SUPPLEMENTAL REPORT

of

Delph E. Carpenter

Commissioner for Colorado,
Colorado River Commission.

(Supplemental to Original Report - Printed Senate Journal of Jan. 5, 1923.)
Denver, Colorado,

February 15th, 1935.

March 20th.

Senator E.E. Nash, Chairman
Senate Committee on Agriculture and Irrigation; and
Honorable Royal W. Calkins, Chairman
House Committee on Agriculture and Irrigation,
Denver, Colorado.

Gentlemen:

Pursuant to your request I respectfully submit the following observations respecting certain provisions of the Colorado River Compact:

First and foremost, it should be ever kept in mind that the intent of the compact is to be ascertained from a consideration of the entire instrument and that each clause must be considered in connection with other clauses.

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**Article III Paragraph (b).**

Paragraph (b) of Article III does not authorize a cumulative increase of beneficial consumptive use of waters to the extent of 1,000,000 acre-feet per annum. This paragraph means that the Lower Basin may increase its annual beneficial consumptive use of water 1,000,000 acre-feet and no more.

Paragraph (a) of said article permanently apportions to the Lower Basin the annual beneficial consumptive use of 7,500,000 acre-feet of water which includes all water necessary for the supply of any rights which may now exist.

Paragraph (b) permits the Lower Basin to increase its annual beneficial consumptive use of water 1,000,000 acre-feet. The two paragraphs permit an aggregate annual beneficial consumptive use of 8,500,000 acre-feet, and no more. The words "per annum" as used in paragraph (b) are not synonymous with the word "annually." No cumulative increase is intended by that paragraph.
Article VIII.

Article VIII is not intended to authorize, constitute or result in any apportionment of water to the Lower Basin beyond or in addition to that made in paragraphs (a) and (b) of Article III.

The Imperial Valley project which diverts water below Yuma, Arizona, is said to have diverted the entire low flow of the river for a period of several days during three of the past ten years. Those in control of that project feared that additional development in the Upper Basin (before storage facilities had been provided for the Lower Basin) would materially decrease the October flow of the river at Yuma. Storage facilities constructed in the great canyon of the river are for the entire supply necessary for the Imperial Valley. While the Imperial Valley probably has no legitimate claim which it may enforce against the Upper Basin, it was urged, nevertheless, that whatever rights such users may claim should not be disturbed until time and opportunity may afford the building of storage works.

The apportionment to the Lower Basin by paragraph (a) of Article III, provides that such apportionment "shall include all water necessary for the supply of any rights which may now exist". Any claims of the Imperial Valley therefore would be satisfied out of such apportionment of water. The storage of water in reservoirs, as provided in Article VIII, must be made "not in conflict with Article III". After storage is provided, water stored in harmony with Article III will be available to the Imperial Valley project and "present perfected rights" on the Lower river shall thereafter be satisfied from the water stored in harmony with Article III and their claims, if any, against the Upper Basin are thereafter cut off by the substitution of stored water for direct flow.

Article I provides that "an apportionment of the use of part of the water of the Colorado River system is made to the Upper Basin and also to the Lower Basin with provision that further equitable apportionment may be made."
Paragraph (f) of Article III provides that "further equitable apportionment of the beneficial uses of the waters of the Colorado System apportioned by paragraphs (a), (b) and (c) may be made * * * if and when either Basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b)". The storage of water under Article VIII must be in harmony with paragraph (f) of Article III, as well as with paragraph (a), and the latter paragraph provides that the apportionment to the Lower Basin "shall include all water necessary for the supply of any rights which may now exist", and the second paragraph of Article VIII provides that all other rights (than present perfected rights) "shall be satisfied solely from the water apportioned to that Basin in which they are situate".

Taking the compact as a whole and construing its provisions together, Article VIII does not authorize, constitute or result in any apportionment of water to the Lower Basin beyond that made in paragraphs (a) and (b) of Article VIII.

It will be noted that Article VIII does not concede that "present perfected rights" in the Lower Basin have any claims against the Upper Basin, the language being "claims of such rights, if any, by appropriators or users of water in the Lower Basin against the appropriators or users of water in the Upper Basin". In other words any such claims are neither acknowledged nor denied and their legal status, whatever it may be, is temporarily left as it was at the time of the compact. But when the reservoir is constructed, any claims against the Upper Basin by such "present perfected rights" are thereafter cut off.

