

“A SMASHING VICTORY”?: WAS ARIZONA V. CALIFORNIA A VICTORY FOR THE STATE OF ARIZONA? *

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Fifty years ago, the U.S. Supreme Court handed down the most important decision in the State of Arizona’s history. Arizona v. California allocated the flow of the Colorado River among the three Lower Basin states (Arizona, California, and Nevada) according to terms of the 1928 Boulder Canyon Project Act (BCPA). Arizonans rejoiced. However, Arizona’s reaction seems perplexing, given that the State spent decades denouncing the BCPA. Arizona challenged the BCPA numerous times in the Supreme Court and engaged in fierce political battles to block its implementation.

This Article explores this riddle by reviewing the legal and political events leading up to Arizona v. California. Ultimately, the Article concludes that the decision was a victory for Arizona because, while Arizona had engaged in a strategy of obstruction, California had steadily been using more of the Colorado River’s flow. California’s use eventually was well above the amount allocated to it in the BCPA—water that would otherwise have gone to Arizona. To secure legal rights to water that California was already putting to a beneficial use, Arizona needed to convince the Supreme Court to depart from established precedent for determining interstate water disputes and ratify the notion that Congress could and had allocated an interstate stream among states.

The decision’s impact on Arizona cannot be overstated. On its heels came Congressional approval of the Central Arizona Project, which allowed Phoenix and Tucson to develop into major

* For comments on earlier drafts, we are grateful to Larry MacDonnell, Jason Robison, and Nathan Schott.

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population and economic centers. But the conflict over how to divide the River is far from over. A growing population and the uncertain yet tangible effects of climate change bring new water challenges to the Colorado River Basin.

TABLE OF CONTENTS

INTRODUCTION	3
I. COLORADO RIVER COMPACT	4
A. The Compact	6
B. Controversy	7
1. The “Anti-Pacters”	8
2. Two Camps.....	10
3. A Near Miss.....	11
II. BOULDER CANYON PROJECT ACT OF 1928	13
III. TRANSFORMATIVE YEARS: 1928-1952.....	15
A. Courtroom Battles.....	15
B. Changing Tactics	18
IV. <i>ARIZONA V. CALIFORNIA</i>	20
A. Early Litigation	20
B. Arizona’s Argument before the Supreme Court	22
C. The Supreme Court’s Equitable Apportionment Doctrine.....	23
D. The Opinion	25
V. THE AFTERMATH	26
A. California’s Viewpoint	26
B. Inside the Justices’ Chambers.....	28
C. Reactions.....	29
D. A New Water Future for Arizona.....	31
E. Colorado River Basin Project Act of 1968 and the Central Arizona Project	33
CONCLUSION: FROM SURPLUS TO SHORTAGE	34

INTRODUCTION

On June 4, 2013, the State of Arizona celebrated the fiftieth anniversary of the U.S. Supreme Court’s decision in *Arizona v. California*,¹ the seminal case over rights to water from the Colorado River.² In celebrating the centennial of Arizona’s statehood in February 2012, *Arizona Attorney* magazine dubbed *Arizona v. California* the most important case in the state’s history.³ As the lawyers’ magazine put it, the series of water disputes between Arizona and California culminating in the Supreme Court decision “remains probably the most significant dispute in Arizona during its first century.”⁴ In the historic decision the Supreme Court not only awarded Arizona an annual supply of 2.8 million acre-feet of Colorado River water, but also held that this share of the Colorado was in addition to flows from the Gila River.⁵

Officials in Arizona reacted to the decision as “a great victory and one of the greatest days in Arizona history.”⁶ Sherman Hazeltine, a leader in the Central Arizona Project Association, said that the decision “vindicates Arizona’s historic position.”⁷ U.S. Senator Barry M. Goldwater proclaimed that the decision reaffirmed “my long-held convictions that Arizona has been entitled to this water.”⁸ U.S. Representative John J. Rhodes noted that he was “greatly pleased with this decision. It appears that Arizona got just about all that it could possibly have hoped for.”⁹

“We have a smashing victory,” boasted Charles Reed, the Chief Counsel for the Arizona Interstate Stream Commission.¹⁰ He went on, “Arizona got more Colorado River water for the Central Arizona Project as a result of the U.S. Supreme Court’s decision than we claimed when we were before Congress in the late 1940’s and early 1950’s.”¹¹ Ben Avery, a reporter for the *Arizona Republic*, reported on June 4, 1963 that “Arizona gave a sigh of relief and joy yesterday that has been pent up for forty years in her battle with California

1. *Arizona v. California*, 373 U.S. 546 (1963).

2. For recent analysis of the case, see Josh Patashnik, *Arizona v. California and the Equitable Apportionment of Interstate Waterways*, 56 *Ariz. L. Rev.* 1 (2014); and Lawrence J. MacDonnell, *Arizona v. California Revisited*, 52 *Nat. Resources J.* 363 (2012).

3. Gregory S. Fisher et al., *The Top 50 Leading Cases that Shaped Life and Law in Arizona’s First 100 Years*, *ARIZ. ATT’Y*, Feb. 2012, at 18, 20.

4. *Id.*

5. *Arizona*, 373 U.S. at 592.

6. Statement by Rich Johnson, president of the Central Arizona Project Association. *Water Decision Called ‘Great Victory’ For State*, *PHX. GAZETTE*, June 3, 1963, at 1.

7. *PHX. GAZETTE*, June 3, 1963, at 1.

8. *Ruling Pleases Delegation*, *ARIZ. REPUBLIC*, June 4, 1963, at 5

9. *Id.*

10. *High Court Water Ruling Called Smashing Victory*, *ARIZ. DAILY STAR*, June 4, 1963, at A12.

11. *Id.*

over the Colorado River.”¹² In large-point font on page 1, *The Arizona Republic* proclaimed “ARIZONA WINS WATER SUIT.”¹³

Californians were understandably less enthusiastic. Their sentiments can be aptly summarized by their governor, Pat Brown, when he was asked his thoughts on the decision: “let’s say it was, to put it mildly, not too favorable to California.”¹⁴

Here’s the puzzle: *Arizona v. California* is routinely described as a huge victory for Arizona, yet the U.S. Supreme Court merely announced that Congress itself had apportioned the lower Colorado River in the Boulder Canyon Project Act (BCPA) of 1928. For decades, Arizona denounced that Act and its allocation system and refused to ratify the 1922 Colorado River Compact. So how did the allocation in the BCPA become a big victory for Arizona when the state had wanted no part of it for decades? This Article attempts an explanation and offers insight into the implications of the decision for the Southwest’s uncertain water future.

Part I of this Article traces the developments leading up to the 1922 Colorado River Compact and Arizona’s role as the lone holdout to the pact among the Basin States. Part II turns to the Boulder Canyon Project Act, the document the Court eventually relied on in Arizona’s “smashing victory” over California, and chronicles Arizona’s staunch resistance to the Act in the decade after its passage. In part III, we examine the sudden change in Arizona’s approach as the Central Arizona Project, the 336-mile canal delivering Colorado River water to central and southern Arizona, transformed from a vague notion to a concrete plan that would drive Arizona’s future economic growth. Section IV analyzes the *Arizona v. California* case itself, including the brilliance of Arizona’s legal strategy and the significance of the Court’s ruling in light of prior precedent. Part V explores the controversy over the Court’s opinion and why Arizona considered it such a favorable result. Part VI concludes by shining light on the developments in the Lower Basin in the 50 years since the ruling and offers some thoughts on where we could and should go from here.

I. COLORADO RIVER COMPACT

As the seven states in the Colorado River Basin (“the Basin”) transitioned from their “wild west” beginnings into modern centers of commerce, these states (Wyoming, Colorado, New Mexico, Utah, Nevada, California, and Arizona) recognized a need for a Basin-wide agreement to determine use of the waters of the Colorado River (“the River”)

12. Ben Avery, *Arizonans Hail Water Win, Call for Speed on Project*, ARIZ. REPUBLIC, June 4, 1963, at 1.

13. *Id.*

14. Robert Blanchard, *Brown Studies Plans to Speed Water Project*, L.A. TIMES, June 5, 1963, at 20.

and its tributaries.¹⁵ But, almost as soon as the discussions about such an agreement began, deep-seeded conflicts emerged. From the beginning, the primary dissenter was Arizona.

Even today, Arizona maintains a fierce individualism, the antecedent of its frontier beginnings. This trait, however, does not explain Arizona’s opposition to the other Basin states’ efforts to form a Colorado River Compact—at least not primarily. Arizona’s dissent was, at its heart, a combination of climate and economics. Supplying approximately 85 percent of the River’s flow,¹⁶ the states of the Upper Basin—Wyoming, Colorado, New Mexico, and Utah—receive relatively abundant amounts of precipitation as compared to the more arid Lower Basin. The need to utilize the River to irrigate and develop land was and is, therefore, much greater in the Lower Basin.¹⁷

Of the Lower Basin states, California had, without question, distinguished itself as the thirstiest. Nevada, with only a toe in the River geographically speaking, had essentially bowed out of any efforts to gain a substantial allocation of River flow early on.¹⁸ Arizona’s angst with regard to the Compact was the prospect of losing out to California.¹⁹ It did not want its economic growth to be stunted so that Southern California could continue to prosper. That Southern California had already gained a reputation for shady dealings in water rights negotiations via the Owens Valley saga did not help to create good will.²⁰

The first effort to negotiate a compact among the basin states was in 1918, when two groups met, one in San Diego; the other in Tucson.²¹ The next year, Governor Simon Bamberger of Utah called a meeting in Salt Lake City where the “League of the Southwest” was organized. The League passed resolutions calling for the federal government to develop the water resources of the region’s basins.²² In 1921, pursuant to an act of Congress, President Warren Harding appointed Secretary of Commerce Herbert Hoover as the chairman of a commission consisting of one representative from each of the seven Basin

15. Larry G. Cummings, *Arizona's Stand in the Colorado River Controversy* 7 (1963) (unpublished M.A. thesis, University of Southern California) (on file with University of Arizona Libraries Special Collections).

16. Winifred Isabella Smith, *The Controversy Between Arizona and California Over the Boulder Canyon Project Act* 32 (1931) (unpublished M.A. thesis, University of Southern California) (on file with University of Arizona Libraries Special Collections).

17. *See id.*

18. The seven Basin states met for the Colorado River Conference in Denver in 1927 to attempt to reach an agreement on a division of the River’s water in the Lower Basin. At the end of the Conference, California and Arizona had both acceded to Nevada’s demand for 0.3 maf of Colorado River water per year, but had not been able to reach an agreement on any other significant issue. NORRIS HUNDLEY, JR., *WATER AND THE WEST* 264-65 (2d ed. 2009).

19. *See* JACK L. AUGUST, JR., *VISION IN THE DESERT* 80 (1999).

20. *See* Cummings, *supra* note 15, at 33; *but see* GARY LIBECAP, *OWENS VALLEY REVISITED* (2007) revisionist account drawing on primary sources that argues Los Angeles bargained fairly with Owens Valley farmers.

21. Cummings, *supra* note 15, at 7.

22. *Id.*

states with the goal of dividing the River's waters among them.²³ In 1922, the representatives met in Washington D.C., Cheyenne, Denver, Salt Lake City, Los Angeles, Phoenix, and finally, on November 24, in Santa Fe.

At the same time, other developments involving the River's flow in the Lower Basin would fan the flame of controversy between Arizona and California over use of the River's water. George H. Maxwell, a prominent political figure in Arizona during the Compact saga and a staunch advocate for the National Reclamation Act of 1902, was, in 1922, busy promoting a newly conceived plan to deliver Colorado River Water into central Arizona.²⁴ While in Washington, two U.S. Congressmen from California, Phil Swing and Hiram Johnson, introduced the first of several Swing-Johnson bills that contained provisions for storage of and power production from the River's flow in the Lower Basin, as well as for construction of an All-American Canal, intended to provide irrigation to California's Imperial Valley.²⁵

The Colorado River Compact ("Compact") came together in Santa Fe, pushed along by the U.S. Supreme Court's opinion in *Wyoming v. Colorado*²⁶ less than six months earlier. In *Wyoming*, the Court held that the doctrine of prior appropriation applied to a conflict over an interstate river because both states subscribed to the doctrine. This ruling alerted the Upper Basin states of the urgency of protecting themselves against California's rapidly increasing water diversions, and was undoubtedly influential in the Basin States representatives finally coming to an agreement.

