BRIEF FOR THE APPELLEES

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 73-1353

GRAND CANYON DORRIES, INC., ET AL.,

Appellants

v.

RONALD H. WALKER, DIRECTOR, ET AL.,

Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

WALLACE H. JOHNSON,
Assistant Attorney General,

C. NELSON DAY,
United States Attorney,
Salt Lake City, Utah 84101,

GEORGE R. HYDE,
ROBERT L. KLARQUIST,
Attorneys, Department of Justice,
Washington, D. C. 20530,

see p. 17

# I N D E X



## CITATIONS

index cont'd

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 73-1853

GRAND CANYON DORRIES, INC., ET AL.,

Appellants

v.

RONALD H. WALKER, DIRECTOR, ET AL.,

Appellees

---

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

---

# BRIEF FOR THE APPELLEES

---

## OPINION BELOW

The district court (Honorable Aldon J. Anderson) did not write an opinion. An order of dismissal was entered on August 1, 1973.

## JURISDICTION

Final judgment was entered on August 1, 1973. A notice of appeal was filed on September 5, 1973. This Court has jurisdiction over this appeal under 28 U.S.C. sec. 1291.

## ISSUES PRESENTED

1. Whether the Secretary of the Interior must file an environmental impact statement concerning the continuous operation of a dam completed before enactment of the National Environmental Policy Act of 1969.

2. Whether the plaintiffs' National Park Service river tour permits create a specifically enforceable implied contractual guarantee to provide certain minimum water releases from Glen Canyon Dam.

3. Whether this appeal should be dismissed as moot.

## STATUTES INVOLVED

Because of their length, Title I of the National Environmental Policy Act of 1969, 83 Stat. 852, 42 U.S.C. secs. 4321-4335, and Section 602 of the Colorado River Basin Project Act of 1968, 82 Stat. 900, 43 U.S.C. sec. 1552, appear in the Appendix to this Brief.

## STATEMENT

This is an appeal from an order dismissing a complaint for failure to state a claim upon which relief can be granted and denying a preliminary injunction.

Plaintiffs commenced this action on July 31, 1973, by filing a complaint and a motion for a preliminary injunction in the District Court for the District of Utah. The complaint alleged that plaintiffs were engaged in the business of running float trips down the Colorado River through the Grand Canyon. The complaint further alleged that on July 27, 1973, the defendants (hereinafter "Secretary") issued an announcement stating that for the period beginning July 29, 1973, and ending September 30, 1973, the Secretary intended to reduce water releases from Glen Canyon Dam to an average of 6,000 to 8,000 cubic feet per second (c.f.s.) during weekdays and that night and weekend releases could be reduced to as low as 1,000 c.f.s. The plaintiffs stated that this reduction in water releases would make the conduct of float trips through the Grand Canyon impossible or unsafe and therefore the announced releases could not legally be put into effect without the prior filing of an Environmental Impact Statement (EIS) made pursuant to the National Environmental Policy Act (NEPA), 83 Stat. 852, 42 U.S.C. sec. 4321 et seq. The plaintiffs also alleged that the reduced releases

violated the implied provisions of concession licenses granted to them by the National Park Service, Department of the Interior. The complaint concluded with a prayer for a declatory judgment and an injunction prohibiting releases less than 4,000 c.f.s. at any time during the river touring season and requiring average releases of at lease 8,500 c.f.s. The plaintiffs did not ask for monetary damages.

The district court held a hearing on the matter on August 1, 1973, at which the plaintiffs presented two witnesses, Mr. Mackay and Mr. Jones, both experienced river guides. Mr. Mackay, the principle witness, testified that he conducted float trips through the Grand Canyon from 1965 to the present. Mr. Mackay stated that he was accustomed to conducting float trips on the Colorado River during periods when the night releases from Glen Canyon Dam regularly reached a minimum of 3,000 c.f.s. (Tr. 11). The witness further stated that the proposed release schedule would probably make the float trips more inconvenient and hazardous. However, Mr. Mackay could not say for certain that the scheduled releases would preclude his float trips altogether or even render them impractical as a business proposition (Tr. 25-26).

Mr. Jones, the other witness, concurred with the testimony of Mr. Mackay. In addition, he stated that the river would be unrunnable for commercial equipment if releases were to be 1,000 c.f.s. all of the time (Tr. 33).

On August 1, 1973, the date of the hearing, the district court entered an order denying the temporary injunction and dismissing the complaint for failure to state a claim upon which relief can be granted. This appeal followed.