**Article III Paragraph (e).**

Paragraph (e) of Article III is reciprocal. It should be construed with paragraph (b) of Article IV. The states of the Lower Division cannot require the delivery of water at Lee Ferry, by the Upper Division, which cannot be reasonably applied to domestic and agricultural uses in the Lower
Basin. The clause preserves the dominant rights of agricultural and domestic uses over power uses and only prevents the withholding of water for power development within the Upper Basin to the extent that such withholding may encroach upon the supply necessary for agricultural and domestic uses in the Lower Basin. In other words the compact means that power claims by the Lower Basin cannot compel the Upper Basin to turn down any water which cannot reasonably be applied to domestic and agricultural uses in the Lower Basin. This permits the first use of the waters of the Upper Basin for the generation of power, limited only by the agricultural and domestic demands in the Lower Basin. All power uses in both Basins are made "subservient to the use and consumption of such water for agricultural and domestic purposes and shall not interfere with or prevent use for such dominant purposes" (referring to agricultural and domestic uses.)

Article III Paragraph (f)

The compact reserves for future apportionment (between the two basins of the river) all of the waters of the river and its tributaries unappropriated by paragraphs (a), (b) and (c) of Article III. This is specifically provided in paragraph (f) of Article III. No such apportionment can occur (except by unanimous consent) until after October 1, 1963 (40 years). If at any time after forty years either basin shall have reached its total beneficial consumptive use, as provided in paragraphs (a) and (b) of Article III, either basin may demand an equitable apportionment of the beneficial uses of the remainder of the water of the river. This does not prevent a diversion and use of water in either basin in excess of the apportionment but all such excess diversions will be made at the peril of the users. This applies to the excess uses made either before or after the expiration of the forty-year period. The apportionment of water to supply any such excess uses will be a matter entirely within the keeping and jurisdiction of the new Compact Commission and will require its unanimous approval.

By the compact the unappropriated waters are reserved for "further equitable apportionment" between the two Basins. This negates any suggestion that excess uses in either Basin will be regarded as legal "appropriations." Any such excess
uses will be by suference and without legal foundation but such users will not be prevented from pressing their equitable claims in the future apportionment provided for in paragraph (g) of Article III. This will apply to all excess uses made by means of enormous reservoirs in the Lower Basin capable of storing and beneficially using (for power or other uses) all of the flow of the river which may pass Lee Ferry. All such uses, made by means of such structures, are and will be subject to the Colorado River Compact and can perfect no claim which will prevent further "equitable apportionment" between the Basins at any time after forty years.

Article IV Paragraph (a).

Intrastate control of appropriations made within the apportionments provided by the compact is specifically reserved by paragraph (a) Article IV. This includes such regulations as each state may provide by its constitution and laws respecting the preference of one class of use over other classes of use. In other words the constitution and laws of Colorado control the details of appropriation, use and distribution of water within the state. The compact does not attempt to invade such matters of local concern. When approved, the compact will be the law of the river as between the states. It deals wholly with interstate relations. This paragraph refers to intrastate control. Whatever the intrastate regulation and control may be it cannot affect the interstate relations. No law of any state can have extraterritorial effect or interfere with the operation of the compact as between the states.

"Beneficial Consumptive Use."

In my original report (printed in the Senate Journal of Jan. 5, 1923) I discussed and defined the term "beneficial consumptive use." In addition to the discussion there contained, I might add there is a vast difference between the term "beneficial use" and the term "beneficial consumptive use." A use may be beneficial and at the same time non-consumptive or the use may be partly or wholly consumptive. A wholly consumptive use is a use which wholly consumes the water. A non-consumptive use is a use in which no water is consumed (lost to the stream). "Consume" means to exhaust or destroy. The use of water for irrigation is but partially consumptive for the reason that a great part of the water diverted ultimately finds its way back to the stream. All uses which are beneficial are included within the apportionments (i.e., domestic, agricultural, power, etc.). The measure of the apportionment is the amount of water lost to the river. The "beneficial consumptive use"
refers to the amount of water exhausted or lost to the
stream in the process of making all beneficial uses. As
recently defined by Director Davis of the U. S. Reclamation
Service, it is the "diversion minus the return flow".
(Congressional Record, Jan. 31, 1933—p. 2815.)

Amount of Flow at Lee Ferry.

The net measured flow of the Colorado River at Lee Ferry
(after all uses above) was 16,100,000 acre-feet from September
30, 1931 to September 30, 1932, according to the report of
the Director of the U. S. Geological Survey. The net flow of
the whole river (after all uses above Yuma) has been measur-
ed and recorded at Yuma, Arizona (below all tributaries in-
cluding the Gila River) since 1899. The mean or average
flow at Yuma for the twenty year period 1903-1932 is
17,400,000 acre-feet per annum. The flow September 30, 1921
to September 30, 1922 at Yuma was 17,600,000 acre-feet. This
was 200,000 acre-feet (1%) greater than the twenty year
average. (See Congressional Record, Jan. 31, 1933—p. 2819.)
In other words the flow of the river for that period was
101% of normal. The flow of 16,100,000 acre-feet at Lee
Ferry therefore represents 101% of the average annual net
flow of the river at that point (after deducting all water
consumed during uses in the entire Upper Basin.) Assuming
that 2,500,000 is now annually consumed during uses in the
Upper Basin, we would obtain a "reconstructed river" by
adding that amount to 16,100,000 acre-feet making an
aggregate of 18,600,000 acre-feet annual discharge, which
is 101% of the twenty year annual average.

