Two Opinions of the Attorney General furnished to Colorado River Commission of Arizona

Arthur T. LaPrade
Attorney General of Arizona

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The two opinions printed herewith were prepared by Charles A. Carson, Jr., special assistant attorney general, concurred in by me and delivered to the Colorado River Commission of Arizona under the dates shown.

They are printed and distributed with the hope that they will aid in a clearer understanding of the legal problems involved in the Colorado River question.

ARTHUR T. LaPRADE,
Attorney General

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FIRST OPINION

SECOND OPINION

July, 12, 1933

Honorable A. H. Favour, Chairman,
Arizona Colorado River Commission,

Prescott, Arizona.

Dear Senator Favour:

You have requested the legal opinion of this office upon the following question:

Would the State of Arizona have authority to build a dam across the main stream of the Colorado River above Boulder Dam, and divert waters therefrom for irrigation and power through ditches, tunnels, and other works across the public domain, without the consent of the Federal Government?

The United States owns the land on both sides of the river from the Utah-Arizona line at least to a point 20 miles down stream from Boulder Dam. Also, the United States in the Arizona Enabling Act, Section 28, reserved certain property in the following language:

> "There is hereby reserved to the United States and excepted from the operation of any and all grants made or confirmed by this act to said proposed State, all land actually or prospectively valuable for the development of water power or power for hydro-electric use or transmission, and which shall be ascertained and designated by the Secretary of the Interior within

5 years after the proclamation of the President declaring the admission of the State."

The Secretary of the Interior did designate and thereby reserve to the United States the lands along the Colorado River from Boulder Dam to the Utah Line.

The ownership of the bed depends upon whether the river is navigable or non-navigable; since the United States owns the lands on both sides of the river, this question of course does not effect the ultimate answer to your question.

If the river is navigable, title to the bed thereof is in the State of Arizona. If the river is non-navigable, title to the bed is in the United States.

United States v. Utah, 283 U. S. 64, 75 L. Ed. 844

In the above case, the Supreme Court of the United States held that the bed of a navigable stream at a point where it is navigable belongs to the State, and that the bed of a stream which is navigable upon some portions thereof, at a point where the same stream is non-navigable belongs to the proprietor of the land on both sides of the stream, and held that although a stream was navigable upon some portions, other portions thereof might be non-navigable, and held that portions of the Colorado River in Utah are navigable, and that other portions thereof in Utah are not navigable.

It was determined by the Supreme Court in the case of Arizona v. California, 283 U. S., 423, 51 S. Ct. Rep. 522, that the lower portion of the Colorado River is navigable. In that case the Court did not undertake to fix the upper limit of navigability but did find that the river was navigable from its mouth to the mouth of the Virgin River. No Courts have passed upon the question of the navigability of the

river between the mouth of the Virgin River and the Utah-Arizona line.

The question of whether or not the river is navigable is one of fact and the test of navigability, as restated in the case of United States vs. Holt State Bank, 270 U. S. 49, 46 S. Ct. Rep. 197, 70 L. Ed. 465, is:

> "The rule long since approved by this court in applying the constitution and laws of the United States is that, streams or lakes which are navigable in fact must be regarded as navigable in law; that they are navigable in fact when they are used or are susceptible of being used, in their natural or ordinary condition, as highways for commerce over which trade and travel are, or may be, conducted in the customary modes of trade and travel on water; and further, that navigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels, or flat boats—nor in absence of occassional difficulties in navigation, but on the fact if it be a fact that the stream in its natural and ordinary condition affords a channel for useful commerce."

While there is record of at least three expeditions of small boats passing through the section of the river from the Utah line to the mouth of the Virgin River, beginning with the Powell Expedition in 1869, in view of the fact that the river between these points is in the bottom of deep canyons filled with rapids and cataracts, it would seem to be very probable that after hearing evidence the courts would hold the Colorado River between the Utah line and the up stream limit of the reservoir to be created by Boulder Dam, to be non-navigable, in which event it

would follow, as a matter of law, that title to the bed of the river between those points is in the United States.

It has been specifically held by the Circuit Court of Appeals, Eighth Circuit, in the case of Utah Power and Light Company v. United States, 230 Fed. 328, that public lands, the property of the United States, are not subject to State power of eminent domain. In that case, the Circuit Court of Appeals said:

> "It is true that in some of the earlier decisions the validity of the exercise of the right of eminent domain by a state over the lands of the United States has received apparent recognition. (citing cases) This view is predicated upon the assumption that while government lands are not reserved or held for specified national purposes, the United States occupies the position of a mere individual proprietor, with rights and remedies neither less nor greater. An examination of the cases cited, however, discloses that the peculiar facts with which they dealt, as well as the limitations stated in the opinions written, greatly modify the scope of the doctrine stated; and the later cases leave little doubt that the Supreme Court has not recognized, and will not recognize, the limited control of Congress over the territory and property belonging to the United States, for which defendant contends. The public lands of the United States are held by it, not as an ordinary individual proprietor, but in trust for all the people of all the states to pay debts and provide for the common defense and general welfare under the express terms of the Constitution itself. It matters not whether the title is acquired by cession from other states, or by treaty with a foreign country, whether the lands are located

within states or in territories, they are held for these supreme public uses when and as they may arise. The Congress has the exclusive right to control and dispose of them, and no state can interfere with this right or embarrass its exercise. (Citing Cases).