## ARGUMENT

### INTRODUCTION

In reviewing a lower court's dismissal of a complaint, an appellate court should accept as true all well-pleaded facts alleged in the complaint. Franklin v. Meredith, 336 F.2d 958, 959 (C.A. 10, 1967). However, unjustified deductions of fact, conclusions of law, and mere unfounded pronouncements of fact or law and arguments need not be admitted true as alleged. Newport News Co. v. Schauffler, 303 U.S. 54, 57 (1938); Oppenheim v. Sterling, 368 F.2d 516, 520 (C.A. 10, 1966), cert. den., 386 U.S. 1011; Droppleman v. Horsley, 372 F.2d 249, 250 (C.A. 10, 1967). A complaint is properly dismissed where a plaintiff fails to allege facts demonstrating that he

is entitled to relief. Droppleman, supra, at 251; Hoover v. United States, 253 F.2d 266 (C.A. 10, 1958), cert. den., 356 U.S. 960, reh. den., 357 U.S. 944; Wilshire Oil Company of Texas v. Riffe, 409 F.2d 1277, 1283 (C.A. 10, 1969); Rapland v. Mueller, 460 F.2d 1196 (C.A. 5, 1972). We will demonstrate that plaintiffs in this action failed to allege any facts which would entitle them to judicial relief.

I

THE SECRETARY IS NOT REQUIRED TO FILE AN IMPACT STATEMENT CONCERNING THE CONTINUOUS OPERATION OF A DAM COMPLETED BEFORE ENACTMENT OF THE NATIONAL ENVIRONMENTAL POLICY ACT

The Glen Canyon Dam, authorized by the Colorado River Storage Act of 1956, 70 Stat. 105, 43 U.S.C. sec. 620, et seq., and constructed in the period 1957 to 1964, is located on the Colorado River near the Arizona-Utah boundary. The physical setting and legislative background of the dam was recently discussed at length by this Court in Friends of the Earth v. Armstrong, 485 F.2d 1 (1973), cert. den. U.S. , Jan. 21, 1974, and need not be repeated here. We would only point out

that by regulating water releases from the dam, the Bureau of Reclamation is able to control, in the short-run, the flow of water in the Colorado River between the dam and Lake Mead. 1/ This in turn may, under some circumstances, have an effect upon commercial float trips on this section of the river. The primary question in this appeal is whether the National Environmental Policy Act of 1969 (NEPA), 83 Stat. 852, 42 U.S.C. sec. 4321, requires the Bureau of Reclamation to file an Environmental Impact Statement (EIS) concerning the continuous operation of Glen Canyon Dam.

Section 102(2)(C) of NEPA, 42 U.S.C. sec. 4332(2)(C), states that federal agencies shall file an EIS in cases of "* * * major Federal actions significantly affecting the quality of the human environment * * *." Courts have fashioned a "rule of reasonableness" in order to apply the broad language of this section to specific factual situations. As

---

1/ As this Court noted in Friends of the Earth v. Armstrong, supra, the potential effects of the Glen Canyon Dam upon recreational aspects of the Colorado River Basin were the subject of intensive debate when the Colorado River Storage Act was pending before Congress. It cannot be said that Congress completely failed to consider potential environmental consequences when it authorized construction of the dam.

stated by the District of Columbia Circuit: "The statute must be construed in the light of reason if it is not to demand what is, fairly speaking, not meaningfully possible, given the obvious, that the resources of energy and research--and time--available to meet the Nation's needs are not infinite." Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827 (C.A. D.C. 1972). See also Ragland v. Mueller, 460 F.2d 1196 (C.A. 5, 1972); Iowa Citizens for Environmental Quality v. Volpe, 487 F.2d 849, 852 (C.A. 8, 1973).

Applying this standard to the present case, we submit that it would be unproductive and unreasonable to require the Secretary to file an EIS concerning the continuous operation of Glen Canyon Dam. The dam was completed before NEPA was enacted and is currently operated under specific statutory guidelines.[2/] Thus, at this late date, the range of practical alternatives still open to the Secretary is obviously limited.

---

2/ The Colorado River Basin Project Act of 1968, 82 Stat. 885, narrowly limits the Secretary's discretion to control water releases from Glen Canyon Dam. Section 602(a) of the Act, 43 U.S.C. sec. 1552, sets forth a list of priorities which must be incorporated in the Secretary's criteria regarding water storage and releases from Lake Powell. Under this system of priorities, the Glen Canyon Unit must be managed to (1) provide assurance that the United States can meet its Mexican treaty requirements; (2)

Similar consideration have made courts reluctant to require the preparation of an EIS where a project is completed and being used in the manner for which it was constructed. 3/ A case directly in point is Morris v. Tennessee Valley Authority, 345 F.Supp. 321 (N.D. Ala., 1972). In that case, the court found that TVA was not required to file an EIS concerning the

