United States

Circuit Court of Appeals

For the Ninth Circuit

VERDE RIVER IRRIGATION AND POWER DISTRICT
Appellant

VS

SALT RIVER VALLEY WATER USERS' ASSOCIATION,
and HAROLD L. ICKES,
Appellees.

BRIEFS.

1938.

1.00

No. 8510

United States
Circuit Court of Appeals
For the Ninth Circuit

VERDE RIVER IRRIGATION AND POWER DISTRICT, an Irrigation District,

Appellant,

vs.

SALT RIVER VALLEY WATER USERS' ASSOCIATION, a corporation, and HAROLD L. ICKES, Secretary of the Interior of the United States,

Appellees.

Brief of Appellant

Upon Appeal from the United States District Court for the District of Arizona.

[1938 See 91 Fed.2 936]

INDEX

TOPICAL INDEX

TABLE OF CASES

TABLE OF CASES—(Continued)

TABLE OF CASES—(Continued)

STATUTES OF THE UNITED STATES

STATUTES OF THE UNITED STATES
(Continued)

STATUTES OF ARIZONA

REGULATIONS

APPENDIX

No. 8510

United States
Circuit Court of Appeals
For the Ninth Circuit

VERDE RIVER IRRIGATION AND POWER DISTRICT, an Irrigation District,

Appellant,

vs.

SALT RIVER VALLEY WATER USERS' ASSOCIATION, a corporation, and HAROLD L. ICKES, Secretary of the Interior of the United States,

Appellees.

Brief of Appellant

(For brevity the Appellee, Salt River Valley Water Users' Association, is referred to as the "Association", and Appellee, Harold L. Ickes, is sometimes referred to as the "Secretary".)

JURISDICTIONAL FACTS

This appeal is prosecuted from a final order of the District Court of Arizona sustaining Appellee,

Salt River Valley Water Users' Association's, several motions to dismiss Appellant's amended complaint. The Appellee, Harold L. Ickes, has not, to date, entered his appearance, nor has process been served upon him. The Appellee Association moved for dismissal upon eight separately and distinctly assigned grounds. The court sustained the Association's motion generally without specification of the grounds of its ruling. It becomes necessary, therefore, for the Appellant to assume for the purposes of this appeal that the trial court sustained the Association's motion to dismiss upon each of the eight assigned grounds. The Appellant has assigned as error the action of the trial court in sustaining the Association's motion on each of these eight grounds. Two of these grounds go to the question of the jurisdiction of the District Court and we are assuming the necessity of arguing these assignments at length in another part of this brief. We trust, therefore, we may be pardoned for somewhat briefly and formally complying with paragraph (b) of Rule 24 in this part of our brief and referring the court to a later portion of the brief in which the question of jurisdiction is discussed at greater length after a complete statement of the case in compliance with paragraph (c) of Rule 24.

Briefly, then, the amended complaint alleges that the Appellant is an irrigation district duly organized under the laws of the state of Arizona; that the Appellee, Salt River Valley Water Users' Association, is a private corporation duly organized under the laws of the State of Arizona, with its principal office and place of business at the City of Phoenix, Arizona; that the defendant, Harold L. Ickes, is a citizen of the state of Illinois, temporarily resid-

ing in Washington in the District of Columbia; that the amount in controversy in the suit exceeds, exclusive of interest and costs, the sum of three thousand dollars ($3,000.00); and that the suit involves a controversy arising under the statutes and laws of the United States and between citizens of different states. (Record 5, 6.) A reading of the amended complaint will disclose that the controversy is not a severable one. The amended complaint by appropriate averments sets forth that the Appellant is the owner of a permit duly issued by the state of Arizona to appropriate the unappropriated surplus and flood waters of the Verde River, (Record 7, 8) an intrastate stream, for the purpose of irrigating approximately 85,000 acres of land lying within the exterior boundaries of the District; (Record, 6) that the Appellant is the owner of easements and rights of way granted pursuant to the Act of March 3, 1891, (26 Stat. 1101, 1102, 43 U.S.C.A. 946, 948) for three storage dams and reservoirs upon the Verde River designed to provide a water supply for the irrigation of the lands of the District; (Record 10, 11) and of permits duly and regularly procured from the State Water Commissioner of Arizona to construct storage dams at its Camp Verde and Horse Shoe sites on the Verde River; (Record 8) that the Commissioner of the General Land Office and the Secretary of the Interior attempted to cancel these easements and rights (Record 11) and thereafter the Secretary, purporting to act under the authority of the Act of Congress approved June 17, 1902, known as the Reclamation Act (32 Stat. 388) and acts amendatory thereof or supplemental thereto, and pursuant to the Act of Congress of April 8, 1935, known as the Emergency

Relief Appropriation Act of 1935, (49 Stat. 115, 15 U.S.C.A. 728) entered into a contract with the Appellee, Salt River Valley Water Users' Association whereby he appropriated to the use of the Association and committed the United States to the duty, among other things, of constructing for the use and benefit of the Appellee Association a dam upon the Verde River to be known as the Bartlett Dam, upon the identical site of the Appellant's Bartlett Dam, with an impounding capacity of 200,000 acre feet. (Record 17, 18) The Appellant charges that the acts of the Commissioner of the General Land Office and of the Secretary of the Interior in attempting a cancellation of its easements and rights were acts in excess of the statutory authority of these two officials (Record 11, 12) and that the Secretary of the Interior, Harold L. Ickes, violated the provisions of the Reclamation Act in entering into the contract in question, (Record 19, 20) and that the Emergency Relief Appropriation Act of 1935, in so far as it may be construed as authorizing the making of the contract in question, is an unconstitutional and void enactment. (Record 20)

The complaint charges that the Appellees have gone upon the Appellant's Bartlett Dam site and are actually engaged in the construction of the dam and reservoir contemplated by the above referred to contract, and that unles restrained they will proceed with such work to the destruction and loss of Appellant's water rights and its easements and rights of way upon the Verde River. (Record 21, 22) The complaint further charges that the acts complained of constitute clouds upon Appellant's water rights upon the Verde River and upon its easements and rights of way. (Record 20, 21) The Appellant

asks injunctive relief and that its easements and rights be decreed to be valid and subsisting rights; that the contract in question be found and adjudged to be null and void as an act in excess of the authority of the defendant Ickes; and that it have all other and further relief as to the court may seem meet and equitable. (Record 22, 23)

The amended complaint involves the construction and effect of the Act of March 3, 1891, (26 Stat. 101, 1102, 43 U.S.C.A. 946, 948); the validity, construction and effect of the Emergency Relief Appropriation Act of 1935, (49 Stat. 115, 15 U.S.C.A. 728), which, for the convenience of court and counsel, is set out verbatim in an Appendix to this brief; the construction and effect of Section 8 of the Act of June 17, 1902, (32 Stat. 390, 43 U.S.C.A. 383); the construction and effect of Section 4 of the Act of December 5, 1924, amending the Reclamation Act (43 U.S.C.A. 702, 43 U.S.C.A. 412); the construction and effect of Section 4 of the Act of June 25, 1910, amending the Reclamation Act (36 Stat. 836, 43 U.S.C.A. 413); and the construction and effect of Section 16 of the Act of August 13, 1914, amending the Reclamation Act (38 Stat. 690, 43 U.S.C.A. 414.)

The amended complaint as a whole is within the provisions of Section 24 (1) of the Judicial Code (Comp. Stat. 991 (1), and within the provisions of Section 128 (a) First, of the Judicial Code (28 U.S.C.A. 225 (a) First). For a further discussion of the question of jurisdiction see page 17, et seq. of this brief.

STATEMENT OF CASE

By its amended complaint the Appellant seeks to uncloud its titles to its rights to appropriate for irrigation, domestic and power uses and purposes 960 cubic feet per second constant flow of the surplus and unappropriated waters of the Verde River in Arizona and its easements and rights of way upon and over the public domain for its reservoir and dam sites upon that stream.

The inducement to, occasion and necessity for the suit, is the making of the contract between the Appellees under date of June 3, 1935 (Record 44-62), whereby among other things the United States agrees with the Association to construct, on its behalf and at its expense, through the Bureau of Reclamation, a dam on the Verde River at the Bartlett site, creating a storage reservoir of 200,000 acre feet as a supplemental water supply of the Association for use on lands under canals of its project now constructed. This agreement purports to have been made by the Secretary of the Interior pursuant to the Reclamation Act (Act of Congress June 17, 1902, 32 Stat. 388) and the Emergency Relief Appropriation Act of 1935 (Act of April 8, 1935, 49 Stat. 115, 15 U.S.C.A. 728).

The Appellant by formal allegations sets forth facts disclosing diversity of citizenship, a controversy involving more than $3,000.00 in amount exclusive of interest and costs, and that the controversy involves statutes and laws of the United States.

The Appellant has within its boundaries 85,000 acres of arable irrigable lands. It has heretofore adopted in the manner prescribed by the laws of

Arizona, a general plan of an irrigation system for the reclamation of its lands. This plan provides for the construction of a series of dams upon the Verde River for the impounding and diversion of the unappropriated waters of that stream for use for irrigation, domestic and power purposes. The plan includes dams at the Camp Verde, Horse Shoe and Bartlett sites, each of which is necessary to Appellant's general plan of development. (Amended Complaint, Par. 11, Record, 6)

The Association does not now have and never has had any storage facilities upon the Verde River and has not at any time, or in any manner, acquired the right as against the Appellant to use any more of the water of that stream than it has heretofore put to beneficial use by means of diversion unaided by storage facilities. The Appellant has duly and regularly procured, pursuant to the State Water Code of Arizona, a permit from the State Water Commissioner as of April 17, 1920, to appropriate an amount of the surplus waters of the Verde River over and above the amount being diverted by the Association equal to 960 cubic feet per second continuous flow. This amount constitutes all of the surplus and flood waters of the stream. (Amended complaint, Par. III, Record 7-8)

A long time prior to the making of the contract between the Appellees, the Appellant in compliance with the provisions of the Water Code of Arizona, duly and regularly procured permits to construct its storage dams and reservoirs at its Camp Verde and Horse Shoe sites. These permits are and were at the time of the filing of Appellant's amended complaint, valid and subsisting permits for such

constructions. (Amended complaint, Par. III, Record, 8)

At a time long prior to the making of the contract between the Appellees, the Appellant had duly and regularly filed with the State Water Commissioner of Arizona its application for a permit to construct a storage and diversion dam at its Bartlett site. This application was at the time of the filing of the amended complaint, and is now, a valid and subsisting application, which accords to the Appellant a right to a reservoir permit at that site superior to any right which the Association may claim to have. It is the purpose of the Appellant, unless prevented by the wrongful acts and conduct of the Appellees, to utilize its permit for the construction of the Bartlett Dam as a necessary part of its proposed irrigation system. (Amended complaint, Par. III, Record 8-9)

On June 30, 1930, the Secretary of the Interior granted to Appellant, pursuant to the provisions of the Act of Congress of March 3, 1891, (26 Stat. 1101, 1102, 43 U.S.C.A. 946, 948) easements and rights of way for its Camp Verde and Horse Shoe dam and reservoir sites, inclusive of the right to occupy a strip of land one mile in width on either side of the Verde River from the Camp Verde dam site to its mouth for canals and power development. The Bartlett Dam site is below the Camp Verde Dam site and within this two mile strip. These easements and rights embrace the identical area covered by conditional easements and rights granted to Appellant on May 21st and 25th, 1920, (Exhibit "A", Record 24-35).

As a condition precedent to this grant the Appellant entered into a contract with the Secretary of the Interior by the terms of which it acknowledged and agreed to respect the prior rights of the Indians of the Salt River Indian Reservation to divert and use water from the flow of the Verde River for the irrigation of 8,310 acres of Indian lands and in lieu of such natural flow rights, agreed to carry and deliver from its works to be constructed 22,000 acre feet of water annually to these lands for the consideration and subject to the conditions set forth in the contract (Exhibit "B", Record 36-43). This contract has in no manner been breached and is now in full force and virtue as a valid and subsisting contract between the Appellant and the United States. On October 14, 1935, the Commissioner of the General Land Office made and served upon Appellant an order cancelling its easements and rights upon the theory that five years had passed since the grant without Appellant having made any showing of progress in the construction of its works. The action of the Commissioner was affirmed by the Secretary of the Interior under date of March 23, 1936. Among the reasons assigned by the Secretary for confirming the action of the Commissioner was the following:

> "The Bartlett Reservoir site is on the Verde River below the Camp Verde site and the Horse Shoe site so the construction of the two latter reservoirs, assuming that the district were able to finance and construct them, might seriously interfere with the use of the Reservoir to be constructed on the Bartlett site in which latter reservoir the Government will be particularly interested by reason of the allocation and use of Federal funds for the construction and by

reason of its duty to see that the Indians of the Salt River Indian Reservation are supplied with water (39 Stat. 130); particularly is this true should there arise any controversy over the appropriation of the water of the Verde River and its release from storage." (Deft's. Ex. 1, Record, 113)

These orders and rulings both of the Commissioner of the General Land Office and of the Secretary of the Interior are void and without effect to cancel or impair appellant's easements and rights for the reasons that the grants were in praesenti, conferring upon Appellant vested rights in and to those portions of the public domain therein involved, which were beyond the power and jurisdiction of the Commissioner or the Secretary to cancel or impair and could only be cancelled and voided through an action instituted in a court of competent jurisdiction by the Attorney General of the United States and upon due process being accorded to the Appellant with a right to be heard thereon. (Amended complaint, Par. IV, Record 9-12)

Although the five year period of these grants would normally have expired on June 30, 1935, the United States is estopped to assert such expiration and forfeiture for the following reasons: On the 28th day of July, 1932, when only two years of the period of Appellant's grant had expired, the Appellant tendered to that agency an application for a loan with which to develop its project. This application was received and given consideration by Reconstruction Finance Corporation. The Appellant's engineers, attorneys, officers and employees did a large amount of work in assembling and presenting data to that agency in support of its

application. The application was vigorously opposed by the Association as had been all applications before the Secretary affecting its easements and rights of way. The application pended before Reconstruction Finance Corporation until the creation of the Federal Emergency Administration of Public Works, when the application was transferred to that agency. The opposition of the Association was continued before that agency resulting in a hearing at Phoenix, Arizona, during the month of August, 1933, before a board of engineers appointed by Public Works Administration, and a further hearing in Washington, D. C., about the month of September, 1933, before a like board. At each of these hearings the Association was fully heard as to its rights and claims. The contentions of the Association were twice denied and the rights and claims of the Appellant relative to its water rights in the Verde River, its permits to construct its dams as granted by the State of Arizona, its easements and rights of way and the feasibility of its project were on each occasion upheld and confirmed. Following these hearings and on November 3, 1933, the Appellant's application before the Federal Emergency Administration of Public Works was allowed and that agency made an allotment of $4,000,000.00 to the Bureau of Reclamation, with the direction that $3,500,000.00 be used to construct the first unit of Appellant's works, and that $500,000.00 be used for the making of a survey and plans for its project. The Bureau of Reclamation proceeded with work upon Appellant's project preliminary to actual construction and continued in such work until October, 1934, and at all times until that date led the Appellant to believe that the United States Govern-

ment, through the Bureau of Reclamation would build its project, including its Bartlett Dam. From the date of this allocation to the month of October, 1934, the Association continued its active opposition to Appellant's development, at which time the Bureau of Reclamation influenced by the acts and conduct of the Association and by other causes unknown to Appellant falsely reported that its project was infeasible. As a result of this report the Emergency Administration of Public Works cancelled Appellant's allotments and stopped work upon its project. (Amended complaint Par. IV, Record 9-16.)

The Reconstruction Finance Corporation and the Federal Emergency Administration of Public Works, as agents of the grantor of Appellant's easements and rights of way, having with the knowledge, active cooperation and approval of the Secretary of the Interior, accepted Appellant's application for moneys with which to construct its works and having encouraged it to prosecute its application before such agencies, and having actually made an allotment to it for the building of its works, the period of time intervening between the date of the inception of its application, viz: July 28, 1932, and the cessation of work upon its project, may not legally or equitably be considered a part of the time accorded to it under the Act of March 3, 1891, and the contract of June 30, 1930. Nor may any of the time transpiring since October 1934 be so considered for the reasons hereinafter set forth. These agencies futilely consumed more than two years of the time accorded to the Appellant under the terms of that Act and by reason of such acts and conduct Appellant's easements and rights of

way are, and of equity and right ought to be, extended from the period of July 28, 1932, to such time as the present interference of the Secretary of the Interior ceases. (Amended Complaint, Par. IV, Record 16-17.)

The contract of June 3, 1935, was made by the Appellee Ickes with full knowledge and information of Appellant's general plan for its development. He had full knowledge and available record information in his own office of the diligent efforts of the Appellant to finance its development and of the persistent opposition interposed by the Association. He at that time knew that the Appellant held a permit from the State of Arizona to appropriate all of the surplus and unappropriated waters of the Verde River. He knew that the Verde River development contemplated by the contract of June 3, 1935, if given effect, would utterly destroy the Appellant's projected enterprise. He admitted as much in the portion of the opinion of his office quoted above. He then knew the Association had no permit or other right or authority whatsoever to appropriate the waters contemplated by the Association's proposed storage dam. He then knew the Appellant held permits from the State of Arizona to construct its storage dams upon the Verde River; that this was a necessary preliminary step in any construction of the type contemplated by that contract, and that the Association had neither applied for nor procured such permit. He, of course, knew of the existence of Appellant's easements and rights of way for its dams and reservoirs; that the statutory period of the grant had not then expired; and that the making of the contract in question cast a cloud upon both Appellant's water rights and its

easements and rights of way. He knew that the contentions of the Association had been given full consideration at the two hearings referred to in this statement, and that these contentions had been twice denied by boards appointed by his office. He knew the Bartlett site was the identical site located by William H. Bartlett, Engineer and Secretary of the Appellant, as a storage and diversion site for Appellant's project and that its application was then pending in his office for a specific easement covering this site. (Amended Complaint, Par. VI, Record 17-18.)

The contract purports to have been made in part upon the authority of the Reclamation Act. This is not true for the reason that the Association's Verde River project had not at any time prior to the making of the contract, been approved by the President of the United States, or by the Chief of Engineers, nor had it been submitted to Congress for its approval, nor had any appropriation been made or authorized by Congress as required by the terms of this Act.

The Emergency Relief Appropriation Act of 1935 is, insofar as it may be construed to authorize the making of the contract and construction of the proposed dam under the supervision and jurisdiction of the Bureau of Reclamation, unconstitutional and void for the reasons: (a) That it is vague, indefinite and general as to its purpose and intent; (b) It would confer upon the President an uncontrolled discretion as to the expenditure and use of the money therein appropriated; (c) It attempts to deliver to the President legislative powers and functions that may be exercised by the Congress

alone. (Amended Complaint, Par. VI, Record 17-21.)

The Appellees were at the time of filing the amended complaint, and now are, engaged in construction work at the Bartlett Dam site and unless restrained by the court will construct the contemplated dam wih a storage capacity of 200,000 acre feet. The conduct of the Appellees in entering into the contract in question and entering upon the work of construction of the dam in question, constitutes a joint attempt upon their part to wrongfully and unlawfully invade subsisting rights of the Appellant acquired under and pursuant to the laws of the State of Arizona and of the United States of America, and by such wrongful conduct to take from the Appellant and appropriate to the use of the Association the Appellant's dam and reservoir site upon the Verde River and by so doing unlawfully to take from the Appellant, store, divert, use and convert to the Association's own use, a major portion of the waters of the Verde River, the subject of Appellant's lawful appropriation. The net result of the joint conduct of the Appellees is to completely destroy the Appellant's irrigation project to its irreparable loss and damage and to the loss and damage of each and every of its landowners. It is apparent that the Appellant has no plain, speedy or adequate remedy at law for the redress of these wrongs. (Amended Complaint Par. VII, Record 21-22.)

All of the foregoing facts are covered in Appellee's amended complaint. To this complaint the Association filed a motion to dismiss on eight separately assigned grounds. The motion was granted by the court in general terms, without specific as-

signment of his reasons therefor. (Record 69.) The Appellant prepared, tendered and moved for the privilege of filing a second amended complaint. The purpose of this amendment was to amplify the Appellant's statement of its water rights by adding the following paragraph to Appellant's first amended complaint:

> "During the year 1916 the plaintiff's predecessors in interest and in the year 1918 this plaintiff itself, posted and recorded notices of their and its appropriation of all of the then unappropriated waters of the Verde River pursuant to the laws of Arizona then in force and effect. These notices and the rights initiated thereby have at no time been waived, but to the contrary have at all times been expressly reasserted by the plaintiff in all of its proceedings before the State Water Commissioner of Arizona."

and by setting forth in the sub-paragraph immediately following an averment that the Appellant in its application for a permit to the State Water Commissioner expressly re-asserted the right so initiated by it through the posting and recording of notices as above set forth in its second amended complaint.

The court denied this motion and upon Appellant's announcement that it would stand upon its first amended complaint, rendered final judgment for the defendants without specification of his reasons therefor. (Record, 94.)

The plaintiff petitioned an order allowing its appeal and assigned errors numbered 1 to 4, both inclusive, all of which are relied upon and urged in this appeal. (Record, 97-99.)

ARGUMENT

Assignment of Error 2 (d) and (e).

"2. The court erred in its ruling and order made on January 27, 1937, directing dismissal of plaintiff's amended bill of complaint, upon the grounds:

"(d) That it appears upon the face of the amended bill of complaint that the court is without jurisdiction, for the reason that the controversy is not one arising under the constitution and laws of the United States.

"(e) That it appears upon the face of the amended bill of complaint that the court is without jurisdiction, for the reason that the suit is not one arising wholly between citizens of different states.

By reason of the provisions of Rule 24 as amended December 22, 1936, requiring an appellant to give first consideration to questions of jurisdiction of the District Court and of this court as an Appellate court, we consider first sub-paragraphs (d) and (e) of our second assignment of error.

Paragraph numbered IV of the Association's motion to dismiss is to the effect that the trial court is without jurisdiction, for the reason that the controversy does not arise under the constitution and laws of the United States. That paragraph is as follows:

"That it appears upon the face of said Amended Bill of Complaint that this Court is without jurisdiction herein, for the reason that said alleged controversy is not one arising under the Constitution and laws of the United States." (Record, 64.)

Paragraph numbered V of the Association's motion to dismiss is upon the theory that the defendant Harold L. Ickes is a citizen and resident of the District of Columbia, and that diversity of citizenship does not exist. That paragraph is as follows:

> "That it appears upon the face of said Amended Bill of Complaint that this Court is without jurisdiction herein, for the reason that said suit is not one arising wholly between citizens of different states; the plaintiff and the defendant, Salt River Valley Water Users' Association, being citizens and residents of the State and District of Arizona, and the defendant, Harold L. Ickes, Secretary of the Interior of the United States, being a citizen and resident of the District of Columbia." (Record, 64.)

Upon the court's order sustaining these motions is based sub-paragraphs (d) and (e) of paragraph 2 of Appellant's assignments of error as set out above.

Sections 18 and 20 of the right of way act of March 3, 1891, are involved in the controversy arising under Appellant's amended complaint. The pertinent portions of those sections are the following:

> "Sec. 18. *Right of way to canal and ditch companies for irrigation purposes.* The right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company or drainage district formed for the purpose of irrigation or drainage and duly organized under the laws of any State or Territory, and which shall have filed or may hereafter file with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under

the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: PROVIDED, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the department of the Government having jurisdiction of such reservation; and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories. (Mar. 3, 1891, c. 561, §18, 26 Stat. 1101; Mar. 4, 1917, c. 184, §1, 39 Stat. 1197.)"

Also the following proviso of Section 20 of the Act:

"Provided, That if any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights therein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture. (Mar. 3, 1891, c. 561, § 20, 26 Stat. 1102, 43 U.S.C.A. 948)"

A grant of an easement and right of way under the authority of this act is a grant in praesenti. The clause "the right of way through the public lands and reservations of the United States is hereby granted" clearly implies a grant by general law

of a permanent character upon approval by the Secretary of the Interior of the Appellant's maps. The forfeiture clause, being the proviso in Section 20 of the Act above quoted, is also in the nature of a general law specifying the conditions of breach or failure of compliance with the purposes of the grant upon which after facts found by appropriate judicial inquiry forfeiture may be decreed. To attempt a cancellation of Appellant's easements and rights by order of the Commissioner of the General Land Office or of the Secretary of the Interior, constitutes an attempt to deprive Appellant of its property without due process of law.

United States v. Whitney, et al.,
176 F. 593, (Dietrich, District Judge);
Union Land & Stock Company v. United States, (C.C.A. Ninth) 257 F. 635;
United States v. Kern River Co.
(C.C.A. Ninth) 264 F. 412;
Kern River Co. v. United States,
257 U. S. 146, 66 L. Ed. 175;
Noble v. Union River Logging Co.
147 U. S. 165, 13 S. Ct. 271, 37 L. Ed. 123.

It will be observed that this court has twice construed Sections 18, 19 and 20 of the act in question. In Union Land and Stock Company v. United States, it quotes with approval Judge Dietrich's reasoning in United States v. Whitney. The Supreme Court in Kern River Co. v. United States, sustains this court. We quote from the opinion of the Supreme Court the following pertinent paragraphs:

"'The approval, once given, could not be recalled or annulled by the Secretary, either for

fraud practiced in procuring it or for mistake in giving it. To do that it was necessary for resort to a suit in equity."

"The right of way intended by the act was neither a mere easement nor a fee simple absolute, but a limited fee on an implied condition of reverter in the event the grantee ceased to use or retain the land for the purpose indicated in the act."

