Waiving Federal Sovereign Immunity in Original Actions Between States

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Introduction

This article investigates the adverse consequences of federal sovereign immunity in original actions between states in the U.S. Supreme Court, where there is no federal immunity waiver despite extensive federal involvement in the underlying dispute. By contrast, states and other aggrieved parties can invoke immunity waivers for regulatory and takings claims against the federal government in the lower courts and on petitions for certiorari. Federal immunity in high stakes litigation between states imposes a perverse disincentive for states to seek relief from the highest court in the land, and forces them to litigate their grievances in a piecemeal fashion in the lower courts. The inconsistent and unpredictable role of the federal government in original actions before the U.S. Supreme Court poses “the legal equivalent of asymmetrical warfare.”

To eradicate this disincentive and to stimulate comprehensive resolution of interstate battles over one of the world’s most precious resources—water—the article recommends a congressional waiver of federal immunity for original actions between states.

The doctrine of sovereign immunity is deeply entrenched in American jurisprudence, yet federal sovereign immunity is not explicitly required by the U.S. Constitution. While there may be good reasons for shielding state governments from litigation by aggrieved individuals, shielding the federal government from suit, and especially from original actions between states in the U.S. Supreme Court, is less defensible.

Congress has waived federal immunity in several important contexts without destroying the balance of powers or the federal treasury. It has authorized claims against the federal government for Fifth Amendment takings of private property, for tort claims, and for final agency actions. Also, to facilitate comprehensive resolution of water rights, Congress has waived federal immunity in general stream adjudications in state court. Perversely, there is no such waiver for original actions in the U.S. Supreme Court. When states seek equitable apportionment or enforcement of interstate compacts, the United States can and often does sit on the sidelines, despite being a necessary party to the litigation.

Disputes over interstate water bodies provide a compelling context to explore the dimensions and consequences of federal sovereign immunity in original actions. The twentieth century saw an explosion of federal involvement in water management throughout the nation, from reclamation to flood control and beyond, heightening the potential for combat between federal and state governments. Of the 88,000 inventoried dams in the country, federal agencies operate the largest

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1 Burke W. Griggs, Interstate Water Litigation in the West: A Fifty-Year Retrospective, 20 U. Denv. Water L. Rev. 153, 210–11 (2017).

2 Helen Hershkoff, Waivers of Immunity and Congress's Power to Regulate Federal Jurisdiction-Federal-Tort Filing Periods a Testing Case, 39 Seton Hall Legis. J. 243, 258 (2015).
of them, including Hoover, Grand Coulee, and Bonneville Dams. Meanwhile, nearly 14,000 miles of federal levees armor the nation’s riverbanks and coastlines.\(^3\)

Although Congress has charged federal agencies with an array of statutory flood control, reclamation, and navigation responsibilities, and has provided substantial appropriations for those purposes, it has done very little to facilitate the resolution of intergovernmental disputes. Intergovernmental conflict arises when federal actions interfere with state-sanctioned private property rights or with state regulation and control of water, which is an area purported to be within the states’ traditional authorities.\(^4\) The management of transboundary water supplies on major river systems generates uncertainty and conflict between states, water users, environmental interests, and the federal government. Finding a forum that can provide meaningful relief presents its own unique set of challenges. In the past few decades, jurisdictional battles over interstate water bodies seem to have grown immune to resolution. Sovereign immunity and federalism are at the heart of the problem.

Part I of this article considers the nature of original actions between the states before the U.S. Supreme Court under Article III, § 2, which authorizes a limited set of claims that would be difficult if not impossible to resolve absent Supreme Court involvement.\(^5\) Part I also investigates the underpinnings of federal sovereign immunity. Separation of powers suggests that the government may need to insulate itself from liability to individuals for policy decisions that affect the public at large, which should be left to the political process rather than the judiciary. Critics of sovereign immunity point out, however, that immunity contradicts democratic principles by placing the government above the people, thereby “thwart[ing] the administration of justice.”\(^6\) In some circumstances, Congress has alleviated this injustice through waivers of immunity that authorize claims against the federal government for takings of private property, unlawful or arbitrary agency action, torts, and some other types of claims. It has not, however, waived federal immunity for original actions in the U.S. Supreme Court.

The article then turns to several river basins across the nation to tease out the jurisdictional quandaries posed by federal involvement, or lack thereof, in interstate water allocation and dispute resolution. The basins of interest are situated within three distinct but related contexts. Part II of the article examines original actions for equitable apportionment between states over the Arkansas River and the Apalachicola-Chattahoochee-Flint River Basin (ACF). Next, Part III covers interstate compact litigation on the Republican and Rio Grande Rivers. These two Parts demonstrate how federal immunity for original actions obstructs comprehensive resolution of interstate controversies. With respect to water rights, the absence of a federal immunity waiver for original actions incentivizes states to sue in district court instead of bringing an original action or, for that matter, negotiating an interstate compact that may be litigated before the Supreme Court.

\(^3\) See U.S. Army Corps of Engineers, National Inventory of Dams (2016), available at http://mid.usace.army.mil/cm_apex/?p=838:12; U.S. Army Corps of Engineers, National Inventory of Levees (2017), https://www.infrastructurereportcard.org/cat-item/levees/.

\(^4\) See Reed D. Benson, Deflating the Defe

\(^5\) See U.S. Const. Art. III, § 2.

\(^6\) Susan Randall, Sovereign Immunity and the Uses of History, 81 Neb. L. Rev. 1, 15 (2002).
The paradox posed by congressional waivers of federal immunity for litigation in the lower courts is illustrated in Part IV. This Part explores basins that have been subject to general stream adjudications (GSAs) as well as other basins that have been beleaguered by regulatory and takings litigation in the lower courts. Part IV shows how states and other interested parties have sought and obtained relief from the federal government in the Milk, the Missouri, the Platte, and the Klamath River Basins through immunity waivers provided in the McCarran Amendment, the Tucker Act, the Administrative Procedure Act, and federal environmental statutes.

In Part V, the article concludes by promoting the merits of a waiver of federal immunity in original actions between the states. Although sovereign immunity is a staple of our nation’s jurisprudence, it serves little purpose in this context. A congressional waiver of federal immunity would foster more predictable and productive participation by the United States in high stakes disputes over transboundary resources and would have few downsides, at least in the case of interstate disputes before the U.S. Supreme Court.

I. Sovereign Immunity and Original Actions

In one of the earliest tests of judicial power – Marbury v. Madison – the Supreme Court recognized that the law’s capacity to provide a remedy for violations of rights is the “essence of civil liberty.” If one accepts that premise, then sovereign immunity is problematic. Why should governments be shielded from suits by those who have been wronged by their actions or omissions? The Framers said nothing explicit about sovereign immunity in the U.S. Constitution, although the ratification of the Eleventh Amendment immunized the states from suits “by Citizens of another State, or by Citizens or Subjects of any Foreign State.”

What happens when a state invokes the Supreme Court’s original jurisdiction to sue a sister state over interstate water rights, boundary lines, or other high stakes disputes? And what if complete relief cannot be provided unless the federal government participates as a party and can be bound by the Court’s order? This Part considers the nature of original actions before the Supreme Court to demonstrate the need for immunity waivers when sovereigns sue each other. It then draws distinctions between state and federal sovereign immunity and, finally, assesses waivers of federal immunity that provide relief to those who seek redress from the United States in the lower courts.

