumptive right, not in merchandising advantage. Outside its own borders a State or municipal corporation, reselling power, is on a parity with any other public utility selling in that territory. If it seeks to elect, on behalf of consumers who are not its citizens, whether those consumers shall buy from it or from another company, its decision has not the dignity of a "preference" within the policy of the Federal Water Power Act (sec. 7), but has the status of a competitive offer. Solicitor Finney Opinion, 53 I.D. 1 (1930).

The States of Nevada, Arizona, and California can not claim two separate independent preference rights, one under the Federal Water Power Act (section 7), and another under the Boulder Canyon Project Act. The importance of the preference language of the project act lies in its distinction between States and municipalities, not in any distinction as to place of use. The special reference to the preference of the three lower basin States in the project act preserves the rights of Arizona and Nevada as superior to those of Los Angeles, provided both should meet the conditions of the Federal water power act. But to indicate that no greater concession from the policy of the



Federal water power act was intended, the restriction "for use within the State" was added. No distinction between the city of Los Angeles on the one hand, and other municipalities on the other, can be recognized. Solicitor Finney Opinion, 53 I.D. 1 (1930).

It appears to have been the intent of the language of section 5 (c) following the word "except" to convey a limited preference upon the three lower basin States. The preference of a State over a municipality given by the project act is intended to apply to these three States only. Solicitor Finney Opinion, 53 I.D. 1 (1930).

A State, and a municipality of another State, both presenting applications under section 7 of the Federal Water Power Act, stand on a basis of equality. If the conflict is between applications of a State and a municipality of that same State, the right of the State is superior. If the conflict is between a State and a municipality foreign to it, the Secretary may make an equitable allocation between them in accordance with the public interest and in accordance with what, in his discretion, appears the best method of conserving and utilizing the water resources of the region. Solicitor Finney Opinion, 53 I.D. 1 (1930).

Within 6 months a State presenting plans equally well adapted as those of a competing municipality (outside the State) and equally consistent with the public interest, might claim power in preference to the municipality. After six months the State reverts to the parity with outside municipalities established by the Federal Water Power Act. Solicitor Finney Opinion, 53 I.D. 1 (1930).

A preference right itself is not assignable either before or after the execution of a contract by the State. A contract obtained in exercise of this preference right is assignable, subject to all restrictions and conditions contained in the original contract, and without diminution of the State's liability to the United States and without waiver of the requirement of financial and legal capacity of the assignee. Solicitor Finney Opinion, 53 I.D. 1 (1930).

### 13.—Contracts

The Secretary of the Interior may not discriminate against the California Electric Power Company in the sale of power from Boulder Dam in such matters as granting a "load-building period" and lower rates for "secondary power." *California Electric Power Co. v. United States*, 60 F. Supp. 344, 104 Ct. Cl. 289 (1945).

The Citizens Utilities Company made application to purchase 5,000 kilowatts of

electrical energy from the power plant at Boulder Dam for use in Arizona, and the Department, citing the contract of April 26, 1930, with the City of Los Angeles and the Southern California Edison Co. for lease of power privileges at Boulder Dam, held that the States of Arizona or Nevada must themselves contract for the Boulder Dam power allotted to them, and that any such contract made by the State of Arizona would not constitute a ratification by Arizona of the Colorado River compact, but that Arizona "would be bound by the Compact for the duration of the power contract" (Citing Sec. 8a of the Boulder Canyon Project Act.) It was also held that secondary energy which is not used by the Metropolitan Water District or the lessees and unused firm energy allocated to the district which is not taken by the lessees, may be disposed of to the Citizens Utilities Company for use in the State of Arizona, and that such energy would not constitute a part of the allotment of firm energy made to the State of Arizona. Solicitor's Opinion, M-29291 (July 13, 1937).

In view of the sufficiency of the city and company contracts to meet all requirements of the Boulder Canyon Act, the power contract executed with the Metropolitan Water District is valid notwithstanding the fact the district has not yet voted bonds to provide funds to build the aqueduct on which the power would be used. Even if the aqueduct financing were construed as being a prerequisite, the Secretary's reservation of energy for the district is within his authority under the second paragraph of section 5 (c) of the Boulder Canyon Project Act. 36 Op. Atty. Gen. 270 (1930).

