Michael Gans
Clerk of the Eighth Circuit
Court of Appeals
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August 30, 2019

Re: Document to lodge in Texas v. New Mexico, Orig. 141

Dear Mr. Gans:

Per our telephone conversation yesterday I am writing to introduce myself and to find out how to get the attached document Embargo on the Upper Rio Grande lodged in *Texas v. New Mexico*. My name is Lana E. Marcussen, New Mexico Bar No. 7215. I was very involved in water adjudications in New Mexico in the 1990's using my new political accountability federalism argument. I am the original author of the federalism argument adopted in *New York v. United States*, 505 U.S. 144 (1992). I wrote the argument as a third year law student in the clinical law program at the University of New Mexico School of Law to give New Mexico authority to contest and negotiate the opening of the Waste Isolation Pilot Project (WIPP) nuclear waste facility in Carlsbad, New Mexico.

After graduating from law school I quickly became involved in the main water adjudications because the federalism argument pointed to actual solutions that balanced the interests of all the parties involved. By 1993, I was representing the Tracy family on the Pecos River and had clients in the *Abousleman* adjudication in the federal court. The Tracy family began the reclamation project on the Pecos that was bought out and then completed by the United States in 1907. The Tracy's were land owners in the project and wanted to establish that their water rights were real property rights subject to the jurisdiction of New Mexico and assured as part of the project waters of the United States. Applying the federalism argument to Special Issue No. 3 in the *L.T Lewis* adjudication in state court on the Pecos River we successfully argued and proved that state jurisdiction over the basic water rights was compatible with the Reclamation Act of 1902.

The Pecos River litigation spurred the messier situation on the Rio Grande kicking the *Abousleman* litigation into a new gear in the federal court. When the United States attempted to take over the full administration of the entire river over the "emergency" that the Monsoon season was late, I successfully used the same arguments we were using on the Pecos to prove that no emergency existed and that New Mexico had primary jurisdiction over the Rio Grande. To be frank, the attorney for the New Mexico State Engineer did not understand what I was doing but went along with me because I had the backing of the law school and Governor Bruce King. When I convinced the Indian pueblos that their water rights would be more protected as state pueblo water rights than if they were awarded federal reserved water rights, the case settled giving the Indian pueblos all the waters they could prove were being applied to beneficial use as the highest priority on the river.

The *Abousleman* settlement discussions began in 1994. Then in my own divorce case, the judge in the case *sua sponte* decided to change the custody of my son. The divorce had been finalized the year before awarding me primary custody. According to the testimony of the judge in the hearing to remove her from the bench in 1999 she was asked to "stop" me by John Leshy who at that time was the Solicitor to the Department of the Interior under Secretary Bruce Babbitt. It is over what New Mexico did to my son in an attempt to control me and stop me from using the federalism argument on the Rio Grande that is now my main interest in making sure this document found by accident while looking for other water documents is lodged in *Texas v. New Mexico*.

Instead of backing down after I was attacked in the family court, I decided to find out what I had stirred up. James Scott Boyd had found me through the litigation on the Pecos and had been trying to get me to take on representation. I was very reluctant because Mr. Boyd believed he knew more than any attorney. We were able to work out a representation agreement and with attorney Caroline Moore we were able to litigate in the Court of Claims convincing that court that the Leasburg diversion dam had been completed prior to any claim of forfeiture by the United States. That representation agreement does include a clause that if Mr. Boyd ever wins a settlement that I am entitled to a percentage of the award. The ruling by the Court of Claims that the United States had not committed a "taking" against the Rio Grande Dam and Irrigation Company but may have committed fraud against the Company ratcheted up my punishment in the New Mexico family court. In a hearing in which the Guardian ad litem recommended that primary custody be restored to me, my visitation with my son was completely cut off in a hand written minute entry that was not subject to any appeal. In 1993, New Mexico had entered into an agreement with the United States to apply the Indian Child Welfare Act as the primary law in the family courts to decide all custody cases. This Demonstration Project suspended all parental rights and due process rights in the family courts.

After the ruling in the Court of Claims for Mr. Boyd, the United States filed the Quiet Title suit in the federal court in New Mexico. When New Mexico panicked and submitted a very weak answer, attorney Caroline Moore and I again represented Mr. Boyd in the quiet title suit to assert his claims in an attempt to defeat the claim of the United States. By asserting Mr. Boyd's interests there was enough for me to apply the federalism argument and refute the claims of the United States. Before Judge Parker was willing to allow full litigation he requested and received from me what is referred to in the case as the "Secret Memorandum" which is a direct application of the federalism argument as applied to the Mexican water treaty issue and what it meant in terms of "ownership" of the water. This memorandum was not seen by the other parties until the United States' appealed the ruling to the Tenth Circuit Court of Appeals.

After the ruling on the Quiet Title case, and the other rulings a hired assassin took three shots at me in the parking garage of the Western Bank building where my office was in December 1998. I rented a home in Arizona and only returned to New Mexico long enough to remove my personal property. I have resided in Arizona since January 1999. The attack from New Mexico still has not completely ended but the success of the federalism argument did allow me to

break my son loose and restore my full law license. But the power to attack me as was done used the same powers asserted for the first time against the Rio Grande Dam and Irrigation Company a century earlier. This gave me a great interest to find out what had really happened on the Rio Grande and how the United States had continued to use "war powers" to suspend individual rights, especially to due process of law. My research quickly led to the Nixon Indian policy and attorney William H. Veeder who was special counsel on Indian Affairs in the Nixon White House. In fact, it was while searching for the main documents of the Nixon Indian policy that I came across the two memoranda that are attached to this letter.

The main document is entitled "Embargo on the Upper Rio Grande" and is attached to this letter with all of its attachments. This is the only document I request be lodged. The second and much smaller document entitled "Federal Irrigation Water Rights" is about the application of the federal reserved rights doctrine. This second document was submitted to the United States Supreme Court this past term attached to an *amici curiae* brief in *Sturgeon v. Frost*, (2019) written for the Citizens Equal Rights Foundation (CERF). I have represented CERF for more than 20 years and written many amicus briefs for them. The document on the federal reserved rights doctrine is submitted with this letter only to apprise the Special Master of how the United States claims it can use the *Rio Grande Dam and Irrigation* rulings from the last century currently.

It is the "Embargo on the Upper Rio Grande" that discusses what actually happened on the Rio Grande and how the war power embargo order will continue to be applied by the United States in the Compact on the Rio Grande. The memorandum begins with a description of the preexisting canal structures that were found when the Spanish arrived in the El Paso area. The memorandum implies that those structures were built by the Pueblo Indians of Northern New Mexico. This implied fact is contradicted by the Pueblo Indians themselves who acknowledge their Hohokam cousins as the builders just as existed in Phoenix, Arizona when the Spanish arrived. The Hohokam were extinct before the Spanish arrived. The memorandum speaks for itself in describing the claimed federal authority to apply the war power of embargo against the sovereign interests of the future State of New Mexico. Because the use of the war power was done completely in secret, none of the litigation of the Rio Grande Dam and Irrigation Company ever addresses the authority to apply a war embargo power. This issue has never been litigated because it has never been openly disclosed that this war embargo power was the real basis for stopping the Company from exercising the rights it acquired legally to build the Rio Grande project.

The Special Master does need to know that there are two issues not addressed in the Embargo Memorandum that may come up in future litigation. The two facts left out of the Embargo Memorandum are important for how Richard Nixon engineered his Indian policy with the help of his mentor A.B. Fall to continue and expand the domestic use of the war powers. Indians were forcibly removed from the Pueblo of Isleta and from the Mescalero Apache reservation and forced to live at the Elephant Butte and Leasburg dam sites by the U.S. Military as part of the enforcement of the embargo order. In both locations, the Army prevented intrusion while "protecting" the Indians. The other issue involves the treachery of A.B. Fall in his so-called

representation of the Rio Grande Dam and Irrigation Company. The two issues are unlikely to appear in the Rio Grande litigation.

I hope that my letter sufficiently explains my overriding interest in presenting the Embargo Memorandum. If the United States can use true war powers in domestic law without ever disclosing their use there is no reason for my federalism argument or any discussion of applying the constitution. War powers override all civil liberties. In a real emergency or war these powers are appropriate but must be subject to termination at the end of the emergency or war. It is the fact that a direct use of the war powers was asserted and used by the United States to prevent the Rio Grande Dam and Irrigation Company from completing its project that is the problem no party in this litigation wants to raise because no one knows what the result will be if the United States exceeded its authority. What scares me is what happens if the truth never comes out and these war powers can be asserted against anyone who happens to end up against a major federal interest and ends up losing all their rights without even knowing what happened.

Under normal circumstances my suggestion would be that the Embargo Memorandum be sent out to all parties asking them to comment about its impact on the litigation. My educated guess is that after questioning its authenticity all of the States and the United States will say that it does not affect the litigation. The States are in a very difficult position in regards to the use of federal war powers. Many major social programs today incorporate federal war powers in domestic legislation through the Nixon Indian policy. The States could be threatened with losing federal funding if they even consider bringing out the truth on the Rio Grande. The other issue is whether the States actually know what it means to apply war powers in domestic law. It has never been openly disclosed that war powers were asserted to create the reserved rights doctrine or laws like the Indian Child Welfare Act that Texas is currently alleging is unconstitutional. The United States as it has done since 1896 will just lie and say in the briefing that these war powers mean nothing while they internally continue to enforce the war powers to deliberately thwart state authority to apply the public trust doctrine as disclosed in the "Federal Irrigation Water Rights" memorandum attached to this letter.

The only potential parties that could assert the reality are the State of New Mexico, landowner/water users in New Mexico served by the Rio Grande project and Mr. Boyd. I have spent over a year trying to convince Mr. Boyd that he should introduce this Memorandum with his Petition to Intervene. Mr. Boyd has chosen not to do so because he believes the Memorandum will get the credit for changing the law on the river and not him. Similarly, the State of New Mexico was given a copy and has chosen not to disclose it. The Elephant Butte Irrigation District was also told of its existence and would rather argue the old line from the federal government relying on the war powers that they preexist the State and are not subject to its jurisdiction. As the law currently exists, no party is positioned to assert what the rights and jurisdiction should be on the Rio Grande without the federal war powers. Yet, this undisclosed secret of the war embargo power underlying the federal reserved rights doctrine needs to be confronted to allow the sovereign interests on the Rio Grande to be determined within the constitutional structure.

Because over a hundred years has passed and the war power embargo has been incorporated into the Compact, I suggest that the Special Master cannot accept how the United States took control of the Rio Grande given what is said in this Embargo Memorandum. The Memorandum does need to be disclosed to all parties. I suggest that the Special Master lodge the "Embargo on the Upper Rio Grande" memorandum and request the parties to brief whether it is the asserted war embargo power that allows the Rio Grande Compact to make the water transfer to Texas at Elephant Butte calling into question New Mexico's sovereignty within the Rio Grande Project boundaries within New Mexico. Requiring the parties to say what the law should be without the war embargo power will require all of them to reconsider their respective positions. I think this is the only way to correct what happened on the Rio Grande.

Both of these attached memoranda were certified by the National Archives where they were located. If the Special Master requires the certifications I will transmit them separately at a later time. The hard copy of the "Embargo on the Upper Rio Grande" is harder to read than the photographed copy that is attached.

I don't believe the jurisdiction on the Rio Grande can ever be judicially determined without dealing with the asserted war power of embargo on the Rio Grande. The war powers subvert the intent of Congress in making legislation like the Reclamation Act of 1902 and the authority of any court to make a decision that impairs the power as asserted by the Department of Justice. The Rio Grande is where the war powers were first asserted without an emergency. With the Rio Grande Compact the United States asserted these war powers without ever explaining to Congress or to the people in the States how their rights could be suspended indefinitely. Certainly the water users in southern New Mexico deserve the same rights as all other similarly situated persons in federal reclamation projects. These persons are literally orphans without a State. By lodging the "Embargo on the Upper Rio Grande" memorandum the underlying law has a real chance of being corrected. If it is not lodged, no party is going to introduce it and the undisclosed use of the war powers will remain federal law. I hope the discovery of the Embargo Memorandum will result in confronting the war embargo power.

Sincerely,

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and the Mormons established Manassa in 1878.

THE EMBARGO ON THE UPPER RIO GRANDE

Pioneer Irrigation Development

By Ottamar Hamele
Special Attorney Representing the Bureau of Reclamation before the Rio Grande Commission.

As already stated, the irrigation development of the valley goes back over 350 years or more. The rights under the Ysleta, Juan Mariarie and Socorro ditches at El Paso are quite ancient. Each permanent white settlement in the Rio Grande valley represents at least one diversion substantially of the present settlement. In addition to these were the earlier irrigation rights of the Pueblo Indians.

First Settlements in Rio Grande Valley

Spanish explorers under Coronado, moving easterly from the Pacific, reached the valley of the Rio Grande before the middle of the sixteenth century. They found the Pueblo Indians irrigating fields of wheat, corn, fruit and flowers from the waters of this river and its tributaries. The acequias then in use indicated great age, and suggested the existence of a prehistoric people of substantial population.

The Ysleta Church below El Paso and the Juarez Cathedral across the river, probably date back of the middle of the sixteenth century. The City of Juarez, Mexico (formerly called Paso del Norte) was an important town in the year 1600. Its diversion from the Rio Grande (Acequia Madre) quite likely was constructed more than 350 years ago.

The first attempts of the Spaniards to colonize the valley of the Rio Grande were carried on from Juarez as a base. Santa Fe was made the capital of New Mexico in 1605. Bernalillo was founded about the year 1700 and Albuquerque 1706. Permanent settlement in the San Luis Valley in Colorado was not begun until after 1850. The town of Conejos was founded by Mexicans in 1855,

and the Mormons established Manassa in 1878.

Pioneer Irrigation Developments

As already stated, the Acequia Madre at Juarez is probably 350 years of age. The rights under the Ysleta, San Elizario and Socorro ditches at El Paso are quite ancient. Each permanent white settlement in the Rio Grande Valley represents at least one diversion substantially as of the date of the settlement. In addition to these were the earlier irrigation rights of the Pueblo Indians.

The first half of the last century saw a considerable extension of irrigation in this region. The El Paso city ditch (formerly Ponce acequia) was built in 1827. In the Mesilla Valley in New Mexico, the Dona Ana Ditch was constructed in 1844, the Las Cruces ditch in 1849, and the Mesilla ditch in 1850. In the San Luis Valley in Colorado, the People's Canal on Culebra Creek has an appropriation dating from 1852.

Extent of Irrigation Prior to 1880

Baron von Humboldt who visited Juarez in 1806 wrote as follows regarding that region:

> Travelers are in the habit of taking a short rest at Paso del Norte (Juarez) in order to lay in provisions so as to proceed on their way to Santa Fe. The country around El Paso included splendid fields comparable with the best in Andalusia. The land is sown with corn and wheat; the vines bear excellent grapes, preferable even to those of New Biscay, and the gardens yield an abundance of European fruit such as peaches, apples and pears. As the soil is very dry, an irrigating canal brings water from the Rio Grande to El Paso. (Travels of Humboldt, Vol. IX, p. 265, German edition).

Major William Emory of the U. S. Army, who explored the Rio Grande in 1852-1854, described Juarez and vicinity (the El Paso

Valley) as a "continuous vineyard", and stated that an area extending for twenty miles on both sides of the river was in cultivation.

In 1880 this area consisted of approximately 25,000 acres on the Mexican side supporting a population of about 20,000 and approximately 15,000 acres on the American side with a population of about 10,000. It is estimated that 550 second-feet of water were diverted for this irrigation.

In the same year there were irrigated from the Rio Grande in the Territory of New Mexico, approximately 183,000 acres, demanding the use of about 5600 second-feet of water, and there were irrigated from the Rio Grande in the State of Colorado, approximately 122,000 acres requiring about 3700 second-feet of water. Of the area in New Mexico, about 10,000 acres were irrigated in the Rincon Valley, and about 31,000 in the Mesilla Valley, just north of El Paso.

Complaints from Mexico

In the early eighties of the last century complaints began to be made on behalf of irrigators in New Mexico, to the effect that irrigation in the United States had been increased to such an extent as seriously to deplete the water supply used for centuries on the lands in the vicinity of Juarez. The diversion particularly complained of were those in the San Luis Valley in Colorado. These complaints, voiced at first by individual landowners, later were taken up by the Government of Mexico with our State Department at Washington. It was contended by the Mexican

authorities that the diversions in the United States were in violation of the Treaty of Guadalupe Hidalgo of February 2, 1848 (9 Stat., 22), and that damages amounting to upwards of $35,000,000 had been sustained by the citizens of Mexico. It was suggested that a dam be constructed across the Rio Grande to provide the water to which the lands in Mexico were entitled.

General Stanley of the U. S. Army, commanding the Department of Texas, in his official report dated September 12, 1889, says on this subject:

> Our relations with our Mexican neighbors upon the long line of the Rio Grande have been kindly although they are a good deal excited over what they deem the violation of their riparian rights through our people taking all the water of the Rio Grande for the irrigation of the San Luis Valley, which leaves the Rio Grande a dry bed for 500 miles. The question is one that must be settled by the State Department, and thus far there had been no call for military force. The remedy for this water famine and consequent ruin to the inhabitants of the Rio Grande Valley must be found in storage reservoirs, so easy of construction, one in the canyon opposite Taos and the other in the canyon near and north of El Paso.

Concurrent Resolution of April 29, 1890

There ensured several years filled with bickerings over this matter. Americans became interested from a financial standpoint in the proposed international dam, and bills to provide for its construction by the United States were introduced in Congress. A bill of this character (S. 1644-H.R. 3924) introduced in the 51st Congress (1899) provoked considerable discussion. The agitation culminated in the passage on April 29, 1890, of a concurrent resolution authorizing the president to enter into negotiations with the Government of Mexico for the purpose of remedying the difficul-

ties existing between the two countries on account of the depleted water supply in the Rio Grande. Under treaty of March 1, 1889 (26 Stat., 1512) there was created an International Boundary Commission to pass on matters affecting the common boundaries of the two countries on the Rio Grande and the Colorado, but this commission was not authorized to consider the question of the depleted water supply, as has been frequently erroneously stated. A copy of the concurrent resolution of April 29, 1890 marked Exhibit A is attached hereto.