"Moreover, the act enabling the people of Utah to form a Constitution and state government imposes the condition that the people inhabiting said proposed state forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof. In the Constitution of Utah, subsequently adopted, this provision was incorporated in terms. It is urged that insistence upon these terms, when the new state of Utah was admitted, implies that the exclusive control of Congress was conceived not to exist in the absence of such an express reservation; but the better view is that the expression in the Enabling Act, and in the Constitution of the new state, was but declaratory of a constitutional power known to exist, and was inserted to forestall all possible contention. VanBrocklin v. Tennessee, 117 U. S. 167, 6 Sup. Ct. 670, 29 L. Ed. 845; Stearns v. Minnesota, 179 U. S. 223. It is idle to insist that the provisions of the Utah Enabling Act and Constitution do not interfere with defendant's contentions. x x x

"This is a distinction without a substantial difference. The acquisition of a perpetual easement under the alleged power of eminent domain is such an appropriation as amounts to an invasion of the constitutional power of Congress. xxx

"The United States does not and cannot

hold property as a monarch may for private or personal uses; it cannot hold as a private proprietor for other than public objects. VanBrocklin v. State of Tennessee, 117 U. S. 158, 6 Sup. Ct. 670, 29 L. Ed. 845. 'All the public lands of the nation are held in trust for the people of the whole country.' United States v. Trinidad Coal Co., 137 U. S. 160, 11 Sup. Ct. 57, 34 L. Ed. 640; Light v. United States, 220 U. S. 523-537, 31 Sup. Ct. 485, 55 L. Ed. 570.

"The United States can prohibit absolutely or fix the terms on which the property may be used. As it can withhold or reserve the land it can do so indefinitely. Light v. United States, 220 U. S. loc. cit. 536, 31 Sup. Ct. 485, 55 L. Ed. 570; Stearns v. Minnesota, 179 U. S. 223, 21 Sup. Ct. 73, 45 L. Ed 162. In Coe v. Errol, 116 U. S. 517-524, 6 Sup. Ct. 475, 29 L. Ed. 715, Mr. Justice Bradley said:

'We take it to be a point settled beyond all contradiction or question that a state has jurisdiction of all persons and things within its territory which do not belong to some other jurisdiction, such as the representatives of foreign governments, with their houses and effects, and property belonging to or in the use of the government of the United States.'

"And in Van Brocklin v. Tennessee, 117 U. S. loc. Cit. 165, 6 Sup. Ct. 670, 29 L. Ed. 845, Mr. Justice Gray quotes approvingly the following language of Mr. Douglas in which Mr. Webster concurred:

'The title of the United States can be divested by no other power, by no other means, in

no other mode, than that which Congress shall sanction and prescribe. It cannot be done by the action of the people or Legislature of a territory or state.'

"To hold otherwise—

'would tend to create a conflict between the officers of the two governments, to deprive the United States of a title lawfully acquired under express acts of Congress, and to defeat the exercise of the constitutional power to lay and collect taxes, to pay the debts and provide for the common defense and general welfare of the **United States.**'

"The rights of the states in the shores and beds of navigable waters below high-water mark bear no analogy to the claim of defendant here. In such cases the government asserts not title, but control over navigation. United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53, 33 Sup. Ct. 667, 678, 57 L. Ed. 1063. The distinction is clearly drawn by the Supreme Court in VanBrocklin v. Tennessee, 117 U. S. 167, 168, 6 Sup. Ct. 670, 29 L. Ed. 845;

'Upon the admission of a state into the Union, the state doubtless acquires general jurisdiction, civil and criminal, for the preservation of public order, and the protection of persons and property, throughout its limits, except where it has ceded exclusive jurisdiction to the United States. The rights of local sovereignty, including the title in lands held in trust for municipal uses, and in the shores of navigable waters below high-water mark, vest in the state, and not in the United States. New Orleans v. United States, 10

Pet. 662, 737 (9 L. Ed. 573); Pollard v. Hagan, 3 How. 212 (11 L. Ed. 565); Goodtitle v. Kibbe, 9 How. 471 (13 L. Ed. 220); Doe v. Beebe, 13 How.25 (14 L. Ed. 35); Barney v. Keokuk, 94 U. S. 324 (24 L. Ed. 224). But public and unoccupied lands, to which the United States have acquired title, either by deeds of cession from other states, or by treaty with a foreign country, Congress, under the power conferred upon it by the Constitution, "to dispose of and make all needful rules and regulations respecting the territory or other property of the United States," has exclusive right to control and dispose of, as it has with regard to other property of the United States; and no state can interfere with this right or embarrass its exercise. United States v. Gratiot, 14 Pet. 526 (10 L. Ed. 573); Pollard v. Hagen, 3 How. 212 (11 L. Ed.. 565); Irvine v. Marshall, 20 How. 558, 563 (15 L. Ed. 994); Gibson v. Chouteau, above cited.'

"It has been thought advisable and necessary to carry this discussion to somewhat unusual length because of the importance of the question involved, the earnest insistence of counsel upon the right asserted, and the absence of an express ruling by the Supreme Court thereon.

In United States v. City of Chicago, 7 How. 185, 12 L. Ed. 660, the proposition was not decided because 'open to some debate' and 'not necessary to a disposition of the case.' In Van-Brocklin v. Tennessee, supra, it was announced:

'When that question shall be brought into judgment here, it will require and receive the careful consideration of the Court.'

"In Siler et al. v. Louisville & Nashville R. R. Co., 213 U. S. 175, 29 Sup. Ct. 451, 53 L. Ed. 753, it was said that:

'Where a case in this court can be decided without reference to questions arising under the federal Constitution, that course is usually pursued and is not departed from without important reasons.'

"The same considerations moved this court upon the last appeal to refrain from making an express determination of this point, although then suggested, as being unnecessary to a disposition of the case. Now, however, the question is squarely presented and we answer it without hesitation. In our opinion, the public lands involved were not subject to state power of eminent domain, either directly or indirectly, without the consent of the United States; and to sustain its contention, the defendant must point to some express grant by the government, or at least to subsisting legislation from which the grant may be inferred, or by which its claims have been recognized and preserved. United States v. Utah Power & Light Co. (C. C. A.) 209 Fed. loc. cit. 559, 126 C. C. A. 376. In this view, it is unnecessary to consider whether there has been any effective exercise of the power claimed."

The above opinion of the Circuit Court of Appeals is quoted thus at length because of its clear discussion of the question at hand. In this connection, it should be noted that the Arizona Enabling Act and the Arizona Constitution contain the same provisions as those of Utah referred to in the foregoing opinion.

Paragraph II of Section 20 of the Arizona Enabling Act;

Paragraph IV of Article XX of the Constitution of Arizona.

