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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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[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

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[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

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[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)).