The Rio Grande Dam & Irrigation Company

For several years immediately following the passage of the concurrent resolution of April 29, 1890, little or nothing was done by our Government to carry out the purpose of the resolution. In the meantime, Sections 18, 19, 20 and 21 of the statute of March 3, 1891 (26 Stat., 1095), authorizing rights of way over the public lands for canals, ditches or reservoirs, was enacted into law, and on February 1, 1895, by approval of the Secretary of the Interior under said act, a private concern known as the Rio Grande Dam and Irrigation Company, secured a right of way over public lands to construct a large irrigation dam across the Rio Grande near Elephant Butte in New Mexico, about 120 miles above the city of El Paso. Sections 18, 19, 20, and 21 of the right of way act of March 3, 1891, marked Exhibit B and attached hereto. The dealings of the Government with the Rio Grande Dam & Irrigation Company will be referred to later.

More Complaints from Mexico

The activities of the Rio Grande Dam and Irrigation Company led to renewed efforts on the part of the Mexican authorities to secure action from this Government under the concurrent resolution of April 29, 1890. It was realized that those in control of a large private dam across the Rio Grande in New Mexico would be able still further to reduce the water supply available for the Mexican lands. Also it was assumed that if the proposed developments of the Rio Grande Dam and Irrigation Company were carried out it would be unfeasible to construct the proposed international dam at El Paso. Under date of October 21, 1895 the Mexican Minister, M. Romero, sent a vigorous letter to Secretary of State Richard Olney, urging action under the concurrent resolution. A copy of this letter marked Exhibit C is attached hereto.

Opinion of Attorney General Harmon

By letter dated November 5, 1895, the Secretary of State transmitted to Attorney General Judson Harmon a copy of the Mexican Minister's letter of October 21, 1895, referred to the concurrent resolution of April 29, 1890, and requested answers to the following questions:

(1) Are the provisions of article 7 of the treaty of February 2, 1848, known as the treaty of Guadalupe Hidalgo, still in force so far as the river Rio Grande is concerned, either because never annulled or because recognized and reaffirmed by article 5 of the convention between the United States and Mexico of November 12, 1884.

(2) By the principles of international law, independent of any special treaty or convention, may Mexico rightfully claim that the obstructions and diversions of the waters of the Rio Grande, in the Mexican Minister's note referred to, are violations of its rights which should not continue for the future, and on account of which, so far as the past is condemned, Mexico should be awarded adequate indemnity?

On December 12, 1895 the Attorney General rendered an opinion

which is to be found in Volume 21 Ops. Atty Gen'l. at page 274. The following is the syllabus of the decision as found in the report.

Article VII of the treaty of February 2, 1848, between Mexico and the United States, known as the treaty of Guadalupe Hidalgo is still in force, so far as it affects the Rio Grande.

The taking of water for irrigation from the Rio Grande above the point where it ceases to be entirely within the United States and becomes the boundary between the United States and Mexico is not prohibited by said treaty.

Article VII is limited in terms to that part of the Rio Grande lying below the southern boundary of New Mexico, and applies to such works alone as either party might construct on its own side.

The only right the treaty professed to create or protect with respect to the Rio Grande was that of navigation. Claims against the United States by Mexico for indemnity for injuries to agriculture alone, caused by scarcity of water resulting from irrigation ditches wholly within the United States at places far above the head of havigation, find no support in the treaty.

The rules, principles, and procedents of international law impose no duty or obligation upon the United States of denying to its inhabitants the use of the water of that part of the Rio Grande lying entirely within the United States, although such use results in reducing the volume of water in the river below the point where it ceases to be entirely within the United States.

The fact that there is not enough water in the Rio Grande for the use of the inhabitants of both countries for irrigation purposes does not give Mexico the right to subject the United States to the burden or arresting its development and denying to its inhabitants the use of a provision which nature has supplied, entirely within its own territory. The recognition of such a right is entirely inconsistent with the sovereignty of the United States over its national domain.

Agreement of May 6, 1896.

While the Attorney General's opinion of December 12, 1895, held that the complaints of the Mexican authorities were not justified either under treaty rights or under the rules of international law, the State Department apparently took the position that the United States was under a moral obligation to make good the depleted water supply of the Mexican lands.

On May 6, 1896 an agreement was made by Secretary of State Richard Olney, Representing the United States, and the Mexican Minister, Col. Anson Mills and Senor Don F. Javier Osorono, members of the International Boundary Commission, provided by the treaty of March 1, 1889, were directed to investigate and report as soon as practicable upon the following three questions:

1. The amount of water in the Rio Grande taken by the Irrigation canals constructed in the United States of America.

2. The average amount of water in said river, year by year, before the construction of said irrigation canals and since said construction - the present year included.

3. The best and most feasible mode whether through a dam to be constructed across the Rio Grande near El Paso, Texas, or otherwise of so regulating the use of the waters of said river as to secure to each country concerned and to its inhabitants their legal and equitable rights and interests in said waters.

Joint Commission Report of November 25, 1896

Pursuant to the agreement of May 6, 1896, the joint commission therein named proceeded to consider and report upon the three questions set forth in that agreement. The commission's report bears date November 25, 1896.

On question No. 1 relative to the amount of water taken from the Rio Grande by irrigation canals constructed in the United States the commission reported as follows:

From the very elaborate statistical report of Civil Engineer Follett the commission find that prior to 1880 there were in Colorado 511 canals taken from the Rio Grande and its tributaries, irrigating about 121,000 acres of land; that this number of canals and amount of land irrigated has kept increasing year by year, many of the canals being enlarged during the same period, so that the number of canals at this date has increased to 925, irrigating 318,000 acres of land; and that in New Mexico there were, prior to 1880, 563 canals taken from the Rio Grande and its tributaries, irrigating 183,000 acres of land, and at the present time there are

603 canals, irrigating 186,000 acres of land.

These results show an aggregate of 1,074 canals taken out in Colorado and New Mexico prior to 1880, and 1528 taken from the River and its tributaries at this date, showing an increase of 454 canals and of 196,000 acres irrigated in the State of Colorado and Territory of New Mexico. This shows quite accurately the increase for the past sixteen years. There are no reliable records available showing the increase in the preceding years, but they were doubtless on a more rapidly increasing ratio.

It will also be observed that the greatest increase during these sixteen years was in the State of Colorado, the number of canals and acres irrigated remaining almost stationary in New Mexico for that period, but this es easily accounted for by the fact that the appropriation of water in Colorado has rendered such a scarcity in New Mexico that little further increase of canals and acreage was profitable.

It is evident to the commissioners that as the flow of water on the Rio Grande had not only become scarce at El Paso, but high up in New Mexico prior to 1888 or 1889, any increase of water used in Colorado would diminish materially the flow at El Paso during the irrigation season.

Relative to the second question, concerning the average amount of water in the Rio Grande year by year, the commission reported as follows:

There are no records or testimony available which will enable the commissioners to determine this question entire with any degree of accuracy. The first record of the flow of the river here at El Paso was taken in 1889, the driest year up to that date, the river being dry as far above as Albuquerque, N. Mex., and no water passing El Paso for four months during the year, embracing August, September, October and November. There is no tradition of such scarcity of water prior to this date - 1889 - the river only being dry once in about seven years, and then only for a short period in the latter part of the summer.

For the eleven months prior to March 31, 1890, the flow of the river at El Paso was 425,000 acre-feet. This includes the long drought of 1889, before mentioned. For the year ending March 31, 1891, the flow was 1,100,000 acre-feet. For the year 1892 the flow at El Paso was 1,850,000 acre-feet. For the year 1893 the flow was 875,000 acre-feet.

During a part of this time measurements at Embudo at the Rio Grande near the Colorado line showed that the flow at that point was greater than at El Paso, there being no increase in the flow from Embudo to El Paso. This fact is mentioned to show that the supply of water both in New Mexico and in the valley of El Paso depends, for the greater part, upon that of its head waters in Colorado.

An examination of the old canals in use in the El Paso Valley some thirty years ago convinces us that those on the Mexican side had a capacity of about 300 second-feet, and that those on the United States side had a capacity of about 250 second-feet.

Many of these for the past five years have been constantly dry, and all of them have been dry for a great part of the irrigating season three years out of the five past.

The foregoing is a condensed compendium of the large mass of information and statistics taken by our engineers, from which we for the following conclusions:

That the flow of the river at El Paso has now been decreased by the taking of water for irrigation by canals constructed in the United States of America about 1,000 second-feet for one hundred days annually, equal to 200,000 acre-feet of water.

It will be observed that this loss is distributed through the summer flow, which at best was not always sufficient before the diminution took place during dry seasons.

It should be understood that the great mass of these waters both before the construction of the canals and since consists of flood waters carried down the river unused, being utterly unavailable without large reservoirs to hold it for the season of irrigation the maximum flow lasting but a few days, running as high as 16,000 second-feet, generally before the irrigation season fully sets in, and an average flood of about 5,000 second-feet during about forty or fifty days in April and May.

On the third question, respecting the most feasible mode of regulating the use of the waters of the Rio Grande, so as to secure to each country an equitable right to the use of the waters, the commission reported as follows:

The joint report of the engineers develops a feasible method of building a dam across the Rio Grande near El Paso about 3 miles above, and impounding a large mass of the flood waters in a lake some 15 miles long by about 3½ miles wide, which it is believed by the commission will so regulate the use of the waters of said river as to secure to each country concerned and to its inhabitants their legal and equitable rights and interests in said waters, and neither they nor the commissioners have been able to discover any other feasible mode of consummating these ends.

The joint commission is of the opinion that the present flow of the river is sufficient to maintain the reservoir as projected, but insufficient to maintain it and at the same time maintain the projected reservoir 120 miles above El Paso, in New Mexico, known as the Elephant Butte dam and reservoir. One of these projects, in

the opinion of the commission, must give way to the other, or at least, if both are built, that at Elephant Butte must in some way be restrained from using water already appropriated by the citizens of the El Paso Valley, both Mexicans and Americans, and a method provided in case they violate these restraining rules for a prompt and efficient legal remedy for the parties injured.

.....

It is the opinion of the joint commission that Mexico has been wrongfully deprived for many years of a portion of her equitable rights in the flow of one-half of the waters of the Rio Grande at the time of the treaty of Guadalupe Hidalgo; and if there were no other evidence of that fact than the records and measurements above referred to, it is apparent to the eye of any visitor to the locality, where can be witnessed the dying fruit trees and vines, the abandoned fields and dry canals for the greater portion that has heretofore been cultivated; and while we are considering the equitable rights of Mexico, this is also true of the United States side, where almost the same abandonment and destruction of former prosperous farms may be witnessed.

The joint commission is of the opinion that the impounding of this large body of the flood waters of the Rio Grande would not only effectually remedy the existing troubles regarding the equitable division of the waters of said river between the two countries, but would make it feasible to control the flow in the river so that it will be practically constant and uniform and prevent the erosions and avulsions which have heretofore rendered the boundary line between the two countries so undertain, unstable and vexatious. It is certain that this effect will result as far down the river as the mouth of the next important tributary, the Concho River, of Mexico, and that the restraint of the torrential flow will, in a great degree, remedy the erosions and avulsions below the mouth of the Concho and the Gulf.

The Commission recommended that the two Governments enter into a treaty to provide for a final settlement of all questions, past and future, regarding the distribution of the waters of the Rio Grande. It proposed that the United States defray all of the cost of the dam, estimated at $2,317,113.36; that an equitable distribution of the waters from the dam be made between the two countries and that Mexico relinquish all claims for indemnity for the unlawful use of water in the past.

On the subject of interference with the water supply on the upper river, the commission recommended that the United States - in some way prevent the construction of any large reservoirs in the Rio Grande in the Territory of New Mexico, or in lieu thereof, if that be impracticable, restrain any such reservoirs hereafter constructed from the use of any waters to which the citizens of the El Paso Valley, either in Mexico or in the United States, have right by prior appropriation, and provide some legal and practicable remedy and redress, in case such waters should be used, to the citizens of both countries.

The complete text of the joint commission's report of November 25, 1896, with copies of other related papers, will be found in Senate Document No. 229, 55th Congress, 2nd Session 1898. Copies of additional papers on the general subject appear in Senate Document No. 154, 57th Congress, 2nd Session, 1903.

STATE DEPARTMENT REQUESTS EMBARGO

On August 4, 1896, while the joint commission was considering the Mexican complaints in accordance with the concurrent resolution of April 29, 1890, and th agreement of May 6, 1896, the Mexican Minister again addressed the Secretary of State on the subject, forwarding a petition calling attention to the distressing situation on the Mexican side of the Rio Grande, and stating that the efforts of the two Governments to remedy the condition would be fruitless if, in addition to the forty dams in Colorado, the Rio Grande Irrigation and Land Company, Limited (Successor to the Rio Grande Dam and Irrigation Company) should be permitted to construct a dam across the river at Elephant Butte, New Mexico. The communication from the Mexican Minister was referred to Col. Anson Mills of the joint commission, who reported thereon under date of November 17, 1896. This report was transmitted by the Secretary of State to the

Secretary of the Interior by letter dated November 30, 1896. This latter communication suggested that an investigation be made of the rights of the Rio Grande Irrigation and Land Company, Limited, and that the Secretary of the Interior decline to grant additional rights of way over public lands for dams and reservoirs under the Act of March 3, 1891 A copy of the letter of November 30, 1896 is marked Exhibit D and is attached hereto.

Initial Embargo of December 5, 1896

Following the suggestion of the Secretary of State made in letter of November 30, 1896, the Secretary of the Interior on December 5, 1896, addressed a letter of that date to the Commissioner of the General Land Office directing the suspension of action on all applications for rights of way for irrigation purposes over public lands in the Rio Grande basin in Colorado and New Mexico. By letter dated December 19, 1896, the Secretary of the Interior reported this action to the Secretary of State, and commented upon the rights of the Rio Grande Dam and Irrigation Company. A copy of the order of December 5, 1896, marked Exhibit E and a copy of the letter of December 19, 1896, marked Exhibit F are attached hereto. The order of December 5, 1896 has been modified six times as will hereafter appear.

First Modification of Embargo, January 13, 1897.

The Pecos River flowing through Eastern New Mexico is a tributary of the Rio Grande and was included in the blanket order of December 5, 1896. However, its waters reach the Rio Grande at a point below the irrigable area in the vicinity of Juarez, and therefore could not affect the question under discussion. This fact

was brought to the attention of the Secretary of the Interior by letter of January 11, 1897 from the Secretary of State, a copy of which letter marked Exhibit G is attached hereto. Accordingly on January 13, 1897, the order of December 5, 1896, was modified by the Secretary of the Interior so that it would not apply to the tributaries of the Rio Grande which empty into that river below the point where it becomes the international boundary. A copy of the order of January 13, 1897, marked Exhibit H is attached hereto.

Negotiations for Treaty meet Difficulty

In letters of December 19, 1896, December 29, 1896, and January 5, 1897, from the Mexican Minister M. Romero to Secretary of State Olney, the former expressed approval of the joint commission's report of November 25, 1896, and in letter dated January 30, 1897, the Mexican Minister transmitted to our State Department, a draft of proposed treaty following the recommendations of the report of the joint commission, which draft had been approved by the Mexican Government. The position of the United States was expressed in the following paragraph taken from letter of January 4, 1897 from Secretary Olney to the Mexican Minister:

"in preparing to enter into negotiations the Department has found the subject embarrassed by greatly perplexing complications arising out of reservoir dams, etc., either already built or authorized through the concurrent action of the Federal and State authorities. Just what legal validity is to be imputed to such grants of authority, or in what way structures completed or begun are to be dealth with, are questions under careful investigation and which must be disposed of before the United States will be in a condition to negotiate."

Navigability of the Rio Grande

The letter of January 11, 1897 from the Secretary of State to the Secretary of the Interior (Exhibit G), in addition to sug-

gesting that the embargo be lifted from the Pecos River, also suggested that the Rio Grande was a navigable river and that before approving rights of way for dams in the Rio Grande basin, the Secretary of the Interior should assure himself that the erection of such dams would not in any manner interfere with navigation. By letter dated January 13, 1897, the Secfetary of State addressed the Secretary of War on the subject of the Rio Grande Dam and Irrigation Company, and suggested that the Secretary of War secure from the Attorney General an opinion as to whether the proposed dam of the company could be constructed without the sanction of the Secretary of War as directed by the river and harbor act of July 13, 1892, (27 Stat., 88, 100). A copy of the letter of January 13, 1897 marked Exhibit 1 is attached hereto. The Attorney General' sopinion was requested by the Secretary of War on February 13, 1897 and again on April 8, 1897. Delay in the matter was caused by a change in National administration. On April 24, 1897 Attorney General Joseph McKenna approved an opinion of that date by Solicitor General Holmes Conrad. This opinion is reported in volume 21 Op. Atty Gen'l at page 518. The following is the syllabus from the report.

The Secretary of the Interior had no power, under the act of March 3, 1891, providing for the location and selection of reservoir sites on the public lands of the United States and rights of way for irrigating ditches and canals, to grant a right to construct dams across the Rio Grande for the purpose of checking the flow of water and distributing it for irrigation purposes.

The control and supervision of the navigable waters of the United States is vested in the Secretary of War.

The remedy of the United States in case of the erection of a dam across navigable waters is by injunction, under section 10 of

of the act of September 19, 1890, and if the dam has been constructed, also by criminal prosecution.