A. The Compact

The Compact formed the basis of all subsequent discussion over dividing the River's flow among states. Only three pages in length, the Compact's critical terms were as follows:

- The Compact settled on Lee's Ferry as the boundary between the Upper and Lower Basins.²⁷
- It allocated to each basin 7.5 million acre feet ("maf") per year in perpetuity for beneficial consumption.²⁸ In addition the Lower Basin was given permission to

23. DELPH E. CARPENTER, *The Colorado River Compact: History and Inducing Causes*, in PAPERS OF DELPH E. CARPENTER AND FAMILY, WATER RESOURCES ARCHIVE, COLORADO STATE UNIVERSITY. SERIES VII: PUBLICATIONS AND REPORTS. SUBSERIES A: COMPACTS AND RIVERS Appendix C pp. 5-6, available at <http://lib.colostate.edu/archives/findingaids/water/wdec.html>.

24. RICH JOHNSON, THE CENTRAL ARIZONA PROJECT 1918-1968 13 (1977).

25. AUGUST, JR., *supra* note 19, at 89.

26. 259 U.S. 419 (1922).

27. Colorado River Compact, art. II(e)-(g), (1922), available at <http://www.usbr.gov/lc/region/g1000/pdfiles/crcompact.pdf> [hereinafter Compact].

28. *Id.* art. III(a).

increase its consumption by one maf per year for any surplus above 15 maf.²⁹ The Compact also provided the option for the Basin states to further apportion the River in forty years (October 1, 1963).³⁰

- It prohibited the Upper Basin from causing the flow at Lee’s Ferry to drop below 7.5 maf on a rolling ten-year average.³¹
- The Compact included within the Basin the drainage area of the entire river system plus all other territory within states for which the waters of the system could be beneficially applied.³² That is, member states could transfer waters from the River’s hydrologic basin to other areas within the state.
- Under the Compact, use of the River for navigation was to be subservient to domestic, agricultural, and hydro-power use.³³
- Finally, it specified that water for Mexico would come only after each Basin received 7.5 maf and the Lower Basin received an additional one maf. If surplus water proved insufficient, then the deficiency would be split between the two Basins.³⁴

All seven state representatives in attendance at Santa Fe signed the Compact,³⁵ which then went to each state’s legislature for approval. Six state legislatures unconditionally approved the Compact; Arizona did not.³⁶

B. Controversy

Arizona politicians were not willing to follow along with their Basin-state contemporaries. The state was uniquely vulnerable to California’s growing water use, and Arizona would not sacrifice its own interest for California’s or the other Basin states’ without a fight. The state’s new governor, George W.P. Hunt, led the resistance to Arizona ratification of the Compact. Hunt’s stated reason to Secretary Hoover for not ratifying the Compact was that Arizona had not yet finished an account of the amount of irrigable acreage in the state, so it did not know whether the allocation of water agreed to in Santa Fe would be sufficient to meet its future needs.³⁷ Other factors were just as influential. Hunt and the Arizona legislature, along with agricultural interests in the state, foresaw future

29. *Id.* art. III(b); JOHNSON, *supra* note 24, at 15.

30. *Id.* art. III(f).

31. *Id.* art. III(d).

32. *Id.* art. II(b).

33. *Id.* art. IV(a).

34. *Id.* art III(c).

35. Smith, *supra* note 16, at 30.

36. JOHNSON, *supra* note 24, at 15.

37. AUGUST, *supra* note 19, at 95.

difficulties involved in not stipulating an allocation of water for Mexico,³⁸ and they thought it unfair that the Gila River, which is almost entirely within Arizona's borders,³⁹ was included as a basin-wide resource. Finally, Arizona's powerful mining interests led efforts to prevent ratification of the Compact because it failed to grant Arizona a share of revenues from the generation of hydroelectric power from dams within the state.⁴⁰

1. *The "Anti-Pacters"*

Hunt's concern about the amount of irrigable acreage in the state was, at least in part, related to a vague plan, just taking shape, for a Central Arizona Project—a massive canal system to supply central Arizona with Colorado River water—referred to at this time as the "Highline Canal Project."⁴¹ Hunt's most trusted advisor on Colorado River issues, Maxwell, had been actively campaigning in favor of the project while the Compact was being negotiated.⁴² Even at this early stage, there were those in Arizona who felt the project essential for the state's future economic survival.⁴³

a. Prior Appropriation

As important, many in Arizona feared that ratifying the Compact could allow California to put the River's flow to beneficial use, giving it the right to the River's flow under the doctrine of prior appropriation. Hunt and his backers argued that the Compact would effectively repeal the law of prior appropriation between the basins, which would protect the Upper Basin states from fast-growing California. But the Compact gave no similar protection to Arizona. It would share the 7.5 million acre-feet allocated to the Lower Basin with California and Nevada. Ratifying the Compact would result in much of the River water that flowed into the Lower Basin going to California. Such a development would establish senior rights to most of the water for California, leaving insufficient flow for future growth in Arizona.⁴⁴

b. Allocations to Mexico

Losing water to Mexico was another concern of those who resisted the Compact. Many, especially large agricultural interests in the state, were disappointed that the Compact placed no restraint on the use of water from the River by Mexico. Instead, Mexico would effectively be given water by the United States because the Compact limited the Basin states'

38. Smith, *supra* note 16, at 14 (citing Thomas Maddock, Reasons for Arizona's Opposition to the Swing-Johnson Bill and Santa Fe Compact, with Tentative Tri-State Compact Submitted to California and Nevada by Arizona Commission (unpublished manuscript)).

39. A small portion is in New Mexico.

40. *Supra* note 38 at 13-14.

41. See AUGUST, *supra* note 19 at 99-100; JOHNSON, *supra* note 24, at 13-14.

42. JOHNSON, *supra* note 24, at 13.

43. See AUGUST, *supra* note 19, at 91-92.

44. HUNDLEY, *supra* note 18, at 251-52.

ability to apportion additional River water forty years.⁴⁵ Agricultural interests feared that the Compact would allow Mexican farms to out compete Arizona farmers.⁴⁶

c. Gila River

A common theme in Arizona’s displeasure with the Compact was its opposition to including Gila River waters in the Compact. Arizona’s primary argument for why it should retain exclusive access to Gila River stems from the fact that there were prior appropriation claims to the river’s waters long before the Compact was written. Ratifying the compact would effectively reduce Arizona’s share of the Gila River while unjustly enriching California.⁴⁷

By the time the Compact was created in 1922, central Arizona farmers were already straining their available water sources (the Gila River and its two main tributaries, the Salt and Verde Rivers) because of their need for its waters for power generation and irrigation. Immediately after the Reclamation Act of 1902⁴⁸ was signed into law, construction of the Roosevelt Dam east of Phoenix was approved. Central Arizona farmers organized the Salt River Valley Users Association to administer the Salt River Project, the water delivery system created to manage water stored in the Roosevelt dam reservoir.⁴⁹ At the time of its completion in 1911, Roosevelt was the largest dam in the world,⁵⁰ and it created a reservoir with a storage capacity of 1.382 maf.⁵¹ Between 1923 and Arizona’s ratification of the Compact in 1944, three more dams were constructed on the Salt River, and two were constructed on the Verde River.⁵²

d. Hydro-power

The Compact did not address royalties to be collected by the state from those producing power at plants like those envisaged for the Boulder Canyon area.⁵³ “Anti-pacters”⁵⁴ claimed that Arizona had a right to tax revenues from the dam’s generation of electricity, derived from the rightful recognition and establishment of full water rights to the waters flowing within its borders. As a sovereign state, on equal footing with other states,

45. Maddock, *supra* note 38, at 1.

46. *Id.*

47. Cummings, *supra* note 15, at 41-42. Eventually, Arizona was able to retain control over the Gila River in the Boulder Canyon Project Act.

48. Reclamation Act of 1902, ch. 1093, Pub. L. No. 57-161 (1902).

49. JOHNSON, *supra* note 24, at 3.

50. AUGUST, *supra* note 19, at 16.

51. JOHNSON, *supra* note 24, at 3.

52. *Id.* The increase in the number of dams did not translate to a greater available water supply to the Salt River Valley Users Association (SRVUA). By 1948 SRVUA’s available reservoir supply had dwindled to 0.191 maf. *Id.* at 49.

53. HUNDLEY, *supra* note 18, at 239.

54. AUGUST, *supra* note 19, at 93.

Arizona had jurisdiction over the bed of streams within its boundaries from high-water mark to high-water mark and over all water that flowed therein.⁵⁵

2. *Two Camps*

Many Arizonans, however, supported the Compact. Seen by some as a necessary concession to receive a share of the future benefits of federal projects⁵⁶ and supported by others who stood to benefit from the immediate ratification of the Compact,⁵⁷ the division between those supporting approval of the Compact and the anti-pacters created a battle remembered as one of the most politically charged periods in Arizona history.⁵⁸

Pro-ratification efforts in Arizona were led by U.S. Senator Carl Hayden. Although Hayden sympathized with most of the positions taken by the anti-pacters, he felt that Arizona was not justified in refusing approval of the Compact. Hayden thought that because the Upper Basin would never use its allotted share of the River, Arizona would receive a water supply ample to satisfy all uses, even irrigation from the "Arizona Highline Canal."⁵⁹ He felt that the issue of Mexico's share of the River was a federal matter that did not concern the Arizona legislature.⁶⁰ He also felt that the disagreement over power generation royalties could be settled in future legislation.⁶¹ And, while Hayden agreed that the Gila should not be included within the Compact, he did not believe the state should jeopardize the entire agreement by amending it to exclude the Gila.⁶²

Mohave and Yuma counties, on the western side of the state, were heavily in favor of unconditional approval of the Compact.⁶³ Mohave County, where a future dam springing from the Compact would likely be located, stood to become a chief supply point of labor and materials for its construction.⁶⁴ Increases in land values, industrial production, and tourism dollars were also sure to accompany the dam's completion.⁶⁵ Yuma County, with its presence on the banks of the Colorado, would benefit immediately from the flood control and irrigation projects that the Compact promised.⁶⁶

The period between the signing of the Compact at Santa Fe in November of 1922 and the vote by the Arizona legislature on whether to approve the Compact in February of 1923 was one of fierce campaigning within the state. The most colorful character in the

55. Maddock, *supra* note 38, at 23-27.

56. AUGUST, *supra* note 19, at 92.

57. *Id.* at 102-03.

58. *Id.* at 95.

59. HUNDLEY, *supra* note 18, at 241.

60. *Id.*

61. *Id.*

62. *Id.*

63. AUGUST, *supra* note 19, at 102.

64. *Id.*

65. *Id.*

66. *Id.* at 103.

debate over Compact approval was George Maxwell. Maxwell, who had considerable influence with Governor Hunt, was considered by many to be a crackpot, a demagogue, and without question, a xenophobe.⁶⁷ After the Santa Fe Colorado River Compact meetings, Governor Hunt sent Maxwell to other Basin states meetings and on a public relations campaign, speaking throughout the state of the evils of the Colorado River Compact.⁶⁸ Some of Maxwell's claims about the Compact stretched the imagination.⁶⁹ Maxwell, for instance, blasted the Compact as “a carefully camouflaged effort to hamstring Arizona and . . . to establish a great Asiatic city and state in [the] Colorado River delta . . . inevitably resulting . . . in a war with Asia in which Arizona and California would be the shock country as was Belgium in the World War.”⁷⁰

Despite Maxwell's unsavory reputation among many in western water politics, credible claims arose that it was he, not Hunt, who was truly running the campaign efforts against Arizona's ratification of the Compact.⁷¹ It was claimed that Hunt, in actuality, knew nothing about the Colorado River⁷²—he had spent the two years prior to the signing of the Compact abroad as ambassador to Siam⁷³—and nearly all his public statements were written by Maxwell.⁷⁴

Aside from his anti-Asian paranoia, Hunt was aligning himself with the big economic players in the state.⁷⁵ The Salt River Valley Water Users Association feared that cheap federal hydroelectric power would mean unwanted competition with their power production. Agricultural interests resented the prospect of losing the Gila's flow and of Mexican farmers using increased water supplies as a result of the Compact to undercut Arizona farmers' prices.⁷⁶ Finally, the mining industry feared that if private power developments were driven out of business, the tax burden on itself would increase.⁷⁷ Other powerful interests in the Arizona business community, particularly editorial support from the *Arizona Republican*, the predecessor to the *Arizona Republic*,⁷⁸ supported the Compact, but Governor Hunt would not relent.

