

**LIGHT ON THE MEXICAN WATER TREATY
FROM THE RATIFICATION PROCEEDINGS
IN MEXICO**

**A REPORT TO THE COLORADO RIVER
WATER USERS' ASSOCIATION**

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LIGHT ON THE MEXICAN WATER TREATY FROM THE RATIFICATION PROCEEDINGS IN MEXICO

(By Southworth Ely, Washington, D. C.)

INTRODUCTION

This report, prepared for the Colorado River Water Users' Association, deals with the ratification of the Mexican-United States Water Treaty by the Mexican Government, exhibits a comparison of the conflicting analyses and interpretations officially offered by the Mexican and American negotiators, to their respective Senates, all with particular reference to the Colorado River, and submits certain conclusions and recommendations.

The Mexican Water Treaty must be kept in proper perspective. It has been ratified by both Governments. It is the law of the land and presumably will remain so. From this point on it matters little whether we opposed or supported the ratification of the treaty. All of the Colorado Basin States now have a common interest in protecting the interests of the basin in the interpretation and administration of the treaty, with complete fairness to Mexico.

The treaty is both an international compact and a domestic statute. As a contract, it must and will be fully performed. It is a first mortgage on the waters of the Colorado River system. As a domestic statute, it operates in many ways that do not concern Mexico at all, or are of only incidental interest to her, in her own rendition of faithful and spirited administration.

The treaty, both as an international mortgage and a domestic statute, because of first-rank importance in the development of the comprehensive plan for the development of the Colorado River.

Comprehensive planning for the Colorado Basin's water utilization cannot safely proceed until the weight of this mortgage and the meaning of this domestic statute, collectively encompassing the treaty, are more definitely ascertained. If evidence of that necessity were needed, the ratification proceedings in Mexico, discussed in this report, amply provide it.

Anyone who examines the Mexican proceedings will come away with other respect for the caliber of the Mexican negotiators and what they believe they have accomplished for their country. This is not to say that the Mexican negotiators were right and ours were wrong, in reporting what the treaty accomplished, but, as the conflict in these pages shows, they could not both be right.

Whatever may be done toward clarifying the opposing interpretations of the treaty as a contract, it seems clear that the ascertaining of this document as a domestic statute, governing the operation of American works by American officials who remain subject to American

constitutional and statutory controls and processes, can properly be resolved by domestic legislation without injuring Mexico. Such legislation is, in fact, imperative.

I. SUMMARY OF THE PROCEEDINGS IN MEXICO

1. RELEASE OF TEXT OF TREATY IN MEXICO

On April 21, 1941, the Mexican Government for the first time released the text of the treaty, protocol, and American reservations to the Mexican public. This was 2 days after the *Signing Treaty* had appeared in full, with 11 reservations. Prior to that time, there had been considerable discussion of the treaty in the Mexican press, but no release of its terms. Explanatory statements by various officials were released along with the treaty text.

2. "HEARD TABLE" PROCEEDINGS

The Mexican Senate did not meet until September 1941. However, commencing July 21, 1941, the Commission on Foreign Relations of the Mexican Senate (there are two of these commissions) held a series of "heard table" hearings or discussions, which were reported quite fully in the Mexican press, including *El Nacional*, an official Government publication. These hearings were not, strictly speaking, proceedings of the Senate or of its committee, but were meetings of "interested Senators" under the auspices of the two commissions. Nevertheless, for reasons stated later, these proceedings hearings, and may properly be regarded as, part of the legislative history of the treaty in Mexico. They were concluded on September 11, 1941.

3. CHARACTER OF PROCEEDINGS

The proceedings in Mexico were conducted upon a high level of ability, both by the proponents and opponents of the treaty. A reading of them adds professional respect to that which those lawyers and engineers had already earned as shrewd negotiators on behalf of their country. Unfortunately, the text is not available in official form. While it was stated that a "memoria" containing the official Mexican proceedings would be printed, together with the stenographic transcript, this has not been done, so far as can be ascertained. The present report is based on newspaper accounts.

4. ISSUE OF CONSTITUTIONALITY UNDER MEXICAN LAW

Very serious doubts were expressed about the constitutionality of the treaty, because of the export prohibition in article 27 of the Mexican Constitution against alienation of either land or water under Mexican dominion, and the harsh admission of the Mexicans without that this treaty was an exchange of 372,000 acres in the Rio Grande for 1,540,000 acres in the Colorado. Some proponents of the treaty conceded that its ratification might require amendment of the Mexican Constitution.

2. EXCHANGE OF WATER OF THE COLORADO FOR THAT OF THE RIO GRANDE

Contrary to assurances given the American Senate that in negotiating the treaty each river was considered separately and did not represent a trade of Colorado River water given to Mexico at the expense of the Colorado River States, in exchange for water given Texas, the Mexican negotiators finally said that Mexico was getting water in her own right on the Colorado by paying for it with water of the Rio Grande (Carson, *Id.* *Supra*, August 2, 1941). They cited the Okouloff decision:

If you take care of me on the Colorado, I will take care of you on the Rio Grande, and vice versa (Karlson, *Id.*, August 2, 1941).

3. INTERPRETATION OF THE MEXICAN RESERVATIONS

The wording of the American reservations was not considered by the Mexican witnesses to be very clear, but the proponents of the treaty said that it would be better to clarify them by an exchange of notes than by Mexican reservations, which would have to go back to the American Senate, where the treaty would not find as favorable a climate as that which had prevailed when the treaty was ratified.

4. DISCUSSION OF SUBSIDIARY AGREEMENTS

It was stated in the Mexican hearings that the present treaty had been proposed by Mexico, not by the United States, in early 1941, in very much the same form as that in which it was finally signed (Karlson, *Id.*, August 4, 1941), and that the text of the present treaty had been agreed upon in Spanish, then translated into English (Hastings de Alva, *Id.* *Supra*, September 6, 1941). Between March 20, 1942, and February 18, 1943, Mexico sent four notes defining the problems to be solved (Karlson, *Id.*, August 4, 1941). At one stage of the negotiations, Mexico demanded 2,000,000 acre-feet of Colorado River water, but offered to pay for the regulatory works in quantities of water instead of money (id.).

5. DISCUSSION OF CERTIFICATES

The Mexican testimony was that the treaty negotiations were precipitated in 1940 by a drought on the Rio Grande. Mexico and the United States were said to have exchanged notes during this period at the rate of one every 20 days. It was stated that the Mexicans brought to the treaty negotiations by Governmental authorization, but the authorization demanded apparently related to the Rio Grande (Karlson, *Id.*, August 4, 1941).

All this diplomatic background should be published, together with the minutes of the negotiations themselves.

6. THE QUESTION OF "WATTS OF THE RIVER"

The official argument for the treaty in Mexico was based on the doctrine of the *course of the river*; namely, that the seven American States of the Colorado River Basin, in the Colorado River compact, had abandoned the doctrine of priority of use, or an apportionment

based on the contribution of water by each State to the river, and had constituted a doctrine of equitable apportionment. It was said that a principle which is right and proper for the entire American States ought to apply to the Mexican States of Sonora and Territory of Lower California. The argument is involved, if not expressed, that the treaty is founded upon the Santa Fe compact. *Ing. Oliver Allen* (S. Doc. 98, p. 10) says that Mexico's 1,500,000 acre-feet is included in the difference between the 15,000,000 acre-feet allocated by the compact and the 17,500,000 acre-feet which he says comprised the entire flow of the stream. This reserve, that the Mexican reservation, although guaranteed, is a part of the surplus or excess of the flow over and above the compact allocations may have considerable importance.

III. COMMITTEE REPORT

On September 27, 1943, the two committees submitted a formal report to the Mexican Senate, reading and discussing the arguments presented in the round-table proceedings, and recommending ratification of the treaty. On the same day this report was approved the transcript of the round-table proceedings was ordered printed in the *Diario de los Debates* (the Mexican equivalent of the Congressional Record), and a draft of decree promulgating the treaty was approved by the Senate. (The *Diario*, however, has not been published since 1942.) The Mexican President signed the instrument of ratification October 14 and exchange of ratifications was ordered. (Note below the interesting omission in the Mexican resolution of ratification.)

