

NEGOTIATIONS ON WATER RIGHTS  
BETWEEN  
THE UNITED STATES  
AND  
THE REPUBLIC OF MEXICO

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THE REPUBLIC OF MEXICO

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## PREFACE

The equitable division and distribution of the waters of the Rio Grande and Colorado rivers have been subjects of diplomatic exchange since the early 1880's. Economic development on either side of the river has resulted in protest against the diversion of the waters of these rivers by the people of the opposite side. Custom and tradition have always demanded riparian rights, but international law has not upheld these demands. However, most treaties involving the question of water rights on international streams have protected uses existing at the time of negotiations in the lower riparian states.

When the present water treaty was being debated in Congress, a civic organization in Stillwater, Oklahoma, contemplated the advisability of protesting against its passage. It seemed an opportune time to make a study of the negotiations leading to the present convention. The senate's ratification of the treaty in the latter part of April, 1945, has made it possible to write the concluding paragraph to an interesting prolonged phase of the diplomatic relations between the United States and Mexico.

The author is indebted to Professor Mabel D. Holt, who directed the study, and also Doctors T. H. Reynolds and O. E. Hooley, who have given valuable advice. Miss Grace A. Campbell and her staff are entitled to acknowledgement for the service they rendered in helping to locate the needed material.

## CHAPTER I

## HISTORICAL BACKGROUND

The roots of the question relating to the equitable division of the waters of the Rio Grande, Colorado, and Tia Juana rivers lie deep in history. In this arid region in Southwestern United States and Northern Mexico "water is life."<sup>1</sup>

Over four hundred years ago the Spaniards entered the valley of the Rio Grande and found the Pueblo Indians tilling the land and "bringing water on to it by acequias, or irrigation ditches, many of which are still in use to this day."<sup>2</sup> These are "the oldest irrigation works now in use in this country."<sup>3</sup> It is not known how long these Indians had been irrigating their fields, but they were old inhabitants<sup>4</sup> when the white man first visited them. They were not only raising fruit and grain but also flowers.

...one poetical and doubtless homesick Spaniard wrote that roses bloomed along the acequias bank [sic.] "as bloomed the roses of beautiful Aragon."<sup>5</sup>

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<sup>1</sup> "Eight States Vie for Water," Business Week (March 17, 1945), p. 31.

<sup>2</sup> W. W. Follett, "A Study of the Use of Water for Irrigation on the Rio Grande Del Norte," Senate Document No. 229, 55 Cong. 2 sess., XXI (3610), (Washington, 1898), p. 54. Because of the date of this publication, this point was rechecked in "A Harness for the Rio," Business Week (January 22, 1944), p. 19, which states that some of the ancient ditches were still in use in 1944.

<sup>3</sup> Elwood Mead, Irrigation Institutions (New York, 1910), p. 285.

<sup>4</sup> S. Doc. No. 229, p. 54.

<sup>5</sup> Ibid.

At that time some fifteen to twenty thousand people were living from products raised by irrigation in the Rio Grande drainage above Jornada del Muerto, and the area of the land irrigated probably exceeded thirty thousand acres.<sup>6</sup>

The first attempt to colonize this region was made in 1598 with El Paso as a base.<sup>7</sup> When the Pilgrims landed at Plymouth, the bottom lands around Las Cruces were being irrigated by the Spaniards.<sup>8</sup> Even after the American population began settling in the Rio Grande valley in New Mexico, and canal building had taken place on a large scale, ninety per cent<sup>9</sup> of the irrigation in that section was done by Mexicans and Indians. "Custom, as old as settlement, rather than statute law, governs the distribution of water."<sup>10</sup>

International problems "of great magnitude and considerable delicacy arise from many factors"<sup>11</sup> involved in the use of the waters from rivers which form boundaries between nations. The first question regarding the diversion of waters on the international rivers between the United States and Mexico arose in 1880. A petition was sent to the county commissioners' court of El Paso County, Texas, April 6, 1880, signed by two hundred fifty-

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<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

<sup>8</sup> Mead, loc. cit. The ditches of Las Cruces, New Mexico, have an unbroken record of more than three hundred years of service. Their history is written in the canal banks by sediment. Instead of being channels cut out below the surface, they are now raised two or three feet above. (Mead, op. cit., p. 42.)

<sup>9</sup> S. Doc. No. 229, p. 55.

<sup>10</sup> Mead, op. cit., p. 285.

<sup>11</sup> S. Whittemore Boggs, International Boundaries (New York, 1940), p. 69.

four citizens of the towns of Elizario, Socorro, and Ysleta.<sup>12</sup> The petition stated that the people had suffered the loss of their entire corn crop in 1879, due to the fact that they were unable to get water from the Rio Grande for irrigation. The river had ceased running in June that year, and conditions were even worse in 1880. Many had lost not only their crops, but also their live-stock because of the scarcity of pasture and want of water.<sup>13</sup>

Henry Cook, county judge of El Paso County, wrote the governor of the state that

the Mexican people many years ago constructed a permanent dam at a point known as Hart's Hill, about  $1\frac{1}{2}$  miles above our town of El Paso, Tex., and have assumed and still claim the right to control said dam, and have constructed and had in use for many years a large acequia, or canal, which at low water drains every drop flowing down the river to the Mexican side, thereby depriving our people, at a time when most in need, of their just portion of water.<sup>14</sup>

The people of El Paso County contended that they were entitled to

one-half the water flowing down the Rio Bravo,<sup>15</sup>...by treaty stipulations, to wit, the treaty of Guadalupe Hidalgo, which says, "the middle channel of the river from its mouth to the southern boundary line of New Mexico, shall be the boundary between the two nations."<sup>16</sup>

Governor Roberts appealed to the national government to take some diplomatic action in regard to this matter, as he feared it would "result

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<sup>12</sup> House Executive Document No. 1, 46 Cong., 3 sess., in Foreign Relations of the United States, 1880-81, I (1951), p. 755.

<sup>13</sup> Ibid.

<sup>14</sup> Cook to Governor O. M. Roberts, April 16, 1880, ibid., p. 754.

<sup>15</sup> Rio Bravo means "wild river" and is the name usually applied to the Rio Grande by the Mexicans.

<sup>16</sup> Ibid.

in hostilities."<sup>17</sup> Realizing the seriousness of the situation, Secretary of State William M. Evarts wrote to the American ambassador at Mexico City regarding the matter, June 12, 1880. In this communication he stated that the diversion of water by the agriculturists up stream on the Mexican shore of the river was in opposition to the

recognized rights of riparian owners, and, if persisted in, must result in disaster and ruin to our farming population on the line of the Rio Grande, and might eventually, if not amicably adjusted through the medium of diplomatic intervention, be productive of constant strife and breaches of peace between the inhabitants of either shore.<sup>18</sup>

Secretary Evarts also wrote Senor Juan N. Navarro, Mexican ambassador to Washington, June 15, 1880, bringing the matter to his attention.<sup>19</sup> The following day Senor Navarro acknowledged the communication and replied that he felt his government would give the matter serious consideration

being actuated as it is by the same sentiments that actuate the American Government in behalf of harmonious and friendly relations which should exist between the two republics.<sup>20</sup>

No further correspondence appears to have taken place until four years later. Then the Mexican legation presented a delayed reply in August, 1884,

to the effect that the scarcity of water in 1880 was due, not to diversion, but to the dry season; that the Mexicans in fact suffered more than the Texans; that the scarcity was aggravated by the waste of water on the American side, in Colorado and New Mexico; and that, while there was a dam at Paso del Norte, Mexico, it had been in existence more than 300 years, being

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<sup>17</sup> Roberts to Evarts, May 10, 1880, ibid., p. 753.

<sup>18</sup> Evarts to P. H. Morgan, ibid., p. 752.

<sup>19</sup> Evarts to Navarro, ibid., p. 783.

<sup>20</sup> Navarro to Evarts, ibid., p. 784.

as old as the town itself, and no additions had been made to it.<sup>21</sup>

The weather conditions during the next four years may account for no further complaint being made by the Americans. The driest year of record prior to 1889 was 1879. In that year the flow of the river ceased nearly as far north as Albuquerque.<sup>22</sup> The weather records of the rainfall at El Paso, Texas, for 1879 and the years immediately following are:

|               |        |        |    |
|---------------|--------|--------|----|
| 1879. . . . . | 6.80   | inches |    |
| 1880. . . . . | .15.37 | "      |    |
| 1881. . . . . | .19.17 | "      |    |
| 1882. . . . . | 8.27   | "      |    |
| 1883. . . . . | .12.92 | "      |    |
| 1884. . . . . | .18.30 | "      | 23 |

During the period from February through June the rainfall for the years 1879 and 1880 was very scanty, ranging from no precipitation to 0.30 of an inch.<sup>24</sup> In 1884 a very destructive flood occurred throughout the valley.<sup>25</sup>

The vital importance of the life-giving waters of the Rio Grande and its tributary streams is older than historical records. The aborigines, the Spaniards, and, more recently, the Americans, who have made their homes in this valley have all been dependent upon irrigation for their very existence. The people have grown up under the "doctrine of riparian rights--where water had flowed there it must continue to flow without

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<sup>21</sup> Mr. Romero, Mex, min., to Frelinghuysen, sec. of state, Aug. 27, 1884, 34 MS. Notes from Mex. Leg. in John Bassett Moore, A Digest of International Law, I(Washington, 1906), p. 653.

<sup>22</sup> S. Doc. No. 229, p. 100.

<sup>23</sup> World Weather Records, Smithsonian Miscellaneous Collection,

<sup>24</sup> Ibid.

<sup>25</sup> S. Doc. No. 229, p. 100.

interruption from anyone higher up on the stream."<sup>26</sup> On this doctrine the Americans had based the complaint which raised the problem relating to the diversion of waters of the international streams between the United States and Mexico. It was evident to the officials of both countries that the matter would eventually have to be settled by diplomacy.

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<sup>26</sup> John A. Widtsoe, Success on Irrigation Projects (New York, 1928), p. 2.

## CHAPTER II

## EARLY NEGOTIATIONS ON WATER RIGHTS

A study of the industries in that part of the Rio Grande Valley, which lies in Colorado and New Mexico, makes clear why water became increasingly important. Until about 1882 cattle raising was the main occupation of the people in that section. At about that date the era of large canal building began and continued for ten years. Colonists were brought in rapidly, and it was predicted that this region would have a bright future. Later it was found that the waters of the Rio Grande were not sufficient to supply these large canals and their network of laterals. This, together with the hot climate and low fertility of the soil in many places, tended to check immigration; and irrigation, instead of increasing after 1892, failed to hold its own.<sup>1</sup>

Nevertheless, during the early nineties the division and diversion of the waters of the Rio Grande were not completely ignored by either side.

