Chapter 18
GUNBOATS ON THE COLORADO: INTERSTATE WATER CONTROVERSIES, PAST AND PRESENT

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Synopsis

§ 18.01 Introduction[*1]

In 1934 the federal government began construction of Parker Dam on the Colorado River, a dam that would straddle the border between Arizona and California. A major purpose of the dam was to supply water to the Metropolitan Water District of Southern California, which was paying the U.S. Bureau of Reclamation to construct the dam.[2]

Governor Benjamin Moeur of Arizona took umbrage at the fact that the federal government was building another dam on the Colorado River without the permission of the State of Arizona.[3] Arizona had previously sued the U.S. government and the other Colorado Basin States, without success, to prevent the construction of Hoover Dam and to have the Colorado River Compact declared unconstitutional.[4] Governor Moeur was determined that, this time, things would be different. This time, Arizona would mount military resistance.

Governor Moeur called out the Arizona National Guard, which commandeered two ferry boats named the "Nellie T" and "Julia B," which in turn were immediately dubbed the "Arizona Navy." These two ferry boats, filled with armed men, steamed into the waters of the Colorado with orders to prevent further construction. The standoff ended when Harold Ickes, the Secretary of the Interior, called a halt to construction until a U.S. Supreme Court order could be obtained against Arizona.[5] The United States soon filed a bill in the original jurisdiction of the Supreme Court seeking an injunction against the State of Arizona. A motion for a temporary injunction and order to show cause why a restraining order

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[*]Cite as John B. Draper & Jeffrey J. Wechsler, "Gunboats on the Colorado: Interstate Water Controversies, Past and Present," 55 *Rocky Mt. Min. L. Inst.* 18-1 (2009).

[1]Mr. Draper is or has been counsel for states involved in certain cases discussed in this chapter. He has been counsel of record for Kansas in Kansas v. Colorado, No. 105, Orig., and Kansas v. Nebraska & Colorado, No. 126, Orig., U.S. Sup. Ct. He is counsel of record for Montana in Montana v. Wyoming & North Dakota, No. 137, Orig. He also advises the State of New Mexico with regard to interstate issues on the Rio Grande. The authors wish to thank Leland Rolfs, Burke Griggs, Maria O'Brien, Christopher Grunewald, and Sarah Bond for their assistance. The positions expressed here do not necessarily represent the positions of any of the aforementioned states or persons.

[2]United States v. Arizona, 295 U.S. 174, 181 (1935). *See* Report of the Special Master, Arizona v. California, No. 8, Orig., at 33-34 (1960).

[3]David R. Berman, Arizona Politics and Government: The Quest for Autonomy, Democracy, and Development 161 (Univ. of Neb. Press 1998). The Attorney General of Arizona issued an opinion that the dam was illegal. Arizona Att'y Gen. Op. of July 31, 1933, *reprinted in* Two Opinions of the Att'y Gen. Furnished to Colo. River Comm'n of Ariz. (1933).

[4]Arizona v. California, 283 U.S. 423 (1931).

[5]Marc Reisner, Cadillac Desert: The American West and Its Disappearing Water 258 (Penguin Books 1986).

should not issue against the State of Arizona was also filed. The State of Arizona moved to dismiss the bill, and argument was heard by the Court on the motions.

This time, Arizona *was* more successful. The Supreme Court held that the federal government had failed to obtain an act of Congress authorizing the construction of the dam, that it had failed to obtain specific approval by the President of the United States, and that it had failed to obtain the recommendation of the Chief of Engineers and the approval of the Secretary of War, all as required by the reclamation laws. Therefore, the federal government's complaint was dismissed.[6]

Parker Dam was later authorized by Congress,[7] the necessary approvals were obtained, and the dam was constructed, but not before the State of Arizona was able to exact support in the form of federal irrigation project approvals.[8] Governor Moeur thereby provided one of the more colorful chapters in the development of legal principles concerning the balancing of state and national interests in interstate waters in our federal system of government.

As a result of controversies like these over the last century, an elaborate structure of Supreme Court decrees, interstate compacts, and congressional enactments controlling the apportionment and administration of interstate rivers has emerged. It is the purpose of this chapter to describe and analyze the first century of interstate water conflict, its impact on in-state uses, and unresolved controversies. First, the authors will describe the U.S. Supreme Court's central role in shaping interstate water allocations and the mechanics for bringing suit in the Court's original jurisdiction. Next, the methods of allocating interstate waters that have developed over the years will be discussed. Third, the authors will describe the developing area of enforcement of interstate allocations, including a discussion of certain controversies that were unresolved as of the date of this writing. Finally, the authors will address the impact of interstate allocations on in-state users.

§ 18.02 The Supreme Court and Interstate Water Disputes

[1] The Court's Central Role

The Supreme Court of the United States has played a critical and central role over the last century in shaping interstate relations with respect to rivers and other interstate resources. This is not entirely surprising, given the unique role of the Court in resolving controversies between

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[6] United States v. Arizona, 295 U.S. 174, 192 (1935).

[7] Act of August 30, 1935, 49 Stat. 1028, 1040.

[8] Robert J. Glennon, Water Follies: Groundwater Pumping and the Fate of America's Fresh Waters 193, 194 (2004).

states under the U.S. Constitution. In 1924, Charles Warren, a respected commentator, wrote:

> We Americans now are so accustomed to the Supreme Court and its peculiar place in our government, that we fail to realize what an absolute novelty the Federal Convention in 1787 was proposing for adoption by the people of the States. Never before in history had there existed a Court with the powers which this new tribunal was to exercise. For the first time, there now came into existence a permanent Court, which should have the power to summon before it sovereign States in dispute and to determine their respective rights by a judgment which should be enforceable against them.
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> Such a Court, with such functions, is the most original, the most distinctively American contribution to political science to be found in the Constitution. It is even more. It is the cement which has fixed firm the whole Federal structure.[9]

As we shall see, the Supreme Court, in the exercise of this extraordinary power, has articulated the theory of interstate relations inherent in the Constitution and the ramifications of that theory. It has provided the relevant principles that should be applied in allocating interstate waters. It has performed the function of actually making the interstate allocation in many instances. It has affirmed the power of Congress to make interstate allocations. It has encouraged the states to enter into compacts with the approval of Congress. It has also played a critical role in interpreting and enforcing interstate allocations, no matter which method was originally used to arrive at the allocation. The Court has recently entered into a new phase of this jurisprudence in which the Court is determining what principles apply to the enforcement of allocations, including the enforcement of its own decisions when a state fails to comply with the Court's decree interpreting and requiring compliance with a compact.

[2] Original Jurisdiction

In 1775, Benjamin Franklin made the first proposal to give the power to the federal government to settle disputes between the colonies, and it was John Dickenson of Delaware who in 1776 proposed such a power in the clause that became Article IX of the Articles of Confederation.[10] It has been said that this provision constituted an "entirely new expedient of statecraft."[11] Approximately one-eighth of the entire text of the Articles of Confederation was devoted to the procedure for resolution of interstate disputes. Article IX provided for a special court to be constituted by agreement of the states involved in the dispute, or by Congress, if the states

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[9] Charles Warren, The Supreme Court and Sovereign States 32 (Princeton Univ. Press 1924).

[10] *Id.* at 4-5. *See* Articles of Confederation, Art. IX, Const. art. 1, §§ 1-8, *available at* http://www.loc.gov.

[11] Warren, *supra* note 9, at 3.

could not agree. The judgment of the court was to be final and conclusive, even if one of the states refused to participate.[12]

Only one interstate case was tried pursuant to Article IX of the Articles of Confederation. It was *Pennsylvania v. Connecticut*, a territorial dispute, in which sovereignty over more than five million acres, including Scranton, Pennsylvania, and other cities, was at stake. The case was tried in Trenton, New Jersey, and resolved in favor of Pennsylvania in 1782.[13] Charles Warren has remarked on "how simply the States and the people of the day accepted the idea that sovereign States might and should appear before a Court, even before a Court having compulsory jurisdiction."[14]

The power under Article IX of the Articles of Confederation to resolve interstate disputes was converted, under the Constitution, into the power of the Supreme Court to resolve interstate disputes. Article III, Section 2, Clause 1 provides that the judicial power of the federal courts "shall extend . . . to Controversies between two or more States." Clause 2 provides that the jurisdiction of the Supreme Court shall consist of *appellate* jurisdiction over cases from such lower federal courts as the Congress may have ordained and established under Section 1 of Article III, and *original* jurisdiction over controversies involving certain kinds of parties:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those *in which a State shall be Party*, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.[15]

The original jurisdiction of the Supreme Court is the only jurisdiction established in the Constitution that may be exercised without enabling legislation by Congress.[16]

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[12] *Id*. at 5.

[13] *Id*. at 6-8, App. A at 99.

[14] *Id*. at 8.

[15] *Id*. (emphasis added).

[16] *See, e.g.,* Grayson v. Virginia, 3 U.S. (3 Dall.) 320 (1796). The Supreme Court heard argument recently with respect to the award of expert witness costs in *Kansas v. Colorado* to the effect that the Court's original jurisdiction is not subject to *regulation* by Congress, just as the Court had ruled in 1803 that the *scope* of its original jurisdiction could not be expanded by Congress. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803). The Court determined that it did not need to reach the constitutional or statutory questions presented because it chose to conform its original jurisdiction rule to the rule in the federal district courts. Kansas v. Colorado, 129 S.Ct. 1294, 1298 (2009).

In the Judiciary Act of 1789, Congress set the number of justices of the Supreme Court,[17] created the initial system of lower federal courts,[18] and provided that certain types of cases, in addition to the types specified in Article III of the Constitution, would lie in the Court's original jurisdiction.[19] The Court has stated that its jurisdiction "over controversies between two or more states was declared by the judiciary act of 1789 to be exclusive, *as in its nature it necessarily must be*."[20] This statement is consistent with the fundamental notion that the states waived their sovereign immunity from suit by another state in the Supreme Court, but not in any other court. The Judiciary Act further provided that certain types of original jurisdiction would be exclusive to the Supreme Court. The latter provisions concerning exclusive jurisdiction have been relied upon and enforced by the Supreme Court since 1789, but the additional areas of original jurisdiction added by the 1789 Act were struck down by the Court in 1803 in *Marbury v. Madison*.[21] In that case, Chief Justice John Marshall, speaking for a unanimous Court, declared the doctrine of Judicial Review, by which the Court may declare unconstitutional, and therefore null and void, an act of Congress that is contrary to the Constitution.

The creation of the power to resolve interstate controversies in the Supreme Court had the benefit of assigning such power to a body permanently constituted, not one specially formed upon the occasion of each interstate dispute. The permanence of the Supreme Court helped dispel the notion that states would not be treated fairly under the ad hoc system of the Articles of Confederation.[22] The Federalist Papers argued in support of this grant of power, and the Anti-Federalists did not oppose it.[23] The Supreme Court immediately took a confident stance towards its power to resolve controversies involving a state, even in the absence of the state, if it should refuse to appear.[24]

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[17] 1 Stat. 73, § 1 ("the supreme court of the United States shall consist of a chief justice and five associate justices").