In Noble v. Union River Logging Co. the court had before it for construction the Railroad Right of Way Act. The granting clause in that act is "the right of way through the public lands of the United States is hereby granted to any railroad duly organized" etc. We quote from that opinion:

"The uniform rule of this court has been that such an act was a grant in praesenti of lands to be thereafter identified. Railway Company v. Alling, 99 U. S. 463. The railroad company became at once vested with a right of property in these lands, of which they can only be deprived by a proceeding taken directly for that purpose. If it were made to appear that the right of way had been obtained by fraud, a bill would doubtles lie by the United States for the cancellation and annulment of an approval thus obtained. Moffat v. United States, 112 U. S. 24; United States v. Minor, 114 U. S. 233. *A revocation of the approval of the Secretary of the Interior, however, by his successor in office was an attempt to deprive the plaintiff of its property without due process of law, and was, therefore, void.*" (Italics are ours.)

Appellant's easements and rights of way upon the Verde River were granted under and pursuant to the terms of this Act. The Commissioner of the

General Land Office and the Secretary of the Interior have attempted to cancel these easements and rights by executive order, thereby casting a serious cloud upon the Appellant's titles. This has been followed by a joint and continuing trespass by Appellees upon Appellant's property. The character and quality of a title conferred by the terms of the Act becomes a material inquiry. The question of appropriate procedure for challenging a grantee's rights under the act is involved. The time element and the effect thereon of conditions subsequent as set forth in the amended complaint must be considered. The contract of June 3, 1935, is tantamount to a grant to the Association of easements and rights upon and over existing titles, the validity of which had not even been challenged on that date. That contract provides for a loan to the Association of the necessary money for the construction of the dam in question. It constitutes the Bureau of Reclamation an agency of the Association for that construction. That agency was at the time of filing Appellant's amended complaint, and is now, in possession of the land in controversy.

The construction and effect of a number of the provisions of the Reclamation Act and amendments thereto is involved in the suit. Section 8 of that Act in the following language is involved:

> "Sec. 8. *Vested rights and State Laws unaffected by chapter.* Nothing in this chapter shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior,

in carrying out the provisions of this chapter, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof. (June 17, 1902, c. 1093, § 8, 32 Stat. 390, 43 U.S.C.A. 383.)"

At the time of making the contract of June 3, 1935, the Secretary knew the Appellant was lawfully entitled to appropriate all of the then unappropriated waters of the Verde River. He knew the Association had no lawful right or permit whatsoever to appropriate any of those waters other than such as it had theretofore appropriated and applied to beneficial use, without the aid of storage facilities. He knew his action in making the contract in question would affect and interfere with the laws of Arizona relative to the control, appropriation, distribution and use of the waters of the Verde River, an intrastate stream, and with the rights granted thereon by the State Water Commissioner of Arizona to Appellant. He well knew he was not proceeding in conformity with the Water Code of Arizona, but in direct and willful violation of it. He knew he was casting a cloud upon Appellant's water rights and that the contract of June 3, 1935, if fully executed, would have the effect of completely destroying them.

The Secretary at no time prior to the contract of June 3, 1935, reported to Congress the results of any examination or surveys made by him in behalf of the Association for the construction of the Bartlett Dam, nor was the Congress in any manner consulted prior to the making of this contract. Sec-

tion 2 of the Reclamation Act contemplates that these things shall be done:

> "Sec. 2. *Surveys for, location, and construction of irrigation works generally; reports to Congress.* The Secretary of the Interior is authorized and directed to make examinations and surveys for, and to locate and construct, as provided in this chapter, irrigation works for the storage, diversion, and development of waters, including artesian wells, and to report to Congress at the beginning of each regular session as to the results of such examinations and surveys, giving estimates of cost of all contemplated works, the quantity and location of the lands which can be irrigated therefrom, and all facts relative to the practicability of each irrigation project; also the cost of works in process of construction as well as of those which have been completed. (June 17, 1902, c. 1093, § 2, 32 Stat. 388, 43 U.S.C.A. 411.)"

The Bartlett Dam is an entirely new division of the Salt River Project which has been completed for many years. At the time the contract of June 3, 1935, was made, the Secretary knew that the Association had no storage rights whatsoever in the Verde River. Section 4 of the Act provides:

> "Sec. 4. *Prerequisites to initiation of project or division of project.* After December 5, 1924, no new project or new division of a project shall be approved for construction or estimates submitted therefor by the Secretary until information in detail shall be secured by him concerning the water supply, the engineering features, the cost of construction, land prices, and the probable cost of development and he shall have made a finding in writing that it is feasible, that it is adaptable for ac-

tual settlement and farm homes, and that it will probably return the cost thereof to the United States. (Dec. 5, 1924, c. 4, § 4, subsec. B, 43 Stat. 702, 43 U.S.C.A. 412.)"

At no time has the Bartlett Dam been approved by direct order of the President. Section 4 of the Act of June 10, 1910, amending the Reclamation Act, provides:

"Sec. 4. *Approval of project by President.* No irrigation project shall be begun unless and until the same shall have been recommended by the Secretary of the Interior and approved by the direct order of the President of the United States. (June 25, 1910, c. 407, § 4, 36 Stat. 836, 43 U.S.C.A. 413.)"

Congress made no appropriation for carrying out the purposes of the Reclamation Act in respect of the Bartlett Dam project as required by the provisions of Section 16 of the Act of August 13, 1914, amending the Reclamation Act. That section provides:

"Sec. 16. *Appropriation for projects essential.* Expenditures shall not be made for carrying out the purposes of the reclamation law except out of appropriations made annually by Congress therefor, and the Secretary of the Interior shall annually, in the regular Book of Estimates, submit to Congress estimates of the amount of money necessary to be expended for carrying out any or all of the purposes authorized by the reclamation law, including the extension and completion of existing projects and units thereof and the construction of new projects. The annual appropriations made hereunder by Congress for such purposes shall be paid out of the reclamation fund provided for

by the reclamation law. (Aug. 13, 1914, c. 247, § 16, 38 Stat. 690, 43 U.S.C.A. 414.)"

The amended complaint clearly alleges that Harold L. Ickes was at that time a citizen of Illinois, temporarily residing in Washington, D. C. We assume therefore, for the present, that paragraph V of the Association's Motion to Dismiss upon the grounds of diversity of citizenship is not seriously urged.

Assignment of Error 2 (f).

"2. The court erred in its ruling and order made on January 27, 1937, directing dismissal of plaintiff's amended bill of complaint, upon the grounds:

"(f) That it appears from the amended bill of complaint that the plaintiff has no such interest in the subject matter of the suit as will entitle it to maintain its said suit to enjoin the construction of the proposed irrigation works referred to in the amended bill of complaint."

The above assignment of error arises upon paragraph VI of the Association's Motion to Dismiss, as follows:

"That it appears upon the face of said Amended Bill of Complaint that said plaintiff has no such interest in the subject matter of said suit as to entitle it to maintain said suit to enjoin the construction of the proposed irrigation works referred to in its said Amended Bill of Complaint."

The theory upon which this motion to dismiss is based, as presented to the court below, is that, prior to the filing of Appellant's original com-

plaint, the Commissioner of the General Land Office and the Secretary of the Interior had by executive order cancelled Appellant's easements and rights of way for its dams and reservoirs upon the Verde River. Appellant's original complaint was filed on March 24, 1936. The Secretary's order sustaining the action of the Commissioner bears date March 23, 1936. This order had been promulgated and was known to us at the time of filing our amended complaint.

We have heretofore argued and shown that these executive orders are utterly void as acts in excess of the authority of the Commissioner and the Secretary, and constitute attempts to deprive Appellant of its property without due process of law. Their only effect is to cast clouds upon Appellant's easements and rights of way. The removal of these clouds is the gist of Appellant's action.

We have also heretofore shown that Appellant is the owner and holder of a permit duly issued by the State Water Commissioner of Arizona to appropriate all of the unappropriated waters of the Verde River, and that the Association has no right or authority whatsoever so to do. This permit is a valuable property right—in fact the very life blood of Appellant's project. The acts of the Appellees have cast a cloud upon these rights. The subject of Appellant's water rights will be further discussed in a later portion of this brief.

Assignment of Error 2 (g).

"2. The court erred in its ruling and order made on January 27, 1937, directing dismissal of plaintiff's amended bill of complaint, upon the grounds:

"(g) That it appears upon the face of the amended bill of complaint that there is a fatal defect of parties defendant to the suit, in that the United States of America, as the owner of the lands involved and of the irrigation works proposed to be constructed, is the real party in interest and an indispensable party to the determination of the suit, and that the United States of America has not been made a party defendant to the suit and has not consented to be sued."

This assignment arises upon paragraph VII of the Association's Motion to Dismiss in the following language:

"That it appears upon the face of said Amended Bill of Complaint that there is a fatal defect of parties defendant to said suit, in that the United States of America, the owner of the lands involved and of the irrigation works proposed to be constructed, is the real party in interest herein and an indispensable party to the determination of said suit, and that the said United States of America has not been made a party defendant to said suit, and has not consented to be sued herein."

It is true the United States is not a party to the suit. It is neither a necessary nor a proper party. The United States is not answerable for the wrongful or unlawful conduct of its officers and agents. Such officers and agents as individuals must respond for their irregular or illegal acts and conduct. The Secretary is definitely charged with having exceeded his authority and also with having positively and willfully violated laws of congress to the irreparable damage and detriment of Appellant. The purpose of the suit is to erase the

effect of these wrongful and unlawful acts and incidentally to enjoin continuing trespasses upon and damage to Appellant's property and property rights. The United States is never a trespasser upon the property of others. Its officers and agents frequently are. Suits to enjoin and redress such trespasses serve the United States to discipline its derelict agents whose excesses frequently tend to bring the United States into disrepute.

A leading case upon the question of the United States as a necessary party is Philadelphia Company v. Henry L. Stimson, Secretary of War, 223 U. S. 605, 56 L. Ed. 571. In his opinion in this case, Justice Hughes said:

> "If the conduct of the defendant constitutes an unwarrantable interference with the property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded."

The case of Noble v. Union River Logging Railroad Company, Supra, was a bill in equity brought by the Union River Logging Railroad Company to enjoin the Secretary of the Interior and Commissioner of the General Land Office from executing an order revoking the approval of the plaintiff's maps for a right of way over public lands and also from molesting the plaintiff in the enjoyment of such rights of way granted and secured to it by virtue of an act of Congress. The company had availed itself of the Act of Congress of March 3, 1875 (18 Stat. 482) granting to railroads a right

of way through the public lands of the United States. An order was served upon the plaintiff by the Secretary of the Interior requiring it to show cause why the approval of its right of way should not be revoked and annulled. The Secretary asserted as his authority for attempting the cancellation that the approval had been improvidently made by his predecessor in office on false suggestions and without authority under the statute. The court held that the Secretary had no authority whatsoever to do the act complained of and said:

> "If he has no power at all to do the act complained of he is as much subject to an injunction as he would be to a mandamus if he refused to do an act which the law plainly required him to do."

The case of Miller, Collector of Internal Revenue vs. Standard Nut Margarine Co. of Florida, 49 F. (2d) 79 (C.C.A. Fifth), was an action to review the judgment of the District Court in enjoining the Collector from attempting to collect a tax alleged to be owing by the plaintiff. One of the defenses affirmatively urged on behalf of the Commissioner was that the suit was not maintainable because the United States was an indispensable party to the suit of the character in question and had not been made a party nor was it subject to be made a party thereto. The court said:

> "The United States is not a necessary party to this suit, the object of which is to restrain threatened illegal conduct of a federal official violative of rights of the plaintiff. The exemption of the United States from suits does not protect its officers from personal liability to

persons whose rights of property they have wrongfully invaded or threatened to invade."

In National Remedy Co. v. Hyde, Secretary of Agriculture, 50 F. (2d) 1066, (C.C.A. D.C.), the court reversed the action of the Supreme Court of the District in sustaining a motion to dismiss Appellant's bill to enjoin the Appellee from causing to be made alleged multiple seizures of Appellant's property. The court in criticizing the Secretary's conduct said:

"Such a course of conduct on the part of the Department amounts to arbitrary exercise of power and is a deprivation of due process of law. It is not, therefore, a suit against the United States."

In Ryan et al. v. Chicago B. & Q. R. Co. 59 F. (2d) 137, (C.C.A. Seventh), the railroad company instituted an action to restrain an alleged unauthorized exercise of power by the Secretary of War and others. The plaintiff claimed that the defendants as officers and agents of the United States were proceeding to build a dam which would deprive the plaintiff of its property without due process of law and without just compensation in violation of the plaintiff's rights under the Fifth Amendment. It claimed that the defendants were proceeding to damage and destroy its property under pretended authority of an act of congress but in fact contrary to and in disregard thereof. Injunctive relief was granted by the lower court and that feature of the cause was sustained by the circuit court. We quote from the opinion:

"It is also contended by appellants that the court erred in overruling their motion to dis-

miss the bill because the government had not consented to be sued, and because the bill disclosed no ground for equitable relief. We think the court very properly found that this is not a suit against the United States, but is a suit against her agents, who appellee claims are exceeding the authority granted by their principal, and that, if they are permitted so to continue, irreparable damage to appellee will result. Philadelphia Company v. Stimson, Secretary of War, 223 U. S. 605, 32 S. Ct. 340, 56 L. Ed. 570. Inasmuch as the government cannot be held liable for the acts of its agents committed in excess of their authority, appellee would be remediless at law for damages resulting from such unauthorized acts. In view of our holding that, prior to the act of February 24, 1932, appellants were threatening to act in excess of their authority, we think the allegations of the bill were sufficient to warrant the interference of equity. Osborne v. Missouri Pacific R. Co., 147 U. S. 248, 13 S. Ct. 299, 37 L. Ed. 155; Bass v. Metropolitan West Side El. R. Co. (C.C.A.) 82 F. 857, 39 L.R.A. 711; Payne v. Kansas & A.V.R. Co. (C.C.) 46 F. 546."

In Santa Fe Pacific Railroad Company v. Franklin K. Lane, Secretary of the Interior, 244 U. S. 492, 61 L. Ed. 1275, the Railroad Company sought to enjoin the Secretary of the Interior from insisting upon or giving effect to an order and demand that it make an advance deposit to cover the entire estimated cost of surveying a township in which the grantee was entitled to the odd numbered sections only. The court held that the congressional enactment in question gave no warrant for demanding of the grantee a deposit covering the entire cost

of survey and that in making such demand the defendant exceeded his authority. The court said:

> "If the demand was unlawful, as we hold it was, the plaintiff was entitled to sue in equity to have the defendant enjoined from insisting upon or giving effect to it. The hazard and embarrassment incident to any other course were such as to entitle it to act promptly and affirmatively, and of course there was no remedy at law that would be as plain, adequate, and complete, as a suit such as this against the defendant."

In Magruder v. Belle Fourche Valley Water Users' Association, 219 F. 72 (C.C.A. Eighth), the Association sued in the District court to enjoin the defendants who were project manager and engineer, respectively, of a reclamation project, from collecting dues alleged to be unlawful and in excess of the authority of the defendants as officers and agents of the United States government to demand. We quote from the opinion in that case the following paragraph:

> "Another objection to the complaint is that it evidences a cause of action against the United States. This contention is presented in numerous forms, such as that the defendants are the officers of the United States and their acts are the acts of the United States, that an injunction against their acts would constitute an interference with the use and possession of the property of the United States, the water of its reservoir, and would compel specific performance of its contracts. If the acts of the defendants done and threatened were authorized by law, they might be the acts of the United States against which a court of equity would

grant no relief. But if the averments of the complaint are true, and in deciding the question now under consideration they must be assumed to be so, these acts are unauthorized by and contrary to law. They are, therefore, not the acts of the United States, and a suit to enjoin their performance is not a suit against the United States, or a suit to interfere with its property, or a suit to compel specific performance of its contracts. It is a suit to enjoin officers of the United States from unlawfully interfering with and diverting its water from those persons lawfully receiving and entitled to receive it, from unlawfully preventing the United States from discharging its duties and performing its contracts, to the irreparable injury of the plaintiff and its shareholders. That an executive officer is committing or about to commit acts unauthorized by or in violation of law, to the irreparable injury of the property rights of the plaintiff, is a good cause of action against such officer for injunctive relief. A suit against him for such a cause is neither a suit against the United States nor is it, or the injunction against such acts of the officer, objectionable either on the ground that it interferes with the property of the United States, or its possession, or compels the specific performance of its contracts by the latter. American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 110, 111, 23 Sup. Ct. 33, 47 L. Ed. 90; Philadelphia Co. v. Stimson, 223 U. S. 605, 619, 620, 32 Sup. Ct. 340, 56 L. Ed. 570; Garfield v. Goldsby, 211 U. S. 249, 261, 29 Sup. Ct. 62, 53 L. Ed. 168; Pennoyer v. McConnaughy, 140 U. S. 10, 12, 17, 11 Sup. Ct. 699, 35 L. Ed. 363; Baker v. Swigart (D.C.) 196 Fed. 569, 571; Id. 199 Fed. 865, 866, 118 C.C.A. 313; Swigart v. Baker, 229 U. S. 187, 192, 33

Sup. Ct. 645, 57 L. Ed. 1143; United States v. Cantrall (C.C.) 176 Fed. 949, 954."

In the recent case of Franklin Township in Somerset County, New Jersey v. Tugwell, 85 F. (2d) 208, counsel for Tugwell urged as ground for dismissal that the United States was a necessary party. The court in disposing of the contention said:

> "It is urged by counsel for defendants that plaintiffs cannot maintain this action because it is, in effect, a suit against the United States, which has not consented to be sued. We are not impressed by this contention. The action here is one to restrain agents of the United States from performing allegedly illegal acts. The authority of the agents to do the things of which complaint is made is challenged. That such a suit is not one against the United States, but against the officials who are threatening performance of such illegal acts, is well settled. Philadelphia Co. v. Stimson, 223 U. S. 605, 619, 620, 32 S. Ct. 340, 56 L. Ed. 570; Lane v. Watts, 234 U. S. 525, 540, 34 S. Ct. 965, 58 L. Ed. 1440; Payne v. Central Pac. Ry. Co., 255 U. S. 228, 238, 41 S. Ct. 314, 65 L. Ed. 598."

We also quote from the case of Ickes, Sec'y of Interior, v. Fox, et al, an opinion rendered February 1, 1937, ... U. S. ....., 81 L. Ed. 284, (Advance sheets), as follows:

> "The suits do not seek specific performance of any contract. They are brought to enjoin the Secretary of the Interior from enforcing an order, the wrongful effect of which will be to deprive respondents of vested property rights not only acquired under Congressional acts, state laws and government contracts, but set-

tled and determined by his predecessors in office. That such suits may be maintained without the presence of the United States has been established by many decisions of this court, of which the following are examples: Noble v. Union River Logging R. Co. 147 U. S. 165, 171, 172, 176, 37 L. Ed. 123, 125-127, 13 S. Ct. 271; Philadelphia Co. v. Stimson, 223 U. S. 605, 619, 56 L. Ed. 570, 576, 32 S. Ct. 340; Goltra v. Weeks, 271 U. S. 536, 544, 70 L. Ed. 1074, 1078, 46 S. Ct. 613; Work v. Louisiana, 269 U. S. 250, 254, 70 L. Ed. 259, 262, 46 S. Ct. 92; Payne v. Central P. R. Co. 255 U. S. 228, 238, 65 L. Ed. 598, 603, 41 S. Ct. 314. These decisions cite other cases to the same effect. The recognized rule is made clear by what is said in the Stimson Case:

> " 'If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded . . . And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process . . .
>
> " 'The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States.' "

Assignment of Error 2 (h).

"2. The court erred in its ruling and order made on January 27, 1937, directing dismissal of plaintiff's amended bill of complaint, upon the grounds:

"(h) That it appears that the defendant, Harold L. Ickes, has not been subjected to the jurisdiction of the court, and that it would be inequitable to the defendant, Salt River Valley Water Users' Association, to proceed in the cause in the absence of said defendant."

This assignment arises upon paragraph VIII of the Association's Motion to Dismiss, which is as follows:

"That the defendant, Harold L. Ickes, Secretary of the Interior of the United States, has not been subjected to the jurisdiction of this Court, and it would be inequitable to the defendant, Salt River Valley Water Users' Association, to proceed with this cause in the absence of said defendant."

It is true that the Secretary had not been served with process, actual or constructive, at the time the Association's Motion to Dismiss was submitted. At that time, however, a motion supported by affidavit was pending for an order directing this defendant to appear and plead, answer or demur to Appellant's amended bill of complaint. (Record 67, 68.) This motion was submitted at the same time as the defendant's motion to dismiss. The court denied Appellant's motion and on the same day granted the Association's motion "on the ground, among others, that Harold L. Ickes, Secretary of the Interior, was a necessary party to said action, and that he had not been served with process or appeared in

the suit." (Record 69.) Delay in service of process upon a defendant affords no grounds nor jurisdiction to dismiss a suit, unless such delay is an unreasonable one within the intendment of a statute, or unless it should conclusively appear that there is no possibility of procuring actual or constructive service upon a defendant.

Assignment of Error 1.

> *"1. The court erred in its ruling and order made on the 27th day of January, 1937 denying plaintiff's motion for an order directing the defendant, Harold L. Ickes, to appear, plead, answer or demur to plaintiff's amended bill of complaint."*

At the time of filing its amended complaint the Appellant filed a motion, in proper form, for an order requiring Appellee Ickes to appear, plead, answer or demur to Appellant's amended complaint. This motion was filed pursuant to the provisions of Section 57 of the Judicial Code, which is as follows:

> "§57. *Absent defendants in suits to enforce liens.* When in any suit commenced in any district court of the United States to enforce any legal or equitable lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of or found within the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur by a day certain to be designated, which order shall be

served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks. In case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its discretion, and upon proof of the service or publication of said order and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district; and when a part of the said real or personal property against which such proceedings shall be taken shall be within another district, but within the same State, such suit may be brought in either district in said State. Any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said district court, and thereupon the said court shall make an order setting aside the judgment therein and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall

be proceeded with to final judgment according to law. (R.S. §§738, 742; Mar. 3, 1875, c. 137 §8, 18 Stat. 472; Mar. 3, 1911, c. 231, §57, 36 Stat. 1102, 28 U.S.C.A. 118)

The motion was denied. (Record 69, 70.)

An interest in real property is involved in the controversy. The situs of that property is Arizona. The action involves the removal of clouds cast upon Appellant's titles by the wrongful and illegal acts and conduct of Appellees and the restraint of trespasses upon its property. There is no plain, adequate and efficient remedy at law for the redress of the wrongs of which Appellant complains. The Secretary becomes a necessary party to the action and Section 57 of the Judicial Code provides an ideal method for procuring service of process in such cases.

Thompson v. Emmett Irrigation District,
227 F. 560; (C.C.A. Ninth);
Clark v. Boysen,
39 F. (2d) 800, (C.C.A. Tenth);
Jellenick v. Huron Copper Mining Co.,
177 U. S. 1, 44 L. Ed. 647, 20 S. Ct. Rep. 559;
Crichton v. Wingfield,
258 U. S. 66, 66 L. Ed. 467.

Assignment of Error 3.

"3. That the court erred in its order of March 3, 1937, denying the plaintiff's motion for leave to file its second amended complaint in said cause."

Appellant prepared, lodged with the clerk and moved for leave to file its second amended com-

plaint. (Record, 70-92.) This motion was denied. (Record, 93.) The only material changes or additions to Appellant's amended complaint were the addition of the following sub-paragraph to paragraph III:

> "During the year 1916 the plaintiff's predecessors in interest and in the year 1918 this plaintiff itself, posted and recorded notices of their and its appropriation of all of the then unappropriated waters of the Verde River pursuant to the laws of Arizona then in force and effect. These notices and the rights initiated thereby have at no time been waived, but to the contrary have at all times been expressly re-asserted by the plaintiff in all of its proceedings before the State Water Commissioner of Arizona." (Record, 74.)

and a modification of the sub-paragraph immediately following by embodying the allegation to the effect that in its application to the State Water Commissioner Appellant expressly re-asserted its rights initiated by the posting and recording of notices as set forth in the above quoted paragraph. Arizona's Water Code providing for the issuance of permits to appropriate the public waters of the state was enacted in 1919. It contains the following provision:

> "*Vested rights not affected.* Nothing herein contained shall impair vested rights to the use of water, affect relative priorities to the use of water determined by decree of the court, nor impair the right to acquire property by the exercise of the right of eminent domain whenever conferred by law; nor shall the right to take and use water be impaired or affected by the provisions hereof where appropriations

have been initiated under and in compliance with previous laws then existing, and such appropriators have, in good faith and in compliance with the laws then existing, commenced the construction of works for the application of the water so appropriated to a beneficial use and prosecuted such work diligently and continuously, but such rights shall be adjudicated as herein provided." — §3317 Revised Code, Ariz. 1928. (§§56, 58, Ch. 164, L. '19, Rev.)

The proposed amended complaint was designed to more fully set forth the history and quality of Appellant's rights to appropriate the waters of the Verde River. Even though the court may have been of the opinion that the amendment would not cure what it conceived to be fatal defects in Appellant's amended complaint, the amendment should have been allowed for whatever benefit it accorded Appellant on this appeal.

Assignment of Error 2 (a), (b) and (c).

"2. The court erred in its ruling and order made on January 27, 1937, directing dismissal of plaintiff's amended bill of complaint, upon the grounds:

"(a) That the said amended bill of complaint does not state any matter of equity entitling plaintiff to the relief prayed for, nor facts sufficient to entitle the plaintiff to any relief against the defendants, or either of them.

"(b) That the said amended bill of complaint does not state any matter of equity entitling the plaintiff to relief prayed for, nor to any relief against the defendant, Salt River Valley Water Users' Association.

"(c) That the said amended bill of complaint fails to set forth a cause of action adequate to warrant the court in entertaining jurisdiction."

These assignments arise upon paragraphs numbered I, II and III of the Association's Motion to Dismiss, which are as follows:

"I. That the said Amended Bill of Complaint does not state any matter of equity entitling the plaintiff to the relief prayed for, nor are the facts sufficient to entitle the plaintiff to any relief against the defendants, or either of them.