A. Original Actions Between Sovereigns

Article III, § 2 gives the U.S. Supreme Court original jurisdiction over cases brought by a state against another state. To invoke the Court’s jurisdiction, the state itself must be the party of

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7 43 U.S.C. § 666.
8 28 U.S.C. §§ 1346(a)(2), 1491.
9 5 U.S.C. §§ 701-706.
10 See, e.g., Endangered Species Act, 16 U.S.C. §§ 1531-1544.
11 5 U.S. (1 Cranch) 137, 163 (1803).
12 U.S. Const. Amd. XI (ratified in 1795).
13 See U.S. Const. Art. III, § 2 (“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.”). The Court also has original jurisdiction over controversies between the United States and a state and actions by a state against citizens of another state or aliens. Id.; 28 U.S.C. § 1251. However, disputes between states comprise the majority of original actions heard by the Court. Stephen M. Shapiro et al., Supreme Court Practice § 10.2 (10th ed. 2013).
record, and the suit must be authorized by the governor or another competent state official.\textsuperscript{14} The state must bring suit in its capacity as the representative of its citizens,\textsuperscript{15} and it must assert “quasi-sovereign” interests, rather than proprietary or individual interests.\textsuperscript{16} In addition, original actions must be civil in nature, rather than penal,\textsuperscript{17} and they must involve a justiciable “case or controversy” under Article III.\textsuperscript{18}

There are several reasons for these high jurisdictional bars. The first, and most obvious, is to preserve the dignity of the highest court of the land.\textsuperscript{19} Perhaps less apparent, but no less significant, involves state sovereign immunity. When the action is brought by a state in its sovereign capacity, the defendant state is not shielded by immunity, as it would be if the suit were brought by an individual or a foreign entity.\textsuperscript{20}

Even if all of the requisites are met, the Supreme Court can refuse jurisdiction. In deciding whether to hear a case, the Court considers the seriousness of the claim and the availability of an alternative forum for resolution of the dispute.\textsuperscript{21} Among other things, the Court will dismiss the complaint if it cannot fashion appropriate relief.\textsuperscript{22}

Original proceedings are “basically equitable in nature,” in which the Court may “mould the process [to] best promote the purposes of justice.”\textsuperscript{23} The exercise of original jurisdiction in litigation between states serves “‘as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force.’”\textsuperscript{24} Original jurisdiction is also designed to ensure that federal law can be enforced effectively against the states, given the constraints of state sovereign immunity.\textsuperscript{25}

If it cannot obtain jurisdiction over a necessary party because of sovereign immunity or otherwise, the Court cannot fashion appropriate relief, and it will not accept jurisdiction.\textsuperscript{26} The pitfalls and virtues of state and federal sovereign immunity are examined in the next two subsections.

\textbf{B. Shielding the Sovereign from Liability: The Good, the Bad, and the Ugly}

\begin{itemize}
\item \textsuperscript{14} Florida v. Anderson, 91 U.S. 667 (1875).
\item \textsuperscript{15} Id.
\item \textsuperscript{16} Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907); Pennsylvania v. New Jersey, 426 U.S. 660 (1976).
\item \textsuperscript{17} See Wisconsin v. Pelican Ins. Co., 127 U.S. 265 (1888), overruled in part on other grounds, Milwaukee County v. M.E. White Co., 296 U.S. 268 (1935) (observing that, under common law, the criminal laws of a sovereign do not reach beyond its own territory).
\item \textsuperscript{18} Mississippi v. Louisiana, 506 U.S. 73 (1992).
\item \textsuperscript{19} Daniel J. Meltzer, State Sovereign Immunity: Five Authors in Search of a Theory, 75 Notre Dame L. Rev. 1011, 1039 (2000).
\item \textsuperscript{20} Maryland v. Louisiana, 451 U.S. 725 (1981); Kansas v. Colorado, 206 U.S. 46 (1907).
\item \textsuperscript{21} Arizona v. New Mexico, 425 U.S. 794 (1976).
\item \textsuperscript{22} Illinois v. City of Milwaukee, 406 U.S. 91 (1972); Florida v. Georgia, 138 S. Ct. 2502 (2018).
\item \textsuperscript{23} Kansas v. Nebraska, 135 S. Ct. 1042, 1051 (2015) (citing Ohio v. Kentucky, 410 U.S. 641, 648 (1973). See id. (“the Court may invoke equitable principles to devise ‘fair ... solution[s]’ to compact violations”) (citing Texas v. New Mexico, 482 U.S. 124, 134 (1987)).
\item \textsuperscript{24} Id. (citing North Dakota v. Minnesota, 263 U.S. 365, 372–373 (1923)).
\item \textsuperscript{25} James Pfander, Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases, 82 Cal. L. Rev. 555, 559 (1994).
\item \textsuperscript{26} Florida v. Georgia, 138 S. Ct. 2502 (2018).
\end{itemize}
For better or worse, sovereign immunity is deeply entrenched in American jurisprudence. For the past 200 years, the U.S. Supreme Court has adhered to the notion that the sovereign cannot be sued without its consent. The Court has characterized the doctrine as “universal” in the states at the time the Constitution was ratified.

Yet, as a foundational doctrine of jurisprudence, none is more hotly contested than sovereign immunity, and few have less solid grounding in constitutional text. The history of the nation’s founding helps fill in the foundational cracks.

Although they threw off the shackles of British rule, the colonies hewed to the British common law notion that the King could do no wrong, at least no wrong that could be subject to private lawsuits. In olden days, the only recourse British subjects had against the crown was a petition of right. This cumbersome device was “formal and ceremonious,” both to preserve the dignity of the crown and to avoid “the absurdity of the king's sending a writ to himself to command the king to appear in the king's court.” If the procedural barriers were overcome, however, the petition of right provided an “efficient remedy for the invasion by the sovereign power of individual rights.”

In Federalist No. 81, Alexander Hamilton assured the colonies that they would continue to be protected by immunity upon ratification of the Constitution: “It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.” However, the U.S. Supreme Court observed in 1882 in United States v. Lee, “As we have no person in this government who exercises supreme executive power or performs the public duties of a sovereign, it is difficult to see on what solid foundation of principle the exemption from liability to suit rests.”

Whether it be a monarchy or a democracy, arguably, immunity from suit protects the dignity of the sovereign and its courts, which, through immunity, avoid being embroiled in political disputes. This justification carries less weight, however, in a democracy, where the people are sovereign, and recourse to the courts is a hallmark of participatory government. There may be other reasons for sovereign immunity that apply with full, or perhaps even greater, force in a democracy.

Arguments in favor of governmental immunity in a democracy center both on the nature of democratic decisionmaking and the balance of powers among the three branches of government. Absent sovereign immunity, “policy-making decisions by the democratic branches of government

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27 Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 411-412 (1821).
28 Alden v. Maine, 527 U.S. 706 (1999).
29 Hershkoff, supra note 2, at 258.
30 Id.
31 See United States v. Lee, 106 U.S. 196, 205 (1882) (“from the time of Edward the First until now the king of England was not suable... except where his consent had been given on petition of right”).
32 Id. at 206. See Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907) (“there can be no legal right as against the authority that makes the law on which the right depends”) (Holmes, J).
33 Lee, 106 U.S. at 206.
34 The Federalist No. 81, at 487-88 (Alexander Hamilton) (Clinton Rossiter ed., 1961).
35 106 U.S. 196, 206 (1882). See Erwin Chemerinsky, Shifting the Balance of Power? The Supreme Court, Federalism, and State Sovereign Immunity: Against Sovereign Immunity, 53 Stan. L. Rev. 1201, 1202 (2001) (arguing that sovereign immunity places the government “above the law”).
36 Gregory C. Sisk, The Continuing Drift of Federal Sovereign Immunity Jurisprudence, 50 Wm. & Mary L. Rev. 517, 544 (2008).
may be second-guessed and subjected to chilling interference by the courts.”\textsuperscript{37} It should not be easy for aggrieved individuals to defeat decisions made by the people through their elected officials. The government’s policy-based decisions that affect the public at large are insulated from suit “because open-ended and unconstrained access to the courts by those who object to governmental policies or actions could undermine effective governance by the people through an electoral majority.”\textsuperscript{38} This rationale suggests, then, that sovereign immunity should only shield government actions that are intimately tied to policy determinations.\textsuperscript{39}

This leads us to an examination of the federal government’s claim to immunity from suits by states and others. Some of the reasons for state sovereign immunity support federal immunity, but some do not.

For one thing, the federal government has a duty to do justice to the people, as “a pervasive constitutional norm, derivable from the Declaration of Independence and from the Preamble to the Constitution, as well as the due process clause.”\textsuperscript{40} States have duties to their citizens, too, but there is no constitutional equivalent to the Eleventh Amendment for the federal government. If anything, an examination of constitutional text weighs against federal immunity. By granting power to the federal courts to hear “Controversies to which the United States shall be a party,” Article III seems to negate federal immunity.\textsuperscript{41} However, in \textit{United States v. Lee}, the Supreme Court remarked that Article III “created a court in which it has authorized suits to be brought against the United States, but has limited such suits to those arising on contract, with a few unimportant exceptions.”\textsuperscript{42}

In \textit{Lee}, the Court looked beyond the constitutional text and engaged in a comparative analysis of Britain and the United States to probe the lineage and nature of federal sovereign immunity. Not surprisingly, it found that sovereignty looks very different in the United States:

What were the reasons which forbid that the king should be sued in his own court, and how do these reasons apply to the political body corporate which we call the United States of America? As regards the king, one reason given by the old judges was the absurdity of the king's sending a writ to himself to command the king to appear in the king's court. \textit{No such reason exists in our government}, as process runs in the name of the president and may be served on the attorney general.\textsuperscript{43}