[18] *Id.* §§ 2, 3.

[19] *Id.* § 13.

[20] Kansas v. Colorado, 185 U.S. 125, 139 (1902) (internal quotation marks omitted, emphasis added).

[21] 5 U.S. (1 Cranch) 137 (1803).

[22] Warren, *supra* note 9, at 12-13.

[23] The Federalist No. 80 (Alexander Hamilton); *see* Brutus, "Essays of Brutus" *in* The Anti-Federalist 174-176 (Herbert J. Storing ed., Univ. of Chi. Press 1985); Warren, *supra* note 9, at 33 ("the clause which gave jurisdiction to the Supreme Court over controversies between the States of the new Union received not a breath of opposition").

[24] *See* Grayson v. Virginia, 3 U.S. (3 Dall.) 320 (Ellsworth, Ch. J. 1796); New Jersey v. New York, 30 U.S. (5 Pet.) 284 (Marshall, Ch. J. 1831).

[3] Original Jurisdiction Procedure

[a] Initiation

Unlike the federal district courts, the Supreme Court will not necessarily take a case that falls within its original jurisdiction. This is true even when the Supreme Court's original jurisdiction is exclusive.[25] The action therefore begins with a motion for leave to file a bill of complaint.[26] This motion typically includes the initial pleading proposed to be filed and is accompanied by a brief in support. The state applying for relief must convince the Court that its cause of action lies within the Court's original jurisdiction *and* that it satisfies the Court's other criteria, which are: (1) the case must be of sufficient dignity and seriousness, and (2) there must be no alternative forum.[27] The Court has said, "[t]he model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign."[28] Interstate water cases generally fall into this category. In a prescient statement in 1925, Felix Frankfurter, later to become a Justice of the Court, and James Landis stated in their discussion of the benefits to be obtained by interstate water compacts, "no one State can control the power to feed or to starve, possessed by a river flowing through several States."[29]

The defendant state is allowed to file a responsive brief opposing the motion for leave to file the bill of complaint, and the plaintiff state is allowed to file a reply.[30] The Court then makes a decision on the motion, often inviting the views of the U.S. Solicitor General before ruling. In recent cases, the Court has agreed to consider motions to dismiss for failure to state a claim filed by the defendant state after the Court has granted the motion for leave to file, for the purpose of further testing the

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[25] Mississippi v. Louisiana, 506 U.S. 73, 76-77 (1992).

[26] *See* Sup. Ct. Rule 17.3.

[27] Mississippi v. Louisiana, 506 U.S. 73, 77 (1992).

[28] Texas v. New Mexico, 462 U.S. 554, 571 n.18 (1983) (citations omitted).

[29] Felix Frankfurter & James R. Landis, "The Compact Clause of the Constitution—A Study in Interstate Adjustments," 34 Yale L.J. 685, 701 (1925) (footnote omitted) (*quoted in* Texas v. New Mexico, 462 U.S. 554, 569 n.15 (1983)).

[30] *See* Sup. Ct. Rule 17.5.

legal sufficiency of the bill of complaint.[31] Since the existence of a cause of action is necessarily an issue addressed in briefing on the motion for leave to file, this extra preliminary step allows a second, more thorough, round of briefing on that issue.

[b] Parties

Water apportionment suits involve unique interests that "rise[] . . . above a mere question of a local private right. . . ."[32] A water apportionment action is "one between states, each acting as a quasi sovereign and representative of the interests and rights of her people. . . ."[33] In water apportionment suits in the original jurisdiction of the Supreme Court, the states are the real parties in interest. It is for this reason that the Eleventh Amendment does not preclude interstate water disputes. This issue was resolved in the first equitable apportionment suit before the Court. In *Kansas v. Colorado*,[34] Colorado asserted that the real parties in interest were the water users in each state. The Supreme Court disagreed. It decided that Kansas was the rightful plaintiff because it was acting "as parens patriæ, trustee, guardian or representative of all or a considerable portion of its citizens. . . ."[35] As a result, water claimants in the litigating states are bound by the Court's final decree, even though they were not parties to the suit.[36]

As illustrated by the gunboat standoff between the Secretary of the Interior and the Governor of Arizona, the United States has an interest in many interstate water disputes. In general, the United States has been allowed to intervene in equitable apportionment litigation if there is a significant federal interest at stake.[37] Likewise, other states have been

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[31] *See, e.g.,* Kansas v. Nebraska & Colorado, 527 U.S. 1020 (1999) ("Nebraska granted leave to file a motion to dismiss, in the nature of a motion under Rule 12(b)(6), Federal Rules of Civil Procedure. . . ."); Montana v. Wyoming & North Dakota, 128 S. Ct. 1332 (2008). In the Republican River case, the Court denied the motion to dismiss. Kansas v. Nebraska & Colorado, 530 U.S. 1272 (2000). The special master in Montana v. Wyoming & North Dakota, has recommended denying the motion to dismiss in that case. No. 137, Orig., Memorandum Op. of the Special Master on Wyoming' Motion to Dismiss Bill of Complaint 2 (June 2, 2009), *available at* http://www.doj.mt.gov/news/releases2009/20090603specialmasteropinion.pdf.

[32] Kansas v. Colorado, 206 U.S. 46, 99 (1907).

[33] Wyoming v. Colorado, 286 U.S. 494, 508-09 (1932).

[34] 185 U.S. 125, 138 (1902).

[35] *Id.* at 142.

[36] *See, e.g.,* Wyoming v. Colorado, 286 U.S. 494, 508-509 (1932); Nebraska v. Wyoming, 515 U.S. 1, 22 (1995) (interstate water disputes may be "resolved by compact or decree without the participation of individual claimants, who nonetheless are bound by the result reached through representation by their respective States").

[37] *See* Nebraska v. Wyoming, 304 U.S. 545 (1938).

allowed to intervene if their interests are significantly affected.[38] The Supreme Court made clear in *New Jersey v. New York*,[39] however, that it will not allow the original jurisdiction to be "expanded to the dimensions of ordinary class actions." The Court denied permission to the City of Philadelphia to intervene because the State of Pennsylvania was already a party.[40] The state, acting as parens patriae, represents the interests of its citizens, unless a party can show "some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state."[41] As a result, the Court has strictly limited intervention by non-state parties in water apportionment cases.

The question often arises whether the United States is an indispensable party to interstate litigation. The answer seems to depend on the degree and nature of the United States' involvement in the basin at issue. A suit brought by Texas against New Mexico under the Rio Grande Compact was dismissed because the United States was found to be an indispensable party and could not be joined.[42] The indispensability of the United States must be considered in light of each state's constitutional right to have its disputes with other states resolved by the Supreme Court.

[c] Proceedings Before a Special Master

Once a motion for leave to file has been granted and any motions to dismiss have been denied, the Court, if it has not already done so, will often appoint a special master. The Court will refer the case to him or her for further proceedings, after which the special master is to report back to the Court with recommendations.

The special master, on behalf of the Court, will manage the case, determine the scope of discovery, and rule on any related motions. Though not binding, the Federal Rules of Civil Procedure and Evidence "may be taken as guides."[43] Discovery can be quite lengthy in interstate water cases,

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[38] *See* Arizona v. California, 347 U.S. 985 (1954).

[39] 345 U.S. 369, 373 (1953).

[40] *Id.* at 372.

[41] *Id.* at 373.

[42] Texas v. New Mexico, 352 U.S. 991 (1957). This decision was later explained to have been based on the existence of Indian water rights in the basin that would necessarily be affected if the relief sought were granted. Idaho *ex rel.* Evans v. Oregon, 444 U.S. 380, 391 (1980).

[43] Sup. Ct. Rule 17.2.

requiring many months if not years to complete.[44] Typically, experts must be hired and given the opportunity to identify and investigate the relevant factual issues. After the experts have developed their opinions, each party must be given a fair opportunity to discover the opposing expert opinions and their foundations, and to prepare responsive reports. In the meantime, the special master may seek to resolve legal issues that do not require discovery. Trial can be substantial. In *Kansas v. Colorado*,[44.1] trial consisted of approximately 270 days, stretching from 1990 to 2003.

[d] Disposition by the Court

At appropriate times during the litigation, the special master may find it necessary or convenient to submit reports to the Court, containing his or her legal and factual rulings. Ultimately, there is no decision in an original jurisdiction case until the Court itself rules. A recommendation of a special master, in and of itself, does not constitute a ruling of the Court. If any party disagrees with the recommendations of the special master, that party may file exceptions, supported by briefs. The other states may respond, and oral argument is typically scheduled. The Solicitor General of the United States will often participate in the exceptions process if the United States is a party or if requested by the Court.

After oral argument, the Court will issue its opinion. If further proceedings are required, the Court will remand the case to the special master. In the case of *Kansas v. Colorado*,[44.2] the special master has issued five reports to the Court, four of which have been the subject of argument to the Justices. In *Kansas v. Nebraska & Colorado*,[44.3] oral argument before the Justices never occurred. Nebraska's motion to dismiss was denied without argument, and the case was later settled.[45]

In the later phases of an interstate case, the Court will typically enter a judgment and decree, providing for the retrospective and prospective relief granted by the Court. For instance, in *Kansas v. Colorado*,[45.1] two of the three volumes of the Special Master's Fifth and Final Report contain the proposed Judgment and Decree. The Judgment and Decree

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[44] *See* United States v. Texas 339 U.S. 707, 715 (1950) ("The Court in original actions . . . has always been liberal in allowing full development of the facts.").

[44.1] No. 105, Orig.

[44.2] No. 105, Orig.

[44.3] No. 126, Orig.

[45] Kansas v. Nebraska & Colorado, 538 U.S. 720 (2003) (Decree approving Final Settlement Stipulation).

[45.1] No. 105, Orig.

have been entered.[46] The Judgment includes confirmation of the payment by Colorado to Kansas of $34.6 million in damages and prejudgment interest, and costs of $1.1 million.[46.1] Almost all of the Judgment and Decree is actually the decree, which sets out in detail the requirements for future compliance with the Arkansas River Compact. An important part of the decree is the model developed during the course of the litigation. An entire volume is devoted to documentation of the model, including a DVD containing the electronic version of the model.[46.2]

Entry of a judgment and decree is typically the end of the litigation. In *Kansas v. Colorado*, the Judgment and Decree has been entered, but jurisdiction was specially retained to resolve a remaining issue.[47] In two instances the Court has appointed a river master, one on the Delaware River[48] and one on the Pecos River.[49] The situation on the Republican River is quite unusual because, as of the date of this writing, Kansas is claiming a violation of the Supreme Court's compact enforcement decree. This will be discussed further in section 18.04[3][b], *infra*.

§ 18.03 Allocating Interstate Waters

As between states, there are three methods recognized by the Supreme Court for allocating interstate waters. These are (1) suit in the original jurisdiction of the Supreme Court, (2) compact, and (3) act of Congress. Each method is considered below. Private interstate litigation is also discussed.