The Supreme Court of the United States in the case of Utah Power and Light Company v. United States, 243, U. S. 389, 37 Sup. Ct. 387, 61 L. Ed. 791, also held that state laws, including those relating to the exercise of power of eminent domain, have no bearing upon a controversy such as there presented, save as they may have been adopted or made applicable by Congress, and in the course of its opinion, the Supreme Court said:

> "But the settled course of legislation, congresional and state, and repeated decisions of this Court, have gone upon the theory that the power of Congress is exclusive, and that only through its exercise in some form can rights in lands belonging to the United States be acquired. * * * From the earliest times Congress by its legislation, applicable alike in the states and territories, has regulated in many particulars the use by others of the lands of the United States, has prohibited and made punishable various acts calculated to be injurious to them or to prevent their use in the way intended, and has provided for and controlled the acquisition of rights of way over them for highways, railroads, canals, ditches, telegraph lines and the like. The states and the public have almost uniformly accepted this legislation as controlling, and in the instances where it has been questioned in this court its validity has been upheld and its supremacy over state enactments sustained."

It is, therefore, necessary to examine the acts of Congress to ascertain whether or not rights have been granted which would enable the state to build such a dam as is proposed.

Paragraphs 946 to 951 of Title 43, United States Code, contain the general grant of rights of way through public lands to "any canal ditch company, irrigation or drainage district formed for the purpose of irrigation or drainage, and duly organized under the laws of any state or territory * * *

to the extent of the ground occupied by the water of any reservoir and of any canals and laterals and fifty feet on each side of the marginal limits thereof, and upon presentment of satisfactory showing by the applicant, such additional right of way as the Secretary of the Interior may deem necessary for the proper operation and maintenance of said reservoirs, canals and laterals; * * *"

Paragraph 946.

Paragraph 951 provides that the rights of way granted for canals might be used for water transportation, for domestic purposes or for the development of power, as subsidiary to the main purpose of irrigation or drainage.

Paragraph 946 was enacted March 3, 1891. Paragraph 951 was enacted May 11, 1898.

The foregoing sections, however, have been modified by Paragraphs (c) and (d) of Section 13 of the Boulder Canyon Project Act, approved December 27, 1928, which provide:

"(c) Also all patents, grants, contracts, con-

cessions, 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 convenants 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."

Upon the authority of Utah Power and Light Company v. United States, supra, it is within the power of Congress to attach such conditions.

The fact that the Colorado River has been held to be navigable in the lower portion of the River by the Supreme Court in the case of Arizona v. California, supra, also raises additional questions. It has been held by the Supreme Court of the United States that juprisdiction of the United States over the waters of the navigable portion of the stream, carries with it jurisdiction over the head waters of that stream or streams tributary thereto in order to preserve the navigability of the navigable portion of the stream.

> United States v. Rio Grande Dam & Irrigation Co., 174 U. S. 690, 19 Supreme Court Reporter 770, 43 L. Ed. 1136;

Paragraph 403 of Title 33 of the United States Code provides as follows:

> "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, wier, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States outside established harbor lines, or where no harbor lines have been eestablished, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channels of any navigable water of the United States, unless the work has been recommended by the chief

of Engineers and authorized by the Secretary of War prior to beginning the same."

Paragraph 403 A of Title 33, United States Code, is as follows:

"The creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of which the United States has jurisdiction, is hereby prohibited. The continuance of any such obstruction, except bridges, piers, docks and wharves, and similar structures erected for business purposes, whether heretofore or hereafter created, shall constitute an offense and each week's continuance of any such obstruction shall be deemed a separate offense. Every person and every corporation which shall be guilty of creating or continuing any such unlawful obstruction shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $5000, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court, the creating or continuing of any unlawful obstruction may be prevented and such obstruction may be caused to be removed by the injunction of any district court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney-General of the United States."

In the case of United States v. Rio Grande Dam and Irrigation Company, Supra, the Supreme Court held that the question of whether or not a proposed

dam would constitute an obstruction to the navigable capacity of a river navigable in its lower reaches, is a question of fact and that if it be found to be a fact that the construction of the dam in the upper reaches of the stream would diminish the navigable capacity of the lower reaches of the stream, its construction would be enjoined under the provisions of Paragraph 403 A, supra.

The last above cited case was a case brought by the United States through the Attorney-General to restrain the defendant from constructing a dam across the Rio Grande River in the Territory of New Mexico and appropriating the waters of that stream for the purpose of irrigation, thus destroying the navigability on the lower stream, which was alleged to be navigable from its mouth upward 350 miles by steam boats and susceptible of navigation an additional 350 miles up stream. In the course of its opinion the Court said:

> "The creation of any such obstruction may be enjoined, according to the last provision of the section, by proper proceedings in equity, under the direction of the Attorney-General of the United States, and it was in pursuance of this clause that these proceedings were commenced. Of course, when such proceedings are instituted, it becomes a question of fact whether the act sought to be enjoined is one which fairly and directly tends to obstruct (that it, interfere with or diminish) the navigable capacity of a stream. It does not follow that the courts would be justified in sustaining any proceeding by the attorney general to restrain any appropriation of the upper waters of the navigable stream. The question is always one of fact, whether such appro-

priation substantially interferes with the navigable capacity within the limits where navigation is a recognized fact. In the course of the argument this suggestion was made, and it seems to us not unworthy of note, as illustrating this thought. The Hudson River runs within the limits of the state of New York. It is a navigable stream, and a part of the navigable waters of the United States, so far at least as from Albany southward. One of the streams which flows into it, and contributes to the volume of its waters is the Croton river, a nonnavigable stream. Its waters are taken by the state of New York for domestic uses in the city of New York. Unquestionably, the state of New York has a right to appropriate its waters, and the United States may not question such appropriation, unless thereby the navigability of the Hudson be disturbed. On the other hand, if the state of New York should, even at a place above the limits of navigability, by appropriation for domestic purposes, diminish the volume of waters which, flowing into the Hudson, make it a navigable stream, to such an extent as to destroy its navigability, undoubtedly the jurisdiction of the national government would arise, and its power to restrain such appropriation be unquestioned; and, within the purview of this section, it would become the right of the attorney general to institute proceedings to restrain such appropriation."