Litigation with Rio Grande Dam and Irrigation Company

In accordance with the Attorney General's opinion of April 24, 1897, suit by the United States against the Rio Grande Dam and Irrigation Company was filed in the District Court of the Territory of New Mexico, Third District, May 24, 1897. The purpose of the suit was to enjoin the defendant from obstructing the flow of the waters and interfering with the navigable capacity of the Rio Grande, a navigable river, in violations of acts of Congress and contrary to treaty with Mexico. The bill was dismissed by the trial court and this decision was affirmed by the Territorial Supreme Court (9 N. M., 392). The United States Supreme Court reversed the decree and remanded the cause with directions for "an inquiry into the question whether the intended acts of the defendants in the construction of a dam and in appropriating the waters of the Rio Grande will substantially diminish the navigability of that stream within the limits of present navigability and if so, to enter a decree restraining those acts to the extent that they will so diminish." (See U. S. v. Rio Grande Dam and Irrigation Co. (1899) 174 U. S., 690.)

Again in the trial court the cause came in for hearing, and again a decree against the Government was entered and later affirmed by the Territorial Supreme Court. Again the U. S. Supreme Court reversed the lower court, and remanded the case with "direction to grant leave to both sides to addjuce further evidence". (See U. S. v. Rio Grande Dam & Irrigation Co. (1902) 184 U.S.416)

For a third time the suit was placed on the docket of the New Mexico trial court. The Government amended its complaint, alleging that the statutory period of five years for construction required by the right of way act of March 3, 1891 had run, the requirement had not been met, and the rights, if any, the company had acquired were forfeited. Upon this new allegation, the trial court found for the Government, and its decree was thereafter affirmed by the Territorial Supreme Court (13 N.M., 386) and by the U. S. Supreme Court. (See Rio Grande Dam and Irrigation Company v. U. S. (1909) 215 U. S., 266). It will be noted that this litigation covered a period of over twelve years. Incidentally, the successors of the Rio Grande Dam and Irrigation Company (British interests) are now attempting to secure against the United States in an international tribunal an award of damages because they were prevented from carrying out their proposed irrigation enterprise.

Bills in Congress

While the litigation between the United States and the Rio Grande Dam and Irrigation Company was in progress, various bills, providing for the construction of an international dam at El Paso and the distribution of the waters, therefrom, were introduced in Congress. Typical of these was the bill (S 3894-H.R. 9710) introduced in 1900. A copy of this bill marked Exhibit J is attached hereto. On December 19, 1900 the Senate Committee on Foreign Relations reported this bill favorably and recommended that it be passed. (See Senate Report No. 1755, 56th Congress, 2nd Session). However, the bill was not enacted. New Mexico interests were

strongly opposed to the plan for an international reservoir at El Paso, as such a reservoir would inundate a large irrigable area in the Mesilla Valley in New Mexico and prevent a much-desired further development of that region.

The National Irrigation Act.

On June 17, 1902 the National Irrigation Act became a law (32 Stat., 388). Under this act, the Secretary of the Interior was authorized to use certain moneys from public lands to construct and maintain irrigation works in sixteen designated States and Territories, of which the Territory of New Mexico was one. The State of Texas was not included in the list as there were no public lands in that State.

The new United States Reclamation Service in the Geological Survey, organized under said act, began investigations on the Rio Grande March 1, 1903, and the survey of a reservoir site in the vicinity of Elephant Butte was completed in August of that year. Borings for the foundations of the dam were begun in October 1903 and completed in February 1904. (See 2nd Annual Report U. S. Reclamation Service, p. 377; 3rd Annual Report, p. 95, 395). Under date of June 3, 1904, the Mexican Minister M. de Azpiroz, brought the claims of Mexico to the attention of the State Department again, urgently requesting the providing of a water supply or the payment of damages. In letter dated Jun 27, 1904 from Secretary of State John Hay to Secretary of the Interior Ethan Allen Hitchcock, reference is made to the letter of June 3 from the Mexican Minister, and it is suggested that the National Irrigation Act might be utilized to solve the difficulty. A copy

of the letter of June 27, 1904 marked Exhibit K is annexed hereto.

Plans for a Reclamation Service Project

On November 18, 1904, before the National Irrigation Congress held at El Paso, Engineer B. M. Hall of the Reclamation Service, presented a paper dealing with Government irrigation on the Rio Grande. He compared the plan for an international dam at El Paso as proposed in the joint commission's report of November 25, 1896, with the plan for a Federal dam at Elephant Butte in New Mexico. The following is taken from his paper:

As mentioned above, Mr. Follett estimates that about 40,000 acres of land had prior rights under the old canals in El Paso Valley and were deprived of irrigation by the act of American citizens on the headwaters; and that some thing more than one-half of this 40,000 acres lay on the Mexican side of the river. As the restoring of these ancient water rights is the primary object of the proposed expenditure of $2,317,113.36, the cost of project, would be $57.92 per acre. However, it will be shown further along in this paper that the proposed reservoir could be made to irrigate 550000 acres in El Paso valley, which would put the cost per acre at $42.12, provided the estimate of the commission is a correct one. There is every reason for believing this estimate too low, but aside from the monetary cost per acres for the land to be irrigated, there is another item of cost to be considered. The reservoir would cover 25,565 acres of good valley land with mud and water and would cause marshes to form in the low flat valley at the head of the lake amounting to perhaps 15,000 acres additional, making a total destruction of about 40,000 acres of land in the Mesilla Valley, which is just as near to El Paso, and just as valuable as any of the land that would be irrigated.

While the published report of the commission and its engineers plainly sets forth the fact that increased irrigation in Colorado caused shortage of water in Mexico, Texas and New Mexico, their recommendations not only leave New Mexico out of all the benefits to be derived from a project inaugurated for the purpose of making up this shortage, but give part of her territory to Mexico, cover up another part of it by the proposed reservoir; and distinctly ask that the government shall prevent the construction of any other large reservoir on the Rio Grande in the territory of New Mexico. The only reasonable explanation of these extraordinary recommendations lie in the probable fact the commission had no alternative plans for consideration, and thought the plan recommended was the

only possible plan that could be adopted for restoring the water to which Mexico laid claim by virtue of ancient prior use. Indeed, they were confronted at the time with the prospect of an Elephant Butte dam in New Mexico not under government management, but to be constructed, owned and operated by a stock company of private capitalists whose plans contemplated the construction of a comparatively low dam without sufficient storage capacity for irrigating a large area above and having a surplus for Mexico. At that time the United States government had no Reclamation Service. Now that conditions have completely changed, and there is an alternative plan which claims to be able to accomplish just as much for Mexico, and a great deal more for the United States, it becomes necessary to compare these two plans and choose between them.

The Elephant Butte dam has a final advantage of being in New Mexico, and subject to the operations of the United States reclamation service. The project can be so planned that legislation by congress can allow New Mexico and Texas to participate. But the extent and manner of this participation is a matter that must be arranged and decided on by Congress and the department of state. All estimates for work in the territory of New Mexico that will not conflict with any action that may be taken by congress and by the Secretary of State for restoring water to which El Paso Valley in Texas and Mexico has laid claim by virtue of ancient prior appropriation and continuous use."

Congres Authorizes Construction of Dam

By act of February 25, 1905 (33 Stat., 814) Congress extended the provisions of the National Irrigation Act "to the portion of the State of Texas bordering upon the Rio Grande which can be irrigated from a dam to be constructed near Engle, in the Territory of New Mexico, on the Rio Grande, " and directed that "if there shall be ascertained to be sufficient land in New Mexico and Texas which can be supplied with the stored water at a cost which shall render the project feasible and return to the reclamation fund the cost of the enterprise, then the Secretary of the Interior may proceed with the work of constructing a dam on the Rio Grande as part of the general system of irrigation, should all other conditions as regards feasibility be found satisfactory/" By act of June 12, 1906 (34 Stat., 259) the provisions of the National Irrigation Act were

extended so as to include and apply to the State of Texas."

Treaty of May 21, 1906

Although the third and final decision of the United States Supreme Court in the Rio Grande Dam and Irrigation Company case was not made until December 13, 1909, the third and final decision of the New Mexico trial court was rendered on May 21, 1903. Subsequent acts of the Federal Government apparently were based on the idea that the decision of May 21, 1903 would not be disturbed.

The negotiations which had been carried on between the United States and Mexico over a period of about a quarter of a century, culminated in the treaty of May 21, 1906 (34 Stat., 2953) between the two countries. Under this treaty the United States agreed to deliver to Mexico 60,000 acre-feet of water per annum, from the proposed Federal Elephant Butte reservoir, while Mexico waived all claims for damages, and all claims to any other water from the Rio Grande between the Acequia Madre at El Paso and Ft. Quitman, Texas. A copy of the treaty marked Exhibit L is attached hereto.

By act of March 4, 1907 (34 Stat., 1357) the sum of $1,000,000 was appropriated from the Treasury toward the construction of the dam required by the treaty, the remaining cost of the dam to be paid from the reclamation fund and collected from the landowners under the Rio Grande project.

While the construction of a division (Leasburg Unit) of the Rio Grande Irrigation Project was authorized by the Secretary of the Interior on December 2, 1905, the construction of the Elephant Butte reservoir was not authorized until May 23, 1910, and was not completed until May 13, 1916, ten years after the treaty was signed.

Federal Appropriations of Water from Rio Grande

By instrument dated January 23, 1906, and filed in the office of the Territorial Engineer of New Mexico, on the same day, the United States gave notice of appropriation of 730,000 acre-feet of water per annum from the Rio Grande for the proposed Government project. A copy of this notice marked Exhibit M is attached hereto.

By instrument, dated April 1908, and filed in the office of the Territorial Engineer of New Mexico on April 8, 1908, the United States gave notice of appropriation of all the unappropriated water of the Rio Grande for the said project. A copy of this notice marked Exhibit N is attached hereto.

The Rio Grande Federal Irrigation Project

The Elephant Butte dam constructed by the Reclamation Service is 1,585 feet long not including the spillway, 306 feet high from the bed rock foundation to the parapet, and contains 611,700 cubic yards of concrete masonry. In addition to the main structure it was necessary to build an earth and rockfill embankment 2,000 feet long containing 165,700 cubic yards. The reservoir is 45 miles in length with an original storage capacity of 2,638,860 acre-feet of water. This reservoir supplies the 60,000 acre-feet of water provided by the treaty of May 21, 1906 for the irrigation of approximately 25,000 acres of land in the Republic of Mexico, and in addition is intended to irrigate approximately 83,000 acres of land in the Elephant Butte Irrigation District of New Mexico and approximately 67,000 acres of land in the El Paso County Water Improvement District No. 1 of Texas.

By order dated May 25, 1906 the Secretary of the Interior modified the embargo on the Upper Rio Grande so as to permit approval of rights of way over public lands for irrigation purposes initiated by actual field surveys based upon notices of appropriation of water filed under the laws of Colorado prior to March 1, 1903. This action was not taken until it had been approved by the State Department in letters of March 7, 1906, and May 22, 1906, to the Secretary of the Interior. A copy of the order of May 25, 1906 marked Exhibit O is attached hereto.

Third Modification of Embargo, July 10, 1906

On July 10, 1906 by letter of that date to the Commissioner of the General Land Office, the embargo was modified by providing that in the future all applications for rights of way should be submitted to the Director of the Geological Survey, "to ascertain whether they will conflict with the obligations of the United States under the treaty with Mexico, recently ratified, or with the Rio Grande or any other project of the Reclamation Service". A copy of the order of July 10, 1908, marked Exhibit P, is hereto attached.

Fourth Modification of Embargo, September 27, 1906

On September 27, 1906 with the approval of the State Department, the Acting Secretary of the Interior issued an order revoking all prior orders affecting the embargo on the Upper Rio Grande in view of the settlement of the water right question between the United States and Mexico by treaty of May 21, 1906. It was further order that all applications involving the use of the waters of the Rio Grande in Colorado and New Mexico should be submitted for a determination by the Geological Survey to ascertain whether favorable action thereon would interfere with any project of the reclamation service or with the obligations of the United States under the treaty. A copy of this order marked Exhibit Q is attached hereto.

Fifth Modification of Embargo, April 25, 1907

The obligations of the United States under the treaty, the fulfilment of which depended upon the construction and utilization of the Elephant Butte reservoir, make it necessary for the Secretary of the Interior to determine a policy in dealing with applications for rights of way over the public lands for irrigation purposes, and on April 25, 1907, Secretary of the Interior J. R. Garfield approved a recommendation of the Reclamation Service providing that - until the development of irrigation on the upper Rio Grande, in the State of Colorado and the Territory of New Mexico, shall furnish sufficient data to determine the effect of the storage and diversion of water in that vicinity upon the water supply for the Engle Reservoir of the Rio Grande project,

no further rights of way be approved which involve the storage or diversion of the waters of the upper Rio Grande and its tributaries, except applications of two kinds: First, those in connection with which there is a showing that the rights of the parties were initiated prior to the beginning of active operations by the Reclamation Service for the Rio Grande project, namely, March 1, 1905; second, applications which involve the diversion or storage of not exceeding 1,000 acre-feet of water per annum.

When it becomes possible to determine the effect of the approved applications upon the water available for storage for the Rio Grande porject, it may be possible to allow the use of rights of way to a greater extent than is now proposed.

A copy of the order of April 25, 1907 marked Exhibit R is attached hereto.

Sixth Modification of Embargo, March 2, 1923

By letter dated, March 2, 1923, the Director of the Reclamation Service reviewed the history of the embargo, and recommended that that Service be authorized to

negotiate for the release of specific areas of public land for purposes of water storage under conditions that will best conserve and utilize the water resources and will protect vested rights in all parts of the Rio Grande basin-such negotiations to be subject to the approval of the Secretary of the Interior and, prior to such approval, to be subject to the scrutiny of all interested parties.

This recommendation was approved by Secretary of the Interior, Albert B. Fall on the date of the letter. A copy of this letter, marked Exhibit S, is attached hereto.

Rights of Way in Colorado which have been approved.

While the embargo applies to New Mexico as well as to Colorado, there are few irrigation possibilities in the former State that could conflict with the Embargo. From a compilation made from the records of the General Land Office in February, 1923, it appears that since

the embargo went into effect, irrigation rights of way over public lands in the Rio Grande basin in Colorado have been approved by the Government as follows:

Applicant	Capacity, acre-feet
Alta Lake Reservoir	414
Balmon reservoir	40
Botefur reservoir	8
Bristol Head reservoir (2)	569
Clemmons & Bielser ditch	
Cole reservoir	19
Colton Creek Air Line ditch	
Colton Creek reservoir	76
Continental reservoir	38,196
Cove Lake reservoir	10,683
David Bros. ditch	
Deer Lake reservoir	203
Haton reservoir	95
Lost Lake reservoir	194
Poage reservoir	260
Pond Lily reservoir	142
Regan reservoir	1,375
Rio Grande reservoir & Ditch Co.	43,567
Road Canyon reservoir	915
San Antonia reservoir (see Alta Lake)	
San Isabel reservoir (2)	451
San Jose Ditch No. 2	
San Luis Valley reservoir	3,283
Santa Maria reservoir (See Rio Grande)	
Short Creek reservoir	112
Sierra Blance reservoir	184
Swift Company reservoir	139
Tabor Ditch No. 1	
Tabor Ditch No. 2	
Taos Valley Canal	
Terrace reservoir	13,000
Wild Cherry reservoir	684
Total	114,609

Objections to the Embargo

Frequently since the embargo was made effective in 1896 protests have been filed against its continuance. These have come principally from landowners in the San Luis Valley in the State of Colorado, where the burden of the embargo is most keenly felt.

On the part of the complainants it has been urged (a) that the embargo is a restriction on the use of water, and is in conflict with the enabling act of March 3, 1875 (18 Stat., 474) under which Colorado was admitted to the Union, (b) that the right of way act of March 3, 1891 (26 Stat., 1095) makes a grant, and the Secretary of the Interior has no authority to withhold this grant as demanded by the embargo, and (c) that diversions in Colorado will not adversely affect the Government project.

On the other hand, the United States contends (a) that the enabling act of March 3, 1875 reserves to the Federal Government full authority over its public lands, (B) that the right of way act of March 3, 1891 gives the Secretary of the Interior a discretion to refuse to approve an application for a right of way when in his opinion it is contrary to the public interest to do so, and (C) that as a condition precedent to the approval of any application, it must appear clear that the Government project will not be injured thereby. The subject is dicussed at some length by First Assistant Secretary Pierce in the Wagon Wheel Gap Reservoir case (39 L. DL., 104).

Rio Grande Commission

Complaints against the embargo finally brought forth the suggestion that a commission should be named to make a study of the water supply and draft a form of compact between the states affected, under which an equitable allocation of the use of the waters of the Rio Grande would be made to each State. This would follow the precedent of the Colorado River Compact signed at Santa Fe, N. Mex., November 24, 1922.

On March 12, 1923 the State of New Mexico enacted a law (N. Mex. Session Laws, 1923, p. 175) authorizing the appointment of a representative of such a commission. Under this Act the Governor appointed Mr. J. O. Seth, an attorney at law, of Santa Fe, N. Mex. A copy of the statute marked Exhibit T is attached hereto.

On March 20, 1923, the State of Colorado enacted a Statute (Colorado Session Laws, 1923, p. 702) for a similar purpose, and under its authority the Governor appointed Mr. Delph E. Carpenter, an attorney at law, of Greeley, Colorado, to represent that State. A copy of the act marked Exhibit U is attached hereto.

In December, 1923, President Coolidge named Mr. Herbert Hoover as the representative of the United States on the Rio Grande Commission.

It is anticipated that at the January 1925 session of the Texas legislature, the Governor of that State will be authorized ot name a representative on the Commission.

Dated November 11, 1924.

EXHIBIT A.

(Copy of concurrent resolution of April 29, 1890.)

Concurrent resolution concerning the irrigation of arid lands in the valley of the Rio Grande,River, the construction of a dam across said river at or near El Paso, Texas, for the storage of its waste waters, and for other purposes.