[1] Equitable Apportionment by the Court

The first case in which the Supreme Court declared the existence of a cause of action for the allocation of interstate waters was *Kansas v. Colorado*,[50] as noted above. Beginning with that case, the Court has developed a federal common law jurisprudence based on the principle of equitable apportionment.[51] The general principle was probably best stated in *New Jersey v. New York* by Justice Holmes who, after making the famous point that "[a] river is more than an amenity, it is a treasure," stated that "the effort always is to secure an equitable apportionment without

[46] Kansas v. Colorado, 129 S.Ct. 1294 (2009).

[46.1] 2 Fifth and Final Report of the Special Master 2 (2008), *available at* http://www.abanet.gov/publiced/preview/briefs/pdfs/07-08/105,Orig_5thandfinalreportvolI.pdf.

[46.2] *Id*. vol. 3.

[47] *Id*. vol. 2, at 6-7.

[48] New Jersey v. New York, 347 U.S. 995, 997 (1954).

[49] Texas v. New Mexico, 482 U.S. 124, 134-135 (1987).

[50] 185 U.S. 125 (1902).

[51] Kansas v. Colorado, 206 U.S. 46 (1907).

quibbling over formulas."[52] That case resulted in a decree apportioning the Delaware River.

[a] Criteria of Apportionment

In the first case in which the Court explicitly apportioned an interstate river, involving two prior appropriation states, the Court applied the doctrine of prior appropriation without regard to the state line.[53] Subsequent decisions by the Court have developed a more nuanced analysis for apportioning interstate waters, taking into consideration not only the water law doctrines followed by the states involved, but also efficiency of use, reliance by existing economies on existing uses, and whether existing uses are wasteful.[54] In 1945, the Supreme Court set forth what it termed an illustrative, but not exhaustive, list of factors to be evaluated in equitable apportionment cases:

> Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors.[55]

Thus, criteria that the Supreme Court has applied in equitable apportionment cases include priority of appropriation,[56] a comparison of the relative harm

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[52] New Jersey v. New York, 283 U.S. 336, 342-43 (1931).

[53] *See* Wyoming v. Colorado, 259 U.S. 419, 470 (1922).

[54] *See, e.g.,* Colorado v. New Mexico, 459 U.S. 176 (1982), 467 U.S. 310 (1984); A. Dan Tarlock, "The Law of Equitable Apportionment Revisited, Updated, and Restated," 56 U. Colo. L. Rev. 381 (1985).

[55] Nebraska v. Wyoming, 325 U.S. 589, 618 (1945).

[56] *See, e.g., id.*; Colorado v. New Mexico, 459 U.S. 176, 183-84 (1982) (where both states recognize the prior appropriation doctrine, priority is the "guiding" but not controlling principle).

and benefits,[57] conservation and efficiency,[58] the availability of substitute supplies,[59] and return flows.[60]

[b] Standard of Proof

The Supreme Court, when asked to apportion the waters of an interstate stream, is performing the function of a high court of international justice, declaring rights among sovereign states, and its determinations are therefore of a highly equitable nature. In such cases, one state is asking the Court to enjoin another state from uses of water that it is making or can make within its own territorial boundaries. Accordingly, the Court has adopted the higher clear and convincing standard of proof.[61]

[c] Pending Litigation

South Carolina v. North Carolina[62] is the only equitable apportionment case pending before the U.S. Supreme Court as of the date of this writing. South Carolina's suit seeks an equitable apportionment of the Catawba River, which originates in the mountains of North Carolina and flows through the western portion of that state before passing into South Carolina at Lake Wylie.[63] The Court granted South Carolina's Motion

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[57] *See, e.g.*, Nebraska v. Wyoming, 325 U.S. 589, 619 (1945); Colorado v. New Mexico, 459 U.S. 172, 186-88 (1982) (burden on Colorado to prove that benefits of its proposed diversion would substantially outweigh the harms to existing uses in New Mexico); Washington v. Oregon, 297 U.S. 517, 523 (1936) ("To limit the long established use in Oregon would materially injure Oregon users without a compensating benefit to Washington users.").

[58] *See, e.g.,* Colorado v. New Mexico, 467 U.S. 310, 320 (1984) ("Colorado has not identified any 'financially and physically feasible' means by which the District can further eliminate or reduce inefficiency. . . .").

[59] *See, e.g.*, Colorado v. New Mexico, 459 U.S. 176, 189 (1982) (special master should consider "availability of substitute sources of water to relieve the demand for water from the Vermejo River. . . .").

[60] *See, e.g.,* Nebraska v. Wyoming, 325 U.S. 589, 644-45 (1945).

[61] *See, e.g.*, Colorado v. Kansas, 320 U.S. 383, 393 (1943). Recently, the Court found it unnecessary to decide whether the preponderance test or the clear and convincing test applied in a compact enforcement case, because the plaintiff state had proven a compact violation that satisfied even the higher burden of clear and convincing proof. Kansas v. Colorado, 514 U.S. 673, 693-94 (1995). The Court has suggested, however, that the lower standard applies to enforce an existing apportionment, as the Special Master had found. *Id*. at 693 (discussing Nebraska v. Wyoming, 507 U.S. 584 (1993)).

[62] No. 138, Orig.

[63] First Interim Report of the Special Master, South Carolina v. North Carolina, No. 138, Orig. (2008), *available at* http://www.supremecourtus.gov/SpecMastRpt/Orig138_112808.pdf. The pleadings before the Special Master in this case are available at http://www.mto.com/sm.

for Leave to File, over North Carolina's opposition, in October 2007.[64] South Carolina's application for a preliminary injunction was denied.[65] In January 2008, the Court appointed a special master.[66]

Motions to intervene in the Catawba River case have resulted in a First Interim Report by the Special Master recommending that the City of Charlotte, the Catawba River Water Supply Project, and Duke Energy Carolinas LLC be allowed to intervene.[67] The State of South Carolina, supported by the United States, has filed exceptions to these rulings. The United States has expressed concern that "the [Special Master's] proposed rule raises the specter of wide-scale intervention by individual water users. Such an outcome would have a negative effect on equitable-apportionment proceedings."[68] Moreover, wide-scale intervention is contrary to the Court's precedent, and could place an unnecessary burden on the Court. The authors believe that each state should speak to the Supreme Court with a single voice and that intrastate controversies should not be resolved in that forum.[69]

[2] Equitable Apportionment by Compact

[a] Compact Clause

The Supreme Court has often advised the states to resolve their differences, if at all possible, through the use of interstate compacts rather than resorting to the Court's original jurisdiction.[70] The Compact Clause of the U.S. Constitution provides "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State. . . ."[71] As Justice Brandeis once pointed out, with respect to interstate water compacts:

> If Congress consented, then the states were in this respect restored to their original inherent sovereignty; such consent being the sole limitation imposed

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[64] 128 S.Ct. 349 (2007).

[65] *Id.*

[66] 128 S.Ct. 1117 (2008). Kristin L. Myles is the first woman to serve as a Supreme Court Special Master in the history of the United States. *See* Anne-Marie C. Carstens, "Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases," 86 Minn. L. Rev. 625, 628 n.13 (2002).

[67] First Interim Report, *supra* note 63.

[68] South Carolina v. North Carolina, No. 138 Orig., Brief for the United States as Amicus Curiae in Support of Plaintiff's Exceptions at 21 (2009).

[69] Special Master Vincent L. McKusick denied multiple motions by political subdivisions of Nebraska to participate as amici curiae in Kansas v. Nebraska & Colorado. No. 126, Orig., Case Mgmt. Order No. 6 (10/18/00).

[70] *See, e.g.*, Colorado v. Kansas, 320 U.S. 383, 392 (1943).

[71] U.S. Const. art. I, § 10, cl. 3.

> by the constitution, when given, left the states as they were before . . . whereby their compacts became of binding force, . . . operating with the same effect as a treaty between sovereign powers.[72]

The Compact Clause is a remarkably flexible tool for dealing with interstate and regional issues. While use of the Compact Clause goes far beyond water allocation compacts,[73] it has proven to be an invaluable mechanism for apportioning interstate waters.

When the states saw the equitable apportionment decisions that the Supreme Court issued in the early part of the twentieth century, there was a general movement to adopt compacts in order to better meet the desires of the states involved. Some 21 compacts were entered into in the period 1922-1980.[74] A compact is not a compact, however, until Congress has consented to the agreement of the states and the President has approved.[75]

Once approved, a compact becomes a law of the United States, enforceable according to its terms. This was shown graphically in the recent Ellis Island case. The Court stated, "courts have no power to substitute their own notions of an equitable apportionment for the apportionment chosen by Congress."[76] Accordingly, the Court held that it lacked authority to adjust the boundary between New York and New Jersey that was found to run through the Admissions Building on Ellis Island. The Court said, "[a] more

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[72] Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 107 (1938) (quoting Rhode Island v. Massachusetts, 12 Pet. 657 (1838)).

[73] *See, e.g.*, The Council of State Governments, State Trends & Policy, Programs, National Center for Interstate Compacts, *available at* http://www.csg.org (listing compacts addressing agriculture, boundaries, bridges, navigation, port authorities, building construction and safety, child welfare, conservation and environment, corrections and crime control, to name just a few); *see also* http://www.stateline.org.

[74] La Plata River Compact, 43 Stat. 796 (1925); S. Platte River Compact, 44 Stat. 195 (1926); Colorado River Compact, 45 Stat. 1057 (1928); Rio Grande Compact, 53 Stat. 785 (1939); Republican River Compact, 57 Stat. 86 (1943); Belle Fourche River Compact, 58 Stat. 94 (1944); Costilla Creek Compact, 60 Stat. 246 (1946), amended, 77 Stat. 350 (1963); Upper Colorado River Basin Compact, 63 Stat. 31 (1949); Arkansas River Compact, 63 Stat. 145 (1949); Pecos River Compact, 63 Stat. 159 (1949); Snake River Compact, 64 Stat. 29 (1950); Yellowstone River Compact, 65 Stat. 663 (1951); Canadian River Compact, 66 Stat. 74 (1952); Sabine River Compact, 68 Stat. 690 (1954), *amended*, 76 Stat. 34 (1962); Klamath River Basin Compact, 71 Stat. 497 (1957); Bear River Compact, 72 Stat. 38 (1958), amended, 94 Stat. 4 (1980); Arkansas River Basin Compact, Kansas-Oklahoma, 80 Stat. 1405 (1966); Upper Niobrara River Compact, 83 Stat. 86 (1969); Big Blue River Compact, 86 Stat. 193 (1972); Arkansas River Basin Compact, Arkansas-Oklahoma, 87 Stat. 569 (1973); Red River Compact, 94 Stat. 3305 (1980).

[75] President Franklin D. Roosevelt vetoed the original version of the Republican River Compact because of concerns about limitations on the jurisdiction and authority of federal agencies in the original draft. Veto Message from the President, H.R. Doc. No. 690, 77th Cong., 2d Sess. (April 2, 1942).

