B. A. Fowler

BRIEF

OF

Salt River Valley Water Users' Association

FOR CONSIDERATION WITH

PROPOSED MEMORANDUM OF AGREEMENT RELATIVE TO CONSTRUCTION OF SALT RIVER RESERVOIR.

B. A. Fowler

BRIEF

OF

Salt River Valley Water Users' Association

FOR CONSIDERATION WITH

PROPOSED MEMORANDUM OF AGREEMENT RELATIVE TO CONSTRUCTION OF SALT RIVER RESERVOIR.

TO THE HONORABLE

THE SECRETARY OF THE INTERIOR:

In connection with the draft of a proposed agreement between the Secretary of the Interior and the Salt River Valley Water Users' Association, we beg leave to submit for consideration the following notes:

In a statement dated May 25, 1903, heretofore submitted to the Secretary of the Interior, The Salt River Valley Water Users' Association set out briefly a history of the legislation and judicial interpretation of the law relative to the appropriation and use of water for irrigation in Arizona; a historical sketch of the origin and practice of irrigation in the Salt River Valley, and an explanation of the purposes of the organization of the Salt River Valley Water Users' Association and the conditions and considerations that prompted the Association, together with a somewhat detailed exposition of the principles adopted and the methods agreed upon for their application and enforcement.

The conditions in that valley, because of the unwise and improvident practices involving the acquisition and exercise of the right to the use of water have become intolerable.

Those practices have resulted in the futile attempt to subject to cultivation an area of lands vastly in excess of that for which an edequate supply of water is available. There have been encroachments from time to time upon vested rights, for which there has been, hitherto, no practicable remedy. Confusion has resulted, and each year seems to further confound it. The situation is such that further progress in the development of the valley has been completely arrested; it is such that in the very nature of things, unless there be made available an increased and a more reliable water supply, there must be retrogression, involving hardship and disaster to many of the settlers.

Much of this situation has arisen out of an honest misconception of the extent of the water supply available, and of the extent of land that can be successfully reclaimed with that supply. Much of it is due to ignorance, willful or negligent, of certain principles concerning the rights of water users which have, by costly experience, been demonstrated to be fundamental, and the neglect of which has been shown to be disastrous.

The condition is, as a result of this faulty practice, that there are thousands of acres of exceedingly fertile land adaptable, by reason of climatic conditions, to the cultivation of peculiarly valuable products, without, in fact, a reliable right to the use of water. In theory these thousands of acres have some sort of a water right, or right to use water. In fact, as we have before suggested, the demand is so largely in excess of the supply that all can not have an adequate supply of water. The result has been the apportionment of the deficient supply

amongst all the claimants, giving to none an adequate supply.

The practice of irrigation in the United States is of comparatively recent origion, and the law concerning it has had necessarily to be the result of an evolutionary process. The principles of the common law, as it is prevalent in the older and humid States of the Union, are inapplicable to the conditions that make irrigation necessary. Those conditions are anomalous and peculiar. The processes of the courts to which those who live in the humid States are accustomed, are wholly inadequate to the preservation and enforcement of the rights of conflicting claimants to the right to the use of water for irrigation. The delays necessarily incident to those processes are ruinous, and the cost so great, in proportion to the right, as to be prohibitive.

Water is not like land; it is incapable of possession; it is elusive; if used at all it must be captured and used at once. It is, in the physical sense, capable of capture and use by one or by many, to the destruction of the right of another who is, in law or in morals, entitled to its use. The damage by the trespass is instant and complete. The trespasser, while legally liable, is, more often than not, irresponsible for the damage, and even if he were responsible the remedy by suit is inadequate. Equity might interfere, but the trespass has been committed, and the damage inflicted, before the chancellor could issue his writ of prevention.

It has become, we think we may safely say, the concensus of opinion of those who have given to the subject careful study, that some definitive rules should be established by which to determine the rights of the claimant to the use of water for irrigation, and that some means of instantly, summarily and effectively enforcing those rights be adopted.