### 14.—Renewals

Citizens Utilities Company and California Pacific Utilities Company have a statutory right under section 5(b) of the Boulder Canyon Project Act to a renewal of their contract to purchase Hoover Dam energy surplus to the needs of the Metropolitan Water District, as against the Government's contention that the statutory right of renewal extends only to those contractors who, in effect, underwrote the project by undertaking to purchase project electricity at a time when such promises were a condition precedent to the appropriation of money for the project, and even though the Government in the meantime had entered into contracts purporting to sell the energy to which plaintiff's right of renewal would extend. *Citizens Utilities Co. v. United States*, 137 Ct. Cl. 547, 149 F. Supp. 158 (1957), cert. denied, 355 U.S. 892 (1957).

**15. —Rights-of-way**

The Secretary may make a reasonable charge (a) for rights-of-way for oil pipe lines over the public land granted pursuant to section 28 of the act of Feb. 25, 1920 (41

Stat. 437, 449), as amended, but not (b) for right-of-way for transmission line under section 5 (d) of the Boulder Canyon Project Act (45 Stat. 1057). Solicitor's Opinion, 57 ID 31 (1939).

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

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

The Federal Power Commission is hereby directed not to issue or approve any permits or licenses under said Federal water power act upon or affecting the Colorado River or any of its tributaries, except the Gila River, in the States of Colorado, Wyoming, Utah, New Mexico, Nevada, Arizona, and California until his act shall become effective as provided in section 4 herein. (45 Stat. 1061; 3 U.S.C. § 617e)

**EXPLANATORY NOTE**

**Reference in the Text.** The Federal Water Power Act, referred to in the text, is the Act of June 10, 1920, 41 Stat. 1063. The Act appears herein in chronological order.

## NOTES OF OPINIONS

Power 3  
 River regulation 1  
 Water uses 2

**1. River regulation**

The release of water through the California Sluiceway at Imperial Dam in order to transport sediment load downstream is appropriate to accomplish river regulation. The United States has, under the contract with Imperial Irrigation District and within the limitations provided, a prior right to release water for this purpose as compared with the diversion of water for generation of power at Pilot Knob. Also, Mexico cannot, under the Mexican Water Treaty, insist as a matter of right that all or substantially all of the water allotted to it under the Treaty be delivered via the All-American Canal; nor can Mexico require that the United States assume responsibility either for the quality of the water delivered to it or for disposal of sediment load. Memorandum of Associate Solicitor Fisher, October 17, 1956.

**2. Water uses**

The power of the Secretary of the Interior to apportion and distribute Colorado River water among and within the Lower Basin States through the execution of contracts for its use is subject to a number of standards and limits in the Boulder Canyon Project Act. These include (1) the limitation in § 4(a) of 4,400,000 acre-feet on California's consumptive uses out of the first 7,500,000 acre-feet of mainstream water, leaving 3,100,000 acre-feet which the Secretary properly has apportioned by contract in the quantities of 300,000 acre-feet to Nevada and 2,800,000 to Arizona; (2) the provision in § 6 setting out in order the purposes for which the Secretary must use the dam and reservoir; (3) the § 4(b) requirement for revenue provisions in the contracts adequate to ensure the recovery of the expenses of construction, operation and maintenance of the dam and other works within 50 years after their construction; (4) the directive in § 5 that water contracts for irrigation and domestic use shall

be only for "permanent service"; (5) the recognition given in § 8(a) to the Colorado River Compact, which means that the Secretary and his permittees, licensees and contractees can do nothing to upset or encroach on the Compact's allocation of water between the Upper and Lower Basins; (6) the application by § 14 of general reclamation law except as the Act otherwise provides; and (7) the protection given in § 6 to "present perfected rights." *Arizona v. California*, 373 U.S. 546, 583-85 (1963).

In construing the Boulder Canyon Project Act, the Court would look to the Colorado River Compact for the limited purposes of interpreting compact terms specifically incorporated in the Act—such as the reference to satisfaction of "present perfected rights" in section 6, and the definition of "domestic" in section 12—and of resolving disputes between the Upper and Lower Basins. *Arizona v. California*, 373 U.S. 546, 566 (1963).