WHEREAS the Rio Grande River is the boundary line between the United States and Mexico; and

WHEREAS by means of irrigating ditches and canals taking the water from said river and other causes the usual supply of water therefrom has been exhausted before it reaches the point where it divides the United States of America from the Republic of Mexico, thereby rendering the lands in its valley arid and unproductive to the great detriment of the citizens of the two countries who live along its course; and

WHEREAS in former years annual floods in said river have been such as to change the channel thereof, producing serious avulsions and oftentimes and in many places leaving large tracts of land belonging to the people of the United States on the Mexican side of the river and Mexican lands on the American side, thus producin a confusion of boundary, a disturbance of private and public titles to lands, as well as provoking conflicts of jurisdiction between the two Governments, offering facilities for smuggling, promoting the evasion and collection of revenues by the respective countries; and

WHEREAS these conditions are a standing menace to the harmony and prosperity of the citizens of said countries, and the

amicable and orderly administration of their respective Governments: Therefore,

Resolved by the Senate (the House of Representatives concurring), That the President be requested, if in his opinion it is not incompatible with the public interests, to enter into negotiations with the Government of Mexico with a view to the remedy of all such difficulties as are mentioned in the preamble to this resolution, and such other matters connected therewith as may be better adjusted by agreement or convention between the two Governments. And the President is also requested to include in the negotiations with the Government of Mexico all other subjects of interest which may be deemed to affect the present or prospective relations of both Governments.

EXHIBIT B

(Sections 18, 19, 20, and 21 of the act of March 3, 1891 (26 Stat. 1095), entitled "An Act to repeal timber-culture laws, and for other purposes, "granting a right of way through the public lands and reservations of the United States for the use of canals, ditches, or reservoirs.)

Sec. 18. That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation, and duly organized under the laws of any State or Territory, which shall have filed or may hereafter file with the Secretary of the Interior a copy of its article of incorporation and due proofs of its organization under the same to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch; Provided, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the department of the Government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.

Sec. 19. That any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the

location of ten miles of its canal if the same be upon surveyed lands, and if upon unsurveyed lands within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located, a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats of said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way. Whenever any person or corporation in the construction of any canal, ditch or reservoir injures or damages the possession of any settler on the publid domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

Sec. 20. That the provisions of this act shall apply to all canals, ditches, or reservoirs heretofore or hereafter constructed, whether constructed by corporations, individuals, or association of individuals on the filing of the certificates and maps herein provided for. If such ditch, canal, or reservoir has been or shall be constructed by an individual or association of individuals, it shall be sufficient for such individual or association of individuals to file with the Secretary of the Interior and with the register of the land office where said land is located a map of the line of such canal, ditch, or reservoir, as in case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association, if any there be. Plats heretofore filed shall have the benefits of this act from the date of their filing, as though filed under it: Provided, That if any section of said canal or ditch shall

not be completed within five years after the location of said section the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the exteht that the same is not completed at the date of the forfeiture.

Sec. 21. That nothing in this act shall authorize such canals or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch.

EXHIBIT C.

(Letter from the Mexican Minister, M. Romero, to Secretary of State, Richard Olney.)

Legation of Mexico

Washington, October 21, 1895

Mr. Secretary: I have addressed your Department on various occasions, communicating the instructions which I have received from my Government to endeavor to secure the adoption of an arrangement designed to remedy the evils which are suffered by the inhabitants of the Mexican bank of the Rio Grande from Paso del Norte to a distance of about 200 kilometers below.

Paso del Norte and the adjacent region down the river are situated in the center of the dry zone and consequently can not depend upon the rains for their agricultural operations, but are obliged to depend upon irrigation. From a report of the Weather Bureau at El Paso, Tex., dated August 24, 1894, a copy of which is herewith enclosed, it appears that the total rainfall registered from August 15, 1893, to August 14, 1894, was 4.97 inches, or next to nothing at all.

The city of Paso del Norte has been in existence for more than three hundred years, and during (almost) all that time its people have enjoyed the use of the water of the Rio Grande for the irrigation of their lands; and as that city and the districts within its jurisdiction did not need more than 20 cubic meters of water per second, which is almost an infinitesimal portion

of the amount of water which flowed down the river, even in times of the severest drought, they had sufficient water for their crops until about ten years ago, when a great many trenches were dug in the State of Colorado, (especially in the St. Louis Valley) and in the Territory of New Mexico, through which the Rio Grande and its affluents flow. The volume of water thus taken has so greatly diminished that which is brought by the river to Paso del Norte that, when the rains are not very abundant, there is a scarcity of water from the 15th of June of one year til the month of March of the next, which is the very time when water is most needed for the crops.

In the year 1894 the river became dried up entirely by the 15th of June, and only when it rained in New Mexico was there any water in it, and that lasted of course for but a short time. In that the year the farmers were unable to raise any Indian corn, vegetables, or grapes, and the scarcity of water was such that even the fruit trees began to wither.

This state of things has naturally reduced the price of the land, which was good until that time, to an extremely low figure, and has diminished the population of that region very considerably. In 1895 there was at Paso del Norte, Zaragoza, Tres Jacales, Guadalupe, and San Ignacio, a population of about 20,000 which in 1894, was reduced to half that number. Farms no longer produced enough to support their owners, and the situation of the people is wretched in the extreme, because, as they are unable to raise vegetables or other articles necessary to support life, they are obliged to send for them a distance of from 500 to 1000

miles, their cost being thus increased while the people's means of paying for what they need are greatly diminished.

The United States Congress recognized the serious injury suffered by the Mexicans in a concurrent resoluation approved April 29, 1890, whereby it recommended to the President of the United States to enter into negotiations with the Mexican Government with a view to deciding upon such means as might tend to remedy the difficulties occasioned by the scarcity of water in the Rio Grande from the point where it serves as a boundary between Mexico and the United States of America.

The Mexican Government, to which the United States minister in Mexico communicated the aforesaid resolution in pursuance of the instructions of his Government, authorized me to take steps here to secure the arrangement proposed in the resolution, and I so informed the Department of State in a note dated October 26, 1893. It has not, however, thus far been possible to make much progress in this matter.

The Government of Mexico thinks that according to Article VII of the treaty of Guadalupe Hidalgo of February 2, 1848, the inhabitants of one country cannot, without the consent of the other build any works that obstruct or impede navigation in international rivers, and nothing couldimpede it more absolutely than works which wholly turn aside the water of those rivers. It is true that Article IV of the treaty of Mesilla of December 30, 1853, annulled Article VII of the treaty of Guadalupe Hidalgo, but at the same time it left its stipulations in force, as far as the Rio Grande is concerned, from the point where that river begins to be the boundary line between the two countries, and moreover, by Article V of

the convention of November 12, 1884, the right of both countries to that river was again recognized, and it was again stipulated that one could not construct any works that obstructed navigation without the consent of the other.

From a report of the assistant quartermaster-general addressed to the general in chief of the U. S. Army, and dated Brazos de Santiago, Tex., September 5, 1850, it appears that Captain Lowe, U. S. Army, ascended it with a vessel, reaching a point several kilometers above Paso del Norte, which shows that it was navigable at that time.

Still, even supposing, without admitting it, that the Mexican Government's interpretation of the treaties were not well founded, and even if there were no stipulation on this subject between the two countries, the principles of international law would form a sufficient basis for the rights of the Mexican inhabitants of the bank of the Rio Grande. Their claim to the use of the water of that river is incontestable, being prior to that of the inhabitants of Colorado by hundreds of years, and, according to the principles of civil law, a prior claim takes precedence in case of dispute.

The circumstance that that river serves as the boundary between the two countries, and that it is consequently an international river, gives it a special character, which considerably restricts the freedom and rights of the inhabitants of both banks, and does not permit them to construct works the reduce the volume of water in the river to such an extent that it is no longer navigable, and even, at last, is dried up entirely.

I should fear to cast a reflection upon your knowledge of such matters if I were to quote the various doctrines laid down by writers of international law, which are applicable to the present case and

which support my asseverations.

These considerations, and the terrible situation in which the inhabitants of Paso del Norte and the neighboring districts now are, render the Government of Mexico exceedingly desirous to conclude an arrangement with that of the United States on this subject as speedily as may be possible; and I therefore repeat the request which I have verbally made on several occasions, viz, that the antecedents may be examined, and that the necessary steps may be taken to effect an arrangement with the Government of Mexico that will facilitate the fulfillment of international obligations and remedy existing evils as far as possible.

Be pleased to accept, etc.

M. Romero.

EXHIBIT D.

(Letter dated November 30, 1896 from Secretary of State Richard Olney to Secretary of the Interior D. R. Francis).

DEPARTMENT OF STATE
WASHINGTON

November 30, 1896.

The Honorable

The Secretary of the Interior

Sir:

I have the honor to invite your attention to the enclosed copy of a letter dated November 17, 1896, and accompanying papers from Colonel Anson Mills of the United States Army, who is a member of a joint commission appointed by the United States and the Republic of Mexico to report upon the best and most feasible mode - whether by a dam across the Rio Grande River near El Paso, Texas, or otherwise - of so regulating the use of the waters of the Rio Grande River as to secure to each country and its inhabitants their legal and equitable rights and interests in said waters for irrigation purposes.

This examining board was appointed in pursuance of a concurrent resolution of Congress, approved April 29, 1890, which recites the fact that by reason of the irrigating ditches and canals leading from the upper waters of the Rio Grande in the State of Colorado and Territory of New Mexico, an insufficient quantity of water remains in the river to irrigate the lands adjacent to the river after it

leaves New Mexico, thereby rendering the lands arid and unproductive, to the great detriment of the citizens of both countries who live along the Rio Grande below the line of New Mexico. The resolution then authorizes the President to enter into negotiations with the Government of Mexico with a view of remedying this condition. I enclose a copy of the resolution.

The duty imposed upon this Board of Examiners was to ascertain:

(1) The amount of water taken from the Rio Grande by the irrigation canals constructed in the United States:

(2) The average amount of water in said river year by year before the construction of said irrigation canals and since their construction:

(3) The best and most practicable mode of regulating the use of the waters of the Rio Grande so as to secure to each country and to the border landowners on both sides of the river their legal and equitable rights and interests in said waters.

August 4th last, the Mexican Minister to the United States transmitted to this Department a copy of a petition forwarded by the inhabitants of the City of Paso del Norte, Mexico, calling attention to the distressing situation in the town on the Mexican side of the Rio Grande caused by the immoderate use of the waters of the river for irrigation purposes by the adjacent owners in the United States above the boundary line. This petition states that the efforts of the two governments to remedy this condition will be fruitless, if in addition to the forty dams already existing in Colorado the Rio Grande Irrigation and Land Company Limited should be permitted to construct, as it proposes, a dam across the Rio Grande at Elephant Butte, New Mexico. The Mexican Minister said

that his Government regarded this petition as well founded, and requested the United States to adopt such measures as may be in its power to put a stop to the work undertaken by the Rio Grande Irrigation and Land Company Limited until the effect of that company's proposed works upon the practicability of the international scheme could be considered by the examining board and determined upon to the satisfaction of the two governments. A copy of the Mexican petitionwas sent to Colonel Mills for his suggestions. The enclosed letter of November 17th, 1896, to which your attention is invited, is his reply.

Colonel Mills says that the proposed dam and reservoir of the Rio Grande Irrigation and Land Company limited is located about one hundred and twenty five miles above El Paso, and that it will be useless at that distance to furnish water for irrigation in the vicinity of El Paso and below. He says furthermore, that he is informed that the same company has on file in the Interior Department applications for two additional dams and reservoirs, one at Rincon, New Mexico, about 100 miles above El Paso, and another at Fort Seldon, about 60 miles above; also that at the latter place a man named Ernest Dale Owen has applied for permission to erect a dam and reservoir.

It is understood that the Rio Grande Irrigation and Land Company Limited acquired its right to build the reservoir it is now constructing from a corporation existing under the laws of New Mexico under the name of the "Rio Grande Dam and Irrigation Company", to which company the right of way for the construction of the storage dam at Elephant Butte was granted by the Secretary of the Interior February 1, 1895, under the provisions of the Act of

March 3, 1891.

Colonel Mills gives it as his opinion that the probable flow of water in the river will be sufficient to supply the proposed international reservoir after deducting for all the small reservoirs now in operation and likely to be constructed above, but that the flow will not be sufficient to supply the proposed international reservoir and allow for the supply of the proposed reservoir of the Rio Grande Irrigation and Land Company Limited at Elephant Butte or any other reservoirs upon the same scale, and that the scheme of building an international reservoir will have to be abandoned unless the completion of the works proposed by the Rio Grande Irrigation and Land Company Limited and by Owen is prevented. Colonel Mill's letter suggests that the rights obtained from the United States by the Rio Grande Irrigation and Land Company Limited may be subject to conditions in favor of the rights of those who live below, which on a proper showing might enable the Secretary of the Interior to cancel the grant made to that Company. The other applications for permission to build reservoirs for storage of the waters of the Rio Grande mentioned by Colonel Mills, have not, it is assumed, yet been finally acted upon.

The circumstances being as above stated, I desire to suggest the propriety of declining to grant any additional rights to build dams and reservoirs as applied for - certainly until negotiations now pending between Mexico and the United States have reached a final conclusion. I desire also to suggest that an investigation may be made of the right already granted to the Rio Grande Irrigation and Land Company Limited and of any acts or proceedings done by that company by virtue of such rights, with a view of ascer-

taining whether there is any legal power to cancel those rights, and, if the power exists, whether it can be exercised without injustice to the parties directly and indirectly interested in that enterprise.

With a request for your earliest practicable attention to this matter,

I have the honor to be, Sir,

Your obedient servant,

Richard Olney.

EXHIBIT E.

(Order, dated December 5, 1896, of the Secretary of the Interior, placing the embargo on the Upper Rio Grande.)

Department of the Interior,
Washington, December 5, 1896.

THE COMMISSIONER OF THE GENERAL LAND OFFICE.

Sir: Your office is hereby directed to suspend action on any and all applications for right of way through public lands for the purpose of irrigation by using the waters of the Rio Grande River or any of its tributaries in the State of Colorado or in the Territory of New Mexico until further instructed by this Department.

Very respectfully,

D. R. Francis, Secretary.

EXHIBIT F.

(Letter dated December 19, 1896, from the Secretary of the Interior to the Secretary of State.)

Department of the Interior
Washington, December 19, 1896.

The Honorable the Secretary of State,

Sir:

I have the honor to submit, in response to your communication of November 30, the enclosed paper, prepared under the direction of the Assistant Attorney General, which fully sets forth the claims and contentions of the Rio Grande Dam and Irrigation Company, and discusses at considerable length the laws of the State of Colorado and Territory of New Mexico relating to waters, and the acts of Congress and rulings of this Department relating to irrigation.

The application of the Rio Grande Dam and Irrigation Company was approved by my predecessor on the 1st day of February, 1895. In my opinion I have no right under the law, to revoke this approval. It has been decided by the Supreme Court of the United States in the case of Noble V. Union River Logging Railroad Company (147 U. S., 165) that the approval of the Secretary of the Interior of a right of way for railroad purposes over the public land can not be revoked by his successor, and upon the principle therein declared I deem it beyond my authority to revoke my predecessor's approval of the map filed by the Rio Grande Dam and Irrigation Company.

Assuming that I had such power, I submit to you whether or no

the exercise of it would be proper in view of the opinion of the Attorney General of your Department under date of December 12, 1895. (21 Op. Att. Gen. p. 274)

It is not the duty of this Department to protect the citizens of the United States against unlawful appropriation of the waters of the States and Territories by the inhabitants thereof, and if no treaty obligations of the Government are involved, I do not believe that I should assume to interfere.

Since the receipt of your communication complaints have been made to this Department by parties now having applications for irrigation privileges pending for the vacation of my order of December 6, upon the ground that the effect of such order is to imperil the rights by subordinating them to the claims of persons who may hereafter for lawful or nefarious purposes enter lands along the rights of way applied for. Very grave inconvenience would arise if such claims are filed and I therefore submit for your consideration whether or not there is further need for continuing the suspension heretofore declared.

Immediately upon receipt of your communication I addressed to the Commissioner of the General Land Office directions that he suspend all applications for right of way through the public lands for the purposes of irrigation by using the waters of the Rio Grande River or any of its tributaries in the State of Colorado or the Territory of New Mexico until further instructed by this Department. A copy of said order is hereto attached.

Very respectfully,

D. R. Francis,

Secretary.

EXHIBIT G.

(Letter of January 11, 1897 from the Secretary of State to the Secretary of the Interior.)

DEPARTMENT OF STATE

Washington, January 11, 1897.

Sir:

In your letter of December 19, 1896, relative to the reservoir which the Rio Grande Dam and Irrigation Company, or another corporation claiming the rights of that company, intends to build at Elephant Butte, N. Mex., you informed me that you directed the Commissioner of the General Land Office to suspend action on any and all application for right of way through public lands for the purpose of irrigation by using the waters of the Rio Grande River or any of its tributaries in the State of Colorado or in the Territory of New Mexico until further instructions from you. The request of this Department upon which your order was based was made at the suggestion of Col. Anson Mills, a copy of whose letter, dated October 29, 1896, was transmitted to you October 31 of that year.

The attorneys of parties who have made application to your Department for the approval of rights of way to build dams and reservoirs on the Pecos River have made verbal complaint to this Department that the order has been applied by the General Land Office to the river Pecos, as well as to the tributaries of

the Rio Grande which join that river above El Paso. Upon receipt of this complaint, I made inquiry of Colonel Mills as to whether his request that otion be suspended on all applications for permits to build additional dams across the Rio Grande or its tributaries was intended to apply to the Pecos, and whether the building of additional reservoirs on that river would affect the plan which this Department has under consideration of building an international reservoir at El Paso. He has replied under date of January 7, 1897, that he had not intended to stop the granting of permits for reservoirs on the Pecos or on any stream which empties into the Rio Grande below the proposed location of the international reservoir. He does not believe that further use of the waters of the Pecos for irrigation purposes will affect the international question pending between the United States and Mexico, as the river falls into the Rio Grande at a point where the diminution of its waters will have little if any perceptible effect upon the volume passing downward from that point.