With these purposes in view, the water users of the Salt River Valley have associated themselves together, under the corporate name of the Salt River Valley Water Users' Association. They have, by their articles of incorporation, agreed amongst themselves that certain principles governing the right to the use of water shall be established.

There has been a mutual concession amongst them. There has been a voluntary abondonment by a large minority—probably a majority of them—of distinct and diametrically opposed claims to the right to the use of water.

In that valley, in practice, the right to the use of water has been treated by a majority of the claimants as a floating and not an appurtenant one. It has hitherto been a prevalent opinion and practice that the ownership or occupancy of land was not a necessary basis for the right to appropriate water. It has not been the practice that beneficial use should be, on the one hand, the "measure," or, upon the other, the "limit" of an appropriation of water.

As might be expected, interminable litigation has been the result, and, from what we have before said, "ineffective litigation."

A crisis in water matters in that valley was approaching when the passage of the National Irrigation Act came and suggested a remedy. The time had come when there was necessary an adjustment of rival claims to the use of water. And every one knew that an adjustment meant a violent change in the practice heretofore prevalent that would result in the utter ruin of hundreds of settlers. This was inevitable; no decision of the court could create a new or additional supply of water, and whatever principle of adjustment was adopted by the court many thousands of acres of land, in spite

of their claim, would be found and adjudged to have no right to the use of water at all.

It could not be safely predicted upon what acres this calamity might fall—but that it must come was a fact, fearfully and reluctantly, it is true, but none the less positively recognized.

The National Irrigation Act recognized the existence of vested rights whatever their character might ultimately be held to be, and it provided that in the operation of the act such rights should not be interfered with. It is fairly to be assumed from the act that the Secretary might make any voluntary adjustments of such rights to which the holders might consent. The act expressly gives the Secretary the power of condemnation. It further gives him power to perform any and all acts, &c., as may be necessary and proper for the purpose of carrying the provisions of the act into full force and effect.

The act further provides that water may, under certain conditions, be supplied from Government works to lands held in private ownership.

We think it cannot be doubted that the Secretary has complete power to make a contract with any individual owning lands under Government works, who already has a vested water right (whether adequate or inadequate) either to abandon that right entirely, or to adjust it to such rules, regulations and conditions that the Secretary may deem proper to promote the objects of the Irrigation Act. To view it otherwise leaves the Secretary—where vested rights to the use of water, however limited or extended exist—but two alternatives; to condemn, or to abandon the enterprise, where such rights may be involved. Such a restricted construction will hardly, we think, be placed upon the act. Such a construction would render the act inoperative anywhere, for it is not to be expected that a locality can be

found in the country where the operation of governmental reclamation works would not affect someone's previously existing vested rights.

If the Secretary can deal with an individual owner of a vested right, either for its abandonment or adjustment, which it must be conceded he can do, there can be no legal reason why he may not deal with any number of such individuals associated together, in their associate capacity, for a like purpose and to the like extent.

And it is just this that the water users—present as well as prospective—of the Salt River Valley now offer to the Secretary to do.

It would be impracticable to attempt this by individual negotiation. In the first place, the individual rights are unascertained and the subject matter of the negotiation would, therefore, be uncertain and indefinite.

If, as is the case in some localities, there were only a few isolated claimants whose rights were capable of easy ascertainment, this objection might not exist.

Again, these rights are, in a certain sense, interdependent rights, complex in their nature and not capable of definite negotiation by the individual with the Government. A complete adjustment is only possible with the assent of all the conflicting claimants.

Again, the large number of individuals with whom separate negotiations would have to be conducted, amounting from 2,500 to 3,000 individuals, suggests the impracticability of that plan.

But although the several individual rights may be undefined, yet they, in the aggregate, constitute all the rights to be affected, and an adjustment, therefore, assented to by all, results in an adjustment of the entire matter.

We have shown by our statement before referred to (of date May 25, 1903,) that the Salt River Valley Water

Users' Association is fully empowered in its associate capacity to enter into negotiation with the Secretary for this very purpose.