IV. FORM OF THE MEXICAN RATIFICATION

The resolution of the Mexican Senate on September 27, 1943, which approved the treaty, specifically accepted the American reservations, except that, as to the American reservations (a), (b), and (c), the Mexican resolution of ratification says:

The Mexican Senate refrains from considering, because it is not competent to pass judgment upon them, the provisions which relate exclusively to the internal legislation of the United States and the United States of America and by its own authorization, and which are included in the understandings on faith under the same (a) to its first part, due to the said preceding the words, "It is understood" and under the letters (b) and (c). (See Treaty Series 594, p. 50.)

The rather interesting restriction as placed on reservation (a) results in creating any agreement by Mexico that the works to be built by the United States are only the eight projects named in reservation (a). The other two reservations digested out, (b) subject American officers to American statutory controls and provisions, and also or control the distribution of water to users within the territorial limits of the United States.

In short, Mexico says she doesn't have to agree to these reservations because they are none of her business, but whether they are her business or not, the fact remains that she has not agreed to them and is not bound by them. The American resolution of ratification insisted that—

these understandings will be mentioned in the ratification of this treaty as necessary to the true meaning of the treaty, and will in effect form a part of the treaty.

The Mexican resolution specifically makes a point of "failing to mention" (*dejar puros estos*)¹ some of these understandings. Retifications were nevertheless exchanged between the two nations November 8, 1943, as noted below.

II. EXCHANGE OF RETIFICATIONS

The exchange of retifications between the two Governments in Washington, November 8, 1943, was witnessed by signatures of a supplementary protocol, and the treaty entered into force on that date. President Franco signed a proclamation to that effect on November 27, 1943.

III. FACT DIFFERENCES DISCLOSED

The Mexican proceedings reveal differences from the account given the American Senate by the American proponents of this treaty with respect to the Colorado River, in three broad categories:

First, As to the assumptions, legal and engineering, on which the treaty was based.

Second, In the interpretation of the document signed.

Third, As to factors on which the treaty is based.

These differences, so deep in some instances as to indicate that there was no real meeting of the minds on some of the basic factors of the treaty, insofar as the Colorado is concerned, are discussed below.

II. CONFLICTING ASSUMPTIONS UPON WHICH THE TREATY WAS BASED

The argument in both countries raised the following questions, and drew the following official answers:

1. AS TO THE IRRIGABLE AREA IN MEXICO

The assumptions of the American negotiators.—Mr. Lawrence, Assistant Secretary of the Boundary and Water Commission, and one of the negotiators, testified (hearings, pp. 3, pp. 37-38):

" . . . In the Mexican Valley, also, there is opportunity for great irrigation by the Colorado. Estimates of the amount of Mexican irrigable land from the Colorado River vary from 400,000 to 1,000,000 acres.

Part 3, page 84

The Commission. If I understand you correctly, you mean that under present conditions the water has been released by the river, and it goes down into Mexico, and without any control it is appropriated to irrigating the irrigable territory there, and that if the treaty gave that effect the water be limited to 1,000,000 acres in the future, and if not the small amount to develop and increase the savings over a larger territory and have a basis for the future to establish that the best irrigated water ought to go to you, and that that would be embarrassing to the United States. Is that what you're talking about?

Mr. Lawrence, Assistant Secretary. If they are going, as we can assume they are, if they are irrigating water something like 100,000 acres, then why, with that water supply being furnished, should they doubt that there's that amount, because they have about 500,000 acres of irrigable land in that valley. The water supply is not available for their use. The treaty leaves them to use what they have and use any, however.

¹ See pp. 14-15.

The assumptions of the Mexican negotiators.—Now for one of the Mexican negotiators, Ing. Adolfo Ortiz Alva, Chairman of the National Irrigation Commission, corresponding to our Commissioner of Reclamation with the difference that our Commissioner Backus testified that he was not consulted until after the treaty was signed. Ing. Ortiz Alva said, in a formal statement printed August 3, 1945:

Now, later, before assuming the treaty a precise estimate was made of the use area in Mexican territory available under water from the Colorado River under reasonably favorable conditions. Accordingly, this estimate found that there was an area of potential irrigable land of 1,041,000 acres, appearing in a given area of irrigable features. The gross area of 1,041,000 becomes 775,000 acres, it was then that estimate is arrived at by not counting during the 1940 national censuses of 1929 in which we referred to the beginning of this report. The difference between these two estimates is that in the latter, some areas, considered in the estimate of 1929, are considered as being useless for agricultural operations due to the large amount of water that the lands require. For example, the lack of the Laguna Salada and the lands adjacent to the Gulf of California. These two also illustrated some other areas of such extent making them being irrigable would be required. (Quoted supplied.)

Comparison of the American and Mexican assumptions as to irrigable acreage.—From the foregoing official testimony, it is clear that the American negotiators were completely misinformed as to the area of irrigable land in Mexico. The Americans thought Mexico had at least 800,000 acres; the Mexicans knew that their net irrigable area was 491,000 acres. This discrepancy as to potential use should be borne in mind in considering the text and other misunderstanding as to just use.

4. AS TO THE LAND AND WATER ALREADY PUT TO THE USE OF THE

The assumptions of the American negotiators.—Mr. Lowry, one of the State Department witnesses, said succinctly what most of his associates said in more detail (hearings, pt. 1, pp. 20, 202):

Let me make one more statement, please. Mexico's use is, every year, that approximately 1,000,000 acres have already, and that is increasing. . . . Another thing I want to point out about this deal is that as the Canal States require it will be almost under this treaty to cut into the supply now being used by Mexico in the extent of 100,000 acre-feet, cutting Mexico back to 1,000,000 acre-feet. That is the ultimate fact. (Quoted supplied.)

The Foreign Relations Committee of the United States Senate accepted these representations. Its report (H. Rep. 3, 79th Cong., 1st sess., February 24, 1945) said (p. 1):

Mexico, on the other hand, is not using approximately 1,000,000 acre-feet a year, and in the meantime some 1,000,000 or 1,200,000 acre-feet of water flows through Mexican territory and wastes unused into the Gulf of California. The testimony is that in only a few years hence before this water can all be put to beneficial use by the United States. . . . That when that time arrives, present Mexican use must be curtailed. Thus, by placing first of all this water, approximately before present Mexican demands, upon the obligation of the United States to supply Colorado River water to Mexico, the treaty provides needed assistance to American agriculture and commerce in planning future development.

The assumptions of the Mexican negotiators.—But Ing. Adolfo Ortiz Alva, whom we have previously introduced, reporting to the Mexican Senate, compared the amount of water Mexico was previously using and the amount she would use under the treaty as follows:

By means of the treaty the actually beneficial condition of the crops of 120,000 hectares (298,000 acres) known at present to irrigated crops have 2.1 feet—1,211,013 acre-feet present annual use; see explanation below.

The treaty promise of returning the indicated area to the head of the river can be achieved consistently, that is, to 200,000 net hectares (500,000 acres). (Graphs, and comments in parentheses, added.)

As to future work, let us go in more detail.

One item for the resolution of the net 200,000 hectares (500,000 acres), in accordance with the coefficient of irrigation *fixed* at an average near the requirement of agricultural work in the Mexican Valley (3.75 hectares or 9.1 acres), a surplus of 1,000,000,000 cubic meters (2,700,000 acre-feet) would be needed.

The volume was to be obtained, 1910, the amount guaranteed by the treaty of 1,600,000,000 cubic meters (4,300,000 acre-feet), in the minimum years or 2,000,000,000 (5,700,000 acre-feet) in the majority of the years plus the waste that is pumped down wells—waste as those running on the tapirs—waste will more than supply the difference between the quantity required and the quantity guaranteed by the treaty.

If the coefficient of irrigation in Mexican Valley should be increased steadily, it will be necessary to make a greater use of the abundant American water which enters in the valley of Mexican Valley. If, on the contrary, as we have, by a greater transference of use between the coefficient of irrigation themselves, it will be possible to provide to increase the value of the 200,000 net hectares (500,000 acres) existing with the volume guaranteed by the treaty. (Graphs are required.)