[76] New Jersey v. New York, 523 U.S. 767, 811 (1998) (internal quotation marks & citations omitted).

convenient boundary line must therefore be a matter for arrangement and settlement between the States themselves, with the consent of Congress."[77]

[b] Impetus for Compacts

The most prevalent impetus for compacts has been the prospect of obtaining federal water projects with interstate features. Typically, the federal government required that the states enter into a compact before agreeing to build such projects.[78]

The existence of a cause of action in the Supreme Court to obtain an equitable apportionment is also a great motivator for states to enter into compacts that address these issues in ways likely to be more satisfactory to the states. The Court recognized this in the first interstate boundary case when it said:

> Bound hand and foot by the prohibitions of the constitution, a complaining state can neither treat, agree, or fight with its adversary, without the consent of congress: a resort to the judicial power is the only means left for legally adjusting, or persuading a state which has possession of disputed territory, to enter into an agreement or compact, relating to a controverted boundary. Few, if any, will be made, when it is left to the pleasure of the state in possession; *but when it is known that some tribunal can decide on the right, it is most probable that controversies will be settled by compact.*[79]

Likewise, when it is known that the Supreme Court can decide on the right to a share of a valuable interstate water resource, it is most probable that controversies will be settled by compact. Indeed it was the Court's first explicit apportionment, based on a strict application of the doctrine of prior appropriation, that motivated the states in the Colorado River Basin to enter into a compact to avoid the same result.[80]

The Colorado River Compact, which Arizona finally signed in 1944, was the first compact to be negotiated that allocated water among states.[81]

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[77] *Id.* at 811-812 (internal quotation marks omitted). Similarly, the special master in the Republican River Compact case held that "[t]he Compact makes no exception for any depletion of the virgin water supply merely because of the difficulty of quantifying that depletion; there is no 'administrative convenience' exception." Kansas v. Nebraska & Colorado, No. 126, Orig., First Report of the Special Master (Subject: Nebraska's Motion to Dismiss) 43 (2000). The Court denied the Motion to Dismiss. 530 U.S. 1272 (2000).

[78] This was true with respect to the Arkansas River Compact, the Republican River Compact, and the Yellowstone River Compact, for example.

[79] Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 726 (1838) (emphasis added). *See also* Texas v. New Mexico, 462 U.S. 554, 569 (1983) ("[T]he threat of such litigation undoubtedly contributed to New Mexico's willingness to enter into a compact.").

[80] *See* Wyoming v. Colorado, 259 U.S. 419 (1922); Arizona v. California, 373 U.S. 546, 555-57 (1963).

[81] *See* Colo. Rev. Stat. § 37-61-101 (elec. 2009) ("Done at the City of Santa Fe, New Mexico, this Twenty-fourth day of November, A.D. One Thousand Nine Hundred Twenty-Two").

It was not, however, the first to become effective. That honor goes to the La Plata River Compact, which was finalized three days after the Colorado River Compact.[82] Both were negotiated at Bishop's Lodge in Santa Fe, New Mexico.[83] Congress consented to the La Plata River Compact in 1925.[84] The Colorado River Compact languished until the Boulder Canyon Project Act of 1928 gave congressional consent and amended the agreement of the states to provide for the Compact's becoming effective upon the approval by California and five of the six other states, along with other conditions.[85] Arizona consistently resisted the Compact, at least until the Supreme Court rebuffed its attempt to invalidate it in 1931. Ironically, Arizona was able to utilize the provisions of the 1928 Act to convince the Court some 30 years later that the 1928 Act had, in fact, effected an apportionment of the waters of the Lower Basin of the Colorado River among the Lower Basin states.[86]

[c] Methods of Allocation

There is great diversity in the methods of compact allocation of interstate rivers. In apparent recognition of this diversity, many of the compacts contain the provision that: "[t]his Compact shall not be construed as establishing any general principle or precedent applicable to other interstate streams."[87] More than one allocation method is often employed in a single compact.

A common method of apportioning interstate surface waters is by allocating the consumptive use of the waters of the interstate basin by

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[82] 43 Stat. 796, 798 (1925) ("Done at the City of Santa Fe, in the State of New Mexico, this twenty-seventh day of November, in the year of our Lord, one thousand nine hundred and twenty-two").

[83] Bishop's Lodge is the former country retreat of Archbishop Jean-Baptiste Lamy (1814-1888), the central figure in Willa Cather's Death Comes for the Archbishop (1927). A number of other compacts were negotiated at Bishop's Lodge or elsewhere in Santa Fe, including the Pecos River Compact (1948), the Upper Colorado River Compact (1948), the Rio Grande Compact (1938), the Canadian River Compact (1950), the Costilla Creek Compact (1944), and the Amended Costilla Creek Compact (1963).

[84] 43 Stat. 796 (1925).

[85] 45 Stat. 1057, 1064, § 13(a) (1928).

[86] Arizona v. California, 373 U.S. 546 (1963). See Jack L. August, Jr., Dividing Western Waters: Mark Wilmer and Arizona v. California (TCU Press 2007).

[87] Pecos River Compact, art. XIII, 63 Stat. 159, 165 (1949).

percentage.[88] Other methods of allocation include percentages of available flow[89] and limitation on the amount of storage,[90] while others utilize indices of inflow vs. outflow.[91] Regardless of the method of allocation that is employed, certain principles have emerged. For example, existing uses are generally preserved and protected.[92] One consequence of preserving and protecting existing rights at the time of the compact, especially when the waters of the basin are at that time largely or fully appropriated, is to allow the upstream state to take water that it would have taken under

[88] The Upper Colorado River Basin Compact (UCRC), after making a 50,000 acre-foot per annum deduction for Arizona, allocates the waters of the Upper Colorado River Basin to the states as follows: Colorado, 51.75%; New Mexico, 11.25%; Utah, 23.00%; Wyoming 14.00%. UCRC, art. III(a)(2); 63 Stat. 31, 33 (1949). The Republican River Compact (RRC) is essentially the same. It allocates specific acre-foot amounts annually of the assumed virgin water supply. If the virgin water supply varies more than 10%, the allocations change accordingly. RRC, art. III, 57 Stat. 86, 88 (1943).

[89] *See, e.g.*, Yellowstone River Compact, art. V.B, 65 Stat. 663 (1951) (percentages applicable to diversions of certain previously unused waters). In the Yellowstone case, Wyoming is asserting that, since some of the allocations are quantified on the basis of a percentage of *diversions*, its *depletions* are unlimited. *See* Wyoming's Motion to Dismiss Bill of Complaint, Montana v. Wyoming and North Dakota, No. 137, Original at 32-50, 55-58 (Apr. 2008). This would seem contrary to the fundamental rule that one state may not invade another's allocation. *See* Texas v. New Mexico, 462 U.S. 554, 567 (1983) ("There is no doubt that this court's jurisdiction . . . extends to a properly framed suit . . . to enforce a prior apportionment.").

[90] *See* Canadian River Compact, art. IV(b), 66 Stat. 74 (1952) ("the amount of conservation storage in New Mexico . . . shall be limited to an aggregate of 200,000 acre-feet"); Arkansas River Basin Compact, Kansas-Oklahoma, art. V, 80 Stat. 1405 (1966).

[91] The prime example is the Rio Grande Compact, 53 Stat. 785 (1939), which contains tables of inflows and corresponding required outflows from one state to another. The Pecos River Compact also utilizes this type of methodology, although the calculation formulas are more complicated. 63 Stat. 159 (1949). Rather than being set out in the Compact, the requirements are quantified in a referenced engineering report. *See id*., arts. III(a), II(g).

[92] *See, e.g.*, Colorado River Compact, art. VIII, Colo. Rev. Stat. § 37-61-101 (elec. 2009) ("Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact."); Yellowstone River Compact art. V.A, 65 Stat. 663, 666 ("Appropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State . . . shall continue to be enjoyed. . . ."); *see generally* Jerome C. Muys, Interstate Water Compacts (12 National Water Comm'n Legal Study 14, 1971) ("whatever the allocation formula, existing uses and/or rights are usually protected"). *But see* Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938). Under the La Plata River Compact, the states alternate their uses, thus depriving some adjudicated water rights owners in Colorado of their right to divert on certain days.

rights existing at the time of the compact before letting any flow pass to the downstream state.[93]

It is only the amount of water that was being used in the upstream state at the time of the compact that is protected, however. Additional depletions in the upstream state, even on the same lands as were being irrigated at the time of the compact, will typically not be allowed.[94] This is a corollary of the more fundamental principle that, once an allocation among states has been made, one of the states may not invade another state's allocation. Accordingly, Montana has alleged a violation of the Yellowstone River Compact in part by virtue of the conversion of furrow irrigation with surface water to sprinkler irrigation with surface water on lands that were irrigated at the time of the Yellowstone River Compact's adoption.[95] For similar reasons, Colorado has issued draft regulations seeking to address the increased consumption associated with conversion from flood to sprinkler irrigation to avoid violating the Arkansas River Compact.[96]

[d] Compact Administration

Compact commissions or administrations have become common as a means for administering interstate compacts. This has not always been the case, however. The first compact negotiated, the Colorado River Compact, provided for no administrative body at all to administer the Compact.[97] By the time of the Rio Grande Compact in 1939, however, the benefits of an interstate agency to administer the Compact were recognized.[98] Such commissions or administrations do not have the power to enforce the Compact. This is because the commissions must generally act by unanimous vote. Thus, a single state can usually block compact

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[93] The Arkansas River Compact is a good example. Article IV.D of the Compact protects usable Stateline flows in Kansas. 63 Stat. 145, 147 (1949). Another example is the Yellowstone River Compact. art. V., 65 Stat. 663 (1951).

[94] On the Arkansas River, well users in Colorado increased their consumption by drilling more than a thousand high capacity groundwater wells to provide a supplemental supply. This had the effect, among others, of increasing consumption of water even on acreage irrigated at the time of the Compact, and was disallowed by the Supreme Court. Kansas v. Colorado, 514 U.S. 673 (1995).

[95] Montana v. Wyoming & North Dakota, No. 137, Orig., U.S. Sup. Ct., 2007 WL 4947613 (Jan. 31, 2007) (Motion for Leave to File Bill of Complaint).

[96] Colorado Div. of Water Resources, Compact Rules Governing Improvements to Surface Water Irrigation Systems in the Arkansas River Basin in Colorado (July 27, 2009 Working Draft), *available at* http://water.state.co.us/wateradmin/ArkansasRiver.asp.

[97] *See* Colorado River Compact, 45 Stat. 1057 § 16 (1928) (providing for certain cooperation of the chief officials of each state charged with administration of water rights, the Bureau of Reclamation and the USGS).

[98] Rio Grande Compact art. XII, 53 Stat. 785, 791.

commission action.[99] The interstate agency created by a compact is not like a federal executive agency from which appeal may be had only from a final decision.[100]

Even though interstate compact agencies do not have the ability to enforce interstate compacts as a general rule, their actions may determine facts critical to such enforcement. For example, in *Texas v. New Mexico*,[101] the Pecos River Commission had determined the amount of shortfall for the period 1950-1961. The Supreme Court determined that the Commission's quantification was dispositive and would not be revisited.