I have the honor, therefore, to suggest that the order to the Commissioner of the General Land Office, referred to in your letter to me of December 19, 1896, be limited in its application to the tributaries of the Rio Grande which pour into that river above the point where it becomes the boundary between the United States and Mexico, and that it be no longer applied to applications for dams and reservoirs on the Pecos.

There is another phase of this question which, it has occurred to me, may have an important bearing upon the rights of parties

now applying for permission to erect dams across the Rio Grande, and also upon the international question involved. I have information which indicates that the Rio Grande River in some parts above the international boundary line is, and has been used as, a waterway for navigation between the United States and Mexico, and possibly between the State of Colorado and the Territory of New Mexico. If it be true that this stream in its natural condition is capable of use for the transportation of commerce between two States of the Union or between the United States and a foreign country, the river is a navigable water of the United States and as such subject to laws of Congress enacted for the maintenance, protection, and preservation of the navigable waters of the United States. One of the principal matters of complaint by Mexico is that the diversion of the upper waters of the Rio Grande for irrigation purposes has affected the usefulness of that stream as a waterway for commerce.

The Attorney-General in his opinion of December 12, 1895 (21 Op. 274), held that the river was not navigable above the boundary in the sense of the treaty between the United States and Mexico; but the question here is whether it is navigable within the meaning of the laws of the United States. The conditions of navigability within the meaning of our statutes are well defined in the decisions of the Federal courts. Many of these are referred to in 20 Op. Att. Gen., 101.

If the Rio Grande River is in the part under consideration a navigable water of the United States, the question arises whether the erection of the proposed dams across it will not interfere with its navigability and bring those dams within the prohibition

of the statutes enacted for the preservation of navigable waters. I refer particularly to the act of September 19, 1890, Sections 7 and 10 (26 Stat. L., 426), and to the Act of July 13, 1892, section 3 (27 Stat. L., 110). It is true that the enforcement of these statutues developesprimarily upon the Secretary of War, and that at first view it may not appear to be a part of the duty of the Secretary of the Interior to take care of the navigability of the streams on thepublic lands, but in a case where the act of the Secretary of the Interior approving the right of way to build a dam across a river on the public lands may operate, as it must if the river is a navigable water of the United States, as a grant of executive sanction to a proceeding which is in violation of law, it would seem to be the duty and within the jurisdiction of the Secretary of the Interior to ascertain before sanctioning the erection of the dam whether it would constitute an obstruction to a navigable water of the United States and be within the prohibition of the statutes.

As the erection of the dams under consideration is now the subject-matter of a complaint of the Government of Mexico, I feel it my duty to lay this question before you in order that you may determine, in the first place, whether you have the power, and in the second place whether it is a part of your duty to withhold approval of the pending applications for rights of way to build dams across the Rio Grande River and its tributaries above the boundary line, until the applicants have satisfied you that the river in the part effected by these dams is not a navigable water of the United States or that the dams will not interfere

with the navigation of the river. It must be observed that the obstruction to navigation may result not only from the intervention of the dams across the course of the river, but also from the diversion of the waters, leaving an insufficient quantity below the dam for the purposes of navigation.

I have, etc.,

Richard Olney.

EXHIBIT H.

(Order, dated January 13, 1897, of the Secretary of the Interior, modifying the embargo on the Upper Rio Grande.)

DEPARTMENT OF THE INTERIOR

Washington, January 13, 1897.

The Commissioner of the General Land Office:

Sir: By departmental letter of December 5, 1896, 697 were directed to suspend action on all applications for right of way for irrigation purposes by the use of the waters of the Rio Grande or any of its tributaries in Colorado or New Mexico til further instructed.

I now hereby modify the above order by limiting its application, so far as the tributaries of the Rio Grande are involved, to those tributaries which empty into the river above the point where it becomes the boundary between the United States and Mexico.

Very respectfully,

D. R. Francis, Secretary.

EXHIBIT I.

(Letter dated January 13, 1897 from the Secretary of State to the Secretary of War.)

DEPARTMENT OF STATE

Washington, January 13, 1897.

The Honorable the Secretary of War:

Sir:

August 4, 1896, the Mexican Minister in Washington presented to this Department the enclosed petition from Mexican citizens in and about Paso del Norte, Mexico, protesting against the immoderate use of the waters of the Rio Grande River and its tributaries by residents of Colorado and New Mexico. The Mexican minister called attention to article 7 of the treaty of Guadalupe Hidalgo, of February 2, 1848; to article 1, last clause, of the treaty of December 30, 1853; to article 3 of the convention of November 12, 1884; and to article 5 of the convention of March 1, 1889, between the United States and Mexico, and, relying upon those treaty provisions, requested that the United States Government prevent the erection and operation of a dam by a company known to the complainants as the "Rio Grande Irrigation Company", at Elephant Butte N. Mex., about 125 miles above. Paso del Norte, designed to store all the surplus waters of the river and turn it into irrigating ditches and canals.

The complaint of Mexico was sent August 8, 1896, to Col. Anson

Mills, of the United States Army, who was then engaged, under the direction of this Department, in an investigation of the volume of water in the Rio Grande and the feasibility of a plan under consideration by both governments of erecting an international reservoir. Col. Mills reported, November 17, 1896, the erection of the dam at Elephant Buttes and of other dams below there, which the same com any contemplated building, would stop practically all the water coming into the Rio Grande above those points. The complaint and Colonel Mill's report were referred to the Secretary of the Interior November 30, 1896, with a view to ascertaining whether there was any legal power to cancel the rights claimed by the said irrigation company, and if the power to cancel existed, whether it could be exercised without injustice to the parties directly or indirectly interested in the enterprise. The Secretary of the Interior, had been previously requested to suspend temporarily all applications for rights of way to build dams across the river in all pending cases. December 5, 1896, he suspendedd the applications not already approved, but in a letter of December 19 said, with reference to the dam at Elephant Buttes to be built by the corporation referred to in the Mexican complaint, the proper name of which is "The Rio Grande Dam and Irrigation Company", that his predecessor had approved the application of that company for a dam and reservoir at Elephant Buttes, and that he had no power to revoke his predecessor's action. The law under which the Secretary of the Interio acts in approving rights of way and maps for dams and reservoirs on public lands is contained in sections 18 to 21 of the act of March 3, 1891. (26 Stat.

L., 1095, 1101, and 1102).

The Secretary of the Interior is, for the reason above given powerless to intervene or inquir further into the lawfulness of the proposed dam across the Rio Grande at Elephant Buttes. The act of July 13, 1892 (27 Stat. L., 88-100) provides, however (in section 3, amending section 7 of the act of September 19, 1890):

> That it shall not be lawful to build any wharf, pier, delphin, boom, dam, weir, breakwater, bulkhead, jetty, or structure of any kind outside established harbor lines or in any navigable waters of the United States where no harbor lines are or may be established, without the permission of the Secretary of War. . . . .

As the proposed erection of this dam across the Rio Grande at Elephant Butte has given rise to an important and international question, I have the honor to inquire whether the parties engaged in this enterprise, or others whose rights they enjoy, have obtained from you, as Secretary of War, the permission required by the act first above quoted. If your permission has not been obtained for the placing of this obstruction across the Rio Grande River, I have the honor to request that you will ascertain whether the river in the parts which will be affected by the dam and the diminution of the volume of water consequent upon its erection, is not a navigable water of the United States within the meaning of the statutes above quoted, so as to make your sanction a necessary prerequisite to the lawful erection of the dam. I have received information tending to show that the Rio Grande River is navigable for commercial purposes between the United States and Mexico, and possibly between the State of Colorado and the Territory of New Mexico. It probably will not float water craft of great size; but I understand that it has been used in the timber commerce

the country, and is, in its natural state, capable of regular, periodical, if not perennial, use as a waterway for commercial traffic between the two States of the Union or between the United States and a foreign country. If that be true, the river is a navigable stream of the United States, within the meaning of the law for the protection of such waters.

In case it should be ascertained as a fact that the Rio Grande Dam and Irrigation Company, or persons exercising the rights obtained by that company, are without the permission required by the act of July 13, 1892, building or about to build a dam across a navigable river of the United States in a manner that will obstruct or impair the use of that river as a highway for commerce between the United States and a foreign country, or between States of the Union, I have the honor to request that you will adopt such measures as are most effective to open the river and keep it open to such navigation as it is naturally capable of affording for commercial traffic between the States or between any portion of the United States and Mexico.

Section 10 of the act of September 19, 1890, is a general provision enforcible in the courts under the direction of the Attorney General of the United States, and his aid would necessarily be invoked by you should you determine to put this provision of law in force against the Rio Grande Dam and Irrigation Company's obstruction of the river at Elephant Butte. In this connection I desire to call your attention to an opinion of the Attorney-General delivered December 12, 1895 (20 Op. Att. Gen. 274), in which he holds that the Rio Grande is not a navigable

river about a point 150 miles below Paso del Norte in so far as the treaty obligations of the United States with Mexico are concerned. He did not consider the question whether the river where it lies wholly in the United States is a navigable water of the United States within the meaning of the Federal Statutes. This latter question is, I believe, a new one, dependent upon facts not yet fully ascertained, facts which I have no doubt your Department can readily obtain and furnish to the Attorney General in case they, in your opinion, justify or require the intervention of his office.

To put you in a more complete possession of the facts relating to the dam at Elephant Buttes, I enclose copy of the letter of the Secretary of the Interior, dated December 19, 1896, referred to above, and of the accompanying report of the Assistant Attorney-General for the Interior Department. From these papers it appears that the Secretary of the Interior has acted upon the assumption that the Rio Grande River above the boundary line is not a navigable river of the United States, without requiring proof or otherwise ascertaining that it is not navigable.

I have the honor to be, Sir, your obedient servant,

Richard Olney.

EXHIBIT J

(Bill to provide for an international dam and distribution of waters of Rio Grande, introduced in Congress in 1900.)

A bill to provide for the equitable distribution of the waters of the Rio Grande River between the United States of Americaan and the United States of Mexico and for the purpose of building and internationaldam and reservoir on said river at El Paso, Texas.

WHEREAS the Republic of Mexico has made reclamation of the United States to the Secretary of State, through its legation in Washington, for a large indemnity for water alleged to have been taken and used by the citizens of the United States in Colorado and New Mexico, on the head waters of the Rio Grande to which citizens of Mexico had right by prior appropriation, in violation of the spirit of article seven of the treaty of peace of Guadalupe Hidalgo: and

WHEREAS an investigation directed jointly by the State Departments of the two Republics and carried out by the International Boundary Commission organized under the convention of March first, eighteen hundred and eighty-nine, discovered the fact that the flow of the river has gradually diminished for the past fifteen years in an increasing ratio, so that the ordinary summer's flow in the lower river is inadequate to supply the wants of irrigation, domestic, and other purposes, as has been supplied in previous years, and

WHEREAS a remedy has been proposed by the two Governments

for this deficiency by impounding in an international dam and reservoir near the boundary line between the two Republics, the annual flood waters of the spring season, which are greatly in excess of the wants of irrigation, domestic, and other purposes in those seasons, such waters to be equitably distributed between the two Republics: and

WHEREAS it was afterwards discovered that other like projects of large dams and reservoirs were contemplated above said proposed international dam and reservoir : and

WHEREAS the two Governments jointly directed the International Boundary Commission hereinbefore mentioned to investigate and report upon the feasibility of the project; and

WHEREAS said commission reported that, in their judgment, the project was feasible, but that the flow was insufficient for more than one reservoir; and

WHEREAS the two Governments were enable to agree upon the construction of said proposed international dam and reservoir until some method of restraining the building and use of other dams and reservoirs which would destroy the usefulness of said proposed international dam and reservoir has been devised; now therefore

BE IT ENACTED by the Senate and House of Representatives of the United States of America in Congress assembled, that nothing in the acts of March third, eighteen hundred and ninety-one, January twenty-first, eighteen hundred and ninety-five, February twenty-sixth, eighteen hundred and ninety-seven, and May eleventh eighteen hundred and ninety-eight, shall be so construed as to authorize the appropriation and storage of the waters of the Rio

Grande or its tributaries in the Territory of New Mexico, to which others have right by prior appropriation, and every person and every corporation which shall be guilty of thus unlawfully appropriating and stering said waters in this act mentioned shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars or by imprisonment (in the case of a natural person) not exceeding one year, or both such punishments, in the discretion of the court. The unlawful appropriating and storing of water in this act mentioned may be prevented, and the dam, reservoir, or other means used for impounding the water may be removed by the injunction of any circuit court exercising jurisdiction in any district in which said water may be appropriated or stored, and proper proceedings in equity to this end may be instituted under the direction of the Attorney General of the United States.

Sec. 2. That the Secretary of State is hereby authorized to proceed with the consummation of the proposed treaty between the United States of America and the United States of Mexico, and if the United States of Mexico shall accept the construction of the proposed dam and reservoir, with the conditions that the flood water impounded by it shall be equally distributed between the two countries as liquidation of all past and future claims for water appropriated in the past or to be appropriated in the future by citizens of the United States otherwise than by impounding it in large dams and reservoirs in New Mexico, then the Secretary of State is further authorized to proceed with the construction of said dam and reservoir according to the plans and specifications submitted in the report of the International Boundary Commission, as published in Senate Document Number

Two hundred and twenty-nine, Fifty-fifth Congress, second session, and the sum of two million, three hundred and seventeen thousand, one hundred and thirteen dollars and thirty-six cents is hereby appropriated for that purpose.

EXHIBIT K

(Letter dated June 27, 1904 from the Secretary of State to the Secretary of the Interior.)

Washington, D. C., June 27, 1904.

My dear Mr. Secretary:

I have this day sent you a copy of a note from the Mexican Ambassador in relation to the diversion of the waters of the Rio Grande River. It has been informally suggested that a practical solution of this question might be accomplished under the National Irrigation Act. I am informed that the engineers of the Hydrographic Bureau of the Geological Survey have already made some examination of the Rio Grande drainage basin with the view to devising some plan to provide a water supply for the irrigation of all the lands of the valley. I am also informed that the reservoir site known as Elephant Butte has been set aside as a reclamation project. It has been suggested that by establishing the main storage reservoir at Elephant Butte in New Mexico and a secondary reservoir near El Paso to catch the surplus flood waters and back up the overflow of the river, which is said to be heavy and perpetual, a sufficient supply of water can be obtained for irrigation in New Mexico, Texas and Mexico. It has occurred to me that you might be able, under the National Irrigation Act, to provide an ultimate solution of the question presented by the Mexican Ambassador. If so, I should be happy to cooperate in accomplishing that desirable object. I have

accordingly transmitted to you a copy of the note of the Mexican Ambassador, and have asked for any suggestion which you may be pleased to make in order to aid the Department in making an answer to the Ambassador's note.

Sincerely yours,

John Hay

Honorable Ethan Allen Hitchcock,
Secretary of the Interior.

EXHIBIT L.

(Treaty between the United States of America and the United States of Mexico, dated May 21, 1906 (34 Stat., 2953) concerning irrigation from the Rio Grande.)

The United States of America and the United States of Mexico being desirous to provide for the equitable distribution of the waters of the Rio Grande for irrigation purposes, and to remove all causes of controversey between them in respect thereto, and being moved by considerations of international comity, have resolved to conclude a convention for these purposes and have named as their plenipotentiaries:

The President of the United States of America, Elihu Root, Secretary of State of the United States; and

The President of the United States of Mexico, His Excellency Senor Don Juaquin D. Casasus, Ambassador Extraordinary and Plenipotentiary of the United States of Mexico at Washington:

Who, after having exhibited their respective full powers, which were found to be in good and due form, have agreed upon the following articles.

Article 1. After the completion of the proposed storage dam near Engle, New Mexico, and the distributing system auxiliary thereto, and as soon as water shall be available in said system for the purpose, the United States shall deliver to Mexico a total of 60,000 acre-feet of water annually, in the bed of the Rio Grande at the point where the head works of the Acequia Madre known as the Old Mexican Canal, now exist above the city of Juarez, Mexico.

Article 2. The delivery of said amount of water shall be assured by the United States and shall be distributed through the

year in the same proportionsaas the water supply proposed to be furnished from the said irrigation system to lands in the United States in the vicinity of El Paso, Texas, according to the following schedule, as nearly as may be possible.

	Acre-Feet per Month	Corresponding cubic feet of water.
January	0	0
February	1,090	47,480,400
March	5,460	237,837,600
April	12,000	522,720,000
May	12,000	522,720,000
June	12,000	522,720,000
July	8,180	356,320,800
August	4,370	190,357,200
September	3,270	142,441,200
October	1,090	47,480,400
November	540	23,522,400
December	0	0
Total for the year	60,000	2,613,600,000

In case, however, of extraordinary drought or serious accident to the irrigation system in the United States, the amount delivered to the Mexican Canal shall be diminished in the same proportion as the water delivered to lands under said irrigation system in the United States.

Art. 3. The said delivery shall be made without cost to Mexico, and the United States agrees to pay the whole cost of storing the said quantity of water to be delivered to Mexico, of conveying the same to the international line, of measuring the said water, and of delivering it in the river bed above the head of the Mexican Canal. It is understood that the United States assumes no obligation beyond

the delivering of the water in the bed of the river above the head of the Mexican Canal.

Art. 4. The delivery of water as herein provided is not to be construed as a recognition by the United States of any claim on the part of Mexico to the said waters; and it is agreed that in consideration of such delivery of water Mexico waives any and all claims to the waters of the Rio Grande for any purpose whatever between the head of the present Mexican Canal and Fort Quitman, Tex. and also declares fully settled and disposed of, and hereby waives, all claims heretofore asserted or existing, or that may hereafter arise, or be asserted, against the United States on account of any damages alleged to have been sustained by the owners of land in Mexico by reason of the diversion by citizens of the United States of waters of the Rio Grande.

Art. 5. The United States in entering into this treaty does not thereby concede, expressly or by implication, any legal basis for any claims heretofore asserted or which may be hereafter asserted by reason of any losses incurred by the owners of land in Mexico due or alleged to be due to the diversion of the waters of the Rio Grande within the United States; nor does the United States in any way concede the establishment of any general principle or precedent by the concluding of this treaty. The understanding of both parties is that the arrangement contemplated by this treaty extends only to the portion of the Rio Grande which forms the international Boundary, from the head of the Mexican Canal down to Fort Quitman, Texas, and in no other case.