Comparison of the American and Mexican assumptions as to land and water already put to use in Mexico:—It is a very plain that the American negotiators, for some reason, were convinced that Mexico was already using 1,800,000 acre-feet of water from the river, and that this use was increasing; hence that a limitation of 1,200,000 acre-feet was a good bargain. But the Mexicans knew that they were using not over 1,210,000 acre-feet, that they were irrigating only 200,000 acres; that the treaty meant an increase in irrigated area to 400,000 acres, an increase of 60 percent, instead of a decrease as claimed by the American negotiators; and that the treaty, moreover, would bring a like increase in the quantity of water used, from 1,210,000 acre-feet to at least 1,800,000, and not a decrease of 200,000 acre-feet as claimed. With constant juggling, the Mexicans stated their expectations of reaching over 1,000,000 acre-feet, compared with 1,210,000 acre-feet produced by all methods, including pumping, prior to the treaty.

These comparisons are the background for the next and critically most basic of the conflicting assumptions which guided the two sets negotiators.

2. INDEMNITY OF WATER WHICH MEXICO COULD PAY TO THE UNITED STATES

Now we get into three or four related hypotheses such as: First, how much water as abstraction tolls could reach Mexico; second, whether she could get along without storage and offstream works on American soil; and, third, whether as abstraction costs would cover her the cost of those American works. The reports on these points given by the two sets of officials to their respective foreign offices are as follows.

The assumptions of the American negotiators.—The Under Secretary of State, Hon. Dean Johnson, testified as follows (hearings, pt. A, p. 176):

SENATOR DOWNEY. All right, Mr. Secretary. Let us first take up another subject.

THE SECRETARY. That statement is a little misunderstanding, which I will read to you. It is really that of Mr. Dean Johnson.

SENATOR DOWNEY. There is nothing to stop Mexico's using more and more of this water as time goes on.

Are you sure that we could not, by the use of our dams and reservoirs in the United States, prevent Mexico from using that water?

Mr. ARNOLD. I am not engineering expert. The facts of the matter, as I understand them, are that it will take somewhere in the neighborhood of 20 to 25 years to divert the Colorado River before all those waters will be put to use. Whether they can be directed to the Pacific (subject to the Mississippi) is not known, of course.

SENATOR HAWLEY. Mr. Secretary, is it not the fact of your own argument here, and that of the State Department, that the main difficulty is to determine in time there is a great volume of water going down to Mexico that we cannot prevent from going for irrigation, and by using it our lands are completely watered, thus rendering our claim?

Mr. ARNOLD. That is the statement that I made.

Mr. TAYLOR, one of the American negotiators, testified (hearings, pt. 3, p. 1015):

SENATOR HAWLEY. You take the position, I understand, that without any treaty you feel that the rights of the users of water in the United States would be protected?

Mr. TAYLOR. Very definitely we can do.

SENATOR HAWLEY. And you have that primarily upon the idea that Mexican irrigation rights build up a use that would be a basis for an equitable claim against the water supply of the Colorado River in the future?

Mr. TAYLOR. Definitely; with one qualification. Not "unless," but "unless" build up something. There is no question in my mind, as to that.

SENATOR HAWLEY. That would depend upon whether or not the waters of the Colorado were made available for Mexico, would it not?

Mr. TAYLOR. No. The water is being made available immediately by the operation of works in the United States. Mexico can divert and use that water without the use of United States facilities, which I shall subsequently show.

SENATOR HAWLEY. Without the use of dams?

Mr. TAYLOR. Yes, sir.

At another point, Mr. Taylor testified in the testimony of the treaty committee, as follows (hearings, pt. 3, p. 1015):

" * * * It is entirely feasible and practicable at this time for Mexico to build a great bank leading to Mexican territory, just below the upper boundary line only a few hundred yards below the present Mexican territory, and from such banking to begin to divert all of the lands now supplied from the downstream boundary in the United States and for operation of the canal system, to begin practically all the lands in the Colorado Valley on both sides of the river. As the present flow, notwithstanding certain small dams for pumping from the States (and, really, pumping would have to be continued with the big old Mexican bank), and certain other small dams would have to be required for pumping other than the main system or dams from the river as in the present position.

The above is on the point that Mexico can divert from the lower Colorado River to her own territory water in sufficient quantity to irrigate a much larger area than now irrigated by her (about 1,500,000 and 1,000,000 acres the water now has now discharged through a cut in the river bank, and there that that water goes, instead from overflowing down banks for an extensive system of levees.

With the large surplus discharge of water from the lower Colorado in the lower Colorado River most systems to be available to Mexico for many years in the future. Mexico's interests and use is certainly not harmed.

Again (pt. 4, p. 1342):

" 13. If the treaty were ratified it appears probable that Mexico will continue to increase her use, with a possibility that she may provide a greater diversion immediately below the upper boundary without a dam across the river, and that after her use have substantially increased she will ask that the question be submitted under the Pan-American Republic Arbitration Treaty. If the only source were utilized, the source of the arbitration would still be more favorable to the United States interests, including those of California, than are the terms of the treaty. Not only would the quantity of water be increased, but the question of quality, both with respect to salt and silts, could be solved by Mexico. It is believed that these questions are solved by the treaty.

In short, the American treaty proponents thought that the United States had to have a Colorado River treaty, but that Mexico did not, and we were fortunate in obtaining this one. Now let us see what the Mexican legislators told their Senate on the same subject.

The newspapers of the Mexican legislators.—*Don Fernando Man-
dreyer*, Mexican member of the International Boundary and Water Commission, and opposite member of our life, however, issued a pre-
pared statement answering a critic of the treaty, saying:

"Of the negotiators *Lic. Manuella del Campo* was the only one who did not limit himself to showing that Mexico has no legitimate rights in the waters of the Colorado River in favor of which we are endeavoring to agree with her, but went further to fix a quantity of this right in the annual volume of 2,000,000 imperial (7,539,822 cubic meter) waters."

"It is true that in *Lic. Manuella del Campo* that the volume of Colorado River water assigned to Mexico by the treaty, and which as a minimum is 1,600,000 imperial cubic meters per year, has great value for our country, that since which he submitted, the National Irrigation Commission, at my request, had prepared a plan to which *Lic. Manuella* adhered fully. But due to the difference of time, it was not possible for me to explain. In this I have shown, the several discharges (waters) from this stream in the form in which the same are still being treated by simply not using by each of the beneficiaries water contributed in American territory and not using. This graph shows clearly that in the summer time in which the flows would come, Mexico, instead of receiving benefits, would experience serious damage; so it is that when the water was available, it would demand an excessive flow, which would destroy crops, and on other occasions in the months of the greatest scarcity and the greatest necessity, the channel would be dry."

"I repeat, the waters that Mexico will receive in accordance with the treaty will be well compensated by the American works, and of the agreeable character that negotiation with the treaty. There is no reason why it is established in the treaty, approved by means of which the Mexican section of the International Boundary and Water Commission will receive such data in addition to the American section of the same Commission, namely, before the delivery of the water which our lands are going to need for the following year; and, what is more, there is a clear notice that these lands can be watered 20 years, plus or minus, in case in addition, in Mexico, that the farmers that had been made are not used."

In the same point to which I referred to in showing clearly that even supposing that not a single drop of water of the Colorado River were assigned to American territory, the negotiators in which the drainage would serve its own country, would not permit any important work of land to be irrigated. That is to say, supposing that there is assigned no amount the permission to which *Lic. Manuella del Campo* serves, not only would it be unable to increase our irrigation system on the Colorado River in lower California and Arizona up to maximum capacity in several places, as we are going to develop the treaty water and other, but probably the area already irrigated would have to be reduced considerably."

"I wish the above statements as a Mexican, as a public official, minister of my day, knowing full that good fortune in our lives had the same 25 years of my life in the study of this problem to have the honor to sign the treaty of February 3, 1911, together with *Lic. Francisco Cuatrecasas*, present Secretary of Foreign Affairs, a treaty which in my opinion, constitutes a great example of what peacefully negotiation can do when, with all good will and understanding, they sit down at the conference table to solve their problems. The Treaty signed is a satisfactory and equitable form the problem that constitutes the two Governments as there is international river" (El Nacional, September 25, 1910). (Emphasis supplied.)