A concurrent resolution was passed by congress, April 29, 1890, stating

that there should be definite and authoritative ascertainment of facts concerning irrigation of arid lands in the valley of the Rio Grande River and construction of a dam across said river at or near El Paso, Tex., for the storage of its waste waters,...

A joint resolution was passed, May 9, 1890, requesting the "President...to negotiate with the Government of Mexico for the creation of an

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<sup>1</sup> S. Doc. No. 229, p. 55.

<sup>2</sup> Congressional Record, XXI, pt. 4, 51 Cong., 1 sess. (Washington, 1889), p. 3963. Although the date on the fly leaf is 1889, the information covers the period from April 4 to 30, 1890.

international commission"<sup>3</sup> to settle boundary disputes between the two countries. Among other problems to be considered were the

regulation and distribution of the waters of the Rio Grande where the said river constitutes the boundary between the two countries and to secure the equitable use of the same on both sides of the river for irrigation.<sup>4</sup>

Mexico raised the question in the fall of 1894, when Senor M. Romero, Mexican ambassador to Washington, in a communication to the American secretary of state, called attention to

the urgent necessity that exists for a decision of the question relative to the taking of water from the Rio Bravo (Rio Grande) del Norte in the State of Colorado and the Territory of New Mexico, which has so seriously affected the existence of the frontier communities for several miles below Paso del Norte,...

In acknowledging this communication, November 1, 1894, Secretary Gresham stated that according to the report of the department of agriculture, it was

by no means certain that the low state of the Rio Grande at Ciudad Juarez and vicinity is due to the utilization of water for irrigation along the upper course of the river to a greater extent than heretofore. A failure of the supply has frequently occurred at Ciudad Juarez in the past, and this is satisfactorily explained by the drought that has prevailed over the headwaters of the Rio Grande for the last two or three years, and over the territory around El Paso for six or eight years. The evidence...does not show any material increase in the utilization of water for irrigation on the Upper Rio Grande for several years past.<sup>6</sup>

In October of 1895 the Mexican ambassador again complained that the digging of irrigation trenches in Colorado and New Mexico had diminished

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<sup>3</sup> House Committee Report No. 1967, 51 Cong., 1 sess., VI (2812), (Washington, 1891), p. 3.

<sup>4</sup> Section 5, ibid., p. 3.

<sup>5</sup> Romero to W. Q. Gresham, October 12, 1894, H. Ex. Doc. No. 1, pt. 1, 53 Cong., 3 sess., in Foreign Relations of the United States, 1894, I (3292), (Washington, 1895), p. 395.

<sup>6</sup> Gresham to Romero, ibid., p. 397.

the water in the Upper Rio Grande to such an extent that a scarcity was created in the lower part of the stream, causing damage and hardship to many inhabitants of Mexico.<sup>7</sup> He represented this as a violation of international law and Article VII of the treaty of Guadalupe Hidalgo. The attorney-general advised

1. That the rules of international law imposed upon the United States no duty to deny to its inhabitants the use of the water of that part of the Rio Grande lying wholly within the United States, although such use resulted in reducing the volume of water in the river below the point where it ceased to be entirely within the United States, the supposition of the existence of such a duty being inconsistent with the sovereign jurisdiction of the United States over the national domain.
2. That Article VII of the treaty of Guadalupe Hidalgo, although it prohibited "any work that may impede or interrupt, in whole or in part," the exercise of the right of navigation, was limited in terms to "the part of the Rio Bravo<sup>8</sup> del Norte lying below the southern boundary of New Mexico...."

The negotiations contemplated by the earlier resolutions of congress resulted in a protocol drawn up by Secretary of State Richard Olney and Senor Romero, May 6, 1896. This agreement provided for Colonel Anson Mills and Senor Don F. Javier Osorno<sup>9</sup> to direct an investigation and report upon the following questions:

1. The amount of water of 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 construction--the present year included.

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<sup>7</sup> Romero to State Department, Moore, op. cit., p. 653.

<sup>8</sup> Ibid., pp. 653-654. More cited Harmon, At.-Gen., Dec. 5, 1895, 21 MS. Dom., Let. 274. The writer of this thesis did not have access to this document.

<sup>9</sup> Colonel Mills and Senor Osorno were the American and the Mexican members, respectively, of the international boundary commission which had been created in 1889.

3. The best and most feasible mode, whether through a dam to be constructed across the Rio Grande near El Paso, Tex., 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 of said waters.<sup>10</sup>

While this investigation was being made, Senor Romero submitted to the state department a petition from the citizens of Paso del Norte, Mexico protesting against the immoderate use of the waters of the Rio Grande and its tributaries by residents of the United States, and against the construction of a dam near Elephant Butte in New Mexico by the Rio Grande Dam and Irrigation Company.<sup>11</sup>

Andres Horcasitas, attorney for the petitioners, had pointed out that if this proposed dam were built, the international dam, which had been suggested as a remedy for the international situation, would be rendered useless,

as there is no doubt that the accumulation of the waters of the Rio Bravo at the former dam will not leave even a small quantity for the second dam, and my clients will find themselves subjected to the unavoidable necessity of abandoning their homes or of buying the water which is so indispensable to their existence at the price that any speculating company may be pleased to fix.<sup>12</sup>

Horcasitas also requested his government to recommend to the United States government the suspension of all work on the Rio Grande by the company.<sup>13</sup>

The Rio Grande Dam and Irrigation Company had been incorporated under the laws of New Mexico in 1893. The condition of the money market in the United States in this year of panic made it impossible to raise the large capital required to carry out the project for which the company had been

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<sup>10</sup> S. Doc. No. 229, p. 36.

<sup>11</sup> Romero to Olney, August 4, 1896, ibid., p. 2.

<sup>12</sup> Horcasitas to Secretary of Foreign Relations of Mexico, June 22, 1896, ibid., p. 3.

<sup>13</sup> Ibid.

organized, namely, "to construct irrigation works and consolidate under one corporate body certain irrigation rights and interests in the Rio Grande Valley in southern New Mexico and El Paso County, Tex."<sup>14</sup> Nathan E. Boyd, director-general of the company, went to Europe to try to place debenture bonds.<sup>15</sup>

The mistrust of American securities had become so universal that he could get no one to risk his capital, although investors admitted there was merit in the undertaking. He learned that the foreign capitalists would be more likely to intrust their money to an English board of directors, since "in England the directors of a public company are individually and collectively responsible to investors for good management."<sup>16</sup> Therefore an English company, the Rio Grande Irrigation and Land Company, Limited, was formed to issue shares and debenture bonds, which were to be secured by a lease of the American company's undertaking. Through this, the necessary capital was obtained.<sup>17</sup> The purpose of this English company was

to acquire, by lease and assignment, the franchise rights, water rights, right of appropriating the waters of the Rio Grande... contracts, properties, and undertaking of the Rio Grande Dam and Irrigation Company, and for the purpose of irrigating, colonizing, and improving the lands in the famous Rio Grande Valley,...<sup>18</sup>

Upon receiving the Mexican protest of August 4th, the state department sent copies of the Mexican ambassador's letter and the petition to

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<sup>14</sup> Ibid., p. 5.

<sup>15</sup> Letter by Boyd to Members of U. S. Senate, January 10, 1901, S. Doc. No. 104, 56 Cong., 2 sess., V (4033), [Washington, n.d.], p. 3.

<sup>16</sup> Ibid., p. 4.

<sup>17</sup> Ibid.

<sup>18</sup> S. Doc. No. 229, p. 5.

Anson Mills requesting his suggestions on the subject.<sup>19</sup> Mills found that the application of the Rio Grande Dam and Irrigation Company<sup>20</sup> had been approved by the secretary of interior on February 1, 1985, but that the commissioner of the general land office in Washington had not approved it at the time Mills interviewed him. In a letter to Secretary Olney on November 17th, Colonel Mills suggested that the approval for the company's reservoir at Elephant Butte either be cancelled or withdrawn,<sup>21</sup> since statistics taken by the international (water) boundary commission<sup>22</sup> indicated that

the probable flow of water in the river here [El Paso] is likely to be ample for the supply of the proposed international reservoir after deductions are made for all the small reservoirs that are likely to be constructed...but that flow will not be sufficient to supply the proposed international reservoir here and allow for the supply of the proposed reservoir of the Rio Grande Irrigation Company, Limited, at Elephant Butte, in New Mexico,...and but one of these schemes can be successfully carried out.<sup>23</sup>

The secretary of interior, D. R. Francis, acting on the suggestion of the state department, directed the commissioner of the general land office to suspend action on all applications for right of way through the public lands, drained by the Rio Grande and tributaries, for irrigation purposes, until further instructions were received. The secretary was of the opinion

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<sup>19</sup> Acting Sec. W. W. Rockhill to Mills, August 8, 1896, ibid., p. 11.

<sup>20</sup> The name of the American Company is used in most documents.

<sup>21</sup> Mills to Olney, November 17, 1986, ibid., p. 11-13.

<sup>22</sup> The Boundary Commission was created by a convention with Mexico in 1889, and extended several times. When the question relating to the diversion of the waters of the Rio Grande arose, the members of this commission were put in charge of the investigation. In 1901 the Boundary Convention was extended indefinitely and the commission was called the Water-Boundary Commission.

<sup>23</sup> Ibid., p. 13.

that he had no right to revoke the approval given the Rio Grande Dam and Irrigation Company by his predecessor, Hoke Smith.<sup>24</sup> This permission had been given in accordance with Sections 18 and 20 of the Act of March 3, 1891.<sup>25</sup>

Congress, in 1892, had passed an amendment to the earlier act, which gave the secretary of interior the right to approve right of ways and dams for irrigation. This amendment provided that permission of the secretary of war must be secured for the building of a dam or other obstruction in any navigable waters of the United States.<sup>26</sup> Permission had not been obtained from the secretary of war for the erection of the dam across the Rio Grande at Elephant Butte. In order to make the sanction of the secretary of war a requisite to the lawful erection of the dam, it was necessary to ascertain whether the river, in those parts that would be affected, was navigable water within the meaning of the law. Therefore Olney requested Colonel Mills to secure information on the matter. He defined navigability of a river that would come under the control of congress as

a river which affords a channel for useful commerce. The commercial traffic need not necessarily be carried on in boats or vessels. Waters which are capable only of floating rafts or logs are public highways for that kind of commerce. The navigable condition need not be perennial, but it must recur regularly at stated seasons...It is not essential that waters in order to be navigable shall afford a continuous passage throughout the entire extent of the stream, but...there must be capacity to float commercial

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<sup>24</sup> Francis to Olney, November 19, 1896, ibid., p. 17.

<sup>25</sup> United States Statutes at Large, XXVI, pt. 2 (Washington, 1891), pp. 1101-1102.