---

Footnote continue from previous page.

store and release waters so that the Upper Basin States can meet their Article III(c) commitment to the Lower Basin States under the Colorado River Compact; and (3) provide an equitable apportionment of waters in excess of those needed to fulfill priorities (1) and (2). Priority (3) waters "shall be released from Lake Powell: (i) to the extent it can be reasonably applied in the States of the Lower Division to the uses specified in Article III(e) of the Colorado River Compact, but no such releases shall be made when the active storage in Lake Powell is less than the active storage in Lake Mead, (ii) to maintain, as nearly as practicable, active storage in Lake Mead equal to the active storage in Lake Powell, and (iii) to avoid anticipated spills from Lake Powell." Section 602(a)(3), 43 U.S.C. sec. 1552(a)(3). NEPA does not absolve the Secretary from compliance with these provisions. See Section 105, 42 U.S.C. sec. 4335.

3/ Some courts have stated that an EIS is required primarily in situations where there is a significant change in the environmental "status-quo." Hanly v. Kleindienst, 471 F.2d 823, 830-831 (C.A. 2, 1972), cert. den., 412 U.S. 908; Maryland-National Cap. Pk. & Pl. Com'n v. U.S. Postal Serv., 487 F.2d 1029, 1036-1037. In the present case, there was no significant change in the environmental "status-quo" because the Glen Canyon Dam was being operated in a manner consistent with the purposes for which it was constructed and within specific statutory guidelines.

continuing operation of a dam completed before the passage of NEPA. Likewise, in Virginians for Dulles v. Volpe, 344 F.Supp. 573, 577-578 (E.D. Va., 1972), the court ruled that NEPA did not require the Secretary of Transportation to file an EIS concerning the continuous operation of Washington National Airport. 4/

In the same vein, courts have often declined to order the preparation of an EIS where an on-going project has reached such a stage of completion that it is clear the basic course

---

4/ Sierra v. Mason, 351 F.Supp. 419 (D.Conn., 1972), discussed in plaintiffs' brief at pages 15-16, does not stand for the proposition that an EIS is required for the continuing operation of completed facilities. In Mason, the court found that a proposal to dredge a harbor for the first time in 14 years and deposit a million tons of polluted materials into Long Island Sound was an independent project with a "life of its own." Similarly, nothing in the relevant CEQ guidelines, 40 C.F.R. sec. 1500.5, or Department of the Interior regulations, 36 Fed. Reg. 19344, compels the conclusion that the Secretary is required to file an EIS concerning the continual operation of Glen Canyon Dam.

The threshold decision whether or not to file an impact statement rests upon the agency. Congress was apparently willing to depend upon the agency's good faith determination as to what conduct would be sufficiently serious from an ecological standpoint to require use of the full-scale NEPA procedures. Hanly v. Mitchell, 460 F.2d 640, 644 (C.A. 2, 1972), cert. den., 409 U.S. 990; Hanly v. Kleindeinst, 471 F.2d 823, 830 (C.A. 2, 1972), cert. den., 412 U.S. 908.

of action cannot be meaningfully reassessed. As stated by the Fourth Circuit in Arlington Coalition on Transportation v. Volpe, 458 F.2d 1323, 1331 (1972), cert. den., 409 U.S. 1000:

> Doubtless Congress did not intend that all projects ongoing at the effective date of the Act be subject to the requirements of Section 102. At some state of progress, the costs of altering or abandoning the project could so definitely outweigh whatever benefits that might accrue therefrom that it might no longer be "possible" to change the project in accordance with Section 102. At some stage, federal action may be so 'complete" that applying the Act could be considered a "retroactive" application not intended by the Congress.

See also Greene County Planning Board v. Federal Power Com'n, 455 F.2d 412, 424 (C.A. 2, 1972), cert. den., 409 U.S. 849; Pennsylvania Environmental Council Inc. v. Bartlett, 454 F.2d 613, 623-624 (C.A. 3, 1971); Ragland v. Mueller, 460 F.2d 1196, 1198 (C.A. 5, 1972).

There are logical policy reasons for this general reluctance to require impact statements for completed projects. If an agency is required to file an EIS for one completed dam, it is difficult to explain why an EIS is not required for other completed dams. If an EIS is required for a completed dam, then

why not require an EIS for long-completed airports, military installations, and federal office buildings? It is easy to see that such an approach would rapidly distort NEPA beyond manageable proportions and also divert attention and manpower from other areas where a thorough environmental investigation would more likely have a substantial effect upon future conduct.