It was provided by Article IV (a) of the Colorado River Compact that,

"Inasmuch as the Colorado River has ceased to be navigable for commerce and the reserva-

tion of its waters for navigation would seriously limit the development of its basin, the use of its waters for purposes of navigation shall be subservient to the uses of such water for domestic, agricultural, and power purposes. If the Congress shall not consent to this paragraph, the other provisions of this compact shall nevertheless remain binding."

Congress in Paragraph (a) of Section 13 of the Boulder Canyon Project Act approved the Colorado River Compact and in Paragraph (b) of Section 13 of that act provided:

> "(b) The rights of the United States in or to waters of the Colordao 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."

It was urged in the Supreme Court in the case of Arizona v. California, supra, that by these provisions of the Boulder Canyon Project Act, Congress had subordinated navigation to the use of the waters of the Colorado River to domestic, agricultural and power purposes, but the Supreme Court held adversely to this contention.

The Boulder Canyon Project Act specifically authorized the construction of two dams, obstructions in the River, one at Boulder Canyon and the other "a 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," for the Imperial and Coachella Valleys in California. That Act did not authorize the construction of any dam other than the

two named and, therefore, cannot be held to have authorized any dam at any other point in the River, by Arizona.

Section 18 of the Boulder Canyon Project Act provides:

> "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."

It will be noted that this section does not confer any rights upon the states in addition to those they had at the time of the adoption of the act and, as above stated, since the River has been held, by the Supreme Court of the United States, to be navigable, the United States would have the right under the provisions of the statutes quoted to enjoin the erection of an obstruction to the navigable capacity of the River and to enjoin the diversion of water from the River, if such obstruction or such diversion of water in fact interfered with or diminished the navigability of the stream upon its navigable portions.

In the case of United States v. Rio Grande Dam and Irrigation Company, supra, the Court considered the effect of the Act of March 3, 1891, hereinabove quoted, and also considered the effect of the Act of July 26, 1866, Revised Statutes, 2339-2340 United States Code, Section 661 of Title 43, which provides:

> "Whenever by priority of possession, rights to the use of water for mining, agricultural, man-

ufacturing, or other purposes, have vested and and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injuries or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

"All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by this section."

In the case of the United States v. Rio Grande Dam and Irrigation Company, supra, the Court considering the effects of these various statutes, said:

"Obviously, by these acts, so far as they extended, congress recognized and assented to the appropriation of water in contravention of the common-law rule as to continuous flow. To infer therefrom that congress intended to release its control over the navigable streams of the country, and to grant in aid of mining industries and the reclamation of arid lands the rights to appropriate the waters on the sources of navigable streams to such an extent as to destroy their navigabilty, is to carry those statutes beyond

what their fair import permits. This legislation must be interpreted in the light of existing facts,—that all through this mining region in the West were streams, not navigable, whose waters could safely be appropriated for mining and agricultural industries, without serious interference with the navigability of the rivers into which those waters flow. And in reference to all these cases of purely local interest the obvious purpose of congress was to give its assent, so far as the public lands were concerned, to any system, although in contravention to the common-law rule, which permitted the appropriation of those waters for legitimate industries. To hold that congress by these acts, meant to confer upon any state the right to appropriate all the waters of the tributary streams which unite into a navigable water course, and so destroy the navigablity of that water course in derogation of the interests of all the people of the United States, is a construction which cannot be tolerated. It ignores the spirit of the legislation, and carries the statute to the verge of the letter, and far beyond what, under the circumstances of the case, must be held to have been the intent of congress."

The Court quoted the statute, which is hereinabove quoted as Paragraph 403 (a) of Title 33, and then said:

"As this is a later declaration of congress, so far as it modifies any privileges or rights conferred by prior statutes, it must be held controlling, at least as to any rights attempted to be created since its passage (which was September 19, 1890); and all the proceedings of the appellees in this case were subsequent to this act."

The Court, therefore, held that by the enactment of the Reclamation Act and grant of rights of way, the Congress of the United States had not surrendered jurisdiction over navigable streams and had not surrendered the right to prohibit obstruction to navigable capacity and diversion of water which would interfere with or diminish navigable capacity.

Congress, in the Boulder Canyon Project Act, (c) and (d) of Section 13, makes the use of any right of way, license or privilege necessary or convenient for the use of the waters of the Colorado River or its tributaries, 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 which the same are necessary, convenient or incidental and the use of the same, shall be subject to and controlled by said Colorado River Compact. In view of the foregoing cases and decisions it is clear that Arizona could not construct a dam above Boulder Dam without agreeing to the conditions attached. It is provided in Article 8 of the Colorado River Compact:

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

solely from the water apportioned to that basin in which they are situate."

It is thus apparent that the use of water in the lower basin states is according to the terms of the Colorado River Compact limited to that apportioned in Article III (a) to 7,500,000 acre-feet per annum and Article III (b) 1,000,000 acre-feet per annum included for the Gila River. Arizona, of course, is not bound by the terms of the Colorado River Compact, not having ratified the same, but according to the condition attached to rights of way, the use of such waters would be subject to the Colorado River Compact although not ratified by the State of Arizona and the total use of water in the lower basin states, as defined by the Colorado River Compact, would be limited as above set forth.

It is also provided by the Federal Water Power Act (June 10, 1920) Chapter 12, Title 16, United States Code, that the Federal Power Commission created by that Act, should issue permits and licenses for the construction of power dams upon navigable waters of the United States. The term "navigable waters" is defined in the Federal Water Power Act as meaning "Those parts of streams or other bodies of water over which congress has jurisdiction, under its authority to regulate commerce with the foreign nations and among the several states and which either in their natural or improved condition, notwithstanding interruptions between the navigable parts of said streams or waters by falls, shallows or rapids compelling land carriages, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows or rapids; together with such other parts of streams as shall have been authorized by congress for improvement by the United

States or which have been recommended to Congress for such improvement after investigation, under its authority."

