"It is thus manifest that in the lower basin the water of the Colorado River System is 'more than an amenity'; it is more than a 'treasure'. It is indispensable to life; no substitute for it has yet been invented or envisaged." (Special Master Simon H. Rifkind, in report to U.S. Supreme Court, 1960.)

THE ARIZONA-CALIFORNIA LAWSUIT — longest, most complicated, most costly litigation in the history of water development — has been decided by the U.S. Supreme Court. Decided, but not settled. This suit has involved more people, more water and greater property values than any other water case . . . More than 300 witnesses, nearly 50 attorneys, 4,000 exhibits, 25,000 pages of transcript. Total cost: Probably over $5 million. California alone spent two to three million. At stake: The economic future of Arizona and Southern California. Plus vital water supply interests of other Colorado River basin states, including Colorado.

WHAT WAS IT ALL ABOUT? The water war between Arizona and California over Colorado River water has been going on for more than 30 years. In the beginning, Arizona aligned herself with Southern California interests and pressed hard for lower basin water development.
Both sides agreed to use the compact method to settle interstate water rights disputes. But they didn't stay hitched very long. Arizona wanted to divert Colorado River water to irrigate millions of Arizona acres. But high lift pumping was required and reclamation engineers labeled Arizona's plan infeasible. Instead, they backed California's plan (Fall-Davis report) for an all-American canal from the Colorado River to the Imperial Valley and a dam in Boulder Canyon. The Fall-Davis report raised strong fears in upper basin states that faster growing lower basin states, particularly California, would gobble up the Colorado River water under the prevailing law of prior appropriation (first in time, first in right).

In 1922, only four months after the Fall-Davis report was released, U.S. Supreme Court (Wyoming v. Colorado) held that the doctrine of prior appropriation could be given interstate effect. This intensified upper basin fears that they would not get their fair share of Colorado River water. The seven basin states appointed compact commissioners who negotiated for nearly a year and finally reached an agreement known as the Colorado River Compact. Negotiators failed to achieve their primary objective: agreement on each state's share of the water. Best they could do was accept a compromise suggested by Secretary of Commerce Herbert Hoover. It divided the Colorado River basin into two parts, separated at a point on the river in northern Arizona known as Lee Ferry. It attempted to apportion the water supply equally between both basins.
by stating that upper basin should deliver 7.5 million acre feet
per year to the lower basin at Lee Ferry, on a 10-year average
basis. **Dedicated compact negotiators** tried hard, but they
underestimated the water supply and they overestimated the
understandability of their compact.

Special Master Simon Rifkind: "I have no doubt that if the
distinguished negotiators who wrote the (Colorado River)
Compact had defined the terms they were using, we would be
spared a great deal of agony and grief. But when you project
a new concept . . . and don't define it, you are inviting
difficulty, and that is the difficulty we are struggling with."

**Failure of the Compact** to determine each state's share of
water left Arizona and Nevada with fears that California would use
the **law of prior appropriation** to get for herself the lion's share
of the water allotted to the lower basin. Also, Arizona intensely
resented the Compact's inclusion of **Colorado tributaries** in its
allocation scheme. Arizona alone, of all the states in both basins,
refused to ratify the Compact. Between 1922 and 1927 California's
Congressman Swing and Senator Johnson made three **attempts to pass bills**
authorizing construction of Hoover (Boulder) Dam and the All-American
Canal. **Arizona bitterly opposed** these bills, insisting on a definite
guarantee of water plus exclusive use of the tributary Gila River.
Finally, in 1928, the fourth Swing-Johnson bill passed Congress and
became the **Boulder Canyon Project Act**.

**Boulder Canyon Project Act** authorized construction of Hoover
Dam, the All-American Canal and related works. It also authorized
the three lower basin states to enter into an **agreement to apportion**
the lower basin's 7.5 million acre feet on this basis: 4.4 million acre feet to California, 2.8 to Arizona, 0.3 to Nevada. But it did not require them to do so and they didn't do it. The Project Act protected the upper basin against California, should Arizona refuse to ratify the Compact, by providing that the Act would not take effect until six states including California ratified the Compact and not until California legislature agreed to limit its annual consumption of Colorado River water to 4.4 million acre feet of the waters apportioned to lower basin states, plus half of any surplus unapportioned by 1963. California legislature lost no time in passing its Self Limitation Act. Six states (not Arizona) ratified the Compact and the Project Act became effective in 1929.