One additional factor which of course must be considered is the nature and extent of environmental injury alleged by the complainant. In the present case, the only specific environmental injury alleged by the plaintiffs was that the announced nine-week schedule of water releases of 6,000 to 8,000 c.f.s. during weekdays with weekend and night release possibly ranging down to 1,000 c.f.s. would render commercial float trip operations impossible or hazardous during those nine weeks.

The hearing on the preliminary injunction demonstrated that the situation was not really as severe as the complaint indicated. Mr. Mackay, plaintiffs' principal witness testified that he had been running the river below

Glen Canyon Dam each season since 1965 and that he successfully conducted commercial tours in spite of continually fluctuating power releases from the dam which often ranged down to 3,000 c.f.s. (Tr. 11, 20). Mr. Mackay further testified that periodic minimum releases of 1,000 c.f.s. would create timing difficulties in running certain rapids; however, he could not definitely say that such water releases would make the trip so hazardous or impractical as to justify suspension of the operations. In light of this inconclusive showing of significant environmental impact as balanced against the substantial task of preparing and filing an EIS for an already constructed dam, we believe the court below properly dismissed the action.

II

PLAINTIFFS' ALLEGED CONTRACTUAL RELATIONSHIP WITH THE UNITED STATES DOES NOT ENTITLE THEM TO INJUNCTIVE AND DECLARATORY RELIEF

Plaintiffs' allege that their National Park Service river touring permits create an implied contractual guarantee by the Secretary to continually maintain the flow of the Colorado River so as to allow them to conduct their commercial float trips without any interruption. Plaintiffs further state that this alleged implied provision may and should be specifically enforced against the Secretary.

It is clear that the requested relief would require affirmative action by the United States in its sovereign capacity. Consequently, under familiar principles of sovereign immunity, this suit must fail unless the plaintiffs can point to a specific statutory waiver allowing such suits to be brought against the United States and plaintiffs have not done so in this case. See Malone v. Bowdoin, 369 U.S. 643 (1962); Larson v. Domestic & Foreign Corp., 337 U.S. 682 (1949); Cotter Corporation v. Seaborg, 370 F.2d 686, 691-692 (C.A. 10, 1966).

Absent a specific statutory provision, the United States does not waive its sovereign immunity to suit for injunctive and declaratory relief when it enters into a contractual relationship with a private party. As this Court recently stated in National Helium Corporation v. Morton, 486 F.2d 995, 1000 (1973):

> We have fully considered the Supreme Court cases which prohibit injunctive relief against governmental officers on account of their upholding the rights of the government arising under a contract. Such a suit is distinguished by the Supreme Court from actions seeking compensations for an alleged wrong and are regarded as actions against the sovereign to which there has not been consent.

The rule prohibiting injunctive relief against the United States in contract cases is based on sound policy considerations. As the Supreme Court observed in Larson v. Domestic & Foreign Commerce Corporation, 337 U.S. 682 (1949) at 704:

> * * * it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract right.

Plaintiffs rely heavily upon Chapman v. El Paso Natural Gas Co., 204 F.2d 46 (C.A. D.C., 1953) as authority for the proposition that contracts may be specifically enforced against the United States. However, in Chapman the court merely stated that the Secretary could not refuse to perform the purely ministerial act of formally issuing a permit to a qualified applicant who refused to sign a subsequent stipulation incorporating certain permit conditions which the Secretary had no legal authority to impose. Thus, Chapman stands only for the familiar rule that courts may compel an officer to perform a ministerial act.

Consequently, the plaintiffs' alleged contractual relationship with the United States does not create any grounds for injunctive and declaratory relief against the federal defendants.

III

THIS APPEAL SHOULD BE DISMISSED AS MOOT

As this Court is aware, during the spring of 1973 certain federal officials were under an injunctive order issued by the District Court for the District of Utah which had the effect of requiring those officials to discharge large quantities of water from Lake Powell. Friends of the Earth v. Armstrong, 360 F.Supp. 165 (1973). After this Court vacated the injunctive order, the Secretary, as noted in the news release, reduced anticipated summer water releases in order to restore the powerhead and to comply with the long-term operating criteria issued pursuant to Section 602 of the Colorado River Basin Project Act, 43 U.S.C. sec. 1552. 5/

---

5/ The operating criteria are published at 35 Fed. Reg. 8951 (1970).