[e] Alternative Dispute Resolution

Certain compacts and decrees provide for various forms of alternative dispute resolution that can or must be pursued before initiating Supreme Court litigation.[102] For instance, the Arkansas River Compact provides that the Compact Administration may, by unanimous vote, refer any matter within the purview of the administration to arbitration.[103]

The Supreme Court has never required that states pursue alternative dispute resolution or exhaust administrative remedies prior to coming to the Court for relief. In the Arkansas River Compact enforcement litigation, Colorado based its opposition to the motion for leave to file in part on a failure to exhaust administrative remedies.[104] The Court granted the motion for leave to file without comment.[105]

[3] Equitable Apportionment by Congress

The third method recognized by the Supreme Court for allocating interstate waters is equitable apportionment by Congress.

[a] Commerce Clause

The Commerce Clause of the Constitution provides that "[t]he Congress shall have Power . . . To regulate Commerce with foreign Nations, and

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[99] *See* Texas v. New Mexico, 462 U.S. 554, 568 (1983) ("New Mexico could indefinitely prevent authoritative Commission action solely by exercising its veto on the Commission").

[100] 462 U.S. 554, 566-71.

[101] 462 U.S. 554, 571 n.18 (1983) ("When it is able to act, the Commission is a completely adequate means for vindicating either State's interests."); *see also* Kansas v. Nebraska & Colorado, No. 126, Orig., Second Report of the Special Master, App. D1 (2003).

[102] *See, e.g.*, Richard A. Simms, Leland E. Rolfs & Brent E. Spronk, "Interstate Compacts and Equitable Apportionment," 34 Rocky Mt. Min. L. Inst. 23-1, 23-23 to 23-24 (1988).

[103] Arkansas River Compact, art. VIII-D, 63 Stat. 145, 150.

[104] *See* Colorado's Brief in Opposition to Motion for Leave to File Complaint, Kansas v. Colorado, No. 105, Orig., U.S. Supreme Court, 1986 WL 1178161, at 9-14 (02/14/86).

[105] Kansas v. Colorado, 475 U.S. 1079 (1986).

among the several States, and with the Indian Tribes."[106] Although the Court had expressed doubts about Congress' power in 1902, it now seems clear that this clause of the Constitution empowers Congress to regulate interstate rivers and apportion the water among states.[107] When the Supreme Court first acknowledged this power in *Arizona v. California*,[108] there was considerable debate over the source of congressional power to allocate interstate waters.[109] It now appears that there is general consensus that the commerce power is the most important source. Since *Arizona v. California*, the Court has determined in *Sporhase v. Nebraska ex rel. Douglas*[110] that water is an article of commerce for purposes of the Commerce Clause. In the *Sporhase* case, the Court determined that Nebraska's anti-export statute violated the dormant Commerce Clause.[111] In that case, the Court also declared that Congress has the power to legislate with respect to interstate aquifers: "Ground water overdraft is a national problem and Congress has the power to deal with it on that scale."[112]

[b] Colorado River

In 1963, the Supreme Court ruled in favor of Arizona's argument that the waters of the Lower Basin of the Colorado River had been apportioned by act of Congress.[113] The Court held that the same act that gave congressional consent to the Colorado River Compact, apportioning waters between the Upper Colorado River and Lower Colorado River Basins, also had apportioned the waters of the Lower Basin among the states in that basin.[114] That act was the Boulder Canyon Project Act.[115] The Court declared: "Where Congress has so exercised its constitutional power over waters, courts have no power to substitute their own notions of an

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[106] U.S. Const. art. I § 8 cl. 3.

[107] *See* Kansas v. Colorado, 206 U.S. 46, 94-95 (1907); 4 Waters and Water Rights § 47.01(a), at 47-1 (Robert E. Beck ed., 2004).

[108] 373 U.S. 546 (1963).

[109] *See* 4 Waters and Water Rights, *supra* note 107, § 47.01(a).

[110] 458 U.S. 941, 945-54 (1982).

[111] *Id.* at 954-960.

[112] *Id.* at 954. *See* Intake Water Co. v. Yellowstone River Compact Comm'n, 769 F.2d 568 (9th Cir. 1985) (holding that congressional approval of a compact immunizes the compact from Commerce Clause challenges).

[113] Arizona v. California, 373 U.S. 546 (1963).

[114] *Id.* at 565-67.

[115] 45 Stat. 1057 (1928) (codified at 43 U.S.C. §§ 617 to 617v (elec. 2009)).

equitable apportionment for the apportionment chosen by Congress."[116] Although the Court was split 5-3, the doctrine adopted by the majority has become black letter law. It has been noted that there is another explicitly recognized apportionment of interstate waters by Congress in the Truckee-Carson-Pyramid Lake Water Right Settlement Act of 1990,[117] allocating the waters of Lake Tahoe and the Truckee and Carson Rivers between California and Nevada, once certain conditions are met.[118]

[c] Rio Grande River

In addition to the Lower Colorado River and the Lake Tahoe-Carson River-Truckee River congressional apportionments, the Rio Grande River may in fact also have been initially apportioned by act of Congress. This has been persuasively argued based on a 1905 act of Congress,[119] which in turn was based on agreements of regional interests at the 1904 Twelfth National Irrigation Congress in El Paso.[120] The Act was brief and left certain matters to the discretion of the Reclamation Service, which had been created only three years before. The conditions set by Congress, however, were satisfied by the Reclamation Service, and the plan originally agreed to by the Texas, New Mexico, and Mexican interests at the 1904 Twelfth National Irrigation Congress was implemented.

For years, the 1905 Act was not commonly recognized as a congressional apportionment. One reason may have been that just two years later, in 1907, the Supreme Court cast doubt on Congress' power to make interstate allocations.[121] Since then, the Court has confirmed Congress' power to apportion interstate waters. In light of this authority, it is plausible that Congress did allocate the waters of the Rio Grande by virtue of the 1905 Act. This conclusion is consistent with the fact that the United States

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[116] Arizona v. California, 373 U.S. 546, 565 (1963), *quoted in* Texas v. New Mexico, 462 U.S. 554, 568 (1983) (internal quotation marks omitted).

[117] 104 Stat. 3289, tit. II (1990).

[118] 4 Waters and Water Rights, *supra* note 107, § 47.01(b).

[119] An Act Relating to the Construction of a Dam and Reservoir on the Rio Grande, in New Mexico, for the Impounding of the Flood Waters of Said River for Purposes of Irrigation, Act of February 25, 1905, 33 Stat. 814.

[120] *See* Douglas R. Littlefield, Conflict on the Rio Grande, Water and the Law, 1879-1939 (2008). The Country of Mexico, the Territory of New Mexico, and the State of Texas were the major regional interests that were part of the settlement reached at the 1904 Twelfth National Irrigation Congress. *Id.* at 109-111.

[121] Kansas v. Colorado, 206 U.S. 46, 94-95 (1907).

relied on the 1905 Act when it entered into a treaty with Mexico in 1906, allocating the waters of the Rio Grande between the two countries.[122]

[4] Private Interstate Litigation

The impact of a water shortage may initially be felt by downstream private water users. For this reason, it should come as no surprise that the earliest reported cases involving interstate water disputes involved private litigants.[123] These private water suits represent rare situations in which a state or federal court has been asked to resolve private disputes involving interstate waters where a general interstate allocation does not exist.

The best known of these private disputes is *Bean v. Morris*.[124] In *Bean*, the downstream senior water appropriators in Wyoming sought relief against an upstream junior appropriator in Montana. The Court granted the senior downstream users relief, explaining that "we believe that it always was assumed, in the absence of legislation to the contrary, that the states were willing to ignore boundaries, and allowed the same rights to be acquired from outside the state that could be acquired from within."[125]

In general, the lower courts have allowed a downstream user to sue an upstream user in the upstream state for interference with the flow of water in the lower state. For example, in *Conant v. Deep Creek & Curlew Valley Irrigation Co.*,[126] a Utah court addressed a dispute over an interstate stream flowing from Idaho to Utah. The downstream plaintiffs sought to enforce an adjudication of water rights in both states that was issued by an Idaho court. The Utah court held that the Idaho adjudication court had jurisdiction to protect downstream Utah water rights against interference from junior Idaho users. According to the Utah court, however, the Idaho adjudication court lacked the authority to settle the relative rights of the Utah users.[127]

Similar reasoning was adopted by the Tenth Circuit in *Albion-Idaho Land Co. v. Naf Irrigation Co.*[128] In *Albion*, the downstream Idaho water users sued the upstream Utah water users in Utah federal district court. The Tenth Circuit agreed with the *Conant* court that water right adjudication is a local action, and that as a result, a Utah court lacked jurisdiction to

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[122] Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, signed May 21, 1906, 34 Stat. 2953.

[123] 4 Waters and Water Rights, *supra* note 107, § 44.01.

[124] 221 U.S. 485 (1911).

[125] *Id.* at 487.

[126] 66 P. 188 (Utah 1901).

[127] *Id.* at 190.

[128] 97 F.2d 439 (10th Cir. 1938).

adjudicate the rights of the downstream Idaho water users. Nonetheless, the court held that it could divide the water between the upstream and downstream groups based on earlier adjudication decrees in both Idaho and Utah.[129]

A departure from the rule that a court lacks the ability to adjudicate rights in another state can be found in *Brooks v. United States*.[130] In *Brooks*, the Ninth Circuit addressed an earlier decree from an Arizona federal court that adjudicated the rights of the Gila River, which flows from New Mexico to Arizona. The Arizona district court decree determined individual rights in both states and appointed a water commissioner to administer those rights.[131] The Ninth Circuit rejected the claim from the upstream New Mexico users that the decree was void as to their rights. In so holding, the court acknowledged that "ordinarily" a court lacks the ability to adjudicate water rights outside its territorial jurisdiction.[132] The court reasoned, however, that this rule did not apply when water rights need to be determined on an interstate stream. Accordingly, the court upheld Arizona's right to adjudicate all the rights of an interstate stream. It explained that "to exercise its unquestioned power to settle" the downstream rights, the court also had to consider the amount of water that "should rightly be in the stream when it enters" the lower state.[133] The *Brooks* decision is difficult to explain, and may be limited to its facts.[134]

Lingering questions about the validity of the interstate apportionment on the Gila River by the federal district court in Arizona were resolved in *Arizona v. California*. There, the special master recommended, and the Court adopted, the allocation in the federal district court as the interstate allocation.[135] The Supreme Court's equitable apportionment of the Gila River in *Arizona v. Colorado* remedied the earlier suspect rulings of the lower federal courts that were based on the notion that a federal district court had *in rem* jurisdiction outside its geographical limits.

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[129] *Id.* at 445.

[130] 119 F.2d 636 (9th Cir. 1941).

[131] *See generally* Gila River Irrig. Dist. v. United States, 118 F.2d 507 (9th Cir. 1941) (suit involving interpretation of the adjudication decree).

[132] 119 F.2d at 639.

[133] *Id.*

[134] 4 Waters and Water Rights, *supra* note 107, § 44.04(a)(2).

[135] Report of Special Master, *supra* note 2, at 343 ("For purposes of this equitable apportionment, the State of New Mexico, as well as her citizens, is bound by the Gila Decree (Globe Equity No. 59) and priorities therein specified shall continue to be administered thereunder."); *id* at 354-55; Arizona v. California, 373 U.S. 546, 594-95 (1963); 376 U.S. 340, 347-49 (1964) (Decree).