It seems curious, then, that the \textit{Lee} Court ultimately shielded the federal government from suit in the United States, just as the monarchy would be shielded by immunity in Britain. The Court explained: “[I]t would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the sovereign, to subject him to repeated suits as

\textsuperscript{37} Id.
\textsuperscript{38} Id. at 529.
\textsuperscript{39} Hershkoff, \textit{supra} note 2, at 268.
\textsuperscript{40} Vicki C. Jackson, \textit{Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence}, 35 Geo. Wash. Int'l L. Rev. 521, 607 (2003).
\textsuperscript{41} See U.S. Const. art. III, § 1 (stating inter alia that judicial power shall vest in “such inferior Courts as the Congress may from time to time ordain and establish”); U.S. Const. art. III, § 2 (stating that, other than for original jurisdiction cases, the Supreme Court “shall have appellate Jurisdiction... with such Exceptions, and under such Regulations as the Congress shall make”). \textit{See also} U.S. Const. art. I, § 8, cl. 9 (enumerating Congress' power to “constitute Tribunals inferior to the supreme Court”).
\textsuperscript{42} 106 U.S. at 205–06.
\textsuperscript{43} Id. at 206 (emphasis added).
a matter of right, at the will of any citizen, and to submit to the judicial tribunals the control and disposition of his public property, his instruments and means of carrying on his government in war and in peace, and the money in his treasury.”

The Court concluded its comparative analysis with a metaphorical turn through the Queen’s garden, where the judiciary are naught but careful gardeners:

Notwithstanding the progress which has been made since the days of the Stuarts in stripping the crown of its powers and prerogatives, it remains true to-day that the monarch is looked upon with too much reverence to be subjected to the demands of the law as ordinary persons are, and the king-loving nation would be shocked at the spectacle of their queen being turned out of her pleasure garden by a writ of ejectment against the gardener. The crown remains the fountain of honor, and the surroundings which give dignity and majesty to its possessor are cherished and enforced all the more strictly because of the loss of real power in the government. It is not to be expected, therefore, that the courts will permit their process to disturb the possession of the crown by acting on its officers or agents.

Thus, the Court reasoned, “It seems most probable that [federal sovereign immunity] has been adopted in our courts as a part of the general doctrine of publicists, that the supreme power in every state, wherever it may reside, shall not be compelled, by process of courts of its own creation, to defend itself from assaults in those courts.”

Since Lee, the Supreme Court has been untroubled by fine distinctions between state and federal sovereign immunity, having consistently held that, like states, the federal government is immune from suit unless it consents. It has also insisted that such consent must come from legislation enacted by our democratically elected Congress.

In addition to the reasons articulated in Lee, there are several arguments that sovereign immunity has an important role to play in a democratic government, both in terms of horizontal separation of powers and vertical separation of powers.

With respect to horizontal separation of powers—the separation between the three branches of the federal government—sovereign immunity cabins the judiciary’s ability to substitute its

44 106 U.S. at 206 (citing Briggs v. The Light Boats, 11 Allen 162 (Mass. 1865)).
45 106 U.S. at 208.
46 106 U.S. at 206. “[T]he judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.” Id. at 209.
47 Sisk, Continuing Drift, supra note 36, at 529. Constitutional claims are an exception to this rule. Kathryn E. Kovacs, Revealing Redundancy: The Tension Between Federal Sovereign Immunity and Nonstatutory Review, 54 Drake L. Rev. 77, 124 (2005). See David Cole, Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress’s Control of Federal Jurisdiction, 86 Geo. L.J. 2481, 2508 (1998) (noting that “courts construe statutes to preserve jurisdiction over constitutional claims unless Congress has expressly and unequivocally specified that it intended to bar such jurisdiction”).
48 Sisk, Continuing Drift, supra note 36, at 529. See United States v. Mitchell, 463 U.S. 206, 212 (1980) (“It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.”); United States v. Clarke, 33 U.S. (8 Pet.) 436, 444 (1834) (“As the United States are not suable of common right, the party who institutes such suit must bring his case within the authority of some act of congress, or the court cannot exercise jurisdiction over it.”).
judgment for choices made by the elected branches.\textsuperscript{49} In a democratic society, where political means of redressing wrongs and preserving the rule of law are available, Gregory Sisk argues that “reserving to the sovereign the power to consent to suit against itself ultimately means reserving the power to govern to the people.”\textsuperscript{50} Thus, rather than detracting from it, sovereign immunity “bolsters popular sovereignty by restraining the legal elite from imposing their policy preferences and by denying judges the power to evaluate the prudence of the political choices made by the majority.”\textsuperscript{51} Sisk ultimately concludes that federal sovereign immunity has a legitimate place in our jurisprudence. By his account, “Properly understood, . . . federal sovereign immunity fits comfortably with popular sovereignty, divided and diminished government power, and political accountability for public officers.”\textsuperscript{52}

A related, but distinct, reason for federal sovereign immunity is the need to protect the federal treasury, built by the public as a whole, from attacks by individuals who would drain it for private gain. Not only is this a fiscal concern; it is also a separation of powers concern, with significant implications for judicial power.\textsuperscript{53} Congress has authority over appropriations.\textsuperscript{54} Courts “cannot compel payments from the Treasury absent statutory authority.”\textsuperscript{55} Although courts can enter judgments that will be satisfied from the treasury, “in the absence of some form of legislative commitment in advance to satisfy those judgments, entry of such a judgment may prove inefficacious.”\textsuperscript{56} Understandably, courts wish to avoid issuing judgments that will not be enforced.\textsuperscript{57} To do otherwise would erode public faith in the judiciary and, more broadly, the rule of law.\textsuperscript{58}

In a democracy based on federalism, suits by states against the federal government raise unique concerns. Vertical separation of powers—\textit{i.e.}, federal supremacy—requires a degree of freedom from the imposition of state prerogatives that could destroy congressional priorities and the federal instrumentalities established to carry out those priorities.\textsuperscript{59} In\textit{Marbury v. Madison}, the Court held that Maryland could not tax the Bank of the United States because the state’s “power to tax involves the power to destroy.”\textsuperscript{60} In addition to state taxation, the United States is immune from state regulation that undermines federal supremacy.\textsuperscript{61} For example, a federal agency “is under no obligation to submit the plans and specifications to the state engineer for approval” of a proposed

\textsuperscript{49} See Gregory C. Sisk, \textit{The Inevitability of Federal Sovereign Immunity}, 55 Vill. L. Rev. 899, 900 (2010) (“federal sovereign immunity ‘fortifies the separation of powers between the political and judicial branches’”).

\textsuperscript{50} Id.

\textsuperscript{51} Id. at 905.

\textsuperscript{52} Id. at 900.

\textsuperscript{53} Jackson, supra note 40, at 539.

\textsuperscript{54} U.S. Const. Art. I § 9, cl. 7.

\textsuperscript{55} Jackson, supra note 40, at 539.

\textsuperscript{56} Id.

\textsuperscript{57} Id.

\textsuperscript{58} See ROBERT V. REMINI, \textit{THE LIFE OF ANDREW JACKSON} 216 (1988) (describing Jackson's statement about the Supreme Court's ruling in Worchester v. Georgia, 31 U.S. 515 (1832): “John Marshall has made his decision; now let him enforce it!”).

\textsuperscript{59} U.S. Const. art. VI, cl. 2.

\textsuperscript{60} 17 U.S. (4 Wheat.) 316, 341 (1819). See U.S. v. New Mexico, 455 U.S. 720 (1982).

\textsuperscript{61} See Arizona v. California, 283 U.S. 423, 451 (1931) (“The United States may perform its functions without conforming to the police regulations of a state.”).
federal dam. Likewise, federal agencies may take action to protect federal public lands and resources from destruction despite prohibitory state regulations.

For purposes of this article, it is not necessary to pronounce judgment on the merits of federal immunity across the board. The critical point, examined further below, is that federal sovereign immunity is palatable when waivers of immunity exist for constitutional wrongs and for other infractions committed by the government that are suitable for judicial—as opposed to purely political—resolution.

C. Waivers of Federal Sovereign Immunity

Beginning with the passage of the Tucker Act in 1887, Congress has allowed “a broad tapestry of . . . judicial actions against the federal government.” The Tucker Act authorizes contract claims and takings claims against the United States in the Court of Federal Claims. It was the only significant waiver of federal immunity for nearly sixty years, when, in 1946, Congress passed several others in order to effectuate the New Deal administrative state. In addition to the Tucker Act, two statutory waivers are most relevant to this analysis: the Federal Tort Claims Act (FTCA) and the Administrative Procedure Act (APA). The FTCA authorizes compensatory damages for torts against the federal government, while the APA authorizes non-monetary relief against federal agencies. For purposes of complex litigation over water rights, a fourth provision – the McCarran Amendment of 1952 – waives federal immunity for adjudications in state court. This part of the article takes a look at each of these statutory waivers, as well as waivers found in federal environmental statutes such as the ESA.