Congress did not intend that the power of the Secretary of Interior to contract with water users under the Boulder Canyon Project Act was to be controlled by law of prior appropriation. *Arizona v. California*, 373 U.S. 546 (1963).

**3. Power**

The authority conferred on the Secretary of the Interior by section 6 of the Boulder Canyon Project Act to prescribe and enforce rules and regulations conforming with the requirements of the Federal water power act respecting "control of rates and service" of companies purchasing Hoover power, was superseded and repealed by Part II of the Federal Power Act of 1935 with respect to resales of electric energy from Hoover dam at wholesale in interstate commerce, and therefore the Federal Power Commission has jurisdiction over the rates at which Southern California Edison Company sells power, including energy from Hoover and Davis dams, to the City of Colton, California. *F.P.C. v. Southern California Edison Co.*, 376 U.S. 205, 216-20 (1964).

**Sec. 7. [Title to main canal—Utilization of power possibilities by participating agencies—Revenues.]**—The Secretary of the Interior may, in his discretion, when repayments to the United States of all money advanced, with interest, reimbursable hereunder, shall have been made, transfer the title to said canal and appurtenant structures, except the Laguna Dam and the main canal and appurtenant structures down to and including Syphon Drop, to the districts or other agencies of the United States having a beneficial interest therein in proportion to their respective capital investments under such form of organization as may

be acceptable to him. The said districts or other agencies shall have the privilege at any time of utilizing by contract or otherwise such power possibilities as may exist upon said canal, in proportion to their respective contributions or obligations toward the capital cost of said canal and appurtenant structures from and including the diversion works to the point where each respective power plant may be located. The net proceeds from any power development on said canal shall be paid into the fund and credited to said districts or other agencies on their said contracts, in proportion to their rights to develop power, until the districts or other agencies using said canal shall have paid thereby and under any contract or otherwise an amount of money equivalent to the operation and maintenance expense and cost of construction thereof. (45 Stat. 1062; 43 U.S.C. § 617f)

## NOTES OF OPINIONS

## 1. "Net proceeds"

The Public Works Administration and the Rural Electrification Administration proposed to make loans aggregating \$3,460,000 to the Imperial Irrigation District for financing the construction of an electric power production, transmission and distribution system in the Imperial Valley, Calif., and in construing the nature and extent of the security of the United States for repayment of the construction cost of the All-American canal under its contract of Dec. 1, 1932, as amended, with the Imperial Irrigation District, the Acting Solicitor held that the payments of principal and interest on the PWA and REA bonds and the one-year reserves for such payments may be deducted in determining the amount of "net proceeds" payable into the Colorado River dam fund except that the so-called "second lien" of the REA bonds on the PWA revenues would be ineffective as against the prior right of the United States under Sec. 17 of the Boulder Canyon project act and Article 35 of the All-American canal contract, in the event that the right of the United States to net proceeds should

be held to be limited to those from generation of energy alone. Acting Solicitor Kirgis Opinion, 56 I.D. 116 (1937).

It is clear that under section 7 of the Boulder Canyon Project Act, the "net proceeds" from any power development on the All-American Canal are required to be paid into the Colorado River Dam Fund and credited to the various districts until the construction, operation and maintenance costs have been paid. However, section 7 does not specify when this payment is to be made. With respect to Coachella Valley County Water District's share of the net proceeds from power facilities on the canal operated by the Imperial Irrigation District, the requirements of the law will be met if:

- (1) the net proceeds for 1954 and subsequent years are paid directly by Imperial into the Colorado River Dam Fund; and
- (2) the \$490,366.02 in net proceeds paid by Imperial directly to Coachella for the years 1945 through 1953, which Coachella used to purchase U.S. Government bonds, is paid to the Fund as the bonds mature. Dec. Comp. Gen. B-124783 (September 2, 1955).

