The
BOULDER DAM DECISION

SPEECH OF

CLIFTON MATHEWS

AT

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I have been getting some undeserved sympathy of late. Since the Boulder Dam decision on May 18, 1931, I have had to listen every now and then to the condolences of well-meaning friends who have got the impression that Arizona was ingloriously and teetotally licked in her Colorado River case, and that I, as one of her counsel, am a proper object of sympathy.

Now sympathy is a fine thing, and I appreciate it, but in this case it happens to be premature. It makes me feel as Mark Twain did when he said the reports of his death had been exaggerated. There has been a considerable amount of exaggeration in the reports of Arizona's supposed defeat at Washington on May 18. My purpose today is to correct some of this exaggeration and to show you that the Boulder Dam decision was, in fact, a victory for Arizona—not a complete victory, it is true, but a victory nevertheless, and a very important one—and that it isn't yet time to send flowers.

On December 21, 1928, Congress passed the Boulder Canyon Project Act, which, prior to its passage, was commonly known as the Swing-Johnson Bill. This Act authorized the Secretary of the Interior to construct a dam at Boulder Canyon or Black Canyon, in that part of the Colorado River which forms the boundary between Arizona and Nevada, and to use the dam for certain specified purposes, which I will presently discuss.

The Act "authorized" the appropriation of $165,000,000 with which to carry out its provisions, but did not actually appropriate any money for that purpose. Consequently, a year and a half went by before any work was started. Finally, however, on July 3, 1930, Congress appropriated $10,660,000 with

which to start construction of Boulder Dam, and the Secretary of the Interior announced that work would shortly begin.

Thereupon, the State of Arizona, acting through its Colorado River Commission, requested the Attorney General of Arizona to bring suit in the Supreme Court of the United States to test the constitutionality of the Boulder Canyon Project Act. This was done. In preparing, filing, briefing and arguing the case, Attorney General Peterson was aided by two assistants specially employed for that purpose. One of these special assistants was Mr. Dean Acheson, of Washington, D. C. The other was myself. That is how I happen to be talking to you about the case.

Our bill of complaint was written in July and August, printed in September and presented to the Supreme Court on October 6, 1930. After reading and considering our bill, the Court on October 13 granted leave to file it, and it was filed on that date. The defendants in the case were the States of California, Nevada, Utah, New Mexico, Colorado and Wyoming and Ray Lyman Wilbur, Secretary of the Interior. The Court ordered these defendants to answer or plead to the bill of complaint on January 12, 1931. They appeared on that date and moved to dismiss our bill. Arguments for and against the motions were heard on March 9 and 10. The Court on May 18 handed down its decision, granting the motions and dismissing our bill of complaint, without prejudice.

This dismissal has been misunderstood and misinterpreted by many good citizens of Arizona. In reading the decision, or reading about it in the newspapers, everyone has noted the word "dismissed," but a good many have overlooked the words "without prejudice," or have failed to grasp their meaning. There is a widespread but wholly erroneous impression that, in dismissing our bill, the Court decided all the questions raised in our suit, and decided them all against us.

Some of you may have that erroneous impression. If so, I want to correct it by showing you what questions were raised in the case, which of these questions were decided and how, and

which ones were not decided, so that you may see for yourselves how foolish it is for Arizonans to consider themselves whipped in this battle of the Colorado.

First of all, we objected to the Boulder Canyon Project Act, because it authorized the construction of a dam in Arizona, or partly in Arizona, without Arizona's consent, and so we raised the question whether, under the Constitution of the United States, Congress had the right to pass such an act. The answer to this question depended on whether or not the Colorado River was navigable. We knew, of course, as everyone knows, that, if the river was navigable, Congress had the right to improve it, by damming it or by any other appropriate means, but we alleged that the river was not navigable, and that, therefore, Congress had no such right.

The Court decided this question against us and held that the river was navigable, and that, therefore, Congress could put a dam in it without Arizona's consent.