But there are limitations upon that power—few, simple, but deemed fundamental. These limitations are expressed in the articles of incorporation (heretofore submitted to the Secretary).

We assumed that the Secretary would not permit in any adjustment of rights, the retention by our members of rights or claims to rights to the use of water, the exercise of which would be repugnant to or inconsistent with the principles enunciated by the National Irrigation Act.

We, therefore, have agreed amongst ourselves that our vested water rights shall hereafter, whatever may have been their legal attributes heretofore, be appurtenant to the land irrigated by water supplied from the Government works. We have further agreed that beneficial use shall be the basis, the measure and the limit of the right to use water.

These are wide departures from the practice heretofore prevalent in the valley; but they are distinctly enunciated in the Irrigation Act (proviso to section 8 of the Irrigation Act). We believed that the Secretary would not undertake to construct the works, and therefrom supply the lands of our members unless that adjustment was made. And hence we are ready to agree with the Secretary that if he does construct the reservoir, that our vested rights, whatever characteristics they now possess, shall thereafter, in those respects, conform to the provisions of the National Irrigation Act.

The conception of a vested right involves the preconception of a prior claim. Among claimants to the right to use of water by reason of appropriation from a public source of supply, if such a right can be vested, it must have vested instantly at the moment of actual appro-

priation, and the rights must therefore have become vested in the order of the times of the appropriation as among the several claimants.

The National Irrigation Act does not, in terms, refer to the priority of claim, but it does preserve vested rights from interference. As the doctrine of priority of claim is not inconsistent with the principles of the National Irrigation Act, it has been retained in our Articles of Incorporation. If the construction of the proposed irrigation works should prove to have accomplished the purposes contemplated, the question of priority becomes unimportant; on the other hand if those works should should fail to accomplish the result anticipated, then, there being not enough water for all, the best public policy dictates that such water as there may be should be distributed to effect the greatest good, and there must in such an event (which it is earnestly hoped will not occur) be a selection of lands to which the available supply should be applied; and no juster rule can be devised than that of applying the doctrine of the priority of claim. After a full and earnest consideration of that subject, our people have adopted that rule.

It was also agreed among our people that the cost incurred by the Government in the construction of the proposed reservoir and water works should be imposed upon the owners of land benefited thereby in the proportion of the number of acres owned by them respectively. It might be that the benefits might not in fact be proportionate to the acreage owned. There are so many elements to be considered in determining that question, however, that it will readily appear incapable of practical solution upon any other basis than that of equal benefit. Of these elements are the priority of rights, the extent of the rights, the character of soil and

the segregation of the vested right as to its extent from the cumulative right made possible by the construction of the Government's works; and of equal, if not of greater importance, but wholly incapable of accurate estimate, the value of the settlement of the interminable, harrassing and ineffective disputes about water and the assurance to all, without dispute or conflict, of a certain adequate supply of water.

There is no rule for even a fairly approximate estimate of any of these elements. The owner of the vested right retains his priority leaving to the newer right the hazard of failure of the accomplishment of the purposes of the proposed works. Taking all these things into consideration, the owner of the older right has consented to take upon himself the same proportionate part of the burden of reimbursing the Government for the cost of the reservoir, as does the owner of the newest, and under present conditions, the most precarious and least valuable, and they have done this after balancing all the complex conditions, as the most equitable solution of the matter.

Similar conditions enter into the consideration of the the question of how the burden of cost of maintenance and operation shall be borne. And again equality of the apportionment of the cost has been deemed the most equitable. In this instance, the owner of the newer right had made a concession to the owner of the older right—as in the other the older made a concession to the newer.

In arriving at these conclusions, advantages arising accidentally from favorable location or other adventitious circumstances, were, as they justly should be, left out of consideration and voluntarily ignored, to promote the adoption of a uniform, even and equitable system.

Our articles of incorporation provide that no one can become and continue to be a member unless he shall in good faith have initiated and perfected a right to the use of water from the Government works. The propriety of this provision suggests itself.