3. *A Near Miss*

After much campaigning within the state by both the Hunt and Hayden camps, the Compact came before the state legislature for a vote on February 15, 1923. Approval of the

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67. *See id.* at 95-96, 98-99.
68. *Id.* at 98.
69. *Id.*
70. Quoted in HUNDLEY, JR., *supra* note 18, at 233.
71. *See* AUGUST, *supra* note 19, at 99-100.
72. *Id.* at 99.
73. *Id.* at 95.
74. *Id.* at 99.
75. *See Id.* at 105.
76. *Id.* at 106.
77. *Id.* at 106.
78. HUNDLEY, JR., *supra* note 18, at 239.

Compact without reservations failed in the House by a vote of twenty-three to twenty-two.⁷⁹ The House then considered an amended version of the Compact with reservations. The amended version excluded the Gila from the Compact, capped the water Mexico could receive from the Colorado at two maf per year, and imposed a royalty of five dollars per horsepower per year of electricity generated by Colorado River water imposed by any state with a federal hydroelectric dam built on its land.⁸⁰ The amended Compact passed the House by a vote of twenty-eight to seventeen.⁸¹ The Arizona senate then passed legislation approving a different amended version of the Compact. The senate version, which passed by a ten to none vote, provided for a “full and unrestricted right of taxation by way of the imposition of a royalty upon electric power generated from any structure within the state.”⁸² Neither bill passed in the other chamber, however, and a last-ditch effort by the House to save the compact by passing its unconditional ratification failed on a twenty-two to twenty-two vote.⁸³

Although water leaders elsewhere in the Basin were still optimistic that Arizona would eventually agree to the Compact,⁸⁴ subsequent events cast serious doubt on such optimism. Providing ammunition to those opposed to ratifying the Colorado River Compact, William Mulholland, chief of the City of Los Angeles Bureau of Water Works and Supply, testified in 1924 before the U.S. House Committee on Irrigation and Reclamation: “I am here in the interest of a domestic water supply for the City of Los Angeles; and that injects a new phase into this whole matter.”⁸⁵ Indeed it did. His announcement confirmed the most paranoid beliefs of Arizona and the other Colorado River Basin states about the desires of California to corner rights to most of the Colorado River system.

In 1927, the governors of the Basin states met in Denver for one last attempt at reconciling lingering disagreements between the Lower Basin states over the Compact.⁸⁶ California came to the table with an offer: divide the Lower Basin’s 7.5 maf apportionment by allowing itself 4.562 maf from the River’s main stem and granting Arizona 2.6374 maf from the main stem, plus the waters of its tributaries.⁸⁷ The remaining 0.3 maf would be apportioned to Nevada. In addition, after twenty years any apportioned water not being used could be acquired by either state.⁸⁸ Arizona summarily rejected this proposal. The Upper Basin states next stepped in with a suggestion of their own. California’s allocation would be reduced to 4.2 maf. Arizona would receive 3 maf, plus 1 maf from its tributaries,⁸⁹ but

79. *Id.* at 242.

80. *Id.* at 240.

81. *Id.* at 242.

82. *Id.* at 243.

83. *Id.*

84. *Id.*

85. *Id.* at 251.

86. *Id.* at 264; Cummings, *supra* note 15, at 29.

87. HUNDLEY, *supra* note 18, at 265.

88. *Id.*

89. *Id.*

Arizona would be required to supply Mexico’s allotment from its basins.⁹⁰ Although Arizona agreed to the Upper Basin states’ suggestion, save the Mexico burden, California refused the suggestion outright.⁹¹

Exasperated by Arizona’s and California’s inability to come to an agreement, Nevada Senator Key Pittman proposed amending the Swing-Johnson Bill—which eventually would become the Boulder Canyon Project Act (BCPA)—to include a congressionally pre-approved Lower-Basin pact.⁹² Evidence suggests that the allocation laid out in the amendment, and eventually included in the BCPA, was intended as only a suggested solution.⁹³ Because it was pre-approved in the Act, the congressional apportionment could be streamlined through Congress if the Lower Basin states later agreed to it.⁹⁴ Thirty-five years after the proposed allocation became part of the Swing-Johnson Bill, the Supreme Court declared it to be the Law of the River.⁹⁵

II. BOULDER CANYON PROJECT ACT OF 1928

Political opposition to the Boulder Canyon Project Act (BCPA), unlike the Colorado River Compact, was nearly unanimous in Arizona. Resistance to the BCPA in Arizona came from the Salt River Project, mines, and agriculture. All three feared that California would hoard the water and energy that would come from new hydroelectric dams. Leading the fight against the BCPA was Arizona’s legendary politician Carl Hayden. As a U.S. Representative, Hayden, who had supported the Compact, opposed the BCPA on the grounds that “Congress has no right to force adherence to . . . a compact without the full concurrence of the states that would be affected thereby.”⁹⁶

In 1926, Hayden moved from the House of Representatives, where he had fought against the BCPA’s predecessor, the Swing-Johnson Bill, to the United States Senate. A large part of his senatorial campaign rested on his proud opposition to the BCPA. One campaign poster reprinted headlines from California newspapers that showed Hayden’s skill at delaying action on the BCPA.⁹⁷

90. Cummings, *supra* note 15, at 30.

91. HUNDLEY, *supra* note 18, at 265.

92. *Id.* at 269.

93. *Id.* at 269-70.

94. *Id.* at 270.

95. *Id.*

96. AUGUST, *supra* note 20, at 126.

97. *See Id.* at 129. Thanks to Jack August for permission to reproduce this poster.

Who Stopped the Swing-Johnson Bill in Congress? The Californians Know!

These headlines from California Newspapers record the skill and courage of Arizona's ablest defender in her hour of need.

<p>The San Francisco Daily News</p> <p>HAYDEN WINS DAM BATTLE</p> <p>Defeat of Boulder Bill Personal Victory For Him</p> <p>BY RUTH FINNEY</p> <p>Daily News Washington Bureau</p> <p>WASHINGTON, May 12.—After two hours of debate in executive session the House Committee on Irrigation today adopted an amendment to the Swing-Johnson bill, the effect of which is to leave in doubt the location at which the Colorado River Dam shall be built.</p>	<p>The Los Angeles Times</p> <p>COMMITTEE LEAVES RIVER DAM - SITE ISSUE IN DOUBT</p> <p>Arizona Representative Argues for Latitude in Selection of Project Location</p> <p>WASHINGTON, May 12.—After two hours of debate in executive session the House Committee on Irrigation today adopted an amendment to the Swing-Johnson bill, the effect of which is to leave in doubt the location at which the Colorado River Dam shall be built.</p>	<p>The Riverside Press</p> <p>HAYDEN IS DELAYING THE GAME</p> <p>Arizona Man Secures Another Meeting On Boulder Dam Bill</p> <p>SWING OPPOSES THIS</p>
<p>The Calexico Chronicle</p> <p>OUTLOOK FOR RIVER BILL GLOOMY</p> <p>Attorney Childers Back From Washington; Is Not Optimistic</p> <p>HAYDEN IS BLAMED</p> <p>The Boulder dam project has been a successful failure of general at the present session of Congress according to the statement of attorney Charles Childers, who returned here from his Washington trip.</p>	<p>The Visalia Times</p> <p>BOULDER DAM BILL ONCE MORE DELAYED</p> <p>Arizona Representative Is After Information From State Department</p> <p>The Calexico Chronicle</p> <p>RIVER BILL IS ENDANGERED IN CLASH</p> <p>Hayden of Arizona Moves To Have Measure Tabled By House Committee</p> <p>Swing Criticized for Plan To Withhold Measure From Action on Floor</p>	<p>The Santa Ana Register</p> <p>HEARINGS ON BOULDER DAM PROJECT ARE TO CONTINUE</p> <p>Grant Request By Representative Hayden, Arizona, For Another Meeting</p> <p>TIME GROWING SHORT</p> <p>Doubt Expressed Whether Scores Of Changes Can Be Voted On At Session</p> <p>By United Press</p>
<p>The Anaheim Bulletin</p> <p>BOULDER DAM HAS NEW FOE</p> <p>Arizona Representative Declares He Will Fight To Finish</p> <p>WASHINGTON, May 12.—The Arizona, California, Nevada and New Mexico reclamation committee today reported to the House that it has approved the Boulder dam project for the dam.</p>	<p>The Monrovia News</p> <p>NEW DELAY FOR BOULDER DAM BILL MAY PREVENT ACTION THIS SESSION</p> <p>Arizona Representative Demands Statement of Plans for Mexico to Obtain Water</p> <p>WASHINGTON, May 12.—(U.P.)—The Swing-Johnson Boulder dam bill met further delay today in the House irrigation and reclamation committee. The committee expected to close hearings and consider the bill in executive session, but Representative Hayden, Democrat, Arizona, asked for another meeting Wednesday. Hayden wants officials of the state department to explain the status of their negotiations with Mexico over the use of waters of the Colorado.</p>	<p>The Indio Date Palm</p> <p>HAYDEN OF ARIZONA URGES AGREEMENT</p> <p>WASHINGTON, April 16.—Representative Hayden today declared that he would not support the Boulder dam project unless the federal government would agree to purchase the water rights under the dam from the state of Arizona.</p>

CARL HAYDEN

Democratic Candidate For United States Senator

What particularly annoyed Senator Hayden was the disparity in allocation of funds under the BCPA. The legislation provided no funding for reclamation projects in Arizona, while at the same time promising to California \$31 million to build the All-American Canal. The BCPA also would provide heavily subsidized electricity from hydroelectric power plants created to supply power to Southern California. No such projects were planned for providing Arizona with cheap power.

As a senator, Hayden continued his efforts to delay passage of the BCPA. In 1928, he and fellow Arizona senator, Henry Ashhurst, filibustered the bill at the end of the session. Eventually, support for the law from outside Arizona prevailed. The Senate passed the BCPA on December 16, 1928. According to Hayden's biographer, Jack L. August, Jr., "much to the chagrin of the majority of Arizonans, terms of the Colorado River Compact

became effective with the passage of the Boulder Canyon legislation. At the time of its passage, the Boulder Canyon Project Act was viewed by Arizonans as giving California everything and Arizona nothing.”⁹⁸

Hayden did, however, manage to gain important concessions in favor of Arizona. The BCPA was accompanied by the California Limitation Act, which limited California to 4.4 maf of the River’s water.⁹⁹ In addition, Arizona was guaranteed exclusive rights to the flow of the Gila River, something that Hayden and other key political figures in Arizona had long fought for. Surplus mainstream flow to the Lower Basin would be split equally between Arizona and California. Finally, Arizona, along with Nevada, would each receive 18.75 percent of the surplus profits from hydroelectric power revenues.¹⁰⁰

Section 4 of the BCPA provides that the Act would not take effect until all seven states agree, or six states including California agree. If the Act did take effect, the States of Arizona, California, and Nevada were pre-authorized to enter into an agreement to apportion 4.4 maf to California, 2.8 maf to Arizona, and 0.3 maf to Nevada. Any alternative agreement would need to receive Congressional authorization. There was no obligation on the part of any state to participate in this apportionment. If the apportionment did occur, the Act also provided that the State of Arizona shall have the “exclusive beneficial consumptive use” of the Gila River and its tributaries.