**Sec. 8. [(a) Colorado River compact to control in use of water. (b) Use of water also governed by compact among States of the lower division.]—(a) The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried and/or distributed by the reservoir, canals, and other works herein authorized, shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation of said reservoir, canals, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, anything in this act to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide.**

(b) Also the United States, in constructing, managing, and operating the dam, reservoir, canals, and other works herein authorized, including the appro-

priation, delivery, and use of water for the generation of power, irrigation, or other uses, and all users of water thus delivered and all users and appropriators of waters stored by said reservoir and/or carried by said canal, including all permittees and licensees of the United States or any of its agencies, shall observe and be subject to and controlled, anything to the contrary herein notwithstanding, by the terms of such compact, if any, between the States of Arizona, California, and Nevada, or any two thereof, for the equitable division of the benefits, including power, arising from the use of water accruing to said States, subsidiary to and consistent with said Colorado River compact, which may be negotiated and approved by said States and to which Congress shall give its consent and approval on or before January 1, 1929; and the terms of any such compact concluded between said States and approved and consented to by Congress after said date: *Provided*, That in the latter case such compact shall be subject to all contracts, if any, made by the Secretary of the Interior under section 5 hereof prior to the date of such approval and consent by Congress. (45 Stat. 1062; 43 U.S.C. § 617g)

## NOTES OF OPINIONS

## 1. Colorado River Compact

The declarations in sections 1, 8(a), 13(b), and 13(c) of the Boulder Canyon Project Act that the Secretary of the Interior and the United States shall be subject to and controlled by the Colorado River Compact, were made only to show that the Act and its provisions were in no way upset, alter, or affect the Compact's congressionally approved division of water between the Upper and Lower Basins. They were not intended to make the compact and its provisions control or affect the Act's allocation among and distribution of water within the States of the Lower Basin. *Arizona v. California*, 373 U.S. 546, 567 (1963).

The power of the Secretary of the Interior to apportion and distribute Colorado River water among and within the Lower Basin States through the execution of contracts for its use is subject to a number of standards and limits in the Boulder Canyon Project Act. These include (1) the limitation in § 4(a) of 4,400,000 acre-feet on California's consumptive uses out of the first 7,500,000 acre-feet of mainstream water, leaving 3,100,000 acre-feet which the Secretary properly has apportioned by contract in the quantities of 300,000 acre-feet to Nevada and 2,800,000 to Arizona; (2) the provision in § 6 setting out in order the purposes for which the Secretary must use

the dam and reservoir; (3) the § 4(b) requirement for revenue provisions in the contracts adequate to ensure the recovery of the expenses of construction, operation and maintenance of the dam and other works within 50 years after their construction; (4) the directive in § 5 that water contracts for irrigation and domestic use shall be only for "permanent service"; (5) the recognition given in § 8(a) to the Colorado River Compact, which means that the Secretary and his permittees, licensees and contractees can do nothing to upset or encroach on the Compact's allocation of water between the Upper and Lower Basins; (6) the application by § 14 of general reclamation law except as the Act otherwise provides; and (7) the protection given in § 6 to "present perfected rights." *Arizona v. California*, 373 U.S. 546, 583-85 (1963).

Apportionment of the Lower Basin waters of the Colorado River is not controlled by doctrine of equitable apportionment or by the Colorado River Compact. *Arizona v. California*, 373 U.S. 546 (1963).

As Congress intended to apportion only the Colorado River mainstream, the Secretary of Interior cannot reduce water deliveries thereunder to Arizona and Nevada by the amount of their uses from tributaries above Lake Mead, though the Secretary may charge them for their diversions from the mainstream above the lower basin. *Arizona v. California*, 373 U.S. 546 (1963).

Sec. 9. [Withdrawal of all irrigable lands—Entry under reclamation law—Preference in entry to soldiers.]—All lands of the United States found by the Secretary of the Interior to be practicable of irrigation and reclamation by the