This act is therefore, broad enough to include the Colorado River in Arizona.

The Boulder Canyon Project Act directed the Federal Water Power Commission not to issue or approve any permits or licenses under the Federal Water Power Act upon or effecting the Colorado River or any of its tributaries, except the Gila River, in the states of Colorado, California, Wyoming, Utah, Nevada, New Mexico and Arizona until the Boulder Canyon Project Act should become effective. The latter Act has of course now become effective so that the Federal Water Power Commission is again in a position to issue permits and licenses under the Federal Water Power Act.

The Federal Water Power Act has been held constitutional in the case of Alabama Power Company v. Gulf Power Company, 283 Federal 606, and also in the case of State of Missouri v. Union Electric Light and Power Co., 42 Fed. (2nd) 692, and also in the case of Ryan v. Chicago B. & Q. R. Co., in the Circuit Court of Appeals of the 7th Circuit, 59 Fed. (2nd) 137, and the portion of it passed upon was held constitutional in the case of Ford and Son v. Little Falls Fibre Co. 74 U. S. (L. Ed.) 483. The State of New York filed an action in the Supreme Court of the United States against the members of the Federal Power Commission, attacking the constitutionality of the Act, which action however was dismissed upon stipulation and without final adjudication by the Court.

After an examination of the cases above cited

and the brief on behalf of New York in the case which was dismissed, it seems probable that in construing the Act the Court would hold that it gave power to the Federal Power Commission to license power dams and plants only as an incident to navigation and in aid of navigation and that the Act would be declared unconstitutional in so far as it was found to attempt to give to the Federal Power Commission authority over such power dams, power sites and power plants, other than as were in fact incidental to navigation and aid of navigation. However, pending such determination by the Court, it would be necessary before a dam could be constructed on the Colorado to secure a license from the Federal Power Commission.

Thus it will be seen that under existing Federal statutes there are three Federal agencies whose requirements must be satisfied before the construction of such a dam could be undertaken, to wit, the Secretary of War, the Secretary of the Interior and the Federal Power Commisson.

The very instant that the State of Arizona achieved statehood, the right to divert the waters of the Colorado River for beneficial use was subordinated to the paramount authority of Congress to exercise control over the water of the river in aid of navigation.

Section 8 of Article I of the Constitution of the United States, which so far as here pertinent, is as follows:

"Section 8. The Congress shall have Power To * * * regulate Commerce with foreign na-

tions and among the several States, and with the Indian Tribes;"

If the diversion of water from the Colorado River would in fact interfere with or diminish the navigable capacity of the navigable portions of that stream, such diversion could be prevented by the United States in the manner hereinabove set forth.

This has been established by a long list of decisions of the Supreme Court of the United States, beginning with the case of The Daniel Ball, 10 Wall. 557, 19 L. Ed. 999, and The Montello, 21 Wall. 430, 22 L. Ed. 391; Economy Light & Power Company v. United States, 256 U. S. 133, 113, 41 Sup. Ct. 409, and in the very recent case of New Jersey v. New York, 283, U. S. 336, 51 Sup. Ct. 478.

In the Economy Light & Power Company case, the Supreme Court affirmed an injunction granted by the lower Court restraining the Economy Light & Power Company from constructing a dam in the Des Plaines River in Illinois, on the ground that that river was a navigable stream. The Court in that case found that there was no evidence of actual navigation within the memory of living man, or for an hundred years, but nevertheless found it to be a navigable stream and held that if streams which were once navigable are to be abandoned, it is for Congress, not the Courts, so to declare. In that case the Court also held specifically.

> "The authority of congress to prohibit added obstruction is not taken away by the fact that it has omitted to take action in previous cases."

It is provided in Paragraph (b) of Section 13 of the Boulder Canyon Project Act that,

"The rights of the United States in or to the waters of the Colorado River and its tributaries, howsoever claimed or aquired, as well as the rights of those claiming under the United States, shall be subject to and controlled by said Colorado River Compact."

It is probably true that by the foregoing provision in the Boulder Canyon Project Act and its approval of the Colorado River Compact, Congress has agreed that the waters apportioned by the Colorado River Compact might be diverted from the Colorado River and that any of the states signatory to the Colorado River Compact are by such Act authorized to divert waters from the River to the extent apportioned by the Compact.

However, Arizona has not ratified the Compact and is, therefore, not bound by the terms thereof and is not burdened with its obligations and is not entitled to claim any benefits thereunder.

Arizona v. California, 283 U. S. 423, 51 Sup. Ct. 522.

Unquestionably by the passage of the Boulder Canyon Project Act, Congress did agree, to the extent therein specified, to the diversion of the waters from the River. It does not seem probable however that that Act would be construed by the Courts as an abandonment by Congress of the Colorado River as a navigable stream, nor as permission to divert any waters from that stream other than those apportioned by the Colorado River Compact.

To paraphrase the foregoing quotation from the Economy Light & Power Company case, it would seem that the Court would hold the authority of con-

gress to prohibit additional diversions of water from navigable streams is not taken away by the fact that it has permitted diversions in previous cases, provided that the subsequent diversions in fact interfere with or diminish the navigable capacity of the stream.

Of course Arizona could not divert waters from that stream to the injury of prior appropriators, either within or without the State of Arizona. In this respect of course, the provisions of the State Water Code, Article I of Chapter 81, 1928 Revised Code of Arizona, govern as to appropriations within the State.

All of the cases heretofore cited in this opinion from the Supreme Court of the United States, have been cases in which the Court's decision was based upon a provision of the Federal Constitution or of the Acts of Congress. The following opinions of the Supreme Court were based upon the principles of international law applicable to controversies between sovereign states of the Union, without regard to the construction of any particular provision of the Federal Constitution or of the Acts of Congress. These opinions have become an important part of the great body of international law.