Section 5 authorized the Secretary of the Interior to contract for the delivery of stored water. No person could use any stored water except pursuant to a contract with the Secretary. These pertinent sections in the Act would be contested in the U.S. Supreme Court for decades to come.

III. TRANSFORMATIVE YEARS: 1928-1952

A. Courtroom Battles

Arizona’s unhappiness with the Boulder Canyon Project Act manifested itself immediately. In 1930, two years after passage of the Act, Arizona brought an original jurisdiction suit in the U.S. Supreme Court against the Secretary of the Interior and the six other Colorado River Basin states.¹⁰¹ Arizona sought an injunction against the federal government from building both the Hoover Dam and the All-American Canal. Additionally, Arizona sought a declaration that both the Colorado River Compact and the BCPA were unconstitutional. Addressing the constitutional claims, Justice Brandeis, writing for the Court, held the Act a valid exercise of congressional power under the Commerce Clause.¹⁰² Arizona had claimed that its “quasi-sovereign rights” would be invaded by the construction of the dam, because the dam and the reservoir would be located partially within the state.

98. *Id.* at 136.

99. HUNDLEY, *supra* note 18, at 276-77.

100. AUGUST, *supra* note 19, at 136.

101. *Arizona v. California*, 283 U.S. 439 (1931).

102. *Id.* at 455-56.

However, the Court held that the federal government could perform its functions without conforming to the police regulations of a state.¹⁰³ If Congress has power to authorize construction of a dam and reservoir, the Secretary of the Interior is under no obligation to gain Arizona's approval.¹⁰⁴ The federal government has obvious power to create obstructions on interstate rivers for the purposes of improving navigation.¹⁰⁵ Arizona, quite remarkably, actually challenged whether the Colorado was a navigable river, but the Court had little difficulty in rejecting this claim.¹⁰⁶

Ultimately, the Court dismissed the case because Arizona's claim—that the Act violated Arizona's rights—was speculative. The dismissal was without prejudice. Arizona could apply for subsequent relief if the water stored at Hoover Dam (Lake Mead) was used in such a way as to interfere with Arizona's rights.¹⁰⁷ As Justice Brandeis put it,

The [Boulder Canyon Project] Act does not purport to affect any legal right of the State, or to limit in any way the exercise of its legal right to appropriate any of the unappropriated 900,000 acre-feet which may flow within or on its borders.¹⁰⁸

In 1934, Arizona filed a new suit in the Supreme Court. This case sought to perpetuate testimony in an action arising out of the BCPA, which Arizona would, “at some time in the future,” commence against California and the other Basin States.¹⁰⁹ Arizona conceded that its rights had not yet been violated. The Court dismissed the suit on the ground that the testimony that Arizona sought to preserve would not be admissible as evidence of the meaning of the BCPA or the Compact.¹¹⁰ It reaffirmed that the BCPA did *not* apportion waters. “[T]he Act does not purport to apportion among the states at the lower basin the waters to which the lower basin is entitled under the Compact. The act merely places limits on California's use of waters under article III(a) and of surplus waters . . .”¹¹¹

The next round of *United States v. Arizona*¹¹² followed after Arizona's governor sent troops to halt construction work on Parker Dam in 1934. In what is remembered as the “Great Colorado River war of 1934,” National Guardsmen moved in a truck convoy from Phoenix over to the construction site of the dam in Parker. It was uproarious from a national perspective, prompting the *Los Angeles Times* to wryly report on the “impending

103. *Id.* at 451.

104. *Id.* at 451-52.

105. *Id.* at 452.

106. *Id.* at 452-54 (“[Upon completion of the dam,] navigation for considerable distances both above and below the dam will become feasible.”).

107. *Id.* at 464.

108. *Id.* at 462. The Supreme Court assumed that the average annual flow including the tributaries was 18 maf.

109. *Arizona v. California*, 292 U.S. 341, 345 (1934).

110. *Id.* at 360.

111. *Id.* at 357.

112. 295 U.S. 174 (1935)

movement of State troops into this theater of war to protect the State of Arizona from invasion by all or part of the State of California.”¹¹³ The serious subtext was that, for the first time since the Civil War, a state of the union was rebelling against the federal government. Rather than engage the state in military action, the Interior Department brought suit in the Supreme Court.¹¹⁴ This time, the Court sided with Arizona because it determined that Congress had not authorized the dam.¹¹⁵ Within months, Congress did authorize the dam’s construction. Arizona withdrew its troops, and construction recommenced.¹¹⁶

Arizona had been knocked down but not defeated. In 1936, Arizona was again before the Court after suing the other Basin States in the Supreme Court, asking the Court to exercise its equitable apportionment authority and to fix the amounts of water that both Arizona and California could claim from the Colorado River.¹¹⁷ In essence, the State of Arizona asked the Supreme Court for a judicial apportionment of the water among the Lower Colorado River Basin states. Arizona requested that it receive an “equitable share” of the water and that the State of California be prohibited from using more than its equitable share, which would be determined by the Court but would not exceed the limitation imposed upon California’s use of such water by the Boulder Canyon Project Act.¹¹⁸ Arizona also argued that any share of the river to be enjoyed by the Republic of Mexico should come from California’s share.¹¹⁹ The Supreme Court dismissed this effort, because it determined that the United States Government was an indispensable party and it had not consented to be sued.¹²⁰

At this point, Arizona was in a bind. The state could not obtain judicial relief until the United States consented to be sued. California, meanwhile, proceeded to enter contracts with the Secretary of the Interior that called for the delivery of 5.3 maf per year.

Ever since the Colorado River Compact was formed, Arizona had been engaging in an obstructive strategy.¹²¹ It was not working. Arizona failed in three Supreme Court suits. In the meantime, it had created no official state planning effort and no state agency with planning authority.¹²² Arizona had no unified position or organization for advancing its cause.¹²³ Throughout Arizona’s flurry of lawsuits, there was no great driving force for new water development in the state. Arizona had, instead, only vague plans for using its share of

113. NORRIS HUNDLEY, JR., *THE GREAT THIRST* 229-30 (rev. ed. 2001).

114. *Id.* at 230.

115. *Id.*

116. *Id.*

117. *Arizona v. California*, 298 U.S. 558, 558-60 (1936).

118. *Id.* at 559-60.

119. *Id.* at 560.

120. *Id.* at 572.

121. *See* Johnson, *supra* note 24, at 18.

122. *Id.*

123. *Id.* at 19.

the Colorado.¹²⁴ The state had, therefore, focused its efforts on obstructing California, where the drive for new projects that would deprive Arizona of future water was strong.¹²⁵

As the 1930s came to an end, Arizona became more proactive. By 1938, the state legislature had created the Colorado River Commission of Arizona (CRCA). In 1939, the CRCA filed an application with the Federal Power Commission for a preliminary permit to construct a dam in Bridge Canyon.¹²⁶ That same year, Arizona applied to the federal government for a contract to have Colorado River water delivered to the state from Lake Mead, for the first time acknowledging the federal government's authority to enter into such contracts.¹²⁷

B. Changing Tactics

Several events influenced Arizona's change in position. For one, the state's former strategy had simply failed.¹²⁸ Arizona realized no significant benefit from its series of Supreme Court cases. In addition, Arizona foresaw that a U.S. treaty with Mexico to deliver Colorado River water was imminent.¹²⁹ Finally, in 1939, the Metropolitan Water District began diverting water from Lake Havasu.¹³⁰ More than two decades of resistance collapsed, as Arizona feared that the new demands by Mexico and California would leave it in the dust. Somehow, Arizona had to put Colorado River water to beneficial use or else, under the prior appropriation doctrine, it would lose out to California and Mexico.¹³¹ If Arizona were to maintain any hope of future vitality, a change in strategy was necessary.

In 1944, the United States signed a treaty with Mexico that granted Mexico 1.5 maf of Colorado River water and California announced plans to increase its annual diversions from the river by 2 maf. But Arizona, too, was making moves. In 1944 the Arizona legislature finalized a water delivery contract with the Secretary of the Interior for 2.8 maf annually while simultaneously, after twenty-two years of resistance, ratifying the Colorado River Compact.

Still, the Central Arizona Project—the reason why Arizona fought so hard to keep California from taking what Arizona felt was its share of the River's flow—remained an abstract notion, with no concrete plan.¹³² Serious efforts to work with the Bureau of Reclamation on creating such a plan, however, would soon be underway.¹³³

124. *Id.*

125. *Id.* at 18.

126. *Id.* at 19.

127. *Id.*

128. *Id.* at 19-20.

129. *Id.* at 19.

130. *Id.* at 20.

131. *See* AUGUST, *supra* note 19, at 150-51.

132. JOHNSON, *supra* note 24, at 21.

133. *See id.* at 20-21.

In 1946, the private non-profit CAP Association was organized, and a year later, after Arizona U.S. Senator Ernest McFarland introduced a bill in the Senate to authorize the CAP, the Association organized hearings before the Senate Subcommittee on Irrigation and Reclamation of the Committee on Public Lands.¹³⁴ In 1948, Arizona created the Arizona Interstate Stream Commission (its own agency to handle Colorado River matters for the state including the CAP).¹³⁵ Also in 1948, the CAP plan report was approved by Secretary of the Interior Krug and submitted to Congress.¹³⁶ The CAP finally seemed on its way to becoming a reality. California, however, had other ideas, and it would fight federal authorization of the project to the bitter end.

In the 1920's, Senator Hayden delayed passage of the Boulder Canyon Project Act and prevented California from using Colorado River water. Now the shoe was on the other foot. California took advantage of its superior numbers in the House of Representatives to prevent authorization of the Central Arizona Project.¹³⁷

But California went one step further and now contended that the annual flow of the Gila River should be included in Arizona's allotment; this suggestion infuriated Senator Hayden. Reacting to California's position, Hayden attacked the:

Perfectly idiotic idea that California owns the whole of the Colorado River and the cockeyed idea that Arizona doesn't own Gila . . . It never was in the mind of Senator Johnson [architect of the Boulder Canyon Project Act]. It never was in the mind of Senator Shortridge [Republican Senator from California (1921-1933)]¹³⁸. I know what I am talking about, because I was there!¹³⁹

California's primary goal, much like Arizona's in earlier decades, was obstruction. On February 21, 1950, due largely to Hayden's influence in the Senate, bill S 75, authorizing the CAP, passed the Senate by a vote of 55-28.¹⁴⁰ But California was committed to delaying a vote on the CAP in the House, where its superior numbers afforded it greater influence. At this time California had twenty-three representatives in the House, compared to two for Arizona.¹⁴¹ During the 81st Congress, California representatives introduced twenty-three separate Colorado River bills, referring the entire question of water rights to the Judiciary Committee—a clear attempt to delay.¹⁴² Most observers close to the legislation knew that

134. *Id.* at 31.

135. *Id.* at 7.

136. *Id.*

137. *See* AUGUST, *supra* note 19, at 167.

138. BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, *available at* <http://bioguide.congress.gov/scripts/biodisplay.pl?index=S000380> (last visited Feb. 25, 2013).

139. AUGUST, *supra* note 19, at 164-65.

140. *Id.* at 166.

141. *Id.* at 166-67.

142. *Id.* at 168.

Northcutt Ely masterminded the delay tactic.¹⁴³ Hayden believed Ely was laying the groundwork for what he believed was an inevitable Supreme Court case,¹⁴⁴ in which Ely would represent California.