The Tucker Act authorizes suits against the federal government founded “upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.” In addition to contract claims, the U.S. Supreme Court has construed this provision as a waiver of immunity for claims seeking compensation for Fifth Amendment takings. Gregory Sisk characterizes the Tucker Act as the “foundation stone” in the adjudication

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62 Arizona v. California, 283 U.S. at 451-452 (1931).
63 Hunt v. United States, 278 U. S. 96, 100 (1928).
64 28 U.S.C. §§ 1346(a)(2), 1491. “Government liability in contract is viewed as perhaps ‘the widest and most unequivocal waiver of federal immunity from suit.’” United States v. Mitchell, 463 U.S. 206, 215 (1983).
65 Gregory C. Sisk, The Tapestry Unravels: Statutory Waivers of Sovereign Immunity and Money Claims Against the United States, 71 Geo. Wash. L. Rev. 602, 603 (2003).
66 28 U.S.C. §§ 1346(a)(2), 1491. Previously, Congress had created the Court of Claims and gave it limited authority to hear contract claims and certain other claims against the U.S. Act of Feb. 24, 1855, ch. 122, 10 Stat. 612.
67 David H. Rosenbloom, 1946: Framing A Lasting Congressional Response to the Administrative State, 50 Admin. L. Rev. 173, 173 (1998). With the New Deal’s creation of dozens of new federal agencies, Congress sought to maintain “legislative supremacy” in the face of the growing strength of the Presidency “lest it lose its constitutional place in the Federal scheme. Id. at 174.
68 28 U.S.C. §§ 1346(b), 2671 et seq.
69 5 U.S.C. § 702.
70 43 U.S.C. § 666.
71 28 U.S.C. § 1491(a)(1).
72 Mitchell, 463 U.S. at 216.
of monetary claims against the United States, both because of its remarkable stability over time and the breadth and depth of its implications for the federal government and its treasury.\footnote{Sisk, \textit{Continuing Drift}, \textit{supra note} 36, at 532. \textit{See id. at} 524 (stating that “a money suit in the Court of Federal Claims is the vehicle for a large category of important claims against the federal government”).}

When injured parties seek damages for torts committed by the federal government, they may bring suit under the FTCA.\footnote{28 U.S.C. § 1346(b).} The FTCA grants federal district courts jurisdiction over monetary claims against the United States for personal injury or property loss caused by the negligent or wrongful act or omission of federal employees, under circumstances where the United States, if a private person, would be liable under the law of the place where the act or omission occurred.\footnote{Id.} While the FTCA has become the most comprehensive and commonly invoked waiver of federal sovereign immunity for tort claims,\footnote{Id. \textit{supra note} 36, at 536.} there are several broad exceptions. The statute bars strict liability claims, claims for assault, libel, and misrepresentation, and claims for interference with contract.\footnote{28 U.S.C. § 2680(h).} In addition, the FTCA’s “discretionary function” exception preserves federal immunity “from liability based upon an employee’s exercise or failure to exercise a discretionary function or duty.”\footnote{28 U.S.C. § 2680(a).} The exception is intended to “prevent judicial ‘second-guessing’ of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort.”\footnote{Berkovitz v. U.S., 486 U.S. 531, 537-39 n.4 (1988).} In the past two decades, it has become “[t]he most gaping and frequently litigated of the FTCA’s exceptions.”\footnote{James R. Levine, \textit{The Federal Tort Claims Act: A Proposal for Institutional Reform}, 100 Colum. L. Rev. 1538, 1541 (2000). It appears that the exception has been invoked to dismiss over 75% of FTCA claims brought in federal district court. Gretchen Callas and Jackson Kelly, \textit{Overview of the Federal Tort Claims Act}, 34 EMLF § 9.02 (2013).}

For suits seeking declaratory or injunctive relief instead of monetary damages, the APA waives sovereign immunity for challenges to federal agency action.\footnote{5 U.S.C. §§ 702, 704.} It authorizes claims that the government has acted “contrary to constitutional right, power, privilege, or immunity.”\footnote{5 U.S.C. § 706(2)(B).} Prior to the APA, aggrieved plaintiffs could challenge some federal actions through the back door, so to speak, by filing a suit for injunctive relief against a federal officer who allegedly acted outside the scope of authority.\footnote{See Kathryn E. Kovacs, \textit{Scalia’s Bargain}, 77 Ohio St. L.J. 1155, 1159-1160 (2016) (explaining that, “if the officer acted ultra vires, he did not act “on behalf of the sovereign and hence, is not protected by sovereign immunity”). This theory is similar to \textit{Ex Parte Young} doctrine, which allows suits against state officials for prospective injunctive and declaratory relief. \textit{Id. at} 1159 (citing 209 U.S. 123 (1908)).} However, if the officer acted consistently with federal law, or if a judgment would operate against the government itself, the suit would be dismissed.\footnote{Dugan v. Rank, 372 U.S. 609, 621 (1963).} Under the APA, any “person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”\footnote{5 U.S.C. § 702.} The APA waives immunity regardless of whether the agency or officer “acted or failed to act in an
official capacity or under color of legal authority.” Moreover, judgments issued under the APA bind the federal government, not just the agency official. APA litigation has become one of the most significant avenues for obtaining relief against United States agencies, including agencies in charge of federal dams and other infrastructure.88

More specifically, with respect to resource management and allocation, Congress has provided discrete waivers of federal immunity in a variety of modern environmental statutes.89 Although waivers in federal environmental laws have become “increasingly broad and inclusive,” Congress has never enacted a general waiver for environmental regulations, and there appears to be no coherent congressional policy for the waivers that have been adopted.90 As a practical matter, “if achieving environmental goals are worth forcing individuals and companies to bear the cost of complying with environmental standards, government agencies should also bear those costs in carrying out their activities.”91 Congress has minimized the risk of discriminatory enforcement and has protected federal agencies from bearing a disproportionate share of the cost of compliance by treating federal agencies and facilities the same as other regulated “persons.”92 By requiring federal agencies to comply with permit requirements imposed by states who have assumed the responsibility of implementing federal environmental laws, immunity waivers level the playing field between agencies and other regulated entities.93

With respect to water rights, Congress adopted a significant waiver of sovereign immunity in the McCarran Amendment of 1952, which permits the United States to be joined in “in any suit . . . for the adjudication of rights to the use of water of a river system or other source.”94 Remarkably, the McCarran Amendment waives federal immunity for general stream adjudications (GSAs) in state court.95 Since the passage of the Amendment, there have been a dozen or so state court adjudications of federal reserved water rights.96

86 Id. See Kovacs, Scalia’s Bargain, supra note 83, at 1194 (tracing the evolution of the APA’s waiver of federal immunity and arguing that ongoing “doctrinal confusion about the availability of relief under the APA imposes costs on the government and potential plaintiffs”).
87 5 U.S.C. § 702.
88 Sisk, Continuing Drift, supra note 36, at 540.
89 Id. See Kenneth M. Murchison, Waivers of Immunity in Federal Environmental Statutes of the Twenty-First Century: Correcting A Confusing Mess, 32 Wm. & Mary Envtl. L. & Pol’y Rev. 359, 389 (2008) (citing statutes).
90 Id. at 362. The disparate nature of federal environmental waivers may be attributed, in part, to institutional factors. There are nearly a dozen different congressional committees and subcommittees with jurisdiction over environmental and resource-related matters. Id. at 394-395.
91 Id. at 394.
92 Id. See Bennett v. Spear, 520 U.S. 154, 164 (1997) (stating that the ESA’s provision that “any person” may sue is “an authorization of remarkable breadth,” and refusing to dismiss claims against the U.S. Bureau of Reclamation); Schoeffler v. Kemphorne, 493 F. Supp. 2d 805, 814 (W.D. La. 2007) (holding that the ESA’s citizen suit provision waives federal sovereign immunity) (citing 16 U.S.C. § 1540(g)(1)(c)).
93 Murchison, supra note 89, at 396.
94 43 U.S.C. § 666.
95 Id.
96 See, e.g., United States v. Idaho, 508 U.S. 1, 3 (1993); United States v. Dist. Court In & For Eagle Cty., Colo., 401 U.S. 520, 524 (1971) (holding that the Amendment reaches appropriative rights, riparian rights, and federal reserved rights). For commentary, see Lawrence J. MacDonnell, General Stream Adjudications, The McCarran Amendment, and Reserved Water Rights, 15 WYO. L. REV. 313 (2015); John E. Thorson et al., Dividing Western Waters: A Century of Adjudicating River and Streams, 8 U. DENV. WATER L. REV. 355 (2005); John E. Thorson et al., Dividing Western Waters: A Century of Adjudicating Rivers and Streams, Part II, 9 U. DENV. WATER L. REV. 299 (2006).
Congress has not always been so open-minded when it comes to waivers of sovereign immunity. In the context of federal water management, the Flood Control Act is especially relevant.\(^\text{97}\) It states, “No liability of any kind shall attach to or rest upon the United States for any damage from or by floods or floodwaters at any place.”\(^\text{98}\) The Supreme Court construed the terms of this provision expansively in \textit{U.S. v. James}.\(^\text{99}\) There, the Court found that the Act barred wrongful death claims arising out of boating accidents on federal reservoirs created for flood control but used extensively for recreational purposes: “The terms ‘flood’ and ‘floodwaters’ apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control. . . .”\(^\text{100}\) The Court added, “Congress’ choice of the language ‘any damage’ and ‘liability of any kind’ further undercuts a narrow construction” of this immunity provision.\(^\text{101}\)