That was the first question decided in the case and the only question decided against us. It was not the most important question in the case. Long ago, before our suit was ever started, and many times since, in discussing it here and elswhere, I have stated, and I now repeat, that it was not just a dam suit. It was a river suit. The question of building or not building Boulder Dam was comparatively unimportant. The thing Arizona was vitally interested in was the use to be made of the dam. The main object of our suit was to prevent the Secretary of the Interior from so using the dam as to deprive Arizona of her rights in the river. Therefore, let us consider for a moment the uses which the Act authorized the Secretary to make of the dam.

The biggest and most important use of the dam, as provided in the Act, was to enforce the Colorado River Compact, not only in the States of California, Nevada, Utah, New Mexico, Colorado and Wyoming, which had accepted the Compact, but also (and especially) in the State of Arizona, which had rejected the Compact and refused to come under it. This the Act attempted to do by providing that no one should have or use any

water stored by the dam (and the dam will store all the water in the river) except by contract with the Secretary of the Interior, and that all contracts should be subject to the Colorado River Compact. It becomes necessary at this point to give a brief explanation of the Compact, so that you may see what its enforcement would have meant to Arizona.

The Compact is a long document, and I haven't time to read it to you, but will simply state the substance and effect of it. Of course it couldn't disturb, and doesn't attempt to disturb, existing water rights. It says they shall remain unimpaired. In other words those who have heretofore made valid appropriations of water are permitted to keep on using the water already appropriated. But, aside from this appropriated water, there is also flowing in the river each year about 9,000,000 acre-feet of unappropriated water, all of which flows in Arizona and, under our laws, is subject to appropriation in Arizona.

The Compact says, in effect, that this 9,000,000 acre-feet of unappropriated water shall no longer be subject to appropriation in Arizona; that 5,000,000 acre-feet of it is apportioned, in perpetuity, to the Upper Basin States (Utah, New Mexico, Colorado and Wyoming); that 3,000,000 acre-feet of it is reserved for Mexico; and that the remaining 1,000,000 acre-feet is apportioned to the Lower Basin, consisting of Arizona, California and Nevada. Before our suit was started, the Secretary of the Interior, acting under the provisions of the Boulder Canyon Project Act, had already contracted to California the entire 1,000,000 acre-feet of unappropriated water which the Compact apportioned to the Lower Basin, leaving none at all for Arizona.

Thus the Compact, if enforced, would have made it absolutely impossible for Arizona ever to appropriate another drop of water from the Colorado River. Any use which we might have made of the water would have been temporary only, and only until such time as somebody else wanted it. No permanent water title could have been acquired, and of course you all know that, without a permanent water title, no irrigation project could be developed in Arizona. For us to have accepted the Compact

would have been to sign a quitclaim deed, relinquishing for all time our rights in the Colorado River.

That is a true picture of the Colorado River Compact—the unfairest and most inequitable document a sovereign State was ever asked to put its pen to. We refused to accept such a compact. We rejected it, and Congress, in the Boulder Canyon Project Act, tried to ram it down our throats, whether we wanted it or not.

But they didn't succeed. We went to court and, in our suit, we raised the question whether, under the Constitution of the United States, Congress could force the Compact on Arizona. That was the one all-important question in the case, and the Court decided it in our favor. The decision says that we are not under the Compact, that we are not bound by it, that we cannot be bound by it without our consent, that our State water laws are still in force, and that we are still free to appropriate any unappropriated water in the river, just as if the Boulder Canyon Project Act had not been passed.

And so this Compact clause—the clause that attempted to force the Compact on Arizona—has gone by the board. It is dead. It was the heart of the Act, and we tore it out, tore it up, and made waste paper of it. And yet some people say we lost our case, and isn't it just too bad?

There are three other uses which the Act authorizes the Secretary to make of Boulder Dam. One is to store water and operate a power plant with it. Another is to store water and deliver it to Los Angeles and other Coast cities through the proposed Los Angeles aqueduct. A third use is to store water and deliver it to the Imperial Valley through the proposed All-American Canal.

In our suit we questioned the legality and constitutionality of these three projects, but the Court did not pass on these questions. It said that several years must elapse before the dam would be completed, that it was, therefore, unnecessary to decide these questions now, and that if, after completing the dam, the

Secretary should attempt to make any unlawful use of it, Arizona could complain then, and the Court would hear her complaint. So the Court dismissed our bill, without prejudice, thereby reserving our right to renew it later, if necessary.