Lic. Francisco Ballester, an important Mexican authority on international law, who participated in the negotiation, testified:

"6. It appears, the treaty not only is necessary, but is indispensable to us. The United States of America can get along without it, and even to avoid it. However, the favorable result of a judgment of arbitration that Mexico might win would not give to the end and not be as good as they obtained through this international instrument."

"7. If the treaty were not ratified, it would be almost impossible to hope that for many years we would be able to increase our crops, and in this the matter of time has always been a factor in us" (El Nacional, August 2, 1910). (Emphasis supplied.)

At another point, *Luz Estigarribia* was reported by the official newspaper of the Mexican Government as follows:

A judgment in substance, said Estigarribia, on treating the matter of the agreement, would not give to Mexico the advantages that the situation with the United States would afford. The advantage only lay in having to discuss what quantity of water would belong to Mexico and to the United States, respectively. What would be left to be discussed would be water rights to be held in the United States portion of the river, with the object of obtaining a better use of the flow. Estigarribia stated the opinion that generally such claims in the Colorado River would be considered by Mexico as being greater than that which the present treaty assigns to her, but that Mexico would have to be prepared to accept with regard to her ownership of the river. Mexico could not pretend to any existing compensation of any sort, the treaty gives no compensation and regulations made in the United States. Consequently, if our country did not agree before it would involve us in the matter of two stages of the river, but should according to the nature of the river, and therefore to the extent which is what water is made more valuable for irrigation, its position would be much less than that which it can have available in accordance with the treaty, which purpose is to demand the water in greater quantity, according to its ownership in the quantity of greater consumption (El Nacional, August 7, 1942, fragment supplied).

The same official newspaper reports the following exchange between the chairman of the committee, *Luz Garcia de Alva*, and one of the opponents, *Luz Manzanera del Campo* (El Nacional, September 15, 1942):

Senor Luz Garcia de Alva, presiding, referred the matter of investigation to *senor Luz Manzanera del Campo*: Which will be most beneficial to Mexico, to receive 2,000,000 acre-feet of water, (unutilized) (unused) water, or to have 1,000,000 acre-feet of regulated (unutilized) water, as the latter when they are necessary, such as during the months of low water in the year? *Manzanera del Campo* responded categorically that it was obvious that he would prefer the unutilized water.

Before leaving this point of who needed the treaty, Mexico or the United States, let us turn again to the informative report of *Ing. Ortiz Alva*.

After referring to the construction of Boulder Dam and the All-American canal, *Ortiz Alva* states (p. 12):

We Mexicans emphasize, wherever we find them, again and again, the following essential conditions that there are essential to the United States for Mexico in which the lands of the Colorado Valley are the object of retaining to their condition of one of the most important sources to the world through lack of water, since our country would have to depend on taking water, in the manner that I could best be able to do it, from the Colorado River by using mechanical methods for giving flow through our river.

In 1917 the All-American canal project had operation (p. 13), it was an urgent necessity to carry the water of the Colorado River through Mexican territory to water the irrigable American lands and therefore it was not possible for Mexico to take part of the 50 percent of the water in the All-American Canal to supply it and the rights, and this need was also absorbed by the extensive service of Mexico, which already had in operation that year more than 125,000 hectares (300,000 acres) in Mexican Valley.

The situation he had described as being well handled was not far from being that year, during which of the former water, there came from the same American dams constructed on the Colorado River only a small volume which did not permit of filling the requirements of irrigation in Mexico. And while this was the cause of the public indignation, the great anxiety, and solicitude of our Colorado River Irrigation District, who was (even though) not the best of water. And there is every reason to see in the end of the matter, there came from Boulder Dam a great flow of water which was sufficient to the use, maintaining excellent conditions and filling the needs of other thousands of hectares.

That is, even when it is that part of the total volume of the material which has through the Colorado River will still be very great to many times the demand is from now on in irrigation that it can be supplied, while during some weeks the

Mexican lands of the Mexican Valley can be doing at present, in the following water they may be divided and controlled by the institutions provided by the *Organismo para el Desarrollo Rural*.

Under these conditions the agreement of the Mexican Valley is a temporary situation. As under the terms of the treaty, it has been necessary for the Mexican Government, in the years 1913 and 1914 and the present year, to constantly request aid of the American Government and the knowledge to have that aid, the American may be demanded, and part of the water is furnished through the *Organismo para el Desarrollo Rural*.

The critical situation makes that the agreement in the system of water of the Mexican Valley is not a permanent one. It is necessary to be prepared in the case of the Colorado River and that the treaty was not signed, as it could always take the abundant water which previously found in the Colorado River. No doubt that, effectively, in the case of the Colorado River as in the case of the Mexican Valley, the water of the Colorado River will remain for purposes which will lead to the lack of water and that these institutions cannot be used to improve the water in the Colorado River. The only solution for using water will be to improve them by a system that will increase the water that at the beginning of this operation, we said that in Mexico there is not the sufficient possibility of storing the water in the Colorado River, a possibility which exists for the water in the Colorado River in the Colorado River.

For this and using other means to solve the problem of the Mexican Valley in the present water they have been examined that there was no other solution than that which is being given which guarantees water from the Colorado River for the irrigation of the river.

The treaty which is under consideration contains this problem (Mexico, *Organismo para el Desarrollo Rural*, August 1, 1914, U. S. Senate Doc. No. 58, 75th Cong., pp. 14, 15).

At another point this Mexican authority, having told of Mexico's "disastrous condition" without a treaty, painted the following encouraging picture of her happy situation under the treaty (El Universal, August 1, 1914, U. S. Senate Doc. No. 58, 75th Cong., pp. 14, 15):

It is necessary to say that as Mexico did not have any power to regulate the waters of the Colorado River in order to distribute them for her use, during the war, according to the needs of irrigation. It was necessary to arrange by means of the treaty for the United States to deliver the water to us in regular flows, which would permit Mexicans to do what we had to do in our own plan of irrigation and to follow in the Mexican Valley. For the waters of irrigation of that water, our country had not been in a position to do so. Besides this, on account of the geographical conditions of the lands to be irrigated on both banks of the Colorado River, it was necessary to arrange that the water of the Colorado River be delivered to us in such degree by Mexico, according to the needs of the lands to be irrigated on these different points:

1. In First Point, in order to irrigate the high lands which are found adjacent to the Colorado River on its right bank.
2. In the Lake Mead, in order to irrigate the high lands which are found on the left bank of the Colorado River.
3. In the Colorado River, in order that by means of the construction of an international dam at the site where Mexico must draw in the rest of the lands on both banks of the river can be irrigated.

Mexico was not the possibility, if it was desired, of obtaining construction by America of a great work which would give water of the Colorado River from a different place than the present one, the water of the river flowing the lands of Mexico.

There are the advantages obtained by the treaty which would be irrigated in a second place, for which we will mention the fundamental consequence because if it were not for these we could not be able to see the second reason that the treaty is signed in Mexico. (Emphasis supplied.)

CONCLUSION

So much for the assumptions upon which the treaty was based. The two sets of language make it very clear that one group of negotiators on the other was totally mistaken.

First. As to the irrigable acreage in Mexico.

Second. As to the land and water already put to use in Mexico.

Third. As to the amount of water Mexico could get to use without a treaty: is there on the whole basic question as to who needed a treaty, the United States or Mexico.

III. CONFLICTING INTERPRETATIONS

Let us turn now to the second class of differences disclosed by the Mexican hearings, namely, the conflicting interpretations placed by the two sets of negotiators upon the language they agreed upon in the treaty itself.

It is clear that there was no meeting of the minds at all upon several points:

First. As to the quality of the water which the United States guaranteed to deliver.

Second. As to the operation of the extraordinary drought clause.

Third. As to several important factors upon which the treaty is silent. Thus (a) the circumstances which would entitle Mexico to 1,700,000 acre-feet instead of 1,500,000, and (b) as to Mexico's right to discharge as much return flow as she pleases into the closed basin of Salton Sea, thereby drowning out American farm lands in Imperial Valley.