<sup>26</sup> Ibid., XXVII (Washington, 1893), p. 110.

products from one State to another or between a State and a foreign country. The river must be an interstate or international highway for commerce.<sup>27</sup>

Anson Mills in his reply on January 7, 1897, cited a number of cases showing that from El Paso to the Gulf of Mexico the river would without question come under the class of navigable rivers. In his report he pointed out the fact that the Rio Grande received no addition to its volume between northern New Mexico and the mouth of the Concho River, some two hundred miles below El Paso. Steamboats had reached Roma, Texas, and it was possible to use the river for navigation above Roma to the mouth of the Devil River, a total distance of five hundred sixty-seven miles. At an earlier date, Mills, himself, had floated logs for building purposes from a point eighteen miles above El Paso.<sup>28</sup> Furthermore, he reported that

this navigability of the river has been greatly depleted, almost wholly destroyed, by the cutting off of the waters of the Rio Grande and its tributaries in Colorado and New Mexico...It follows therefore, that the further cutting off of the waters in that river would in a slight degree "injuriously affect the navigation of the Rio Grande and the rights of the citizens of Mexico under international law and treaty."<sup>29</sup>

George McC. Derby, captain of engineers of the United States Army, who had also been directed to furnish information as to the navigability of the Rio Grande, reported to the chief of engineers, William P. Craighill, as follows:

The flow of water in the Rio Grande at and near El Paso is exceedingly variable. There are months in the year when there is no flow at all, and at other times the monthly flow is as great

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<sup>27</sup> Olney to Mills, January 4, 1887, S. Doc. No. 229, p. 19.

<sup>28</sup> Mills to Olney, ibid., pp. 20-23.

<sup>29</sup> Ibid., p. 23.

as 12,000 cubic feet per second. The periods of high water recur annually with regularity, and at such times the river is unquestionably navigable at and above El Paso, and could certainly be used in commerce for floating logs and flatboats. I have no knowledge of the fact that this portion of the river has ever been put to such use,...But the issue is not whether the river has been actually navigated, but whether it is navigable within the meaning of the law,...

As many rivers of the country have been so classified which in point of depth, volume, and regularity of flow offer fewer advantages to navigation than does the Rio Grande at El Paso, it seems clear to me that this stream should also be so classified.<sup>30</sup>

On the basis of these facts, and after having ascertained that auxiliary work on the Elephant Butte project had been in progress for five months, the attorney-general, under the authority of Section 10 of the River and Harbor Act of September 19, 1890,<sup>31</sup> filed a suit against the Rio Grande Dam and Irrigation Company and also its lessee, the Rio Grande Irrigation and Land Company, Limited.<sup>32</sup> The case was carried from the supreme court of New Mexico to the national supreme court, which ordered a further inquiry to be made into the question as to whether the construction of the dam and the appropriation of the waters of the Rio Grande would diminish the navigability of the stream within the limits then existing.<sup>33</sup>

In the meantime the joint commission had been making its investigation on the various points indicated in the agreement between the two

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<sup>30</sup> Cap. Derby to Craighill, February 1, 1897, ibid., p. 29.

<sup>31</sup> U. S. Stat. L. XXVI, pt. 1 (Washington, 1890), p. 454. This act makes the creating of obstructions in navigable waters unlawful and punishable in the federal courts.

<sup>32</sup> "United States vs. Rio Grande Dam and Irrigation Company," U. S. Supreme Court Reports, CXXLIV (Rochester, N. Y., 1926), p. 690.

<sup>33</sup> Ibid., p. 709.

governments on April 6, 1896. The data, compiled in respect to the amount of water taken from the river by irrigation canals constructed in the United States, showed

an aggregate of 1,074 canals taken out in Colorado and New Mexico prior to 1880, and 1,528 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 in the past sixteen years...the greatest increase...was in...Colorado, the number of canals and acres irrigated remaining almost stationary in New Mexico for that period...

It is evident...any increase of water used in Colorado would diminish materially the flow at El Paso.<sup>34</sup>

The commission's findings as to the "average amount of water in said river [Rio Grande] year by year before construction of...irrigation canals and since..." showed that there was no record of the flow in the river at El Paso prior to 1889. For the next few years the following facts were recorded:

| Year (ending March 31,) | River flow in acre-feet <sup>35</sup> |
|-------------------------|---------------------------------------|
| 1890 . . . . .          | 425,000 <sup>36</sup>                 |
| 1891 . . . . .          | 1,100,000                             |
| 1892 . . . . .          | 1,850,000                             |
| 1893 . . . . .          | 875,000                               |

The greatest amount of this flow, both before and after the construction of irrigation canals, had consisted of flood waters, which were unavailable without large reservoirs to hold them for the irrigation season. Nevertheless it was estimated that irrigation projects in the United

<sup>34</sup> Report of Joint Commission, November 25, 1896, S. Doc. No. 299, p. 38.

<sup>35</sup> An acre-foot is the unit of the volume of water equal to the volume of a prism one foot high with a base an acre in area, or 43,500 cubic feet of water.

<sup>36</sup> The record was kept for only eleven months prior to March 31, 1890. This data was in S. Doc. No. 229, p. 38, but it was not tabulated.

States had reduced the flow at El Paso about two hundred thousand acre-feet annually.<sup>37</sup>

As to the most feasible method of regulating the use of the waters of the Rio Grande, the commission recommended the building of an international dam across the river about three miles above El Paso to form a large reservoir for the impounding of the flood waters.<sup>38</sup> It further recommended that the two governments enter into a treaty for the final settlement of all questions relating to the distribution of the waters of this river. As a basis for negotiations the commission suggested that the United States should cede Mexico about ninety-eight acres of land at the point where the dam was to be constructed, so that both countries would own half the dam and have access to the lake formed by it. The United States should defray all expenses incurred in carrying out this project and also should have charge of the construction of the dam. And Mexico, in consideration of all this, should relinquish "all claims for indemnity for the unlawful use of waters in the past."<sup>39</sup>

Anson Mills explained this recommendation in a communication to Richard Olney on the day the commission made its report.

My first impulse was to insist that Mexico should share a portion of the pecuniary burden; but, ...the Mexican commissioner would not agree to this...and...if Mexico did share in the expense she would expect to share in the control of the construction, and as a double administration between any different people would invariably prolong the work and increase the cost...it would be more economical for the United States to take it alone and bear all the burden.<sup>40</sup>

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<sup>37</sup> Ibid.

<sup>38</sup> Ibid., p. 39.

<sup>39</sup> Ibid., p. 41.

<sup>40</sup> Mills to Olney, November 25, 1890, ibid., p. 33.

The Mexican government, upon receiving its copy of the joint commission's report, authorized Senor Romero to sign a convention with the United States department of state, based upon the recommendations of the report.<sup>41</sup> When Romero suggested that he prepare a draft of a convention for this purpose, Olney approved the step but added

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 dealt with, are questions under careful investigation and which must be disposed of before the United States will be in a condition to negotiate.<sup>42</sup>

The plan of the project worked out by the joint commission was violently opposed by the people of New Mexico because it did not utilize the entire flow of the river, lacked both storage capacity and irrigable land, would require the moving of many miles of railroads, and furnished no water for irrigating land in New Mexico, although the reservoir would submerge a large acreage in that territory.<sup>43</sup> Therefore a better solution of the matter had to be sought.

The problems that had to be solved in providing storage on the Rio Grande were very difficult. The floods on the river were enormous but irregular. The large amount of silt carried by the river would be caught and held by any reservoir but would be less acute with a large one than with a small one. Consequently it was imperative that the reservoir

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<sup>41</sup> Romero to Olney, December 9, 1896, ibid., p. 178.

<sup>42</sup> Olney to Romero, January 4, 1897, ibid., p. 179.

<sup>43</sup> Arthur Powell Davis, United States Irrigation Works (New York, 1917), p. 237.

should be as deep and large as possible.<sup>44</sup>

While the water-boundary commission was trying to solve these problems to the satisfaction of all concerned, and during the course of the judicial proceedings relating to the proposed dam at Elephant Butte, New Mexico, several attempts were made to introduce legislation in congress providing for a treaty settlement of the equitable distribution of the waters of the Rio Grande. Marsden C. Burch, assistant attorney to the department of justice, in a communication to John H. Stephens, one of the main sponsors for such a bill, stated,

the Department's policy must be hands off as to legislation regarding this matter. It would not be proper to do any thing by way of urging legislation, while we are in charge of litigation for one of the parties, which would interfere with the source of the litigation.<sup>45</sup>

Nevertheless, the secretary of state in February, 1900, requested the advice of Attorney-General John W. Griggs, as to whether the bringing forward of a proposed bill to provide for the equitable distribution of these same waters "would be expedient or likely to cause embarrassment to the department of justice" in the prosecution of the litigation against the corporation seeking to construct the dam at Elephant Butte.<sup>46</sup>

The attorney-general replied,

I have examined the proposed bill and see no objection to it from the point of view which you have indicated...the sole basis of jurisdiction in the Federal Courts, so far as the United

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<sup>44</sup> Ibid.

<sup>45</sup> Burch to Stephens, January 27, 1900, S. Doc. No. 154, 57 Cong., 2 sess., XIII (4428), (Washington, 1903), p. 70.

<sup>46</sup> Griggs to Hay, March 15, 1900, ibid., p. 70. This information was given by Griggs in referring to a communication he had received from Hay.

States Government is concerned is interference with the navigable capacity of the stream. The use of the waters of the river for purposes of irrigation is not a use connected with the regulation of commerce, and the act under which the present suit is being maintained...is one solely for the protection of commerce.<sup>47</sup>

The litigation against the Rio Grande Irrigation and Land Company, Limited was brought to an end on May 21, 1903, when the United States supreme court awarded a "perpetual injunction" against this company, not because of the navigability of the river, but because more than five years had elapsed during which "the defendants were not impeded or hindered by any injunction against them."<sup>48</sup> The Act of March 3, 1891, under the authority of which the applications had been filed, required the project to be completed within five years, or the rights granted by it would be forfeited.<sup>49</sup>

Congress, in the meantime, passed the Reclamation Act of June 17, 1902, which provided for setting aside the receipts from the sale of public lands in the sixteen western states and territories for reclamation fund

to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development<sup>50</sup> of waters for the reclamation of arid and semi-arid lands...

After the passage of this act, the engineers connected with the geological survey in charge of this work, aided the water boundary

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<sup>47</sup> Ibid., p. 71.

<sup>48</sup> "The Rio Grande Dam and Irrigation Company vs. United States" U. S. Supreme Court Reports, CCXV, (Rochester, N. Y., 1926), p. 278. The preliminary injunction was brought against the company, May 24, 1897, and dissolved July 31, 1897.

<sup>49</sup> U. S. Stat. L., XXVI, pt. 2, p. 1102.