When the 82nd Congress convened in January of 1951, the Interior and Insular Affairs Committee discussed the Colorado River water rights issue for nearly two months, but to no avail.¹⁴⁵ In mid-April, however, California Committee members Sam Yorty, Clair Engle, and Norris Poulson asked fellow Republican Committee member Paul Saylor to a breakfast meeting. Their purpose was to convince him to offer a preferential motion to postpone further consideration of the bill until either the water rights issue had been adjudicated in the Supreme Court or an agreement among the Lower Basin states had been made.¹⁴⁶ On April 18, 1951, Saylor did just that.¹⁴⁷ Engle and Poulson, of course, wasted no time seconding the motion.¹⁴⁸ Arizona Governor Howard Pyle was present at the Committee hearing to testify. Upon witnessing the events that had just unfolded before him, Pyle set aside his prepared statement, and instead addressed the Committee with these words:

I think this is one of the most depressing moments of my life [...] We have been treated here this morning to a magnificent presentation of what political power can do. I say it respectfully, for perhaps if I were in the opposite position, I, too, would make use of it.¹⁴⁹

In 1952, Arizona appealed once more to the Supreme Court in regard to its Colorado River water rights. California responded to Arizona's complaint to the Court that it interposed no objection to the Court granting Arizona's motion to file the bill of complaint.¹⁵⁰ Next, the U.S. Solicitor General requested permission to intervene, which was granted.¹⁵¹ The most significant lawsuit in Arizona's history had begun.

IV. ARIZONA V. CALIFORNIA

A. Early Litigation

Arizona v. California proved to be one of the most complex and fiercely contested cases in Supreme Court history.¹⁵² The Court appointed a special master, George I. Haight,

143. *Id.*
 144. *Id.*
 145. *Id.* at 169-70.
 146. *Id.* at 170.
 147. JOHNSON, *supra* note 24, at 78.
 148. *Id.*
 149. *Id.* at 79.
 150. *Id.* at 89.
 151. *Id.*
 152. AUGUST, *supra* note 19, at 175.

to hear arguments.¹⁵³ After his sudden death before formal hearings began, the Court appointed as his replacement Simon Rifkind, a prominent New York City federal district court judge and former partner at Paul Weiss.¹⁵⁴

California grounded its position on both the Boulder Canyon Project Act and its contracts with the Secretary of the Interior.¹⁵⁵ Before the Special Master, California argued that the prior appropriation doctrine should govern and protect its use of Colorado River water. Established Supreme Court doctrine supported this position.¹⁵⁶ Both California and Arizona were and are prior appropriation doctrine states. California, therefore, had a good argument that the doctrine should apply to conflicts over the Colorado. Because California had entered into contracts with the Secretary of the Interior for 5.3 maf annually, it should be entitled to this amount.¹⁵⁷

In response, Arizona asserted that California had agreed to be bound by 4.4 maf, both based on the 1929 Boulder Canyon Project Act and on the California Limitation Act.¹⁵⁸ But California responded that Arizona’s failure to ratify the Colorado River Compact, together with its efforts to have both the Compact and the Boulder Canyon Project Act declared unconstitutional, should prevent Arizona from relying on either one.¹⁵⁹

In the early part of the litigation, the chief lawyer for Arizona was John Frank of the Phoenix law firm Lewis & Roca. His task was to figure out some standard that would quantify Arizona’s water rights, no small task given that Arizona wanted no part of either the Colorado River Compact in 1922 or the Boulder Canyon Project Act in 1928. He decided to rely on the “equitable apportionment doctrine,” which the Supreme Court had developed in resolving interstate disputes over water.¹⁶⁰ His argument was, in effect, if Arizona could prove a need for water, that should determine its right to the water.¹⁶¹ It was a squishy argument, for California could with equal plausibility assert its own need to a substantial amount of water. Plus California was already using the water through several aqueducts constructed in the late 1930s and 1940s.¹⁶² In contrast, Arizona had no conveyance system, i.e., no Central Arizona Project, to move large quantities of water from the mainstem to Arizona’s population centers located in the central and southern parts of the state.

153. *Id.* at 177.

154. *Id.*

155. *Id.*

156. *See* “The Supreme Court’s Equitable Apportionment Doctrine,” *infra* p. 24.

157. *See* JACK L. AUGUST, JR., *DIVIDING WESTERN WATERS: MARK WILMER AND ARIZONA V. CALIFORNIA* 62-63 (2007).

158. *Id.* at 61.

159. *Id.* at 63.

160. *Id.* at 67.

161. *Id.* at 66-67.

162. *See* the list of California aqueduct projects from this time period provided, *infra* note 228.

California's chief counsel Northcutt Ely's reliance on prior appropriation made a great deal of sense. In the early-twentieth century decisions,¹⁶³ the U.S. Supreme Court had, under its equitable apportionment jurisdiction, used prior appropriation to divide the waters when both states relied on the prior appropriation doctrine. In the Colorado River Basin, all seven states employed the prior appropriation doctrine.¹⁶⁴

Ely argued that California had prior appropriation rights to 5.3 maf pursuant to contracts with the Secretary of the Interior. Pouring salt in the wound, California argued that the million acre-feet that Arizona used from the Gila River should be deducted from its mainstream claim.¹⁶⁵ And as a matter of equity, Arizona's claim of water for its farms and ranches should not come at the expense of California's rapidly increasingly populated urban areas.¹⁶⁶

Trial before Special Master Rifkin began in 1956 and did not go well for Arizona. The state claimed that it was entitled to 2.8 maf, but its attorneys failed to cite any legal authority for this proposition. Arizona was arguing as a matter of fairness that it should have this amount of water from the river "in order to sustain its economy."¹⁶⁷ A simple claim that the prosperity of the state was a reason to give it water was unlikely to be successful.

B. Arizona's Argument before the Supreme Court

In 1957, Arizona changed course and retained new counsel, Mark Wilmer, senior partner of the Snell & Wilmer law firm in Phoenix.¹⁶⁸ According to his biographer, Jack August, Wilmer found his predecessor's legal reasoning rather baffling.¹⁶⁹ It was vague, and not likely to be persuasive to the Supreme Court, which would have to come up with some actual numbers to apportion the River. The Supreme Court might actually use the equitable apportionment doctrine to cut against Arizona, particularly if it decided to use the prior appropriation doctrine. Wilmer decided to embark on an unorthodox and risky but ultimately necessary strategy. He filed an "Amended and Supplemental Statement of Position" in 1957 in which he conceded that Arizona's earlier "Statement of Position . . . and certain legal conclusions and arguments set forth in its various pleadings filed herein unsound and not supported in the law in relation to the proper interpretation of [the Boulder Canyon Project Act and the Colorado River Compact]."¹⁷⁰

Instead Wilmer argued that the Colorado River Compact and especially the Boulder Canyon Project Act awarded Arizona 2.8 maf *and* protected its rights to sole use of the Gila

163. See "The Supreme Court's Equitable Apportionment Doctrine" *infra* p. 25.

164. AUGUST, *supra* note 160, at 69.

165. *Id.* at 70.

166. *Id.*

167. *Id.* at 66.

168. *Id.* at 74.

169. *Id.* at 75-77.

170. *Id.* at 78.

River.¹⁷¹ It was an audacious argument for a state that, for decades, had refused to go along with either the Compact or the Act. In a neat twist, he used the Compact and the Act to insist that Arizona had rights to the Gila River based on Article 8, which protects present perfected rights.¹⁷²

It was a nery argument to make for another reason. At the time that he made it, Arizona had already completed the trial of its case in brief. This had consumed 37 trial days, amassed some 5,000 pages of testimony, and included 200 exhibits that comprised an additional 10,000 pages.¹⁷³ The State of California had almost completed its presentation of evidence, and now found itself in mid-litigation, having to respond to an entirely different legal theory.¹⁷⁴ To grasp the audacity and brilliance of this change, it is necessary first to review the Supreme Court’s jurisprudence with respect to the equitable apportionment doctrine in interstate water rights disputes.

C. The Supreme Court’s Equitable Apportionment Doctrine

Prior to 1907, the U.S. Supreme Court’s original jurisdiction cases between states were primarily confined to disputes over boundaries.¹⁷⁵ The seminal equitable apportionment of water decision was the 1907 case, *Kansas v. Colorado*.¹⁷⁶ In that dispute, Kansas sued to enjoin Colorado from using the Arkansas River, which runs through both states. Colorado countered that its territorial sovereignty gave it the right to drain the entire flow of the river. The Court sided with Colorado, though not with its rationale, and dismissed the Kansas complaint. The Court reasoned that each state had an equal right to the river’s flow, and the amount of water each state was entitled to should be based on an equitable apportionment. The Court stated:

The diminution of the flow of water in the river by the irrigation of Colorado has worked some detriment to the southwestern part of Kansas, and yet when we compare the amount of this detriment with the great benefit which has obviously resulted to the counties in Colorado, it would seem that equality of right and equity between the two States forbids any interference with the present withdrawal of water in Colorado for purposes of irrigation.¹⁷⁷

171. *See id.* at 77.

172. *See id.* at 78-79.

173. *Id.* at 83.

174. *Id.*

175. Patashnik, *supra* note 2 (manuscript at 17); A. Dan Tarlock, *The Law of Equitable Apportionment Revisited, Updated, and Restated*, 56 U. COLO. L. REV. 381, 384 (1985).

176. 206 U.S. 46 (1907).

177. *Id.* at 113-14.

The *Kansas v. Colorado* decision established the Court's jurisdiction over interstate water disputes and announced a sharing rule, which was essentially a crude cost-benefit analysis of alternative water uses.¹⁷⁸

Early cases did not consider local law as a factor in equitable apportionment, but in 1911 in *Bean v. Morris*, Justice Holmes applied the doctrine of prior appropriation in an interstate stream dispute on the theory that when all states through which a river flowed had adopted the same system of water law, they estopped themselves from asserting the power to ignore out-of-state priorities.¹⁷⁹

In 1922, the Court relied on *Bean* in its first substantive decision apportioning water in an interstate dispute.¹⁸⁰ In *Wyoming v. Colorado*, Wyoming brought an action against Colorado—both of which are prior appropriation states—to protect irrigators in Wyoming from proposed upstream diversions from the Laramie River in Colorado.¹⁸¹ The Court integrated state water laws into its equitable apportionment ruling, and awarded Wyoming based on priority, 272,500 acre-feet of the 288,000 acre-feet of dependable annual flow.¹⁸²

The Court downgraded local law to a “guiding principle” twenty-two years later in *Nebraska v. Wyoming*.¹⁸³ To protect the flow of the North Platte River for irrigation purposes, Nebraska sued the upstream state of Wyoming, which impleaded Colorado. Unlike *Wyoming v. Colorado*, where the Court was faced with a new use conflicting with an established use, *Nebraska v. Wyoming* was a conflict between two established uses. This distinction prompted the Court to depart from its holding in *Wyoming v. Colorado*, holding that it would not strictly follow the prior appropriation doctrine if doing so came at the expense of equity and justice.¹⁸⁴

This line of cases represented the state of the equitable apportionment doctrine when Arizona challenged California's apportionment of the Colorado River. But the years since *Nebraska v. Wyoming* had ushered in a new era of federal involvement in interstate water issues.¹⁸⁵ Federal flood control and reclamation projects, like the ones at the center of Arizona's suit against California, had opened the door to challenge the long established law limiting the federal government's power over interstate water issues to navigation protection.¹⁸⁶ The legal argument and facts were there for Arizona to challenge the traditional doctrine of interstate water disputes. It just needed a lawyer with the vision to pull it off.

178. Tarlock, *supra* note 175, at 386-87.

179. *Id.* at 395; *Bean v. Morris*, 221 U.S. 485, 487 (1911).

180. Tarlock, *supra* note 175, at 395.

181. *Wyoming v. Colorado* 259 U.S. 419, 455 (1922).

182. *Id.* at 496.

183. *Nebraska v. Wyoming*, 325 U.S. 589 (1945); Tarlock, *supra* note 175, at 394.

184. *Nebraska v. Wyoming*, 325 U.S. at 618; Patashnik, *supra* note 2, (manuscript at 21).