The Supreme Court subsequently disavowed the dicta of \textit{James} that may have immunized projects merely “related to” flood control.\(^\text{102}\) It clarified: “the statute directs us to determine the scope of the immunity conferred, not by the character of the federal project or the purposes it serves, but by the character of the waters that cause the relevant damage and the purposes behind their release.”\(^\text{103}\) If “floodwaters” caused the harm, the government enjoys statutory immunity from tort claims for both property damage and personal injury under the FCA.\(^\text{104}\) If the FCA is inapplicable, the courts must look to other sources of federal law to determine whether sovereign immunity is intact or, conversely, whether Congress has consented to suit.\(^\text{105}\)

II. The Supreme Court Attempts to Mediate War Through Equitable Apportionment

Absent an interstate compact, state versus state disputes over the allocation of water and other natural resources are subject to equitable apportionment by the U.S. Supreme Court.\(^\text{106}\) The United States sometimes seeks to intervene in the dispute, but it frequently sits on the sidelines, despite palpable federal interests and extensive federal involvement in water management. This part of our interstate odyssey navigates original actions between the states over the waters of the Arkansas River and the ACF.

\textbf{A. The Arkansas River: Kansas v. Colorado}

In 1902, Kansas brought an original action against Colorado for allegedly taking more than its fair share of the Arkansas River. \textit{Kansas v. Colorado}\(^\text{107}\) forced the Supreme Court to grapple

\textit{\footnotesize \textsuperscript{97} 33 U.S.C. § 702c.\textit{\footnotesize \textsuperscript{98} 33 U.S.C. § 702c.\textit{\footnotesize \textsuperscript{99} United States v. James, 478 U.S. 597 (1986).\textit{\footnotesize \textsuperscript{100} Id. at 605.\textit{\footnotesize \textsuperscript{101} Id. See Sandra B. Zellmer, Takings, Torts & Background Principles, 52 Wake Forest L.Rev. 193, 202 (2017).\textit{\footnotesize \textsuperscript{102} Central Green Co. v. United States, 531 U.S. 425, 431 (2001).\textit{\footnotesize \textsuperscript{103} Id. at 434. “[T]o characterize every drop of water that flows through that immense project as ‘floodwater’ simply because flood control is among the purposes served by the project unnecessarily dilutes the language of the statute.” Id.\textit{\footnotesize \textsuperscript{104} Id.; James, 478 U.S. at 605.\textit{\footnotesize \textsuperscript{105} See Arkansas Fish & Game Comm’n v. United States, 568 U.S. 23 (2012) (allowing state agency to sue the United States for takings); infra Part IV (assessing claims against the U.S. for damages and injunctive relief arising out of its river-related operations under the Fifth Amendment, the APA, and the ESA).\textit{\footnotesize \textsuperscript{106} Tarrant Reg’l Water Dist. v. Herrmann, 569 U.S. 614, 619 (2013). See supra Part I.A (discussing original actions under Art. III).\textit{\footnotesize \textsuperscript{107} 185 U.S. 125 (1902).
with the immutable forces of geography and gravity and to conclude that equitable apportionment must be a necessary outgrowth of federal common law:

An upstream State can appropriate all water from a river, thus ‘wholly depriv[ing]’ a downstream State ‘of the benefit of water’ that ‘by nature’ would flow into its territory. In such a circumstance, the downstream State lacks the sovereign's usual power to respond—the capacity to make war[,] . . . or even enter into agreements without the consent of Congress. 108

The Court observed that, “[b]ound hand and foot by the prohibitions of the Constitution, . . . the judicial power is the only means left” to the downstream state, who must come straight to the top—the highest court in the land—to seek equity. 109 After further factual development, the Court issued an order in 1907 dismissing Kansas’s complaint for failure to show substantial harm from Colorado’s withdrawals, while recognizing Kansas’s right to institute new proceedings if it could show that Colorado’s actions were destroying “the equitable apportionment of benefits between the two states resulting from the flow of the river.” 110 Since then, the Court has issued only a scant handful of equitable apportionment decrees. 111

In terms of federal involvement in the Arkansas River dispute, the United States sought to intervene, claiming a “superior right . . . to control the whole system of the reclamation of arid lands.” 112 It urged the Court to adopt prior appropriation to resolve the controversy, arguing “[t]hat the doctrine of riparian rights . . . would prevent the sale, reclamation, and cultivation of the public arid lands, and defeat the policy of the government in respect thereto.” 113 The Court rejected the notion that the United States had a “superior right” in water apportionment and denied its motion to intervene, without prejudice to any future action by the United States if necessary to maintain or improve navigability. 114 Kansas v. Colorado represents a rare example of the United States attempting to engage in an equitable apportionment and being flatly rejected by the Court.

B. The ACF: Florida and Alabama v. Georgia

States that follow riparian water law are not immune to battles over transboundary waters. As a case in point, Georgia, Alabama, and Florida have been fighting over the ACF for decades. 115 The downstream states, in particular, Florida, seek to ensure adequate flows to protect both the ecosystem and the oyster fishery in the Apalachicola river and its estuary. The leading antagonist – Georgia – uses water for the megalopolis of Atlanta and for irrigation. The U.S. Army Corps of

108 Id. at 143.
109 Id. at 144.
110 Kansas v. Colorado, 206 U.S. 46, 117-118 (1907).
111 Douglas L. Grant, Interstate Water Allocation Compacts: When the Virtue of Permanence Becomes the Vice of Inflexibility, 74 U. Colo. L. Rev. 105, 173 (2003) (listing the Laramie River, the Delaware River, and the North Platte River). Cf. Idaho v. Oregon, 462 U.S. 1017 (1983) (extending the doctrine to anadromous fish).
112 206 U.S. at 87.
113 Id. at 88.
114 Id. at 117. The Court noted that the federal government has superior rights to control navigation but not reclamation. Id. at 92-93 (citing Act of June 17, 1902, sec. 8, 32 Stat. 388).
115 Heather Elliott, The Court’s Original Jurisdiction Doctrine Discriminates Against Downstream States, ABA Water Law Conference 7-8 (Mar. 26, 2019).
Engineers, which manages upstream dams for hydropower, water supply, and recreation, is a key player but, oddly enough, is not a party to the original action in the Supreme Court.\textsuperscript{116}

In addition to litigation worthy of a Charles Dickens novel,\textsuperscript{117} the states have also attempted to reach an agreement. In 1997, Congress approved the ACF Compact, which committed the states to negotiate and to develop an allocation formula for the waters of the basin.\textsuperscript{118} The Compact Commission was composed of the governors of the three states, but instead of making the Corps a full partner, it included a non-voting federal representative.\textsuperscript{119} When the states failed to adopt an equitable allocation formula, the Compact lapsed in 2003.\textsuperscript{120}

On major river systems like the ACF, the Corps develops “master manuals” to coordinate the operations of its projects.\textsuperscript{121} A proposed revision to the ACF manual spawned years of litigation, during which the Corps steadfastly maintained that it had no authority to supply water to Atlanta from Lake Lanier, its second largest reservoir in Georgia.\textsuperscript{122} When the Eleventh Circuit determined that water supply was a congressionally authorized purpose, the Corps issued a new ACF manual in 2017, allocating over a quarter million acre-feet of Lake Lanier water for use in Georgia.\textsuperscript{123}