"II. That the said Amended Bill of Complaint does not state any matter of equity entitling the plaintiff to the relief prayed for, nor to any relief against this defendant, Salt River Valley Users' Association, a corporation.

"III. That said Amended Bill of Complaint fails to set forth a cause of action adequate to warrant this Court in entertaining jurisdiction."

The above paragraphs challenge the sufficiency of the allegations of the Appellant's amended complaint to state a cause of action.

Does Appellant's amended complaint set forth facts sufficient to disclose clouds cast upon its titles by the acts and conduct of the Appellees therein set forth?

The orders of the Commissioner of the General Land Office and of the Secretary, if valid, have the effect of destroying Appellant's titles to its easements and rights of way upon the Verde River. The contract of June 3, 1935, if valid and executed,

will have the effect of seriously impairing Appellant's rights to appropriate the surplus and unappropriated waters of the Verde River. On the face of the record they have that effect. We have pleaded that both the executive orders and contract of June 3, 1935, are void as acts in excess of the authority of the United States officials involved. If either of these contentions are sound, we have pleaded a case of cloud upon our titles as we understand that term.

We doubt that this court will care for any precedents as an aid in determining what constitutes a statement of fact disclosing the existence of a cloud upon an alleged title. However we cite a few illustrative examples.

In the case of Lane v. Watts, 234 U. S. 525, 58 L. Ed. 1440, the facts briefly outlined are: An act of Congress authorized the Baca heirs to select five square bodies of land of 100,000 acres each in the then territory of New Mexico, in lieu of a 500,000 acre grant which embraced the town of Las Vegas. It was held under the recited facts that the legal title to the tract in question passed to the Baca heirs on April 9, 1864. On June 12, 1905, the Commissioner of the General Land Office, upon information he had gathered, directed that the location of the tract in question be rejected. In this he was sustained by the Secretary of the Interior. The court held that the Commissioner and Secretary had acted illegally and that these acts cast a cloud upon the title of the Appellees. We quote from the opinion:

> "The title having passed by the location of the grant and the approval of it, the title could not be subsequently devested by the officers of the Land Department. Ballinger v.

United States, 216 U. S. 240, 54 L. Ed. 464, 30 Sup. Ct. Rep. 338. In other words, and specifically, the action of the Commissioner in approving the location of the grant cannot be revoked by his successor in office, and an attempt to do so can be enjoined. Noble v. Union River Logging R. Co. 147 U. S. 165, 37 L. Ed. 123, 13 Sup. Ct. Rep. 271; Philadelphia Co. v. Stimson, 223 U. S. 605, 56 L. Ed. 570, 32 Sup. Ct. Rep. 340. The suit is one to restrain the appellants from an illegal act under color of their office which will cast a cloud upon the title of appellees."

In the case of Payne v. Central Pacific Railroad Co. 225 U. S. 228, 65 L. Ed. 598, the Appellee had selected indemnity lands under a railroad land grant. The language of the act was "there be, and is hereby, granted." The grant covered every alternate section of unoccupied non-mineral land within the designated strip. The act provided for lieu selections where granted lands were occupied or were known to contain mineral. The Commissioner ordered cancellation of the Appellee's lieu selections on the ground that the lands had been included in a temporary executive withdrawal for water power development. The secretary affirmed the Commissioner's ruling. Suit was brought to enjoin the cancellation. The court held that the title to the selected land had vested at the time of the withdrawal order and that the wrongful action of the Commissioner and Secretary operated to cloud the Appellee's titles. We quote from the court's opinion:

"We are asked to say that this is a suit against the United States, and therefore not maintainable without its consent; but we think

the suit is one to restrain the appellants from cancelling a valid indemnity selection through a mistaken conception of their authority, and thereby casting a cloud on the plaintiff's title. Ballinger v. United States, 216 U. S. 240, 54 L. Ed. 464, 30 Sup. Ct. Rep. 338; Philadelphia Co. v. Stimson, 223 U. S. 605, 619, 620, 56 L. Ed. 570, 576, 577, 32 Sup. Ct. Rep. 340; Lane v. Watts, 234 U. S. 525, 540, 58 L. Ed. 1440, 1456, 34 Sup. Ct. Rep. 965."

In the case of Santa Fe Pacific Railroad Co. v. Lane, heretofore cited, the court held that the attempted exaction of the survey fees there involved operated to cloud the railroad's titles. The court said:

"A claim such as evidenced by the demand made by the defendant, unless and until it is adjudged unauthorized, will cast a serious cloud on the plaintiff's rights in the granted lands remaining unsurveyed and be a source of serious embarrassment."

Does the Appellant's amended complaint set forth facts sufficient to entitle it to the injunctive relief therein prayed for?

Since the opinion in the case of Philadelphia Co. v. Stimson, Supra, the principle that an unlawful or unauthorized act of a federal official will be enjoined by a court of equity at the instance of the injured party, has become so thoroughly settled that it would seem an act of supererogation to cite further authorities in support of it; however we cite the following additional cases which announce and apply the principles:

Noble v. Union River Logging Railroad Co., Supra;

Garfield v. United States ex rel Goldsby,
211 U. S. 248, 53 L. Ed. 168;
Miller v. Standard Nut Margarine
Co. of Florida, Supra;
National Remedy Co. v. Hyde, Supra;
Ryan v. Chicago Burlington & Quincy
Railroad Co., Supra;
Santa Fe Pacific Railroad Co.
v. Lane, Supra;
Lane v. Watts, Supra;
Payne v. Central Pacific Railroad Co.
Supra;
Colorado v. Toll,
268 U. S. 228, 69 L. Ed. 927.

Character and quality of Appellant's water rights and the nature of Appellees interference therewith.

The amended complaint properly alleges that appellant is the owner and holder of a permit to appropriate the surplus and unappropriated waters of the Verde River; that these rights are valid and subsisting rights; and that the Association has no rights whatsoever in respect thereof other than the limited flow rights as set for in the amended complaint. The Secretary is charged with having full knowledge of these facts.

Appellant's permit was procured pursuant to the authority of and is held and enjoyed agreeably to the provisions of Sections 3284 to 3289, both sections inclusive, and of Sections 3315 and 3316 of the Revised Code of Arizona, 1928. These sections are printed in full in the appendix to this brief. They provide the only method whereby the appropriable public waters of the state of Arizona may be appropriated. Section 3286 provides that if an

application is rejected the applicant *shall take no steps toward the construction of its contemplated works or the diversion of the waters in question.*

Section 3315, among other things, provides, in effect, that: (a) The use by any person of water, the use of which has been lawfully denied him by the Water Superintendent, or other competent authority; or (b) the unauthorized use of water to which another is entitled; or (c) the diversion of the water of a stream without authority so to do; or (d) the use, storage or diversion of water without authority or before the issuance of a permit to appropriate such water, shall constitute a misdemeanor.

Section 3316 exacts the fees therein provided for filing and recording a permit to appropriate. These fees were exacted from and paid by the Appellant in the sum of approximately $11,000.00 in the perfection of its right to appropriate.

The making and execution of the contract of June 3, 1935, amounts to a direct and active interference with the above referred to sections of the Arizona Code relative to the control, appropriation, use and distribution of the waters of an intrastate stream. It directly and seriously impairs the vested right of the Appellant to appropriate those waters. The Secretary has not in the making of the contract in question proceeded in conformity with the above referred to laws of the state of Arizona, but to the contrary has directly violated them and in so doing has violated every provision of Section 8 of the Reclamation Act, which we again quote for the convenience of the court:

"Sec. 8. *Vested rights and State Laws unaffected by chapter.* Nothing in this chapter shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof. (June 17, 1902, c. 1093, § 8, 32 Stat. 390, 43 U.S.C.A. 383.)"

Section 18 of the Act of March 3, 1891, provides among other things that the privileges therein granted (easements and rights of way) shall not be construed to interfere with the control of water for irrigation and other purposes under the authority of the respective states and territories. Indirectly then, this statute provides in effect that he Secretary shall not grant easements and rights of way upon a stream where such grant will interfere with the control of the water of that stream by the state. It is to be presumed that the Secretary in granting Appellant's easements was given the necessary information and found that Appellant was the owner and holder of permits to appropriate and that such grants would not impair any vested rights of the Association. It contemplates that the Secretary in granting an easement or right will act in cooperation with the state in the *exercise of its jurisdiction over the water* in its grants

of easements and rights of way upon the stream. The contract of June 3, 1935, amounts in effect to the grant to the Association of an easement for its proposed Bartlett Dam and is a further direct interference with Arizona's control of the waters of the Verde River for irrigation.

In the case of United States ex rel Sierra Land & Water Co. v. Ickes, Secretary of the Interior, 84 F. (2d) 228, (U.S.C.A. D.C.), the Water Company by an action of mandamus attempted to compel the Secretary to issue to it easements and rights of way under the act of March 3, 1891, for its proposed canals and reservoirs. The Commissioner of the General Land Office rejected the application in the first instance upon the ground that there was no evidence of the existence of the water right claimed by the applicant. An appeal was taken to the Secretary. During the pendency of the appeal and at the request of the applicant action was suspended on the appeal pending an adjudication of the water rights in the courts of California. The decision of the supreme court of the state of California was adverse to the claims of the applicant. Notwithstanding this adverse ruling the water company urged its appeal before the Secretary of the Interior. The Secretary affirmed the Commissioner's finding upon the ground that the Applicant had no right to the use of the water relied upon by it.

In the course of its opinion the court quotes a regulation promulgated by the Secretary of the Interior on June 6, 1908, and in force at all times since that date. We quote that rule:

"While these acts grant rights of way over the public lands necessary to the maintenance and use of ditches, canals, and reservoirs, the control of the flow and use of the water is, so far as this act is concerned, vested in the States or Territories, the jurisdiction of the Department of the Interior being limited to the approval of maps carrying the right of way over the public lands. If the right of way applied for under this act in any wise involves the appropriation of natural sources of water supply, the damming of rivers, or the use of lakes, the maps should be accompanied by proof that the plans and purposes of the projectors have been regularly submitted and approved in accordance with the local laws or customs governing the use of water in the State or Territory in which such right of way is located. No general rule can be adopted in regard to this matter. Each case must rest upon the showing filed." (Par. 3, Regulations for Rights of Way over Public Lands and Reservations, approved June 6, 1908, 36 L.D. 568).

We also quote sub-paragraph (b) of paragraph 8 of the regulations for rights of way over public lands and reservations approved June 6, 1908.

"(g) A copy of the company's title or right to appropriate the water needed for its canals, ditches and reservoirs, certified as required by the State or Territorial laws. If the miner's inch is the unit used in such title, its equivalent in cubic feet per second must be stated. If the right to appropriate the water has not been adjudicated under the local laws, a certified copy of the notice of appropriation will be sufficent. If the notice of appropriation is accompanied by a map of the canal or reservoir it will not be necessary to furnish a copy of the

map where the notice describes the location sufficiently to identify it with the canal or reservoir for which the right-of-way application is made. If the water-right claim has been transferred a number of times it is not necessary to furnish a copy of each instrument of transfer; an abstract of title will be accepted." (Par. 8, Regulations for Rights of Way over Public Lands and Reservations, approved June 6, 1908, 36 L.D. 570, 571.)

It will be observed that the first rule above quoted requires that proof shall be made that the plans and purposes of the applicant have been regularly submitted and approved in accordance with the local laws or customs governing the use of the waters in the state. The second rule above quoted specifies that a notice of appropriation shall accompany an application for right of way. In discussing the cooperative jurisdictions and duties of the states and the secretary, the court used the following language:

"It will be observed that while the broad policy here established constitutes a present grant of rights of way through public lands and reservations to canal or ditch companies and individuals for the construction of irrigation works, the jurisdiction conferred is dependent upon a cooperative jurisdiction to be exercised by the states. The states control the water and the distribution thereof within their respective jurisdictions, and the ditch company, to operate under the authority conferred by the general government, must first secure from the state a water right sufficient to furnish water for successfully carrying out the proposed project. The appropriator must then secure from the

> Secretary of the Interior an approval of its right of way for the construction of the ditch or ditches."

In Ickes v. Fox, 85 F. (2d) 294 (U.S.C.A. D.C.) the court held that the water belongs to the State, and that the United States under the Reclamation Act, occupies the same position as an individual citizen in respect of its duty to comply with the state's water laws and regulations:

> "Under the Reclamation Act the United States, in putting in an irrigation enterprise, stands in the same position with relation to the state as a private individual. The waters belong to the state, and the United States never acquires any title therein any more than a private appropriator."

It was the duty of the Secretary to require that the Association make application for and procure a permit to appropriate before entering upon the contract of June 3, 1935, or in lieu thereof that the United States in its own behalf make and procure the grant from the state of such right. We quote further from the above case:

> "To proceed under the Reclamation Act the United States must make application for a permit to appropriate the waters and to distribute it for beneficial purposes. The state does not surrender its right to control its use."

The contract of June 3, 1935, ante dates the statutory expiration of Appellant's easements and rights. It cannot be questioned that on June 3, 1935, Appellant's rights to its Camp Verde and Horse Shoe storage dam sites, together with its rights to occupy for canal and power purposes the identical area

covered by the proposed Bartlett Dam, were valid and subsisting, nor that Appellant then had an application pending before the Secretary for specific easements for its Bartlett Dam covering the identical site of the Association's proposed Bartlett Dam. The Commissioner's order of cancellation was made and promulgated on October 14, 1935, and that of the Secretary on March 23, 1936. These belated executive orders were evidently made in an attempt to give validity to a contract that was void at its inception as an act in excess of statutory authority and whether so intended or not, the contract constitutes an unlawful assault upon both Appellant's easements and rights of way and its water rights. That the outstanding motive and purpose of the Secretary's action was the destruction of both Appellant's easements and rights of way and its water rights and the utilization of these rights for the benefit and advantage of the Association, is clearly evidenced by the opinion of his first assistant secretary of March 23, 1936, which we again quote for the convenience and consideration of the court:

> "The Bartlett Reservoir site is on the Verde River below the Camp Verde site and the Horseshoe site so the construction of the two latter reservoirs, assuming that the district were able to finance and construct them, might seriously interfere with the use of the reservoir to be constructed on the Bartlett site in which latter reservoir the Government will be particularly interested by reason of the allocation and use of Federal funds for the construction and by reason of its duty to see that the Indians of the Salt River Indian Reservation are supplied with water (39 Stat. 130); particularly is this

true should there arise any controversy over the appropriation of the water of the Verde River and its release from storage."

The Secretary in the preamble of the contract of June 3, 1935, has committed himself to the Reclamation Act and Amendments thereto and Rules and Regulations based thereon as the administrative authority for expending the moneys therein provided for use on behalf of the Association, and looks to the Emergency Relief Appropriation Act of 1935 as the authority for the allocation.

If the administrative authority for the expenditure and application of the money in question is not to be found in the Reclamation Act, then no administrative authority exists for such expenditures since neither the Emergency Relief Appropriation Act of 1935, nor any other Act of Congress provides such authority. Certainly no such administrative authority is to be found in the Emergency Relief Appropriation Act of 1935. Subdivision (b) of the purposes and projects for which the $4,000,000,000.00 fund set up by the Act may be expended sets forth, without amplification, conditions or restrictions, five uses that may be made of $500,000,000.00 of that fund. These uses in the order set forth are: 1. Rural rehabilitation; 2. Relief in stricken agricultural areas; 3. Water conservation; 4. Transmountain water diversion; and 5. Irrigation and Reclamation. Any portion, none, or all, of this $500,000,000.00 fund may be expended upon any one or more of the projects outlined, in the discretion of the President. The act is entirely silent as to the manner of such expenditures or the amounts that may be expended upon any given

project. No administrative provisions are provided for in the resolution itself, nor is there any pre-existing act of congress applicable to the expenditure of the allocation in question to any of the five projects, other than the inference that the expenditure for relief in stricken agricultural areas may be justified under the emergency powers of the executive and other than that the Act may be construed to mean that such funds as are allocated to irrigation and reclamation may be expended and administered pursuant to the Reclamation Act. If such construction cannot be given to the expenditure of the funds allocated to irrigation and reclamation, then the act is clearly unconstitutional in so far as it applies to reclamation and irrigation in that the Congress has attempted to delegate law making powers with which it alone is vested under the constitution. The act lays down no policies and establishes no standards for the expenditure in question.

Another provision of the act allocates $450,000.00 for "housing" without specification of the manner, place or purpose of such expenditure. The United States District Court of Appeals for the District of Columbia had occasion to consider this subdivision of the allocation of the $4,000,000,000.00 fund in question in its opinion rendered May 15, 1936, in the case of Franklin Township in Somerset County, New Jersey vs. Tugwell, 85 F. (2d) 208, (U.S.C.A. D.C.), in which it held that act, in so far as it related to and appropriated money for "housing", unconstitutional as an unlawful delegation of legislative power to the President and cited in support of its views the recent cases of Panama Refining Co. v. Ryan, 293 U. S. 388, 55 S. Ct. 241,

79 L. Ed. 446, and the case of Schechter Poultry Corp. v. United States, 295 U. S. 495, 55 S. Ct. 837, 79 L. Ed. 1570. In its opinion the court said:

> "We are not here confronted with an appropriation for internal improvement of a national character or importance, or for the creation of public buildings, or the grant of loans to a state or municipality to carry out public works projects. As to these we might find in the nature of the objective a well beaten path by which to supply the omitted means to that end. But here we have neither path nor program."

Unless the words "irrigation and reclamation" as the subject of the allocation of the portion of the fund above referred to can be supplemented by the inference that the Reclamation Act supplies a "well beaten path" for the administration of the moneys in question, the act as respects the allocation for irrigation and reclamation is clearly unconstitutional under the authority and holding in the Tugwell, Panama Refining Co. and Schechter cases. For the purposes of this case we are entirely content to assume and rest our case upon either the question of the unconstitutionality of the act or an alternative finding of the court that the Reclamation Act does provide the working machinery for the expenditure of the fund.

Assuming then, for the sake of argument, that the Act may be construed to contemplate an expenditure pursuant to the terms of the Reclamation Act, we have clearly alleged separate and distinct affirmative violations of this act, and other acts and conduct not in conformity with it, that render the contract and allocations made thereunder void.

The case of the United States v. Arizona, 295 U. S. 174, 79 L. Ed. 1371, involved a contract made by the United States, acting through the Secretary of the Interior, with the Metropolitan Water District of Southern California of somewhat similar character to the contract of June 3, 1935. The District agreed to repay the United States $13,000,000.00 to be advanced for the construction of the Parker Dam in the Colorado River. The construction was to be done pursuant to the provisions of the Reclamation Act and supplemental acts and pursuant to the provisions and authority of the National Recovery Act. The United States sued to restrain Arizona's interference with the construction of the Parker Dam. The complaint alleged that the dam had been included by the Secretary as Administrator of the National Recovery Act, in the comprehensive program of public works authorized by Section 202 of that Act and that pursuant to the Act the Chief of Engineers of the U. S. Army had recommended the construction and his recommendation had been approved by the Secretary of War. The court in its opinion held that the recommendation of the Chief of Engineers of the United States Army was an after-thought and an act done to impart validity to the contract made prior to the procuring of such authority. The court further held that the undertaking was not in conformity with but violated the terms of the Reclamation Act in that the consruction had not been approved by direct order of the President of the United States. Incidentally, in this case there was better reason and authority for invoking the provisions of the Reclamation Act than are to be found in the Emergency Relief Appropriation Act of

1935, in that the National Recovery Act contained an express provision that its Administrator could, in carrying out his extensive program, employ other governmental agencies in aid of his expenditures.

Although the Appellant is not a party to the contract in question, it is a party seriously injured thereby and it has a vital interest in the subject matter of the contract. It may, therefore, raise these questions and have the contract in question interpreted for the purpose of determining whether or not it constitutes a cloud upon Appellant's titles.

> *The United States has, by the conduct of its officers and agencies, waived the right to insist upon, and is estopped to assert that appellant's easements and rights have expired by limitation.*

Appellant's complaint sufficiently alleges that it has a good and sufficient defense in equity to such action as may be appropriately brought to challenge the legality and standing of its easements and rights of way. We will not further discuss those allegations herein, since they are outlined in our Statement of Case and may be found in full in the Transcript of Record beginning with the second paragraph on page 11 and ending on page 17. Mutuality of interest is supplied by the interest of the Interior Department in supplying water to the Indians of the Salt River Reservation as evidenced by the companion contract of June 30, 1930, to the grant of Appellant's easements pursuant to the Act of March 3, 1891.

The modern view and construction of the doctrine of estoppel is that it is founded on principles of equity, morality and justice and accords with

good conscience, honesty and reason. Only two years of that period of Appellant's grants had expired at the time the interest of Reconstruction Finance Corporation was elicited and obtained. There has not been a moment since that time that Appellant had an opportunity to finance and build its works because of the continued interest of the government in or its opposition to its project. Equity should not permit the United States to exercise such high-handed bad faith and then avail itself of its own acts and conduct as a basis for the destruction of the property rights of Appellant.

The doctrine of estoppel applies to the government with equal force as it does to individuals in those cases in which the government acts in its proprietary as distinguished from its governmental capacity.

J. Homer Fritch Inc. et al v. U. S.
236 F. 133, (C.C.A. Ninth) On Rehearing;
Ritter v. U. S.
28 F. (2d) 265, (C.C.A. Third);
Rio Grande Dam & Irrigation Co. v. U. S.
215 U. S. 266, 54 L. Ed. 190.

In the Rio Grande Case the company pleaded that the United States was estopped to enforce a forfeiture of its easements and rights of way granted under the Act of March 3, 1891, for its canals and reservoirs, notwithstanding the expiration of the five year period, by reason of the United States having procured a preliminary injunction against the building of its works. The court found that a period of six years had intervened between the dismissal of its preliminary injunction and the granting of a permanent injunction, during which period

the United States had interposed no obstacle to the Company's building its project and that by reason thereof the government was not estopped. We construe the opinion to be an inference that had the preliminary injunction pended during the period complained of, the court would have held the United States to have been estopped by its conduct.

Upon the foregoing reasoning and authorities we submit that Appellant has, in its amended complaint, set forth a good cause of action both for removal of clouds upon its titles and for injunctive relief, and that, by reason thereof, the court erred in ordering and granting final judgment for the defendants.

Respectfully submitted,

P. H. HAYES,
Attorney for Appellant.

RAYMOND ALLEE,
DOW B. ROUSH,
Of Counsel.

APPENDIX

Emergency Relief Appropriation Act of 1935.

"Sec. 1. That in order to provide relief, work relief and to increase employment by providing for useful projects, there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to be used in the discretion and under the direction of the President, to be immediately available and to remain available until June 30, 1937, the sum of $4,000,000,000, together with the separate funds established for particular areas by proclamation of the President pursuant to section 15 (f) of the Agricultural Adjustment Act (but any amounts thereof shall be available for use only for the area for which the fund was established); not exceeding $500,000,000 in the aggregate of any savings or unexpended balances in funds of the Reconstruction Finance Corporation; and not exceeding a total of $380,000,000 of such unexpended balances as the President may determine are not required for the purposes for which authorized, of the following appropriations, namely: The appropriation of $3,300,000,000 for national industrial recovery contained in the Fourth Deficiency Act, fiscal year 1933, approved June 16, 1933 (48 Stat. 274); the appropriation of $950,000,000 for the emergency relief and civil works contained in the Act approved February 15, 1934 (48 Stat. 351); the appropriation of $899,675,000 for emergency relief and public works, and the appropriation of $525,000,000 to meet the emergency and necessity for relief in stricken agricultural areas, contained in the Emergency Appropriation Act, fiscal year 1935, approved June 19, 1934 (48 Stat. 1055); and any remainder

of the unobligated moneys referred to in section 4 of the Act approved March 31, 1933 (48 Stat. 22): Provided, That except as to such part of the appropriation made herein as the President may deem necessary for continuing relief as authorized under the Federal Emergency Relief Act of 1933, as amended, or for restoring to the Federal Emergency Administration of Public Works any sums which after December 28, 1934, were, by order of the President impounded or transferred to the Federal Emergency Relief Administration from appropriations heretofore made available to such Federal Emergency Administration of Public Works (which restoration is hereby authorized), this appropriation shall be available for the following classes of projects, and the amounts to be used for each class shall not, except as hereinafter provided, exceed the respective amounts stated, namely: (a) Highways, roads, streets, and grade-crossing elimination, $800,000,000; (b) rural rehabilitation and relief in stricken agricultural areas, and water conservation, transmountain water diversion and irrigation and reclamation $500,000,000; (c) rural electrification $100,000,000; (d) housing, $450,000,000; (e) assistance for educational, professional and clerical persons, $300,000,000; (f) Civilian Conservation Corps, $600,000,000; (g) loans or grants, or both, for projects of States, Territories, Possessions, including subdivisions and agencies thereof, municipalities, and the District of Columbia, and self-liquidating projects of public bodies thereof, where, in the determination of the President, not less than twenty-five per centum of the loan or the grant, or the aggregate thereof, is to be expended for work under each particular

project, $900,000,000; (h) sanitation, prevention of soil erosion, prevention of stream pollution, sea coast erosion, reforestation, forestation, flood control, rivers and harbors and miscellaneous projects, $350,000,000; Provided further, That not to exceed 20 per centum of the amount herein appropriated may be used by the President to increase any one or more of the foregoing limitations if he finds it necessary to do so in order to effectuate the purpose of this joint resolution: Provided further, That no part of the appropriation made by this joint resolution shall be expended for munitions, warships, or military or naval material; but this proviso shall not be construed to prevent the use of such appropriation for new buildings, reconstruction of buildings and other improvements in military or naval reservations, posts, forts, camps, cemeteries, or fortified areas, or for projects for non-military or non-naval purposes in such places.