Art. 6 The present convention shall be ratified by both con-

tracting parties in accordance with their constitutional procedure, and the ratifications shall be exchanged at Washington as soon as possible.

In witness whereof, the respective Plenipotentiaries have signed the Convention both in the English and Spanish languages and have thereunto affixed their seals.

Done in duplicate at the City of Washington, this 21st day of May, one thousand nine hundred and six.

Elihu Root (Seal)

Joaquin D. Casasus (Seal)

EXHIBIT M.

(Notice of appropriation of 730,000 acre-feet of water per annum from the Rio Grande, filed by the United States, in the office of the Territorial Engineer of New Mexico, on January 23, 1906.)

DEPARTMENT OF THE INTERIOR

United States Reclamation Service

Carlsbad, New Mexico, Jan. 23, 1906

Mr. David L. White,
Territorial Irrigation Engineer,
Santa Fe, New Mexico.

Dear Sir:

The United States Reclamation Service, acting under authority of an act of Congress known as the Reclamation Act, approved June 17, 1902 (32 Stat., 388), proposes to construct within the Territory of New Mexico certain irrigation works in connection with the so-called Rio Grande project. The operation of the works in question contemplates the diversion of water from the Rio Grande River.

Section 22 of Chapter 102 of the laws enacted in 1905 by the 36th Legislative Assembly of the Territory of New Mexico an act entitled, "An Act creating the Office of Territorial Irrigation Engineer, to Promote Irrigation Development and Conserve the Waters of New Mexico for the Irrigation of Lands and for other Purposes", approved March 16, 1905 reads as follows:

"Whenever the proper officers of the United States authorized by law to construct irrigation works shall notify the territorial irrigation engineer that the United States intends to utilize certain specified waters, the water so described, and unappropriated at the date of such notice, shall not be subject

to further appropriations under the laws of New Mexico, and no adverse claims to the use of such waters, initiated subsequent to the date of such notice, shall be recognized under the laws of the territory, except as to such amount of the water described in such notice as may be formally re-leased in writing by an officer of the United States thereunto duly authorized."

In pursuance of the above statute of the Territory you are hereby notified that the United States intended to utilize the following described waters, to-wit:

A volume of water equivalent to 730,000 acre-feet per year requiring a maximum diversion or storage of 2,000,000 miner's inches said water to be diverted or stored from the Rio Grande River at a point described as follows:

Storage dam about 9 miles west of Engle, New Mexico, with capacity of 2,000,000 acre-feet, and diversion dams below in Palomas, Rincon, Mesilla, and El Paso Valleys in New Mexico and Texas.

It is therefore, requested that the waters above described be withheld from further appropriation and that the rights and interests of the United States in the premises be otherwise protected and contemplated by the statute above cited.

Very truly yours,

B. M. Hall

Supervising Engineer.

EXHIBIT N

(Notice of appropriation of all the unappropriated water of the Rio Grande, filed by the United States in the office of the Territorial Engineer of New Mexico, on April 8, 1908.)

DEPARTMENT OF THE INTERIOR

United States Reclamation Service

Phoenix, Arizona, April 1908.

Mr. Vernon L. Sullivan,
Territorial Engineer,
Santa Fe, New Mexico.

Dear Sir:

Claiming and reserving all rights under our former notice of January 23, 1906, addressed to David L. White, Territorial Engineer of New Mexico, which said notice advised him of the intention of the United States to use the waters of the Rio Grande for the purpose of irrigation, and is now filed in your office, I do now hereby give you the following notice in addition to said former notice and supplemental thereto.

The United States acting under authority of an Act of Congress, known as the Reclamation Act, approved June 17, 1902, (32 Stat., 388), proposes to construct within the Territory of New Mexico certain irrigation works in connection with the so-called Rio Grande project. The operation of the works in question contemplates the diversion of the water of the Rio Grande River.

Section 40 of Chapter 49 of the laws enacted in 1907 by the 37th Legislative Assembly of the Territory of New Mexico, an Act entitled "An Act to conserve and regulate the use and distribution of the waters of New Mexico; to create the office of Territorial

Engineer, to create a Board of Water Commissioners, and for other purposes", approved March 19, 1907, reads as follows:

Whenever the proper officers of the United States authorized by law to construct works for utilization of waters within the Territory, shall notify the Territorial Engineer that the United States intends to utilize certain specified waters, the waters so described, and unappropriated, and not covered by applications of affidavits duly filed or permits as required by law, at the date of such notice, shall not be subject to a further appropriation under the laws of the Territory of New Mexico for a period of three years from date of said notice, within which time the proper officers of the United States shall file plans for the proposed work and no adverse claim to the use of the water required in connection with such plans, initiated subsequent to the date of such notice, shall be recognized under the laws of the Territory, except as to such amount of water described in such notice as may be formally released in writing by an officer of the United States thereunto duly authorized, Provided, that in case of failure to file plans of the proposed work within three years, as herein required, the waters specified in the notice given by the United States to the Territorial Engineer shall become public water, subject to general appropriations.

In pursuance of the above statute of the Territory you are hereby notified that the United States intends to utilize the following described waters, to-wit:

All the unappropriated water of the Rio Grande and its tributaries, said water to be diverted or stored from the Rio Grande River at a point described as follows:

Storage dam about nine miles west of Engle, New Mexico, with capacity for two million (2,000,000) acre-feet and diversion dam below in Palomas, Rincon, Mesilla and El Paso Valleys in New Mexico and Texas.

It is therefore requested that the waters above described be withheld from further appropriation and that the rights and interests of the United States in the premises be otherwise protected as contemplated by the statute above cited.

Very truly yours

Louis C. Hill
Supervising Engineer.

EXHIBIT O

(Order dated May 25, 1906, of the Secretary of the Interior, modifying the embargo on the Upper Rio Grande.)

DEPARTMENT OF THE INTERIOR
Washington, May 25, 1906.

The Commissioner of the General Land Office.

Sir: In a letter of January 25, 1906, to the department, Mr. F. C. Goudy, president of the Rio Grande Reservoir & Ditch Company made complain that the proposed construction of a reservoir by the company in Colorado for reclamation purposes and the procuring of a right of way therefor is being prevented by the Government.

In a report of February 26, 1906, on this letter the Director of the Geological Survey recommended that -

"If there be no bojection on the part of the State Department, at whose instance the order of December 5, 1896, was made, the same be modified to permit the approval of rights of way for irrigation purposes on the tributaries of the Rio Grande which were initiated by actual field surveys based upon notices of appropriation of water filed under the laws of Colorado prior to March 1, 1903."

The Acting Secretary of State, in a letter of March 7, 1906, to the department, stated that -

"The Department of State approved the recommendation of the Director of the Geological Survey modifying the order of suspension in accordance with the request of the Rio Grande Reservoir & Ditch Company."

In a letter of the 22nd instant to the department the Acting Secretary of State has extended the approval covered by the letter of March 7, supra -

"so as to include all companies or applicants whose rights of way for

irrigation purposes on the tributaries of the Ric Grande -------- were initiated by actual field surveys based upon notices of appropriation of water filed under the laws of Colorado prior to March 1, 1903".

In view of the foregoing the departmental order of December 5, 1896, directing you to suspend action on all applications for right of way through the public lands for purposes of irrigation by using the waters of the Rio Grande or any of its tributaries in Colorado or New Mexico, and the order of January 13, 1897, modifying the original order so far as the tributaries of the Rio Grande are concerned by limiting its applications to tributaries emptying into the Rio Grande above the point where it becomes the boundary between the United States and Mexico, are hereby modified so as to exclude from their operation all applications for right of way covered by the approval in the letter of the 22d instant from the Acting Secretary of State, quoted above.

The letter of Mr. Goudy is transmitted herewith.

Very respectfully,

E. A. Hitchcock, Secretary.

EXHIBIT P

(Order, dated July 10, 1906, of the Acting Secretary of the Interior, modifying the embargo on the Upper Rio Grande.)

DEPARTMENT OF THE INTERIOR
Washington, July 10, 1906.

The Commissioner of the General Land Office:

Sir: In departmental letter of May 25, 1906, to you, departmental orders of December 5, 1896, and January 13, 1897, were modified so as to exclude from their operation all applications for rights of way through the public lands for purposes of irrigation by using thewaters of the Rio Grande or any of its tributaries in Colorado and New Mexico initiated by actual field surveys based on notices of appropriation of water filed under the laws of Colorado prior to March 1, 1903, such modification being favored by the Acting Secretary of State in a letter of May 22, 1906, to the department.

In view of this modification of the orders mentioned you are directed that in acting on this class of applications, now on file or that may be filed hereafter in your office, to submit them to the Director of the Geological Survey to ascertain whether they will conflict with the obligations of the United States, under the treaty with Mexico, recently ratified, or with the Rio Grande or any other project of the Reclamation Service, and to transmit the reports of the director, with the applications when they are submitted for departmental action.

Very respectfully,

Thos. Ryan,

Acting Secretary.

EXHIBIT Q

(Order, dated September 27, 1906, of the Acting Secretary of the Interior, modifying the embargo on the Upper Rio Grande).

DEPARTMENT OF THE INTERIOR
Washington, September 27, 1906.

The Commissioner of the General Land Office:

Sir: In a letter of the 24th instant to the department the Acting Secretary of State has stated with respect to applications for right of way through public lands for purposes of irrigation by using the waters of the Rio Grande or any of its tributaries in Colorado and New Mexico, that the Department of State perceives no reason for the further suspension of action on any application of such character.

He has stated further that the intent of the original departmental order of suspension dated December 5, 1896, was to conserve the interests of the Mexican Government in the waters of the Rio Grande pending an agreement between the United States and Mexico on the question, and that such anagreement has been reached and is embodied in the treaty signed May 21st. last, by which the United States obligates itself to deliver to the Mexican Government 60,000 acre-feet of water annually.

He has accordingly recommended that the order of December 5, 1896, and all modifying orders be rescinded, thus removing so far as the Department of State is concerned, all restrictions on the consideration of applications involving any enterprise of a character which, on investigation by the Reclamation Service, is found

to be not prejudicial to the treaty interests of Mexico.

In view of this recommendation the departmental order of December 5, 1896, and the several modifying orders are hereby revoked, and it is hereby directed that before any applications involving the use of the waters mentioned in Colorado and New Mexico are submitted for the final departmental action by you, they be first submitted to the Director of the Geological Survey to ascertain whether favorable action thereon would interfere with any project of the Reclamation Service, or with the obligations of the United States under the treaty of May 21, 1906, with Mexico.

Very respectfully,

Thos. Ryan,

Acting Secretary.

EXHIBIT R.

(Order, dated April 25, 1907, of the Secretary of the Interior, modifying the embargo on the Upper Rio Grande.)

DEPARTMENT OF THE INTERIOR

United States Reclamation Service

Washington, D. C.

April 22, 1907.

The Honorable

The Secretary of the Interior.

Sir:

The situation on the Rio Grande requires careful consideration and determination of policy by the Secretary. Briefly stated the conditions are these:

The United States has entered into a treaty with Mexico, proclaimed by the President on January 16, 1907, by which it is agreed that the United States shall deliver to Mexico 60,000 acre-feet of water at the head of the Mexican Canal near El Paso. In order to carry out this part of the treaty, Congress has appropriated by Act approved March 4, 1907, the sum of $1,000,000 towards the construction of a dam on the Rio Grande, this being assumed to furnish water for 25,000 acres at $40.00 per acre. The total estimated cost of this project, including the dam, will be $7,200,000, of which amount $200,000 has been set aside and is now being used in the construction of subsidiary works, notably a diversion dam above Las Cruces, New Mexico. The remaining amount,

6,000,000 must be obtained from the reclamation fund.

It is estimated that for this expenditure of $7,200,00 it will be possible to irrigate 180,000 acres at $40.00 per acre. Deducting the 25,000 acres in Mexico, this leaves 155,000 acres in New Mexico and Texas to refund the $6,200,000. By storing all the water of the Rio Grande, including storm floods, this acreage can be supplied. If the flow of the stream is notably diminished the area to be served will be correspondingly reduced and the cost per acre increased. This increase of cost will probably be at the expense of the lands in the United States as Congress has already made the appropriation for the building charge to comply with the terms of the treaty.

The headwaters of this river are in the State of Colorado, surrounding the San Luis Valley. For several years after December 5, 1896, the Department of the Interior refused to grant rights of way for reservoirs or canals on these headwaters because of the effect of the international problem below. The Department order was first modified May 25, 1906, to permit approval in cases where the applicants made a showing of priority over the United States. After the Senat had advised the ratification of the treaty on July 10, 1906, these orders of the Department were revoked and the Reclamation Service was required to pass upon each case as to conflict with the treaty or the Rio Grande Project. Most of the older cases have been reported on favorably by the Reclamation Service. In some of the cases, especially the later ones, the conditions involved some doubt as to the advisability of approval and the questions of policy to be

considered by the Department were reported to the General Land Office for submission to the Department when the cases were presented for your consideration.

Recently a few exceptions have been made as to small reservoirs located high in the mountains where it appeared that the construction of works would not interfere notably with the supply of water which could be had in the lower reservoir. In view of the fact, however, that the treaty above mentioned has been concluded and an appropriation has been made by Congress for constructing the works in part, it appears probable that any considerable extension of the reservoir system at the headwaters may interfere with the plans of the Government.

Wide publicity has been given to the fact that the Department has a few cases permitting the location of small reservoirs on the headwaters of the Rio Grande. As a result a considerable number of applications are being made for other reservoir sites. If it were practicable to lay down a general rule by which the smaller of these sites could be approved the results would probably be beneficial, but a practical diffidulty arises in the possibility of defining the limtts between the large and small projects. It is unquestionably true that if all of the large projects on the headwaters of the river which are planned by private parties could be actually constructed, the water supply for the Government reservoir would be to a large extent cut off. It is important, therefore, to have a general rule which can be applied to all cases.

Recommendations

I therefore recommend that the Department lay down the general policy that until the development of irrigation on the Upper Rio Grande in the State of Colorado and the Territory of New Mexico shall furnish sufficient data to determine the effect of the storage and diversion of water in that vicinity upon the water supply for the Engle Reservoir of the Rio Grande Project, no further rights of way be approved which involve the storage or diversion of the waters of the Upper Rio Grande and its tributaries, except applications of two kinds; first, those in connection with which there is a showing that the rights of the parties were initiated prior to the beginning of active operations by the Reclamation Service for the Rio Grande project, namely, March 1, 1903; second, applications which involve the diversion or storage of not exceeding 1,000 acre-feet of water per annum.

When it becomes possible to determine the effect of the approved applications upon the water available for storage for the Rio Grande project, it may be possible to allow the use of rights of way to a greater extent than is now proposed.

Very respectfully,

F. H. Newell

April 25, 1907

Approved:

J. R. Garfield, Secretary.

EXHIBIT S

(Order, dated March 2, 1923, by the Secretary of the Interior, modifying the embargo on the Upper Rio Grande.)

DEPARTMENT OF THE INTERIOR

United States Reclamation Service

Washington, D. C., March 2, 1923

The Secretary of the Interior.

My dear Mr. Secretary:

In the hearings on the problems of the Colorado River held in San Diego December 12, 1921, the Reclamation Service was criticized by the delegate from Colorado for the attitude of the United States concerning the reservation of public lands in Colorado for the protection of the water supply of the Rio Grande. In reply to his remarks youmade the following rejoinder:

> "It may be that the Reclamation Service has been dilatory in not having ascertained and reported heretofore that there was sufficient water falling within that basin to fill the Elephant Butte reservoir and to enable us to perform our international obligations and our obligations to the prior users below that reservoir and yet to release certain of the waters in the State of Colorado. It may be that they have been dilatory, as I say, in the performance of that duty. I have suggested as much myself, and it shall be my pleasure to see that at an early date a report is made upon this proposition."

In response to your wishes thus expressed I have the honor to make the following report concerning this question:

The policy of the Department in regard to the approval of rights of way for the use of public lands in the Rio Grande drain-

age was initiated upon a request of the Department of State through the Department of Justice on December 5, 1896, in pursuance of which the Secretary of the Interior directed suspension of applications for rights of way upon public lands for irrigation purposes by the use of waters of the tributaries of the Rio Grande entering it above where it becomes the international boundary. Soon after the organization of the Reclamation Service a study of the situation was made which resulted in recommendation for the construction of Elephant Butte reservoir. The treaty with Mexico regarding the furnishing of 60,000 acre-feet for the Mexican lands was proclaimed January 16,1907.

A letter from Director Newell to the Secretary of the Interior dated April 22, 1907 was closed with the following recommendations:

Recommendations

I therefore recommend that the Department lay down the general policy that until the development of irrigation on the Upper Rio Grande in the State of Colorado and the Territory of New Mexico shall furnish sufficient data to determine the effect of the storage and diversion of water in that vicinity upon the water supply for the Engle Reservoir of the Rio Grande project, no further rights of way be approved which involve the storage or diversion of the waters of the Upper Rio Grande and its tributaries, except applications of two kinds; first, those in connection with which there is a showing that the rights of the parties were initiated prior to the beginning of active operations by the Reclamation Service for the Rio Grande Project, namely, March 1, 1903, second, applications which involve the diversion or storage of not exceeding 1,000 acre-feet of water per annum.

When it becomes possible to determine the effect of the approved applications upon the water available for storage for the Rio Grande project, it may be possible to allow the use of rights of way to a greater extent than is now proposed."

These recommendations were approved by the Secretary of the Interior on April 25, 1907.

The recommendation and the accompanying letter indicate that

the purpose of the reservation of the lands in Colorado was to protect this water supply of the Rio Grande project as a whole, including prior rights in the United States and Mexico and extension of irrigation as contemplated by the construction of the Elephant Butte reservoir.