Notwithstanding *Brooks*, two general principles emerge from the private interstate water disputes. First, when the relevant water laws in the two states are the same, the rights may be enforced across state lines according to the appropriate doctrine.[136] Second, courts in private interstate stream disputes normally lack the ability to adjudicate water rights outside their territorial jurisdiction. This latter principle represents a limitation on private interstate water disputes that is illustrated by *Vineyard Land & Stock Co. v. Twin Falls Salmon River Land & Water Co.*[137] In that case, the appellants argued that the court should apply the common law doctrine of equitable apportionment to allocate the water between the two states. The Ninth Circuit rejected this argument, and explained that "the matter [of equitable apportionment] is one for adjustment between the states; it is not for individual users to raise a controversy about the use of such water in another state, out of the territorial jurisdiction of the court."[138] In sum, a state or federal district court has the right to adjudicate *intra*state uses within its territorial jurisdiction. Such a court, however, lacks the ability to allocate water between states.

The lack of *in rem* jurisdiction, not only in state courts, but also in federal district courts, to adjudicate water rights outside their territorial jurisdiction has made the lower courts a largely unsatisfactory forum in which to adjudicate interstate water rights. For example, in 1943, the Supreme Court enjoined lower federal court adjudications of water rights in Colorado and Kansas in conjunction with the Court's determination that Colorado was not using more than its equitable share of the Arkansas River.[139] Private interstate suits will continue to occur, however, where the issues are too localized to galvanize action by state governments.

§ 18.04 Enforcement of Interstate Allocations

One of the key aspects of the Supreme Court's role in interstate water controversies is its enforcement of prior allocations.

[1] Supreme Court Jurisdiction

Just as the Supreme Court has jurisdiction to apportion interstate waters directly in the context of an equitable apportionment suit, it also has the power to resolve disputes over prior allocations, whether those prior allocations are by its own decree, by compact, or by act of Congress. Justice Felix Frankfurter, in a case involving a controversy among West Virginia state officials that reached the Court on certiorari, explained:

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[136] *E.g.*, Gregory v. City of New York, 346 F. Supp. 140 (S.D.N.Y. 1972) (riparian doctrine rights enforced across state lines by implication); Bean v. Morris, 221 U.S. 485 (appropriation doctrine rights enforced across state lines).

[137] 245 F. 9 (9th Cir. 1917).

[138] *Id*. at 26.

[139] Colorado v. Kansas, 320 U.S. 383 (1943) (opinion); 322 U.S. 708 (1944) (decree).

> But a compact is after all a legal document. Though the circumstances of its drafting are likely to assure great care and deliberation, all avoidance of disputes as to scope and meaning is not within human gift. Just as this Court has power to settle disputes between States where there is no compact, it must have final power to pass upon the meaning and validity of compacts.[140]

This assertion of the Court's power was echoed 22 years later when the Court described its power to resolve a dispute over the Pecos River Compact, in response to contrary arguments by New Mexico:

> There is no doubt that this Court's jurisdiction to resolve controversies between two States extends to a properly framed suit to apportion the waters of an interstate stream between States through which it flows or to a suit to enforce a prior apportionment. It also extends to a suit by one State to enforce its compact with another State or to declare rights under a compact.[141]

As discussed below, the Court has exercised its authority to enforce prior allocations in two distinct circumstances: (1) to enforce prior allocations in a compact or decree and (2) to enforce the Court's own previous enforcement decrees where one state has failed to comply.

[2] Interpretation and Enforcement of Prior Allocations

As discussed in section 18.03, *supra*, prior interstate water allocations can take the form of compacts, prior Supreme Court equitable apportionment decrees, and acts of Congress. Disputes over the proper interpretation and administration of these compacts and decrees have led states to seek relief in the Supreme Court's original jurisdiction. The Court, in fact, has entertained a number of suits to enforce prior apportionments. In addition to the Pecos River Compact, the Court has agreed to enforce allocations on the Laramie River, the North Platte River, the Republican River, the Arkansas River, and the Yellowstone River.

[a] Laramie Decree

The Supreme Court recognized and declared its powers to equitably apportion interstate rivers in *Kansas v. Colorado* in 1902,[142] but it was not until 1922 that the Supreme Court wielded this power to limit the diversions in an upstream state. That occurred with respect to the Laramie River in *Wyoming v. Colorado*.[143] As has been noted earlier, that case determined that the prior appropriation doctrine, which was recognized by both states, would be applied across the state line as if the line did not exist.[144]

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[140] West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22, 28 (1951).

[141] Texas v. New Mexico, 462 U.S. 554, 567 (1983) (citations omitted).

[142] 185 U.S. 125 (1902).

[143] 259 U.S. 419 (1922).

[144] *Id.* at 470.

Following that decree, there were several enforcement actions which caused the Court to clarify and specify in more detail the elements of the equitable apportionment arrived at in its 1922 decree.[145]

[b] North Platte Decree

In 1986 Nebraska filed a petition with the Supreme Court to enforce the Court's decree of 1945 apportioning the waters of the North Platte River.[146] The Court determined that the case was in fact partly an enforcement action and partly a request for a reweighing of the equities and reapportionment of the river.[147] After much pretrial activity and a further decision of the Court on requests by Nebraska to amend its complaint,[148] the case ultimately was settled and a decree of the Court adopting the settlement was entered.[149] No enforcement action was taken, but the North Platte Decree was modified with respect to the inclusion of groundwater pumping, administration of the decree, and other matters.[150]

[c] Pecos River Compact

The Pecos River Compact was entered into by the States of Texas and New Mexico in 1948 and consented to by Congress in 1949.[151] In 1974, Texas invoked the Supreme Court's original jurisdiction seeking to enforce the Compact in light of the groundwater pumping that had increased considerably since the time of the Compact.[152] The Court issued two major opinions during the course of this litigation that have provided a great deal of guidance to the states in subsequent enforcement proceedings.[153] From these cases we have learned that the Court is not at liberty, under the guise of its equitable powers, to modify an interstate compact in any respect:

> [O]nce given, "congressional consent transforms an interstate compact within [the Compact Clause] into a law of the United States." One consequence of this metamorphosis is that, unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms.[154]

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[145] Wyoming v. Colorado, 286 U.S. 494 (1932); 298 U.S. 573 (1936); 309 U.S. 572 (1940).

[146] Nebraska v. Wyoming, 507 U.S. 584 (1993).

[147] *Id.* at 590-93.

[148] Nebraska v. Wyoming, 515 U.S. 1 (1995).

[149] 534 U.S. 40 (2001).

[150] *Id.*; Final Report of the Special Master and Proposed Joint Settlement (2001).

[151] 63 Stat. 159 (1949).

[152] Texas v. New Mexico, 462 U.S. 554 (1983).

[153] *Id.*; 482 U.S. 124 (1987).

[154] Texas v. New Mexico, 462 U.S. 554, 564 (1983) (citations omitted).

Therefore, the Special Master's recommendation that the Court appoint a tie-breaking member to the Pecos River Commission was rejected ("we are not free to rewrite [the Compact]").[155] The Pecos River Commission was also held not to be a typical executive agency whose decisions could be appealed to the Supreme Court.[156]

In the final phase of the case, the Supreme Court declared for the first time that it would provide contract-like remedies for breach of an interstate compact, that the Court was free to fashion its remedy so that it was fair and equitable under the circumstances,[157] and that the retrospective remedy might be repayment in water or money. The Court also entered a prospective decree requiring compliance with the compact as interpreted by the Court and appointing a river master to oversee that compliance.[158] Ultimately the retrospective remedy was settled by the states and approved by the Court in the amount of $14 million.[159]

[d] Republican River Compact

The Republican River Compact was entered into by Colorado, Kansas, and Nebraska in 1942 and consented to by Congress in 1943.[160] The Compact was entered into long before the advent of center pivot pumping, which, since its beginnings in the mid-1960s, has spread extensively throughout the basin of the Republican River in Nebraska, into areas not expected to be irrigable at the time of the Compact. The result has been a depletion of the flows of the Republican River that should be available for use in Kansas pursuant to the Compact. Kansas began complaining to Nebraska in 1985 that its pumping was depleting Kansas' share of the compacted waters, but to no avail.

Finally, in 1998, Kansas brought suit in the Supreme Court's original jurisdiction. Nebraska filed a motion to dismiss based on its position that groundwater pumping was not controlled by the Compact. The State of Colorado, which had also been named by Kansas in the Bill of Complaint, supported the Nebraska position to the extent that Nebraska would exclude pumping from the Ogallala aquifer. The special master, Vincent L. McKusick, rejected the motion to dismiss with respect to all groundwater, holding that groundwater pumping that affected the flows of the Republican River must be accounted for under the Republican

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[155] *Id.* at 565.

[156] *Id.* at 566-71.

[157] Texas v. New Mexico, 482 U.S. 124, 128-32 (1987).

[158] *Id.* at 133-136. A more detailed Amended Decree was entered thereafter. Texas v. New Mexico, 485 U.S. 388 (1988).

[159] Texas v. New Mexico, 494 U.S. 111 (1990).

[160] 57 Stat. 86 (1943).

River Compact.[161] On the basis of the special master's recommendation, the Court denied Nebraska's Motion to Dismiss.[162] On the basis of that denial and subsequent rulings by the special master, the parties initiated settlement negotiations which resulted in a final settlement stipulation, which was approved by the Court.[163] The Decree approved by the Supreme Court included the electronic version of the basin groundwater model that determines the time, amount, and location of groundwater pumping impacts on the baseflows of the Republican River.[164]

[e] Arkansas River Compact

The Arkansas River Compact was entered into by the States of Kansas and Colorado in 1948 and consented to by Congress in 1949.[165] Kansas brought suit against Colorado in the original jurisdiction in 1985, and after considerable trial before Special Master Arthur L. Littleworth, the Court adopted the special master's recommendations that Colorado be found to have violated the Compact by virtue of extensive postcompact groundwater pumping.[166] The special master and the Court rejected two other counts of noncompliance alleged by Kansas.[167] The Court found that the Kansas claim was not barred by laches.[168] The Court agreed with the special master that the amount of precompact pumping that would be allowed under the Compact would be the actual amount of pumping rather than the total capacity of Colorado wells in place at the time of the Compact.[169] The Court also determined that it did not need to decide the burden of proof that must be met by the complaining state enforcing a compact, since Kansas had proved a compact violation due to postcompact groundwater pumping by the higher clear and convincing standard.[170]

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[161] First Report of the Special Master (Subject: Nebraska's Motion to Dismiss), Kansas v. Nebraska & Colorado, No. 126, Orig. (2000), *available at* http://www.supremecourtus.gov.

[162] Kansas v. Nebraska & Colorado, 530 U.S. 1272 (2000).

[163] Kansas v. Nebraska & Colorado, 538 U.S. 720 (2003). The Final Settlement Stipulation and related reports of the special master are also on the Supreme Court website *at* http://www.supremecourtus.gov.