It is evident that the States of the Upper Basin may safely
guarantee 75,000,000 acre-feet aggregate delivery at Lee
Ferry during each ten year period. This would mean an average
annual delivery of 7,500,000 acre-feet as against 16,940,594
acre-feet present net annual average flow (100%) at Lee Ferry
or 18,415,942 acre-feet natural average annual flow (100%)
on the basis of a "reconstructed" river.

I herewith attach for your information, copies of
certain telegrams which will be self-explanatory.

Very truly yours,

Delph E. Carpenter

Commissioner for Colorado.
Hon. Herbert Hoover,
Chairman Colorado River Comm.
Washington, D.C.

Do you concur with me that the intent of the commission in framing the Colorado River Compact was as follows:

That paragraph b of article three means that the Lower Basin may increase its annual beneficial consumptive use of water one million acre feet and no more.

That article eight is not intended to authorize constitute or result in any apportionment of water to the Lower Basin beyond that made in paragraphs a and b of article three.

Delph E. Carpenter.
POSTAL TELEGRAM

Washington, D.C.

February 12, 1923.

Delph E. Carpenter,
State Capitol,
Denver, Colo.

I concur with you and shall so advise Congress in my report that the intent of the Commission in framing the Colorado River Compact was as follows:

First that paragraph B of Article Three means that lower basin may acquire rights under the compact to annual beneficial consumptive use of water in excess of the apportionment in paragraph A of that article by one million acre feet and no more. There is nothing in the compact to prevent the states of either basin using more water than the amount apportioned under paragraphs A and B of Article Three but such use would be subject to the further apportionment provided for in paragraph F of Article Three and would vest no rights under the present compact.

Second that Article Eight is not intended to authorize, constitute or result in any apportionment of water to the lower basin beyond that made in paragraphs A and B of Article Three.

HERBERT HOOVER.
Denver, Colorado,
February 13, 1928.

R. T. McKissick,
Deputy Attorney General
Sacramento, California.

Do you concur with me that intent of Commission in framing Colorado River Compact was as follows:

That paragraph b of article three means that the lower basin may increase its annual beneficial consumptive use of water one million acre feet and no more;

That article eight is not intended to authorize, constitute or result in any apportionment of water to the lower basin beyond that made in paragraphs a and b of article three.

Delph E. Carpenter.
Hon. Delph E. Carpenter,
State Capitol,
Denver, Colo.

Am of opinion that paragraph B of article three permits
increase of annual beneficial consumptive use of water by
Lower Basin to eight million five hundred thousand acre-
feet total or one million in excess quantity apportioned
each basin in perpetuity by paragraph A Article three,
and no more. When both paragraphs are read together
no other construction tenable. "Per annum" not synonymous
with annually".

Article eight is not intended to authorize, constitute
or result in any apportionment of water to the lower basin
beyond that made in paragraphs A and B of Article three
but means that if and when the water passing Lees Ferry
as provided paragraphs D and E article three is impounded
within specified storage, claims of lower basin appropriators
or users adverse to those of upper basin appropriators or
users shall be transferred to and satisfied from the water
so stored.

R. T. McKisick.
WESTERN UNION

TELEGRAM.

Sacramento, Calif.
February 15, 1923.

Delph E. Carpenter,
Denver, Colo.

My interpretation of articles three and eight well expressed in McKiernick's wire of the thirteenth.

W. F. McClure.
"Article VIII provides that all of the rights of the lower basin shall be satisfied from the water apportioned to that basin. There is no indication that any portion of its needs shall be taken from the allotment to the upper basin. The assumption that the lower basin could claim priority for the appropriation of water in a reservoir is an assumption that the compact is invalid, for this is just the contingency which it was designed to meet. The proviso that a storage reservoir of 5,000,000 acre-feet or more shall take care of the perfected rights in the lower basin is designed to lift the ban upon the diversion of the low water flow from the upper tributaries after the construction of such a reservoir, which will be filled from the flood waters but which is to be charged against the allotment of the lower division as specifically provided in paragraph (a), Article III. This provides conclusively against the supposition that the stored waters are not to come out of the allotment to the lower basin.

The assumption that paragraph (b) of Article III has no limit is its own refutation on account of the absurdity of that assumption. It would in a few years, if so construed,
absorb more than the entire flow of the river, which reduces the assumption to an absurdity. Furthermore the language is specific as the apportionment is for the consumptive use of 1,000,000 acre-feet per annum and cannot be construed to mean 2,000,000 acre-feet per annum or any other amount.
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