

MEMORANDUM REGARDING OUT-OF-BASIN USES OF COLORADO
RIVER WATER

1. Introduction. This memorandum is prepared pursuant to the request made by Director Stone of the Colorado Water Conservation Board in his letters of May 22, 1952, and July 15, 1952. In those letters Director Stone called specific attention to the following statement which appears in the comments of the Colorado River Board of California and which is attached to the official comments of the State of California on the Fryingpan-Arkansas Project located in Colorado:

"The Colorado River Compact limits use of Colorado River water to the seven Colorado River Basin states. With exportation of any large quantity of Colorado River water to the Arkansas River, substantial return flows to the Arkansas may be experienced. Any authorization of the project should require adequate assurances from the State of Colorado that the water exported to the Arkansas will be consumptively used in Colorado, i.e. that it will not permit the flow of the Arkansas River at the Colorado-Kansas state line to be augmented by return flows from the Colorado River water."

Director Stone also indicated that he deemed the question was of importance in connection with the consideration by the Board of the proposed Narrows Dam to be located in the channel of the South Platte River near Fort Morgan. The Narrows Dam

will permit the storage of flows in the South Platte so that they may be utilized as a supplemental supply for downstream lands in Colorado and also for the irrigation of lands not presently irrigated. This is in addition to the flood control benefits to be derived from the Narrows Dam.

It is expected that the diversion of 310,000 acre feet of water from the Colorado River into the South Platte by means of the Colorado-Big Thompson Project, which is now nearing completion, will result in increased South Platte flows in the Fort Morgan area and that unless these flows are impounded by a dam such as Narrows much of this water will flow into Nebraska. Also, the proposed Blue-South Platte Project will bring additional Colorado River water into the South Platte basin and may result in an even greater increase in the South Platte flows to Nebraska.

The pertinent query is whether Colorado will violate the Colorado River Compact of 1922 and the Upper Colorado River Basin Compact of 1942 if it permits its appropriators to divert into the basin of an Eastern Slope stream water from the Colorado River Basin and by their failure to use consumptively all of such imported water some of it flows

out of Colorado and into Nebraska or Kansas, neither of which is a Colorado River Basin State.

Consideration of the problem was deferred until a copy of the April 4, 1936 opinion of the Solicitor of the United States Department of the Interior dealing with trans-mountain diversions of Colorado River water could be obtained. A copy of that opinion, to which reference will later be made, was transmitted with Director Stone's letter of July 15, 1952.

2. The Colorado River Compact of 1922. Rights to the rights to the use of waters of the Colorado River are apportioned between the Upper and Lower Basins of that River by the 1922 Colorado River Compact. Basically the issue under consideration in this memorandum must be determined by reference to the provisions of that Compact. The following definitions contained in Article II are pertinent:

"(a) The term 'Colorado River System' means that portion of the Colorado River and its tributaries within the United States of America.

(b) The term 'Colorado River Basin' means all of the drainage area of the Colorado River System and all other territory within the United States of America to which the waters of the Colorado River System shall be beneficially applied.

* * * * *

(f) The term 'Upper Basin' means those parts of the States of Arizona, Colorado, New Mexico, Utah, and Wyoming within and from which waters naturally drain into the Colorado River System above Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System above Lee Ferry.

(g) The term 'Lower Basin' means those parts of the States of Arizona, California, Nevada, New Mexico and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System below Lee Ferry."

Apportionment of water between the two Basins is made by Article III as follows:

"(a) There is hereby apportioned from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

(b) In addition to the apportionment in paragraph (a), the Lower Basin is hereby given the right to increase its beneficial consumptive use of such waters by one million acre-feet per annum."

Other provisions of that Compact will be mentioned later herein.

3. The Upper Colorado River Basin Compact of 1948.

The Upper Basin States by Compact signed in 1948 and ratified in 1949 apportioned among themselves the rights to the use

of water apportioned to the Upper Basin by Article III (a) of the 1922 Compact. The apportionment provisions of the Upper Basin Compact are found in Article III which reads as follows:

"ARTICLE III

(a) Subject to the provisions and limitations contained in the Colorado River Compact and in this Compact, there is hereby apportioned from the Upper Colorado River System in perpetuity to the States of Arizona, Colorado, New Mexico, Utah and Wyoming, respectively, the consumptive use of water as follows:

- (1) To the State of Arizona the consumptive use of 50,000 acre-feet of water per annum.
- (2) To the States of Colorado, New Mexico, Utah and Wyoming, respectively, the consumptive use per annum of the quantities resulting from the application of the following percentages to the total quantity of consumptive use per annum apportioned in perpetuity to and available for use each year by Upper Basin under the Colorado River Compact and remaining after the deduction of the use, not to exceed 50,000 acre-feet per annum, made in the State of Arizona.

State of Colorado.....	51.75 per cent,
State of New Mexico.....	11.25 per cent,
State of Utah.....	23.00 per cent,
State of Wyoming.....	14.00 per cent.