It is just as important, too, that the Government rights should not be issued to any who are not, or who may not become, members of the Association. It would be impracticable, in the first place, to define the extent of such a right; and, again, it would, instead of promoting a uniformity, at once create a diversity of systems. It would introduce into the valley and into the Government project a necessarily hostile and irreconcilable element. The act itself contemplates that ultimately the water users shall form some sort of an organization (sec. 6) amongst themselves. It can not mean that such an organization shall be of either other than, or of less than all of, such water users. Hence, believing this principle applicable, by analogy and reason, to our association, we have adopted it. Of course, if there be other lands than those embraced within the reservoir district, to which the Secretary should find it desirable and proper to supply with water from the Government works, the articles of incorporation expressly provide for such extension. The very desirable result would be that all the users of water, not only from natural, but from those additional sources created by the Government, would all be members of one association, subject to like rules, with equal rights and effective means of enforcing them.

These are the principles embodied in our articles of incorporation, which are deemed fundamental, and are the principles to and upon which the water users of the Salt River Valley are willing to adjust their existing vested rights, the terms upon which they have agreed to

deal with the Secretary of the Interior to adjust conditions to the provisions and operation of the National Irrigation Act; and they constitute the limitations upon the power of the Association, in its corporate capacity, to deal concerning the individual rights of the individual members.

These principles may be briefly formulated to be:

1. The priority of right of use by reason of priority of appropriation, to be applied to vested rights.

2. The permanent appurtenance of water rights vested as well as subsequently acquired to specific lands.

3. That the basis of an appropriation of water for irrigation is the ownership of land (or occupancy under the Government by an entryman in process of acquiring title).

4. That beneficial use shall be the measure and the limit of the right.

5. Equality in the apportionment of the cost, both of the construction of the Government works and of maintenence and operation on all water users in proportion to the acreage held by them respectively.

6. The centralization of powers of the Association to enforce those principles.

7. That all beneficiaries of the Government shall be subjected to these principles.

In addition to the concessions involved in the application of these principles to the present existing vested water rights, the members of the Association have empowered the Association, in its corporate capacity, to assure the Government of the reimbursement to it of the cost of the construction of its works.

It is proposed by the Association that it will either collect and pay to the Government the installments, as they shall become due, of the cost of construction charged

against its members, or that it will guarantee such payments in such manner as the Secretary of the Interior may direct.

That its guarantee may be effective, the individual members of the Association have pledged their lands to it. That this pledge may inure to the benefit of the Government there must, of course, be some sort of a convention or contract between the Association and the Government. In other words, the individual land owners must be dealt with (in this instance through their associated agency) to render this lien operative in favor of the Goverment. This subject is considered and explained more in detail in our statement to the Secretary of the 25th of May, 1903, a printed copy of which is herewith submitted.

Up to this time there has been no adjustment of vested rights in the Valley to render the conditions there such that the Government may proceed with respect to them, in the construction of its works. An agency has been created by the owners of those rights, by which an agreement concerning them may be made, that agency being the Salt River Valley Water Users' Association. The Articles of Incorporation define the rules and principles that shall prevail in such adjustment. That they are just and essential to the conditions in that valley, we think can not be successfully controverted.

The Association is also empowered, indirectly, it is true, but completely to effectually pledge the lands to the Government to secure to it the repayment of the cost incurred by it in the construction of the irrigation works. And the Association is now ready to enter into that convention or contract. It is necessary for two reasons that that should be done; first, that the Govern-

ment may have the benefit of the lien on the lands; and, second, to preserve the cohesion of the Association. The importance of the second of these reasons will be apparent when it is taken into consideration that the people of that valley must, and that, too, whether a reservoir is constructed or not, adopt at once some means of the ascertainment and establishment of their relative rights. Some time must elapse before the completion of the proposed works—several years perhaps—and during that interval the water available from existing sources will have to be distributed on some system.