Consider now the position this puts California in. All she has got is a decision saying that Boulder Dam can be built. Her three great projects—the power project, the Los Angeles water project and the All-American canal project—are still under fire. Instead of validating and approving these projects, the decision casts the gravest doubt on their legality. I will tell you why and how.

In order to get the Court's approval of Boulder Dam, California claimed, and the Court upheld her claim, that the Colorado River was navigable. All right, but, if the river is navigable, the bed of it, from the center of the stream to high water mark on the Arizona side, belongs to and is owned by the State of Arizona. The Government can use Arizona's land (her half of the river bed) for the purpose of building a navigation dam, or otherwise regulating navigation, but for no other purpose. California has no right to use Arizona's half of the river bed for any purpose, without Arizona's consent.

One-half of the proposed power plant, one-half of the proposed diversion dam for Los Angeles, and one-half of the proposed diversion dam for the Imperial Valley are to be constructed in and on Arizona's half of the river bed. It cannot truthfully be said that these projects are for the improvement of navigation. How, then, can they be constructed without Arizona's consent?

And that isn't all. We didn't know until recently, but now we know, that we have a great navigable river flowing between us and California. That being so, the State of Arizona has the legal right to insist that its navigability be protected and preserved. We can go into court, if necessary, to enjoin obstructions of it, or diversions of water from it, such as would seriously impair its navigability. That is what New York, Michigan and Wisconsin did in the Chicago Drainage District case. That is

what New Jersey and Pennsylvania did in their recent suit against New York. What those States did Arizona can do, and intelligent Californians know it. That is why they aren't as happy over the Boulder Dam decision as some of us have imagined.

Today, more than ever, California needs an agreement with Arizona, and some day—not now, but eventually—Arizona will need an agreement with California. The truth is that the Colorado River, being a boundary river, and navigable, can never be properly and lawfully developed, except by mutual agreement of the interested States. I think that such an agreement should be made—on proper terms and conditions, of course—and that it can be made. Governor Rolph is an intelligent man and, I think, a fair and reasonable man. His friendly overtures should be met in a friendly and neighborly spirit, and every effort should be made to reach a just and equitable agreement.

Any such agreement should give the two States equal rights in the use of any diversion dam or dams to be constructed in the river, and of any water stored or impounded thereby. It should also provide that anyone using such water in either State shall have an absolute and unconditional right of way over Government lands, wherever necessary, for the construction and maintenance of ditches and other irrigation works. This agreement, like any other interstate agreement, will require the approval of Congress. Such approval will constitute a grant of the rights of way therein provided for. This will remove the chief obstacle now hindering the use of Colorado River water in Arizona.

There is no reason why California should object to such an agreement. By accepting the Compact, and by an act of her Legislature on March 4, 1929, California has put a limit on the quantity of water she may take from the river. We are under no such limitation. When California reaches her limit, there will still be at least 5,000,000 acre-feet of unappropriated water in the river—water which Arizona can appropriate, and California cannot.

It will be to California's interest to have us take and use this water, rather than have it used and consumed in the Upper Basin. Arizona can appropriate water after it has passed Boulder Dam and been used to generate power, most of which will go to California. Water consumed in the Upper Basin cannot possibly do California any good. So, I say, there is every reason to believe that Arizona and California can now reach an agreement that will be satisfactory to both States.

The Boulder Dam decision points the way to such an agreement, and I have no doubt it will come, in time. Also, the time will come when a great area of land in southwestern Arizona, an area larger than the Salt River Valley, of land now useless and uninhabitable, will be reclaimed from the desert and transformed into a rich and prosperous agricultural region, watered from the Colorado River, and supporting a population of many thousands of Arizona citizens. I may not see it, but some of you will, and when you do, I ask you to remember that what you see then was made possible by what we did at Washington in 1930 and 1931.

That may seem to you a small thing to have accomplished. Perhaps it was, but we did the best we could, and the result must speak for itself. Call it defeat, call it failure, if you want to. If so, I can only say that I am proud to have had a part in it.