irrigation works authorized herein shall be withdrawn from public entry. Thereafter, at the direction of the Secretary of the Interior, such lands shall be opened for entry, in tracts varying in size but not exceeding one hundred and sixty acres, as may be determined by the Secretary of the Interior, in accordance with the provisions of the reclamation law, and any such entryman shall pay an equitable share in accordance with the benefits received, as determined by the said Secretary, of the construction cost of said canal and appurtenant structures; said payments to be made in such installments and at such times as may be specified by the Secretary of the Interior, in accordance with the provisions of the said reclamation law, and shall constitute revenue from said project and be covered into the fund herein provided for: *Provided*, That all persons who served in the United States Army, Navy, Marine Corps, or Coast Guard during World War II, the War with Germany, the War with Spain, or in the suppression of the insurrection in the Philippines, and who have been honorably separated or discharged therefrom or placed in the Regular Army or Naval Reserve, shall have the exclusive preference right for a period of three months to enter said lands, subject, however, to the provisions of subsection (c) of section 4 of the Act of December 5, 1924 (43 Stat. 672, 702; 43 U.S.C., sec. 433); and also, so far as practicable, preference shall be given to said persons in all construction work authorized by this act: *Provided further*, That the above exclusive preference rights shall apply to veteran settlers on lands watered from the Gila canal in Arizona the same as to veteran settlers on lands watered from the All-American canal in California: *Provided further*, That in the event such an entry shall be relinquished at any time prior to actual residence upon the land by the entryman for not less than one year, lands so relinquished shall not be subject to entry for a period of sixty days after the filing and notation of the relinquishment in the local land office, and after the expiration of said sixty-day period such lands shall be open to entry, subject to the preference in this section provided. (45 Stat. 1063; Act of March 6, 1946, 60 Stat. 36; 43 U.S.C. § 617h)

## EXPLANATORY NOTES

**1946 Amendment.** The Act of March 6, 1946, 60 Stat. 36, amended section 9 by (1) adding the words "Coast Guard" and "World War II" in the first proviso, (2) by changing "Navy" before the word "Reserve" to "Naval" in the same proviso, and (3) adding the extra second proviso. The effect of these amendments is to extend the veteran's preference to veterans of World War II and extend such preference to lands

watered from the Gila Canal in Arizona. The 1946 Act appears herein in chronological order.

**Reference in the Text.** Subsection (c) of section 4 of the Act of December 5, 1924 (43 Stat. 672, 702; 43 U.S.C., sec. 433), referred to in the text, deals with the qualifications of applicants for entry. The Act is the Fact Finders' Act, which appears herein in chronological order.

## NOTES OF OPINIONS

**Practicability of irrigation 1**  
**Veterans preference 2**

**1. Practicability of irrigation**

When it appears that a commitment in a contract between the United States and an irrigation district with respect to the opening of an area of public lands within the district to entry was based upon a mutual

mistake of fact concerning the irrigability of such lands and the practicability of irrigating them, the commitment is voidable, and should be disaffirmed, to the extent that the Secretary of the Interior finds that the lands are not in fact "practicable of irrigation and reclamation." Solicitor White Opinion, M-35090 (March 18, 1949), in

re East Mesa Lands, Imperial Irrigation District.

The Secretary of the Interior is authorized by section 9 of the Boulder Canyon Project Act to open for entry under the reclamation laws only those public lands which he finds are "practicable of irrigation and reclamation" by the irrigation works authorized in the Act. Whether a particular area of public land is "practicable of irrigation and reclamation" is a question of fact to be decided by the Secretary, and a mistaken determination made by one Secretary that the area is "practicable of irrigation and of reclamation" does not prevent a subsequent Secretary from reversing the earlier

finding on the basis of later and more adequate data. Solicitor White Opinion, M-35090 (March 18, 1949), in re East Mesa Lands, Imperial Irrigation District.

## 2. Veterans preference

The veterans preference provision of section 9 of the Boulder Canyon Project Act was not adopted by the Interior Department Appropriation Act for 1938, approved August 9, 1937, for the Gila project ("Gila project, Arizona, \$700,000; said Gila project \* \* \* to be subject to the provisions of the Boulder Canyon Project \* \* \*"), and the lands in the Gila project are not subject thereto. Acting Solicitor Kirgis Opinion, 57 I.D. 177 (1940).