<sup>50</sup> Ibid., XXXII, pt. 1 (Washington, 1903), p. 388.

commission in working out a feasible plan to meet the various problems connected with the locating of a site for a dam to take care of the international situation. Various schemes were submitted for the construction of a dam, but none was entirely satisfactory until Frederick Haynes Newell, an engineer of the geological survey, devised a plan after a careful examination of the site at Elephant Butte. His plan called for a dam to be constructed at the mouth of a canyon in New Mexico, forming a reservoir which would store a very large amount of water, flood practically no land of value, require the removal of no railroads, make possible the irrigation of about 185,000 acres of land then of little value, and make it possible to irrigate the land in Mexico that had formerly received water from the Upper Rio Grande.<sup>51</sup>

After this plan had been reported, congress on February 20, 1905, passed a bill relating to

the construction of a dam and reservoir on the Rio Grande in New Mexico for the impounding of the flood waters of said river for purposes of irrigation, and providing for the distribution of said stored waters among the irrigable lands in New Mexico, Texas, and the Republic of Mexico, and to provide for a treaty for the settlement of certain alleged claims<sup>52</sup> of the citizens of the Republic of Mexico against the United States of America.<sup>53</sup>

The act also stipulated that

the provisions of the Reclamation Act...shall be extended for

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<sup>51</sup> House Report No. 3990, 58 Cong., 3 sess., III (4762), [Washington, n. d.], p. 2.

<sup>52</sup> Nathan E. Boyd, in his letter to the senate, January 10, 1901, stated that at that time the Mexican claims, for damages to crops due to the diversion of water in the Upper Rio Grande, amounted to over \$35,000,000. S. Doc. No. 104, p. 5.

<sup>53</sup> Congressional Record, XXXIX, pt. 3, 58 Cong., 3 sess. (Washington, 1905), p. 2894; U. S. Stat. L., XXXIII, pt. 1 (Washington, 1905), p. 814.

the purpose of this act to the portion of the state of Texas bordering upon the Rio Grande which can be irrigated from a dam constructed near Engle, in the Territory of New Mexico, on the Rio Grande, to store flood waters of that river, and if there shall be ascertained to be sufficient land in New Mexico and Texas which can be supplied with the stored waters at a cost which shall render the project feasible and return to the reclamation fund the cost of the enterprise,<sup>54</sup> 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.<sup>55</sup>

As a result of this act the United States concluded a convention with Mexico, May 21, 1906,<sup>56</sup> providing for the equitable distribution of the waters of the Rio Grande for irrigation purposes, making special reference to the distribution of waters to be stored as a result of the dam.

Article I of the convention stated that the United States should deliver to Mexico a total of sixty thousand acre-feet of water annually at "the point where the head works of the Acequia Madre...exist above the city of Juarez,<sup>57</sup> Mexico."<sup>58</sup>

Article II provided, that in case of drought or serious accident to the irrigation system, the amount delivered to Mexico "shall be diminished in the same proportion as the water delivered to lands...in the United States."<sup>59</sup>

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<sup>54</sup> The reclamation act provided that the cost of the irrigation projects should be returned to the reclamation fund by the owners of private land or entry men on public land in ten annual installments, with no interest required. U. S. Stat. L. XXXII, pt. 1, p. 389.

<sup>55</sup> Cong. Rec., XXXIX, p. 2894; U. S. Stat. L. XXXIII, pt. 1, p. 814.

<sup>56</sup> William M. Malloy, Treaties, Conventions, International Acts, Protocols, and Agreements between the United States of America and Other Powers, 1776-1909, I (Washington, 1910), pp. 1202-1205.

<sup>57</sup> Juarez was formerly called Paso del Norte.

<sup>58</sup> Ibid., p. 1202.

<sup>59</sup> Ibid., p. 1202-1203.

Article IV contained the provision stating that the delivery of the water should not be construed as "a recognition by the United States of any claim on the part of Mexico to the said waters."<sup>60</sup>

Article V stipulated further:

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 /Acequia Madre/ down to Fort Quitman, Texas,<sup>61</sup> and in no other case.<sup>62</sup>

The dam was constructed in a deep canyon near Engle, New Mexico, less than a mile below Elephant Butte, the site proposed for the dam of the Rio Grande Irrigation and Land Company, Limited. The dam was completed in May, 1916. The United States bore all the expense of construction, and Mexico, on her part, waived all claims to indemnity for the loss incurred by the diversion of Rio Grande waters within the United States.<sup>63</sup>

The railroads penetrated into the arid and semiarid valleys of the Rio Grande and Colorado rivers during the last quarter of the nineteenth

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<sup>60</sup> Ibid., p. 1203.

<sup>61</sup> "Map of Texas," Commerical and Market Guide, Rand McNally, 71 ed., (New York--Chicago--San Francisco, 1940), p. 382. It is important to know the location of Fort Quitman, which is on the Rio Grande about sixty miles below El Paso, as the Treaty of 1906 and the present treaty hinge at this point.

<sup>62</sup> Malloy, op. cit., pp. 1203-1204.

<sup>63</sup> Ibid., p. 1203.

century, and an intensive agricultural development began in the early part of this century, especially in the American sections.<sup>64</sup> The treaty of May 21, 1906, settled the question of water diversion with respect to the section of the Rio Grande as far as Fort Quitman. Diversions in this stream below that point were not included in the treaty stipulations. Article VII of the Treaty of Guadalupe Hidalgo declared that the Rio Grande was a navigable stream, with the provision that neither nation should, "without the consent of the other construct any work that may impede or interrupt in whole or in part the exercise of this right."<sup>65</sup> The Treaty of 1884, in Article V, restricted the right of navigation by securing the common right of both nations "throughout the actually navigable main channels of said rivers [Rio Grande and Colorado]"...<sup>66</sup> Therefore, neither country had any right to use the waters of these streams for irrigation purposes until a treaty granted the privilege. Nevertheless,

the diversions on the American side of the lower Rio Grande, in spite of the treaty provisions with respect to maintaining navigability, have been tacitly permitted by the Mexican Government. In fact Mexico herself has granted concessions in the past for the purpose of irrigating lands on the Mexican side of the river.<sup>67</sup>

In 1907 and in 1908 Mexico called the attention of the United States to two proposed diversions of the waters of the Rio Grande on the

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<sup>64</sup> Charles A. Timm, "Some International Problems Arising from Water Diversion on the United States-Mexican Boundary." Southern Social Science Quarterly, XIII (Austin, Texas, 1933), p. 2.

<sup>65</sup> Malloy, op. cit., p. 1111.

<sup>66</sup> Ibid., p. 1161.

<sup>67</sup> Agricultural Committee Report to Stephen G. Porter, House Chairman of Foreign Affairs, April 26, 1924, H. Rpt. No. 666, 68 Cong., 1 sess., House Report on Public Bills, etc., III (8228), (Washington, 1924), p. 5.

American side of the river. Mexico

contended that the convention of 1906 forbade any further depletion of the water...pending the construction of the storage dam near Engle, New Mexico, and the delivery of the quantity of water to Mexico for which the convention provided.<sup>68</sup>

After securing the advice of the attorney-general, the state department replied that the proposed diversions were not in the stretch of the river which was included within the scope of the treaty, and suggested that the two countries appoint a joint commission to study the equitable distribution of the waters of the Lower Rio Grande, so that an international agreement might be concluded that would be acceptable to both countries. Mexico agreed to the proposal in December of 1908, and a commission for this purpose was appointed by each government.<sup>69</sup>

Congress had authorized the secretary of interior, in 1904, to divert the waters of the Colorado for the irrigation of land now constituting the Yuma Irrigation Project.<sup>70</sup> The Laguna Dam was constructed under this authority, and effectually prevented any navigation of the river between points above and below it. Boats had not been profitably operated on the Colorado River for several years,<sup>71</sup> but treaties recognized the right of navigation. When the Colorado River became an international stream with the negotiation of the Gadsden Treaty in 1853, the theory of navigation was proclaimed. Article IV of that treaty, stipulated that

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<sup>68</sup> Green Haywood Hackworth, Digest of International Law, I (Washington, 1940), p. 585. Hackworth cites state department manuscripts that are not available in our library.

<sup>69</sup> Ibid.

<sup>70</sup> U.S. Stat. L., XXXIII, pt. 1, p. 224.

<sup>71</sup> H. Doc. No. 605, 67 Cong., 4 sess., XLIV (8215), (Washington, 1923), p. 3.

the vessels and citizens of the United States shall...have free and uninterrupted passage through the Gulf of California, to and from their possessions situated north of the boundary line of the two countries. It being understood that this passage is to be by navigating the Gulf of California and the river Colorado, and not by land...<sup>72</sup>

Senor M. de Aguiroz, Mexican ambassador to Washington, wrote to the state department on July 7, 1904, as follows:

My Government having been repeatedly advised that the Department of Interior of the United States has set apart the sum of \$3,000,000 for the construction of a dam in the Colorado River at a place known as Laguna, and in view of the notices published by the newspapers of Los Angeles, Calif., to the effect that work would begin early next fall and be carried on, on both sides of the river for the irrigation of lands in Arizona and the southern part of California, the Department of Foreign Relations of Mexico instructs me to warn the Government of the United States that, under the peace and boundary treaties of 1848 to 1853, no work is to be executed by which the navigable conditions of the continuous Colorado and Rio Grande Rivers or the rights to both rivers which appertain to Mexico as a riparian country and that the United States are bound to respect in the same way as Mexico must respect those of the United States, may be impaired.

Acting Secretary of State Alvey A. Adee, in answer to Senor Don Federico Gamboa, charge'd' affairs, as to the legal liability on the part of the United States to Mexico because of water diversions, stated,

a careful examination of the law of nations on the subject has failed to disclose any settled and recognized rights created by the law of nations by which it would be held that the diversion of the waters of an international boundary stream for purpose of irrigating lands on one side of the boundary and which would have the effect to deprive lands on the other side of the boundary of water for irrigation purposes, would be a violation of any established principle of international law. Nevertheless, the Government of the United States is disposed to govern its action in the premises in accordance with the

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<sup>72</sup> Malloy, op. cit., p. 1123.

<sup>73</sup> M. de Aguiroz to the American secretary of state. "Report of American Section of International Water Commission United States and Mexico," H. Doc. No. 359 (9233), (Washington, 1930), p. 257.

high principles of equity and with the<sup>74</sup> friendly sentiments which should exist between good neighbors...