Meanwhile, Florida sought an equitable apportionment from the Supreme Court, alleging that Georgia’s consumption of water had significantly reduced flows in the Apalachicola, causing harm to the estuary and the collapse of its oyster beds.\textsuperscript{124} Georgia’s response was twofold. First, according to Georgia, Florida was suffering no significant harm that would rise to the level of Supreme Court involvement. Moreover, to the extent there was harm, it was caused by the Corps’ projects, not by Georgia’s water uses, thus the United States was a necessary party.\textsuperscript{125} In either event, Georgia said, the suit must be dismissed.\textsuperscript{126}

The special master found that Florida had suffered harm from decreased flows, and that the oyster fishery had experienced “unprecedented collapse” in the 2012 drought.\textsuperscript{127} His report pointed to Georgia’s “remarkably ineffective” approach to its internal management of irrigation water as

\textsuperscript{116} Reed D. Benson, \textit{Can a State's Water Rights Be Damned? Environmental Flows and Federal Dams in the Supreme Court}, 8 Mich. J. of Envtl. & Admin. L. 1, 21 (forthcoming 2019), draft available at https://ssrn.com/abstract=3247271.
\textsuperscript{117} Bleak House comes to mind. For a run-down of the ACF litigation history against the Corps, see In re: MDL-1824 Tri-State Water Rights Litigation, 644 F.3d 1160, 1174-78 (11th Cir. 2011).
\textsuperscript{118} Pub. L. 105-104 (1997).
\textsuperscript{119} Id.
\textsuperscript{120} In re: MDL-1824 Tri-State Water Rights Litigation, 644 F.3d at 1175.
\textsuperscript{121} Benson, \textit{Can a State's Water Rights Be Damned?}, supra note 116, at 22 (citing U.S. Army Corps of Engineers, Engineering and Design – Water Control Management, Regulation No. 1110-2-240, para. 3-1(a) (May 30, 2016)).
\textsuperscript{122} In re: MDL-1824 Tri-State Water Rights Litigation, 644 F.3d at 1195.
\textsuperscript{123} Id. at 1186-92.
\textsuperscript{124} Florida v. Georgia, 138 S.Ct. 2502 (2018).
\textsuperscript{125} Id. at 2511. Necessary parties are those who have an interest in the subject matter of the suit and whose rights may be materially affected by the judgment. Under the Federal Rules of Civil Procedure, if a necessary party cannot be joined but is indispensable to the adequate and equitable resolution of the case, the court will not proceed to a final determination even as between parties who are before the court. Fed. R. Civ. P. 19(b) (2019). See Richard D. Freer, \textit{Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19}, 60 N.Y.U. L. Rev. 1061, 1076 (1985).
\textsuperscript{126} 138 S.Ct. at 2511.
\textsuperscript{127} Id.
a source of Florida’s harm. Although Georgia had taken steps to conserve water for municipal and industrial purposes in Atlanta, it had failed to implement a state statute designed to reduce water use during droughts, and it had continued to approve new water permits without limiting the amount to be used in irrigation. In short, “Georgia’s position – practically, politically, and legally – can be summarized as follows: Georgia’s agricultural water use should be subject to no limitations, regardless of the long-term consequences for the Basin.”

Even so, the special master recommended dismissal of Florida’s case, based on his belief that the Supreme Court could not effectively remedy the harm without being able to bind the Corps: “improved flows . . . [upstream] might not benefit the Apalachicola during dry seasons, based on the Corps’ ability to withhold more water from its dams on the Chattahoochee and the operating protocols provided in the Corps’ existing water control manual for its projects in the ACF Basin.” The United States was deemed a necessary and indispensable party, but it could not be joined because of sovereign immunity.

Fortunately for Florida, the Supreme Court disagreed, and it denied Georgia’s motion to dismiss in a 5-4 decision, allowing Florida to continue its quest for equitable apportionment. In doing so, the Court found that the special master had erred by requiring Florida to show by “clear and convincing evidence” that the Court would “be able to fashion an appropriate equitable decree.” According to the majority, at this stage of the proceeding, Florida need only establish a likelihood that the Court could issue a workable decree.

The evidentiary standard was only one point of contention. The much larger concern was the Supreme Court’s power to order changes in the Corps’ operations when the federal government was not a party to the litigation. The majority believed that a workable decree would be possible despite the Corps’ “inherent discretion” in operating its projects, due to the Corps’ flexible protocols for both drought and non-drought operations under the current ACF Master Manual. Justice Thomas’s dissent, on the other hand, exhibited deep skepticism that the Corps would change its operations if the Court capped Georgia’s water use in a decree that bound only the state parties but not the Corps. In other words, without the Corps, Florida might win the lawsuit but still lose the water war with the upstream states.

For its part, the United States, in its amicus brief, conceded that the Corps would take a decree from the Court “into account and adjust its operations accordingly,” and that such a decree “would necessarily form part of the constellation of laws to be considered by the Corps” in operating its ACF projects. In almost the same breath, however, the brief voiced reservations as to whether

128 Report of the Special Master at 33, Florida v. Georgia, No. 142, Orig. (Feb. 14, 2017).
129 Id. at 34.
130 Id.
131 See id. at 30-31 (“The evidence does not provide sufficient certainty that an effective remedy is available without the presence of the Corps as a party in this case.”).
132 Florida v. Georgia, 138 S.Ct. 2502 (2018).
133 138 S.Ct. at 2516.
134 Id. at 2527.
135 Benson, Can a State’s Water Rights Be Damned?, supra note 116, at 2.
136 138 S.Ct. at 2540.
137 Id.
138 Brief for the United States as Amicus Curiae 30, Florida v. Georgia, No. 142, Orig. (Aug. 2017).
139 Id. at 32.
the Corps could (or would) provide higher releases to benefit Florida “under its existing authorities.”

[Unlike a compact among the States that is approved by Congress or legislation altering the purposes of the ACF system, an apportionment by this Court in the form of a consumption cap would not formally bind the Corps to take any particular action because the United States is not a party to this suit. . .] 141

Allowing the Corps to block equitable apportionment by sitting on the sidelines of this original action creates perverse incentives. Reed Benson explains, “The Corps’ operating decisions may be found to preclude a workable decree— not because of any clear conflict with project purposes, but simply because the Corps will not be bound and chooses not to change its practices.” 142

From the downstream states’ perspective, it seems wildly inequitable to allow Georgia to exceed its fair share of the ACF simply because of the presence of federal dams in the basin. Beyond the ACF, the nationwide implications are enormous. With the number of federal dams situated all across the nation, equitable apportionment would be a pipe dream on most interstate rivers. As for entering an interstate compact, an upstream state would have little incentive to negotiate with a downstream state if it can defeat equitable apportionment simply by the presence of a federal dam. 144

Ironically, if this litigation were a general stream adjudication in state court, the United States could be forced to join the proceeding—and be bound by it—under the McCarran Amendment. 145 This paradox is assessed below, along with similar phenomenon in takings and regulatory cases. 146

III. Attempts at Peace-Making Through Interstate Compacts

When states do wish to engage in cooperative action, the Compact Clause of Article I, § 10 provides that “[n]o State shall, without the Consent of Congress, ... enter into any Agreement or Compact with another State.” 147 Congressional consent serves to “prevent any compact or agreement between any two States, which might affect injuriously the interests of the others,” and safeguards against the infringement of federal interests. 148 Upon consent, an interstate compact, “like any other federal statute, becomes the law of the land, having both public law (federal and interstate sovereignty) and private law (contract) implications.” 149

There are distinct parallels between interstate compact litigation and equitable apportionment cases. Both are steeped in the “background notion that a State does not easily cede its sovereignty” over water. 150 And when push comes to shove, both wind up before the Supreme Court. 151 Each

140 Id. at 31.
141 Id. at 32 (emphasis added).
142 Benson, Can a State’s Water Rights Be Damned?, supra note 116, at 36-37.
143 Id.
144 Id. at 37.
145 See supra notes 94-96.
146 See infra Part IV.
147 U.S. Const. Art. I § 10, cl. 3.
148 Texas v. New Mexico, 138 S.Ct. 954, 958 (2018) (citing Florida v. Georgia, 17 How. 478, 494, 15 L.Ed. 181 (1855)).
149 Id. (citing Texas v. New Mexico, 462 U.S. 554, 564 (1983)).
150 Tarrant Reg’l Water Dist. v. Herrmann, 569 U.S. 614, 631 (2013) (citing United States v. Alaska, 521 U.S. 1, 5 (1997); Martin v. Lessee of Waddell, 16 Pet. 367, 410, 10 L.Ed. 997 (1842)).
151 Kansas v. Nebraska, 135 S.Ct. 1042, 1052 (2015).
state’s right to invoke the Court’s original jurisdiction “is an important part of the context” in which compacts are made.\textsuperscript{152} Moreover, if a state decides to litigate over compact compliance, the federal government plays an ambiguous role, just as it does in equitable apportionment cases. In any original action between states, where the Court serves “‘as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force,’” it may “‘regulate and mould the process it uses in such a manner as in its judgment will best promote the purposes of justice.’”\textsuperscript{153} With this unique authority and responsibility, the Court occasionally permits the United States to participate to defend “distinctively federal interests” that a normal litigant might not otherwise be allowed to pursue. Yet a generalized interest in interstate commerce will not do. “[J]ust because Congress enjoys a special role in approving interstate agreements, it does not necessarily follow that the United States has blanket authority to intervene in cases concerning the construction of those agreements.”\textsuperscript{154}

This section illustrates these themes with a look at litigation over the Rio Grande River Compact and the Republican River Compact. For contrast, it then considers two interstate-federal compacts. The Delaware River Compact is widely seen as a successful compact, whereas the Missouri River Compact was a failure.