To take these up in order:

II. CONFLICTING INTERPRETATIONS AS TO QUALITY OF WATER TO BE DELIVERED TO MEXICO

The American interpretation.—Mr. Tipton, one of the American negotiators, testified as categorically and unequivocally as to the intent of the negotiators that it is difficult not to believe he spoke accurately. His testified hearings, pt. 1, p. 777:

SENATOR DUNN. Mr. Tipton, is there any statement in the treaty as to the quality of water that must be delivered by the United States to Mexico?

Mr. Tipton. We are concerned for quality, sir.

SENATOR DUNN. That is, you would mean by that statement that we would guarantee the purity of our stream, with Mexico by delivering to her water that would not be salty?

Mr. Tipton. Yes, sir.

SENATOR DUNN. And you think that water used in the future would exceed that kind of interpretation, that we could deliver it as salty as we put our obligation to Mexico under this treaty of delivering 1,500,000 acre-feet of water, even though some or all of it were not suitable for irrigation purposes?

Mr. Tipton. That is my interpretation of the treaty, sir. During the negotiations that question was raised thoroughly. Nevertheless passed here and forth during negotiations without what the intent was. Language was passed in the treaty in favor that intention and in favor only that intention. [Emphasis supplied.]

Part I, page 128.

SENATOR DUNN. Was your one of the negotiating captains of the Executive Commission?

Mr. Tipton. Yes, sir, I am, sir.

SENATOR DUNN. I understand you to say that in your opinion there is no guarantee to be made from the treaty that the water delivered to Mexico shall be of such quality that it will be suitable for irrigation?

Mr. Tipton. That is correct, sir.

SENATOR DUNN. I think you also stated that you based that opinion, in part, at least, on correspondence and exchange of data between the two Governments leading up to the treaty?

Mr. Tipton. That is correct, sir.

Senator Hawley. Mr. Chairman, I would like to request at this time that the statement require the State Department to make available to the committee the exchange of all documents or communications tending to show any intention by the Government of Mexico that in the interpretation of this treaty she would not rely upon the fact that she was obliged to pass it as a quality that would be useful.

The Chairman. I will consult with the Department. I do not mean to stop the proceedings at this moment in doing.

Senator Hawley. This is a point of extreme great importance to me. Would it be dangerous to consider that it is a proper request?

The Chairman. The Chair will consult with the State Department. We have not time to be explained about what he is going to do. The witness has gone over the subject of the treaty several times already. Proceed.

Part 2, page 341

Senator Hawley. Referring to the question of any implied guaranty in the treaty that water shall be of sufficient quality to be available for irrigation, I require that you forward your opinion clearly from the language of the treaty itself, without regard to those interpretations and exchanges between the two Governments to that you have spoken of. Would you tell us of the opinion that from the language of the treaty itself a court or an international arbitrating tribunal would not hold that Mexico was obliged to water that was for the irrigation purposes?

Mr. Tamm. That is not a qualified opinion, Senator, because the language of the treaty itself from those interpretations that you mention, and the language of the treaty that just in plain as it can possibly be under it, and to me unqualified opinion the language of the treaty is such that Mexico would not suit for more water than 1,200,000 gallons for any purpose whatsoever.

Senator Hawley. You do not think that you adding those crops words, "regardless of quality," would have made it very plain?

Mr. Tamm. The language of the treaty is perfectly plain.

Senator Hawley. Now, Mr. Tamm, you say that if the treaty had included the expression, "regardless of quality," that might perhaps have prevented the Mexican Senate from ratifying the treaty?

Mr. Tamm. The men in the Mexican Senate are not so ignorant and so stupid as the men in this room who repeated the treaty. These men repeated the treaty understood fully what they were doing. They understood fully what the Senate might be ultimately, while those in the Senate might not be concerned with the question. The language in the treaty is plain and it means one thing, and one thing only, and the men who repeated that treaty for Mexico understood it. Their men in Mexico know what the quality ought to make of those conditions. In other words, there was no doubt as to the part of the United States negotiators to work out something that was bad for Mexico, and Mexico's negotiators, on the other hand, knew plainly what they were doing, and the language was agreed to with the purpose in mind, and they understood it. [Laughter supplied.]

Part 2, p. 342, 343 (continued).

Senator Hawley. I understood you this morning to say that there had been memoranda signed by both Governments.

Mr. Tamm. I did not want to convey that impression. I meant that there were memoranda exchanged from the American negotiators to the Mexican regarding an indication plainly that the intent of the American negotiators was, and there this not only was there was no doubt. As a result of that the American demands were accepted and there was written into the treaty the general language which is supposed to cover the situation. Whether it does or whether it does not is a question of interpretation of language and a question of legal interpretation of language. But the language is there in writing as before, and I think that the intent was to make the treaty the part of the United States.

Senator Hawley. On the part of the United States?

Mr. Tamm. On the part of the Mexican negotiators.

Senator Hawley. Is the intent on the part of the Mexican negotiators expressed in writing?

Mr. Tamm. I do not know whether I am troubling you that is more the negotiators, whether it was in writing or not, it was understood. [Laughter supplied.]

The Mexican Interpretation.—But now let us listen to the Mexican negotiators, repeating to their Senate on the question of quality of water.

Ing. Ortiz Alba, chairman of the National Irrigation Commission, testified:

With respect to the possibility that the waters of the Colorado River which are delivered to us may be of poor quality, because they originate in the mountains far from cities, I want to affirm, based on reports of local and technical nature, that there exists only a danger that is not serious. In the official report to the Senate that the National Irrigation Commission is transmitting, this danger will be mentioned more fully, in order to discuss it with any details that may be found in this regard. It is not within the purpose and the time set for this report to do it so fully as is necessary, but we may point out at least the following reasons:

1st. The negotiation of the treaty on the part of the American delegation and later its approval by the American Senate were made by taking into consideration facts that of our knowledge include the fact that according to a 1911-1912 investigation of the American Institute of Governmental Statistics, from 1892, the main waters of the Colorado River among the American States of the upper and lower basins, and according to the various studies by the United States to learn from the census which the average cubic volume of the river (22,000,000,000 cubic meters; 17,000,000,000 gallons) had lost the volume considered giving the American States of the upper and lower basins (20,000,000,000 cubic meters; 15,000,000,000 gallons). Our knowledge of 1,000,000,000 cubic meters (7,500,000,000 gallons) is included, then, within the 2,000,000,000 gal. or meters (1,500,000,000 gallons) of the difference. The origin of the Colorado River is of good quality. Besides this, even in a profound study of the quality of water from the introduction in the tributary waters with 1910-1912 investigations, it can be compared with the fact that "due to the influence of such conditions in the advantage of these waters in their use and consumption," it is "in order to obtain the best results in our irrigation system." This is a paragraph borrowed from the preface. In article II of the secondary articles it is clearly stated that the use to which these waters are to be put is that of irrigation. Therefore, in this treaty, in its own sense of the word, it is understood that the water is not to be used for drinking. Moreover, the right to have the water that is conveyed to it from the Colorado River passed entirely from the origin waters of the river, and knowing that this is physically impossible because for any use of water drawn from any water body, natural or not, the Colorado River, we consider that no objection is necessary when water has come to the other American waters of the lower portion of the Colorado River, so long as they are of good quality for irrigation. (Emphasis supplied.)

One of the critics of the treaty in Mexico, Lic. Eusebio Ortega, president of the Academy of Jurisprudence and Legislation, offered several observations. Reservation No. 1 read as follows:

The United States undertakes that the waters delivered to Mexico from the Colorado River shall satisfy, as to chemical composition, the hygienic standards required for agricultural use, so that the lands which receive them may use them (Reserva, August 5, 1912).

Referring to this demand for a reservation, Ing. Ortiz Alba said:

That was inserted in the treaty when it spoke of waters for irrigation. As we could be able to give a drink to give to some extent of that quality because both parties would suffer damage therefore (Ortega, August 20, 1912).