The filings of the Reclamation Service upon the waters of the Rio Grande for storage and use in New Mexico, Texas, and Mexico were designed to cover all the waters of the river at that time unappropriated and to include of course such waters as had been appropriated by the lands included with the project. Information at that time indicated, and subsequent experience has confirmed, the fact that the Elephant Butte reservoir of the large capacity constructed is sufficient to control and store the flood waters of the Rio Grande in all years except a few extraordinary floods of rate occurrence which may be partially wasted; also that the amount of water that can thus be conserved and beneficially used is insufficient to supply all of the lands that might be reached with those waters. Or, in other words, that needs of the available lands exceed the water supply made available by the reservoir.

An important fact in this connection is that the dependable low water and ordinary flow of the river have long been appropriated and used for irrigation in Colorado and New Mexico above the Elephant Butte reservoir and nothing important remained for appropriation for the Elephant Butte project excepting fresets and floods which could not be intercepted and used commercially above this point without storage. Obviously such waters cannot

be made available except by large storage works.

The appropriation of these waters for the use of the Rio Grande project has been diligently followed by the expenditures of public funds in the construction of reservoir, diversion works, canal and distribution system and the consequent drainage systems, with a total investment of over $10,000,000 therein by the United States. Probably an equal amount has been invested by the settlers in clearing, leveling and otherwise improving suitable for appropriate use the lands to utilize this water supply. So far as the formalitites and the diligence of construction are concerned, the rights of the United States and of the settlers on the project have not been and cannot be questioned.

The diversion and use of the dependable natural flow of the river and its tributaries has been so complete in Coloardo and northern New Mexico that it may be stated broadly that any further feasible extension of such diversions can not materially cripple the water supply of the Rio Grande project unless accompanied by storage of the flood waters at or above such diversions.

The treaty with Mexico guarantees the delivery of 60,000 acre-feet of water annually at the diversion dam near El Paso for use in Mexico. The records indicate a dependable supply from the Elephant Butte reservoir of 720,000 acre-feet annually, or 12 times the amount required to fulfill the treaty. A general knowledge of the basin indicates that there is no practical possibility of so depleting the supply that the Elephant Butte reservoir could not receive and conserve sufficient of the flow of the river to fulfill the obligations of the treaty, if the entire shortage were imposed upon the American lands in the Rio Grande project.

Any material decrease in the amount available for storage would react upon the project and cause a loss to the water users due to the deficiency in the water supply.

In view of the above the question resolves itself about as follows:

Is it legal, and if legal, advisable, for the Secretary of the Interior to decline to approve the use of the public lands for storing and diverting for irrigation the waters of the Rio Grande, for the purpose of protecting the water supply of the lands developed under the Elephant Butte reservoir in New Mexico and Texas?

It may be physically possible in some cases to store and use the waters of the Upper Rio Grande without the use of public lands, but the opportunities for such development on exclusively private lands are believed to be few and meager and not seriously to affect the main question. It is possible to build storage reservoirs on the Upper Rio Grande and its tributaries that would intercept sufficient flow to deplete materially the supply of the Elephant Butte reservoir and that the waters thus stored could be used for irrigation below such storage and above Elephant Butte.

There are of course legal means, by injunction and otherwise, by which the valid rights of the irrigators under the Elephant Butte reservoir may be protected, but these are slow of operation and to depend upon them may be an injustice to possible investors in storage works who might undertake storage works in good faith, if such were approved by the Secretary of the Interior, and later find their investment wasted for lack of valid rights to the necessary water.

The above questions of law and of policy are of so fundamen-

tal a character that they demand consideration and decision directly by the Secretary of the Interior. It may, however, be in order for this office to venture a few suggestions.

It is believed that the best use of the waters for irrigation is the proper object of the policies and proceedings of this Service and such use must be determined at any given time with full consideration of existing legal and physical conditions. Practically complete appropriation of the dependable flow of the river was accomplished many years before the construction of the Elephant Butte reservoir, and no material increase of the use of the river could be feasibly accomplished except by the provisions of large storage works. Manifestly to be complete and make the best use of the water supply these works must be constructed at a point low enough to intercept practically all of the drainage of the river which could not otherwise be conserved. The Elephant Butte site was selected as one which combined this advantage of location with the physical condition that at no other place in the basin could a reservoir of sufficient capacity be constructed to intercept the flow of all the unappropriated waters above the Mesilla Valley. Had the reservoir been built at such higher point as White Rock Canyon or above, many large and important tributaries such as the Galisteo, Puerco, and numerous other streams would have continued to waste large quantities of water which are intercepted and conserved at the Elephant Butte Site.

In order to make such a large reservoir commercially feasible it is necessary that it receive the benefits of practically all the unappropriated waters, and these were accordingly appropriated for such use.

Even though the wisdom of the construction of the Elephant Butte reservoir might be questioned by some, the situation now is that the investment has been made and is a physical success. The lands are served and are developed. To take away its water supply would not only violate existing moral and legal rights but would destroy large investments in proportion to the magnitude of the deprivations.

On the other hand it is manifestly wise and just to encourage any developments that may be carried out in the basin above that will not materially deplete the supply of the reservoir or otherwise jeopardize the interests it has built up. Extensive studies have been made by the Reclamation Service as well as by the Geological Survey, the State of New Mexico and other public and private agencies, and these have developed the fact that large areas now or formerly irrigated in Colorado and New Mexico have produced underground conditions where large bodies of land have been deprived of their fertility by the rise of ground water and hundreds of thousands of acres are for this reason now unavailable for cultivation from this cause, although most of the area is still available for grazing and some of it produces a low grade of coarse hay.

More than half a million acres of land in the San Luis Valley, Colorado, and various small valleys in New Mexico, require expensive drainage systems to bring back their fertility.

These waterlogged lands now discharge immense quantities of water into the air through evaporation, a part of which would be conserved by proper drainage systems and returned to the streams because with the lower ground water the natural evaporation from

those lands would be decreased. If such drainage works were carried out in Colorado and the water returned to the stream and not used locally, it would follow down the stream, and unless diverted would increase the supply to the Elephant Butte reservoir. It would, however, pass by many small ditches which divert water from the river and during the irrigation season most of it could be diverted by these ditches and in dry times all of it. It would be extremely difficult to distinguish this from other waters of the river and to prevent its diversion by such ditches.

The valley lands in New Mexico which have been cultivated in the past are largely in need of drainage works also and the proper drainage of these lands would also conserve much water now lost and convey it into the river, where if not intercepted it would flow into the Elephant Butte reservoir. The drainage of practically all of the land in Colorado and New Mexico would be available as inflow to the Elephant Butte reservoir at all times outside of the irrigation season unless storage works so located as to intercept such waters were provided.

No Government authority has any right or power to interfere with the vested rights of the irrigators under the Elephant Butte reservoir or elsewhere. These rights, whatever they are, can be, and if necessary will be defended in the courts by the people most interested, that is, the farmers themselves. But it is believed that the Secretary of the Interior as the head of the Reclamation Service is in a position to assist in the full development and conservation of the water resources of this basin without local interest, bias or prejudice, and that much can be done in the way of encouraging

such development and removing jeopardy from the investments made for this purpose.

It is believed that under present conditions the Department would be justified, with the approval of the interests below, in assuring prospective investors in Colorado and northern New Mexico that they would be protected in the storage of waters in the same quantity that the construction of drainage works might deliver water into the river at a point low enough to insure its flow into the Elephant Butte reservoir. Each individual project should be worked out after careful study of the local physical and other conditions surrounding it. But the announcement of this general principle, it is believed, would remove some of the timidity of proposed investors either public or private.

The effect of an approval by the Secretary of an application for irrigation right of way under the Act of March 3, 1891 (26 Stat., 1095) upon the interests of the United States under the Reclamation Law has not been decided by the Courts. The view has been expressed that, as the regulations require applications to be accompanied by evidence of ample water-right the Secretary's approval may commit the Government to a recognition of the validity of the water right claimed in connection with the application, with a possible estoppel of the United States to assert any water right in conflict therewith. Accordingly any approval of right of way as herein suggested should be carefully guarded by a reservation of all rights claimed by the United States for the Rio Grande project and for the Mexican lands under the treaty.

Recommendation.

It is recommended that this office be authorized to negotiate for the release of specific areas of public land for purposes of water storage under conditions that will best conserve and utilize the water resources and will protect vested rights in all parts of the Rio Grande basin - such negotiations to be subject to the approval of the Secretary of the Interior, and, prior to such approval, to be subject to the scrutiny of all interested parties.

Respectfully,

A. P. Davis,

Director.

Approved:

Albert B. Fall
Secretary.

EXHIBIT T.

(New Mexico Act of March 12, 1923, authorizing representation on Rio Grande Commission.)

An Act Providing for the Appointment of a Commissioner on Behalf of the State of New Mexico to Negotiate a Compact or Agreement Respecting the Use, Control and Disposition of the Waters of the Rio Grande River and for Other Purposes.

S. B. No. 104 (As Amended): Approved March 12, 1923.

Be it Enacted by the Legislature of the State of New Mexico:

Section 1. The Governor of the State of New Mexico shall, with the advice and consent of the Senate, appoint a Commissioner who shall represent the State of New Mexico upon a Joint Commission, to be constituted as hereinafter provided for the purpose of negotiating and concluding a compact or agreement fixing and determining the rights of the signatories to the use, control and disposition of the waters of the Rio Grande River, and of the streams tributary thereto, excepting as to all waters appropriated to the use appurtenant and necessary to the full and complete operation of the Rio Grande Project in Southern New Mexico, being an irrigation project constructed by the United States Reclamation Service: Provided: that settlers and land owners under said project shall not be put to any additional expense by reason of the passage of this Act.

Said Joint Commission shall include either:

(a) Commissioners for the States of Colorado and New Mexico and a duly authorized representative of the United States of America: or

(b) Commissioners for the States of Colorado and New Mexico: Provided, however, that any such compact or agreement shall not

become operative and shall not bind any of the signatories thereto, unless and until the same shall have been ratified and approved by the Legislature of each of the signatory States and by the Congress of the United States.

Sec. 2. The Governor of the State of New Mexico shall notify the Governor of the State of Colorado of the appointment of the Commissioner for New Mexico pursuant to the provisions hereof. The Commissioner for New Mexico shall commence the performance of his duties upon receipt of notice by the Governor of New Mexico from the Governor of Colorado of the appointment of a Commissioner for said State, and unless the Governor of Colorado shall have officially communicated notice of such appointment to the Governor of New Mexico on or before October 1, 1924, the appointment of the Commissioner for New Mexico hereunder shall cease and determine without further act.

Sec. 3. When the Commissioner for New Mexico shall enter upon the performance of his duties he shall be furnished such engineering, legal, stenographic and other assistants as may be necessary or essential to the proper performance of his duties, and it shall be the duty of the State Engineer and his deputies to aid and assist the Commissioner for New Mexico whenever requested by him so to do.

Sec. 4. The compensation of the Commissioner for New Mexico and of his assistants, shall be fixed by the Governor and Attorney General, and the State of New Mexico shall pay all necessary traveling and other expenses incurred in the performance of the duties of the Commissioner and his assistants both within and without the State of New Mexico, and also all other necessary costs, charges,

and expenses hereunder, including the payment of an equitable portion of the costs and expenses of any such Joint Commission. Such compensation and expenses shall be paid monthly, upon vouchers approved by the Governor and Attorney General, by warrants drawn by the State Auditor.

For the purpose of carrying out the provisions of this Act there is hereby appropriated out of the Water Reservoirs for Irrigation Purposes Income Fund the sum of Five Thousand ($5,000.00) Dollars or so much thereof as may be necessary.

Sec. 5. The Commissioner for New Mexico shall have full authority to make any and all investigations of the Rio Grande River and the drainage area thereof, and of the conditions obtaining upon said stream and of the present and future needs relative to the use, control and benefit of the waters of said stream, and to make such other investigations as may be necessary to the proper performance of his duties hereunder, and said Commissioner shall have the authority to administer oaths and to examine and require the attendance of witnesses.

EXHIBIT U.

(Colorado Act of March 20, 1923, authorizing representation on the Rio Grande Commission.)

AN ACT

Providing for the appointment of a Commissioner on behalf of the State of Colorado to Negotiate a Compact or Agreement Respecting the Use, control and Disposition of the Waters of the Rio Grande River and for other Purposes.

Be it enacted by the General Assembly of the State of Colorado.

Section 1. The Governor of the State of Colorado shall appoint a Commissioner who shall represent the State of Colorado upon a Joint Commission, to be constituted as hereinafter provided, for the purpose of negotiating the concluding a compact or agreement fixing and determining the rights of the signatories to the use, control and disposition of the waters of the Rio Grande River, and of the streams tributary thereto. Said Joint Commission shall include either:

(a) Commissioners for the States of Colorado, New Mexico, and Texas, and a duly authorized representative of the United States of America: or

(b) Commissioners for the States of Colorado and New Mexico and a duly authorized representative of the United States of America, or

(c) Commissioners for the States of New Mexico and Colorado:

Provided, However, that any such compact or agreement shall not become operative and shall not bind any of the signatories thereto, unless and until the same shall have been ratified and

approved by the legislature of each of the signatory states and by the Congress of the United States.

Section 2. The Governor of Colorado shall notify the Governors of the States of New Mexico and Texas of the appointment of the Commissioner for Colorado pursuant to the provisions hereof. The Commissioner for Colorado shall commence the performance of his duties upon receipt of notice by the Governor of Colorado from the Governor of either of the States of New Mexico or Texas, of the appoint of a Commissioner for said State, and unless at least one of said States shall have named its Commissioner and shall have officially communicated notice of such appointment to the Governor of Colorado on or before October 1, 1924, the appointment of the Commissioner for Colorado hereunder shall cease and determine without further act.

Section 3. When the Commissioner for Colorado shall enter upon the performance of his duties, he shall be furnished such engineering, legal, stenographic, and other assistants as may be necessary or essential to the proper performance of his duties, and it shall be the duty of the State Engineer and his deputies, the Division Engineer of Irrigation Division No. 3 and the Water Commissioners whose districts are included within said Irrigation Division, to aid and assist the Commissioner for Colorado whenever requested by him so to do.

Section 4. The compensation of the Commissioner for Colorado, and of his assistants, shall be fixed by the Governor, and the State of Colorado shall pay all necessary traveling and other expenses incurred in the performance of the duties of the Commissioner and his assistants, both within and without the State of Colorado,

and also all other necessary costs, charges and expenses hereunder, including the payment of an equitable portion of the costs and expenses of any such Joint Commission. Such compensation and expenses shall be paid monthly, upon vouchers approved by the Governor, by warrants drawn for the payment thereof upon the State Treasurer by the State Auditor in the ordinary manner, out of any funds appropriated under the provisions of an Act entitled "An Act to enable the State of Colorado to Protect the waters of its natural streams and to maintain the right of appropriation and use of such waters for beneficial purposes within this State and making an appropriation therefor of the first class "or out of any appropriation therefor of the first class" or out of any appropriation of the first class made for the protection of the waters of the State.

Section 5. The Commissioner for Colorado shall have full authority to make any and all investigations of the Rio Grande River and the drainage area thereof, of the condition obtaining upon said stream and of the present and future needs relative to the use and benefit of the waters of said stream, and to make such other investigations as may be necessary to the proper performance of his duties hereunder, and said commissioner shall have authority to administer oaths and to examine and require the attendance of witnesses.

Section 6. The General Assembly hereby finds, determines and declares that this Act is necessary for the immediate preservation of the public peace, health and safety.

Section 7. In the opinion of the General Assembly an emergency exists; therefor, this Act shall take effect and be in force

from and after its passage.

Approved March 20, 1923.

MEMORANDUM

FEDERAL IRRIGATION WATER RIGHTS

by

ETHELBERT WARD, January 22, 1930.

The United States is the owner of the unappropriated waters in the non-navigable streams in the public land States of the arid West. This means, for practical purposes, in part, as follows:

1. The United States prescribes the method by which the right to use such unappropriated waters may be acquired.

2. The United States may reserve from further appropriation so much of such unappropriated waters as may thereafter be needed for irrigation uses upon an Indian reservation.

3. The United States may reserve from further appropriation so much of such unappropriated waters as may thereafter be needed for irrigation uses upon the Government's Reclamation Project.

The United States originally owned all the lands in the arid West as a common law proprietor as well as a sovereign proprietor. At the English common law the sovereign owned and controlled the beds of navigable tide waters, while the beds and waters of non-navigable (fresh water) streams were owned and controlled by the proprietor of the lands through which such streams ran. The term "fresh water" used in the common law referred to streams where the tide did not flow; and in England were all non-navigable. The Supreme Court of the United States has extended the common law rule of

navigable tide water to navigable fresh water streams such as the Mississippi and Columbia Rivers.

Shively v. Bowlby, 152 U. S. 1, 13-15.

At common law the waters of a non-navigable (fresh water) stream belong to the owners of the riparian lands.

> Fresh waters of what kind soever do of common right belong to the owners of the soil adjacent; so that the owners of the one side have of common right the propriety of the soil usque filium aquae, and the owners of the other side the right of soil or ownership unto the filium aquae on their side. And if a man be owner of the land on both sides, in common presumption he is the owner of the whole river according to the extent of his land in length.

Hale's De Jure Maris, Chap. 1.

When the Western States were admitted into the Union these states acquired all the sovereign rights of the English Crown theretofore possessed by the United States, except such sovereign rights as were retained by the United States under the Constitution.

> For when the revolution took place, the people of each States became themselves sovereigns; and in that character held the absolute right to all their navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by

> the Constitution to the general Government.
>
> Martin v. Waddell, 16 Pet. 367, 410.
>
> Shively v. Bowlby, 150 U. S. 1, 14-15

One of the sovereign rights acquired by the new States was the title and control of the beds of navigable waters, subject to the Federal paramount navigation control. The new States did not acquire any ownership in the waters of non-navigable (fresh water) streams because that was not a sovereign right of the English Crown. Such waters belong to the proprietor of the riparian lands. That proprietor was the United States.