"Except as hereinafter provided, all sums allocated from the appropriation made herein for the construction of public highways and other related projects (except within or adjacent to national forests, national parks, national parkways, or other Federal reservations) shall be apportioned by the Secretary of Agriculture in the manner provided by section 204 (b) of the National Industrial Recovery Act for the expenditure by the State highway departments under the provisions of the Federal Highway Act of November 9, 1921, as amended and supplemented, and subject to the provisions of section 1 of the Act of June 18, 1934 (48 Stat. 993): Provided, That any amounts allocated from the appropriation made herein for the elimination

of existing hazards to life at railroad grade crossings, including the separation or protection of grades at crossings, the reconstruction of existing railroad grade crossing structures, and the relocation of highways to eliminate grade crossings, shall be apportioned by the Secretary of Agriculture to the several States (including the Territory of Hawaii and the District of Columbia), one-half on population as shown by the latest decennial census, one-fourth on the mileage of the Federal-aid highway system as determined by the Secretary of Agriculture, and one-fourth on the railroad mileage as determined by the Interstate Commerce Commission, to be expended by the State highway departments under the provisions of the Federal Highway Act of November 9, 1921, as amended and supplemented, and subject to the provisions of section 1 of such Act of June 18, 1934 (48 Stat. 993); but no part of the funds apportioned to any State or Territory under this joint resolution for public highways and grade crossings need be matched by the State or Territory: And Provided further, That the President may also allot funds made available by this joint resolution for the construction, repair, and improvement of public highways in Alaska, Puerto Rico, and the Virgin Islands, and money allocated under this joint resolution to relief agencies may be expended by such agencies for the construction and improvement of roads and streets: Provided, however, That the expenditure of funds from the appropriation made herein for the construction of public highways and other related projects shall be subject to such rules and regulations as the President may prescribe for carrying out this paragraph and preference in the employ-

ment of labor shall be given (except in executive, administrative, supervisory, and highly skilled positions) to persons receiving relief, where they are qualified, and the President is hereby authorized to predetermine for each State the hours of work and the rates of wages to be paid to skilled, intermediate, and unskilled labor engaged in such construction therein: Provided further That rivers and harbors projects, reclamation projects (except the drilling of wells, development of springs and subsurface waters), and public buildings projects undertaken pursuant to the provisions of this joint resolution shall be carried out under the direction of the respective permanent Government departments or agencies now having jurisdiction of similar projects.

"Funds made available by this joint resolution may be used, in the discretion of the President, for the purpose of making loans to finance, in whole or in part, the purchase of farm lands and necessary equipment by farmers, farm tenants, croppers, or farm laborers. Such loans shall be made on such terms as the President shall prescribe and shall be repaid in equal annual installments, or in such other manner as the President may determine.

"Funds made available by this joint resolution may be used, in the discretion of the President for the Administration of the Agricultural Adjustment Act, as amended, during the period of twelve months after the effective date of this joint resolution.

"Sec. 2. The appropriation made herein shall be available for use only in the United States and its Territories and possessions. The provisions of

the Act of February 15, 1934 (48 Stat. 351), relating to disability or death compensation and benefits shall apply to those persons receiving from the appropriation made herein, for services rendered as employees of the United States, security payments in accordance with schedules established by the President: Provided, That so much of the sum herein appropriated as the United States Employees' Compensation Commission, with the approval of the president, estimates and certifies to the Secretary of the Treasury will be necessary for the payment of such compensation and administrative expenses shall be set aside in a special fund to be administered by the Commission for such purpose; and after June 30, 1936, such special fund shall be available for these purposes annually in such amounts as may be specified therefor in the annual appropriation Acts. The provisions of section 3709 of the Revised Statutes (U.S.C., title 41, Sec. 5) shall not apply to any purchase made or service procured in carrying out the provisions of this joint resolution when the aggregate amount involved is less than $300.

"Sec. 3. In carrying out the provisions of this joint resolution the President may (a) authorize expenditures for contract stenographic reporting services; supplies and equipment; purchase and exchange of law books, books of reference, directories, periodicals, newspapers and press clippings; travel expenses, including the expense of attendance at meetings when specifically authorized; rental at the seat of government and elsewhere; purchase, operation, and maintenance of motor-propelled passenger-carrying vehicles; printing and binding; and such other expenses as he may determine necessary to

the accomplishment of the objectives of this joint resolution; and (b) accept and utilize such voluntary and uncompensated services, appoint, without regard to the provisions of the civil-service laws, such officers and employees, and utilize such Federal officers and employees, and, with the consent of the State, such State and local officers and employees, as may be necessary, prescribe their authorities, duties, responsibilities, and tenure, and, without regard to the Classification Act of 1923, as amended, fix the compensation of any officers and employees so appointed.

"Any Administrator or other officer, or the members of any central board, or other agency, named to have general supervision at the seat of Government over the program and work contemplated under the appropriation made in section 1 of this joint resolution and receiving a salary of $5,000 or more per annum from such appropriation, and any State or regional administrator receiving a salary of $5,000 or more per annum from such appropriation (except persons now serving as such under other law), shall be appointed by the President, by and with the advice and consent of the Senate: Provided, That the provisions of section 1761 of the Revised Statutes shall not apply to any such appointee and the salary of any person so appointed shall not be increased for a period of six months after confirmation.

"Sec. 4. In carrying out the provisions of this joint resolution the President is authorized to establish and prescribe the duties and functions of necessary agencies within the Government.

"Sec. 5. In carrying out the provisions of this joint resolution the President is authorized (within the limits of the appropriation made in section 1) to acquire, by purchase or by the power of eminent domain, any real property or any interest therein, and improve, develop, grant, sell, lease (with or without the privilege of purchasing), or otherwise dispose of any such property or interest therein.

"Sec. 6. The President is authorized to prescribe such rules and regulations as may be necessary to carry out this joint resolution, and any willful violation of any such rule or regulation shall be punishable by fine of not to exceed $1,000.

"Sec. 7. The President shall require to be paid such rates of pay for all persons engaged upon any project financed in whole or in part, through loans or otherwise, by funds appropriated by this joint resolution, as will in the discretion of the President accomplish the purposes of this joint resolution, and not affect adversely or otherwise tend to decrease the going rates of wages paid for work of a similar nature.

"The President may fix different rates of wages for various types of work on any project, which rates need not be uniform throughout the United States: Provided, however, That whenever permanent buildings for the use of any department of the Government of the United States, or the District of Columbia, are to be constructed by funds appropriated by this joint resolution, the provisions of the Act of March 3, 1931 (U.S.C., Supp. VII, title 40, sec. 276a), shall apply but the rates of wages shall be determined in advance of any bidding thereon.

"Sec. 8. Whenever practicable in the carrying out of the provisions of this joint resolution, full advantage shall be taken of the facilities of private enterprise.

"Sec. 9. Any person who knowingly and with intent to defraud the United States makes any false statement in connection with any application for any project, employment, or relief aid under the provisions of this joint resolution, or diverts, or attempts to divert, or assists in diverting for the benefit of any person or persons not entitled thereto, any moneys appropriated by this joint resolution, or any services or real or personal property acquired thereunder, or who knowingly, by means of any fraud, force, threat, intimidation, or boycott, deprives any person of any of the benefits to which he may be entitled under the provisions of this joint resolution, or attempts so to do, or assists in so doing, shall be deemed guilty of a misdemeanor and shall be fined not more than $2,000 or imprisoned not more than one year, or both.

"Sec. 10. Until June 30, 1936, or such earlier date as the President by proclamation may fix, the Federal Emergency Relief Act of 1933, as amended, is continued in full force and effect.

"Sec. 11. No part of the funds herein appropriated shall be expended for the administrative expenses of any department, bureau, board, commission, or independent agency of the government if such administrative expenses are ordinarily financed from annual appropriations, unless additional work is imposed thereupon by reason of this joint resolution.

"Sec. 12. The Federal Emergency Administration of Public Works established under title II of the National Industrial Recovery Act is hereby continued until June 30, 1937, and is authorized to perform such of its functions under said Act and such functions under this joint resolution as may be authorized by the President. All sums appropriated to carry out the purposes of said Act shall be available until June 30, 1937. The President is authorized to sell any securities acquired under said Act or under this joint resolution and all moneys realized from such sales shall be available to the President, in addition to the sums heretofore appropriated under this joint resolution, for the making of further loans under said Act or under this joint resolution.

"Sec. 13. (a) The acquisition of articles, materials, and supplies for the public use, with funds appropriated by this joint resolution, shall be subject to the provisions of section 2 of title III of the Treasury and Post Office Appropriation Act, fiscal year 1934; and all contracts let pursuant to the provisions of this joint resolution shall be subject to the provisions of section 3 of title III of such Act.

"(b) Any allocation, grant, or other distribution of funds for any project, Federal or non-Federal, from the appropriation made by this joint resolution, shall contain stipulations which will provide for the application of title III of such Act to the acquisition of articles, materials and supplies for use in carrying out such project.

"Sec. 14. The authority of the President under the provisions of the Act entitled 'An Act for the

relief of unemployment through the performance of useful public work, and for other purposes', approved March 31, 1933, as amended, is hereby continued to and including March 31, 1937.

"Sec. 15. A report of the operations under this joint resolution shall be submitted to Congress before the 10th day of January in each of the next three regular sessions of Congress, which report shall include a statement of the expenditures made and obligations incurred by classes and amounts.

"Sec. 16. This joint resolution may be cited as the 'Emergency Relief Appropriation Act of 1935.' "

(Act Apr. 8, 1935, 4 p. m., c. 48, 49 Stat. 115.)

Revised Code of Arizona, 1928.

§3284. *Application to appropriate.* Any person, including a municipality, the state, or the United States, intending to acquire the right to the beneficial use of water, shall make an application to the commissioner for a permit to make an appropriation of water. The application shall state the name and address of the applicant; the water supply from which the appropriation is applied for; the nature and amount of the proposed use; the location, point of diversion and description of the proposed works by which it is to be put to beneficial use; the time within which it is proposed to begin construction and the time required for the completion of the construction and the application of the water to the proposed use. If the application is for agricultural purposes it shall give the legal

subdivisions of the land and the acreage to be irrigated; if for power purposes, the nature of the works by which power is to be developed, the pressure head and amount of water to be utilized, the points of diversion and release of the water, and the uses to which the power is to be applied; if for the construction of a reservoir, the dimensions and description of dam, the capacity of the reservoir for each foot in depth, the description of the land to be submerged, and the uses to be made of the impounded waters; if for municipal uses, the present population to be served, and an estimate of the future requirements; if for mining purposes, the location and the nature of the mines to be served, and the methods of supplying and utilizing the waters. The application shall be accompanied by such maps, drawings and data as prescribed by the commissioner. (§§5-6, Ch. 164, L. '19, am., 2-3, Ch. 64, L. '21, cons. & rev.)

§3285. *Approval or rejection of application; legislative authorization; relative value of uses.* Upon receipt of the application, the commissioner shall indorse thereon the date of its receipt and keep a record thereof. If the application is defective, he shall return the same for correction or completion, indorse thereon the date of and reasons for the return, and keep a record thereof. The application shall not lose its priority of filing on account of such defects if corrected, completed and refiled in the office of the commissioner within sixty days from its return to the applicant, or within such further time as the commissioner may, by an order of record, allow. Applications shall be recorded in a book kept for that purpose.. The commissioner shall approve all applications, made in proper form,

contemplating the application of water to a beneficial use; but when the application or the proposed use conflicts with vested rights, is a menace to the safety, or against the interests and welfare of the public, he shall reject the application. An application for the appropriation of the waters of a stream within the state for the generation of electric energy in excess of twenty-five thousand horsepower, or an application for a permit to build a dam for the generation of hydro-electric energy on a stream within the state in excess of twenty-five thousand horsepower, shall not be approved or granted unless authorized by an act of the legislature. A change in the use of water appropriated for domestic, municipal or irrigation uses, shall not be made without the approval of the commissioner; if the change contemplates the generation of hydro-electric energy or power of over twenty-five thousand horsepower, such approval shall not be granted unless authorized by an act of the legislature.

Before approving or rejecting the application, the commissioner may require additional information to enable him to properly guard the public interest, and may, on applications proposing to divert more than ten cubic feet of water per second, require a statement of the following facts: If a corporation, a copy of the articles of incorporation, the names and residences of directors and officers, and the amount of its authorized and paid up capital; if not a corporation, the name of the party proposing to construct the works, and a showing of his financial ability to carry out the proposed work. He may also require the applicant to show that the

proposed diversion will not conflict with vested rights.

An application may be approved for less water than applied for, if substantial reasons exist therefor, and shall not be approved for more than can be applied to a beneficial use. Applications for municipal uses may be approved to the exclusion of all subsequent appropriations, if the estimated needs of the municipality so demand, upon consideration and order by the commissioner. As between two or more pending conflicting applications for the use of water from a given water supply, where the capacity of the supply is not sufficient for all applications, preference shall be given by the commissioner according to the relative values to the public of the proposed use. The relative values to the public for this purpose are: 1. Domestic and municipal uses, domestic uses to be construed to include gardens not exceeding one-half acre to each family; 2. irrigation and stock watering; 3. water power and mining uses. (§7, Ch. 164, L. '19, am., 4, Ch. 64, L. '21; 1 Ch. 109, L. '27, rev.)

§3286. *Effect of approval or rejection.* The approval or rejection of the application shall be indorsed thereon, a record thereof kept by the commissioner, and the application returned immediately to the applicant. If approved, the applicant may construct the necessary works, take steps to apply the water to a beneficial use and perfect the appropriation. If the application is rejected, the applicant shall take no steps toward the construction of the proposed work or the diversion of the water. (§8, Ch. 164, L. '19, rev.)

§3315. *Violations defined; water superintendent may arrest.* Any person who shall: Wilfully and without authority open, close, change or interfere with any lawfully established head gate, measuring device, or water box; or, wilfully use water or conduct into or through his ditch water which has been lawfully denied him by the water superintendent or other competent authority, or, without authority use the water to which another is entitled; or, without authority divert water from a stream; or, wilfully waste water to the detriment of another; or, divert a stream to the injury or threatened injury of the lands of another; or, use, store, or divert water without or before the issuance of the permit to appropriate such waters; or, when an appropriator of water has the lawful right of way for the storage, diversion or carriage of water, place or maintain any obstruction interfering with the use of the works, or prevent convenient access thereto, is guilty of a misdemeanor. The possession or use of water when the same shall have been lawfully denied by the water superintendent or other competent authority is prima facie evidence of the guilt of the person using it. The water superintendent, or his assistants within his district, may arrest any person violating this section and deliver him to the sheriff or other police officer within the county, and upon delivery to the sheriff or officer shall immediately make complaint before the proper justice of the peace against the person so arrested. (§§39-40, 49-50, Ch. 164, L. '19, cons. & rev.)

§3316. *Fees.* The following fees shall be collected in advance by the commissioner: For examining an application for permit to appropriate water, three dollars; for filing and recording permit to

appropriate water for irrigation purposes; twelve cents per acre for each acre to be irrigated up to and including one hundred acres, and ten cents per acre for each acre in excess of one hundred acres; if the application is for power purposes, twenty-five cents for each theoretical horsepower to be developed up to and including one hundred, ten cents for each horsepower in excess of one hundred and up to and including one thousand, and five cents for each horsepower in excess of one thousand; if the application is for any other purpose, five dollars for filing and recording each permit; for filing or recording any other water right instrument, one dollar for the first hundred words and ten cents for each additional hundred words or fraction thereof; for making copy of any document recorded or filed in his office, ten cents for each hundred words or fraction thereof; but where the amount exceeds five dollars, then only the actual cost in excess of that amount; for certifying copies, documents, records, or maps, one dollar for each certificate; for blue print copy of any map or drawing, ten cents per square foot or fraction thereof; for such other work as may be required of his office, actual cost of the work. At the time of the submission of proof of appropriation, or the taking of testimony for the determination of rights to water, he shall collect from each claimant two dollars for recording the water right certificate in the office of the county recorder, together with an additional fee of twelve cents for each acre of irrigated lands up to and including one hundred acres, and ten cents per acre for each acre in excess of one hundred acres; also twenty-five cents for each theoretical horsepower up to and including one hun-

dred horsepower, and fifteen cents for each horsepower in excess of one hundred up to and including one thousand horsepower, and five cents for each horsepower in excess of one thousand horsepower up to and including two thousand horsepower, and two cents for each horsepower in excess of two thousand horsepower as set forth in such proof, the minimum fee, however, for any claimant in such cases to be two dollars and fifty cents; also a fee of five dollars for any other character of claim to water. The two dollars recording fee shall be transmitted by the commissioner to the county recorder with the certificate when issued. (§§51, 21, Ch. 164, L. '19, am., 22, 10, Ch. 64, L. '21, cons. & rev.)

No. 8510

United States
Circuit Court of Appeals
For the Ninth Circuit

VERDE RIVER IRRIGATION AND POWER DISTRICT, an Irrigation District,

Appellant,

vs.

SALT RIVER VALLEY WATER USERS' ASSOCIATION, a corporation, and HAROLD L. ICKES, Secretary of the Interior.

Appellees.

BRIEF FOR APPELLEE SALT RIVER VALLEY WATER USERS' ASSOCIATION

Upon Appeal from the District Court of the United States for the District of Arizona.

[1938. See 94 Fed 2 936]

No. 8510

United States
Circuit Court of Appeals
For the Ninth Circuit

VERDE RIVER IRRIGATION AND POWER DISTRICT, an Irrigation District,

Appellant,

vs.

SALT RIVER VALLEY WATER USERS' ASSOCIATION, a corporation, and HAROLD L. ICKES, Secretary of the Interior.

Appellees.

BRIEF FOR APPELLEE SALT RIVER VALLEY WATER USERS' ASSOCIATION

Upon Appeal from the District Court of the United States for the District of Arizona.

INDEX

TOPICAL INDEX

INDEX

TOPICAL INDEX

TABLE OF CASES

INDEX

TABLE OF CASES

INDEX

TABLE OF CASES

INDEX

TABLE OF CASES

INDEX

TABLE OF CASES

INDEX

STATUTES OF THE UNITED STATES

INDEX
STATUTES OF ARIZONA

APPENDIX

TEXTS

RULES NINTH CIRCUIT COURT OF APPEALS

No. 8510

United States
Circuit Court of Appeals
For the Ninth Circuit

VERDE RIVER IRRIGATION AND POWER DISTRICT, an Irrigation District,

Appellant,

vs.

SALT RIVER VALLEY WATER USERS' ASSOCIATION, a corporation, and HAROLD L. ICKES, Secretary of the Interior.

Appellees.

BRIEF FOR APPELLEE SALT RIVER VALLEY WATER USERS' ASSOCIATION

JURISDICTION

The issues in this case are primarily jurisdictional.

This is an action brought in the United States District Court for the District of Arizona by the Verde River Irrigation and Power District, an Arizona corporation, against another Arizona corporation, the Salt River Valley Water Users' Association (R. 5), and the Secretary of the Interior, Harold L. Ickes (who is also described as Federal Emergency Administrator of Public Works). Ickes was not served and did not appear (R. 69).

The appellant asserts Federal jurisdiction (Brief, p. 5) under the U. S. Code, Title 28, section 41 (1), Judicial Code, section 24 (1), as a suit (a) "under the constitution or laws of the United States" (Brief p. 17), and (b) "between citizens of different States" (Brief, p. 18, 26). It sought to bring in the Secretary by an order under Section 57 of the Judicial Code (U. S. C. A., Title 28, section 118). This motion was denied (R. 69). The appellant's motion to dismiss was granted, without prejudice (R. 69).

1. Jurisdiction was properly refused, under the clause relating to "the constitution or laws of the United States", because:

(a) As a suit to quiet title (R. 5), which is the only basis on which an order could be sought against the Secretary under section 57, the suit could not proceed in the absence of the adverse claimant to title, the United States;

(b) As a suit for "injunctive relief" (Brief, p. 5), this action may be maintained against the Secretary only in the District of Columbia;

(c) Regardless of the status of the case against the Secretary, the suit is actually one against the United States, not maintainable without its consent.

(d) No Federal question is raised against the Association, and even if there were it would have been inequitable to proceed against it in the absence of two indispensable parties.

2. Jurisdiction was properly refused under the clause relating to diversity of citizenship, because

the plaintiff and one defendant are Arizona corporations.

In addition, this court may in its discretion decline to hear the appeal because the assignments of error fail to conform to Rule 11.

STATEMENT OF THE CASE

This controversy involves Bartlett Dam, now under construction by the Secretary of the Interior (R. 21) at a point on the Verde River about 25 miles above the junction of the Verde and Salt Rivers, Arizona (R. 45). Funds were initially provided by allotment of the President made under the Emergency Relief Appropriation Act of 1935 (R. 114, 115, 116). Congress, however, since that time has twice appropriated funds, aggregating $2,500,000, for continuance of construction of this dam (Act of June 22, 1936, 49 Stat. 1757; Act of....., 1937, Public No.....

This site of Bartlett dam is alleged to be identical (R. 18) with a site claimed by the appellant to have been granted to it by the United States on June 30, 1930, under the Act of March 3, 1891, (26 Stat. 1101-1102, 43 U. S. C. A. 946-948). The complaint does not allege that a right-of-way was ever issued to the Association or any other party. If Bartlett damsite does not belong to the appellant, the site is concededly public domain of the United States.

The appellant seeks relief under three headings (R. 22): *First*, that certain "easements and rights of way upon the Verde River as set forth in those

grants to the plaintiff, pursuant to the Act of Congress of March 3, 1891" be adjudicated valid; *second,* that a contract between the Association and the Secretary of the Interior annexed to the bill (R. 44) be adjudged void as being in excess of the authority of Secretary Ickes; and, *third,* that the construction of Bartlett Dam and reservoir under the terms of that contract be enjoined.

The facts, as disclosed by the complaint, and by Interior Department records of which this Court may take judicial notice, *(Arizona v. California,* 283 U. S. 423; *Caha v. United States,* 152 U. S. 211; *Greeson v. Imperial Irr. Dist.,* 59 F. (2d) 529 (C. C. A. 9), including "those grants to plaintiff" referred to in the complaint are as follows: (For the Court's convenience copies of the Interior Department decisions referred to in the complaint and both briefs are attached as appendices to this brief).

The appellant is a district embracing 85,000 acres, none of it now irrigated. The District plans to irrigate this area by water from the Verde River (R. 6). This river flows into the Salt River. The Salt River Project diverts waters of both rivers below their confluence, at Granite Reef Dam.

The Salt River Project, operated by the defendant Association, was initiated by the United States in 1903. On July 27, 1903 and on December 14, 1904, the Secretary of the Interior withdrew, in aid of the Salt River Project, all of the lands along the Verde River north of Township 4 North, that is, approximately the northern boundary of the Salt River Indian Reservation, under the Reclamation Act of

June 17, 1902 (32 Stat. 388). These withdrawals included the Bartlett site. Supplemental withdrawals were made April 15, 1918, and August 29, 1919. All of these were first-form withdrawals under section 3 of the Reclamation Act, i. e., made for the purpose of constructing reclamation works for this project. These withdrawals have never been vacated. Although storage works were built on the Salt River (five dams are owned by the United States: Roosevelt, Horse Mesa, Mormon Flat, Stewart Mountain, Granite Reef (R. 47), no construction work was done on the Verde River under these withdrawals until 1935, when the Government started the work which is the subject of this suit. (Some reference to the history of these withdrawals may be found in previous litigation involving the District's predecessor and the Association: *Verde Water and Power Co. v. Salt River Valley Water Users' Association, Paradise-Verde Irrigation District, et al.*, 197 Pac. 229, cert. den. 257 U. S. 643.)

The complaint alleges (R. 7) that on April 17, 1920, the State Water Commissioner of Arizona issued a permit to the appellant to appropriate "an amount" (quantity not stated) of the surplus waters of the Verde River over and above the amount being diverted by the Association equal to 960 cubic feet per second continuous flow. The statute under which this permit is claimed provides that construction must be effected within five years (R. S. 1928, sec. 3288).

In 1920 the appellant submitted to the Secretary of the Interior under the Act of March 3, 1891, U.

S. C. A., Title 43, Sec. 946, 947, 948, five right-of-way applications covering various reservoir sites on the Verde River, New River, and Skunk Creek in Arizona (R. 9, 109, 110). Three of these sites (R. 109) are upon the Verde River: (1) Phoenix 036887, a map showing the Horseshoe Reservoir site; (2) Phoenix 049031, two maps, one consisting of six sheets, showing the lower Cave Creek Reservoir site, certain canal rights of way and an index map; and (3) Phoenix 054937, a map showing the Bartlett Dam site, the identical site now in controversy (Brief, p. 4). These maps disclose that the Bartlett Dam site is upon unsurveyed land, as is all of the land involved in the Verde area north of the Salt River Indian Reservation, and the land is so described upon the face of the applications. The only surveyed land involved lies outside the area here in controversy. The Secretary, on December 1, 1920, entered endorsements on these maps, except the Bartlett map, approving them "*as to surveyed lands involved*" subject to "the terms and conditions of an agreement" made May 21, 1920. The terms of this agreement, which appears in the record at p. 24, will be referred to presently.

However, the application for the Bartlett Dam site itself, Phoenix 054937, referred to in the appellant's brief at p. 14, was not approved. It was held for rejection by the Commissioner of the General Land Office May 19, 1923, and specifically rejected by the Secretary of the Interior February 20, 1926. In other words, (1) the rights of way the appellant received were limited to surveyed lands and hence excluded all of the Bartlett Dam site and reservoir site, and (2) the application for the Bartlett Dam

site itself was specifically rejected. Had the Bartlett site been surveyed, the canal route shown on the maps under Phoenix 049031 would have traversed part of the reservoir site.

The Act of March 3, 1891, under which the rights were issued, contains a five-year limitation clause as follows:

> "Provided, that if any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights therein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture."

This five-year period expired in 1925. No works had been constructed. The Secretary, after twice granting periods of grace, on February 13, 1926, rendered a decision cancelling these rights of way (referred to at R. 110).