Prompted by the consideration that the Government would construct a reservoir, the members of the Association have agreed that the principles set out in their Articles of Incorporation should be the rules by which their relative rights should be determined, and that when the reservoir was constructed, those rights, so determined, should be recognized as established and continuing. If these rules and principles are not recognized, then, of course, the matter is at large, and the situation we have sought to bring about is left to uncertain determination without definite rules for our guidance.

The Government is not interested in the result of this adjustment, as it affects individual cases; for as the aggregate of all the claims constitutes the whole subject matter, the final and desired result can not be affected by the adjustment of the parts in detail, if the principles here defined shall have been applied and made the rule of the adjustment.

It is important to observe that the proposed draft of the convention or contract neither purports to, nor does it in fact, bind the Government to the construction of the proposed irrigation works. It does purport, and it

is so intended, to bind the Government to the recognition of certain principles by which the vested rights of the water users shall be adjusted to adapt them to the policy expressed and derivable from the National Irrigation Act, when the works shall have been constructed, if at all.

And the proposed contract does further bind the Association to pay, or cause to be paid, to the Government, the cost of the reservoir or other works constructed by it and to preserve and enforce, and make effective to the Government for that purpose, the lien created by its members on their lands.

Some confusion seems to have arisen in the minds of some as to the relation of our Association to the National Irrigation Law. It has been somewhat hastily assumed that it is the " form " of the " organization " of the water user contemplated by section 6 of that act. The time for such an organization has not yet arrived. This association was formed primarily to facilitate certain negotiations concerning vested rights which must be adjusted as a condition precedent to any control or right of regulation by the Secretary concerning them, and to provide a means of assurance to the Government of the reimbursement to it of the cost of the proposed reclamation works. For those purposes we think we have demonstrated that organized and competent association was necessary. And hence the organization of the water users for the accomplishment of those purposes which are preliminary.

Section 6 of the National Irrigation Act provides " that when the payments required by this act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for then the management and operation of such irrigation works

shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior."

It will be seen at once that such an organization is simply for the purposes of administration. That organization is to be charged with the "management and operation" of the works, under such rules and regulations as may be acceptable to the Secretary of the Interior. "Management and operation" are purely administrative, and are functions that can not be exercised until after the construction of the works, and then not until a major part of the lands have been paid for. Such an organization can have nothing to do with the establishment of rules for the definition of rights or their acquisition or their adjustment. Nor would it have anything to do with providing security to the Government for the repayment of the costs of the works.

At some time some sort of organization of the water users must be effected to take up itself the management and operation of the works. The membership of that organization must and will be identical with the membership of the Salt River Valley Water Users' Association. There being such an identity of constituency of this association, and the organization contemplated by Section 6 of the Irrigation Act and a complete identity of interest of subject matter and of purpose, we have very naturally framed our association so that when the time comes it may be adapted to take upon itself the "management and operation" of the works constructed by the Government.

In this we have, of course, anticipated, in the hope that this association will, for the purposes of administration, be acceptable to the Secretary of the Interior, and

that the management and operation of the works con; structed by the Government will pass to it when the proper time shall come. But we do not ask that approval now, and the proposed agreement does not involve such approval. If, when the proper time comes, the provisions of our articles of incorporation concerning the management and operation of the works should commend themselves to the Secretary of the Interior, he would have the right to charge our association with the management and operation. If they should not then be acceptable, we have expressly engaged that we will adapt them to such rules and regulations as he shall prescribe to make our form of organization acceptable; and it plainly follows that if we did not do so the Secretary of the Interior would not entrust us with the maintenance and operation of the works, but would retain them. In short, the Secretary can not invest us with the control, management and operation of the works unless and until our form of organization is acceptable to him. nor can he do it then until the major part of the lands are paid for. The adaptability of our association to the purposes of administration is completely within the direction of the Secretary. Whatever modifications he may require must be made, otherwise he retains the control, management and operation of the works until such time as the form of organization does become or is made acceptable to him.

That there could not arise any doubt as to this, the approval of the articles of association, to that extent, is expressly reserved to the Secretary by the contract we propose.