> Hale's De Jure Maris, Chap. 1.

The Supreme Court of the States of New York, one of the original thirteen States, holds:

> "Fresh rivers of what kind soever do of Common right belong to the owners of the soil adjacent", is the expressive language of the common law and is of universal application.
>
> Smith v. Rochester, 92 N. Y. 463, 473.

The Supreme Court of Massachusetts, another one of the thirteen original States, holds:

> It is to be noticed, first that the nature of their ownership on the border of tidewater differs from the ownership of a riparian proprietor upon an innavigable river or small stream. The title of the owner in the latter case goes to the thread

> of the stream, he owns all of the land under the water with a right to the flow of the water which goes with the land as a part of the real estate included in his ownership. The State has no ownership of any part of these small streams, nor any control over them except such as it has in all parts of its domain for governmental purposes.
>
> Home for Aged Women v. Commonwealth, 202 Mass. 422,

Some of the State courts in the arid West seem to think that irrigation was unknown or impossible at common law, and that a riparian proprietor had no right to use the water of a stream for irrigation, because, according to their ideas of the common law, the riparian proprietor must let the water flow past his lands unpolluted in quality and undiminished in quantity.

For instance, the Supreme Court of Colorado says:

> A riparian proprietor, owning both sides of a stream, may divert water therefrom, providing that he returns the same to the natural stream before it leaves his own land so that it may reach the riparian proprietor below without material diminution in quantity, quality or force.
>
> Oppenlander v. Ditch Co., 18 Colo. 142, 148.
>
> It is suggested on behalf of the appellants that the use of water for

irrigation was practically unknown to the common law. But, while it may be true that it is seldom necessary or desirable to irrigate land in England by artificial means, yet it appears that a reasonable use of running streams for the purpose by riparian proprietors is recognized by the Courts of that county. It is expressly so stated in Gould on Waters, where a number of English cases are cited; and in Pomeroy on Riparian Rights it is declared that the common law rule that every proprietor has an equal right to the use of water as it is accustomed to flow, without diminution or alteration is subject to well-recognized limits that each owner may make reasonable use of the water for domestic, agricultural and manufacturing purposes; and the author there cites several English and American decisions in support of that declaration.

Benton v. Johncox, 17 Wash. 277, 289.

Gould on Waters, Sec. 217.

Pomeroy on Riparian Rights, Sec. 125.

Wiel on Water Rights (3rd Ed.) 807, 815, 818, 819.

Jones v. Conn, 39 Ore., 30, 36.

Clark v. Allaman, 71 Kans. 206, 241.

Even in the States where the appropriation system prevails, the United States continues to hold its land and waters as a riparian proprietor at common law.

> Although this power of changing the common law rule as to the stream within its domain undoubtedly belongs to each State, yet two limitations must be recognized: First, that in the absence of specific authority from Congress, a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on streams, to the continued flow of its water so far at least as may be necessary for the beneficial uses of the government property****
>
> U. S. v. Rio Grande Irr. Co., 174 U. S. 690, 703.
>
> Gutierrez v. Albuquerque Co., 188 U. S. 545, 554.
>
> The Congress shall have power to dispose of and make all needful rules and regulations regarding the Territory or other property belonging to the United States.
>
> U. S. Constitution. Art. IV, Sect. 3, Par. 2.

In about 1836, it seems that the State of Illinois conceived the notion that the United States held the public lands in the Northwestern territory solely in trust for the State; that the words of the Constitution, "to dispose of" meant only to sell; and that the future state had some sort of a claim or interest in the

minerals in the public lands which prevented the United States from reserving or leasing such mineral lands. The Supreme Court held that the term "territory" in the Constitution meant lands, and that words "to dispose of" meant to reserve, lease, sell, or otherwise handle without let or hindrance.

> U.S. v. Gratiot, 14 Pet. 526, 537-8, (Decided in 1840).

This early case is interesting in view of the claims now made by the Western States that the United States held the waters of non-navigable streams in trust for the future state, and that the ownership of such waters went to the States.

The exclusive Constitutional power of Congress to dispose of the public domain and other property of the United States has been upheld time and again by the Supreme Court.

> No State legislation can interfere with this right or embarrass its exercise; and to prevent the possibility of any attempted interference with it, a provision has been usually inserted in the compacts by which new States have been admitted into the Union, that such interference with the primary disposal of the soil of the United States shall never be made.
>
> Gibson v. Ghouteau. 13 Wall. 92, 99.
>
> These are rights incident to a proprietor, to say nothing of the power of the United States as a sovereign over the property belonging to it.

Light v. U. S. 220 U.S. 523, 537.

Prior to the Mexican war, and for some years thereafter, the appropriation system, regardless of ownership of riparian lands, was practically unknown in the United States. During that period riparian rights attached both to privately owned lands and to the public lands of the United States. Congress, as early as May 18, 1796, recognized this right by enacting

> That all navigable rivers within the territory to be disposed of by virtue of this Act, shall be deemed to be and remain public highways and that in all cases where the opposite banks of any stream not navigable shall belong to different persons, the stream and the bed thereof shall become common to both.

Act of May 18, 1796, 1 Stat. 468.

The above Act applied to lands in the Northwest Territory. Later Congress enacted what is now Revised Statutes, Sec. 2476, where the rule is extended to all public lands.

As non-riparian settlers in California and elsewhere in the West had for a number of years appropriated the public waters of the United States, regardless of the riparian proprietary rights of the United States, and vast mining and agricultural interests were dependent thereon, Congress gave relief by passing the Mining and Water Act of July 26, 1866 (14 Stat. 451). This Act ratified and validated prior appropriations and provided a method by which such rights could in the future be acquired from the United States. Sec. 9 of that Act provides:

> That whenever by priority of possession, rights to the use of water for mining, agriculture, manufacturing or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same ***
>
> Act of July 26, 1866, Sec. 9 (14 Stat. 451)

Section 17 of the Act of 1870, amends and interprets Section 9 of the Act of 1866, as follows:

> *** and all patents granted, or preemption of homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights as may be acquired under or recognized by the ninth section of the Act of which this Act is amendatory ***
>
> Act of July 9, 1870, Sec. 17 (16 Stat. 217)

Without citing the numerous court decisions which discuss the meaning of this Act, it is sufficient to state that Congress thereby provided the way by which persons should in the future acquire the right and title to use the unappropriated waters of the United States flowing upon its public lands. The Act is prospective in its operation.

Jacob v. Lorenz, 98 Calif. 332, 335-6.

Beaver Brook Co. v. St. Vrain, 6 Colo. App. 130, 138.

By the Act of 1866, Congress made the State its agent by requiring compliance with "local customs, laws and the decisions of courts" before the individual could acquire a right and title to the Government's unappropriated waters. The United States have never granted its waters to any State. The unappropriated waters, or the waters that have not been granted by the United States still belong to the United States.

> The waters in question were a part of an innavgable stream, the title to which was never acquired by any State, but remained in the Federal Government.
>
> Anderson v. Bassman, 140 Fed. 14, 20.
>
> The water in an innavigable stream flowing over the public domain is a part thereof, and the national Government can sell or grant the same, or the use thereof, separate from the rest of the estate under such conditions as may seem to it proper.
>
> Howell v. Johnson, 89 Fed. 556, 558.
>
> As the United States then owns the waters which are incident to its lands, it dispose of them separate from its lands if it chooses.
>
> Cruse v. McCauley, 96 Fed. 369, 374.

> It was apparent to Congress, and indeed to everyone, that neither the local customs nor State laws nor decisions of State courts could vest the title to public land and waters in private individuals without the sanction of the owner, viz: the United States.
>
> Benton v. Johncox, 17 Wash. 277, 289.

It will be noted that the Act of 1866 refers principally to mining, and that the same provisions are inserted in that Act regarding compliance with local customs, laws and the decisions of courts before mining rights could be acquired. The Supreme Court held in a well-considered case that the provisions of the mining law, which are similar to the provisions in Sec. 9 concerning water rights, made in effect the states and Territories the agents of the United States to enact and enforce local rules under which, within the limits fixed by Congress, these mineral rights must be acquired and enjoyed. The same rule applies to the water provisions of the Act of 1866. The State acts as the agent of the United States.

> Butte City Water Co. v. Baker, 196 U.S. 119,126

It will be noticed that the Act of 1866 provides for the issue of a patent by the United States for the mining claim, if the locator desires a patent; or the locator can hold the claim under possessory rights. No provision is made for the issuance of a patent for a water right. Congress evidently thought it wiser to grant a possessory right to the use of the water so long as the claimant complied with "local customs, laws and

decisions of courts". The Act of 1866 is the claimant's title deed to water. The grant is in the Act itself, the highest kind of a patent.

> A water right can, therefore, be acquired only by the grant, express or implied, of the owner of the lands and water. The right acquired by appropriation and use of the water on the public domain is founded on the grant from the United States as the owner of the land and water. Such grant has been made by Congress.
>
> Smith v. Denniff, 24 Mont. 20, 21.
>
> Union Co. v. Ferris, 2 Sawyer 176, 184.

In appropriation States the United States still holds its undisposed of waters as a riparian proprietor regardless of State laws. The Supreme Court says:

> Although this power of changing the common law rule as to the streams within is domain undoubtedly belongs to each state, yet two limitations must be recognized: First, that in the absence of specific authority from Congress, a State cannot by its legislation destroy the right of the United States, as the owner of lands bordering on streams, to the continued flow of its waters so far at least as may be necessary for the beneficial uses of the Government property***
>
> U.S. v. Rio Grande Irr. Co., 174 U.S. 690, 703.

Gutierrez v. Albuqueque Co., 188 U.S. 545, 554.

INDIAN RESERVATIONS.

By the establishment of an Indian Reservation the United States, as the owner of the unappropriated waters in the adjacent non-navigable streams, reserves from further appropriation so much of such waters as will in the future be needed for the lands of the reservation.

> The power of the Government to reserve the waters and exempt them from appropriation under the State laws is not denied and could not be. United States v. Rio Grande Ditch & Irrigation Co., 174 U.S. 690, 702; United States v. Winans, 198 U.S. 371. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years.
>
> Winters v. U.S., 207 U.S. 564, 577.

The Federal decisions on the water rights of the United States for the Indian reservations are the following:

1901. U.S. v. Morrison, 203 Fed. 364 (Colo.)

1906. Winters v. U.S., 143 Fed. 740 (Mont.)

1906. Winters v. U.S., 148 Fed. 684 (Mont.)

1907. U.S. v. Conrad, 156 Fed. 123 (Mont.)

1908. Winters v. U.S., 207 U.S. 564 (Mont.)

1908. Conrad v. U.S., 161 Fed. 829 (Mont.)

1918. U.S. v. Wightman, 230 Fed. 277 (Ariz.)

1922. Skeem v. U.S., 273 Fed. 93 (Idaho)

1926. U.S. v. Parkins, 18 F (2d) 642 (Wyo.)

1928. U.S. v. Hibner, 27 F (2d) 909 (Idaho)

U. S. District Judge Hallett of Colorado held in 1901:

> The Acts of Congress and of the State Assembly relating to appropriation of Water for irrigating lands were made for and are applicable only to cases arising between citizens. They have no application whatever to the case in which water is appropriated to a public use by the Government in the exercise of its sovereign authority over the Indian tribes.

U.S. v. Morrison, 203 Fed. 364, 366.

RECLAMATION PROJECTS.

Act of July 2,1902 (32 Stat. 388).

The same rights and powers of the Unites, upon which the Winters case is based, apply to the reservation of waters for the Government's reclamation

projects. It seems that only one case is found in the printed reports of Federal decisions which announces the rule above stated as applicable to the Government's reclamation projects. This was one of Mr. B. E. Stoutemyer's early cases decided in 1910. That opinion is by the United States Circuit Court of Appeals, 9th Circuit. It says:

> That the United States may, where the circumstances and conditions require it, reserve the waters of a river flowing through its public lands for a particular beneficial purpose, was held by this court in Winters v. United States, 143 Fed. 740, and 148 Fed. 684. This decision was affirmed by the Supreme Court of the United States in Winters v. United States, 207 U.S. 564, 577, where the Court said:
>
> "The power of the Government to reserve the waters and exempt them from appropriation under the State laws is not denied and could not be. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 702; U.S. v. Winans, 198 U.S. 371."
>
> To the same effect was the decision of this Court in Conrad Inv. Co. v. U.S., 161 Fed. 829, 831.
>
> Burley v. U.S., 179 Fed. 1, 12.

It seems that the authorities cited in this memorandum, relating to the ownership by the United States of the unapproprated waters in the non-navigable streams and its power to reserve the same

for beneficial Governmental purposes, are sufficient to establish the proprietary and sovereign rights of the United States. I shall, therefore, not repeat those decisions here.

Judge Cavender of the State District Court of Colorado held in 1912 for the Government's Grand Valley Project, and again in 1913 for the Government's Uncompahgre Project, that the United States owned the unappropriated waters of the non-navigable streams in Colorado, and by establishing a reclamation project had reserved so much of said unappropriated waters as were needed for the project. Following these decisions the Attorney General announced his approval of the doctrine in his Annual Report for 1914, at page 39.

Special Master George F. Talbot of the United States District Court of Nevada has announced the same rule. See his Explanatory Report in the case of U.S. v. Orr Water Ditch Co., Departmental File No. 182979. The decree prepared by him enforcing this right of the Government has been temporarily enforced during the past four years by the United States Judge of Nevada.

Section 8 of the Reclamation Act.

Counsel opposing the Government's water rights always rely upon Section 8 of the Reclamation Act as a relinguishment of the Government's proprietary and sovereign rights over its waters and as a mandatory compliance by the United States at its peril with State water laws. The pertinent portions of Sec. 8 are as follows:

> Sec. 8: That nothing in this Act shall be construed as affecting or

> intending to affect or to in any way interfere with the laws of any State or territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired there under, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any land owner, appropriator or user of water in, to, or from any interstate stream or the waters thereof***.
>
> Act of July 2, 1902, Sec. 8 (52 Stat. 388, 390.)

The first part of Section is a re-affirmance of the Government's guaranteed protection of the water rights recognized and validated by the Act of 1866, and water rights thereafter to be acquired from the United States under the provisions of Section 9 of the Act of 1866 by conformity with "the local customs, laws and decisions of courts."

The Secretary of the Interior, in carrying out the provisions of the Reclamation Act is directed to conform with the State water laws provided that such conformity shall not in any way affect any right of the Federal Government.

There are many proprietary, constitutional and sovereign rights of the Federal Government that would be seriously affected by strict conformity with State water laws and the rules and regulations of States

Engineers—such as appropriation permits and time limits for completion of works and application of water.

For illustration, the first requirement of the laws of most of the appropriation States is that the prospective user must obtain a permit to "appropriate" the desired water. An "appropriation" of water means the taking of the steps required by the "local customs, laws and the decisions of courts" of the State, by which the title to the right to use the water—a real property right—vests from the Federal Government to the individual—"whereby the appropriator is granted by the Government the exclusive use of the water."

Monte Vista v. Centenial Ditch Co., 22 Colo. App. 364, 370.

There is no need that the Government should appropriate or acquire title to that which it already owns, viz: the inappropriated waters which, by the establishment of a reclamation project, the Government reserves for the uses of its reclamation project.

> The Government has not to make a prior appropriation to enable it to obtain the use of the waters. It has only to take that which has been reserved or that which has never been subject to prior appropriation upon the public domain. It has only to come into its own when its needs may require—the Department of the Interior being the instrumentality by which it exercises that right and privilege—and all persons seeking appropriations from public streams must take subject to this paramount right.

> U.S. v. Conrad Inv. Co., 156 Fed. 123, 129-130.
>
> It was, therefore, unnecessary for the Government to appropriate the water. It owned it already. All it had to do as to take and use it.
>
> Story v. Wolverton, 31 Mont. 346, 353.
>
> Winters v. United States, 143 Fed. 740, 747.

Section 8, in excepting conformity which will interfere with State rights or with Federal rights or with interstate stream rights, states these exceptions in the disjunctive. Separately stating these exceptions, we have:

1. Nothing herein shall affect any right of any State.

2. Nothing herein shall affect any right of the Federal Government.

3. Nothing herein shall affect any right of any land owner, appropriator, or user of water in, to, or from any interstate stream, or the waters thereof ****.

The Supreme Court of the United States has interpreted the language excepting interstate stream rights.

> Congress was solicitous that all questions respecting interstate streams thought to be involved in that litigation (Kans. V. Colo.) should be left to judicial determination unaffected by the Act,—in other words, that the matter be left just

as it was before. The words aptly reflect that purpose.

Wyo. v. Colo. 259 U.S. 419, 463.

Applying the same interpretation to the language excepting the rights of the Federal Government from the conformity provisions of Section 8, the Court undoubtedly would hold that Congress was solicitous that all questions regarding any rights of the Federal Government be left just as they were before the enactment of Section 8; and that the words "nothing herein shall in any way affect any right of the Federal Government" would aptly reflect that purpose.

We call attention to the numerous decisions regarding conformity with State laws as found in the Conformity Act in Revised Statutes, Sec. 914, and the Eminent Domain Act, Aug. 1, 1888 (25 Stat. 357).

I call special attention to the decision of Judge Lewis, now presiding judge for the 10th Circuit, in the case of U. S. v. O'Neill, 198 Fed. 677, 682-3, and the cases cited by him, especially the case of Hills & Co. v. Hoover, 220 U.S. 329, 336, and the decisions there cited. These decisions are to the effect that conformity with State law is not required where any right of the Federal Government is impaired thereby.

It, therefore, is evident that the conformity provisions of Section 8 are not mandatory, but merely directory and modal, provided that such compliance does not in any way affect any right of the Federal Government.

In actual practice, the Reclamation Service does "conform" with State laws in every way possible in

order to give notice to all of the water requirements of the Government for its projects.

Respectfully submitted,
(Sgd) Etherlbert Ward
Special Assistant to the Attorney General

Denver, Colorado,
January 22, 1930.