In the case of Kansas v. Colorado, 206 U. S. 46, 27 Sup. Ct. 655, the Supreme Court held that an upstream state could not appropriate all the waters of an interstate stream flowing through its boundaries, to the damage of vested rights in a downstream state In the case of Wyoming v. Colorado, 259. U. S. 419, 42 Sup. Ct. 552, the Supreme Court of the United States held that between states, as between individuals, prior use of water is prior right and that each state upon an interstate stream must recognize the

prior appropriations in the other state in the same manner and to the same extent as if made within its boundaries.

This is true as to the Colorado River, except as it may have been modified by the Colorado River Compact. Arizona, not having ratified that Compact, is not bound thereby, nor as to Arizona and her rights in the River are the other States bound thereby. As to Arizona, the rule of prior appropriation is in full force and effect, both as to appropriations made within the State of Arizona and as to appropriations made without the State of Arizona.

Except as modified by its right to control navigable streams in aid of navigation, it is doubtless true that the rights of the United States to the use of water at Boulder Dam for power purposes and for irrigation purposes will be governed by the law of prior appropriation, to the same extent and in the same manner as that law governs appropriations by private individuals.

When Boulder Dam is completed, and the waters impounded thereby have been put to beneficial use for the generation of power or for irrigation, the question of Arizona's right to divert waters above Boulder Dam will be affected by the use of such waters at Boulder Dam.

The relative rights between the State and the United States with reference to the use of waters at Boulder Dam and upstream therefrom, will depend, insofar as this phase of the problem is concerned, upon the question of fact as to whether or not the diversion of water upstream would deprive the United States of any vested right it may have at that time acquired to the beneficial use of the waters of the

stream, and upon the priority of such rights. If the United States establishes a right prior in time to any right established by the State of Arizona, and subsequent to the acquisition of such prior right by the United States, the State should undertake to divert waters from the stream above Boulder Dam, in such quantities and to such extent as to deprive the United States of the beneficial uses of such waters, to which it had established a prior right, it is doubtless true that the United States could enjoin such upstream diversion, at least to the extent that it interfered with the prior use vested in the United States.

Wyoming v. Colorado, 259 U. S. 419, 42 Sup. Ct. 552.

As will be seen above, whether the River should ultimately be held to be navigable or non-navigable upon the portion thereof under consideration, would be immaterial to the answer to your question since in any event the Federal Government holds title to lands across which it would be necessary to acquire rights of way for canals and the principles discussed above apply to that land with full force, as well as the bed of the River in case it should be held non-navigable.

For the foregoing reasons, it is my opinion that your question must be answered in the negative, and that the State of Arizona does not have the legal right to build a dam across the main stream of the Colorado River, above Boulder Dam, and divert waters therefrom for irrigation and power, through ditches, tunnels and other works across the public domain, without the consent of the Federal Government.

Yours very truly,
ARTHUR T. LAPRADE,
Attorney General
CHAS. A. CARSON, Jr.,
Special Assistant

July 31, 1933.

Arizona Colorado River Commission,
Phoenix, Arizona.

Gentlemen:

You have requested the opinion of this office upon the following question.

Will the construction of the proposed Parker Dam by the Secretary of the Interior and the Metropolitian Water District of California and the diversion of waters therefrom by the Metropolitan Water District of California, invade any of the rights of the State of Arizona in the Colorado River?

The Secretary of the Interior on the 24th of April, 1930, entered into a contract with the Metropolitan Water District of Southern California, under the laws of the State of California, which contract as amended by a supplementary contract of September 28, 1931, provided for delivery by the Secretary of the Interior to the Metropolitan Water District of 1,100,000 acre-feet of water per annum from the waters of the Colorado River to be stored at Boulder Dam.

On February 10, 1933, the Secretary of the Interior entered into a contract with the Metropolitan Water District of Southern California under the terms of which the District agreed to advance $13,000,000, or so much thereof as might be necessary, with which the Secretary of the Interior on behalf of the Water District agreed to construct the proposed Parker Dam approximately ten miles above the

boundaries of the Colorado River Indian Reservation, across the main stream of the Colorado River.

In this contract it is recited that the reclamation of Indian and public and other lands will be rendered more feasible by the availability of stored water and electrical energy at the proposed Parker Dam and the floods of the tributaries of the Colorado River between the Hoover Dam and the Parker Dam will be controlled and navigation improved by said Dam and that the District is engaged in a project involving the construction of an aqueduct for the purpose of diverting and conveying water from the Colorado River to the Metropolitan area of Southern California for domestic, municipal and other purposes and as a means of such diversion desires storage in the main stream of the Colorado River at the site of the proposed Parker Dam for the purposes, among others, of desilting water, reducing pump lift and developing incidental electrical energy for pumping water into their said aqueduct and other uses subordinate to said aqueduct project and that the District desires to utilize the proposed Parker Dam in common with the United States and is willing to pay to the United States the entire capital cost of the construction of said Dam, and is further willing that one-half of the power privilege created by said Dam shall be reserved to the United States for the purposes of irrigation and drainage of lands in Arizona within the Colorado River Indian Reservation, as now constituted, and the Gila, or the Gila-Parker Project, without contribution by the United States to the capital cost of the proposed Dam, and is also willing that the Dam be utilized by the United States for the storage and diversion of water for the requirements of Indian, public and other lands in Arizona.

The Secretary of the Interior attempts to bind the United States with the funds to be advanced by the District and for the purposes stated, to construct the proposed Parker Dam, creating thereby a storage reservior having a maximum water surface elevation of 450 feet above sea level. Also, to construct outlet works, pressure tunnels, penstocks and other appurtenant structures and such facilities for navigation as the Secretary may find necessary.

Taking the contract for the construction of the Dam and the contracts for the delivery of water together, it is apparent that the Dam is to be constructed by the Secretary of the Interior for the private benefit of the Metropolitan Water District with incidental advantages merely accruing to the United States for the power and irrigation purposes. The reference in the recitals to navigation apparently has no substantial basis in fact, since it does not appear that the Dam will in any way aid navigation, but that to the contrary it will constitute a very serious obstruction to navigable capacity. Likewise, the reference in the recitals to flood control of floods of tributaries of the Colorado River between Hoover Dam and Parker Dam does not materially aid the contract. It is generally known that there are very few tributaries between the Dams and that the floods thereon are not menacing after reaching the main stream of the Colorado and that the river is brought under control by Boulder Dam.