Thereupon the District sued the Secretary to enjoin cancellation, in the Supreme Court of the District of Columbia. The Court dismissed the bill of complaint. The decision was affirmed by the Court of Appeals on March 5, 1928, in *Verde River Irrigation and Power District v. Work*, 24 F. (2d) 886. Certiorari was denied, 40 S. Ct. 350.

In 1930 identically the same maps, with the exception of the Bartlett map, were resubmitted to the Secretary of the Interior, (R. 10), and on June 30, 1930, the Secretary endorsed a new approval on

them "*as to all surveyed lands involved, subject to all valid existing rights and to the terms of an agreement made this day* between Verde River Irrigation and Power District and the United States of America, acting through the Secretary of the Interior, but reserving rights of way for canals or ditches constructed by authority of the United States,—this approval to supersede and supplant that of December 1, 1920, which was cancelled by the Secretary of the Interior January 20, 1925, to become effective January 16, 1926."

These are the rights of way involved in the present suit; that is to say, they are the identical maps involved in *Verde River Irrigation and Power District v. Work*, supra, revived by the 1930 endorsement. The contract to which the new endorsement was made subject appears in the record, p. 36.

Article I of the 1930 contract recited that:

> "For, and in consideration, and as a condition precedent to the granting of any and all right-of-way by the United States needed in the furtherance and carrying out of the District's development, the said District hereby recognizes the prior right of the Indians of the Salt River Indian Reservation to divert and use such water from the flow of the Verde River for the irrigation of 8,310 acres, more or less, of Indian allotments on that reservation, exclusive of their old or decreed water rights and accordingly, as a condition precedent to the granting of the rights-of-way, agrees on behalf of itself, successors, and assigns, to carry and deliver dur-

> ing each year through its works to be constructed in pursuance to the District's program or as such program may be modified or changed, 22,000 acre-feet of such water to fulfill the water requirements of the Indians on their said reservation;"

in certain percentages per month (R. 38).

Article VI provided (R. 42):

> "It is mutually understood and agreed between the parties that the failure on the part of the District for any reason whatsoever to comply with the terms hereof, shall, ipso facto, render the rights-of-way granted to the District in order for the District to carry out and construct its works and thereafter maintain and operate its project, null and void. The rights-of-way in question shall be obtained through the regular procedure and in compliance with the laws and regulations and shall be granted subject to this provision."

The appellant made two attempts after 1930 to finance its project with Federal funds during the five-year period allowed by the right-of-way act. It applied first to the Reconstruction Finance Corporation (R. 12), and later to the Federal Emergency Administration of Public Works (R. 14). The latter agency allotted funds on November 3, 1933, but in October, 1934, the Bureau of Reclamation reported to the Administration that the appellant's project was infeasible, and following that report the administration cancelled the allotments (R. 16).

The statutory period of five years allowed for construction by the Act of March 3, 1891, expired on June 30, 1935. No work had been done, and no water had been furnished to the Indians.

On June 3, 1935, as the expiration of this period approached, the Secretary of the Interior and the Association entered into a contract providing that when and if the United States should build a dam at the Bartlett site on the Verde River, the Association and the Indian Office should each contribute to its cost and share in its benefits. The complaint refers repeatedly to "the contract of June 3, 1935," but this contract does not appear in the record and is, in fact, confused throughout the complaint and the appellant's brief with a subsequent contract made November 27, 1935, between the same parties, and attached to the complaint, in blank as to date and signatures, at page 44 of the record. This subsequent contract makes a cross reference to the June 3rd agreement (R. 47).

On June 29, 1935, the appellant applied to the Secretary of the Interior to "reapprove" its right-of-way maps, and that the "required rights-of-way be regranted." No action, of course, was taken by the Department before the expiration date, June 30th.

On October 14, 1935, the Commissioner of the General Land Office held these applications for rejection (R. 109).

On November 27, 1935, following the action of the Commissioner of the General Land Office, the

Secretary and the Association entered into a contract which appears at page 44 of the record. This apparently is the contract which the appellant seeks to have declared void (R. 22). It provides that the United States will construct a dam at the Bartlett site, approximately 25 miles above the junction of the Salt and Verde Rivers, with a capacity of 175,000 to 200,000 acre feet (R. 47). Title to the dam and works will remain in the United States until otherwise provided by Congress (R. 58), but the structure will be operated and maintained by the Association (R. 49). Twenty per cent of the water conserved will be delivered to the Salt River Indians and 80 per cent to the Association, in accordance with the provisions of the contract of June 3, 1935 (R. 46). The Association will repay the United States the cost of the work, less a contribution by the United States on behalf of the Indians of twenty per cent of the cost of Bartlett Dam (R. 52). In addition, the Government will do extensive work on Horse Mesa, Roosevelt, Mormon Flat and Stewart Mountain Dams on the Salt River (R. 46, 47).

The Secretary of the Interior is now carrying out this work (R. 21). It is being financed by two executive allotments and three congressional appropriations. In chronological order, these are as follows:

(1) On August 14, 1935, the President allotted $4,500,000 under the Emergency Relief Appropriation Act of 1935 (R. 27). This was reduced to $3,500,000 on September 26, 1935.

(2) The Act of June 22, 1936, 49 Stat. 1757 (Interior Department Appropriation Act for the fiscal year 1937) appropriated $1,500,000.

(3) On September 15, 1936, the Administrator of Public Works transferred $200,000 from the Indian Service allotment (No. 1396) of funds under the National Industrial Recovery Act to the Bureau of Reclamation for Bartlett Dam (Federal project No. 52).

(4) The Act of July ....., 1937, Public No....., (Interior Department Appropriation Act for the fiscal year 1938) appropriated $500,000 under the Bureau of Reclamation.

(5) The same act appropriated an additional $650,000 for the Indian Service, under the caption "Salt River Project." Of this sum the departmental budget carried $500,000 for Bartlett Dam.

Recapitulating, the Executive has allotted $3,700,000 and Congress has appropriated $2,500,000, making a total of $6,200,000 through July 20, 1937. These funds are available for all work under the contract of November 27, 1935, as described in the Departmental estimate submitted to the House Appropriation Committees (Hearings, Interior Department Appropriation Bill, 1938, p. 223), and include Bartlett Dam and rehabilitation work on the four other Government dams on the project (Roosevelt, Horse Mesa, Mormon Flat, Stewart Mountain, R. 47). Bartlett will absorb $4,472,369, and the total cost on all five dams will be $6,894,000. The Association is obligated to repay $6,000,000 in all (R. 12). The Indian Service will contribute $894,000 in all.

The District appealed to the Secretary from the Commissioner's adverse decision on the application

for reapproval of its maps, and on March 23, 1936, the First Assistant Secretary reaffirmed the Commissioner, and directed that the grants be formally noted on the record as null and void for failure to comply with the conditions to which the approvals were made subject. This opinion appears in the record at page 109.

The District applied to the Secretary for rehearing. On March 29, 1937, the Secretary denied the motion.

This suit was commenced on March 24, 1936, the day after the Secretary's decision confirming termination of appellant's rights of way.

The Association was served, and moved to dismiss the bill of complaint on eight grounds, five of them jurisdictional and three relating to the insufficiency of the complaint to state a cause of action (R. 63). Secretary Ickes was not served and did not appear. The appellant moved for an order requiring him to appear, answer or demur (R. 67). The motion was denied (R. 69). The Association's motion to dismiss the bill of complaint was granted without prejudice (R. 69). The assignment of errors assumes that the motion was granted upon all eight grounds (R. 97, Brief, p. 2). The plaintiff moved for leave to file a second amended bill of complaint (R. 70). This motion was denied (R. 93).

As the appellant concedes that its complaint was dismissed on eight grounds (Br. 2), we shall meet the argument in the appellant's brief on all eight

assignments of error. However, the immediate issues here appear to be jurisdictional, and we will not burden the Court unduly with argument upon other points.

SUMMARY OF ARGUMENT

I. The Court properly refused to order the Secretary of the Interior to appear and plead. (1) Insofar as the suit purports to be a quiet title action, the adverse claimant, the United States, is a necessary party. (2) Insofar as the complaint seeks injunctive relief, the action, even if it could be maintained in the absence of the United States, may be maintained only in the District of Columbia.

II. Since the Secretary is conceded by the complaint to be an indispensable party, the court properly refused to proceed against the Association alone in the Secretary's absence. Since the United States is also indispensable, the defect in parties could not be cured by ordering in the Secretary, even if the court had jurisdiction to bring him in.

III. Regardless of the status of the case against the Secretary, this is an attempt to control the United States in the use of its own property, and is in effect an action against the United States. (1) The United States owns Bartlett dam site and the appellant has no interest therein. The appellant's application for a right of way on this site was specifically rejected. Further, such rights of way as were issued to the appellant were specifically limited to surveyed lands, and this site is unsurveyed. Further, all of the appellant's rights-of-way, for whatever they were worth, have expired and been can-

celled, for non-performance of the conditions to which they were expressly made subject when granted. (2) The additional claim of injury to water rights is specious. The appellant has no vested water right. (3) The United States is now utilizing Bartlett Dam site under congressional appropriations for lawful Federal purposes, including supplying of water to Indian wards, and supplying water to a Federal reclamation project, and this would prevent the Government from so doing.

IV. In the absence of the Secretary of the Interior and the United States, no question arising under the constitution or laws of the United States remains as between the two Arizona corporations left in the case. The Federal statutes cited by the appellant all relate to the alleged duties of the Secretary, not the Association.

V. Diversity of citizenship alone is not an available ground for jurisdiction, since the plaintiff and one defendant are Arizona corporations.

VI. Miscellaneous affirmative matters in the appellant's brief neither support jurisdiction nor show the sufficiency of the complaint to state a cause of action.

ARGUMENT.

I. THE COURT PROPERLY REFUSED TO ORDER THE SECRETARY OF THE INTERIOR TO APPEAR, PLEAD, ANSWER OR DEMUR (Assignment of error No. 1).

The assignment of error upon this point (R. 97) in full text reads:

> "1. The court erred in its ruling and order made on the 27th day of January, 1937, denying plaintiff's motion for an order directing the defendant, Harold L. Ickes, to appear, plead, answer or demur to plaintiff's amended bill of complaint."

This assignment of error, in general terms (R. 97), does not state with any particularity why the court's order was wrong, and consequently fails to conform to Rule 11. Compare *United States v. Atchison, T. & S. F. Ry. Co.*, 270 F. 1; *Dayton Rubber Mfg. Co. v. Sabra*, 63 F. (2d) 865 (C. C. A. 9); *Walton v. Wild Goose Mining & Trading Co.*, 123 F. 209 (C. C. A. 9); *O'Brien's Manual of Federal Practice and Procedure*, 2nd Ed., 1929, pp. 105-112, and Cumulative Supplement, 1936, pp. 92-97.

The same objection applies to each of the other assignments of error.

Said Rule 11, as amended December 22, 1936, provides in part as follows:

> "In equity cases the Assignment shall state, as particularly as may be, in what the findings or decree are alleged to be erroneous."

This being an equity case, it was encumbent upon Appellant to particularly assign any alleged errors relied upon by it. This it has not done, and under the authority of the same rule, Appellant's Assign-

ment of Errors should be disregarded. Said amendment to Rule 11 became effective February 1, 1937, approximately a month and a half prior to the filing by Appellant of its Assignment of Errors in this case. At the time of the adoption of the amendment to said rule, members of the bar of this Court were enjoined that the same must be followed with "meticulous care and studied accuracy," as the Court will not be indulgent with counsel who do not strictly comply with these rules.

But whether or not the assignments here are adequate, the court below was right.

The plaintiff's motion was made under Section 57 of the Judicial Code (U. S. C. A., Title 28, section 118). That section is restricted to suits of certain classes, of which the only one claimed to be applicable here is:

> "any suit . . . to remove any encumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought . . . . "

The relief sought by the complaint (R. 22) is not so restricted. The appellant asks injunctive relief (Brief, p. 5), and asks to have a contract declared void.

This suit is on the horns of a dilemma. If it is an action to quiet title to easements on public domain, the United States, as owner of the fee, is the adverse claimant and a necessary party. If it is an injunction action, Section 57 has no application and the

suit may be maintained against the Secretary, if at all, only in the District of Columbia.

(1) *As a suit to remove a cloud on title*:

On the allegations of the bill, Bartlett site belongs either to the appellant or to the United States. There is no allegation that any other party has an interest in it. A suit to quiet title may not be maintained in the absence of the adverse claimant, which is the United States in this case.

In *Appalachian Electric Power Co. v. Smith*, 67 F. (2d) 451, cert. den. 54 S. Ct. 458, (C. C. A. 4, 1933), the power company sued in West Virginia to remove a cloud on title to its lands in a reservoir site, occasioned by a finding of the Federal Power Commission that the use thereof would affect interstate commerce, and would require a major license under the Federal Water Power Act. The action was brought against members of the Commission individually. Proceeding under Section 57 of the Judicial Code, an order issued directing the members to appear and plead. They moved to quash, and to dismiss the bill for lack of jurisdiction. The court overruled these motions, but dismissed the bill on the merits. The Circuit Court of Appeals held that the bill should have been dismissed for want of jurisdiction, saying (p. 455):

> "In the first place, the findings and orders complained of do not constitute a removable cloud upon title. If they be not authorized by statute, or if the statute authorizing them contravenes the constitution, this must be apparent

> on the face of the orders and they could not, therefore, constitute a cloud . . . . As everyone must be presumed to know the law, it follows that no order, the invalidity of which is dependent entirely upon legal principles, can constitute a cloud upon title."

And, page 456:

> "The interest is in the public, represented by the government of the United States. The United States has not been made a party and has not consented to be sued in such a case; and yet it is well settled that in a suit to remove a cloud or quiet title the adverse claimant is a necessary party to the suit."

See also *Wood v. Phillips*, 50 F. (2d) 714, 717, and *Sanders v. Saxton*, 182 N. Y. 477.

In *Moody v. Johnston*, 66 F. (2d) 999, this Court, reversing *Scheer v. Moody*, 48 F. (2d) 327, directed that a suit brought by water users to remove a cloud on title to the waters of a stream be dismissed for want of a necessary party or parties, i. e. the Secretary of the Interior and the United States. The suit had been brought against a project manager of a reclamation project without joining the Secretary or the United States. By leave of court, the plaintiffs amended their complaint, naming the Secretary and the United States as defendants. However, they failed to limit the amended complaint to issues which could be litigated with the Secretary of the Interior. Thereafter this Court, in *Moody v. Johnston*, 70 F. (2d) 835, issued a writ of manda-

mus at the instance of the Secretary of the Interior and the project manager to compel the judge of the trial court to dismiss for failure to comply with the mandate. See page 839:

> "The mere insertion of the name of the Secretary of the Interior and the United States in the caption does not conform to the rulings of this Court."

The Court left open the question of whether the plaintiffs could have secured jurisdiction over the Secretary or whether they would be compelled to bring suit in the District of Columbia.

As said in *Appalachian Electric Power Co. v. Smith*, 67 F. (2d) 451, this suit seeks to try a question of title in which the United States is interested, and to try it behind the Government's back. It is an action seeking to control the United States in the use and occupation of public domain, not to repel a trespass on property of the appellant. Cf. *Louisiana v. Garfield*, 211 U. S. 70, 78; *Oregon v. Hitchcock*, 202 U. S. 60, 68-69; *Naganab v. Hitchcock*, 202 U. S. 473; *New Mexico v. Lane*, 243 U. S. 52. The United States is a necessary party, even if this suit were not deemed to be one against the United States; *Arizona v. California*, 298 U. S. 558, 571, 572; *Moody v. Johnston*, 66 F. (2d) 999 (C. C. A. 9).

(2) *As an injunction action*:

If this case were treated as an injunction action, to avoid the necessity for joining the United States as claimant to the land involved, the appellant would

not be entitled to an order under Section 57, even against a private party; *Appalachian Electric Power Co. v. Smith*, 67 F. (2d) 451; and an injunction would not issue against a party not subjected to personal jurisdiction; *Clarke v. Boysen*, 39 F. (2d) 800. Substituted service would not have been good under Rule 13 of the Equity Rules of the Supreme Court;*Transcontinental and Western Air v. Farley*, 71 F. (2d) 288, 291.

Apellant has cited no precedent justifying the use of Section 57 of the Judicial Code to bring a Cabinet officer into a suit, in any type of case, outside the District of Columbia. Section 57 is not an independent grant of jurisdiction to the Federal courts. Of the cases cited by appellant (Br. 40), *Crichton v. Wingfield*, 258 U. S. 66, held that substituted service should not have issued in a case turning on the localized status of personal property in New York. *Clarke v. Boysen*, 39 F. (2d) 800 (C. C. A. 10), denied constructive service as a basis for an injunction, saying:

> "The writ of injunction will not issue against a person not within or subject to the jurisdiction of the court."

Aside from the inapplicability of Section 57 to a pure injunction action, a suit of such a type against the Secretary may be maintained only in the District of Columbia. Title 28, U. S. C. A., Section 112 (Section 51 of the Judicial Code) prohibits civil actions, with certain exceptions, against any person "in any other district than that whereof he is an inhabitant." The Secretary of the Interior is sued

here in his official capacity. Regardless of his personal residence, he is, as to suits seeking to control his official actions, an "inhabitant" of the District of Columbia, and cannot be involuntarily subjected to jurisdiction in any other judicial district. Thus U. S. C. A., Title 5, section 481, establishes the Department of the Interior and its Secretary "at the seat of Government." Construing this section, the United States Supreme Court in *Butterworth v. Hill*, 114 U. S. 128, denied the jurisdiction of the United States District Court for the District of Vermont over the Commissioner of Patents, who at that time was a subordinate of the Secretary of the Interior. See *Schmertz Wire Glass Co. v. Western Glass Co.*, 178 F. 973; *Barrett Co. v. Ewing*, 242 F. 506 (C. C. A. 2, 1917); *Hammer v. Robertson*, 6 F. (2d) 460 (C. C. A. 2, 1925). The Commissioner of Patents under present statutes apparently may waive objection to jurisdiction when sued in the wrong district; *Senitha v. Robertson*, 45 F. (2d) 51, (C. C. A. 4, 1930, modifying *Canon v. Robertson*, 32 F. (2d) 295), but there is no statutory provision subjecting the Secretary of the Interior to suit elsewhere than in the District of Columbia.

II. THE COURT PROPERLY RULED THAT SINCE SECRETARY ICKES HAD NOT BEEN SUBJECTED TO THE JURISDICTION OF THE COURT, IT WOULD BE INEQUITABLE TO PROCEED AGAINST THE DEFENDANT SALT RIVER VALLEY WATER USERS' ASSOCIATION IN THE ABSENCE OF THE SECRETARY AS AN INDISPENSABLE PARTY (Assignment 2 (h)).

The Assignment of error upon this point (R. 97, 98) reads in full text:

> "2. The court erred in its ruling and order made on January 27, 1937, directing dismissal of plaintiff's amended bill of complaint, upon the grounds: . . . .
>
> > "(h) That it appears that the defendant, Harold L. Ickes, has not been subjected to the jurisdiction of the court, and that it would be inequitable to the defendant, Salt River Valley Water Users' Association, to proceed in the cause in the absence of said defendant."

This point, insofar as it is argued by the appellant at all, appears on page 37 of its brief.

Appellant's brief admits (Brief, p. 3) that "a reading of the amended complaint will disclose that the controversy is not a severable one", and again (Brief, p. 15), that the action of the two defendants "constitutes a joint attempt on their part to wrongfully and unlawfully invade subsisting rights of the appellant." And again, (Brief, p. 6), "the inducement to, occasion for and necessity of the suit is the making of the contract between the appellees." In fact, arguing that the order for substituted service should have issued, the appellant admits (Brief, p. 40):

> "The Secretary becomes a necessary party to the action and Section 57 of the Judicial Code

provides an ideal method for procuring service of process in such cases."

Upon these admissions, if the matter was one for the lower court's discretion, the exercise of that discretion can scarcely be attacked; the Secretary was clearly indispensable. But it seems plain that any other ruling would have been erroneous. Disregarding the argumentative matter in the bill of complaint, and examining the actual contract between the defendants (R. 44), which was the "inducement to, occasion for and necessity of the suit" (Brief, p. 6), it appears that the Association and the Secretary had entered into an agreement whereby the United States undertook to build Bartlett Dam (R. 46), furnish rights of way (R. 48), and own the dam (R. 58), in consideration of the Association's agreement to repay 80 per cent of its cost (R. 46, 52), operate and maintain it (R. 49 and 50), and furnish one-fifth of the developed water to Indian wards of the United States (R. 46). Since this contract is incorporated in the complaint by reference (R. 19), the complaint admits that the work complained of is to be performed by the United States, and that an injunction, if granted against the Association to the full extent prayed for (R. 22), would not have halted construction in the absence of the United States, or in the absence of the Secretary. The only possible effect of such an injunction, if granted, might have been to prevent the Association from receiving the benefits of the structure, possibly thereby relieving it from paying its share of the cost of construction, but conceivably leaving it obligated to pay without use. Under these cir-

cumstances, the court's conclusion that it would be inequitable to proceed against the Association alone, in the absence of the Secretary, seems inescapable.

It is settled that a suit to which the Secretary of the Interior is a necessary party, and in which jurisdiction has not been obtained over him, is subject to dismissal on motion of a co-defendant. See *Moore v. Anderson*, 68 F. (2d) 191 (C. C. A. 9); *Moody v. Johnston*, 66 F. (2d) 999, 1003 (C. C. A. 9). These two Ninth Circuit cases, both involving reclamation projects, are in accord with *Webster v. Fall*, 266 U. S. 507. See also *Gnerich v. Rutter*, 265 U. S. 388; *Transcontinental and Western Air v. Farley*, 71 F. (2d) 288, 292.

And since the United States is the owner of the land claimed and is not a party, the case would fail for want of a necessary party, even if the Secretary could have been ordered in. Cf. *Moore v. Anderson*, 68 F. (2d) 181 (C. C. A. 9). Needless to say, the United States may not be sued without its consent, even by a State. *Kansas v. United States*, 204 U. S. 331, 342.

Parenthetically, it may be added that in several of the cases cited by the appellant on its contention that the United States was not a necessary party (Br. 28, et seq.), the suit was brought in the District of Columbia for the express purpose of getting personal jurisdiction over the officer sued. See *Franklin Township v. Tugwell*, 85 F. (2d) 208; *Garfield v. Goldsby*, 211 U. S. 249, 255; *Philadelphia Co. v. Stimson*, 223 U. S. 605; *Noble v. Union River Logging R. Co.*, 147 U. S. 165; *National*

Remedy Co. v. Hyde, 50 F. (2d) 1066; *Santa Fe Pacific R. Co. v. Lane*, 244 U. S. 492; *Ickes v. Fox*, 81 L. ed. 284. That has not been done here.

III. REGARDLESS OF THE STATUS OF THE CASE AS TO THE SECRETARY, THIS IS AN ACTION AGAINST THE UNITED STATES AND COULD NOT BE MAINTAINED WITHOUT ITS CONSENT. (Assignment 2 g). THE SUBJECT MATTER OF THE SUIT IS FEDERAL PROPERTY, IN WHICH THE PLAINTIFF HAS NO INTEREST WHICH WILL ENTITLE IT TO MAINTAIN THIS ACTION (Assignment 2 f).

The two points covered by assignments 2 (f) and (g) are so closely related that they are discussed under one heading here.

The assignment of error upon this point (R. 97) reads in full text:

> "2. The court erred in its ruling and order made on January 27, 1937, directing dismissal of plaintiff's amended bill of complaint, upon the grounds: . . . .
>
> "(f) That it appears from the amended bill of complaint that the plaintiff has no such interest in the subject matter of the suit as will entitle it to maintain its said suit to enjoin the construction of the proposed irrigation works referred to in the amended bill of complaint.
>
> "(g) That it appears upon the face of the amended bill of complaint that there is a fatal defect of parties defendant to the suit, in that

> the United States of America, as the owner of the lands involved and of the irrigation works proposed to be constructed, is the real party in interest and an indispensable party to the determination of the suit, and that the United States of America has not been made a party defendant to the suit and has not consented to be sued."

Earlier we have argued that the United States, as owner of the fee on which the appellant seeks to adjudicate an easement is so affected by this suit as to be an indispensable party, whether or not this is necessarily an action against the United States (*Arizona v. California*, 298 U. S. 558). But this is, in fact, an action against the United States and subject to dismissal on that broader ground.

The appellant seeks (1) to adjudicate its claim to the damsite, (2) to preserve an unperfected water appropriation, and (3) to prevent construction by the United States. To avoid the objection of sovereign immunity the appellant argues that this is a suit (Br. 28, 29) to erase wrongful acts of the Secretary and to enjoin continuing trespass upon and damage to appellant's property rights. The rights asserted are (Br. 27) first, a right of way on Bartlett site and, second, a claim to water rights.

1. *As to title to Bartlett damsite*:

If Bartlett Dam site belongs to the United States and not to the appellant the decree sought by the appellant would, if granted, control the United States in the use of its own property. Substantially

the appellant's whole case is built upon the assumption that Bartlett dam site belongs to it. Thus, page 22 of its brief, it argues that construction of Bartlett Dam is "a joint and continuing trespass by Appellees upon Appellant's property. The character and quality of a title conferred by the terms of the Act become a material injury." It argues (Br. 22) that the contract between the two defendants "is tantamount to a grant to the Association of easements and rights upon and over existing titles." Again, (Br., p. 8) it refers to "Bartlett Dam as a necessary part of its proposed irrigation system." Again, (Br., p. 12) it complains that the Bureau of Reclamation "led the appellant to believe that the United States Government, through the Bureau of Reclamation, would build its project, including Bartlett Dam." Again, (Br., p. 8) it speaks of a permit from the State for the construction by the appellant of a dam" at its Bartlett site."