185. Tarlock, *supra* note 177, at 402.

186. *Id.*

D. The Opinion

At the Supreme Court, the case was argued for a remarkable *16 hours* during the 1962 Term.¹⁸⁷ The case was set for re-argument the following year after retired Justices Whittaker and Frankfurter were replaced by Justices Goldberg and White. Chief Justice Warren, former governor and attorney general of California, recused himself from the case. The Court heard six more hours of argument in October 1962. The Court’s 5-3 opinion, written by Justice Black, adopted most of the recommendations of the Special Master. The Court’s most significant holdings are summarized as follows:

- Under Congress’ commerce clause power over navigable streams, Congress has power to divide the un-appropriated waters of the Colorado River among the Lower Basin States.¹⁸⁸ The effect of this ruling was to recognize congressional power to apportion the waters of the navigable rivers as a third method for dividing a stream among multiple states, in addition to division by interstate compact and by equitable apportionment under the Supreme Court’s original jurisdiction. Before *Arizona v. California*, most experts thought that navigable interstate rivers could only be divided by compact or equitable apportionment jurisdiction.
- Congress exercised its apportionment power in the Boulder Canyon Project Act of 1928, both by dividing the river itself and by delegating authority to the Secretary of the Interior to enter into contracts with states for use of the water. Under the apportionment set up by Congress, California would receive 4.4 maf plus not more than one-half of any surplus. Arizona would receive 2.8 maf and Nevada 0.3 maf.¹⁸⁹
- The BCPA applies only to the River’s mainstem, not to its tributaries.¹⁹⁰ Tributaries remain the exclusive use of the state. This ruling was very important for Arizona, because the Gila River’s annual flow is two to three maf.
- The Secretary of the Interior has authority to divide the mainstem by contract, subject to the BCPA limitation that California would receive a maximum of 4.4 maf. This delegated authority allows the Secretary to allocate water among states and among users within each state. The Secretary had done so by executing contracts for the delivery of water with the three Lower Basin states. In granting this authority, the Court did insist that the Secretary protect “present perfected rights,” defined as those in effect as of June 25, 1929.¹⁹¹ The most senior rights on the river, especially the 3 maf then being used in the Imperial Irrigation District, could, therefore, not be diminished by any contract entered into by the Secretary.

187. AUGUST, *supra* note 160, at 88.

188. *Arizona*, 373 U.S. at 597-98.

189. *Id.* at 564-65.

190. *Id.* at 574-75.

191. *Id.* at 600.

- In the event of a *shortage*, the Secretary has discretion to allocate water as Congress may direct, or in the exercise of his discretion.¹⁹² A pro rata system of reduction based on the percentage of each state's rights may be appropriate, but that is not the only option available to the Secretary. Again the Secretary must satisfy "present perfected rights."
- Federal law controls both the interstate *and* intrastate distribution of water, not state prior appropriation law. It is the Act and the contracts with the Secretary that govern.¹⁹³
- Indian reservations and other federal reserves are entitled to water necessary to accomplish their purposes. The priority date for these federal reserved rights is the time at which the reservations were established. For the five Indian reservations along the Colorado River, tribes will receive the amount of water necessary to irrigate the "practicably irrigable acreage" on the reservations.¹⁹⁴

V. THE AFTERMATH

A. California's Viewpoint

Californians were naturally unhappy with the decision. Particularly frustrating was the Court's dramatic departure from previous interstate water rights cases. Many felt the decision was flawed. The premier historian of *Arizona v. California*, UCLA historian Norris Hundley, Jr., has written that "the practical result of [*Arizona v. California*] was a tremendous victory for Arizona,"¹⁹⁵ and the result "bitterly disappointed" California interests.¹⁹⁶ Hundley thinks that the Supreme Court's decision in *Arizona v. California* was "based on a faulty reading of the historical record."¹⁹⁷

192. *Id.* at 594.

193. *Id.* at 586.

194. *Id.* at 600-01.

195. HUNDLEY, *supra* note 113, at 305.

196. *Id.* at 306.

197. *Id.* The argument that Hundley makes is that the Court in *Arizona v. California* relied heavily but mistakenly on two provisions in the BCPA that it understood as being inserted in the final version of the Swing-Johnson Bill (that became the BCPA). Those provisions, in Sections 5 and 8(b), had been inserted into the bill in an earlier version, two years prior, for completely different reasons. Section 5 of the BCPA authorized the Secretary of the Interior to make "a complete statutory apportionment," which the Court interpreted as authorizing the Secretary to make water apportionments between the Lower Basin states in times of shortage. In reality, when this provision was added two years earlier it was intended to ensure a way for the federal government to repay the cost of the Boulder Canyon project by requiring water users to contract with the Secretary for water delivery contracts so as to provide revenues. The clause did not, however, grant the Secretary to apportion water quantities in times of shortage. Norris Hundley, Jr., *Clio Nods: Arizona v. California and the Boulder Canyon Act—A Reassessment*, 3 W. HIST. Q. 17, 25-26 (1972). The Court relied on Section 8(b) for its holding that Congress had divided up the waters in the Lower Basin through the BCPA.

In a January 1972 article, Hundley parsed the legislative record to demonstrate that it was exceedingly unlikely that Congress intended the Boulder Canyon Project Act to apportion water.¹⁹⁸ This argument still holds sway over some modern scholars.¹⁹⁹ Hundley maintains that Congress established a framework which still needed approval from the three Lower Basin states. Arizona’s Senator Carl Hayden—the godfather of the Central Arizona Project—gives merit to this argument. “Until there is an agreement,” Hayden is quoted as saying, Arizona could not support the Act because it would “inevitably lead to appropriations of water which are adverse to the State of Arizona.”

In the midst of the legislative deliberations, Nevada Senator Key Pittman proposed an amendment that “authorized” the Lower Basin States to enter into an agreement apportioning the River. Hayden opposed Senator Pittman’s proposal. Hayden wanted explicit concession by California to the provisions, more than a mere “request of the Congress.”²⁰⁰ There was very little evidence that senators at the time thought that Congress was apportioning the river by itself.

It is worth remembering that the scope of congressional power over interstate commerce was quite circumscribed in the 1920’s when Congress passed the BCPA. This was before any of the New Deal decisions, such as *Wickard v. Filburn*²⁰¹ and *NLRB v. Jones & Laughlin Steel Corporation*,²⁰² broadly construing Congress’s power over interstate commerce. “States’ rights” was more than a hollow slogan at that time, and the idea that Congress could itself determine individual states’ apportionments of water seemed far-fetched. But if the River was not apportioned based on the BCPA, then what basis was there for apportionment?

In defense of *Arizona v. California*, the Court acted precisely because the states and Congress did not. The reason why Arizona and California were before the Court in the first place was because the states could not agree and Congress, in 1951, refused to act on the Central Arizona Project until the Court determined each state’s rights to the River. The Court stepped in to fill a vacuum, and did so by using numbers that had already been debated and agreed to by Congress. Also important, California had agreed to limit itself to an annual apportionment of 4.4 maf in the 1929 California Limitation Act. Early in the legislative deliberations, the State of Nevada indicated that it would be satisfied to receive

“The legislative record is less revealing about the reasons for Section 8(b),” but it was apparently also “closely related to the revenue question,” and was created as a way of “avoiding difficulties which might follow from rushing precipitously into the negotiation of the necessary revenue contracts,” not specifying that Congress should apportion the waters in the Lower Basin. *Id.* at 27.

198. *Id.*

199. *See, e.g.,* MacDonnel, *supra* note 2.

200. HUNDLEY, *supra* note 19, at 269.

201. 317 U.S. 111 (1942).

202. 301 U.S. 1 (1937).

300,000 acre-feet. That left 2.8 million acre-feet for Arizona, which is what Mark Wilmer was requesting.²⁰³

B. Inside the Justices' Chambers

Much of the credit for the Court's ruling turned on the good lawyering of Mark Wilmer. Upon taking over the case, Wilmer changed Arizona's legal argument from a general claim under the equitable apportionment rules for a reasonable amount of water for the state's needs—an argument that followed established Supreme Court precedent—to a novel claim that the Boulder Canyon Project Act had settled the matter. Wilmer's strategy, though bold and risky, annoyed many Westerners who viewed prior appropriation as a religious doctrine and the federal government as mere meddlesome interference in state sovereignty. To them, Arizona was apparently selling out by arguing for a repressively broad interpretation of federal power.

From the Court's perspective, however, this was a very helpful legal strategy. Had the Court used equitable apportionment principles, under *Nebraska v. Wyoming*, the Court would have had to buy the argument that despite California's prior rights to much of the River's flow, Arizona was entitled to 2.8 maf based on principles of equity and justice alone. Such a ruling would have exposed the Court to ridicule for seemingly making up the rules out of whole cloth. In *Nebraska* the Court listed seven factors that may justify deviation from strictly adhering to the prior appropriation doctrine:

- (1) Physical and climatic conditions;
- (2) Consumptive use of water in the several sections of the river;
- (3) Character and rate of return flows;
- (4) Extent of established uses and economies built on them;
- (5) Availability of storage water;
- (6) Practical effect of wasteful uses on downstream areas; and
- (7) Damage to upstream areas compared to the benefits to downstream areas if upstream uses are curtailed.²⁰⁴

It is far from clear that these factors, on balance, favored Arizona. Instead the Court simply relied upon numbers that Congress had already approved.

Papers of the Justices in the case, which, until recently, had not been publicly reported, however, tell a slightly different story of the Court's rationale in *Arizona v. California*.²⁰⁵ A fact that is often overlooked by historians is that Justice Black, author of the Court opinion and leading the pro-congressional apportionment group in the Court, was a

203. See Hundley, *supra* note 197, at 22.

204. *Nebraska*, 325 U.S. at 618.

205. The justices' papers were first brought to light by Patashnik, *supra* note 2 (manuscript at 22).

Senator representing Alabama at the time the BCPA was passed.²⁰⁶ The Justices’ papers reveal that Black was adamant behind closed doors that Congress’ intention in passing the BCPA was, in fact, to apportion the River.²⁰⁷ Justice Black’s conviction was undoubtedly influential on at least some of his fellow justices. What was perhaps more influential, however, as the papers reveal, was the sentiment among those in the pro-apportionment camp that the case presented a major problem with national implications.²⁰⁸ It was a problem that should be settled by the federal government.²⁰⁹ The Court’s opinion, therefore, may not have been based on a close reading of the BCPA.²¹⁰

There is tremendous irony in the Boulder Canyon Project Act history. If the waters had indeed been apportioned by the BCPA, the Lower Basin states “were apparently unaware of it, for they spent the next 30-35 years in futile attempts to divide the water among themselves or to persuade the Supreme Court to do it for them.”²¹¹ Even the earlier Supreme Court rulings did not interpret the BCPA as making apportionment. In the 1931 version of *Arizona v. California*, the Court stated that the Boulder Canyon Project Act did not “affect any legal right” or “limit in any way” a state’s “legal right to appropriate any of the unappropriated” waters of the River.²¹² Justice Brandeis made the same point in the 1934 decision.²¹³

The *Arizona v. California* decision allowed Congress to use principles for allocating water that were based neither on prior appropriation nor riparianism.²¹⁴ California lost a substantial amount of water even though it had established uses for that water and, under the prior appropriation doctrine, would have had those rights securely protected.

C. Reactions

As for the significance of *Arizona v. California*, Norris Hundley described the decision in *Arizona v. California* as “the first major setback to California’s water seekers” and as “a tremendous victory for Arizona.”²¹⁵ Arizona Senator Jon J. Kyl has stated that it “helped secure for Arizona a substantial water supply, thereby removing the only obstacle to growth and prosperity in Arizona.”²¹⁶

206. *Id.* at 30.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. Hundley, *supra* note 197, at 46.

212. *See* 283 U.S. at 462.

213. *See* *Arizona v. California*, 292 U.S. at 357.

214. Riparianism is a property rights system that gives landowners bordering a waterway certain appurtenant rights based on their location. *See* DAVID H GETCHES, *Water Law in a Nutshell* 4 (4th ed. 2009).