[164] The Final Settlement Stipulation, which was approved by Supreme Court Decree of May 19, 2003, Kansas v. Nebraska & Colorado, 538 U.S. 720 (2003), is *available at* http://www.supremecourtus.gov/SpecMastRpt/ORG126_4162003.pdf.

[165] 63 Stat. 145 (1949).

[166] Kansas v. Colorado, 514 U.S. 673 (1995).

[167] *Id.* at 681-84.

[168] *Id.* at 687-89.

[169] *Id.* at 689-691.

[170] *Id.* at 693-94.

On remand, further trial was held, and additional findings and legal conclusions were recommended by the special master to the Court.[171] The Supreme Court adopted the special master's recommendations in most respects. It determined that the Eleventh Amendment was not a bar to the Kansas claim for money damages based in part on losses of its water users.[172] The Court also held that prejudgment interest would be allowed as part of Kansas' remedy, but would be limited to interest accruing starting in the year that the action was filed.[173] Finally, the Court adopted the methodology for quantifying Kansas' claims that had been recommended by the special master. The elements of damage accepted were losses to Kansas water users due to additional groundwater pumping costs and crop production losses, regional groundwater damages resulting from lowered groundwater levels, and secondary economic damages throughout the Kansas economy.[174] Although the existence of secondary economic damages had been considered in the *Texas v. New Mexico* litigation, this was the first instance of its being adopted as the basis for a monetary judgment.[175] Although Colorado aggressively resisted secondary damages during trial, it did not file an exception to the special master's recommendation on that point.[176]

Upon remand and further trial, the special master issued a Fourth Report devoted primarily to prospective remedies.[177] Notably, for purposes of future compliance, the method of determining crop consumptive use was changed at the urging of Kansas, over the strong opposition of Colorado, from the modified Blaney-Criddle method to the Penman-Monteith method.[178] The computer model developed by Kansas to assess the impact of postcompact pumping was accepted, but only for use in a 10-year rolling compliance period.[179] The special master and the Court also rejected Kansas' request for the appointment of a river master.[180]

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[171] *See* Second Report (1997) and Third Report (2000) of the Special Master, No. 105, Orig., *available at* http://www.supremecourtus.gov.

[172] 533 U.S. 1, 7-9 (2001).

[173] *Id*. at 9-16.

[174] Third Report, *supra* note 171, at 17-71.

[175] *See id*. at 65-71.

[176] See Kansas v. Colorado, 533 U.S. at 6.

[177] Fourth Report of the Special Master, Kansas v. Colorado, No. 105, Orig., at 98 (2003) (Fourth Report), *available at* http://www.supremecourtus.gov/SpecMastRpt/13671littleworth.pdf.

[178] *Id.* at 53-79. Colorado did not file an exeption to this recommendation.

[179] *Id.* at 80-92, 108-20; 543 U.S. 86, 99-103 (2004).

[180] 543 U.S. at 92-94.

After the Court's 2004 ruling, the states worked diligently to jointly prepare a detailed Judgment and Decree. Matters that could not be agreed to were ruled on by the special master. The special master submitted his Fifth and Final Report in January 2008, consisting of three volumes, two of which contained the proposed Judgment and Decree. The detailed appendices to the Decree include, among many other things, the electronic version of the computer model approved by the Court, on a DVD.

The Judgment and Decree confirms the fact that Colorado paid Kansas $34.6 million in damages and prejudgment interest and $1.1 million in costs. The amount of costs was determined based on the special master's ruling that the limitation on expert witness fees for purposes of costs that is applicable in the federal district courts also binds the Supreme Court in the exercise of its original jurisdiction. Kansas filed an exception to this ruling, but the Court determined that it did not need to reach the constitutional and statutory interpretation issues because it chose to make the cost rules in the original jurisdiction the same as those pertaining in the federal district courts.[181] The Court also approved the entry of the Judgment and Decree.[182]

[f] Yellowstone River Compact

The Yellowstone River Compact was agreed to by Montana, North Dakota, and Wyoming in 1950 and consented to by Congress in 1951.[183] Montana filed a Motion for Leave to File Bill of Complaint against Wyoming in January 2007.[184] Montana, the downstream state, alleged in its complaint that Wyoming had violated the Yellowstone River Compact by virtue of postcompact construction of storage, increases in groundwater pumping (including coalbed methane production pumping), irrigation of new acreage, and increases in consumption on irrigated lands by converting from flood irrigation to sprinkler irrigation. At the suggestion of the Solicitor General of the United States, the Court granted Montana's Motion for Leave to File over Wyoming's objection, and allowed Wyoming to file a motion to dismiss the complaint.[185] The Court then appointed Barton H. Thompson as Special Master and referred the motion to dismiss

[181] Kansas v. Colorado, 129 S.Ct. 1294 (2009).

[182] *Id.* at 1296.

[183] 65 Stat. 663 (1951) (elec. 2009).

[184] Montana v. Wyoming & North Dakota, No. 137, Orig., 2007 WL 4947613 (Jan. 31, 2007).

[185] Montana v. Wyoming & North Dakota, 128 S.Ct. 1332 (2008).

and any further proceedings to him.[186] He has recommended denial of the motion to dismiss.[187]

[3] Failure to Comply with Supreme Court Interpretation and Enforcement Decrees

In two circumstances a state has been formally accused of violating a Supreme Court decree enforcing and interpreting an earlier interstate water allocation. One of these allocations is the 1922 equitable apportionment decree on the Laramie River as interpreted by later decisions of the Court.[188] The other is the 1943 Republican River Compact as interpreted by the Court's 2003 Decree.[189]

[a] Laramie River

In 1939, three years after the Court's latest clarification of its Decree, Colorado overused its decreed share of the waters of the Laramie River both with respect to individual diversions and in the aggregate. The State of Wyoming sought leave to file a petition requiring Colorado to show cause why it should not be adjudged in contempt for violation of the Court's Decree. The Court granted leave to file the petition and directed Colorado to show cause. The Court accepted Colorado's argument that it was not a violation of the Decree if any of the individually specified diversions within Colorado were exceeded, so long as the total of all diversions in Colorado did not exceed the aggregate amount of 39,750 acre-feet.[189.1] In this way, the Court allowed Colorado full flexibility within its own borders, provided that the total amount remaining for Wyoming's use at the state line was not subject to any more than the aggregate diversions in Colorado.

The Court rejected, as a matter of law, Colorado's defense that Wyoming had not been injured.[190] Colorado also alleged, however, the defense of acquiescence, asserting that Wyoming had indicated that it had no objection to the unlawful diversions. Although there was disagreement over the facts, the Court concluded, "[i]n the light of all the circumstances,

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[186] Montana v. Wyoming & North Dakota, 129 S.Ct. 480 (2008).

[187] Memorandum Opinion of the Special Master on Wyoming's Motion to Dismiss Bill of Complaint, Montana v. Wyoming & North Dakota, No. 137, Orig., U.S. Sup. Ct. (6/2/09), *available at* http://www.doj.mt.gov/news/releases2009/20090603specialmasteropinion.pdf.

[188] Wyoming v. Colorado, 259 U.S. 419 (1922); 286 U.S. 494 (1932); 298 U.S. 573 (1936).

[189] Kansas v. Nebraska & Colorado, 538 U.S. 720 (2003).

[189.1] Wyoming v. Colorado, 309 U.S. 572, 579-581 (1940).

[190] *Id.* at 581 ("Colorado is bound by the decree not to permit a greater withdrawal and, if she does so, she violates the decree and is not entitled to raise any question as to injury to Wyoming when the latter insists upon her adjudicated rights.").

we think it sufficiently appears that there was a period of uncertainty and room for misunderstanding which may be considered in extenuation."[191] Because of the extenuating circumstances, the Court denied Wyoming's petition, saying, "[i]n the future there will be no ground for any possible misapprehension . . . with respect to the duty of Colorado to keep her total diversions from the Laramie river and its tributaries within the limit fixed by the decree."[192] Apparently, this was a sufficiently clear admonition for the states to be able to cooperate without further resort to the Supreme Court since 1940.

[b] Republican River

The Supreme Court's Decree approved a five-volume Final Settlement Stipulation (FSS), which includes extensive documentation of the groundwater model and accounting procedures by which effects on the Republican River are to be determined in the future.[193] Accounting under the Decree began in 2003. The first determination of compliance was for "water-short year" 2006, which required an assessment of Nebraska's consumptive use, versus Nebraska's allocations, for the years 2005 and 2006.[194] Based on that accounting, Kansas initiated enforcement proceedings in December 2007 by making demand on Nebraska for a remedy that included requests for (1) a finding of contempt by the Supreme Court, (2) disgorgement of Nebraska's gains from the violation or Kansas' losses, whichever was greater, (3) shut-down of 515,000 acres of groundwater pumping (out of the 1.2 million acres in the Republican Basin in Nebraska), and (4) appointment of a river master. The states have proceeded to utilize the dispute resolution procedure provided for in the 2003 Decree.[195] This included a two-week trial before an arbitrator in 2009.

The arbitration is nonbinding, but the ruling of the arbitrator is admissible, though not conclusive, in any subsequent proceeding before the Supreme Court. The amount of the alleged violation is approximately 79,000 acre-feet, based on two years of accounting (2005 and 2006). Nebraska disputes the amount of the violation, though not its existence. Kansas calculated Nebraska's gains as approximately $64 million and Kansas' losses as approximately $9 million. The arbitrator determined, as

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[191] *Id.* at 582.

[192] *Id.*

[193] *See* Kansas v. Nebraska & Colorado, Second Report of the Special Master (Subject: Final Settlement Stipulation (FSS)) (2003); Final Report of the Special Master with Certificate of Adoption of RRCA Groundwater Model (2003). Both are available at http://www.supremecourtus.gov.

[194] *See* FSS § V.B.2.e.i and App. B.

[195] FSS § VII.

a legal matter, that he would not receive evidence on Nebraska's gains. Nebraska calculated Kansas' losses to be $1.2 million or less. Colorado has participated in the dispute resolution process concerning Kansas' allegations against Nebraska. The arbitrator will issue his decision in June 2009. Unless the states agree with the results recommended by the arbitrator, or reach some other accommodation, it will be necessary, if Kansas is to obtain relief, to bring an enforcement proceeding before the U.S. Supreme Court.

Colorado is not subject to a two-year compliance test, but the first five-year compliance period is now complete, and there seems to be little dispute that Colorado has overused its allocations during that period in violation of the Court's Decree.[195.1] Colorado is seeking approval from the Republican River Compact Administration to implement an augmentation plan that would pipe water to the North Fork of the Republican River at the Colorado-Nebraska state line and undertake other actions to bring itself into compliance.