The Complaint, and Interior Department land records and decisions of which this Court may take judicial notice, (*Arizona v. California*, 283 U. S. 423; *Caha v. United States*, 152 U. S. 211; *United States v. Morrison*, 240 U. S. 192, 207) demonstrate that unencumbered title to Bartlett dam site is in the United States, and that the appellant does not have, and never did have, any interest therein. This is quite aside from the question of validity of the Secretary's cancellation of whatever rights of way the Verde District did have, and of which the appellant complains.

The basis defects in the appellant's claim are three-fold:

First, no right of way ever issued to the Verde District for the Bartlett site; to the contrary, the District filed an application for that site (Phoenix 054937), which was specifically rejected by the Commissioner of the General Land Office on May 19, 1923, and by the Secretary of the Interior on February 20, 1926.

Second, the rights of way issued to the Verde District in 1930, upon which it relies here, not only fail to include the Bartlett site, but were restricted by the appellant's own application, and by the Interior Department's endorsement thereon, to "surveyed land involved." Bartlett dam and reservoir site are on unsurveyed land. This is shown on the face of the maps, was admitted in open court at the hearing below, and is a fact of which the court could take judicial notice in any event; 23 C. J. 95. The Department's endorsement reads: "*Approved as to surveyed lands involved*" and "reserving rights of way for canals or ditches constructed by authority of the United States." A grant, even to a State, does not vest until the lands are surveyed and the survey accepted, *United States v. Morrison*, 240 U. S. 192, even though the grant purports to be *in praesenti; Heydenfeldt v. Daney Gold and Silver Mining Co.*, 93 U. S. 634.

Third, the only rights of way ever received by the appellant (that is, upon such lands as were surveyed, and excluding Bartlett site altogether), were conditional upon the furnishing of a water supply to the Indians, and terminated, by contract, "ipso facto" upon the expiration of five years of non-performance of that condition.

The appellant's argument (Br., pp. 18, et. seq.) is that (Assuming erroneously that the rights-of-way which were issued covered Bartlett site) these rights were unconditional, *in praesenti*, and could only be vacated by judicial proceedings. The argument has been answered so pointedly by the Secretary's opinion on rehearing dated March 29, 1937, that the full text of the opinion is quoted below.

"On March 23, 1936, the Department affirmed a decision of the Commissioner of the General Land Office which denied the application of the Verde River Irrigation and Power District of Phoenix, Arizona, for reapproval of its maps of rights of way for reservoirs and canals, and declared the rights of way null and void. The District now moves for rehearing.

"The petition for rehearing contains nothing which was not presented by the District or considered by the Department upon the appeal. We are convinced that the decision of March 23, 1936, should not be disturbed. There is one phase of the case, however, which needs further discussion. This concerns the right and power of the Department to cancel the rights of way; the appellant challenges that right and insists that cancellation may only be achieved by judicial decree.

"Ordinarily, the legal effect of approval of a map of location of a right of way by the Secretary of the Interior pursuant to the act of March 3, 1891 (26 Stat. 1095, 43 U. S. C. 946, 947), is that title to the right of way vests in the applicant, subject only to forfeiture by judicial decree or act of Congress.

Kern River Co. v. United States, 257 U. S. 147, *Allen v. Denver Power & Irrigation Co.*, 38 L. D. 207,*Windsor Reservoir and Canal Company v. Miller*, 51 L. D. 27, 305.

"Section 2 of the act of February 22, 1911, provides that

> " 'in carrying out the provisions of the reclamation law, the Secretary of the Interior is authorized, *upon such terms as may be agreed upon*, to co-operate with irrigation districts, water users associations, corporations, entrymen or water users for the construction or use of such reservoirs, canals, or ditches as may be advantageously used by the Government and irrigation districts, water users associations, corporations, entrymen or water users for impounding, delivering and carrying water for irrigation purposes.' " 36 Stat. 926, 43 U. S. C. 524. (Underscoring supplied.)

"In *Verde River Irrigation and Power District v. Work*, 24 F. (2d) 886, certiorari denied, 279 U. S. 854, the applicant questioned the right of the Secretary of the Interior to cancel the same rights of way here involved. In 1920, the United States and the predecessor of the District had entered into a contract pursuant to the act of February 21, 1911. As an incident of that contract, right of way applications had been approved and expressly made subject to its terms and conditions. For failure to comply with those terms and conditions, the Department had canceled the rights of way in 1926. The court

affirmed a decree dismissing a bill to enjoin cancellation.

"In thus refusing relief to the District, the courts among other things held that rights of way granted as an incident to a contract authorized by the 1911 statute, may be made conditional on performance of its provisions, that the rights of way and the contract thus become interdependent, and that the Secretary of the Interior may cancel the right of way for failure to perform the terms or conditions of the contract.

"After that decision, on June 30, 1930, the United States by the Secretary of the Interior, and the District, entered into another agreement similarly authorized by the 1911 statute; and on the same day the Department reapproved the maps of the same rights of way, 'subject * * * to the terms of an agreement made this day.' Article VI of the agreement provided that 'failure on the part of the District for any reason whatsoever to comply with the terms hereof, shall, *ipso facto*, render the rights of way granted to the District *in order* for the District to carry out and construct its works and thereafter maintain and operate its project, *null and void.*' (Underscoring supplied). Undoubtedly, the right of way was granted conditionally, and subordinate to and as an incident of, the agreement.

"The use of the words 'ipso facto' in the termination clause has a peculiar significance in the light of previous decisions of the courts. The courts had held that title to a right of way granted under the 1891 statute remained in the grantee until cancelled

by judicial decree or act of Congress. In describing the effect of breach of a statutory condition the courts had repeatedly held that cancellation did not '*ipso facto*' follow. Thus it had been said that such breach 'does not operate *ipso facto* to divest the grantee of title'; and that it 'does not *ipso facto* effect a forfeiture'. *United States v. Whitney*, 176 Fed. 593, 594; *Carns v. Idaho-Iowa Lateral*, 202 Pac. 1071, 1072. It may therefore be assumed that the *ipso facto* provision in the contract was intended to avoid the necessity for judicial decree or congressional act of forfeiture, and to effect automatic cancelation.

"The 1930 contract provided that the District was to supply the Indians of the Salt River Indian Reservation with fixed quantities of water each year; this was its all-pervading purpose. Though more than six years have passed since the execution of the contract, the District has failed to supply the Indians with any water. It has even failed to construct the water works which would enable it to supply the water, and there is no reasonable prospect that they will be constructed. It is true, the contract did not specify when the District was to begin to deliver water to the Indians. But a provision for performance within a reasonable time is implied. Williston on Contracts, 1920 Ed., Sec. 38. Clearly, under the circumstances, a reasonable time has passed. The District has failed to perform its contract. The contract provided that the result of a breach of the contract by the District was to 'ipso facto, render the rights of way granted * * * null and void.' It follows that the Commissioner and the Department

may formally announce the termination of the rights of way. *Verde River Irrigation & Power District v. Work*, 24 Fed. (2d) 886.

"In fact the assumption that the rights of way had become null and void as a result of breach of the contract, is implicit in the petition of the District. It requests the Secretary of the Interior to 'reapprove' the maps, and that the 'required rights of way be regranted.' If the District had considered the rights of way to be still in existence, a mere request for indulgence, for additional time within which to perform, would have been appropriate. But a request to 'reapprove' and to 'regrant' is a concession that the life of the grant had expired. The Commissioner and the Department have officially noted and announced the expiration.

"The motion for rehearing is denied."

The same reasoning disposes of the remaining case cited by the appellant (Br. 20) *Union Land and Stock Co. v. United States*, (C. C. A. 9), 257 F. 635. That case, incidentally, adjudicated a forfeiture for failure to build a dam 50 feet high as stipulated, although the company had built one to 35 feet, lost it in a flood, and rebuilt it to 26 feet. By comparison, the appellant's equities here are rather pale; the Secretary has been more lenient than this Court was in that case.

It may be added that the 1891 statute is not a self-executing grant; the right-of-way becomes operative only if approved by the Secretary. *Utah Power and Light Co. v. United States*, 243 U. S. 389, 406,

407. Where a right to use public domain is subject to the Secretary's approval, the approval may be made subject to conditions: *Verde River Irrigation and Power District v. Work*, 24 F. (2d) 886, *McLennen v. Wilbur*, 283 U. S. 414, 419.

For three reasons, therefore, the appellant's contention that the Secretary is a trespasser at Bartlett Damsite fails: *First*, the appellant's right-of-way application upon that site was denied, not granted; *second*, the only rights of way given the appellant excluded unsurveyed land, and this site is unsurveyed; and *third*, the rights-of-way actually issued were conditional and expired, by contract, "ipso facto" after five years of failure to perform the conditions attached to them.

2. *As to water rights*:

The appellant claims its water rights under Sections 3289, 3315 and 3316 of the Revised Code of Arizona, 1928 (Brief, p. 47). It alleges that it holds a permit from the State Water Commissioner issued April 17, 1920 (R. 7). But Section 3288 provides as follows:

> "3288. *Time of construction.* Actual construction, except under applications by a city or town for its municipal uses, shall begin within one year from the approval of the application, be prosecuted with reasonable diligence and completed within a reasonable time, to be fixed in the permit, not to exceed five years from the date of such approval. The Commissioner shall, for good cause shown, extend the

> time beyond the five years if the magnitude, physical difficulties and cost the work merit such extension."

More than fifteen years, or three times the original statutory period, had expired before this suit was brought, and there is no allegation that the time had been extended or that any work had been commenced. It is alleged only that the permit is now owned by the plaintiff and "has not been revoked." By the language of the statute, the permit expires on expiration of the time "fixed in the permit." Revocation is not necessary. Section 3289 (b), Arizona Supplement (1936) authorizes extensions of time for districts which have applications pending before Federal lending agencies, until six months after the money so applied for shall become available to such districts, but in no event to exceed two years after the time prescribed in such permit as that within which actual construction must be begun. It is admitted that appellant's application was finally rejected by a federal lending agency in the month of October 1934 (R. 14). The appellant's permit, even if still alive, then fourteen years after its issuance, expired in April 1935, more than a year before this action commenced. Furthermore, a permit issued under these sections has no conclusiveness whatever as against other appropriators. *Stewart v. Verde River Irrigation and Power District*, 68 P. (2d) 329. The Commissioner's findings are comparable only to those of a referee, subject to revision by the court. Possession of a permit is not equivalent to a vested right to appropriate water. *Salt River Valley Water Users' Association*

v. Norviel, 29 Ariz. 499, 242 Pac. 1013. Such a right can be acquired only by application of water to beneficial use. Section 3280 provides:

> "Beneficial use shall be the basis, measure and limit to the use of water. Whenever the owner of a right to the use of water shall cease or fail to use the water appropriated for five successive years, the right to the use shall cease, and the water shall revert to the public and be again subject to appropriation."

A fourteen year period of inactivity, even though occasioned by lack of finances, is scarcely a substitute for the requirement of application of water to a beneficial use. See *Arizona v. California*, 283 U. S. 423; *Maricopa County Water District v. Southwest Cotton Co.*, 4 Pac. (2d) 369; *Fourzan v. Curtis*, 29 Pac. (2d) 722.

3. *As to the character of the relief sought*:

The relief asked would prevent the Secretary from utilizing his contract with the Association (R. 22) for the purpose of furnishing water to Indians of the Salt River Reservation, as provided in that contract (R. 46), nothwithstanding the direction given him by statute (Act of May 18, 1916, chapter 125, 39 Stat. 123, 130) to furnish such water, as well as an appropriation made by Congress for expenditure by the Indian Service on construction of Bartlett Dam (Act of July ....., 1937, Public No. .....). The obligation to furnish water to Indian wards is clearly a Federal one, *Winters v. United States*, 207 U. S. 564; *Conrad Investment Co. v. United States*, 161, F. 829 (C. C. A. 9).

On the score of water rights, consequently, as well as on the score of rights in Bartlett damsite, the appellant is not seeking to repel an unlawful invasion, but to control the United States in the discharge of a lawful function.

More generally, the effect of the action would be to prevent the expenditure for federal purposes on the public domain of moneys appropriated by Congress for that purpose, and the use of the structure already partly built. The United States may not be stayed in such a fashion under the guise of an injunction suit or quiet title action against a Cabinet officer. *Oregon v. Hitchcock*, 202 U. S. 60, 68-69; *Louisiana v. Garfield*, 211 U. S. 70, 78; *Naganab v. Hitchcock*, 202 U. S. 473; *New Mexico v. Lane*, 243 U. S. 52; *Arizona v. California*, 283 U. S. 423.

The cases cited by the appellant (Br. 47) are not in point. This is not a case in which the action of the United States or the Secretary affects lands which are admittedly the property of others, as in *Philadelphia Co. v. Stimson*, 223 U. S. 605; nor in which the Secretary is attempting an adjudication without notice or hearing, as in *Garfield v. Goldsby*, 211 U. S. 249; nor in which the Federal officers are constructing works within the corporate limits of a municipality in disregard of its proprietary and governmental interests, as in *Franklin Township v. Tugwell*, 85 F. (2d) 208; nor is it one in which an officer of the United States is attempting an unlawful monetary exaction, as in *Miller v. Standard Nut Margarine Co.*, 49 F. (2d) 79; *National Remedy Co. v. Hyde*, 50 F. (2d) 1066; *Magruder v. Belle Fourche Valley Water Users' Association*, 219

F. 72. Nor is it one in which the Secretary is interfering with vested water rights of others, as in *Ickes v. Fox*, 81 L. ed. 284. Unlike the *Fox* case, the appellant here had no water contract with the Secretary (other than a contract obligating the appellant, not the Secretary, to deliver water, and which the appellant failed to perform). *Colorado v. Toll*, 268 U. S. 228, cited by the appellant, was considered and distinguished by this Court in *Moore v. Anderson*, 68 F. (2d) 191, 195.

IV. IN THE ABSENCE OF THE SECRETARY OF THE INTERIOR AND THE UNITED STATES, NO QUESTION UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES REMAINS AS BETWEEN THE PLAINTIFF DISTRICT AND THE DEFENDANT ASSOCIATION (Assignments 2 c and 2 d).

The assignments of error upon these points (R. 97) read in full text:

> "2. The court erred in its ruling and order made on January 27, 1937, directing dismissal of plaintiff's amended bill of complaint, upon the grounds: . . . .
>
> "(c) That the said amended bill of complaint fails to set forth a cause of action adequate to warrant the court in entertaining jurisdiction.
>
> "(d) That it appears upon the face of the amended bill of complaint that the court is without jurisdiction, for the reason that the

controversy is not one arising under the constitution and laws of the United States."

The constitutional and statutory provisions cited in the brief are mentioned below in the order in which they appear. At the outset it is manifest that nearly all of the statutes relate to the authority of the Secretary of the Interior, and hence if they are a necessary basis of jurisdiction the Secretary is a necessary party.

(1) The first statute cited in support of jurisdiction (Brief, p. 5) is the Act of March 3, 1891 (26 Stat. 1101, 1102, 43 U. S. C. A. 946, 947, 948). This is the right-of-way act. It is argued that the Secretary lacked authority to cancel rights-of-way (Brief, p. 19, et seq.). As has been argued supra, the appellant never acquired any interest in Bartlett damsite under that act. If that is so, the act drops out of the case. If not, then the Secretary, not the Association, is the necessary defendant, for it is not alleged that the Association is claiming under that act.

(2) The Emergency Relief Appropriation Act of 1935 (49 Stat. 115, 15 U. S. C. A. 728). It is argued that this statute is unconstitutional and that in any event it confers no independent authority upon the Secretary. While the contrary is demonstrable, this act is not necessarily involved in this case. Congress has in the Act of June 22, 1936, (49 Stat. 1757), and the Act of ....., 1937, (Public No. .....), appropriated funds for carrying on the construction work provided for in the contract annexed to the complaint (R. 44). The

Interior Department Appropriation Act of 1936 carried $1,500,000, under the item "Bureau of Reclamation, Salt River Project." The 1937 Act carried $650,000 under the item "Office of Indian Affairs, Salt River Indian Reservation," and $500,000 under the item "Bureau of Reclamation, Salt River Project." These appropriations were preceded by the President's allotment under the Emergency Relief Appropriation Act of 1935, appearing at pages 114 to 116 inclusive of the record. Even if that Act were wholly unconstitutional, the subsequent approval and adoption of the project is enough. In *United States v. Arizona*, 295 U. S. 174, 185, 186, counsel suggested that Laguna Dam upon the Colorado River had never had statutory authorization. The Court said:

> "Congress has made appropriations for the benefit of the project of which it is a part, and so recognized and approved the building of the dam. *Wisconsin v. Duluth*, 96 U. S. 379, 386."

In *Wisconsin v. Duluth*, 96 U. S. 379, 386, the State of Wisconsin sued to enjoin diversions of the waters of the St. Louis River from their natural course by the City of Duluth, by the construction of a canal; the canal, after construction, was improved and maintained by the United States under appropriations made in the annual appropriation bill called the Rivers and Harbors Bill. The Court declined the injunction, saying:

> "We do not feel called upon to make an argument to prove that these statutes of the Congress of the United States, and these Acts of the

> Executive Department in carrying those statutes into effect, constitute an adoption of the canal and harbor improvement started by the City of Duluth, and a taking exclusive charge and control of it; that they amount to the declaration of the Federal Government, that we here interpose and assert our power; we take upon ourselves the burden of this improvement, which properly belongs to us, and that hereafter this work for the public good is in our hands and subject to our control."

In *Ryan v. Chicago B. & Q. R. Co.*, 59 F. (2d) 137, (C. C. A. 7, 1932), cited by the appellant on another point, the Court dissolved an injunction against construction of a dam, a congressional appropriation for its construction having been made after the injunction issued. The Court said (p 144):

> "Where an appropriation is made for a general plan or project, the appropriation bill is sufficient authority for the prosecution of that work under the supervision and superintendence of that officer of the United States having charge of the particular matter, and the appropriation is not required to be made for the entire amount before the project is begun."

See also *South Carolina v. Georgia*, 93 U. S. 4; *Miller v. Mayor of New York*, 109 U. S. 385; *Greenleaf Johnson Lumber Co. v. United States*, 204 F. 489.

(3) The third statute relied upon for jurisdiction is section 8 of the Act of June 17, 1902, (32 Stat.

390, 43 U. S. C. A. 383). This is a section of the original Reclamation Act which provides that "nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary in carrying out the provisions of this act, shall proceed in conformity with such laws . . . . "

The State laws cited (Brief, p. 47) are Revised Code (1928) secs. 3284-3289, 3315, 3316. Sec. 3284 purports to require the United States to secure the permit of the State Water Commissioner before building a dam. Sec. 3286 prohibits construction without a permit. The same sections were urged in *Arizona v. California*, 283 U. S. 423, 451, as objections to the construction of Boulder Dam. The Court said:

> "The United tSates has not secured such approval; nor has any application been made by Wilbur, who is proceeding to construct said dam in complete disregard of this law of Arizona.
>
> "The United States may perform its functions without conforming to the police regulations of a State. *Johnson v. Maryland*, 254 U. S. 51, 65 L. ed. 126, 41 S. Ct. 16; *Hunt v. United States*, 278 U. S. 96, 93, L. ed. 200, 49 S. Ct. 200. If Congress has power to authorize the construction of the dam and reservoir, Wilbur is under no obligation to submit the plans and

specifications to the State engineer for approval."

Federal authority was found in the power to improve navigation, in that case. Likewise, the Federal Government has constitutional power to furnish water to Indian tribes, *Winters v. United States*, 207 U. S. 564, *Conrad Investment Co. v. United States*, 161 F. 829, as well as for reclamation, *Brown v. United States*, 263 U. S. 78 Cf. *United States v. Rio Grande Dam and Irrigation Co.*, 174 U. S. 690, 703; *United States v. Alford*, 274 U. S. 264; *Swigart v. Baker*, 229 U. S. 187. And in the face of the 1903 withdrawal of Bartlett site in aid of the Salt River Project the appellant could acquire no easement on the site by virtue of any Arizona statute. *Verde Water and Power Co. v. Salt River Valley Water Users' Association*, (1921, 22 Ariz. 305, 197 Pac. 227, cert. den. 257 U. S. 643.

This is not a water adjudication suit, and no question arises here as to the source of the Government's right to appropriate waters. Its prior right to do so for the benefit of the Indians is conceded by the appellant's own contract with the United States to which the rights of way were subject (R. 38). The complaint does not ask an adjudication of priorities as between the District and the Association.

(4) The fourth statute cited as a basis for jurisdiction is section 4 (b) of the Act of December 5, 1924 (43 Stat. 702, 43 U. S. C. A., sec. 413), which provides that no "new project" or "new division of a project" shall be approved for construction by

the Secretary "until he shall have made a finding in writing that it is feasible, that it is adaptable for actual settlement and farm homes, and that it will probably return the cost thereof to the United States." Bartlett Dam is not a "new project." It is built on lands withdrawn by the United States for this very purpose under Section 3 of the Reclamation Act, in aid of the Salt River Project, on July 27, 1903, and December 14, 1904. No right upon these lands could have been acquired after the withdrawal without license of the United States. See *Verde Water and Power Co. v. Salt River Valley Water Users' Association*, 197 Pac. 227 (1921). The contract under which Bartlett Dam is being built (R. 45) specifically recites that the Dam is being constructed "as a supplemental water supply of the Association for use on land under canals of the Salt River Project now constructed." There is no new project or division of a project involved; the contract (R. 47) as well as the congressional appropriaitons cover work on five Salt River Project dams, including Bartlett and four older ones, without distinction between them. Furthermore, the appellant's argument has two edges; there is no allegation that its own project was ever found feasible by the Secretary, although it is admitted that the appellant's project would be a new project in its entirety, comprising 85,000 acres of land which is now arid (R. 6). However, if this statute were applicable in the instant case the Departmental recommendation of Bartlett Dam which was made to the President would be adequate (R. 116). Congress appears to have regarded it so, in making appropriations thereafter to carry on the work so initi-

ated. The Secretary's authority to spend the money thus appropriated cannot be successfully attacked by the appellant, *Massachusetts v. Mellon*, 262 U. S. 447, regardless of how the project was initiated. Cf. *Wisconsin v. Duluth*, supra.

(5) The fifth statute cited as a basis for jurisdiction is section 4 of the Act of June 25, 1910 (36 Stat. 836, 43 U. S. C. A., sec. 413). This statute provides that "no irrigation project shall be begun unless and until the same shall have been recommended by the Secretary of the Interior and approved by the direct order of the President of the United States." Construction of Bartlett Dam was recommended by the Secretary of the Interior (R. 116) and approved by signature of the President (R. 115). It will be noted again that the statute relied upon deals with the Secretary, not the Association.

(6) The sixth statute cited is section 16 of the Act of August 13, 1919 (38 Stat. 690, 43 U. S. C. A., sec 414). This statute provides that expenditures shall not be made for carrying out the purposes of the reclamation law except out of appropriations made annually by Congress therefor. Congress has made three appropriations for the construction of Bartlett Dam; see the Act of June 22, 1936 (49 Stat. 1757) and the two items in the Act of....., 1937 (Public No.....). For details see the statement of the Commissioner of Reclamation in hearings before the Subcommittee of the House Committee on Appropriations, Interior Department bill, 1938, pp. 223-225.

(7) It is argued (Brief, p. 14) that Bartlett Dam has not been approved by the Chief of Engineers. No statute is cited. Apparently this suggestion is derived from the provision in Section 9 of the Act of March 3, 1891 (U. S. C. A., Title 43, section 946), prohibiting the construction of dams, etc., in any navigable waters of the United States until the consent of Congress shall have been obtained, and until the plan shall have been submitted to and approved by the Chief of Engineers, and by the Secretary of War. As the Verde River is not navigable, this statute has no application. The appellant has cited no other which in any way involves the Chief of Engineers. The Emergency Relief Appropriation Act of 1935 contains no such provision. To the contrary, it explicitly provides that rivers and harbors projects and reclamation projects "shall be carried out under the direction of the respective permanent Government departments or agencies now having jurisdiction of similar projects" (Brief, p. 66).

V. THE COURT BELOW PROPERLY DECLINED TO RETAIN JURISDICTION SOLELY ON DIVERSITY OF CITIZENSHIP.

The assignment of error upon this point (R. 97) reads in full text:

> "2. The court erred in its ruling and order made on January 27, 1937, directing dismissal of plaintiff's amended bill of complaint, upon the grounds: . . . .
>
> "(e) That it appears upon the face of the amended bill of complaint that the court is

> without jurisdiction, for the reason that the suit is not one arising wholly between citizens of different states."

The requisite diversity of citizenship was lacking to permit an action by the District against the Association, and the addition of a nominal defendant, Secretary Ickes, over whom the court could not acquire jurisdiction, did not eliminate that defect.

The plaintiff and the defendant are both Arizona corporations (R. 5). It is axiomatic that "where one or more of the complainants, and one or more of the respondents are citizens of the same state, this is fatal to the jurisdiction of the United States Court on the ground of diversity of citizenship" (to borrow the language of the annotation to the United States Code, Title 28, Section 41 (1), page 292). See *Shainwald v. Lewis*, 108 U. S. 158, and the long list of cases cited in the annotation to the Code. The diversity must be complete, and is not so here. To remain in court, the appellant was required to show a cause of action arising under the Constitution or laws of the United States, and capable of being maintained against the Association alone, without regard to the co-defendant, who could not be subjected to the jurisdiction of the court. The appellant's brief admits "that the controversy is not a severable one" (brief, p. 3) and hence by implication that no cause of action could have been asserted against the Association alone, whether arising under the Constitution and law of the United States, or otherwise.

VI. MISCELLANEOUS MATTERS IN THE APPELLANT'S BRIEF

The following are the remaining assignments of error (R. 97). These deal with the adequacy of the complaint, and not with jurisdiction.