Arizona filed a complaint in the U.S. Supreme Court in 1930, asking that the Compact and the Project Act be declared unconstitutional. She asked for a permanent injunction which would prevent construction of Hoover Dam. The Supreme Court dismissed Arizona's complaint. In 1932, California divided up her water among various state interests who subsequently contracted with the Secretary of Interior for water deliveries totaling 5,362,000 acre feet. Arizona objected to California contracts for deliveries in excess of 4.4 million acre feet, declaring they were for surplus water which would not be divided until 1963. Metropolitan Water District of Southern California contracted for 1.2 million acre feet of this "surplus water." Then MWD went after the water. MWD proposed another big
federal dam at Parker and a 242-mile aqueduct from the Colorado River to the Los Angeles metropolitan area.

This was the last straw for Arizona. Southern California had grabbed the Hoover Dam hydroelectric power and now she was after more than her share of the water for her cities while Arizona remained a desert. Arizona's governor put his state militia on a boat and they steamed up the Colorado River to Parker, where work on the dam was underway. The "Arizona Navy" remained anchored for months, delaying the contractor. But to no avail. Parker Dam and the Colorado River Aqueduct were built, with MWD supplying most of the money.

Arizona brought action in U.S. Supreme Court in 1934 aimed at protecting her rights to use of Gila River water. But the Court refused to hear the case. Arizona brought another action against California in the U.S. Supreme Court in 1936, seeking equitable apportionment of Colorado River water. Again, the high court refused to accept jurisdiction. Reasons: Arizona had not ratified the Compact and therefore could not claim benefits from stored water. Arizona had no definite plans for use of this water. And the U.S. was a necessary party to the litigation.

Then Arizona went on the offensive. In 1944 she contracted with the Secretary of Interior for delivery of 2.8 million acre feet of Colorado River storage in Lake Mead (over strenuous California objections). Then she ratified the Compact and appropriated $200,000
for Bureau of Reclamation cooperative investigations. This led to attempts, beginning in 1947, to obtain congressional authorization of the billion dollar **Central Arizona Project.** The project bill passed the Senate twice, but couldn't get by the House. Southern California congressmen insisted that the project's proposed 1.2 million acre foot annual diversion would be an invasion of California's water rights and that Arizona first had to clear title to the water. Californians stated that litigation should lead to a settlement in one or two years. In 1951, House Interior Committee deferred action on the Central Arizona Project, until the water rights issue could be settled by arbitration, negotiation or litigation. Litigation was Arizona's only hope.

Arizona embarked, with some misgivings, on the biggest water lawsuit of all time. In 1952, she brought suit against the State of California and six Southern California water agencies in the U.S. Supreme Court, to quiet title to 1.2 million acre feet of Colorado River water. She assigned trial responsibility to the Arizona Interstate Stream Commission.

**Arizona Interstate Stream Commission:** "This suit is not of our choosing. We were forced into it. Our sole and remaining hope is the Supreme Court of the United States. Before that Court, neither wealth nor political power can prevail. In that Court all are equal—the rich and the poor—the mighty and the meek alike receive justice from that Court...After a quarter of a century the question is to be resolved. Because we know we are right, we must prevail."
Arizona overlooked one point. All may be equal before the highest court in the land. But all are not equally prepared!

Southern Californians had been preparing for years for a showdown on interpretation of Colorado River documents. They had retained Northcutt Ely, a brilliant water lawyer. They had applied the contested water to beneficial use. This time the Supreme Court accepted jurisdiction and appointed a special master, attorney George Haight of Chicago, to hear the case. California moved at once to bring upper basin states into the suit. Arizona and the upper basin states objected. After two years of investigation, Haight recommended against bringing in the upper basin states, but said Utah and New Mexico should be made parties in their lower basin capacities. Two weeks after rendering this opinion, Haight died. He was replaced by Simon Rifkind, New York attorney and former federal judge. The Supreme Court sustained Haight's recommendation. Colorado evidently thought this ended her responsibilities in this suit. History may show that Colorado erred tragically in not having an observer assigned to this lawsuit.

The long suit finally got underway in San Francisco in June, 1956, following intervention by Nevada and intervention by the U.S. in behalf of lower basin Indians. Arizona got off to a bad start, fumbled the legal ball, changed lawyers in mid-stream amid much back-home criticism. Then she struggled on, in an uphill battle against the massive competence of California's lawyers and engineers.
Arizona based its claim on the doctrine of equitable apportionment as outlined in the Project Act. California based its claim on the doctrine of prior appropriation. The trial lasted until August, 1958. In May, 1960, Master Rifkind submitted his findings and recommended decree in a 433-page report to the Supreme Court. Rifkind fooled the crystalballers and ruled against California. He gave Arizona and the U.S. virtually everything they wanted. He apportioned Colorado River water among lower basin states without regard to interstate priorities: 4.4 million acre feet to California, 2.8 to Arizona, 0.3 to Nevada, with shortages shared on a pro rata basis. News of Rifkind's report burst over Southern California like an unexpected nuclear blast. There was shocked disbelief, bitter disappointment, outcries of "dire consequences", agonizing reappraisals of monies spent and commitments made.