Lic. Eusebio Ortega, the eminent international lawyer, said, with respect to this reservation as quality of water, that he pointed it out that the treaty was clearly that they want the waters useful for agriculture (El Nacional, August 11, 1912).

The reservation was never voted upon.

IN CONCLUDING INTERPRETING AS TO THE QUESTION OF THE "EXTERMINATING DROUGHT" CLAUSE

The Colorado River drought clause.—The testimony of the negotiators here and in Mexico likewise demonstrated that there exists real nothing of the words with respect to the "exterminating drought" clause on the Colorado. This clause (art. IX) reads:

In the event of extraordinary drought or serious accident to the irrigation systems in the United States, thereby making it difficult for the United States to deliver the guaranteed quantity of 7,000,000 acre-feet (1,600,000,000 cubic meters) a year, the water allocated to Mexico under this paragraph out of this article will be subject to the same proportion to consumption as in the United States are subject.

The Rio Grande drought clause in the 1911 treaty.—This clause leaves the drought clause in the Rio Grande, which reserves the Mexicans in the case of serious accident to their "hydrologic system" (not their irrigation systems) making it difficult for them to "make available" (not deliver) annually the "run-off of 100,000 acre-feet" (not "from any and all sources"), which is the "minimum contribution" (not the "guaranteed quantity") from the Mexican contribution. In such event any deficiency existing at the end of a 5-year cycle "shall be made up in the following 5-year cycle with water from the next measured contribution."

The drought clause in the 1906 Rio Grande treaty.—The Colorado River clause differs also from that in the Rio Grande Treaty of 1906. The American Senate executive report on the 1906 treaty says (p. 3):

In the 1906 agreement the delivery of deliveries to Mexico is based upon the selection of deliveries to which in the United States rather than upon a selection of consumption now in the United States, as in the present treaty. The change in the 1906 treaty was made at the instance of the legislature for the United States, in order to take care of situations where water is not "delivered" to the terminal canal, but where, nevertheless, consumption can (and is) measured during periods of drought.

The American interpretation.—The American negotiation of the 1911 treaty explaining this Colorado River drought clause, testified (pt. 1, p. 100):

SENATOR NICHOLSON. This clause was couched up at all in regard to getting up and spelling that out as to what a drought is—how much water would have to be cut back before it would be necessary a drought?

MR. CHAPMAN. Yes, sir. Any actual determination will be made here in the United States, because here is where the records are kept and here is where the water is. However, I think in general effect it would work out this way: We have a measuring stick provided by the Colorado River compact that obliges the upper basin to deliver to the lower basin in 10-year progressive years 75,000,000 acre-feet of water over 10 years. The droughts, of course, would be felt first in the upper basin. That is where the rainfall and snowfall are normally, and the effects would be felt there first. If that represented such a drought that they had to curtail deliveries to the lower basin, I would say that was a drought when the running of the compact and that deliveries to Mexico would be thereby curtailed correspondingly. The drought does not have to occur simultaneously in all portions of the basin. It is sufficient if it occurs in any portion and results in the curtailment of water. (Emphasis supplied.)

MR. CHAPMAN, member for the International Boundary Commission, and actual draftsman of much of the treaty, testified as follows (pt. 1, p. 108):

SENATOR MORGAN. The question I have in mind is this. Suppose that the use of water in the upper basin has to be curtailed over a 5-year period in order to deliver to the lower basin 75,000,000 acre-feet, so that there is an actual curtailment of the use in the upper basin—must there also be a curtailment of use in the upper basin to equal that part of the water that goes to Mexico?

MR. CHAPMAN. Of course, when you speak of any and all sources, as far as the obligation to Mexico is concerned, it is immaterial where the water comes from. If you are speaking about a curtailment in the upper basin as a result of drought conditions, or otherwise, it would be, then, of course, there will be a curtailment also of the deliveries to Mexico.

Part 1, page 188

Senator HAYDEN. I am not afraid of the people when there is a surplus. The worst thing in this treaty is the wage when there is a drought. What then is plenty of water, nobody wants the question, because nobody. But when there is not enough water, then the question is not asked is this true? When there is more than? How do we get the water down to Mexico?

Mr. TAYLOR. There is no obligation to deliver all of the allocation in Texas when there is a contraction of an allocation in the United States. The Mexican allocation will be reduced, too. (Applause supplied.)

Mr. Tipton, previously identified, testified (p. 1, p. 188):

Mr. TAYLOR. In my opinion, in my interpretation of the condition when the "extraordinary drought" provision of the treaty would be invoked should be when the upper basin would be required to restrict its use in order to deliver its 22,000,000 acre-feet in lower basin under the program.

Senator HAYDEN. Is that your definition of "extraordinary drought"?

Mr. TAYLOR. That would be my personal definition of an allocation when the program would be invoked.

Senator HAYDEN. I think it is important to get that straight. Now, if I have followed you, whenever the upper basin has to restrict its use because its allocation, insufficient to use in order to supply the lower basin with the 22,000,000 acre-feet over a 10-year period, that condition, in your opinion, an extraordinary drought under the treaty?

Mr. TAYLOR. That is correct, sir. That certainly would constitute an extraordinary drought, in my opinion.

Part 3, page 188

Senator WATTS. Was there any effect at the time the treaty was negotiated by the long-distance delivery of water to Idaho—to determine what is meant by "extraordinary drought"?

Mr. TAYLOR. No, sir.

Senator KERRY. It was left wide open?

Mr. TAYLOR. It was left open. It was not discussed at great length, except the point I brought out, that the creation of water in use in the United States should apply not only to the lower basin, as it does in the upper Rio Grande Treaty, but that it should apply throughout the basin.

Part 3, page 189:

Mr. TAYLOR. I, J. J. MILLIAN, asked two questions. The first question was, as I understood it—and I have the Senator will correct me if I am wrong. If there was no participation in the consumptive use, but there was a depletion of surplus capacity, whether or not we could involve this provision. I said I did not think so.

The second question was this—that if, assuming the measurement of depletion of water is only shown in crop, there also was a capital stock of actual measurement of consumption per acre of water in the upper basin, where our lands stands unproductive, whether or not under that condition this provision would be invoked. I said that it could have interpreted.

Senator LA FOLLETTE. But you were not asked?

Mr. TAYLOR. I cannot recall.

Senator LA FOLLETTE. One other thing that I got from this series of questions was the fact that in the negotiation of this treaty, in which you participated, as I understand it, there was not very much discussion of this provision with the Mexican negotiators. I was fairly confident, though—and if I am wrong I wish to be corrected—that this particular language in the treaty—the drought-drought language—was moved at almost a last meeting of the words of the negotiators at it when the general provision passed.

Mr. TAYLOR. I think, Senator, that that resulted from this fact—

Senator LA FOLLETTE. Is that true? Am I correct in that statement?

Mr. TAYLOR. You are substantially correct, sir.

Senator LA FOLLETTE. Then, I might just say that it seems rather strange to me—I have never participated in the negotiation of a treaty. However, as I am it, regardless of your statement that you do not think it is very important, this is the one clause in the treaty which could result in any allocation of water delivered to Mexico under the program and that, therefore, it, despite that condition that we are just from that situation, it should occur, it would be the one clause in the treaty

about which were understood, were difficult, and were friction between the two nations might arise than was contemplated in the contemplation of the diplomatic mission. I would quite understand, finally, why there was not a full meeting of the minds of the negotiators, or at least an understanding between them who did negotiate it on the part of the negotiator involved in so readily doing this through these words spoken. (Emphasis supplied.)

Part 3, page 1099:

SENATOR LA FOLLETTE. Is there a full agreement and meeting of the minds on the part of the American negotiators of this treaty as to exactly how this clause will operate, because I have heard my interpretation in many of your meetings. "in my present opinion," or words to that general effect?

MR. TAYLOR. I will answer you, Senator, in this way. There has not been the meeting of the American negotiators in the detail it has been discussed here.

SENATOR LA FOLLETTE. Do you mean that the language was prepared and agreed to without the American negotiators having an understanding of exactly how it would operate? If not when it was involved?

MR. TAYLOR. Not in the detail it has been discussed here.