> "2. The court erred in its ruling and order made on January 27, 1937, directing dismissal of plaintiff's amended bill of complaint, upon the grounds:
>
> > "(a) That the said amended bill of complaint does not state any matter of equity entitling plaintiff to the relief prayed for, nor facts sufficient to entitle the plaintiff to any relief against the defendants, or either of them.
> >
> > "(b) That the said amended bill of complaint does not state any matter of equity entitling the plaintiff to the relief prayed for, nor to any relief against the defendant, Salt River Valley Water Users' Association."

These assignments have been fully covered above in the argument upon the relative interest of the appellant and of the United States in Bartlett damsite. The argument will not be repeated here, except in answering miscellaneous points which were not properly germane to the jurisdictional questions.

(1) The argument (Brief, p. 12) that the Bureau of Reclamation "falsely reported" that the appellant's project was infeasible scarcely requires

answer. The Federal Emergency Administrator of Public Works is not a party to this action. His determination that the appellant's project was infeasible was a finding of fact. (The reports appear in the decision of the Commissioner of the General Land Office, October, 1935). This court will not assume that he acted under improper influence.

(2) The appellant persistently refers to the contract, annexed as Exhibit C to the bill of complaint (R. 44), as though that contract bore the date of June 3, 1935. Thus it argues that the Government obligated itself to build Bartlett Dam by contract with the Association before the appellant's rights of way had expired (Brief, p. 13). The actual date of that contract was November 27, 1935. It was made after expiration and cancellation of the appellant's rights-of-way, as will be seen in paragraph 5 of the contract (R. 46). The date of June 3, 1935, applies to another contract, not in the record, which did not obligate the United States to build Bartlett Dam, but stipulated that when and if it should be built, the Indians were to receive 20 per cent of the water developed thereby.

The error as to dates colors the whole argument. Thus (Brief, p. 22), it is argued that "the contract of June 3, 1935, is tantamount to a grant to the Association of easements and rights upon and over existing titles, the validity of which had not even been challenged on that date."

(3) At page 12 the appellant argues that the Secretary of the Interior was estopped from asserting the five year limitation on appellant's easements be-

cause "the Reconstruction Finance Corporation and the Federal Emergency Administration of Public Works, as agents of the grantor of appellant's easements and rights of way" had accepted and considered the appellant's application for financing and "these agencies futilely consumed more than two years." In other words, the Secretary is charged with the acts of these other governmental officers solely because they are all agencies of the Government, yet he is sued alone on the theory that the United States has no interest in this suit.

CONCLUSION

This is a suit seeking to quiet title to a claimed right-of-way over part of the public domain now being used by the United States for the construction of works for a Federal purpose under congressional appropriations. The action does not join the United States as defendant, and is not brought in a court which has personal jurisdiction over the Secretary of the Interior.

If the case is maintainable against the Secretary without the Government, it is only made so, first, by disregarding the Government's interest in the land involved, abandoning the prayer to quiet title to the easements, and treating this as a simple injunction proceeding; and, second, by assuming that a suit to enjoin construction work under a lawful appropriation is not a suit against the United States. If those assumptions are made, then the appellant is nevertheless out of court for the reasons, first, that its motion under Section 57 of the Judicial Code is entertainable only in a quiet title proceeding, and

is not available in an injunction action; and, second, that an injunction action against the Secretary can be maintained only in the District of Columbia.

If either or both the United States and the Secretary are indispensable parties, the case should not proceed against the Association alone.

Again, the assumption which is essential to bring this case even to the threshold of jurisdiction, namely, that this is a suit to protect a present interest in real property, is controverted by the complaint itself and by the records of the Interior Department to which it refers. Bartlett damsite is not, and never was, the appellant's property.

The decree should be affirmed.

Respectfully,

GREIG SCOTT
EDWIN D. GREEN
NORTHCUTT ELY

Attorneys for Salt River Valley Water Users' Association.

APPENDIX

DEPARTMENTAL DECISIONS

A. Decision of the Secretary of the Interior, February 20, 1926, rejecting application for right-of-way on Bartlett site.

B. Decision of the Commissioner of the General Land Office, October 14, 1935, holding all rights of way for cancellation.

C. Decision of the Secretary of the Interior, March 23, 1936, affirming cancellation of rights of way.

D. Decision, Secretary of the Interior, March 29, 1937, on rehearing (As this is quoted in full text under heading III of this brief, it is not repeated here)

(Appendix A: Decision of February 25, 1926)

DEPARTMENT OF THE INTERIOR
WASHINGTON
February 25, 1926.

Verde River Irrigation and Power District
"F"

Phoenix 054822-054936.
Denied and rejected.

The Verde River Irrigation and Power District has filed three applications (Phoenix serials 054822 and 054936 and 054937) for revised and amended locations for the Camp Verde reservoir site, for the Bartlett reservoir site, and for a right of way for an amended and revised location of the main canal of its project, as shown upon a map approved December 1, 1920, pursuant to a contract with the applicant, dated May 21, 1920. These applications purported to be made under the act of March 3, 1891 (26 Stat. 1095) and section 2 of the act of May 11, 1898 (30 Stat. 404), and when filed were regarded as in furtherance of a contract entered into on May 21, 1920, between the Secretary of the Interior and the predecessor of this applicant, which contract was made in pursuance of section 2 of the act of February 21, 1911 (36 Stat. 925). The reservoir sites therein sought, as are the sites covered by these applications, were withdrawn pursuant to the Reclamation Act of June 17, 1902 (32 Stat. 388). This contract expressly reserved to the United States, acting through the Secretary of the Interior, the supervision and control of all construction and

irrigation works of this applicant and its predecessor.

By decision of May 19, 1923, these applications were suspended pending showings by the applicant, entitling it to continued benefits under the contract of May 21, 1920. In that decision it was stated:

> "If such evidence is furnished, these applications, in the absence of other objections, will be taken up and considered under the law, and on their merits, otherwise they will be forthwith rejected."

The applicant has wholly failed to make showings warranting further waivers by the United States of its failures to comply with the terms of its contract, and by decisions dated January 16, 1926, and February 13, 1926, all rights under the contract of May 21, 1920, and incidental thereto, were declared to be at an end, as provided in said contract. The reasons therefor were fully stated in those decisions and will not be here repeated.

The present claim of the applicant is that the contract of May 21, 1920, was void, and it asserts in an action in the courts a right to proceed with its project, free from all supervision and control by the United States.

These applications relate to lands now withdrawn for reclamation purposes, and are so located that their utilization in connection with any irrigation project not carried out in cooperation with the Unit-

ed States as provided by the act of September 21, 1911, *supra*, and subject to supervision by its officers, will menace the welfare of the Salt River project, heretofore constructed and using the waters of the Verde River, and will imperil the security which the United States has for several millions of dollars of public moneys invested in the Salt River project.

The policy of the Department in cases of this kind is well settled (See D. C. MacWattersm 41 L. D. 425), and it must decline to approve these applications, because of the need for these withdrawn lands for future irrigation in harmony with its previous reclamation work under the Salt River project, and in protection of the interests of the United States.

It becomes unnecessary for these reasons to decide whether the applications are in conformity with the law or the regulations, or to consider the qualifications of this applicant.

These applications are accordingly rejected.

(Signed) HUBERT WORK
Secretary

(Appendix B: Decision of October 15, 1935)

UNITED STATES
DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
Washington

Phoenix 036887-045945-045946
049031-054936 "F" ECD

October 15, 1935.

Salt River Valley Water Users' Association,
c/o Hurley and Ely, Lawyers,
Shoreham Building,
Washington, D. C.

Gentlemen:

Reference is had to Departmental letter of July 25, 1935, to you, concerning certain reservoir sites and canal rights of way in Arizona granted the Verde River Irrigation and Power District.

In accordance with the statement in the letter that you would be advised as to any action taken on the district's pending application for the sites and rights of way, you will find enclosed herewith a copy of office decision of October 14, 1935, holding for rejection the district's application.

Very respectfully,

(Signed) FRED W. JOHNSON,
Commissioner.

10-14-eim

COPY
UNITED STATES
DEPARTMENT OF THE INTERIOR
GENERAL LAND OFFICE
Washington

October 14, 1935.

Phoenix 036887-045945-045946
049031-054936 "F" ECD
Application for reapprovals
held for rejection.

Register,

Phoenix, Arizona.

Sir:

On December 1, 1920, and pursuant to the act of March 3, 1891 (26 Stat 1095), as amended, the Department approved the following maps either filed by the Paradise-Verde Water Users Association or the Paradise-Verde Irrigation District, both of which were subsequently succeeded by the Verde River Irrigation and Power District:

Phoenix C36887: Map showing the Horseshoe Reservoir Site.

Phoenix 045945: Map showing the New River Reservoir Site.

Phoenix 045946: Map showing the Skunk Creek Reservoir Site.

Phoenix 049031: Two maps, one consisting of six sheets, showing respectively the Lower Cave Creek Reservoir Site, and other sites and canal rights of way.

The approvals were made expressly subject to contracts entered into May 21 and May 25, 1920, between the Paradise-Verde Irrigation District and the United States. Section 12 of the contract of May 21, 1920, provided that within three years from date thereof the district should show, to the satisfaction of the Secretary, that it had made arrangements for the funds necessary to construct and further provided that construction should be commenced within that period and prosecuted diligently so that the storage dams contemplated should be completed within six years from the date of the contract. Several extensions of the time within which to finance and start construction were granted but, on January 20, 1925, the Secretary denied a petition of the Verde River Irrigation and Power District for a further extension. Thereafter, another petition was filed by the district and eventually the period was extended until December 4, 1925. By decision of January 16, 1926, however, the Secretary stated in part that:

> "Individual landowners have complained of the assessments being levied on their lands to pay the expense of the district and the salaries of its officers.
>
> "Over $300,000 has been raised by the district through assessments on the landowners for this purpose. No moneys have been ex-

> pended for construction work. After more than five years the district has been unable to finance or begin construction or to file satisfactory evidence that it can finance or construct."

and held that:

> "In view of the foregoing, further delays or extensions are not warranted, and that the action of January 20, 1925, is hereby adhered to and made effective as of this date. The Commissioner of the General Land Office will take the necessary steps to carry this decision into effect."

February 13, 1926 (Phoenix 050246), the Department cancelled and set aside all the conditional rights of way granted. Thereafter, the district brought suit to enjoin the Secretary from putting into effect the decision of February 13, 1926. The dismissal of this suit was upheld by the Court of Appeals of the District of Columbia (24 Fed. 2d Series 886; certiorari denied 279 U. S. 854). Another contract between the United States and the district was then entered into on June 30, 1930, and, on the same date, the above listed maps were reapproved by the Department under the said act of March 3, 1891, as amended, the approvals being made expressly subject to the new contract.

On September 5, 1930, and under the said act of March 3, 1891, as amended, the Department approved a map, serial 054936, of amended location of the Camp Verde reservoir site, this approval like-

wise being made expressly subject to the contract of June 30, 1930.

Article VI of the contract of June 30, 1930, reads as follows:

> "It is mutually understood and agreed between the parties that the failure on the part of the District for any reason whatsoever to comply with the terms hereof, shall, ipso facto, render the rights-of-way granted to the District in order for the District to carry out and construct its works and thereafter maintain and operate its project, null and void. The rights-of-way in question shall be obtained through the regular procedure and in compliance with the laws and regulations and shall be granted subject to this provision."

The five year period allowed by the said act of March 3, 1891, for construction, having now expired without construction of the project, the Verde River Irrigation and Power District has filed a showing and application for either reapproval of the maps by the Secretary or for an extension of time within which to finance and construct the project.

It will be observed that the above quoted Article VI provides that the rights of way for the project be obtained through the regular procedure and "in compliance with the laws and regulations" and be granted subject "to this provision." The article therefore contemplates that the terms of the contract, which mainly provide for the carriage and delivery of water to lands in the Salt River Indian

Reservation, shall be fulfilled by the construction of the project and delivery of the water within the five year period allowed by the said act of March 3, 1891, for construction, failing in which the grants of the sites and rights of way become "null and void." It is admitted by the district that the project has not been constructed. It follows therefore that the grants evidenced by the Secretary's conditional approvals of June 30 and September 5, 1930, in accordance with the said Article VI of the contract to which the approvals were made subject, have become null and void through failure to construct within the statutory period of five years prescribed by the said act of March 3, 1891.

Accordingly, the district's present application and showing are considered an application under the said act of March 3, 1891, for new grants of the same sites and rights of way and, since there would be no objection to the use of the old maps in connection therewith, the application now filed will be considered as an application for reapproval of the old maps.

On August 23, 1935, the Bureau of Reclamation reported with respect to the application for reapproval and showing that:

> "The project for which these rights of way are required was carefully studied by this Bureau and the conclusion reached that it was infeasible on account of the high cost of development. In view of this unfavorable report, it seems very doubtful if private finances can be obtained for the construction of the project.

"Meanwhile, the Salt River Valley Water Users' Association has made application for federal funds to construct the Bartlett dam on the Verde River to augment the supply of water for the Salt River Reclamation project. An allocation has been made to this Bureau for this dam and it is anticipated that construction will start at an early date.

"While the site of the Bartlett dam is not actually on the area covered by this application, its construction would require extensive changes in the plans for the development proposed by the District and a contest over water rights might force abandonment of the Bartlett dam project.

"In view of the decision that the project proposed by Verde District is not feasible and that the storage to be created by the construction of the Bartlett dam is urgently needed by the Salt River federal project, I recommend that the application be denied and that no rights of way for this project be granted."

On September 7, 1935, the Indian Office reported that:

"It is understood the application of the Salt River Valley Water Users' Association, dated October 3, 1934, to the Public Works Administration for funds to construct a dam on the Verde River at the Bartlett Site has been approved and that funds have been allotted to the Bureau of Reclamation to begin construction.

The contract between the Secretary of the Interior and the Salt River Valley Water Users' Association approved June 21, 1935, provides for participation by the Indian Service in the cost of constructing this dam. This agreement supplants the agreement of June 30, 1930, with the Verde River Irrigation and Power District.

"This dam, which will create a reservoir of approximately 200,000 acre feet capacity, will be used to regulate the flow of the Verde River and will make available for use by the Salt River Valley Water Users' Association and the Indians of the Salt River Reservation over fifty per cent of the entire flow of this stream. In view of this project, which makes any possible construction of storage on the Verde River by the Verde River Irrigation and Power District entirely infeasible, it is recommended that the application be denied and that the original grants of rights of way be cancelled."

On October 2, 1935, the Geological Survey reported that:

"The approvals of these rights of way have been the subjects of various contracts between the United States and the applicant companies, but even with lenient extensions of time for construction, the project is practically no nearer consummation than when originally planned many years ago.

"The last contract was entered into on June 30, 1930, and on the same date, the above listed

maps were reapproved by the Department with the distinct understanding that failure on the part of the District for any reason whatsoever to carry out and construct the project would render the right of way granted, null and void.

"The five-year period allowed for construction expired June 30, 1935, and consequently the contract no longer holds, and the present applications and showing for rights of way are considered as requests for new grants under the act of March 3, 1891.

"The proposed source of water supply is the flood flow of Verde River and in view of the great use and demand for water for lands already under irrigation or readily irrigable in Salt River Valley especially during years of subnormal run-off, claims for this flow have been initiated by these users and the right to this flood run-off therefore has been a point of controversy for years. The feasibility of the development of the projects as proposed by the District has always been considered questionable in the Survey and it appears more so now since the contract which offered protection to their rights has lapsed, and because of a contract dated June 3, 1935, between the Secretary of the Interior and the Salt River Valley Water Users' Association to develop the Bartlett reservoir site to a capacity of about 200,000 acre-feet for irrigation of lands within the Salt River Indian Reservation and as a supplemental supply for its own lands, thus further depleting the available water supply of the pro-

posed source which at its best is erratic. During 1933 and 1934 the annual run-off of the Verde River above Camp Creek was only 220,000 and 164,000 acre-feet respectively and although they were abnormally dry years the average annual run-off for the past ten years is only 420,000 acre-feet. Under the foregoing circumstances, it is recommended that the applications be not approved."

As appears from the foregoing, the project contemplated under the grants has been pronounced economically infeasible by reason of the excessive cost of construction per irrigable acre—a conclusion arrived at by the Bureau of Reclamation after a thorough study of the project in connection with the District's application for the allocation of Federal funds and which led to the rescinding of the allocation. Since the original approvals in 1920, the district has had approximately fifteen years within which to finance and construct the project but has made little progress toward that end. The contract of June 30, 1930, has been superseded by the contract referred to in the above quoted Indian office report providing for the construction of a reservoir on the Bartlett site through funds allocated by the Public Works Administration to the Bureau of Reclamation, the water to be stored in the reservoir to be used in part by the Indians of the Salt River Valley Reservation. This site is on the Verde River below the Camp Verde and Horseshoe Reservoir sites so the construction of the two latter reservoirs by the district, assuming that it were able to finance and construct them, might seriously interfere with the

use of the reservoir to be constructed on the Bartlett site, in which reservoir the Government will be particularly interested by reason of the allocation of Federal funds and by reason of its duty to see that the Indians of the Salt River Valley Reservation are supplied with water; particularly is this true should there arise any controversy over the appropriation of the water from the Verde River and its release from storage.

In view of the foregoing, no reason is seen for considering the contract of July 14, 1935, a copy of which has been filed by the district in connection with its application for reapprovals, although it is noted in passing that the Skunk Creek Reservoir is not mentioned in Article I of the contract.

Accordingly, the district's application for new grants of the sites shown on the maps conditionally approved on June 30 and September 5, 1930, is hereby held for rejection subject to the usual right of appeal to the Secretary within 30 days from notice hereof, failing in which the application will be finally rejected and the grants of June 30 and September 5, 1930, formally noted on the records as null and void for failure to comply with the conditions to which the approvals were made subject. Serve notice and in due time make report.

Very respectfully,

(Signed) FRED W. JOHNSON
Commissioner.

10-9-eim

(Appendix C: Decision of March 23, 1936)

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
Washington
A. 19912

March 23, 1936

Verde River Irrigation and Power District "F" Phoenix 036887, 045945, 045946, 049031, 054936. Application for reapprovals held for rejection. Affirmed.

APPEAL FROM THE GENERAL LAND OFFICE

On October 14, 1935, the Commissioner of the Land Office held for rejection the application of the Verde River Irrigation and Power District of Phoenix, Arizona, for reapproval of the district's right of way applications numbered as follows:

Phoenix 036887: Map showing the Horseshoe Reservoir Site.

Phoenix 045945: Map showing the New River Reservoir Site, (104).

Phoenix 045946: Map showing the Skunk Creek Reservoir Site.

Phoenix 049031: Two maps, one consisting of six sheets, showing respectively the Lower Cave Creek Reservoir Site, other sites and canal rights of way.

From the decision the district on December 21, 1935, filed in the local land office of Phoenix, Arizona, its notice of appeal to the Secretary of the Interior and at the same time submitted specifications of error and brief.

The records of the Department indicate that on December 1, 1920, pursuant to the act of March 3, 1891 (26 Stat. 1095), as amended, the Department approved the right of way maps either filed by the Paradise-Verde Water Users' Association or the Paradise-Verde Irrigation District, both of which were succeeded by the Verde River Irrigation and Power District.

Since the beginning of the development of plans for the irrigation of land within the limits of the irrigation district, two series of applications for right of way have been acted on by the department.

The first series were those of 1920 which were cancelled by the Department February 13, 1926, (Phoenix 050216). One of the principal reasons for cancellation was the failure of the district to obtain funds and construct the irrigation works for the delivery of water to the lands in the district and to lands on the Salt River Valley Indian Reservation. Notwithstanding the failures and inability to raise funds for construction, the district again applied for right of way under the act of March 3, 1891 (105) (26 Stat. 1095), and a second contract was made with the district on June 30, 1930, and on the same date the above listed maps were reapproved conditionally. The approval was made expressly subject to the conditions of the collateral contract. On Sep-

tember 5, 1930, the Department approved the map, serial 054936, for Camp Verde site subject to the conditions of the contract of June 30, 1930.

Article VI of the contract provides:

> "It is mutually understood and agreed between the parties that the failure on the part of the District for any reason whatsoever to comply with the terms hereof, shall, ipso facto, render the rights of way granted to the District in order for the District to carry out and construct its works and thereafter maintain and operate its project, null and void. The rights of way in question shall be obtained through the regular procedure and compliance with the laws and regulations and shall be granted subject to this provision."

The five-year period allowed by the said act of March 3, 1891, for construction having expired without construction of the project, the Verde River Irrigation and Power District has filed a showing and application for either reapproval of the maps by the Secretary or for an extension of time within which to finance and construct the project.

The right of way grants were conditional upon the provisions of a collateral contract. If the district failed to carry out the provisions of the contract all of the proceedings which contemplated the possibility of a grant of rights of way to the district would be null and void. There has been a complete failure by the district to construct irrigation works. This is admitted in the brief filed by the district's

representatives. The conditional approvals made by the Secretary on June 30 and (106) September 5, 1930, in accordance with Article VI of the contract, to which the approvals were made subject, have become null and void through failure to construct the irrigation works within the statutory period of five years prescribed by the act of March 3, 1891.

The project contemplated under the grants has been pronounced economically infeasible by reason of excessive cost of construction per irrigable acre. This conclusion, arrived at by the Bureau of Reclamation, was the result of a thorough study of the project and report in connection with the allotment to the district of Federal funds to construct the project. As a result of the report and other factors the allocation of funds was cancelled. Subsequent to the cancellation of the allotment for construction the United States on November 26, 1935, made a contract with the Salt River Valley Water Users' Association for the construction of a dam and appurtenant works on the Verde River at the Bartlett site through funds allocated by the Public Works Administration to the Bureau of Reclamation. Eighty per cent of the cost of the reservoir is to be repaid by the association and twenty per cent of the cost will be contributed by the Office of Indian Affairs, with the understanding that sufficient water will be furnished from Bartlett Reservoir storage or otherwise for the efficient irrigation of 6310 acres of land allotted to Indians on the Salt River Indian Reservation.

The Bartlett Reservoir site is on the Verde River below the Camp Verde site and the Horseshoe site

so the construction of the two latter reservoirs, assuming that (107) the district were able to finance and construct them, might seriously interfere with the use of the reservoir to be constructed on the Bartlett site in which latter reservoir the Government will be particularly interested by reason of the allocation and use of Federal funds for the construction and by reason of its duty to see that the Indians of the Salt River Indian Reservation are supplied with water (39 Stat. 130); particularly is this true should there arise any controversy over the appropriation of the water of the Verde River and its release from storage.

In these circumstances the district's applications are rejected and the grants of June 30 and September 5, 1930, will be formally noted on the records as null and void for failure to comply with the conditions to which the approvals were made subject. Serve notice on the district and its attorneys.

The decision of the Commissioner of the General Land Office is affirmed.

(Signed) T. A. WALTERS,
First Assistant Secretary.

No. 8510

United States
Circuit Court of Appeals
For the Ninth Circuit

VERDE RIVER IRRIGATION AND POWER DISTRICT, an Irrigation District,

Appellant,

vs.

SALT RIVER VALLEY WATER USERS' ASSOCIATION, a corporation, and HAROLD L. ICKES, Secretary of the Interior,

Appellees.

Reply Brief of Appellant

Upon Appeal from the United States District Court for the District of Arizona.

[1938. See 94 Fed.2 936]

REPUBLIC AND GAZETTE PRINTERY, PHOENIX

INDEX

TOPICAL INDEX

TABLE OF CASES

No. 8510

United States
Circuit Court of Appeals
For the Ninth Circuit

VERDE RIVER IRRIGATION AND POWER DISTRICT, an Irrigation District,

Appellant,

vs.

SALT RIVER VALLEY WATER USERS' ASSOCIATION, a corporation, and HAROLD L. ICKES, Secretary of the Interior,

Appellee.

Reply Brief of Appellant

The Appellee's Motion to Dismiss admits every well pleaded allegation of fact. We assume the court will restrict itself to a consideration of the facts alleged in the bill of complaint unless and to the extent that such allegations may be conclusively contradicted by facts of which the court may properly take judicial notice. The Appellee's Exhibits 1 and 2 (R. 108-116) are before this court without exceptions saved to the action of the trial court in admitting them and we may not now object to such consideration as the court may feel should be given them here. As we understand the rule, judicial notice is a dispensation of one party to pending

litigation from producing evidence of a given fact and that a party to be thus favored should make a proper request by pleading, or motion for such dispensation. No such request was made by the Appellee in the court below other than for the introduction and allowance of Appellee's Exhibits 1 and 2 and we may therefore properly assume that no facts outside the pleadings other than these exhibits were considered by the trial court. Upon reading the Appellee's Reply Brief, it seems to us that it has anticipated its answer and defense upon the merits of the controversy and has set forth many allegations of fact which have no place in this record on appeal—allegations of facts which in some instances are disputable, explainable, irrelevant or immaterial.

At the outset of this reply brief, may we point out these allegations with the request that this court disregard them:

In the first complete paragraph on page 4 of Appellee's brief, it refers to decisions of the Commissioner of the General Land Office and of the Secretary of the Interior, which it has copied in full in an appendix to its brief. Of these decisions, neither decision lettered A nor D are in any manner referred to in the Appellant's complaint nor were they presented to or in any manner brought to the attention of the trial court. We are assuming therefore, that they are improperly presented to this court and will be disregarded.

The paragraph at the bottom of page 4 of Appellee's brief beginning with the words "The Salt River Project" embodies issuable defensive matter, some of which may be relevant as matter of defense, and other of which as we now see the issues

will be clearly irrelevant. The Verde Water & Power Company referred to in that paragraph is not the Appellant's predecessor as therein suggested. A consideration of the case there cited will disclose that the Appellant's predecessors were aligned with the Appellee Association as co-defendants in that cause.

On page 5 of Appellee's brief, and elsewhere in the argument, it has misstated the allegations of Appellant's complaint in the following sentence:

> "The complainant alleges that on April 17, 1920, the State Water Commissioner of Arizona, issued a permit to the Appellant to appropriate an amount of the surplus waters of the Verde River, et cetera."