In Arizona: Bright sunshine, peace and understanding, green light visions of a start on the long-delayed, billion dollar Central Arizona Project.

Northcutt Ely struggled and fought for Southern California's lifeblood before the Supreme Court in subsequent briefs and oral arguments. But most observers did not expect the high court to make more than token changes in its special Master's recommendations. On June 3, 1963, the Supreme Court announced its decision in a 52-page opinion written by Justice Black. It upheld Rifkind's water apportionment, but it tossed Rifkind's shortage sharing idea out the window and gave, instead, full authority to the Secretary of Interior.
Justice Black: "While pro rata sharing of water shortages seems equitable on its face, more considered judgment may demonstrate quite the contrary. Certainly we should not bind the Secretary to this formula. We have held that the Secretary is vested with considerable control over the apportionment of Colorado River waters. And neither the Project Act nor the water contracts require the use of any particular formula for apportioning shortages. While the Secretary must follow the standards set out in the Act, he nevertheless is free to choose among the recognized methods of apportionment or to devise reasonable methods of his own. This choice, as we see it, is primarily his, not the Master's or even ours. And the Secretary may or may not conclude that a pro rata division is the best solution."

The Supreme Court rejected California's attempt to include about two million acre feet of tributary water, particularly Arizona's Gila River, in the lower basin allocation. By so doing it sidestepped what upper basin states, including Colorado, consider to be an important problem. On reservation of water for Indians, the high court accepted Rifkind's finding that when the U.S. created Indian reservations or added to them, it reserved not only the land but also the use of enough water to irrigate the irrigable portions of the reserved lands. Coloradans note this: The Supreme Court upheld the Master's ruling that the principle underlying reservation of water rights for Indian reservations was "equally applicable to other federal establishments such as National Recreation Areas and National Forests". The high court added "all uses of mainstream water within a State are to be charged against that State's apportionment, which of course includes uses by the United States."
Supreme Court Justice William O. Douglas dissented from the majority opinion in unusually harsh terms. In his written dissent, Douglas called the ruling "the baldest attempt by judges in modern times to spin their own philosophy into the fabric of the law, in derogation of the will of the legislature." This was surprising, because Justices Douglas and Black have usually stood together, in cases where states' rights conflicted with federal powers, on the side of greater federal authority. Even more surprising was the manner in which Justice Douglas spoke out from the bench against his long-time friend, stating that Black's opinion read "more like a congressional committee report than a judicial opinion".

Douglas added, "The advantage of a long opinion...is that it is very difficult to see how it failed to reach the right result, because one gets lost in words".

Justice Douglas: "The present decision...grants the federal bureaucracy a power and command over water rights in the 17 Western States that it never has had, that it always wanted, that it could never persuade Congress to grant, and that this Court up to now has consistently refused to recognize. Our rulings heretofore have been consistent with the principles of reclamation law established by Congress both in nonnavigable streams...and in navigable ones...The rights of the United States as storer of waters in western projects has been distinctly understood to be simply that of 'a carrier and distributor of water'...

"The principle that water priorities are governed by state law is deepseated in western reclamation law. In spite of the express command of (paragraph) 14 of the Project Act, which makes the system of appropriation under state law determine who has the priorities, the Secretary of Interior is given the right to determine the priorities by administrative fiat. Now one can receive his priority because he is the most worthy Democrat or Republican, as the case may be."
"The decision today, resulting in the confusion between the problem of priority of water rights and the public power problem, has made the dream of federal bureaucracy come true by granting it, for the first time, the life-and-death power of dispensation of water rights long administered according to state law."

Justice Harlan, joined by Justices Douglas and Stewart, expressed misgivings about the amounts of water (about 1 million acre feet) allocated to Indian reservations, then vigorously dissented from "the holding that in times of shortage the Secretary has discretion to select or devise any 'reasonable method' he wishes for determining which users within these States are to bear the burden of that shortage."

Justice Harlan: "In my view, it is the equitable principles established by the Court in interstate water-rights cases, as modified by the Colorado River Compact and the California limitation, that were intended by Congress to govern the apportionment of mainstream waters among the Lower Basin States, whether in surplus or in shortage. A fortiori, state law was intended to control apportionment among users within a single State...."