The Dam of course is intended and will be, if constructed, a desilting dam and diversion dam from which the Metropolitan Water District will draw 1,100,000 acre-feet of water per year, which water, if diverted, will be taken out of the basin of the river so that there will be no possibility of return flow and will, if diverted, be taken to the coastal plain of Cal-

ifornia, which drains directly into the Pacific Ocean, so that if there should be any water not beneficially and consumptively used, and permitted to waste, it would waste into the Pacific Ocean and would never again return to the Colorado River.

Such purposes are clearly not in aid of navigation but destructive thereof.

The contract for the construction of the Dam recites that it is made pursuant to the reclamation law and particularly pursuant to the act of Congress approved March 4, 1921, Section 25 of the act of Congress approved April 21, 1904 and the Boulder Canyon Project Act. As seen above, the construction of the Dam is for the purpose of providing a desilting and diversion dam for the Metropolitan Water District and diversion therefrom of water for domestic use on the coastal plain of California. It is not intended as a reclamation dam for the purpose of reclaiming lands by irrigation or otherwise. It is not a reclamation project.

None of the acts cited as authority for this contract authorizes the Secretary of the Interior to enter into such a contract for or on behalf of the United States. The Secretary of the Interior is authorized by Paragraphs 395-396 of Title 43, United States Code, to receive moneys from irrigation districts for investigation and construction of reclamation projects designed to reclaim public lands. Nowhere is there found any authority granted to the Secretary to construct works for the purpose of furnishing domestic water and nowhere is there found authority to the Secretary of the Interior to enter into any co-operative agreement where by he receives any money from a water district for the purpose of constructing works to furnish water for do-

mestic or municipal purposes. His whole authority is related to reclamation of arid lands and he has no power to engage in construction projects except for the reclamation of lands.

It is, therefore, thought that the contract of February 10, 1933, by the Secretary of the Interior and the Metropolitan Water District is not binding upon the United States, since it was made by the Secretary of the Interior without authority.

At the point where the proposed Dam is agreed to be built, the boundary line between California and Arizona is the mid-channel of the river or thread of the stream of the Colorado River. (Constitution of Arizona, Article I).

Also, according to the contract therefor, the Parker Dam is proposed to be constructed in a navigable portion of the Colorado River. The river has been held to be navigable at this point by the Supreme Court of the United States in the case of Arizona v. California, 283 U. S. 423.

The bed, banks and water of the river to the center of the stream, therefore, belong to Arizona.

United States v. Utah, 283 U. S. 64, 75 L. Ed. 844.
Port of Seattle v. Oregon and W. R. Company, 255 U. S. 56, 41 Sup. Ct. Rep. 237.
Scott v. Lattig, 227 U. S. 229, 33 Sup. Ct. Rep. 242.

In the latter case the Supreme Court of the United States speaking of the Snake River at a point at which the thread or center of the stream is the boundary between the States of Oregon and Idaho, said:

"Bearing in mind that the Snake River is a nav-

igable stream, it is apparent, first that on the admission of Idaho to statehood the ownership of the bed of the river on the Idaho side of the thread of the stream—the thread being the true boundary of the state—passed from the United States to the state, subject to the limitations just indicated * *."

In the case of Port of Seattle v. Oregon and W. R. Company, supra, the Supreme Court speaking through Mr. Justice Brandeis said:

"The right of the United States in the navigable waters within the several states is limited to the control thereof for the purposes of navigation. Subject to that right Washington became upon its organization as a state the owner of the navigable waters within its boundaries and of the land under the same."

The ownership of the bed, banks and water of the navigable stream, the Colorado River, to the thread or mid-channel thereof is in the State of Arizona, subject only to the paramount control of Congress for the purposes of navigation.

United States V. Rio Grande Dam and Irrigation Company, 174 U. S. 690, 19 Sup. Ct. Rep. 770, 43 L. Ed. 1136.

Economy Light & Power Company v. United States 256 U. S. 113, 41 Sup. Ct. Rep. 409.

Paragraph 403 of Title 33 of the United States Code provides as follows:

"The creation of any obstruction not affirmatively authorized by Congress, to the navigable

capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal navigable river, or other water of the United States, outside established harbor lines or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Sec- of War prior to beginning the same."

It will be noted that this act prohibits the construction of the Dam such as the Parker Dam which must of necessity be an obstruction to navigable capacity, unless affirmatively authorized by Congress. Congress has not so authorized the construction of the Parker Dam. The Boulder Canyon Project Act authorized the construction of two dams one the Hoover, or Boulder Dam, and the other the dam authorized to be constructed for the Imperial and Coachella Valleys in California. No additional dam was authorized to be constructed by any person by that act. No authorization has been found in any other act of Congress for the construction of the Parker Dam. Its construction therefore violates the provisions of Paragraph 403 of Title 33 of the United States Code.

The dam constitutes such an obstruction that it could not be lawfully authorized without an act of Congress by either the Secretary of War, under the foregoing statute, or by Federal Power Commission under the provisions of the Federal Water Power Act, Chapter 12, Title 16, United States Code.

The construction of the dam therefore has not been authorized by Congress or by the Federal Government.

Again, the Colorado River being a navigable stream at this point, the State of Arizona is the owner of the waters and bed thereof to the thread of the stream and has the power to prohibit and restrain the erection of any obstruction to the navigable capacity of the stream. Likewise, the State of California being the owner of the waters and bed of the stream to the thread or mid-channel thereof, has the power to prevent an obstruction to the navigable capacity thereof. It has been repeatedly held that the joint consent of the State and of the United States is necessary to permit the obstruction of a navigable stream.

Economy Light & Power Company v. United States, 256 U. S. 113, 41 Sup. Ct. Rep. 409.