The Appellant alleged in its complaint that the State Water Commissioner issued to it a permit to appropriate as of April 17, 1920, which is very different allegation than as recited by the Appellee. The facts are that the Appellant filed with the State Water Commissioner on the 17th day of April, 1920, an application for a permit to appropriate the waters of the Verde River with the reservations set out in Appellant's proposed second amended complaint, and discussed under assignment of error numbered 3 on pages 41, 42 of its brief. On the 9th day of February, 1934, the State Water Commissioner granted Appellant's permit to appropriate the waters of the Verde River as of the date of the filing of its application and upon the payment to the State Water Commissioner of $10,-920.40 as fees for the granting and recording of such permit.

The printed matter in Appellee's brief beginning with the words "In 1920 the Appellant submitted"

at the bottom of page 5, and ending with the next to the last paragraph on page 7, constitutes no part of the bill of complaint nor of the record on this appeal since the grant to Appellant of its easements and rights of way of June 30, 1930, is the issue in this cause and those grants were made under the provisions of the Act of March 3, 1891, while the old grants to which the above referred to matter relates were conditional contract grants for a three year period as limited and restricted in the contracts of May 21st and May 22nd, 1920.
(R. 24-35.)

On page 10 of Appellee's brief, we find the following statement:

> "The complaint refers repeatedly to the contract of June 3, 1935, but this contract does not appear in the record and is in fact confused throughout the complaint and the Appellant's brief with a subsequent contract made November 27, 1935, between the same parties and attached to the complaint in blank as to date and signatures at page 44 of the Record."

It is entirely apparent that the trial court understood and this court will understand that by the contract of June 3, 1935, the Appellant refers to Exhibit "C" of its complaint. That Exhibit as attached to the complaint is taken from the advertisement of the Appellee Association in submitting the contract to a vote of the shareholders of the Association and in that advertisement the date is shown in blank as set out in the Exhibit; however, we think there is no doubt but that the contract was drawn on June 3, 1935, as set forth in our complaint. The date November 27, 1935, evidently refers to the date of the approval of the contract by shareholders of the Association.

On October 2, 1935, as disclosed by the Commissioner's opinion of October 14, 1935, the Geological Survey mentions a contract between the Secretary of the Interior and the Salt River Valley Water Users' Association dated June 3, 1935, for the development of the Bartlett Reservoir to a capacity of 200,000 acre feet. (Appellee's Br. 65.)

In the report of the Indian Office to the Secretary of the Interior under date of September 7, 1935, reference is made to the contract as having been approved on June 21, 1935. The Indian Office further states that the agreement supplants the agreement of June 30, 1930, with the Appellant. (Appellee's Br. 64.)

On August 23, 1935, the Bureau of Reclamation reported to the Secretary of the Interior that "an allocation has been made to this Bureau for this dam and it is anticipated that construction will start at an early date" and that "a contest over water rights might force abandonment of the Bartlett dam project," meaning an abandonment by the Association.

From the foregoing it is entirely apparent to us that the Bureau of Reclamation, the Indian Office and the Geological Survey understood that a contract had been made between the Association and the Interior Department on June 3, 1935, for the construction of the Bartlett Reservoir and that this contract was approved by the respective parties on June 21, 1935. We feel that we will have little difficulty in establishing to the satisfaction of the trial court that the contract in question is the Appellant's Exhibit "C." Please note the Bureau of Reclamation's findings above quoted to the effect that a contest over water rights might force an

abandonment of the Bartlett Dam project in the event of the non-cancellation of the District's easements and rights of way. Please note also, the finding of the Indian Office as quoted by the Commissioner to the effect that the construction of the Bartlett Dam by the Association would render any possible construction or storage on the Verde River by the Appellant entirely infeasible.

That portion of Appellee's brief beginning with the words "It is being financed" on page 11 and ending with the first complete paragraph on page 13, should be disregarded by this court as matter entirely outside the record and in no manner referred to in Appellant's complaint.

At the bottom of page 13 of Appellee's brief is the following statement:

> "As the Appellant concedes that its complaint was dismissed on eight grounds, et cetera."

This is an unfair statement since the Appellant makes no such concession, but does state to this court in effect that since the lower court made a general order of dismissal of Appellant's complaint without specifying the grounds of such dismissal, it becomes necessary for the Appellant to assume for the purposes of its brief that the court dismissed the complaint on each of the eight grounds assigned. Could the Appellant have divined what was in the court's mind in ordering the dismissal, it might have very materially reduced its assignments of error and the length of its opening brief.

RULE 11

At the outset of its argument Appellee charges us with non-conformity to amended Rule 11 of this court, effective February 1, 1937. We had this rule

before us in the preparation of our assignment of errors and endeavored to fully comply with it. We think we have in all respects conformed to its provisions. Our assignments of error are fully set out on page 97 of the record.

Assignment numbered I relates to a question of procedure, namely, the applicability of the provisions of Section 57 of the Judicial Code for procuring the service of process upon the defendant Ickes. The affidavit in support of the motion for an order directing this defendant to appear and answer, demur, or otherwise plead, recites that the complaint is one in equity to remove a cloud from the titles to Appellant's property and for injunction and sets forth the non-residence of this defendant (R. 68). The verified bill of complaint discloses in detail the nature of the clouds upon the titles to Appellant's rights of way and water rights. The question was fully argued to the trial court. We are confident our assignment upon this question is as full and complete as the court would desire. To assign the error with more particularity would be to indulge in argument which is the province of our brief.

The bill of complaint was dismissed by general order, without specification of reasons therefor. Under assignment numbered 2, we have set forth with particularity eight distinct errors committed by the trial court in making this general order and have limited our discussion to the errors specified.

Assignment numbered 3 particularizes the error there assigned as one denying the right of Appellant to file a second amended complaint. This court understands that such assignment raises one simple question, namely, whether or not the trial court

abused the discretion vested in it in denying the Appellant this right.

Assignment numbered 4, of course, relates to the action of the court in rendering final judgment after denying Appellant the right to file a further amended complaint and upon Appellant's announcement in open court that it would stand upon its record as made.

REPLY TO APPELLEE'S ARGUMENT NUMBERED I.

(Brief 15, et seq.)

The Appellee makes a labored effort to support the court's action in sustaining the Appellee's motion to dismiss by seeking to restrict the consideration of this court to the Bartlett site. The complaint will not permit of any such narrow construction. We have clearly charged the defendants jointly with a willful and wrongful invasion of our property rights consisting of our easements and rights of way upon the Verde River for storage reservoirs and dams and of our rights of appropriation as granted and conferred upon us by the State of Arizona. May we repeat here that the action is a non-severable one in which the Association and the Secretary of the Interior are jointly charged with acts which could not be committed by either without the aid of the other and we, of course, to this extent agree with the Appellee's contentions that if the Secretary is not a proper party defendant, the action must fail as against the Association.

As to the Bartlett site, we say that it constitutes an indispensable part of the District's general plan of development; that it was located by one William H. Bartlett, an engineer of the District and bears

his name; that in the grant under the provisions of the Act of March 3, 1891, there was included easements and rights of way in the District for canals and power lines upon either side of the Verde River for a mile distant from its east and west banks; that prior to the making of the contract of June 3, 1935, Exhibit "C" to Appellant's amended complaint, and prior to the attempted cancellation of Appellant's easements and rights of way, the Appellant had filed with the Secretary of the Interior, an application for a dam and reservoir at the Bartlett Site, which application is still pending without action thereon, unless the unlawful intrusion complained of may be construed as a rejection of the application. The proof will disclose that the application above referred to was filed during the period of the promised grant of P.W.A. funds to the Appellant for the construction of its dams and reservoirs and as a step in aid of that construction. This is the extent to which we have gone in setting up our rights in the Bartlett site. We are not asking that our titles be unclouded as to the Bartlett site alone, but we have said in our complaint that the action of the Association and of the Secretary of the Interior in attempting this construction at the Bartlett site operates to cloud our easements and rights of way upon the Verde River generally and also operates as a cloud upon our rights to appropriate the water of the Verde River. A construction at any point upon the Verde River of the character being undertaken would have this effect. Both the Association and the Secretary know that the building of the proposed Bartlett Dam will have the practical effect of destroying or rendering useless the Appellant's Camp Verde and Horse Shoe storage reservoir sites and will so encroach upon and take from the Appellant the water the subject

of its lawful permit to appropriate, as to render its entire project infeasible. In fact these steps are being taken by the Association and the Secretary, if not for the purpose of destroying the District's development program, at least with the knowledge that what is being done will have that effect. The Secretary cancelled the Appellant's allocation of funds under date of October 2, 1934. On October 3, 1934, (Appellee's Br. 63) a date prior to the receipt by the Appellant of the Secretary's order of cancellation, the Appellee Association filed its application before the Public Works Administration for funds to construct a dam at the Bartlett site. Under date of June 3, 1935, (Appellee's Br. 65) a contract was drawn between the Secretary and the Association for the development of the dam in question. On June 21, 1935, this contract was approved (Appellee's Br. 64) and the statement is made in the Commissioner's opinion that the agreement supplants the agreement of June 30, 1930, with the Appellant. The allocation to the Appellee of funds for construction of the Bartlett Dam was made prior to the attempted cancellation of the Appellant's easements and rights. That the Secretary and the Commissioner of the General Land Office had knowledge of Appellant's water right appropriations and sought by their action to destroy these rights is evidenced by the Commissioner's adoption in his opinion of the findings of the Bureau of Reclamation in its statement that "a contest over water rights might force abandonment of the Bartlett dam project," meaning by this that should they not attempt their cancellation of the Appellant's easements and in this manner render it impossible for the District to proceed, the Association's rights to store the water in question, might be successfully contested by the Appellant. That the Secre-

tary fully realized that the effect of building the Bartlett Dam on behalf of the Association would be to destroy and render useless the Appellant's Camp Verde and Horse Shoe reservoir sites, is evidenced by the Commissioner's opinion (Appellee's Br. 64) in which the Commissioner in adopting the Indian Office's report, says:

> "In view of this project (referring to the Bartlett Dam) which makes any possible construction or storage on the Verde River by the Verde River Irrigation and Power District entirely infeasible, it is recommended that the application be denied and that the original grants of rights of way be cancelled."

From what we have said it must be apparent to this court that the Association, an Arizona corporation, two thousand miles distant from the seat of the national government, had information a number of days prior to October 2, 1934, of the action the Secretary would take on October 2, 1934, with respect to the allocation of funds to the Appellant, since the Appellee Association was at Washington on the very next day with a prepared application for funds with which to construct its dam upon the Bartlett site. The conclusion is inescapable of concerted action between the Association and the Secretary, as is the conclusion that the Secretary prior to October 2, 1934, had in mind the attempted cancellation of the Appellant's easements and rights of way. This is further evidenced by the fact that at a date prior to August 23, 1935, the Secretary had made an allocation to the Bureau of Reclamation for the Construction of the dam on behalf of the Association.

REPLY TO APPELLEE'S ARGUMENT NUMBERED II.

(Brief 22, et seq.)

The effect of Appellee's argument here is that upon the basic assumption that the court properly denied to Appellant the benefit of Section 57 of the Judicial Code, and that since for that reason Ickes had not, on the date of the order of dismissal, been subjected to the jurisdiction of the court, the court properly ordered dismissal of Appellant's amended complaint for the reason that it would be inequitable to proceed against the Association alone. The mere re-statement of Appellee's premise sufficiently exposes its fallacy. It amounts to saying that the denial of a particular method of process goes to the merits of the bill of complaint. Appellee's position here could only be sustained upon the assumptions: 1. That the court properly denied to Appellant process under Section 57 of the Judicial Code; and 2. That there is no other statutory or other means of subjecting Ickes to the jurisdiction of the court. We cannot accept either of these assumptions.

REPLY TO APPELLEE'S ARGUMENT NUMBERED III.

(Brief 26, et seq.)

The first phase of Appellee's argument here proceeds upon the assumption that the action is one against the United States which could not be maintained without its consent, and that the subject matter is federal property in which the plaintiff has no interest that will entitle it to maintain its action. Again the Appellee proceeds upon the assumption that the cause of action affects the Bart-

lett site alone. It also ignores the well established principle that the wrongful acts and conduct of a departmental head, does not affect the interests of the United States, but does give rise to an action against the official, as an individual, for the commission of such wrongful acts. This phase of the case has been fully covered by our opening brief and we will therefore restrict our comments here to an analysis of the case of the Verde River Irrigation & Power District v. Work, 24 F. (2d) 886 (Appellee's Br. 31), and of the Secretary's opinion under date of March 29, 1937, (Appellee's Br. 30-34), if the court should elect to consider that part of it.

The grant to the District which was considered in Verde River Irrigation & Power District v. Work, was a conditional contract grant and in no sense of the word a grant pursuant to the provisions of the Act of March 3, 1891. The contract there analyzed is Exhibit "A" to Appellant's amended complaint (R. 24-35). The amendment to the Reclamation Act, pursuant to which this conditional grant was made conferred upon the Secretary the right of cancellation for breach of its conditions. It was not a grant in praesenti which conferred upon the District a vested interest in the easements and rights of way therein referred to. We have an entirely different situation in the grants of June 30, 1930. The rights therein granted were independent of any contract restrictions and were in all respects controlled by the provisions of the Act of March 3, 1891. The contract which accompanied the grant related to one thing only. It obligated the District to recognize and respect the rights of the Indians of the Salt River Indian Reservation to the prior use of the water proposed to be devel-

oped upon and over the District's granted easements and rights of way for 8310 acres of Indian allotments and provided a consideration to be paid to the District for such service. The obligations of the Appellant under this contract would arise upon the completion of its storage dams. They could by no possible construction arise at an earlier date. The contract was in no manner whatsoever breached. Article VI of the contract provides that failure to comply with the terms of the contract shall render the rights of way granted to the District null and void. Since there has been no failure of compliance on the part of the District and since under the circumstances and terms of that contract there could not be any breach prior to the construction of the District's works, it confers upon neither the Commissioner of the General Land Office nor the Secretary any jurisdiction or authority whatsoever to attempt a cancellation of Appellant's easements and rights of way.

An opinion rendered by the Secretary of the Interior on March 29th of the present year, more than a year after the filing of Appellant's complaint, is quoted in full in Appellee's brief at pages 30 to 34, both inclusive. We maintain that this is an improper insertion and that we should not be called upon to give any consideration to it. However, assuming that the court may think otherwise, may we call to the court's attention that this opinion admits that ordinarily the Commissioner and Secretary would be without authority to attempt a cancellation of the District's easements and rights. The Secretary however attempts to rely upon the case of Verde River Irrigation & Power District v. Work, Supra, as an authority for his conduct and assumes in further support of his action a breach of

the contract of June 30, 1930, (R. 36-43). To further excuse and justify his acts he construes the words "ipso facto" in paragraph numbered VI as conferring upon him the jurisdiction and right to find the fact of a breach and take the arbitrary course of which Appellant complains.

The second phase of Appellee's argument has to do with Appellant's water rights. This subject has been fully covered in our opening brief at pages 47 to 55, both inclusive. We desire, however, to call to the court's attention the fact that the Appellee here limits itself to an analysis and discussion of a false premise, namely, that the Appellant's permit was issued April 17, 1920. Let us repeat again, the date is February 9, 1934. Let us also call the court's attention to the fact that the Appellee has no right or pretense of right whatsoever to appropriate any of the waters of the Verde River by means of its proposed Bartlett Dam. Its application for funds with which to construct this dam, filed October 3, 1934, involves the storage and appropriation of the waters of the Verde River to the extent of rendering any further development of the waters of that stream by the Appellant entirely infeasible. The Appellee's application was not accompanied by any proof that the Association's plans and purposes had been submitted to or approved in accordance with the laws of Arizona covering the storage and use of the appropriable waters of the state, nor was any evidence whatsoever submitted of the Association's title or right to appropriate these waters. In giving favorable consideration to Appellee's application under these conditions and in making the contract of June 3, 1935, and in allocating funds to the Reclamation Department for the use of the Appellee, the Secre-

tary committed direct and willful violations of the Acts of Congress and of regulations of his own department which have been in force and effect for thirty years. The only course the Secretary could legally and properly have taken with respect to the Association's application, would have been to have followed the precedent of his office in the case of United States v. Ickes, 84 F. (2d) 228, by saying to the Association: "Submit with your application proof that your plans and purposes have been regularly submitted to and approved by the appropriate officers of the State of Arizona in accordance with the laws of Arizona relative to the construction of dams and the storage of the appropriable waters of the state and with this submit a copy of your title or right to appropriate the waters of the Verde River certified as required by your state laws."

Had this course been taken, the Association would have been confronted with record facts of which courts may take judicial notice, upon proper request: that the Secretary of the Interior had already found in contested hearings before that Department that the right to appropriate these waters was vested in the Appellant District; that at a hearing before a congressional committee, the Association expressly admitted this fact and through its counsel angrily disavowed any intent or purpose of attempting to take any of the waters of the Verde River other than such as had theretofore been diverted and appropriated without the aid of storage facilities; that the Association has heretofore sold, conveyed and delivered to the Appellant District for a valuable consideration amounting to several thousand dollars such engineering data and core drillings as it had there-

tofore taken on the Verde River, with a view to possible future developments of the waters of that stream, thereby showing a direct abandonment of any theretofore asserted rights; that at each of the engineering committee hearings referred to in Appellant's complaint, a board of engineers designated by the Secretary himself, had expressly found these waters were lawfully appropriated by the Appellant District and that the Association had no rights whatsoever to appropriate. Such a hearing would, of course, disclose that the Appellant District has fully complied with all of the laws of the State of Arizona relative to the appropriation of the waters of the Verde River and is in all respects the lawful holder of a right to appropriate.

In the third phase of Appellee's argument, it discusses the character of the relief sought (Appellee's Br. 37). Here, Appellee attempts to hide behind the alleged duty of the Secretary to furnish water to the Indians of the Salt River Indian Reservation as an excuse for its and his invasion of Appellant's rights. At any hearing of the case interesting information would be developed as to the duty of the Association to furnish such water. This matter was fully discussed in a hearing had before Secretary Payne and his subordinates and the record is available both to the defendant Ickes and to the courts. A better statement of the motives and purposes actuating the invasion of the Appellant's rights is found in the statement of the Geological Survey as quoted with approval by the Commissioner of the General Land Office in the following quotation from page 65 of the Appellee's brief.

> "The proposed source of water supply is the flood flow of Verde River and in view of the

> great use and demand for water for lands already under irrigation *or readily irrigable in the Salt River Valley,* especially during years of sub-normal runoff, claims for this flow have been initiated by these users and the right to this flood runoff therefore has been a point of controversy for years." (Italics are ours.)

It can be readily shown that the Association has an ample supply of water for lands already under irrigation. It can also be readily shown that no claims for the flood flow of the Verde River have been initiated by it other than for such flows to the capacity of the Association's canals and these rights are not contested by the Appellant. We think it entirely true that the purposes of the Association in attempting to build the Bartlett Dam is the furnishing of water for lands "readily irrigable" in the Salt River Valley and for the control of hydro-electric power within the state.

REPLY TO APPELLEE'S ARGUMENT NUMBERED IV

(Brief 39, et seq.)

Substitute the word "or" for "and" in the second line of Appellee's premise and we are in entire agreement with the statement. But the truth is the Secretary is a party. He is charged with illegal conduct and the willful invasion of the property rights of Appellant. He will be served with process. The Appellee in support of this premise is engaged in shadow boxing.

In sub-paragraph numbered I of its argument (Brief 40), it evades the issues by seeking to restrict the court's consideration to the Bartlett site.

In sub-paragraph numbered 2 (Brief 40), it in effect admits that the initial allocation to the Bureau of Reclamation for the use of the Association as set forth in Appellant's Exhibit "C" was without congressional approval and seeks to support the action of the Secretary by statements that the congress has on two occasions since the filing of Appellant's complaint appropriated funds for the Bartlett project. The statement amounts to an admission that the initial allocation is an illegal one, unless that allocation has been cured by the congressional appropriations referred to. In seeking to show that the later congressional appropriations amount to a ratification and approval of the initial allocation, the Appellee quotes from U. S. v. Arizona, (Br. 41). The quotation, however, is incomplete and misleading without reference to the context of the opinion. To give the court a better understanding of that phase of the opinion, we quote more fully:

> "But it does not appear that either riparian state objected or that the validity of his authority has ever been drawn in question. Congress has made appropriations for the benefit of the project of which it is a part, and so recognized and approved the building of the dam."

It will be observed that the court does nothing more than approve and apply the familiar doctrine of estoppel by laches.

In sub-paragraph 3 of the argument (Brief 43) Appellee attempts to excuse the Secretary's noncompliance with Section 8 of the Reclamation Act under the authority of Arizona v. California, 283 U. S. 423, 451. On page 44 it refutes its own

argument and shows the inapplicability of that opinion with the following truthful statement:

> "Federal authority was found in the power to improve navigation, in that case."

We are here concerned with the appropriation of the waters of a non-navigable intra-state stream upon which the United States has as much and no more authority than has a private individual.

In sub-paragraph numbered 4 of the argument (Brief 44) Appellee seeks to justify the Secretary's evasion of the provisions of Section 4 (b) of the Act of December 5, 1924, by the assertion that Bartlett Dam is neither a new project nor a new division of an old project. The Salt River Project is one of the oldest reclamation projects in the United States. The Verde development is the first development undertaken by the Association on that stream, except for some core drillings and engineering data compiled a number of years ago and sold to the Appellant. It is true that a strip of land one mile in width on either side of the Verde River was withdrawn under the first form of reclamation withdrawal for future reclamation development, but not necessarily in connection with the Salt River project, or any other specific project. It is equally true that the Secretary granted to the Appellant easements and rights of way upon and over this withdrawal area and specifically denied Appellee Association easements and rights for which it was a rival applicant. The proposed development is clearly a new division of an old project designed to furnish an additional water supply for lands already irrigated under the Salt River project and for other lands "readily irrigable in Salt River Valley."

We find that space forbids an analysis of and comment upon the cases cited in Appellee's brief. We have examined them all and are frankly of the opinion that none of them is in point. We trust the court will pardon us for a brief analysis of two of the cases seriously stressed and relied upon by Appellee:

Appalachian Electric Co. v. Smith, et al, 62 F. (2d) 451 (C.C.A. Second) is in form of the complaint and relief sought strikingly similar to Appellant's bill of complaint. However upon examining the questions raised it will be found to be not at all in point. The suit is one filed against the Federal Power Commissioners as individuals. It involved the question of the effect of the proposed dam upon interstate and foreign commerce. The Kanawa River of which the New River is a tributary was found to be a navigable stream and that the proposed structure would affect interstate and foreign commerce upon that stream. The court further found that the Commissioners were exercising discretionary powers vested in them by a valid act of congress and that they were therefore performing governmental functions. We quote two statements from that opinion which are applicable to our situation:

> "It is well settled, of course, that equity will in a proper case restrain officials of the government from acts constituting an invasion of individual rights where such acts are not authorized by statute or where the statute authorizing them is void because in conflict with some provision of the constitution. Philadelphia Co. v. Stimson, Supra. Ferris v. Wilbur, Supra."

> "Of course, if the suit were one to remove cloud from title, it could be maintained in the District where the property is situate and process might be served on the defendants outside the District. Judicial Code, § 57, 28 U.S.C.A. & 118."

Another case stressed by Appellee is the comparatively recent case of Transcontinental and Western Air v. Farley, 71 F. (2d) 288 (C.C.A. Second). This suit involved the cancellation of certain air mail contracts. The court held that the operation of the mails was a governmental function and that courts will not interfere with the discretion or judgment of the Postmaster General in the exercise of such function.

The case is clearly distinguishable from ours. We are attempting no interference with a governmental function of the Secretary of the Interior, nor are we charging the Secretary with any wrongful conduct or abuse of authority in the performance of his governmental functions. We charge him directly with wrongfully and aggressively invading private property rights and with acts of trespass upon private property while purporting to act for the United States in its private and proprietary capacity. The court in the Farley case made a clear distinction between such cases and the case under consideration by it and in drawing such distinction quoted authoritively some of the cases heretofore quoted by us in our opening brief.

May we at this point call the court's attention to an additional case in point, that of Goltra v. Weeks, 271 U. S. 536, 46 S. Ct. 613, 70 L. Ed. 1074, which was brought to our notice in the study of the Farley case. This case was filed in the eastern district of Missouri. The case was in form an

action to restrain the defendants from the commission of certain wrongful acts and to compel the restoration to the plaintiff of property alleged to have been wrongfully seized. An order to show cause was issued and served upon Secretary Weeks and others presumably pursuant to the authority of Section 57 of the Judicial Code. We quote the following paragraph from the opinion:

> "We cannot agree with the circuit court of appeals that the United States was a necessary party to the bill. The bill was suitably framed to secure the relief from an alleged conspiracy of the defendants without lawful right to take away from the plaintiff the boats of which by lease or charter he alleged that he had acquired the lawful possession and enjoyment for a term of five years. He was seeking equitable aid to avoid a threatened trespass upon that property by persons who were government officers. If it was a trespass, then the officers of the government should be restrained whether they professed to be acting for the government or not. Neither they nor the government which they represent could trespass upon the property of another, and it is well settled that they may be stayed in their unlawful proceeding by a court of competent jurisdiction, even though the United States for whom they may profess to act is not a party and cannot be made one. By reason of their illegality, their acts or threatened acts are personal and derive no official justification from their doing them in asserted agency for the government. The point is fully covered by Philadelphia Co. v. Stimson, 223 U. S. 605, 56 L. Ed. 570, 32 Sup. Ct. Rep. 340."

Another case equally well in point that has come to our attention since the filing of our opening

brief, is American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 23 S. Ct. 33, 47 L. Ed. 90.

Respectfully submitted,

P. H. HAYES,
Attorney for Appellant.

RAYMOND ALLEE,

DOW B. ROUSH,
Of Counsel.