After explaining what the American government was planning in regard to the Rio Grande, he continued,

The department is also taking steps to prepare a draft of a treaty to submit to the Mexican Government for the solution of the questions growing out of the use of the waters of the Colorado River for irrigation purposes, and hopes that both treaties can be negotiated on terms reasonably satisfactory to each Government and in accord with the principles above mentioned.<sup>75</sup>

Because of the engineering features involved, the state department requested the department of interior to draft and submit a basis for the treaties.<sup>76</sup> Charles Walcott, of the interior department, was made director of the committee to draw up such drafts. In his report to Secretary of Interior Hitchcock, he wrote,

It was at first proposed to embody in the draft articles covering the situation both on the Rio Grande and on the Colorado River. The conditions there, however, are found to be so extraordinary that it is not deemed wise to attempt at this time to take up the situation on the Colorado River but to await the results of efforts now being made to check the flow of that stream into the Salton Sink [Imperial Valley, California].<sup>77</sup>

After the signing of the Treaty of 1906, the Colorado situation received little attention until February 10, 1912, when Secretary of Interior Walter L. Fisher suggested to P. C. Knox, secretary of state, that

negotiations be opened with Mexico for the early creation of an international commission embracing in its membership both American and Mexican engineers to investigate and report as to the proper method of utilizing the waters of the lower Colorado in the two countries to the best advantage of each, taking into consideration

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<sup>74</sup> Adec to Canboa, May 1, 1905, ibid., p. 398.

<sup>75</sup> Ibid., p. 399.

<sup>76</sup> Acting Secretary of State Loomis to E. A. Hitchcock, ibid., p. 404.

<sup>77</sup> Walcott to Hitchcock, ibid., p. 404.

the rights and interests of both countries.<sup>78</sup>

Henry Lane Wilson, American ambassador to Mexico, was instructed by the state department, March 21, 1912, to take up the question of appointing a commission immediately with the Mexican government.<sup>79</sup> The state department drew up a "draft of a convention providing for a preliminary commission to study and report upon the bases of the distribution of the waters of this [Colorado] river."<sup>80</sup> After some revisions both governments were in agreement on the draft for a convention, according to Ambassador Wilson's communication of May 3rd, 1913.<sup>81</sup> Five days later Henry Lane Wilson included in a telegram the information that Victoriano Huerta, the president of Mexico, had refused to consider the river questions until the United States should grant formal recognition of his administration.<sup>82</sup> Negotiations were not resumed until January, 1925.

These early negotiations between the United States and the Republic of Mexico for water rights were carried on intermittently for over seventeen years. The treaty of 1906 was the first successful attempt to reach an international agreement on water division and diversion. Since it was the result of the development and extension of irrigation above El Paso, which so depleted the normal flow of the river as to cause crop

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<sup>78</sup> Fisher to Knox, Papers Relating to Foreign Relations of the United States (Washington, 1920), p. 981.

<sup>79</sup> Acting Secretary of State Huntington Wilson to Henry Lane Wilson, ibid., p. 985.

<sup>80</sup> Huntington Wilson to Henry Lane Wilson, September 10, 1912, ibid., p. 991.

<sup>81</sup> H. L. Wilson to State Department, ibid., p. 993.

<sup>82</sup> "Note," ibid., p. 993. Hackworth cites Amb. Wilson to Sec. Knox, May 8, 1913, MS., Dept. of State, file 812.00/7431.

failures in the Mexican community below El Paso, Texas, this treaty dealt only with that section of the river above Fort Quitman, Texas. It was, however, a step forward in the cooperation of the two governments in an effort to regulate and control the water flow of the international streams for the benefit of both nations; and it pointed the way toward the solving of other water diversion problems.

## CHAPTER III

## LATER NEGOTIATIONS ON WATER RIGHTS

The waters of the Rio Grande and Colorado rivers are as necessary to the prosperity and development of large areas in Mexico and the United States as the Nile is to Egypt. The "Magic Valley" in Texas on the Lower Rio Grande and the Imperial Valley of California in the Colorado basin are two of the largest of these areas. They support several hundred thousand inhabitants and have property values running into the hundreds of millions of dollars. This intensive development is the result of irrigation projects along these two international streams. Acres of rich fertile land are brought into productivity that otherwise "would lie wasted or would at most support scattered ranches."<sup>1</sup>

This development was getting a good start when the Mexican government stopped negotiations on the diversion and equitable distribution of the waters of these two rivers in 1913. The next development in negotiations was brought about by the agitation of the Lower Rio Grande Valley Water Users' Association of Texas, and the activities of the states of the Colorado River Compact.<sup>2</sup>

The Lower Rio Grande Valley Water Users' Association was organized to protect the agricultural interests below Fort Quitman and had at various times, during the latter part of the second decade of the

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<sup>1</sup> Timm, op. cit., p. 1.

<sup>2</sup> Ibid., p. 2.

twentieth century, pointed out the need for

an adjustment of the problems involved in the division of those waters between the United States and Mexico, and it informed the department [of state]...that Mexico had created a commission known as the board of international waters with special reference to the Rio Grande and Colorado Rivers...<sup>3</sup>

This association suggested that the American government create a similar commission

to make a study of the interests of the United States with full authority to act in conjunction with the Mexican board, and that the American commission should work out some basis for the distribution of the waters of the Rio Grande and also some plan for joint development under international control, such plan to be used as a basis for a treaty to be negotiated between the two countries. It was further suggested that the American commission should be composed of the American section of the International Boundary Commission, United States and Mexico, and some engineer or engineers of the United States Reclamation Service.<sup>4</sup>

The United States government could not act upon the last suggestion because the boundary commission's activities were restricted by treaty terms with Mexico, and the investigations of the Lower Rio Grande, relative to the distribution of those waters, did not properly come within the scope of its duties. Hughes stated that "if the investigations and surveys were to be made by an appropriate agency...it would be given the benefit of all helpful information which the boundary commission has collected..."<sup>5</sup>

Congress, May 13, 1924, passed a bill providing for a study regarding the equitable use of the waters of the Rio Grande below Fort

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<sup>3</sup> Charles E. Hughes, secretary of state, to Stephen G. Porter, house chairman of committee of foreign affairs, April 21, 1924, H. Rpt. No. 666, p. 1.

<sup>4</sup> Ibid., p. 1-2.

<sup>5</sup> Ibid., p. 2.

Quitman, Texas, in cooperation with the United States of Mexico.<sup>6</sup> This act also authorized the appropriation of \$20,000 to be used for this purpose, and the appointment of three special commissioners, one of whom was to be an engineer experienced in irrigation work.

In the meantime, an act of congress, August 19, 1921, permitted the states of Arizona, California, Nevada, Utah, New Mexico, Colorado, and Wyoming to enter into a compact to apportion the use of the waters of the Colorado River among the several states.<sup>7</sup> The president of the United States was authorized to appoint a representative to participate in any such negotiations "for the protection of the interests of the United States..." The president appointed Herbert Hoover as the federal representative.<sup>8</sup>

The Mexican embassy protested in a communication to the state department,<sup>9</sup> against the passing of the act permitting Colorado River Basin States to form a compact for the division and distribution of the waters of that river.<sup>10</sup> The ambassador asked

that Mexico be duly represented and given consideration as a party in the studies and projects that may be undertaken or arrangements that may be made concerning the distribution and utilization of the waters of the Colorado River, in view of the fact that the

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<sup>6</sup> U. S. Stat. L., XLIII, pt. 1 (Washington, 1925), p. 118.

<sup>7</sup> Ibid., XLII, pt. 1 (Washington, 1923), p. 171.

<sup>8</sup> Report of Herbert Hoover to Speaker of the House, March 2, 1923. H. Doc. No. 605, p. 1.

<sup>9</sup> Tellez to State Department, October 15, 1921, Papers Relating to the Foreign Relations of the United States, 1921 (Washington, 1936), pp. 516-518.

<sup>10</sup> There were about 200,000 acres of irrigated land in the Colorado Valley in Mexico at that time, and additional lands that might be brought under irrigation, H. Doc. No. 605, p. 5.

questions relative to that river...are essentially of international policy, for as long as Mexico and the United States shall not have framed a final agreement definitely stating the rights and obligations with respect to the conservation of the stream of the river, the utilization of its waters as a way of communication, its use for irrigation purposes and motive power, and the manner of protecting the land of both countries from the danger of flood, neither party can particularly put into practice any project whatsoever without a breach of the existing international treaties.<sup>11</sup>

When the Mexican embassy heard indirectly that the Colorado River Basin States were planning to hold some conferences to discuss and to propose the storage and distribution of the waters of the Colorado River, it presented the view of the Mexican government on the matter. Mexico felt that

in consideration of the fact that Mexico holds interests and rights that are established beyond question over part of the waters of the Colorado River, by virtue of the original boundary treaties, and of the actual use it makes of those waters on a very large scale, Mexico [should] be allowed to take in the said conference or conferences the part that belongs to it by right. In doing so, the Embassy of Mexico ventures to bring to the special notice of the Department of State that the greater part of the land benefited by the waters of the river is owned by American Companies or citizens to whom it is the Mexican Government's duty and desire to extend...the same protection it<sup>12</sup> accords to the national companies and citizens of the Republic.

Mathew E. Hanna, acting chief of the division of Mexican affairs in the state department, informed Senor Don Manuel C. Tellez that the proposed conference was to consider domestic interests, and "that it is believed the results of any such consideration will not affect Mexico in any way."<sup>13</sup>

The Colorado River Compact was drawn up and signed by the repre-

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<sup>11</sup> Tellez to State Department, October 15, 1921, For. Rel. 1921, p. 517.

<sup>12</sup> Tellez to State Department, October 24, 1921, ibid., p. 519.

<sup>13</sup> Hanna to Tellez, November 9, 1921, ibid., p. 521.

sentatives of the seven states, November 24, 1922.<sup>14</sup> Article I of this instrument states that its purposes are

to provide for the equitable division and apportionment of the use of the waters of the Colorado River System; to establish the relative importance to different beneficial uses of water; to promote interstate comity; to remove causes of present and future controversies; and to secure the expeditious agricultural and industrial development of the Colorado River Basin, the storage of its waters, and the protection of life and property from floods.<sup>15</sup>

The river basin was divided into two sections. The division point was to be Lee Ferry, Arizona,<sup>16</sup> one mile below the mouth of the Paria River. The Upper Basin included those parts of the states of Arizona, Colorado, New Mexico, Utah, and Wyoming that were drained by the Colorado River and its tributaries, and also those sections outside the drainage system which might be beneficially served by water diverted from the system. The Lower Basin included those parts of the states of Arizona, New Mexico, Utah, Nevada, and California that were drained by the Colorado system, or that might be beneficially served by its waters.<sup>17</sup>

Each basin was to receive the exclusive "beneficial consumptive

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<sup>14</sup> The Compact was ratified by six of the state legislatures; the Arizona legislature did not agree to it until in March, 1944, because it felt the state's interests were not sufficiently protected. "Arizona Declares Peace," Time, XLIII, March 6, 1944, p. 22.

<sup>15</sup> "Colorado River Compact," H. Doc. No. 605, p. 8.

<sup>16</sup> Lee Ferry is a few miles below the New Mexico border on the Colorado River. A map showing the entire lower basin may be found in "Colorado Compact," Business Week, March 17, 1945, p. 31. This map indicates the division point as Lees Ferry, but all official documents refer to it as Lee Ferry.