SENATOR LA FOLLETTE. I like to get you about the detail, and now it is discussed sufficiently in the form where you have made it how this was going to be interpreted from the standpoint of the negotiators of the treaty for the United States?

MR. TAYLOR. I cannot repeat it was discussed, yes, sir.

SENATOR LA FOLLETTE. Was there any difference of opinion among the American negotiators as to how it would be interpreted and how it would be involved and how it would be operated if it was involved?

MR. TAYLOR. I hesitate to say that there was a meeting of the negotiators that it would be involved when it was involved in the upper basin was made in order that the upper basin might enable us to deliver in Lower Basin. That was discussed as an intention. I would hesitate to say, however, that there was a meeting of the American negotiators on that point, and I would not say there was not consensus. That condition would be a most unfortunate interpretation to the United States, and, by my opinion, are present negotiators that would be a measure which would not be interpreted.

SENATOR LA FOLLETTE. I understood that that would be an intention, one way to measure it, but I would say that it has given me in other things that this provision put into the treaty without a full understanding on the part of the United States negotiators as to exactly what it meant, how it would operate, and when it would be involved; and, secondly, the fact understanding on the part of the United States negotiators was not interpreted by, and checked out with those negotiating the treaty on the part of Mexico.

Part 4, pages 1225-1226:

SENATOR WYATT. As I desired to have interpretation the other day, I got the impression that you have partially satisfied me. That "extraordinary drought" meant something different from what the average man would think it meant. But I call your attention to article V. It says:

"In the event of extraordinary drought or serious accident to the irrigation system in the United States—that is the way it is read—"without making it difficult for the United States to deliver the guaranteed quantity of 1,000,000 acre-feet a year, the water allotted to Mexico under sub paragraph (a) of this article will be reduced in the same proportion as extraordinary drought in the United States is reduced."

Then, there must be not only that, but the extraordinary drought or serious accident, but there must also be something to make it difficult for the United States to deliver?

MR. TAYLOR. That is correct.

SENATOR WYATT. With these two factors, we then begin to define the mean of the word?

MR. TAYLOR. That is correct, sir. In other words, the interpretation of the word "difficult" is in the hands of the United States Commissioner. He can determine that it is difficult if the upstream resources are threatened with depletion by reduction by cut-off in the upper basin. It is within his discretion to make the determination of what constitutes extraordinary drought and as to what constitutes difficulty in making deliveries.

SENATOR WYATT. Yes, but it is not enough to have simply an extraordinary drought; there must be also difficulty for our Government to deliver the quantity of 1,500 inches we are about to make?

Mr. Tamm. That is correct.

SENATOR HAWKINS. In other words, your theory is that these mountains, even if there is an extraordinary drought up north, are full, and that they are full for the purpose of taking care of the low altitudes in Mexico?

Mr. Tamm. That is right, to enable the United States to increase her own as well as Mexico's present uses. The capacity required for such purposes however will be minor.

SENATOR HAWKINS. My Chairman, may I ask a question just for my information? The Chairman, surely.

SENATOR HAWKINS. Is there anything in the treaty that says what you have just said, and that is, that our Commissioners can decide whether it is difficult? I have understood that there is not. I have understood that the Commissioners have to agree on it.

Mr. Tamm. No, I do not think an extraordinary drought, etc.

SENATOR HAWKINS. Can you refer to the thing that says that our Commissioners can decide it alone?

Mr. Tamm. I think the lack of saying anything would indicate that it is at the discretion of our Commissioners. As a matter of fact it is implied in the present time that the actual determination would be made by the United States Bureau of Reclamation.

As much for the proceedings in this country. Now let us turn to the report on the extraordinary drought clause given by the Mexican negotiators in their Senate.

The Mexican interpretation.—Ing. Ortiz Alba explained the difference between the drought clause in the Rio Grande and Colorado as follows (22 Universal, August 1, 1945; S. Doc. No. 20, p. 10):

The difference is the following: In the case of the Rio Grande, Mexico does not agree to deliver the guaranteed volume in all and each one of the years—no, on the other hand, happens in the case of the Colorado River—that Mexico has the choice, according to the treaty, of giving the volume guaranteed in some or greater or not, volume, if the actual guaranteed volume is compensated in some of 3 years. This, which is beneficial for Mexico, because it gives Mexico great elasticity in meeting its obligations and while does not exist for the United States, in the case of the Colorado River, is compensated by the fact of having to pay the difference in the following years of 3 years. On the other hand, in the case of the Colorado River, in which the United States, as we will see, is obligated to deliver as well exactly the volume guaranteed and even with the yearly distribution upon our irregular demand requires, there would be no object in having the difference caused by extraordinary droughts compensated by paying us the water in the following years, since we would not have any place to store the excess volume of water from the scheduled years to compensate for the dry ones, while, on the other hand, in the case of the Rio Grande the maximum storage there are there.

Answering objections to the treaty. Ing. Ortiz Alba had this to say: Page 17:

4. That in a year of drought the treaty permits the volume guaranteed to Mexico to be reduced and that this treaty only provides to deliver American volume in an equal proportion, which would be very difficult to carry out in practice. A reading of the final paragraph of treaty article 10 (shown) is at the objection is completely against what the case is really the contrary. The amount permitted to Mexico can only be reduced in case of extreme drought and only if that extraordinary drought should bring about the reduction of all consumptions in the United States.

Lic. Ernesto Ruyrales, the expert on international law, was reported as saying (Knowledge, August 8, 1945):

Only in case of guaranteed drought would the clause enter into effect in the case of the Colorado River. With respect to the Rio Grande, the clause remains inoperative in its own water in drought periods. For this reason, the two drought clauses are distinct, and if either of them results inoperative, it is more. [Emphasis supplied.]

The unsettled position.—The question, in short, remains open: Can we invade the drought clause if the reservoirs on the Gila River system are dry but those on the Colorado are full, and vice versa? Can we invade the clause if the upper basin finds difficulty in delivering the compact contractual quantity of 75,000,000 acre-feet, while the lower basin reservoirs are full? If the run-off is 50 percent but the consumptive use in this country are maintained by drafts on storage which American irrigation has paid for, any deliveries to Mexico be reduced? The Mexican negotiators seemed to have little doubt on this. *La Esquena* stated (*El Nacional*, August 6, 1945):

Mexico, in times of drought, does not have to be a daily witness of the Colorado River by virtue of which Mexico has no need for storage water. The great dams, such as Boulder and Dams, will serve to maintain the delivery of the waters to the periods of low flow of the river.

2. FACTORS UPON WHICH THE TREATY IS BASED

There are two other black spots in the treaty, upon which the legislative history throws very little light:

(a) *The existence of a surplus.*—The standard by which existence of a surplus is to be determined, granting Mexico its reserve 1,700,000 acre-feet instead of 1,500,000, was left completely open by the treaty. If the reservoirs are full but the run-off is below normal, what duty rests upon the American Commissioner? It seems reasonably clear that this is a matter which the treaty leaves to American determination, and the direction to the American Commissioner in this respect ought to be spelled out by Congress before it authorizes any comprehensive plan of development of the Colorado River Basin.

(b) *Discharge of waters flow into Salton Sea.*—The treaty is completely black as to the quantity of return flow which the Mexican water users may dump into the closed basin of the Salton Sea, thereby drowning wet lands of the Imperial and Coachella Valleys. This was frankly admitted by Mr. Tamm to have been overlooked. The American negotiators apparently regarded the matter as of little importance because only 50,000 or 60,000 acre-feet annually have been flowing from Mexican lands into the Salton Sea. But this is because diversions through the Alamo Canal have not exceeded 1,000,000 acre-feet annually and, more important, because under American management flows were held to very low levels. The treaty specifically allows Mexico to divert without limit not only 1,500,000 acre-feet per year, but "any other quantity serving at the Mexican points of diversion" (art. 10), and provides in article 17 that—

The use of the channels of the international rivers for the discharge of flood or other excess waters shall be free and not subject to limitation by other countries, and neither country shall have any claim against the other in respect of any damages caused by such use.