**Sec. 10. [Contract with Imperial Irrigation District not modified—Additional contracts.]**—Nothing in this act shall be construed as modifying in any manner the existing contract, dated October 23, 1918, between the United States and the Imperial Irrigation District, providing for a connection with Laguna Dam; but the Secretary of the Interior is authorized to enter into contract or contracts with the said district or other districts, persons, or agencies for the construction, in accordance with this act, of said canal and appurtenant structures, and also for the operation and maintenance thereof, with the consent of the other users. (45 Stat. 1063; 43 U.S.C. § 617i)

**Sec. 11. [Studies and investigations of Parker-Gila Valley project—Report by December 10, 1931.]**—The Secretary of the Interior is hereby authorized to make such studies, surveys, investigations, and do such engineering as may be necessary to determine the lands in the State of Arizona that should be embraced within the boundaries of a reclamation project, heretofore commonly known and hereafter to be known as the Parker-Gila Valley reclamation project, and to recommend the most practicable and feasible method of irrigating lands within said project, or units thereof, and the cost of the same; and the appropriation of such sums of money as may be necessary for the aforesaid purposes from time to time is hereby authorized. The Secretary shall report to Congress as soon as practicable, and not later than December 10, 1931, his findings, conclusions, and recommendations regarding such project. (45 Stat. 1063)

### EXPLANATORY NOTE

**Codification.** This section originally was U.S. Code, but is no longer shown there-  
codified as section 617j of title 43 of the under.

**Sec. 12. [Definitions of terminology employed.]**—"Political subdivision" or "political subdivisions" as used in this act shall be understood to include any State, irrigation or other district, municipality, or other governmental organization.

"Reclamation law" as used in this act shall be understood to mean that certain act of the Congress of the United States approved June 17, 1902, entitled "An Act appropriating the receipts from the sale and disposal of public land in certain States and Territories to the construction of irrigation works for the rec-

lamation of arid lands", and the acts amendatory thereof and supplemental thereto.

"Maintenance" as used herein shall be deemed to include in each instance provision for keeping the works in good operating condition.

"The Federal water power act", as used in this act, shall be understood to mean that certain act of Congress of the United States approved June 10, 1920, entitled "An act to create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto; and to repeal section 18 of the river and harbor appropriation act, approved August 8, 1917, and for other purposes", and the acts amendatory thereof and supplemental thereto.

"Domestic" whenever employed in this act shall include water uses defined as "domestic" in said Colorado River compact. (45 Stat. 1064; 43 U.S.C. § 617k).

#### EXPLANATORY NOTE

Reference in the Text. Extracts from the Federal Water Power Act, approved June 10, 1920, referred to in the text, appear herein in chronological order.

#### NOTE OF OPINION

##### 1. Domestic uses

In construing the Boulder Canyon Project Act, the Court would look to the Colorado River Compact for the limited purposes of interpreting compact terms specifically incorporated in the Act—such as the

reference to satisfaction of "present perfected rights" in section 6, and the definition of "domestic" in section 12—and of resolving disputes between the Upper and Lower Basins. *Arizona v. California*, 373 U.S. 546, 566 (1963).

**Sec. 13. [(a) Approval of Colorado River compact by Congress—(b) Rights of United States and of all parties claiming under United States—(c) All patents, contracts, grants, etc., subject to compact—(d) All conditions and covenants to run with the land.]—(a)** The Colorado River compact signed at Santa Fe, New Mexico, November 24, 1922, pursuant to act of Congress approved August 19, 1921, entitled "An Act to permit a compact or agreement between the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming respecting the disposition and apportionment of the waters of the Colorado River, and for other purposes", is hereby approved by the Congress of the United States, and the provisions of the first paragraph of article 11 of the said Colorado River compact, making said compact binding and obligatory when it shall have been approved by the legislature of each of the signatory States, are hereby waived, and this approval shall become effective when the State of California and at least five of the other States mentioned shall have approved or may hereafter approve said compact as aforesaid and shall consent to such waiver, as herein provided.

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

(c) Also all patents, grants, contracts, concessions, leases, permits, licenses, rights of way, or other privileges from the United States or under its authority,



necessary or convenient for the use of waters of the Colorado River or its tributaries, or for the generation or transmission of electrical energy generated by means of the waters of said river or its tributaries, whether under this act, the Federal water power act, or otherwise, shall be upon the express condition and with the express covenant that the rights of the recipients or holders thereof to waters of the river or its tributaries, for the use of which the same are necessary, convenient, or incidental, and the use of the same shall likewise be subject to and controlled by said Colorado River compact.