<sup>17</sup> H. Doc. No. 605, pp. 8-9.

use"<sup>18</sup> of 7,500,000 acre-feet of water per year. In addition to this amount the Lower Basin was given the right to increase its "beneficial consumptive use" of water by 1,000,000 acre-feet of water annually.<sup>19</sup>

This compact left open to international settlement any claims Mexico might make to the use of the waters of the Colorado River by stipulating in Article III that

if as a matter of international comity the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River System, such waters shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified [for the Upper and Lower Basins]... and if such surplus shall prove insufficient for this purpose, then the burden of such deficiency shall be equally borne by the Upper and Lower Basin, and whenever necessary the states of the Upper Basin shall deliver at Lee Ferry water to supply one-half of the deficiency.<sup>20</sup>

Article IV provides that

inasmuch as the Colorado River has ceased to be navigable for commerce, and the reservation of its waters for navigation would seriously limit the development of its basin, the use of its waters for purposes of navigation shall be subservient to the uses of such waters for domestic,<sup>21</sup> agricultural, and power purposes....Water...impounded and used for the generation of electric power...shall be subservient to the use and consumption of such water for agricultural and domestic purposes.<sup>22</sup>

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<sup>18</sup> The consumptive use of water is not the same as the amount delivered. It is measured by the amount of water diverted less that part that reenters the stream as return flow. Senate Executive Report No. 2, 79 Cong. 1 sess. (Washington, 1945), p. 17.

<sup>19</sup> H. Doc. No. 605, p. 9.

<sup>20</sup> Ibid.

<sup>21</sup> Domestic purposes include the "use of water for household, stock, municipal, mining, milling, industrial, and other like purposes." "Colorado River Compact," Article II, Section h, ibid., p. 9.

<sup>22</sup> Hoover's Report, ibid., p. 2.

The apportionment between the two sections allocated about eighty per cent of the total natural flow of the river, leaving some 4,000,000 acre-feet unapportioned. While the compact did not definitely allot any other waters, there was nothing to prevent the states of either basin from using more water as long as the amount stipulated was delivered to the other.<sup>23</sup>

Herbert Hoover, after studying the compact and the various effects it would have on future and existing conditions, reported,

The possibilities of agricultural and industrial development are so great and their ramifications so far-reaching as to dwarf any values in the use of this river for navigation. Navigation and diversion for agriculture may not proceed economically together, for one necessarily impairs the other.<sup>24</sup>

The international question in respect to navigation was discussed by Albert B. Fall, secretary of interior, in a letter to Addison L. Smith, chairman of the house committee on irrigation of arid lands. He reached the conclusion that "Article IV of the compact would...be regarded as a violation of the rights of Mexico and...might be made the basis of a claim against the United States."<sup>25</sup> But, when Mr. Smith requested the opinion of Charles E. Hughes, secretary of state, on the advisability of congress approving the compact, Hughes replied,

The compact does not pertain to matters coming within the jurisdiction of this department, except in so far as the control and use of the waters of the Colorado River system may possibly affect the international relations of the Government. The fact that the Colorado River has international aspects, and the possibility that questions of an international character concerning the use

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<sup>23</sup> Hoover's Report, ibid., p. 2.

<sup>24</sup> Ibid., p. 4.

<sup>25</sup> Fall to Smith, ibid.

of the waters may arise, necessitating action by the Federal Government with respect to the distribution of the waters, appears to be recognized and adequately provided for...<sup>26</sup>

The United States, however, was more interested in an international settlement of the Rio Grande. The president appointed the three commissioners to study the equitable distribution of these waters in January, 1925.<sup>27</sup> When the Mexican foreign office was informed of the appointment and was asked to designate a time and place for their representatives to meet the American commission, Aaron Saenz, the foreign minister, replied,

My Government recently proposed to the United States, through the Mexican Embassy at Washington, the renewal of negotiations on the equitable distribution of the waters of the Colorado River on the bases established in 1912, which was interrupted in March, 1913.

I do not yet know the opinion of the Government of the United States on this proposal, but in case it is favorable the Mexican Government would accept similar bases for the functioning of an international investigating committee for the Rio Grande which would inform both Governments and propose a means of settling the pending question.

Since the year 1922 my Government has been occupied in gathering all the necessary data for handling the question pending regarding the uses of the waters of the international rivers and is in possession of all those referring to the Colorado River. As to the Rio Grande, some months will be necessary to complete the document necessary to undertake the negotiations referring to the Rio Grande...the Mexican Government does not deem it appropriate to designate the representatives to cooperate with those of the United States already named until it knows the opinion of the...latter Government on the proposal...relative to the distribution of the waters of the Colorado River...<sup>28</sup>

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<sup>26</sup> Hughes to Smith, December 30, 1922, ibid., p. 5.

<sup>27</sup> Secretary of State Frank B. Kellogg to Calvin Coolidge, H. Rpt. No. 1951, 69 Cong., 2 sess., in House Reports on Public Bills, etc. II (8689), (Washington, 1927), p. 2.

<sup>28</sup> Saenz to American charge d' affairs in Mexico, January 14, 1925, Senate Miscellaneous Document No. 163, 70 Cong., 1 sess., II (8871), (Washington, 1928), p. 5.

The state department proposed to the Mexican foreign office, August 13, 1926, that questions regarding the two rivers be considered together by the same international commission.<sup>29</sup> Saenz replied that his government had no objection to the same international commission jointly studying the matter of the distribution of the waters of both rivers.<sup>30</sup> The commission was not appointed for this purpose until August 16, 1927.<sup>31</sup>

Congress passed a joint resolution on March 3, 1927, to amend the Act of May 13, 1924, as a result of this position on the part of Mexico. This resolution stipulated that

the President is hereby authorized to designate three special commissioners to cooperate with representatives of the Government of Mexico in a study of the lower Rio Grande, and of the Lower Colorado Rivers, for the purpose of securing information on which to base a treaty with the Government of Mexico relative to the use of the waters of these rivers. One of the commissioners so appointed shall be an engineer experienced in such work. Upon completion of such study the results shall be reported to Congress. The Commission may also, with the concurrence of Mexico, make a study of the Tia Juana River,<sup>32</sup> with the view of having a treaty governing the use of its waters.<sup>33</sup>

The appropriation of \$50,000 to carry on the study was also authorized by the act. The secretary of state in whom authority was vested directed the new commission to be known as the "International Water Commission

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<sup>29</sup> American Charge d' Affairs Schoenfeld to Saenz, ibid., p. 7.

<sup>30</sup> Saenz to Schoenfeld, ibid., p. 8.

<sup>31</sup> G. Estrada of the Mexican ministry to Schoenfeld, August 25, 1927, ibid., p. 8.

<sup>32</sup> All the current literature uses the spelling "Tijama" for both the river and the Mexican town of that name. So far as the writer has been able to ascertain this is a matter of recent usage and not an official change in spelling.

<sup>33</sup> U. S. Stat. L., XLIV, pt. 2 (Washington, 1927), p. 1403.

United States and Mexico."<sup>34</sup>

Congress approved the Colorado River Compact in the Boulder Canyon Project Act,<sup>35</sup> December 21, 1928, which authorized the construction of a dam in the main stream of the Colorado River at Black Canyon or Boulder Canyon, in order to create a storage reservoir of a capacity of at least 20,000,000 acre-feet of water.<sup>36</sup> The secretary of the interior was authorized to carry out the provisions of this act subject to the Colorado Compact.<sup>37</sup> He was also "authorized and directed to make investigation and public reports of the feasibility of projects for irrigation, generation of electric power, and other purposes..."<sup>38</sup> Section 16 of the act provides that any commissioners duly authorized under the laws of any of the Colorado River Basin states should have the right "to act in an advisory capacity to and in cooperation with" the secretary of interior, in all matters regarding the "control, improvement, and utilization of the resources of the Colorado River system." These representatives were to have access at all times to the records of all federal agencies that were working on studies relating to that river and, upon request, were entitled to copies of these records.<sup>39</sup>

The international situation was disposed of in Section 20, which stipulated "Nothing in this Act shall be construed as a denial or recognition of any rights, if any, in Mexico to the use of the waters of the

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<sup>34</sup> Hackworth, op. cit., p. 387.

<sup>35</sup> U.S. Stat. L., XLV, pt. 1 (Washington, 1929), p. 1064.

<sup>36</sup> Ibid., p. 1057.

<sup>37</sup> Ibid., p. 1064.

<sup>38</sup> Ibid., p. 1065.

<sup>39</sup> Ibid., p. 1065.

Colorado River system."<sup>40</sup> Hubert Work, secretary of interior at that time, felt that

The settlement of interstate and international problems growing out of the use of this river will be promoted by the construction of these works. It will give a more definite basis for negotiations of the International Water Commission...in formulating the basis of a treaty.<sup>41</sup>

The first session of the international water commission was held in El Paso and Juarez, alternately; the second, in Mexico City; and the third, in Washington, D. C.<sup>42</sup> The sessions continued from February 28, 1928 until November 9, 1929. During the course of the meetings the commission studied every phase of the problem relative to the equitable division of the waters of the two rivers, and a genuine effort was made to reach an international understanding.

Nevertheless the two sections could not agree on the major points involved. The members of the Mexican section held that treaty provisions bound both parties to maintain the navigability of the Rio Grande and Colorado rivers and that they could not recommend to their government any modification of the treaties unless it established a new legal status that should guarantee better uses or services from the water. Outside the legal rights, they admitted other uses of the water might be more advantageous, than that of navigation.<sup>43</sup> The American section took the

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<sup>40</sup> Ibid., p. 1066.

<sup>41</sup> Work to Addison T. Smith, chairman of committee on irrigation and reclamation, January 5, 1928, House Report No. 918, 70 Cong., 1 sess., in House Reports on Public Bills, etc., II (8836), (Washington, 1928), p. 25.

<sup>42</sup> Report of American Section of International Water Commission United States and Mexico, House Document No. 359, 71 Cong., 1 sess. (Washington, 1930), pp. 2, 4, 10.

<sup>43</sup> Minutes of third meeting, Mexico City, August 22, 1929, ibid., p. 40.

position that, because of the importance of conserving and using all the waters of these two streams for irrigation and other beneficial purposes, "the theory of navigability should be abandoned."<sup>44</sup>

The Mexican section held that the uses of the waters of the Colorado River constituted "a common wealth for both countries," therefore, the river must be considered as a single geographic unit and that the development of its resources should "be carried to the maximum of benefits" for both countries. To attain this development it would be necessary to construct works to make possible irrigation, flood control, power, and domestic uses. The Mexican representatives considered "irrigation as being of paramount importance to Mexico."<sup>45</sup>

The American section addressed a memorandum to the Mexican section, August 29, 1929, in which it stated the American position. The Convention of May 21, 1906, was the only "instance of the determination of international rights to water for irrigation and other consumptive uses, between the United States and Mexico." The United States in this treaty "as an act of comity" had undertaken the task of supplying Mexico with a regular flow of water.<sup>46</sup> As "a similar act of comity and as an equitable division of the waters of the Colorado," it was proposed that the United States deliver to Mexico at the international boundary 750,000 acre-feet of water annually. This amount, which was delivered in 1928, was the

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<sup>44</sup> Minutes of fourth meeting, Mexico City, August 24, 1929, ibid., p. 41.