215. *See* HUNDLEY, *supra* note 113, at 304, 305.

216. AUGUST, *supra* note 160, at XVII.

Two days after the Supreme Court released its opinion, California's governor, Pat Brown, captured the feelings of many Californians when he said, "I haven't read [the Supreme Court] opinion yet, but let's say it was, to put it mildly, not too favorable to California, and it may necessitate a re-look at the whole California water project . . ."217 Ely Northcutt agreed, "The state—particularly Southern California—faces a period of uncertainty—a vacuum that must be filled."²¹⁸ The *L.A. Times*, in an editorial, warned "Even though the legal and legislative battles to protect our rights to a fair share of the Colorado are far from over, we dare not delay in finding additional water supplies."²¹⁹

Some Californians managed to put a positive spin on the decision. Mike Dowd, Chairman of the Colorado River Board of California, acknowledged, "throwing out the proration formula was a partial victory"²²⁰ and Northcutt Ely, admitted, "[a]s a result of the Court's modification of the special master's report, California is in a much better position than under the master's recommendations."²²¹ The Metropolitan Water District ("MWD") General Counsel, Charles C. Cooper, Jr., was able to see "a ray of hope" in the Court's ruling, given California would not "be bound by a rigid formula for the prorating of shortages."²²² Thus, California's reaction was tempered by its belief that, "unless there is some devastating and unparalleled drought in the headwaters of the Colorado River for a number of years, the showdown between California and Arizona may not come, in a practical sense, for a generation."²²³

Immediately after *Arizona v. California* came down, the reaction in California focused primarily on one issue: where was Southern California going to get its water from? But another strategy concerned how California could again use its superior numbers in the U.S. House of Representatives to block Arizona from getting appropriations for the Central Arizona Project, thus preventing Arizona from putting to use the water it had just been awarded. Some even called for Secretary of the Interior Stewart Udall to resign from his position overseeing the Bureau of Reclamation. After all, former California governor Justice Warren recused himself from hearing the *Arizona v. California* case.²²⁴ Secretary Udall declined the invitation.

217. Robert Blanchard, *Brown Studies Plans to Speed Water Project*, L.A. Times June 5, 1963, at 20.

218. Ray Herbert, *Southland Looking for New Sources of Water, North Coastal Streams, Ocean Studied to Counter Colorado River Loss to Arizona*, L.A. TIMES, June 9, 1963, at 11.

219. Editorial, *The New Water Challenge*, L.A. TIMES, June 14, 1963, at A4.

220. *Water Supplies Will Be Adequate for Southland Users, MWD Says*, L.A. TIMES, June 5, 1963, at 2.

221. William MacDougal, *California Loses Long Water Suit. Supreme Court Splits 5-3 in Favor of Arizona's Claim*, L.A. Times June 4, 1963, at 1.

222. *State Will File Water Case Appeal: Rehearing to be Asked in Colorado River Defeat*, L.A. TIMES, June 12, 1963, at A1.

223. Ed Ainsworth, Op-Ed., *Feud Continues on the Colorado*, L.A. TIMES, June 5, 1963, at 22.

224. John Averill, *Udall Seeks to Calm Fears He'll Favor Arizona's Side; Says Worries of Californians Are Unfounded*, L.A. TIMES, June 4, 1963, at 2.

Some Californians began planning to block Arizona from using its full allocation of Colorado River flow. The state attorney general, Stanley Most, echoed the sentiments of many in California who were savvy about the state’s water issues when he stated, “water will not be short in California until new projects in other states have been authorized by Congress and completed.”²²⁵ Californians were confident they could determine when or whether such projects were initiated because their thirty-eight congressmen could reject any proposed federal water projects on the Colorado that they felt were disadvantageous for the state.²²⁶ An *L.A. Times* editorial used more combative terms: “It is in Congress . . . that the fight for water justice must be waged. The first action should be a moratorium on any new projects on the Colorado until the secretary’s powers are spelled out.”²²⁷

In the water-rich East, reactions were more detached and subdued. The *Washington Post* stated of the Court’s opinion: “The solution thus effected seems to us equitable in accord with the agreement among the states, and conducive to a balanced development of the West.”²²⁸ The *Post* acknowledged, “California is naturally disappointed, but it can draw on water resources in the northern part of the state.”²²⁹ “Arizona,” however, “is almost entirely dependent on the Colorado. The state is now overdrawing its water supply by 2.5 million acre-feet per year, and its population is growing rapidly.”²³⁰ Instead of reflecting on whether the ruling was a “smashing victory”²³¹ or whether it necessitated a “fight for water justice,”²³² the eastern media’s focus was on Washington’s, particularly Secretary Udall’s, efforts to going forward for “a regional approach to the water needs of the rapidly growing Pacific southwest.”²³³

D. A New Water Future for Arizona

Several aspects of the decision suggest that the ruling was a “smashing victory” for Arizona. Arizona obtained rights to a specific quantity of the Colorado River water. It had been seeking such an adjudication for decades. In addition, the Court rejected the claim by California that its rights should be judged by the prior appropriation doctrine, a ruling that would have greatly favored California, which had been diverting millions of acre-feet for decades. Using the prior appropriation doctrine would have significantly limited Arizona’s rights because Arizona still had not secured its long-desired delivery system for moving water from the Colorado River to Phoenix and Tucson.

225. Statement by California Attorney General, Stanley Most, *Congressmen Called State Water Guards*, L.A. TIMES, June 4, 1963, at 2.

226. *See id.*

227. Editorial, *Muddy Verdict on the Colorado*, L.A. TIMES, June 6, 1963, at A4.

228. *Water for Arizona*, WASH. POST, June 6, 1963, at A20.

229. *Id.*

230. *Id.*

231. *See High Court Water Ruling Called Smashing Victory*, *supra* note 10, at 3.

232. *See Muddy Verdict on the Colorado*, *supra* note 227, at A4.

233. William M. Blair, *Colorado Water Stirs New Crisis: Arizona Diversion Plan May Involve Administration*, N.Y. TIMES, June 12, 1963, at 68.

By protecting Arizona's rights to the Gila River, the ruling had also quelled fears that haunted Arizona since negotiations over the Colorado River Compact began. Water from the Gila River would not count against Arizona's 2.8 maf apportionment, and the United States' obligation to the Republic of Mexico would have to be shared by all Colorado River basin states.²³⁴

California, which had been diverting more than 5 maf from the River, would now be limited to 4.4 maf. In the decades between the BCPA and the Court's decision, however, state leaders believed that the River had much more water than had been allocated. On the basis of this assumption, California had already contracted with the Secretary of the Interior for a total of 5,362,000 acre-feet of Colorado River water.²³⁵ To transport this water, California had built expensive aqueducts, which had supplied southern California farms and cities with Colorado River water for decades.²³⁶ *Arizona v. California* cut back California's water right by 962,000 acre-feet. Most of this water would come from the Metropolitan Water District—the supplier to Metropolitan Los Angeles.

Finally, the opinion paved the way for Arizona to seek approval of and funding for the Central Arizona Project. California had stonewalled the state's long-coveted project for years because Congress refused to consider the matter unless and until Arizona had specific contracts with the Secretary or had obtained a judicial decree allocating specific rights to water from the Colorado River.

It would seem that the final iteration of *Arizona v. California* was a “smashing victory” for the state of Arizona. Ironically, the Boulder Canyon Project Act of 1928, which Arizona opposed, had secured most the benefits ‘won’ in this Supreme Court decision.

Arizona had always been unhappy about the limits imposed on it by the respective documents. But Arizona did not have a use for the additional water it was fighting for beyond a hazy idea for a massive canal project to bring Colorado River water to Phoenix. California, on the other hand, did have a present use for the River's water. To prevent

234. See *Arizona*, 373 U.S. 574-75, 637. California's claim that water from the Gila should count towards Arizona's total Colorado River apportionment was always a weak one, given the plain language in Section 8 of the BCPA. See Boulder Canyon Project Act, 45 Stat. 1057 (1928), 43 U.S.C. § 617 (1928).

235. *Arizona*, 373 U.S. at 562.

236. The Colorado River Aqueduct began delivering water to MWD water users in 1941. *Parker Dam and Power Plant*, U.S. BUREAU OF RECLAMATION, <http://www.usbr.gov/lc/region/pao/brochures/parker.html> (last visited September 9, 2013). The All-American Canal, completed in 1940, replaced the Alamo Canal - which was more vulnerable to flooding and primarily ran through Mexico - supplying the Imperial Irrigation District. ERIC A. STENE, U.S. BUREAU OF RECLAMATION, ALL AMERICAN CANAL: BOULDER CANYON PROJECT 11 (reformatted, reedited, reprinted by Brit Storey, Dec. 2009). The Coachella Canal diverts water from the All-American Canal. It was completed in 1949 to supply water to the Coachella Valley. *Where Does My Water Come From?*, COACHELLA VALLEY WATER DISTRICT, <http://www.cvwd.org/about/wherewater.php#canal> (last visited October 19, 2013).

California from gaining rights to the entire flow of the Lower Basin, Arizona embarked on a decades long obstructionist strategy that was, in the end, utterly unsuccessful. In the meantime, the population of California had grown substantially and the State had signed contracts with the Secretary for 5.3 maf. So, by the time Arizona was ready to use the water that it initially rejected as not enough, the water was no longer available.

If the U.S. Supreme Court in *Arizona v. California* used the established equitable apportionment doctrine, it might have used the prior appropriation doctrine embraced by both Arizona and California, as the Court had done in *Nebraska v. Wyoming*. This would have resulted in California getting more than the 4.4 maf it was apportioned in the BCPA. Instead, Arizona convinced the Court to venture from its established doctrine and subscribe to a new rationale, effectively cutting California back to 4.4 maf. The answer to the riddle, therefore, could be stated this way: Arizona’s “smashing victory” in the 1963 Supreme Court decision was a success, not because Arizona won what had already been awarded to it through the BCPA, but because Arizona lost its BCPA allocation to California largely through its own missteps, then pulled a rabbit out of a hat.

E. Colorado River Basin Project Act of 1968 and the Central Arizona Project

Arizona v. California was an absolute predicate if Arizona was to secure funding for construction of the Central Arizona Project. Now armed with the Supreme Court’s 1964 decree awarding the state 2.8 maf and protecting the state’s rights to the Gila River and its tributaries, there would be plenty of water to fill the Central Arizona Project canal. There were still several years of political battles with California to overcome before the CAP was officially approved. The process culminated in 1968, with the Colorado River Basin Project Act (CRBPA).²³⁷ But what Arizona won in one breath was taken away in the next. The CRBPA secured the support of California’s congressional delegation for funding of the CAP, but Arizona had to concede to California that, during times of shortage, California’s 4.4 maf would be superior to the rights of both Nevada and Arizona.²³⁸ Indeed, the 1.4 maf of Arizona’s rights that would be delivered through the Central Arizona Project were relegated to the lowest priority level—a necessary concession to get the support of California’s congressional delegation. At the time, this did not seem to be a big deal. Most observers believed that the River routinely carried 20 to 22 maf.²³⁹ But subsequent analysis by scientists at the University of Arizona Tree Ring Laboratory showed that the annual reliable supply of the River is closer to 13 or 14 maf.²⁴⁰ With these adjusted flows, the lowest priority goes from “no big deal” to a potential catastrophe.

This concern is magnified when one considers the recent increase in water use in the Upper Basin. The negotiations and conflicts leading up to and including *Arizona v. California* and the approval of the CAP were carried out with the underlying assumption that

237. Colorado River Basin Project Act (CRBPA) §§ 101-605; 43 U.S.C. §§ 1501-1556.

238. CRBPA § 301(b).

239. See HUNDLEY, *supra* note 18, at 308-09.

240. See *id.*

the Upper Basin would never use its entire 7.5 maf share. Congress ended up approving the CAP with full knowledge that much of the water for the project would come from the Upper Basin's unused apportionment, and the Upper Basin went along with the decision because of their belief that the Compact protected their water interests.²⁴¹ That the Upper Basin will in the near future use enough of its water to push up against the Lower Basin's established uses now seems inevitable. When this moment comes, the Basin states will discover whether the Upper Basin's reliance on the water rights provided to it by the Compact was justified.²⁴² If not, another great water conflict might be in the Basin's future.²⁴³

Although Arizona could be said to have achieved a "smashing victory" in the battle over the allocation of Colorado River water rights in *Arizona v. California*, the River's inherent inconsistencies combined with increased variability in future years due to climate change and the looming issue of the Upper Basin's rights mean that the war over the River's flow is not over.