(d) The conditions and covenants referred to herein shall be deemed to run with the land and the right, interest, or privilege therein and water right, and shall attach as a matter of law, whether set out or referred to in the instrument evidencing any such patent, grant, contract, concession, lease, permit, license, right of way, or other privilege from the United States or under its authority, or not, and shall be deemed to be for the benefit of and be available to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming, and the users of water therein or thereunder, by way of suit, defense, or otherwise, in any litigation respecting the waters of the Colorado River or its tributaries. (45 Stat. 1064; 43 U.S.C. § 617l)

#### NOTE OF OPINION

##### 1. Colorado River Compact

The declarations in sections 1, 8(a), 13 (b), and 13(c) of the Boulder Canyon Project Act that the Secretary of the Interior and the United States shall be subject to and controlled by the Colorado River Compact, were made only to show that the Act and its provisions were in no way to

upset, alter, or affect the Compact's congressionally approved division of water between the Upper and the Lower Basins. They were not intended to make the compact and its provisions control or affect the Act's allocation among and distribution of water within the States of the Lower Basin. *Arizona v. California*, 373 U.S. 546, 567 (1963).

**Sec. 14.** [This act a supplement to the reclamation law.]—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. (45 Stat. 1065; 43 U.S.C. § 617m)

#### NOTES OF OPINIONS.

##### Excess lands 2

##### General 1

##### Interchange of funds 3

##### 1. General

The general structure of the Boulder Canyon project act indicates that it was not meant to exist independently but rather as a part of the legislative scheme embodied in the Federal reclamation law. Solicitor Harper Opinion, M-33902 (May 31, 1945), in re applicability of excess land provisions to Coachella Valley lands.

The power of the Secretary of the Interior to apportion and distribute Colorado River water among and within the Lower Basin States through the execution of con-

tracts for its use is subject to a number of standards and limits in the Boulder Canyon Project Act. These include (1) the limitation in § 4(a) of 4,400,000 acre-feet on California's consumptive uses out of the first 7,500,000 acre-feet of mainstream water, leaving 3,100,000 acre-feet which the Secretary properly has apportioned by contract in the quantities of 300,000 acre-feet to Nevada and 2,800,000 to Arizona; (2) the provision in § 6 setting out in order the purposes for which the Secretary must use the dam and reservoir; (3) the § 4(b) requirement for revenue provisions in the contracts adequate to ensure the recovery of the expenses of construction, operation and maintenance of the dam and other

works within 50 years after their construction; (4) the directive in § 5 that water contracts for irrigation and domestic use shall be only for "permanent service"; (5) the recognition given in § 8(a) to the Colorado River Compact, which means that the Secretary and his permittees, licensees and contractees can do nothing to upset or encroach on the Compact's allocation of water between the Upper and Lower Basins; (6) the application by § 14 of general reclamation law except as the Act otherwise provides; and (7) the protection given in § 6 to "present perfected rights." *Arizona v. California*, 373 U.S. 546, 583-85 (1963).

## 2. Excess lands

The provision of section 14 of the Boulder Canyon Project Act declaring it to be a supplement to the Federal reclamation law incorporates the 160-acre limitation into

the Project Act. Solicitor Harper Opinion, M-33902, at 6 (May 31, 1945), in re applicability of excess-land provisions to Coachella Valley lands.

Where a Federal statute provides that the reclamation laws shall govern the construction, operation, and management of project works, the excess land provisions of the reclamation laws are thereby carried into effect unless the terms of the statute provide otherwise. Solicitor Barry Opinion, 71 I.D. 496, 501-08 (1964), in re application of excess land laws to private lands in Imperial Irrigation District.

## 3. Interchange of funds

This section was construed in Comptroller General's decision A-41637, dated June 14, 1932, in connection with the Boulder Canyon Project item in the Appropriation Act for fiscal year 1932.