<sup>45</sup> Ibid.

<sup>46</sup> Memorandum of American Section, ibid., p. 44.

maximum delivered in any one year.<sup>47</sup> The delivery of this proposed amount of water would be conditioned on the construction of Boulder Dam, with an understanding that in case of extraordinary drought or serious accident to the storage or diversion works in the United States, the amount delivered to Mexico would be diminished in the same proportion as deliveries in the United States.<sup>48</sup> The problem of flood control would be largely solved for both the United States and Mexico by the building of Boulder Dam, which would create a reservoir large enough to hold the average flow of the river for one and one-half years.<sup>49</sup> The generation and sale of hydroelectric power did not seem a factor in the equitable division of water between the United States and Mexico.<sup>50</sup> There was an imperative need of the regulatory works which the United States was preparing to build, and both the Imperial Valley in the United States and Lower California in Mexico would benefit by these works.<sup>51</sup>

The Mexican section in a reply to this memorandum contended that it was not the main purpose of the Convention of 1906 to settle problems of the equitable distribution of the waters between the two countries, because that treaty was concluded to satisfy claims of Mexican citizens which were due to damages to their property by the diversion of water in the United States.<sup>52</sup> The status brought about by the diversion of the

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<sup>47</sup> Ibid., p. 45.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Remarks of Mexican Section to the Memorandum of the American Section, August 29, 1929, ibid., p. 47.

waters of the Colorado River through Mexican territory gave Mexico the right to 3,500,000 acre-feet of water per year, therefore Mexico could not consider a smaller amount as an equitable distribution.<sup>53</sup> There were about 6,000,000 acres of American land requiring improvement at low cost or pumping under an eight-foot lift. Mexico had about 1,500,000 acres in the valley that would require improvement under similar conditions. Since the annual run-off of the Colorado River at Yuma was about 17,400,000 acre-feet, Mexico's share would be 3,480,000 acre-feet. Consequently the 750,000 acre-feet proposed by the American section was "notoriously...out of proportion with the figures above analyzed..." and Mexico could not accept it.<sup>54</sup> Mexico desired, with reference to power, that "the same rates be considered for Mexican users as for American users."<sup>55</sup> It was believed the erection of Boulder Dam would not be sufficient for flood control in the lands of the lower Colorado River.<sup>56</sup>

The commission continued to work on the question of an equitable distribution of the waters of the three international rivers until November 9, 1929, without further progress toward an agreement. The American section felt that under the circumstances it should make a report to congress and that "further study of the question...should follow the decision of the proper treaty-making authorities of the two countries..."<sup>57</sup>

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<sup>53</sup> Ibid., p. 48. Mexico had let the United States use an old canal in her territory to convey water to the Imperial Valley. Mexico was entitled to half the water diverted through this canal.

<sup>54</sup> Ibid., p. 48.

<sup>55</sup> Ibid., p. 49.

<sup>56</sup> Ibid.

<sup>57</sup> Reply of the American section to a memorandum presented by the Mexican section, ibid., p. 73.

The American section in making its report to congress, March 22, 1930, pointed out that the inability to agree on the fundamental principles made it impossible for the international water commission to come to any arrangement for a division of the waters of either the Colorado River or the Rio Grande.<sup>58</sup> It prepared a statement of its views on the principles which it believed should control American action in regard to this matter.

In the recommendations on the Colorado River question, it was stated that

the needs in the United States for Colorado River waters are destined to be much greater....Stability in development and peaceful relations on both sides of the boundary, require further efforts to reach an agreement as to policies, and as to the limits which will govern the recognition of rights to water across the boundary.

In the absence of any agreement...it is believed that the position which the United States holds...should be officially stated and notice given to Mexico through the appropriate channel. The interests of both countries will be served by an early agreement as to the extent to which existing uses of water on both sides of the international boundary are to be recognized, but in the absence of such an agreement...the United States should give notice to Mexico that no rights in the Colorado based on future development and extension of existing uses, will be recognized<sup>59</sup> until an agreement covering all three streams has been reached.

In the case of the Rio Grande, the American section believed that a treaty should be drawn up, whereby the two countries might jointly

construct reservoirs on the main river to fully regulate the flow and make available for beneficial use in the two countries the water now being wasted into the Gulf and the power that may be generated along the river below Fort Quitman, the cost of these reservoirs to be borne by the two countries in proportion to the water to be stored therein for each country, and the cost of the works for the development of power and the power to be similarly shared.

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<sup>58</sup> Ibid., p. 57.

<sup>59</sup> Ibid., p. 23.

If Mexico would prefer to receive more electric power and release to the United States more water it is thought such an arrangement would be beneficial to the United States...<sup>60</sup>

It was also recommended that the United States continue to collect the stream flow records being made by the geological survey, that further study be made of the reservoir sites along the stream, and the compilation and study of available data bearing on the questions involved in an equitable distribution of the waters of that river be continued.<sup>61</sup>

The Tia Juana River, on which a study was also made, is only about seventeen miles long and is made up of a number of tributaries flowing from both countries. The greater quantity of the water drains from those tributaries rising in the United States. The river is very intermittent in character and has never been considered a navigable stream, nor is it mentioned in the treaties on navigability between the two nations.<sup>62</sup>

Reservoirs had been established on most of the tributaries north of the boundary line where dam sites were available, but they had not been very successful because of the irregular and uncertain flow. At the time of the investigation Mexico was constructing a large reservoir on the main stream a few miles from where the river crossed the border. If this proved successful, Mexico planned to establish dams on some of the tributaries within her territory.<sup>63</sup>

San Diego, California, wanted to use water from the Tia Juana River for municipal purposes, but such water could not be made available except by storage. The commission's investigation showed that the only

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<sup>60</sup> Ibid., p. 28.

<sup>61</sup> Ibid., p. 29.

<sup>62</sup> Ibid., p. 11.

<sup>63</sup> Ibid., p. 16.

practical site for an additional reservoir for this purpose was at Marron, located at a point where one of the larger tributaries crossed the boundary line from the United States. At this point the dam and reservoir would have to stand in both countries. The international water commission was able to reach an agreement in regard to the Tia Juana River. Representatives from San Diego were told that the commission had no objections to San Diego making arrangements with local California and Mexican authorities for the privilege of investigating the feasibility of that site, and if it was decided favorably, there seemed no reason for not empowering the city or some corporation to build a reservoir at Marron.<sup>64</sup> It was stated in the report that

under the circumstances the commission regards an international action on this stream as unnecessary at this time although it might be advantageous for the two Governments later to formally confirm the agreement reached by local authorities.<sup>65</sup>

The commission continued to work on the study and investigation relative to the division of the waters of the lower Rio Grande and Colorado rivers until the summer of 1932. The economy committee of the house of representatives submitted a bill to abolish the American section of the international water commission and to transfer its functions to the international boundary commission. It was felt that the work of the two commissions could be more efficiently and effectively performed by the one commission, and the immediate result would be a nominal saving of at least twenty-five thousand dollars during the fiscal year, 1933, "in addition to a further economy due to the administration of the work of

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<sup>64</sup> Ibid., p. 16.

<sup>65</sup> Ibid., p. 17.

the two commissions by one commission."<sup>66</sup> This measure was approved by Congress, June 30, 1932, and became effective the following day.<sup>67</sup>

Legislation providing that delegates be named to cooperate with Mexico on the equitable use of the waters of the three international rivers was introduced in the house of representatives sometime later. The house committee on foreign affairs stated in a report in March, 1935, that,

Due to the construction and threatened construction of... works in Mexico which will materially and injuriously effect the rights of our citizens, it is highly important that this legislation be immediately passed.<sup>68</sup>

The proposed act gave considerable authority to the state department in meeting the problems of the situation. Cordell Hull, secretary of state, felt that some definite legislation was necessary to determine the scope and crystalize the functions of the international boundary commission.<sup>69</sup> He also stated that,

The Mexican Government recognizes the international character of the work and particularly the necessity for joint action.... Full authoritative control of funds and performance is necessary to control procedure and actual construction work largely because the responsibilities are not generally delegable.<sup>70</sup>

Congress, accordingly, passed an act, August 19, 1935, whereby the president was

authorized to designate the American Commissioner on the Inter-

<sup>66</sup> House Report No. 1025, 72 Cong., 1 sess. in House Reports on Public Bills, etc., II (9492), (Washington, 1932), p. 1.

<sup>67</sup> U. S. Stat. L. XLVII, pt. 1 (Washington, 1933), p. 417.

<sup>68</sup> House Report No. 422, 74 Cong., 1 sess. in House Reports on Public Bills, etc., I (9886), (Washington, 1935), p. 3.

<sup>69</sup> Hull to McReynolds, house chairman of foreign affairs, March 11, 1935, ibid., p. 3.

<sup>70</sup> Ibid., p. 5.

national Boundary Commission, United States and Mexico, or other Federal agency, to cooperate with a representative or representatives of the Government of Mexico in a study regarding the equitable use of the waters of the lower Rio Grande and the lower Colorado and Tia Juana Rivers, for the purpose of obtaining information which may be used as a basis for the negotiation of a treaty with the Government of Mexico relative to the use of the waters of these rivers and to matters closely related thereto. On completion of<sup>71</sup> such study the results shall be reported to the secretary of state.

The act further authorized the secretary of state, acting through the American commissioner, to conduct technical and other investigations relating to the conservation and utilization of water. It was on the basis of this act that the studies and negotiations were carried on during the following years which ultimately led to the formation of the terms of the treaty.

The state department conducted its studies through the American section of the international boundary commission and in consultation and cooperation with the semiofficial committee of fourteen and sixteen which represented the Colorado River Basin States and the power interests.<sup>72</sup> After gathering all available data, the state department and Mexican authorities worked in secret for three years preparing a formula for the allocation of the waters of the Colorado River to Mexico, and a permanent settlement of the international status of the boundary rivers. The Colorado Basin States were kept fully informed on the progress of the

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<sup>71</sup> U. S. Stat. L., XLIX, pt. 1, (Washington, 1936), p. 660.