§ 18.05 Impact of Interstate Allocations on In-State Water Uses

Once interstate waters have been allocated by compact, Supreme Court decree, or act of Congress, a state is bound by the apportionment. This is true whether the interstate allocation is reached by Supreme Court decree[196] or by compact:[197] "We have said on many occasions that water disputes among States may be resolved by compact or decree without the participation of individual claimants, who nonetheless are bound by the result reached through representation by their respective states."[198] Although the Court has explained that it will not unnecessarily interfere with a state's administration of its own water users,[199] the aggregate water taken by one state's users cannot exceed that state's equitable share as determined by the decree.[200] Likewise, state laws inconsistent with the terms of a compact are superseded. This is true because "congressional

[195.1] *See* Kansas v. Nebraska and Colorado, No. 126, Orig. Final Settlement Stipulation, subsection IV.D., *available at* http://www.supremecourtus.gov.

[196] Colorado v. New Mexico, 459 U.S. 176, 182 n.9 (1982).

[197] Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938).

[198] Nebraska v. Wyoming, 515 U.S. 1, 22 (1995).

[199] Nebraska v. Wyoming, 325 U.S. 589, 623 (1945) ("Nor will the decree interfere with the relationships among Colorado's water users. The relative rights of the appropriators are subject to Colorado's control."); *cf.* Arkansas River Compact, art. VI-A(2), *discussed in* Kansas v. Colorado, 514 U.S. 673, 690-91 (1995).

[200] *E.g.,* Wyoming v. Colorado, 309 U.S. 572, 579-81 (1940).

consent transforms an interstate compact . . . into a law of the United States."[201] This is also true for congressional apportionment.

State court decisions have applied this rule to limit a state's administration of water so that it is consistent with the terms of a compact. For example, in *Alamosa-La Jara Water Users Protection Association v. Gould*,[202] the Colorado Supreme Court addressed a challenge to rules designed to comply with the Rio Grande Compact. The Conejos Water Conservancy District argued that the rules violated the Colorado Constitution. The court rejected this argument and upheld the rules, explaining that "[e]quitable apportionment, a federal doctrine, can determine times of delivery and sources of supply to satisfy that delivery without conflicting with state law, for state law applies only to the water which has not been committed to other states by the equitable apportionment."[203]

[1] *Hinderlider* (La Plata River)

In *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*,[204] the Supreme Court addressed a compact governing the La Plata River. Under the terms of the compact, the states agreed to rotate the use of the water between the states when the streamflow was low. The ditch company sought to enjoin the Colorado state engineer from honoring the rotation agreement on the grounds that the rotation interfered with its rights under a Colorado adjudication decree. The Supreme Court unanimously held that an apportionment between states, whether by compact or decree, binds the private water users of each state.[205]

[2] *Texas v. New Mexico* (Pecos River)

The Pecos River Compact apportions the waters of the Pecos River between the States of New Mexico and Texas based on the conditions of the river in 1947.[206] Unfortunately for the upstream State of New Mexico, the conditions of the river in 1947, as modeled by the two states for compact purposes, "did not describe the actual state of the river."[207] As a result, New Mexico quickly accumulated delivery shortfalls. Attempts at mediation failed, and the Pecos River Compact Commission took no

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[201] Texas v. New Mexico, 462 U.S. 554, 564 (1983) (quoting Cuyler v. Adams, 449 U.S. 433, 438 (1981)).

[202] 674 P.2d 914 (Colo. 1984).

[203] *Id.* at 922 (citation omitted).

[204] 304 U.S. 92 (1938).

[205] *Id.* at 106.

[206] 63 Stat. 159, at Article III(a) (June 9, 1949).

[207] Texas v. New Mexico, 462 U.S. 554, 560 (1983).

action due to the voting provisions, which require unanimous agreement by the two states.

Texas filed its Motion for Leave to File Complaint against New Mexico in 1974, alleging that New Mexico had violated the Pecos River Compact by "countenancing and permitting depletions by man's activities" such that New Mexico had under-delivered in excess of 1.2 million acre-feet of water to Texas.[208] *Texas v. New Mexico*[209] was litigated for 14 years, and resulted in four opinions from the Supreme Court. The Court ultimately found that New Mexico had failed to deliver 340,100 acre-feet of water over the period of 1950 to 1983.[210] To remedy this violation, New Mexico agreed to pay $14 million to Texas for its past over-diversions. In addition, the Court ordered that a river master be appointed to oversee New Mexico's future compliance with the Compact.[211]

As established in *Hinderlider*, New Mexico is bound by the apportionment, and private water rights used in New Mexico cannot exceed New Mexico's share under the Compact. Consequently, New Mexico's initial reaction to the Court's decree was to take steps to facilitate priority administration.[212] Priority administration, however, would have been extremely costly for the state and its citizens. Instead, New Mexico pursued an aggressive strategy of leasing and purchasing water rights and augmenting flows aimed at achieving compact compliance. The New Mexico Legislature recognized that the "shortage of water and the state's obligation to Texas . . . is a statewide problem affecting all the citizens of the state."[213] To remedy this problem, New Mexico initially leased surface water from the largest irrigation district on the Pecos.[214] The lease was intended as a temporary solution. The long-term solution was to authorize the New Mexico Interstate Stream Commission to purchase land with appurtenant water rights and to develop well-fields to augment the flows of the Pecos River.

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[208] *Id.* at 562. The Brief in Support of Motion was less than two pages.

[209] Texas v. New Mexico, 446 U.S. 540 (1980); Texas v. New Mexico, 462 U.S. 554 (1983); Texas v. New Mexico, 482 U.S. 124 (1987); and Texas v. New Mexico, 485 U.S. 388 (1988).

[210] *Texas v. New Mexico*, 482 U.S. at 127-28.

[211] *Texas v. New Mexico*, 485 U.S. at 391.

[212] *See* State *ex rel.* Reynolds v. Pecos Valley Artesian Conservancy District, 663 P.2d 358 (N.M. 1983) (state engineer sought to revise adjudication procedure to allow claimants to challenge *inter se* rights of downstream senior users). The proposed procedure was upheld but never instituted.

[213] NMSA § 72-1-2.2B.

[214] James C. Brockmann, "The Pecos River Compact Compliance Program—A Model for Upstream States," American Bar Association, Section of Environment, Energy and Resources, 27th Annual Water Law Conference 8 (Feb. 18-20, 2009).

In sum, New Mexico, as a state, has made a substantial effort to achieve compliance with the Supreme Court Amended Decree entered in 1988. The New Mexico Legislature has appropriated approximately $100 million to accomplish this purpose.[215] The result of this effort is that New Mexico has never been out of compliance with the delivery requirements of the Court's Amended Decree in any amount.[215.1]

[3] *Kansas v. Colorado* (Arkansas River)

In 2009 the Supreme Court issued its final opinion in *Kansas v. Colorado*.[216] As noted above, that case began in 1985 and sought limitations on postcompact groundwater pumping in the Arkansas Valley in Colorado. The impact of the Compact and its enforcement by Kansas on Colorado groundwater pumping can be seen in part by comparing the amount of groundwater pumping before and after the enforcement action. The maximum groundwater pumping prior to the Supreme Court's rulings had been about 287,000 acre-feet.[217] After implementation of the remedy based on the Supreme Court's rulings, during the years 1997-2008, the maximum pumping was about 134,000 acre-feet per year,[218] a reduction of some 53%. The average pumping prior to the Supreme Court's rulings had been about 170,000 acre-feet per year.[219] The average pumping after implementation of the remedy, for the years 1997-2008, was approximately 87,000 acre-feet per year, a reduction of about 49%.[220] These reductions in pumping are reductions of actual use, not simply a slowdown or moratorium on further increases in use. Moreover, with the approval of the Supreme Court, Colorado has implemented rules by which no groundwater pumping at all is allowed except to the extent that the replacement required by the rules is made to the river to offset the depletions calculated to be caused by such pumping. This includes responsibility for the legacy effects of prior pumping.[221]

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[215] *Id.* at 11.

[215.1] *Id.* at 1, 11.

[216] No. 105, Orig., Kansas v. Colorado, 129 S.Ct. 1294 (2009).

[217] Fourth Report, *supra* note 177, at 98.

[218] Personal communications between John B. Draper and Dale E. Book and Angela Schenk of Spronk Water Engineers, experts for Kansas, and Dale Straw, expert for Colorado, June 12 and 17, 2009.

[219] Fourth Report, *supra* note 177, at 98.

[220] Personal communications, *supra* note 218.

[221] Fourth Report, *supra* note 177, App. Exh. 6, at App. 43 ("all diversions of tributary groundwater . . . shall be totally discontinued unless out-of-priority depletions to senior surface rights in Colorado are replaced . . .").

[4] *Kansas v. Nebraska and Colorado* (Republican River)

Kansas has requested that the groundwater pumping in the Republican River Basin in Nebraska be reduced by some 515,000 acre-feet, which would be a reduction of 43%. As described above, this matter is currently subject to dispute resolution and possible Supreme Court litigation. If the Kansas reduction in acreage irrigated by groundwater were implemented, it would be a smaller percentage reduction than has occurred in the Arkansas River Valley as a result of the compact enforcement action there. Even the pumping that continues to occur in the Arkansas River Valley in Colorado is subject to the requirement that the effects of that pumping on the Arkansas River be replaced, including the effects of prior years' pumping. Whether similar changes will be required in the Republican Basin in Nebraska will be determined in the pending proceedings.

§ 18.06 Conclusion

The U.S. Supreme Court, as it did in the gunboat controversy on the Colorado River, performs a unique and critical role in adjusting interstate water interests within the federal system. It has provided the legal principles and the mechanisms for creating and enforcing interstate water allocations. The compact has shown itself to be the most useful and common method to determine interstate allocations, although allocations by the Court and by Congress have also been accomplished. Allocations approved by Congress, the Court has affirmed, will be enforced as written and will not be altered by the Court. Once an allocation has been set, one state may not invade the allocation of another state by any means, including groundwater pumping or any other increase in consumption that deprives a downstream state of water to which it is entitled. As discussed above, however, this fundamental principle is being challenged in pending litigation before the Court, on the basis that increased efficiency, which reduces return flows, is allowed under the wording of at least the Yellowstone River Compact.

The Court has answered many important questions about how enforcement of allocations will be accomplished. It has affirmed that it will quantify the effect of the general principles of allocation set out in many compacts. The contract remedies of money damages and specific performance will be available in appropriate cases to address past violations. Interest on money damages has been found to be appropriate, at least from the year in which the enforcement action is filed. The Eleventh Amendment is not a bar to quantifying damages based on the losses of individual users.

Much has been accomplished over the last century to resolve questions of interpretation and enforcement, but, as Justice Frankfurter once reminded us, "[a]ll avoidance of dispute . . . is not within human gift."[222]

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[222] West Virginia *ex rel.* Dyer v. Sims, 341 U.S. 22, 28 (1951).

One of the big enforcement questions on the horizon is the approach the Court will take to a remedy for violation of a detailed decree interpreting and enforcing a prior allocation. As discussed above, one such case is developing on the Republican River, in *Kansas v. Nebraska & Colorado*, with Kansas asserting that Nebraska should disgorge the gains obtained by violating the Court's decree and be required to shut down a substantial amount of irrigation to ensure compliance in the future. We can be confident that, just as in the past century, the Court's answers to such still-unresolved questions of interpretation and enforcement of interstate allocations will continue in this century to play a central role as the states deal with each other and the federal government over water issues.