In the case of Cummings v. City of Chicago, 188 U. S. 410, 23 Sup. Ct. Rep. 472, the appellants sought to enjoin the City of Chicago from interfering with the construction of a dock in front of lands owned by appellants and situate on the Calumet River, a navigable stream within the limits of that City, upon the ground that the plans had been approved by the Chief of Engineers and permit granted by the Secretary of War of the United States. In that case the Supreme Court speakng through Mr. Justice Harland, said:

"* * * In a sense, but only in a limited sense, the United States has taken possession of Calumet River, by improving it, by causing it to be surveyed, and by establishing lines beyond which no dock or other structure shall be erected in the river without the approval or consent of the Secretary of War, to whom has been committed the determination of such questions. But Congress has not passed any act under which parties, having simply the consent of the Secretary, may erect structures in Calumet River without reference to the wishes of the state of Illinois on the subject. We say the state of Illinois, because it must be assumed, under the allegations of the bill, that the ordinances of the City of Chicago making the approval of its department of public works a condition precedent to the right of any one to erect structures in navigable waters within its limits are consistent with the Constitution and laws of that state, and were passed under authority conferred on the city by the state.

"Calumet river, it must be remembered, is entirely within the limits of Illinois and the authority of the state over it is plenary, subject only to such action as Congress may take in execution of its power under the Constitution to regulate commerce among the several states. That authority has been exercised by the state ever since it was admitted into the Union upon an equal footing with the original states."

The Court in that case in discussing the acts of Congress bearing upon the subject, as hereinbefore set forth, said:

"The effect of that Act, reasonably interpreted, is to make the erection of a structure in a navigable river within the limits of a state depend up-

on the concurrent or joint assent of both the National Government and the State Government. The Secretary of War, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent, the structure cannot be erected by them. But, under existing legislation, they must before proceeding under such an authority obtain also the assent of the State acting by its constituted agencies."

To the same effect is the language of the Court in Lake Shore & M. S. R. Company v. Ohio, 165 U. S. 366, 41 L. Ed. 748, 17 Sup. Ct. Rep. 357.

In the case of North Shore Boom and Driving Company v. Nicomen Boom Company, 212 U. S. 406, 29 Sup. Ct. Rep. 355, the Court said:

"* * * Where there is a Federal law which it is claimed also applies to the subject and requires the consent of the Federal Government, then there is a concurrent or joint jurisdiction of the state and national governments over the erection of a structure which obstructs navigation. Cummings v. Chicago, 188 U. S. 410, 47 L. Ed. 525 23 Sup. Ct. Rep. 472; Montgomery v. Portland, 190 U. S. 89, 47 L. Ed. 965, 23 Sup. Ct. Rep. 735."

This rule has also been followed in state Courts: Minnesota Canal and Power Company v. Pratt, 101 Minn. 197, 112 N. W. 395, 11 L. R. A. (NS) 105.

Milwaukee v. State, 214 N. W. 820, 54 A. L. R. 419.

In the case of Wisconsin v. Illinois, 278 U. S.

367, 49 Sup. Ct. Rep. 163, the State of Wisconsin and others brought suit against the State of Illinois and the Chicago Sanitary District to prevent excessive diversions of the waters of Lake Michigan through a canal of the District into the Mississippi, on the ground that such diversion constituted an obstruction and impairment of the navigable capacity of the Great Lakes. The suit was brought directly in the Supreme Court of the United States. The matter was referred by the Court to Charles E. Hughes, now Chief Justice, as Special Master. After taking testimony he made his report and recommendations, and the United States Supreme Court enjoined the State of Illinois and the Chicago Sanitary District from diverting waters to such an extent as to interfere with the navigation on the Great Lakes.

In view of the foregoing authorities, it seems settled that the joint assent of Congress and the State or States in which a navigable stream is situate is necessary to permit the construction of an obstruction to the navigable capacity of such stream.

As to the proposed Parker Dam, Congress has not given its assent. The State of Arizona has not given its assent and so far as we know, the State of California has not given its assent. The construction of the Parker Dam, therefore, could be enjoined.

It is understood that no act, other than the execution of the contract of February 10, 1933, has yet been done by either the Secretary of the Interior or the Metropolitan Water District of California toward obstructing the navigable capacity of the Colorado River by the construction of the proposed Parker Dam or otherwise. Upon the first overt act of either Arizona's cause of action will arise. It is therefore recommended that attention be given to the mat-

ter so that when the overt act occurs, that action may be taken by Arizona.

It is also understood that the Metropolitan Water District has not yet diverted any waters from the Colorado River. Again, when the first overt act occurs Arizona's cause of action to enjoin such diversion will accrue and that action should then be taken.

As to the question of the diversion of water from the proposed Dam, in view of the foregoing it is clear that diversion impairs the navigable capacity of the River. In the case of Arizona v. California, 283 U. S. 423, the Supreme Court held that Boulder Dam could be lawfully constructed on the theory that it was a Dam in aid of navigation and thus within the power of the Federal Government to construct. In that case, however, the Supreme Court in dismissing the bill used this language:

> "The bill is dismissed without prejudice to an application for relief in case the stored water is used in such a way to interfere with the enjoyment by Arizona, or those claiming under it, of any rights already perfected, or with the right of Arizona to make additional legal appropriations, and to enjoy the same."

Such diversions would necessarily constitute an impairment of navigable capacity and at the same time, to the extent thereof, prevent the appropriation of waters for beneficial use in Arizona. Arizona, under its power to preserve the navigable capacity of its rivers against impairment or obstruction, could in the suit to enjoin the construction of the dam, also seek to enjoin the diversion of the water.

For the foregoing reasons it is my opinion that

the proposed construction of the Parker Dam by the Secretary of the Interior and the Metropolitan Water District of Southern California and the proposed diversion of waters therefrom by the Metropolitan Water District of California for municipal and domestic use, do invade the rights of Arizona in the Colorado River and that such proposed construction of the proposed Parker Dam and the diversion of waters therefrom can be enjoined by the State of Arizona upon the occurrence of an overt act.

Yours very truly,

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