\textit{A. Rio Grande: Texas v. New Mexico}

The Rio Grande originates in the Rockies and flows through Colorado, New Mexico, Texas, and Mexico, before emptying into the Gulf of Mexico. The summer of 2001 marked the first time in recorded history that the river failed to reach the Gulf. In 2018, it barely made it to New Mexico.\textsuperscript{155} “Drained by farmers, divided by treaty, feuded over in courtrooms and neglected when not pumped and drained, the Rio Grande is at once one of America’s most famous rivers and one of its most abused.”\textsuperscript{156}

In writing the unanimous opinion for the Court in \textit{Texas v. New Mexico}, Justice Gorsuch appears to have taken great delight in citing not the usual suspect in water wars—Mark Twain—but rather Will Rogers, who reportedly called the Rio Grande “the only river I ever saw that needed irrigation.”\textsuperscript{157}

Justice Gorsuch described the origins of the interstate and international agreements governing the waters of the Rio Grande:

Like its namesake, the Rio Grande Compact took a long and circuitous route to ratification. Its roots trace perhaps to the 1890s, when Mexico complained to the United States that increasing demands on the river upstream left little for those below the border. The federal government responded by proposing, among other things, to build a reservoir and guarantee Mexico a regular and regulated release of water.\textsuperscript{158}

\begin{itemize}
  \item\textsuperscript{152} Id.
  \item\textsuperscript{153} Texas v. New Mexico, 138 S.Ct. 954, 958 (2018) (citing Kansas v. Nebraska, 135 S.Ct. at 1042).
  \item\textsuperscript{154} Id. at 959.
  \item\textsuperscript{155} Richard Parker, \textit{The Rio Grande Is Dying. Does Anyone Care?}, NY Times, Sept. 28, 2018.
  \item\textsuperscript{156} Id.
  \item\textsuperscript{157} Id. at 957. Will Rogers was a vaudeville performer, newspaper columnist, and cowboy who not only starred in dozens of films but also mounted a mock campaign for the presidency as Life Magazine’s “Anti-Bunk” party candidate in 1928. Official Website of Will Rogers, https://www.cmgww.com/historic/rogers/about/biography/ (visited Jan. 22, 2019).
  \item\textsuperscript{158} 138 S.Ct. at 957.
\end{itemize}
In the wake of this agreement, the United States located a dam site near Elephant Butte, New Mexico, about one hundred miles north of the Texas state line, and agreed to deliver 60,000 acre-feet of water annually to Mexico upon completion of the reservoir.\textsuperscript{159} The project was completed in 1916 as part of the larger development known as the Rio Grande Project.

Meanwhile, Colorado, Texas, and New Mexico, all of which claim sovereign rights to the water, negotiated several agreements in which the Rio Grande Project played a central role. In the first set of agreements, the “Downstream Contracts,” the federal government promised to provide water from Elephant Butte Reservoir to irrigation districts in New Mexico and Texas. In turn, the districts agreed to pay charges in proportion to their acreage—57% for New Mexico and 43% for Texas.

Around the same time, the three states entered into the Rio Grande Compact, which Congress approved in 1939.\textsuperscript{160} The Compact required Colorado to deliver a specified amount of water to New Mexico at the state line, and also directed New Mexico to deliver water to the Reservoir, some of which would be delivered downstream to Texas. As the Court noted, “In isolation, this might have seemed a curious choice, for a promise to deliver water to a reservoir more than 100 miles inside New Mexico would seemingly secure nothing for Texas.”\textsuperscript{161} Texas, however, had the Downstream Contracts’ guarantee that Texas’s water districts would receive a certain amount of water every year from the Reservoir.

Fast forward to the present dispute. The Supreme Court granted leave for Texas to file an original action to vet its complaint that New Mexico breached its commitment to deliver water to Elephant Butte by allowing downstream users to “siphon off” water below the Reservoir.\textsuperscript{162} The United States sought to intervene, and was allowed to file a complaint with allegations that parallel Texas’s.\textsuperscript{163}

On New Mexico’s motion, the special master recommended dismissal of the United States’ complaint, reasoning that “the Compact does not confer on the United States the power to enforce its terms.”\textsuperscript{164} As in the ACF case, the Supreme Court rejected the special master’s recommendation, and allowed the United States to stay in the game for four reasons. First, New Mexico conceded that the United States plays an integral role in the Compact’s operation.\textsuperscript{165} Second, because it had assumed a legal responsibility to deliver water to Texas, the U.S. “might be said to serve, through the Downstream Contracts, as a sort of ‘agent’ of the Compact,” charged with assuring that the apportionment to Texas and New Mexico “is, in fact, made.”\textsuperscript{166} Third, New Mexico’s failure to deliver water to the reservoir “could directly impair the federal government’s

\textsuperscript{159} Id. (citing Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, 34 Stat. 2953).
\textsuperscript{160} Act of May 31, 1939, 53 Stat. 785.
\textsuperscript{161} 138 S.Ct. at 957-958.
\textsuperscript{162} Id. at 958.
\textsuperscript{163} Id.
\textsuperscript{164} Id. at 957.
\textsuperscript{165} Id. Although New Mexico asserted that “the federal government is so integrally a part of the Compact’s operation that a State could sue the United States under the Compact for interfering with its operation,” this is by no means a foregone conclusion, as seen on the ACF. \textit{See supra} Part II.B.
\textsuperscript{166} 138 S.Ct. at 959.
ability to perform its obligations under the treaty.”

The Court cautioned that “Nothing in our opinion should be taken to suggest whether a different result would obtain in the absence of any of the considerations we have outlined or in the presence of additional, countervailing considerations.”

Notably, if the United States had not sought to intervene, important federal interests would have gone unheard and the states would not be able to obtain complete relief on one of America’s most famous – and most abused – rivers.

Ironically, New Mexico precipitated Texas’s original action in the Supreme Court by suing the U.S. Bureau of Reclamation in federal district court over its operating agreement for the Rio Grande Project. New Mexico believed that the Bureau had given Texas too much water. Only then did Texas initiate its original action, where New Mexico tried – and failed – to limit the United States’ involvement. Waivers of sovereign immunity that allow a state to sue a federal agency in federal court are addressed below in Part IV.

B. Republican River: Kansas v. Nebraska

The Dust Bowl of the 1930s brought an extended drought to the Great Plains, including the Republican River Basin. As if water scarcity weren’t hardship enough, the Republican River experienced a deadly flood in 1935. These forces motivated the United States to step up with a proposal to construct reservoirs to control flooding, along with an array of irrigation projects to utilize the stored water. Before it would commit resources, however, the United States insisted that the states agree to an allocation of the Basin’s water. After all, an interstate dispute over the Republican between a Nebraska irrigation district and the state of Colorado had already made its way to the U.S. Supreme Court once; adding Kansas to the mix could only complicate things further if an agreement were not reached in advance.

Fiercely determined to retain state control while securing federal resources for flood control and reclamation, the initial version of the Compact characterized the Republican River as non-navigable in hopes of neutralizing federal power within the basin. Refusing to have federal interests short-circuited, President Roosevelt vetoed the initial agreement, and the states returned

167 Id. New Mexico’s breach could prevent the U.S. from delivering water to Mexico from Elephant Butte. Id. at 960.

168 Id.

169 Id.

170 Parker, supra note 155.

171 See New Mexico v. U.S., No. CIV11-0691, 2013 WL 1657355 (D.N.M. Mar. 29, 2013) (asserting APA, NEPA, and other claims). This litigation was stayed while the Supreme Court considered Texas’ motion for leave to file its original action complaint. Id. at *4. I thank Reed Benson for bringing this case to my attention.