<sup>72</sup> Senate Executive Report No. 2, 79 Cong., 1 sess., [Washington], February, 1945. The Boulder Canyon project act authorized the Colorado River Basin States to appoint representatives to act in an advisory capacity to the secretary of interior, who was to have charge of the work provided for in that act. U. S. Stat. L. XLV, p. 1065.

negotiations through their representatives.<sup>73</sup> The committee of fourteen and sixteen approved the formula by a vote of five to one. California voted against it and Nevada did not participate. After having secured the approval of the plan by five of the Colorado River Basin States, negotiations were resumed with Mexico, and the terms of the treaty worked out in a series of meetings held from the early part of September to the latter part of December, 1943. On February 3, 1944, the treaty was signed in Washington.<sup>74</sup>

The treaty still had to be approved by the senate. Hearings began on it in January, 1945. California denounced the state department for trading waters of the Colorado River for those of the Rio Grande.<sup>75</sup> Before construction had been started on Boulder Dam, the department of interior had negotiated with the Metropolitan Water District of Southern California to deliver water from the Colorado River to the Metropolitan Water District, the city of Los Angeles, the Palo Verde and Imperial irrigation districts, and the city and county of San Diego.<sup>76</sup> California thought the treaty violated prior obligations of the national government. California's contracts call for a total delivery of 5,362,000 acre-feet per year. She is now using only a little over half that amount.<sup>77</sup>

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<sup>73</sup> "Colorado Treaty," Business Week, February 26, 1944, p. 44.

<sup>74</sup> S. Ex. Rpt. No. 2, p. 2.

<sup>75</sup> Business Week, March 17, 1945, p. 32.

<sup>76</sup> Ibid., p. 34.

<sup>77</sup> S. Ex. Rpt. No. 2, p. 6.

The second fundamental objection to the treaty was that the extensive power granted to the American section of international boundary and water commission permitted it to encroach upon the jurisdiction and functions of other federal agencies of the government.<sup>78</sup> In answer to this the foreign relations committee, after carefully studying the treaty, was of the opinion that

the American section of the Commission, in the discharge of its functions in this country, is subject to the jurisdiction of the courts to the same extent as any other agency of the Government. It is the conclusion of the committee, therefore, that the functions, both of the Joint Commission and of the American section, are adequately circumscribed and that there is no encroachment upon the jurisdiction of any other agency, Federal, State, or local.<sup>79</sup>

The state department had heralded the treaty as proof of our good neighborliness and "had made no secret of its belief that the pact will help to smooth hemispheric relations."<sup>80</sup> John O'Grady, in "The Test of a Good Neighbor," said if the Californians defeated this treaty the Mexican people "will be able to point once again to Yankee hypocrisy with its verbal professions of friendship and its denial of the substance of life to those whom it professes to love."<sup>81</sup>

The progress of the pact in the senate was closely watched in Latin America, "where rejection of the treaty would be construed to mean that the United States has kept imperialistic designs hidden under a cloak of friendship and that 'we are the same old grabbers!'"<sup>82</sup>

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<sup>78</sup> Congressional Record, 79 Cong., 1 sess., XCI, preliminary edition No. 53 (Washington, 1945), p. A1445.

<sup>79</sup> S. Ex. Rpt. No. 2., pp. 9-10.

<sup>80</sup> Business Week, March 17, 1945, p. 31.

<sup>81</sup> The Commonweal, IV, February 16, 1945, p. 438.

<sup>82</sup> "Treaty Opposed," Business Week, January 27, 1945, p. 40.

The struggle and uncertainty in regard to the treaty were brought to an end in the United States, April 18, 1945, when it was ratified by the senate by a seventy-six to ten vote, thus giving the required two-thirds affirmative approval.<sup>83</sup>

The treaty provides that the international boundary and water commission

shall in all respects have the status of an international body, and shall consist of a United States Section and a Mexican Section. The head of each Section shall be an Engineer Commissioner.... Each Government shall accord diplomatic Status to the Commissioner, designated by the other Government.<sup>84</sup>

The waters of the Rio Grande between Fort Quitman, Texas, and the Gulf of Mexico are allotted in the following way:

- A. To Mexico:
  - (a) All of the waters reaching the main channel of the Rio Grande (Rio Bravo) from the San Juan and Alamo Rivers, including the return flow from lands irrigated from the latter two rivers.
  - (b) One-half the flow in the main channel of the Rio Grande... below the lowest major international storage dam, so far as said flow is not specifically allotted under this Treaty to either of the two countries.
  - (c) Two-thirds of the flow reaching the main channel of the Rio Grande...from the Conchos, San Diego, San Rodrigo, Escondido and Salado Rivers and the Las Vacas Arroyo, subject to provisions of subparagraph (c) of paragraph B of this Article.
  - (d) One-half of all other flows not otherwise allotted by this Article occurring in the main channel of the Rio Grande...
- B. To the United States:
  - (a) All the waters reaching the main channel of the Rio Grande...from the Pecos and Devils Rivers, Goodenough Spring, and Alamito, Terlingua, San Felipe and Pinto Creeks.

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<sup>83</sup> Congressional Record, 79 Cong., 1 sess., XCI, preliminary edition No. 76. (Washington, 1945), p. 3547.

<sup>84</sup> "Treaty Between the United States and Mexico, Relating to Waters of the Colorado, and Tijuana Rivers and to the Rio Grande," S. Ex. Rpt. No. 2., p. 18.

- (b) One-half the flow in the main channel of the Rio Grande... below the lowest major international storage dam....
- (c) One-third the flow reaching the main channel of the Rio Grande...from the Conchos, San Diego, San Rodrigo, Escondido and Salado Rivers and the Las Vacas Arroyo, provided that this third shall not be less, as an average amount in cycles of five consecutive years, than 350,000 acre-feet annually....
- (d) One-half of all other flows not otherwise allotted...<sup>85</sup> in the main channel of the Rio Grande....

This allocation divides the waters of the Rio Grande below Fort Quitman about equally between the two countries, although most of the water originates in Mexico. This gives the United States about sixty per cent of the waters which will be impounded in main stream reservoirs.<sup>86</sup> Three major international dams may be constructed in the major sections of the river in order to take care of the periods of alternating floods and droughts. Almost 4,000,000 acre-feet of water waste annually into the Gulf of Mexico because it comes mainly in the form of large floods.<sup>87</sup> The cost of the storage is to be paid by the two countries in proportion to the assigned capacity for use by each country.<sup>88</sup> The construction of the international storage dams shall start within two years after the plans have been approved by the two governments. The construction of the lowest major international dam shall be begun first, although those in upper parts of the river may be built simultaneously. "The lowest major international storage dam shall be completed within a period of eight years from the date of the entry into force of this

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<sup>85</sup> Ibid., pp. 19-20.

<sup>86</sup> Ibid., p. 2.

<sup>87</sup> Ibid., p. 3.

<sup>88</sup> Part II, Article 5 of the treaty, ibid., pp. 20-21.

Treaty."<sup>89</sup>

The treaty, in regard to the Colorado River, provides that Mexico is to receive 1,500,000 acre-feet "from any and all sources."<sup>90</sup> The United States may deliver to Mexico a total quantity not to exceed 1,700,000 acre-feet per year, but Mexico shall acquire no right to the additional water. In case of extraordinary drought or serious accident to the irrigation system in the United States, the water allotted to Mexico would be diminished in the same proportion as consumptive uses in the United States.<sup>91</sup> The average annual virgin run-off of the Colorado River Basin is about 18,000,000 acre-feet. The amount allocated to Mexico is about eight per cent of this total yearly flow, and is 300,000 acre-feet less than the amount she is now using.<sup>92</sup>

Mexico shall construct at her own expense, "within a period of five years from the date of the entry into force of this Treaty," a main diversion structure on the Colorado River below the northern point of the international boundary line. She shall also construct, operate, and maintain protective works to prevent any damage to lands in the United States from flood or seepage because of the construction of their diversion works.<sup>93</sup>

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<sup>89</sup> Ibid., p. 21.

<sup>90</sup> The return flow water may have such a high salt content that it will not have much value for irrigation purposes. Senate Hearings, 79 Cong., 1 sess. (Washington, 1945), pp. 329-330.

<sup>91</sup> Part III, Article 10 of the treaty, S. Ex. Rpt. No. 2., pp. 24-25.

<sup>92</sup> Ibid., p. 4.

<sup>93</sup> Part III, Article 10 of the treaty, ibid., p. 26.

The United States, "within a period of five years from the date of entry into force of this Treaty," shall construct, operate, and maintain in her own territory, and at her own expense Davis dam and reservoir. Also she shall construct any other work that may be necessary to convey the waters allocated to Mexico. Mexico shall pay a proportion of the actual cost of the section of the All-American Canal used for the delivery of her water and a proportionate part of the maintenance cost.<sup>94</sup>

The treaty provides for a study and investigation of the problems of the Tia Juana River to be made by the commission. This study is to include flood control, conservation, and equitable distribution of the waters. The commission is authorized to construct jointly any works recommended, if they are approved by both governments, and each country is to share equally in any expense involved.<sup>95</sup>

The commission shall study and prepare plans for the generation of the hydroelectric energy that may be feasibly developed at the international storage dams on the Rio Grande. Each government shall pay half the cost of "the construction, operation and maintenance of such plants" if approved by the two governments and each shall receive a like proportion of the energy generated.<sup>96</sup> Furthermore, the two governments

shall include such special agreements as may be necessary to regulate the generation, development, and disposition of electric power at international plants, including the necessary provisions for the export of electric current.<sup>97</sup>

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<sup>94</sup> Part III, Article 14 of the treaty, *ibid.*, p. 27.

<sup>95</sup> Part IV, Article 16 of the treaty, *ibid.*, p. 30.

<sup>96</sup> Part II, Article 7 of the treaty, *ibid.*, p. 21.

<sup>97</sup> Part V, Article 19 of the treaty, *ibid.*, p. 31.

This treaty concludes negotiations that have been carried on intermittently for over half a century in regard to the equitable division of the waters of the international streams between the United States and Mexico. The rights and obligations of the two nations in these streams are mutual and reciprocal. This treaty recognizes these rights and obligations. Moreover, it removes a threat to the friendly relations between the United States and Mexico. An opportunity is afforded for agricultural expansion in the basins of both the Rio Grande and Colorado rivers. Also the development of cheap power along both streams will aid in the industrial development of communities in both countries. Although Mexico will receive less water by the treaty terms than she is now using, she will receive twice as much as the United States was willing to offer in 1928. The situation in the two basins is reversed. On the Rio Grande the American farmers need water from the Mexican side; on the Colorado River the Mexican farmers need water from the American watershed. By adhering to the theory of navigability Mexico retained a bargaining power that eventually won her better settlement of the distribution of the waters of the Rio Grande and Colorado rivers. The interest in these two rivers and in the Tia Juana has in more recent years centered in the use of their waters for irrigation, city supply, or electric energy.

The water question between the United States and Mexico now appears to have been satisfactorily solved. It still remains for the two governments to complete the variously named works within the designated time limit.

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