CONCLUSION: FROM SURPLUS TO SHORTAGE

Over the last twenty years, the Law of the River has worked, thanks partly to previously unimagined cooperation among the seven Basin states. What began in the 1990s with intense discussions about developing criteria for sharing *surplus* on the river, turned quickly to an urgent need to develop criteria for sharing expected *shortages* on the River, and morphed into a remarkable recognition by the Bureau of Reclamation that the era of large-scale augmentation projects was over. Finally, new Minutes to the 1944 U.S.-Mexico treaty brought Mexico into the seven Basin states discussions as a full partner regarding both surpluses and shortages, while simultaneously embarking on a trial program to ensure flows to the Colorado River Delta.

Even though the 1964 Decree in *Arizona v. California* made clear that California's rights were 4.4 maf, the state continued to divert in excess of 5 maf annually. It did so thanks to a provision in the Decree that allows the Secretary of the Interior to declare the River in a surplus condition and authorize a state to use some of that surplus water.²⁴⁴ From the 1960s until the new millennium, that surplus condition existed primarily because the Upper Basin States used a relatively small fraction of their entitlement and Arizona, even after the completion of the Central Arizona Project, still only used a fraction of its rights.²⁴⁵ Secretary of the Interior Bruce Babbitt, the former Governor of Arizona, promulgated Interim Surplus Guidelines in 2001. But, in deference to objections by Arizona and other

241. MacDonnell, *supra* note 2, at 419.

242. *Id.*

243. *See id.* at 419-20.

244. *See* Decree § IIB6, *Arizona v. California*, 373 U.S. 546 (1963) (No. 8).

245. *See* A.R.S. §§ 45-2401 to 2491 (2013).

Basin states, he insisted that California develop a plan for reducing its diversions from 5.3 maf to its allotted 4.4 maf. California created such a plan in 2003.²⁴⁶

Meanwhile, another development completely shifted the focus from surplus to shortage. In 1996, the Arizona legislature created the Arizona Water Bank, an apparently innocent-sounding conservation mechanism by which the state would store its currently unneeded excess allocation of Colorado River water in aquifers around the state.²⁴⁷ The creative geniuses behind this plan, Rita Pearson, then-Director of the Department of Water Resources and her chief legal counsel, Mike Pearce, dressed this up as a sensible, long-term conservation program that demonstrated how a state as arid as Arizona could protect itself in the future by saving for the rainy day, or lack thereof. But, it was also a reaction to what had long been a source of irritation to Arizona officials—that California continued to divert so much more water than it was allotted.

Between 1997 and 2013, the Central Arizona Project stored more than 2 maf in recharge basins around the state.²⁴⁸ The amount stored rises to 8 maf when one also considers the use of CAP water in lieu of groundwater for agricultural irrigation.²⁴⁹ In a couple of years, Arizona moved from diverting roughly 700,000 af to diverting almost 1.4 maf—the entire Central Arizona Project allocation.²⁵⁰ Arizona also began to bank water for the State of Nevada.²⁵¹ A 2001 agreement between the two states, authorized by the Secretary of the Interior in regulations adopted in 1999, allows Arizona to recharge excess Colorado River water for Nevada in Arizona aquifers.²⁵² Nevada may subsequently recover this water, which it will take from Lake Mead, while Arizona will take less water through the Central Arizona Project.

246. Quantification Settlement Agreement and Related Agreements and Documents, *supra* note 233.

247. A.R.S. §§ 45-2421 (1996).

248. See David Modeer, Guest Column, *CAP Continues its Strong Role to Ensure Access to Colorado River Water*, ARIZ. DAILY STAR, May 10, 2012, available at http://azstarnet.com/news/opinion/guest-column-cap-continues-its-strong-role-to-ensure-access/article_003172f9-9685-5577-9f8b-3b23c7e9e1ba.html. For a discussion of water banking, see Carlos D. Ronstadt, *Water Banking in the United States*, 58 ROCKY MT. MIN. L. INST. _____ (2012). For more on the Arizona Water Bank and interstate water banking, see Robert J. Glennon & Peter W. Culp, *The Last Green Lagoon: How and Why the Bush Administration Should Save the Colorado River Delta*, 28 ECOL. L.Q. 903, 937-39 (2002).

249. Modeer, *supra* note 248.

250. The CAP is currently under contract for 1.415 maf. CENTRAL ARIZONA PROJECT, SUBCONTRACT STATUS REPORT OCTOBER 2012 (October 1, 2012), available at <http://www.cap-az.com/index.php/departments/water-operations/allocations>.

251. See generally Ronstadt, *supra* note 248.

252. UNIVERSITY OF ARIZONA WATER RESOURCE RESEARCH CENTER, LAYPERSON’S GUIDE TO ARIZONA WATER 15 (2007).

These developments, along with the onset of a multi-year drought, removed any plausible claim that the River was in a condition of surplus. Almost overnight, discussions among the seven Basin states moved from surplus to shortages.

Adding to the urgency were continuing reports from the University of Arizona Tree Ring Laboratory that confirmed that, over a 500 or 1000-year period, the average annual flow in the River at Lee Ferry was in the range of 13 to 14 maf, not the 18 to 20 maf as anticipated by the framers of the 1922 Colorado River Compact.²⁵³

These stresses on the system, rather than encouraging a bunker mentality that in the past often prompted litigation, led to unprecedented consultation and collaboration among the seven Basin states. The net result was, that in December 2007, the Secretary of the Interior adopted the 2007 Interim Guidelines. They provide for coordinated operations of Lake Mead and Lake Powell and for the implementation of both shortages and surplus conditions on the River. The heart of the guidelines is a set of incentives to develop additional water supplies through extraordinary conservation; system efficiency improvements; and augmentation projects. The guidelines allow for Intentionally Created Surplus [ICS] created through extraordinary conservation activities, including fallowing of currently irrigated land and lining of unlined canals. The guidelines do not formally reallocate water from one state to another, but they allow for the possibility of one state using water that, by the law of the River, belongs to another state.²⁵⁴ The ICS proposal has taken hold with the construction of the Drop 2 Reservoir in California that captures ordered but unneeded water from contractors in Imperial and Coachella Valleys. Largely paid for by Las Vegas, the stored water in the reservoir effectively allows Las Vegas to divert more water from Lake Mead.²⁵⁵

The Republic of Mexico was not covered by the 2007 Interim Guidelines, though the Basin States were interested in including Mexico in any shortage sharing system. This came to pass after Mexico suffered a massive earthquake in April 2010 that destroyed much of the irrigation infrastructure in the Mexicali region. The Basin States, together with officials from the State Department and the Republic of Mexico, came together to agree on two minutes to the 1944 U.S.-Mexico treaty. Minute 318 is a binational agreement that defers deliveries to Mexico by holding the water in Lake Mead that Mexico can call on later. Minute 319 continues this deferral period and also establishes a trial for securing flows to the Colorado River Delta.²⁵⁶

253. HUNDLEY, *supra* note 19, at 308-09.

254. See Robert Glennon and Michael J. Pearce, *Transferring Mainstem Colorado River Water rights: The Arizona Experience*, 49 ARIZ. L. REV. 235, 253 (2007).

255. Southern Nevada Water Authority, Intentionally Created Surplus, http://www.snwa.com/ws/river_surplus_ics.html (last visited September 9, 2013).

256. For more on Minutes 318 and 319, see John Entsminger & Peter Culp, *Water Law at the U.S.-Mexico Border: Minute 318 to the 1944 U.S.-Mexico Treaty*, AMERICAN BAR ASSOCIATION ANNUAL WATER LAW CONFERENCE, Las Vegas, Nevada, June 2013.

In December 2012, the U.S. Bureau of Reclamation released its long-awaited Colorado River Basin Water Supply and Demand Study.²⁵⁷ This study gives the 40 million inhabitants of the Colorado River Basin a sober look at a future constrained by climate change, increasing demand, and decreasing supply.²⁵⁸ The study projected future supply and demand scenarios. In the most optimistic one, the future will be similar to the past. A slightly less optimistic vision assumed that the future would resemble the reconstructions of stream flow over a long period—some 1,250 years. A more gloomy future is represented by a blend of the long-term reconstruction and what has been observed in the last hundred years. And the most ominous scenario projects that the climate will continue to warm with regional precipitation and temperature trends calculated based on more than one hundred global climate change models.

The study’s embrace of the reality of climate change is both welcome and significant. The study predicts that the mean natural flow of the Colorado River over the next 50 years will decrease by approximately nine percent, and be accompanied by a projected increase in the frequency and duration of droughts.²⁵⁹ As the supply goes down, the study predicts the demand will rise, fueled in part by population, which is expected to grow from roughly 40 million people to between 49 and 76 million. Depending on scenarios of projected population change, both the Upper and Lower Basin states will require more than their 7.5 maf apportionments.²⁶⁰

Now comes the scary part. When the Bureau of Reclamation compared the median supply projections against the median demand projections, it forecast a long-term projected imbalance of 3.2 maf by 2060. Let’s remember that this is the *median* imbalance. If climate change results in lower river flows, this number will balloon upwards.²⁶¹

This study is nothing less than a proclamation by the Bureau of Reclamation that the era of reclamation has ended.²⁶² The era of new dams, pipelines, and canals to “make the desert bloom” is not a viable option in the 21st Century. To be sure, there are still some surreal solutions out there that would involve Rube Goldberg options, such as diverting from the Missouri River over the Rocky Mountains to arid areas in the West. Although it was unfortunate that initial news reports associated with the release of the study focused

257. U.S. BUREAU OF RECLAMATION, COLORADO RIVER BASIN WATER SUPPLY AND DEMAND STUDY (Dec. 2012) *available at* <http://www.usbr.gov/lc/region/programs/crbstudy/finalreport/index.html>.

258. *See* Robert Glennon & Peter Culp, Op-ed, *West Must Strive for Water Sustainability*, ARIZ. REPUBLIC, Jan. 5, 2013, http://www.azcentral.com/arizonarepublic/opinions/articles/20130102-glennon-culp-west-must-strive-water-sustainability.html?nclick_check=1.

259. *See* U.S. BUREAU OF RECLAMATION, *supra* note 257, at ES-5. For the four scenarios, *see* study *id.* at ES-4.

260. *See id.* at ES-5, -6.

261. *See id.* at ES-6.

262. *See* Glennon & Culp, *supra* note 258.

attention on the proposed Missouri River pipeline, it is important to realize that the study did not endorse this option.

The study, in fact, was agnostic as to all options. Whatever was proposed by whomever received careful and neutral attention by the Bureau of Reclamation. This approach resulted in considering approximately 160 “solutions” to close the gap between supply and demand. A dozen or so of these involved business-as-usual proposals for major new infrastructure. But what is important is that the study found that *none* of these ideas were cost-effective relative to the enormous potential for water savings from water conservation, increased reuse, local desalination, and other strategies that focus on cities and farmers living within their means.²⁶³ The study concludes that there are options in the Colorado River Basin for a sustainable future, and those options do not include transporting water over mountain ranges.

If we are to achieve this sustainable future, the path forward must not be litigation, but cooperation and collaboration, as was evident in the process that led to the 2007 Interim Guidelines. Colorado River stakeholders should engage in a dialogue that recognizes that viable alternatives to litigation offer the best prospect for our future.

263. See U.S. BUREAU OF RECLAMATION, *supra* note 257.