Are New River and Alamo River, through which Mexican return flow drains into the Salton Sea Basin, "international rivers"?

As to the quantity involved, it will be remembered that the Senate Committee on Foreign Relations accepted the State Department's view (report, p. 4) that return flow from some 2,000,000 acre-feet applied in Arizona would yield over 500,000 acre-feet per year. If a like ratio should apply to the 2,000,000 acre-feet which Mexico exports to divert

and jump, the return flow into the Indian Sea could very quickly become catastrophic.

The Mexican proceedings, quite understandably, did not agitate this question in any manner.

IV. CONCLUSION

From all the foregoing, perhaps the following conclusions can be drawn:

1. THE WEIGHT OF THE TREATY'S BURDEN

The failure of the treaty to evidence a meeting of the minds either upon factual assumptions or upon the language of the document, coupled with its silence upon factors of vital importance, makes it impossible to assign any definite weight to the burden it imposes upon the waters of the Colorado River system, either as to priority, quantity, quality, or the geographical distribution of the burden.

2. RELATED TO THE "COMPREHENSIVE PLAN" ON THE BORDER

The comprehensive development of the Colorado River requires a more exact definition of the Mexican burden and a clearer diagram of the administration of the treaty as a domestic statute. Until such definitions are effected, and until the geographical distribution of the burden is determined by interstate agreement or litigation, the only safe assumptions are the most adverse assumptions.

The effect of the treaty on explaining the water budget is illustrated in sharp focus by the analysis of the main-stream water budget of the lower basin, prepared by Mr. Raymond Matthew:

| Water budget, Lower Colorado River Basin, main stream only (assumes no water stored, no water banded through) | |
|--|------|
| Total available water supply from main stream..... | 8.3 |
| Less interstate claims..... | .8 |
| Net supply..... | 7.5 |
| Demand, on supply..... | |
| Nevada, Utah, New Mexico..... | 3.4 |
| Arizona claimed by States..... | 2.4 |
| California for agriculture..... | 5.4 |
| Mexico (by treaty)..... | 1.1 |
| | 12.1 |
| Deficit..... | 4.6 |
| Total available supply..... | 8.3 |
| Including Nevada, Utah, New Mexico, and Mexican demands..... | 1.9 |
| Residual for Arizona and California..... | 6.4 |
| If California demands satisfied, Arizona would have..... | 1.4 |
| If Arizona gets 2.5, California would have..... | 3.9 |
| Or— | |
| Less than listed by one before Boulder Dam was built. | |
| Less than 111 by distribution. | |

No actual planning can be done for new projects until the water budget is balanced again in some way.

B. UNRESOLVED DIFFICULTIES

A number of questions left unsettled by the treaty can be resolved by domestic legislation. Indeed, the treaty's silence on some of these points was defended upon that very ground, and the Mexican resolution of ratification, *supra*, the Mexican Senate—

whereas two conflicting treaties have not succeeded in settling questions, the provisions which they contain are in the internal jurisdiction of the treaty within the United States of America and by its own authorities—

etc. It seems imperative that these blanks be closed by domestic law before the circumstances, interpretations, and explanations responsible for the ratification of the treaty by the American Senate fade too far into the past. Among the objectives of such legislation appear the following:

(a) Construction of Imperial Dam, to control the floods of the Gila, before the Mexican diversion dam is permitted to abstract the main stream of the Colorado. The Gila, not the Colorado, furnished the flood which broke into Imperial Valley in 1905-06, and the building of the Mexican diversion dam converts the danger of a similar disaster.

(b) Definition of the sphere of jurisdiction of the Secretary of the Interior and the Secretary of State, now covered only by a temporary interdepartmental understanding. The majority report, in this respect, assigns that work now only partly for treaty purposes will be under the

control of those Federal agencies which now or hereafter may be vested by Congress with such jurisdiction and control.

(c) Protective works and control of waste water. —The Secretary of the Interior must be authorized to do what reservation (b) contemplates, namely, secure the Salton River Basin from flooding by Mexican waste water. The one-way control is through the reserved living of the releases from the storage dams under the Secretary's control.

(d) Standard for the determination of "surplus" or "excess" surplus Mexico is 1,700,000 acre-feet under article 10 (2) of the treaty. Everyone, at least on this side of the border, agrees that this is a matter for American determination, but by whom and how?

It should be borne in mind, and the point cannot be overemphasized, that the quantity of 1,700,000 acre-feet means a real obligation of 1,700,000 acre-feet, plus reservoir losses, before giving any consideration at all to the "surplus" clause. This is for the reason that the United States gets no credit for water delivered in excess of the schedule fixed by Mexico, but is charged with all deficiencies. For instance, if a heavy wind sends a spill of the ordered water at the border on Monday for 200 second-feet (which is quite normal), and the water comes down on Tuesday, over and above the amount scheduled, the United States gets no credit for Tuesday's excess but is charged with Mexico's shortage. As a minimum, 200/200 acre-feet annually will be thrown out of any accounting. Mexico, in normal years, will get not less than 1,700,000 acre-feet and be charged with 1,200,000; in surplus years, she will get not less than 1,200,000 acre-feet, and be charged with 1,700,000.

(e) Use of the All-American Canal for supplying such surplus. —The treaty (art. 11-12) assumes that when there is a surplus, additional

waters will be supplied through the All-American Canal only "if such use of the canal and facilities will not be detrimental to the United States." A domestic statute ought to vest authority in the Secretary of the Interior to make such determinations, and stipulate what sort of interference with the rights of the American users of the canal, for whom it was built and who in any event will continue to be dependent on it for their existence, constitutes a "harmful."

(f) Determination of extraordinary drought.—The majority report on the treaty assumed that—

The existence of a drought and the consequent curtailment of use are purely natural causes, entirely determinable from the data furnished by the Interior agencies of the United States.

If this is so, Congress should designate the Interior Department as the "interior agency," and give it standards to follow in making its determinations. The conflicting testimony in Mexico and the United States makes it clear that we do know now what standards are to be applied by these "interior agencies."

(g) Quality of water.—The American negotiators have made it so clear that the Secretary of the Interior is not required by the treaty to release water from storage in the dams he controls in order to improve the quality of the flow reaching Mexico, that Congress should so provide, while this testimony is fresh in mind, and before some future Secretary, in the absence of congressional direction, adopts the equally clear and diametrically opposite interpretation reported by the Mexican negotiators.

(h) Provisions for the acquisition of property.—The treaty leaves to each nation, under its own laws, the problem of acquisition of the property to be taken for treaty purposes. The majority report said:

Property in the United States, of course, must be acquired either by voluntary agreement with the owner or through condemnation proceedings. In such proceedings, the courts will pass upon the necessity of the acquisition and the amount of the compensation which should justly be paid the owner (p. 8).

Reservations (b) to the treaty subjects the "powers and functions" of officers of the United States to "statutory and constitutional controls and processes." The Mexican violation of conditions involving our interest in reservation (c). These statutory controls should be spelled out.

One of the black spots in the treaty is the failure to say anything at all about the treatment of several million dollars' worth in levees and canals in Mexico by American farmers who will continue to bear a heaped debt, a mortgage on American land, incurred to finance these works. The United States, under the treaty, is to acquire the levees and canals of this canal system, which are in the United States, and it should properly compensate the American farmers for the whole canal and levee system thus severed. This does not involve any relations or negotiations between Mexico and the United States.

There are other provisions which should properly appear in legislation to implement the treaty.

No domestic legislation, not even the antiquities in the Colorado River Treaty with Mexico, considered as a corollary; but domestic legislation consistent with the official American interpretation of the treaty can and should clarify the application of the document as a domestic statute and fix the direction and course for the American

administrators of American works affected by the treaty (primarily the Secretary of the Interior). In short, domestic legislation can and should supply the omissions and resolve the ambiguities of the treaty respecting purely domestic matters. Until such legislation is enacted, the treaty fails of its proclaimed purpose of clearing the way for the comprehensive development of the Colorado River, because no one can estimate either the true weight of this first mortgage on the water supply, guaranteed "from any and all sources," nor the distribution of that burden among the American projects dependent upon water from these same sources.