**Sec. 15. [Investigations and reports regarding use of water—Appropriation of \$250,000 authorized.]**—The Secretary of the Interior is authorized and directed to make investigation and public reports of the feasibility of projects for irrigation, generation of electric power, and other purposes in the States of Arizona, Nevada, Colorado, New Mexico, Utah, and Wyoming for the purpose of making such information available to said States and to the Congress, and of formulating a comprehensive scheme of control and the improvement and utilization of the water of the Colorado River and its tributaries. The sum of \$250,000 is hereby authorized to be appropriated from said Colorado River Dam fund, created by section 2 of this act, for such purposes. (45 Stat. 1065; 43 U.S.C. § 617n)

**Sec. 16. [Cooperation of commissions or commissioners with Secretary of Interior—Access to records.]**—In furtherance of any comprehensive plan formulated hereafter for the control, improvement, and utilization of the resources of the Colorado River system and to the end that the project authorized by this act may constitute and be administered as a unit in such control, improvement, and utilization, any commission or commissioner duly authorized under the law of any ratifying State in that behalf shall have the right to act in an advisory capacity to and in cooperation with the Secretary of the Interior in the exercise of any authority under the provisions of sections 4, 5, and 14 of this act, and shall have at all times access to records of all Federal agencies empowered to act under said sections, and shall be entitled to have copies of said records on request. (45 Stat. 1065; 43 U.S.C. § 617o)

## EXPLANATORY NOTE

Colorado River Commission. Arizona, California, Nevada, and Utah enacted laws creating a Colorado River Commission: 1929 Arizona Sess. Laws, p. 6; 1927 Cali-

fornia Sess. Laws, p. 1031, amended by 1929 California Sess. Laws, p. 691; 1928-1929 Nevada Sess. Laws, p. 194; and 1929 Utah Sess. Laws, p. 187.

## NOTE OF OPINION

## 1. General

Section 16 is to be construed with section 15, which provides for formulation of comprehensive plans for development of the Colorado River and its tributaries. The purpose of the two sections is to provide liaison between the present undertaking, administered by the Secretary of the Interior, and future development of the river during formulation of plans for such developments. It is not the intention of section

16 to superimpose upon the authority and discretion of the Secretary of the Interior, everywhere else made the basis of administration, the control and supervision of a group of commissioners whose number, place, and time of meeting, responsibility and authority, are unprovided for. The commissioners may tender the Secretary advice but he is in nowise obliged to act thereon contrary to his judgment. Solicitor Finney Opinion, 53 I.D. 1 (1930).

**Sec. 17. [Claims of the United States arising from any contract authorized by this act.]**—Claims of the United States arising out of any contract authorized by this act shall have priority over all others, secured or unsecured. (45 Stat. 1065; 43 U.S.C. § 617p)

## NOTE OF OPINION

## 1. General

The provision in section 17 of the Boulder Canyon Project Act that "claims of the United States arising out of any contract authorized by this act shall have priority over all others" entitles the United States

thereto only so long as the net proceeds from power development of the All American Canal are in the hands of the irrigation district. Acting Solicitor Kirgis Opinion, 56 I.D. 116 (1937).

**Sec. 18. [Rights of States to waters within their borders.]**—Nothing herein shall be construed as interfering with such rights as the States now have either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders, except as modified by the Colorado River compact or other interstate agreement. (45 Stat. 1065; 43 U.S.C. § 617q)

## NOTES OF OPINIONS

## 1. State laws

Where the government has, as here, exercised its right to regulate and develop the river and has undertaken a comprehensive project for improvements of the river and for the orderly and beneficial distribution of water, there is no room for inconsistent state law. *Arizona v. California*, 373 U.S. 546, 587 (1963).

In choosing between users within each State and in settling the terms of his contracts for the use of stored Colorado River water, the Secretary is not bound, either by

section 18 of the Boulder Canyon Project Act, or by section 8 of the Reclamation Act, to follow State law. Although section 18 allows the States to do things not inconsistent with the Project Act or with Federal control of the river, as for example, regulation of the use of tributary water and protection of present perfected rights, the general saving language of section 18 cannot bind the Secretary by state law and thereby nullify the contract power expressly conferred upon him by section 5. *Arizona v. California*, 373 U.S. 546, 580-90 (1963).

**Sec. 19. [Consent of Congress given to basin States to enter into compacts regarding use of water—Representative of United States to cooperate in formulation of compacts—Approval by legislatures and by Congress.]**—The consent of Congress is hereby given to the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming to negotiate and enter into compacts or agreements, supplemental to and in conformity with the Colorado River compact and consistent with this act for a comprehensive plan for the