Hence, the reduced water releases during the summer of 1973 stemmed from a judicial order which was not anticipated by the defendants and which will not likely be repeated in the future. As indicated by the plaintiffs' witnesses, prior normal operations of Glen Canyon Dam have not caused any substantial impediment to float trips on the Colorado River (Tr. 14, 24-25). Because the record demonstrates that the reduced releases were contemplated only for the period beginning July 29, 1973, and ending September 30, 1973, and because past operations have demonstrated that such low water releases are unlikely to persist in the future under normal conditions, we believe it would be appropriate for this appeal to be dismissed as moot. See Brockington v. Rhodes, 396 U.S. 41 (1969); Hall v. Beals, 396 U.S. 45 (1969). Admittedly, there still remains the possibility that at a future date some federal officials may operate Glen Canyon Dam in a manner arguably in violation of NEPA. However, "* * * allegations that government officials may at some unknown future date fail to perform their duties under NEPA does not state a claim upon which relief can be granted." Jicarilla Apache Tribe of Indians v. Morton, 471 F.2d 1277, 1278 (C.A. 9, 1973).

## CONCLUSION

For the foregoing reasons, the decision of the district court should be affirmed.

Respectfully submitted,

WALLACE H. JOHNSON,
Assistant Attorney General.

C. NELSON DAY,
United States Attorney,
Salt Lake City, Utah 84101.

GEORGE R. HYDE,
ROBERT L. KLARQUIST,
Attorneys, Department of Justice,
Washington, D. C. 20530.

FEBRUARY 1974

APPENDIX

NATIONAL ENVIRONMENTAL POLICY ACT OF 1969, 83 STAT. 852

# TITLE I

## DECLARATION OF NATIONAL ENVIRONMENTAL POLICY

SEC. 101. (a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

SEC. 102. The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by title II of this Act.

SEC. 103. All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this Act and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes, and procedures set forth in this Act.

SEC. 104. Nothing in Section 102 or 103 shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

SEC. 105. The policies and goals set forth in this Act are supplementary to those set forth in existing authorizations of Federal agencies.

SEC. 602. (a) In order to comply with and carry out the provisions of the Colorado River Compact, the Upper Colorado River Basin Compact, and the Mexican Water Treaty, the Secretary shall propose criteria for the coordinated long-range operation of the reservoirs constructed and operated under the authority of the Colorado River Storage Project Act, the Boulder Canyon Project Act, and the Boulder Canyon Project Adjustment Act. To effect in part the purposes expressed in this paragraph, the criteria shall make provision for the storage of water in storage units of the Colorado River storage project and releases of water from Lake Powell in the following listed order of priority:

(1) releases to supply one-half the deficiency described in article III(c) of the Colorado River Compact, if any such deficiency exists and is chargeable to the States of the Upper Division, but in any event such releases, if any, shall not be required in any year that the Secretary makes the determination and issues the proclamation specified in section 202 of this Act;

(2) releases to comply with article III(d) of the Colorado River Compact, less such quantities of water delivered into the Colorado River below Lee Ferry to the credit of the States of the Upper Division from other sources; and

(3) storage of water not required for the releases specified in clauses (1) and (2) of this subsection to the extent that the Secretary, after consultation with the Upper Colorado River Commission and representatives of the three Lower Division States and taking into consideration all relevant factors (including, but not limited to, historic stream-flows, the most critical period of record, and probabilities of water supply), shall find this to be reasonably necessary to assure deliveries under clauses (1) and (2) without impairment of annual consumptive uses in the upper basin pursuant to the Colorado River Compact: *Provided*, That water not so required to be stored shall be released from Lake Powell: (i) to the extent it can be reasonably applied in the States of the Lower Division to the uses specified in article III(e) of the Colorado River Compact, but no such releases shall be made when the active storage in Lake Powell is less than the active storage in Lake Mead, (ii) to maintain, as nearly as practicable, active storage in Lake Mead equal to the active storage in Lake Powell, and (iii) to avoid anticipated spills from Lake Powell.

(b) Not later than January 1, 1970, the criteria proposed in accordance with the foregoing subsection (a) of this section shall be submitted to the Governors of the seven Colorado River Basin States and to such other parties and agencies as the Secretary may deem appropriate for their review and comment. After receipt of comments on the proposed criteria, but not later than July 1, 1970, the Secretary shall adopt appropriate criteria in accordance with this section and publish the same in the Federal Register. Beginning January 1, 1972, and yearly thereafter, the Secretary shall transmit to the Congress and to the Governors of the Colorado River Basin States a report describing the actual operation under the adopted criteria for the preceding compact water year and the projected operation for the current year. As a result of actual operating experience or unforeseen circumstances, the Secretary may thereafter modify the criteria to better achieve the purposes specified in subsection (a) of this section, but only after correspondence with the Governors of the seven Colorado River Basin States and appropriate consultation with such State representatives as each Governor may designate.

(c) Section 7 of the Colorado River Storage Project Act shall be administered in accordance with the foregoing criteria.