"The Court's conclusions respecting the Secretary's apportionment powers, particularly those in times of shortage, result in a single appointed federal official being vested with absolute control, unrestrained by adequate standards, over the fate of a substantial segment of the life and economy of three States. Such restraint upon his actions as may follow from judicial review are, as will be shown, at best illusory. Today's result, I venture to say, would have dumbfounded those responsible for the legislation the Court construes, for nothing could have been farther from their minds or more inconsistent with their deeply felt convictions."
NOW WHAT? The Supreme Court has given litigants until Sept. 16, to submit recommended decrees to carry out the opinion. If they can't agree, the Court will enter its own decree next October. Arizona lost no time in introducing congressional bills to authorize the Central Arizona Project. Arizona's 85-year-old dean of the Senate, Carl Hayden, chairman of the powerful Senate appropriations Committee, regards CAP authorization "the main thing I have left to do". But the administration is unlikely to antagonize Californians and help presidential aspirations of Arizona's Sen. Goldwater by pushing for authorization prior to the 1964 elections.

Interior Secretary Udall, a native Arizonan, may be buying political time, as well as promoting his regional water development philosophy, with a proposal for a comprehensive long-range program to develop the water and power resources of the lower basin states. This concept would erase state lines and concentrate on meeting the total water needs of the region. It has been described as "without parallel in the United States, with a significant bearing on water development in the 17 western reclamation states". Udall may now have a big stick to lend far-reaching significance to his much-quoted statement, "In the parched Pacific Southwest we can prosper together or slowly shrivel separately."
In California, the battle for Colorado River water has veered sharply toward the political arena. A hipshooting California congressman has suggested that Secretary Udall resign, because of his Arizona background and his new authority to adjudicate water allocations to Arizona and California. Chief Justice Warren's example of non-participation in the Arizona-California case because of his California background is cited as an example for Udall to follow. In the Imperial Valley: Talk of taking steps to have this lush agricultural valley annexed to Arizona. Attorney General Stanley Mosk (California) is reported to have said that more than $1 billion worth of water still is being contested in the Colorado River case.

Los Angeles Times: "This ($1 billion worth of water) is the water the Supreme Court agreed must be allocated in times of shortage by the secretary of interior...The water in question (900,000 acre feet) represents the difference between the 4.4 million acre feet California will inevitably be cut back to each year under the court's decision and the 3.5 million acre feet the state would have been allocated if the justices had adopted the Special Master's shortage allocation formula. The Attorney General said he is attempting to arrange a conference with California's congressional delegation to apprise the lawmakers of the decision's implications and the importance of blocking new Colorado River irrigation projects that would divert additional water." (June 6, 1963)

U.S. News & World Report: "But California is already using more than the full 4.4 million acre feet which it would be allotted. Its present use, in fact, is around 5.6 million acre feet." (6-17-63)

Assemblyman Porter: "We must bear in mind that at present there is no water shortage in the Colorado River so far as California is concerned and there will be none until there is upper basin development and the Central Arizona Project is constructed." (Los Angeles Times, 6-4-63)
Northcut Ely: "The court told us, in effect, to go to the secretary of the interior and then to congress, if necessary, to obtain a determination of how shortages should be allocated. To California, this question of shortages is the most important point in the lawsuit and always has been. ...we feel Congress will give us this (full) protection or close to it. As for Secretary of the Interior Stewart Udall and his Arizona background--well, we'll just have to assume that he will follow a highly honorable course."
(Los Angeles Times, 6-5-63)

Los Angeles Times: "It is in Congress then 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. Equity requires that any specific allocation authority granted to the secretary be based on the protection of the priorities of already established projects. This is fundamental in any settlement of water rights and if the Supreme Court did not recognize it, the Congress should." (Editorial, 6-6-63, "Muddy Verdict On The Colorado").

Sen. Clair Engle of California: "I do think, however, that the unbridled power given to the secretary of interior by this decree must be viewed with great alarm." (LAT, 6-6-63)

Los Angeles Times: "Leading authorities on water law predicted that the Supreme Court decree heightens prospects that Congress will curb the government's water rights. One water rights expert...said 'The court's decision certainly can be interpreted as a threat to water rights in all 17 western states'. On Capitol Hill, several western legislators predicted there will be legislation to limit the authority of the executive branch to assert rights to water originally on federal lands." (6-6-63)

L. R. Kuiper, Colorado Water Conservation Board: "If any justification is needed to support the statement by Mr. Sparks at a recent Board meeting that immediate action is necessary to determine questions and answers relating to the Colorado River Compact, this document (Statement by Colorado River Board of California) appears to be it...If we accept these figures, which at present we do not, the sum...indicates that uses in the Lower Basin already exceed our interpretation of the Colorado River Compact by at least 1,000,000 acre feet per year." (6-12-63)

ARE WE HEADED on a collision course toward major interbasin litigation involving interpretation of the Colorado River Compact and related documents?