(b) The apportionment made to the respective States by paragraph (a) of this Article is based upon, and shall be applied in conformity with, the following principles and each of them:

- (1) The apportionment is of any and all man-made depletions;

(2) Beneficial use is the basis, the measure and the limit of the right to use;

(3) No State shall exceed its apportioned use in any water year when the effect of such excess use, as determined by the Commission, is to deprive another signatory State of its apportioned use during that water year; provided, that this subparagraph (b) (3) shall not be construed as:

(i) Altering the apportionment of use, or obligations to make deliveries as provided in Article XI, XII, XIII or XIV of this Compact;

(ii) Purporting to apportion among the signatory States such uses of water as the Upper Basin may be entitled to under paragraphs (f) and (g) of Article III of the Colorado River Compact; or

(iii) Countenancing average uses by any signatory State in excess of its apportionment.

(4) The apportionment to each State includes all water necessary for the supply of any rights which now exist.

(c) No apportionment is hereby made, or intended to be made, of such uses of water as the Upper Basin may be entitled to under paragraphs (f) and (g) of Article III of the Colorado River Compact.

(d) The apportionment made by this Article shall not be taken as any basis for the allocation among the signatory States of any benefits resulting from the generation of power."

In its Article II the definitions of Colorado River Basin, Upper Basin, and Lower Basin as found in the 1922 Compact are adopted in identical language. By Article I (b) it is speci-

ficably recognized that all of the provisions of the Upper Basin Compact are subject to the 1922 Compact.

4. The Solicitor's Opinion of April 4, 1936. In response to a request from the Secretary of the Interior as to whether or not the Colorado River Compact permits the transmountain diversions of waters of the Colorado River from the natural watershed into other watersheds, the Solicitor of the Interior Department stated it to be his opinion that:

" * * * the Compact authorizes such diversions if the diverted water is to be used within the boundaries of the States through which the Colorado River System extends and, of course, if the amount of that diversion does not create a use of Colorado River water in excess of that allowed by the provisions of the Compact." (Emphasis supplied)

The Solicitor quotes Sections (f) and (g) of Article II of the Compact defining respectively the Upper Basin and the Lower Basin and states that from such provisions "there can be no doubt that the Compact authorizes the diversion of allocated water into other watersheds within those States."

The Solicitor calls attention to Article II (b) defining the term "Colorado River Basin" and he says that it is ambiguous because of the reference to the other territory which within the United States/might be either within or without

the States through which the Colorado River System extends. He concludes that this ambiguity is resolved by the provision of Article I which is to the effect that the Colorado River Basin is divided into two basins and an apportionment of the water of the Colorado River System is made to each of them. He summarizes:

"Thus it becomes clear that the Compact does not contemplate the diversion of Colorado River waters for use in any State other than those specifically mentioned as Basin States, namely, Arizona, California, Colorado, Nevada, New Mexico, Utah and Wyoming." (Emphasis supplied)

It should be noted that in the first quotation from the Solicitor's Opinion he uses the phrase "to be used" and in connection with that phrase does not use the word "consumptively." Also in the second quotation he refers to "the diversion of Colorado River waters for use," but does not insert "consumptive" before "use."

5. The issue to be determined. This memorandum is directed solely to answering the question of whether a violation of the Colorado River Compact of 1922 occurs when water diverted out of the natural basin of the Colorado River is not entirely consumed within a State through which the Colorado River System extends and by reason of such failure

to entirely consume that water all or portions thereof are permitted to flow into a State which is located without the natural basin of the Colorado River. No consideration will be given to the question of the right to control the use of return flow resulting from diversion of water into one stream basin from another stream basin. The controversial subject of the right to control the use of such water and the return flows therefrom is immaterial to a determination of the basic issue.

6. The factual situations. Diversions of water from the natural basin of the Colorado River are now and for a long period of time have been made in substantial quantities in the States of California, Colorado and Utah. In California water is taken from the Colorado River by the All-American Canal for use in the Imperial Valley which lies outside the natural basin of the Colorado River as it now exists. Substantial quantities of such water for long periods of time have been and now are wasted in the Salton Sea. The water so flowing into the Salton Sea results from return flows from irrigated areas and from the use of water in the generation of hydroelectric power at plants located along the All-American Canal which is not thereafter applied

to irrigation or domestic uses.

The Metropolitan Aqueduct diverts water from the Colorado River for use in Los Angeles, San Diego, and other areas of Southern California. The use of water carried through the Metropolitan Aqueduct is primarily for municipal purposes. It is well known that return flows from municipal uses are large and may vary from 50% to 90%. The return flows from such Southern California municipal uses go into the Pacific Ocean.

In Colorado for some sixty years there have been diversions from the natural basin of the Colorado River into the basins of the South Platte and Arkansas Rivers. One of the oldest of such projects is the Grand River Ditch which diverts an annual average of about 18,000 acre feet of water under priorities which antedate the year 1900. The Independence Pass diversion from the Roaring Fork River into the Arkansas amounts to an annual average of some 30,000 to 40,000 acre feet. The City and County of Denver diverts water from the Fraser River through the Moffat Tunnel into the South Platte drainage for municipal uses. It has been estimated by the engineering staff of the Colorado Water Conservation Board that present transmountain diversions of