172 Kansas v. Nebraska, 135 S. Ct. 1042, 1049 (2015).

173 National Weather Service, Republican River Flood of 1935, https://www.weather.gov/gld/1935flood-aftermath (visited Jan. 24, 2019).

174 Weiland v. Pioneer Irr. Co., 259 U.S. 498 (1922). The Court made it clear that federal law applied to such disputes, which “necessarily rested, not upon Colorado laws or decisions which attempted to deny the asserted right to the use of the water in Nebraska, nor upon Nebraska laws or decisions which could not be effective in Colorado, but upon rights secured to the appellee [irrigation district] by the Constitution of the United States.” Id. at 502.
to the negotiating table. Ultimately, they defined the respective state and federal interests “in a satisfactory manner,” which paved the way for enactment in 1943.

The Republican River Compact provides a percentage allocation of the “virgin water supply originating in” the Basin to each of the states—Nebraska, Kansas, and Colorado. As used in the Compact, “virgin water supply” means “the water supply within the Basin,” in both the River and its tributaries, “undepleted by the activities of man.”

When Kansas experienced a shortfall in the late 1990’s, it brought an original action, alleging that it had been harmed by groundwater pumping from hydraulically connected wells upstream in Nebraska. The states entered into a settlement in 2002, with the understanding that Nebraska would significantly reduce its consumption of Republican River water from both surface and groundwater sources. The settlement's adoption of multi-year averages to measure consumption allowed Nebraska some time to come into compliance. As it turned out, Nebraska came up “markedly short.”

In 2015, the Supreme Court ordered Nebraska to disgorge $1.8 million, representing the portion of Nebraska’s gain from its breach of the Compact through its consumption of 17% more water than its proper share. However, Kansas did not get everything it wanted. In a bold move, the Court authorized amendment of the settlement agreement's accounting procedures, which had charged Nebraska for using water that it had imported to the Republican from the Platte River Basin. Otherwise, the Court remarked, Nebraska’s consumption of Platte River water would be unjustly counted against its Republican River Compact allocation. It justified the amendment with reference to its inherent authority to devise “fair and equitable solutions” to interstate water disputes. According to the Court, it was merely “modifying a technical agreement . . . to align it with the compacting States' intended apportionment.”

The Court emphasized that, when negotiating an interstate compact, states bargain for their rights “in the shadow” of the Court’s equitable apportionment power—that is, its capacity to prevent one state from taking advantage of another. As such, even in compact litigation, the

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175 Sandra Zellmer, *Boom and Bust on the Great Plains: déjà Vu All over Again*, 41 Creighton L. Rev. 385, 422 (2008) (citing 88 Cong. Rec. 3286 (1942)).

176 Frank P. Grad, *Federal-State Compact: A New Experiment in Co-Operative Federalism*, 63 Colum. L. Rev. 825, 838 (1963).

177 Act of May 26, 1943, ch. 104, 57 Stat. 86. This paved the way for seven Bureau of Reclamation reservoirs and one Corps of Engineers reservoir. Reclamation, *Republican River Basin Study Informs Colorado, Kansas and Nebraska* (Mar. 16, 2016), https://www.usbr.gov/newsroom/newsrelease/detail.cfm?RecordID=53087.

178 57 Stat. 86 (1943). Nebraska gets 49%, Kansas 40%, and Colorado 11%.

179 Kansas v. Nebraska, 135 S. Ct. 1042, 1049 (2015) (citing Compact Art. II-III).

180 *Id.* at 1049 (citing Bill of Complaint, O.T. 1997, No. 126, Orig., p. 5 (May 26, 1998)).

181 *Id.* at 1054.

182 *Id.*

183 *Id.* at 1063.

184 *Id.* at 1062 (citing *Texas v. New Mexico*, 482 U.S. at 134; *cf. Kansas v. Colorado*, 543 U.S. at 102 (“After all, a ‘credit’ for surplus water that rests upon inaccurate measurement is not really a credit at all.”)) (emphasis in original).

185 Kansas v. Nebraska, 135 S. Ct. 1042, 1052 (2015).
Court will “invoke equitable principles, so long as consistent with the compact itself, to devise ‘fair ... solution[s]’ to the state-parties' disputes and provide effective relief for their violations.”\(^{186}\)

By imbuing compacts with equitable principles, the latter part of the opinion causes consternation for states seeking to maintain a wall between literal enforcement of compact provisions and less certain, more transformative equitable principles.\(^{187}\) It certainly was for Justice Thomas. In his dissent, Thomas, joined by Justices Scalia and Alito, with Chief Justice Roberts joining in pertinent part, insisted that the majority had invented a new theory of compact reformation. He argued that the majority improperly inflated its equitable powers to construe—and reform—compact terms.\(^{188}\) Invoking state sovereignty, Justice Thomas wrote:

The States’ “power to control navigation, fishing, and other public uses of water” is not a function of a federal regulatory program; it “is an essential attribute of [state] sovereignty.” Thus, when the Court resolves an interstate water dispute, it deals with . . . pre-existing sovereign rights. . . . Authority over water is a core attribute of state sovereignty, and “[f]ederal courts should pause before using their inherent equitable powers to intrude into the proper sphere of the States.”\(^{189}\)

According to the majority, however, the Court’s “equitable authority to grant remedies is at its apex” in cases like this, “when public rights and obligations are thus implicated.”\(^ {190}\) Importantly, in contrast to the Rio Grande litigation, the Court could grant a meaningful remedy without drawing the U.S. into the fray, largely because the Republican River shortages were caused by groundwater pumping and not federal reservoir operations.\(^ {191}\)

This saga turns inward at this juncture, where, ironically, the federal government became embroiled in an intrastate battle within Nebraska. The state’s forecasts for 2013 and 2014 indicated that, once again, its consumption would exceed its Compact allocation, so the Nebraska Department of Natural Resources sent closing notices to permit holders in the Republican River Basin. Several appropriators, representing irrigators within the Frenchman-Cambridge Irrigation District (FCID), filed lawsuits against both the United States and the state.\(^ {192}\) First, the appropriators sought an injunction to stop the Bureau of Reclamation from interfering with their water rights.\(^ {193}\) This novel theory went down in flames due to the failure “to show an unequivocal waiver of the United States' sovereign immunity.”\(^ {194}\) Alternatively, the allegation that the Bureau

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\(^{186}\) Id. (citing Texas v. New Mexico, 462 U.S. 554, 569 (1983); Texas v. New Mexico, 482 U.S. 124, 134 (1987) (supplying an “additional enforcement mechanism” to ensure an upstream state's compliance with a compact)).

\(^{187}\) Id. at 1066-67.

\(^{188}\) Id. at 1066.

\(^{189}\) Id. at 1067 (citing Missouri v. Jenkins, 515 U. S. 70, 131 (1995) (Thomas, J., concurring)).

\(^{190}\) Id. at 1062-63. The Court also opined that the Accounting Procedures adopted in the settlement would violate the Compact by reaching beyond the Compact’s geographic boundaries, i.e., the “virgin water supply originating in” the Republican River Basin). Id. at 1062. The Compact, the majority explained, “is the supreme law in this case: As the States explicitly recognized, they could not change the Compact's terms even if they tried.” Id.

\(^{191}\) See supra notes 165-168 (addressing Court’s reasons for allowing the U.S. to lodge its complaint).

\(^{192}\) Frenchman Cambridge Irr. Dist. v. Heineman, 974 F. Supp. 2d 1264 (D. Neb. 2013).

\(^{193}\) Id. at 1280. The irrigators argued that the Bureau had a duty to control the state “under certain repayment contracts regarding reclamation projects and federal reservoirs.” Id. at 1281.

\(^{194}\) Id. The McCarran Amendment provided no solace, as this was not a GSA, and neither did the Quiet Title Act nor other alleged waivers. Id. at 1080.
had breached a duty “by failing to sue the state of Nebraska in order to prevent curtailment of water rights by state authorities” was dismissed for failure to state a cognizable claim.\textsuperscript{195}

   Federal interests were only indirectly involved in the second lawsuit of note, Hill v. State.\textsuperscript{196} There, Nebraska appropriators alleged both regulatory and physical takings claims against the State of Nebraska for taking their water and giving it to Kansas.\textsuperscript{197} The Nebraska Supreme Court rejected these claims. Citing Kansas v. Nebraska,\textsuperscript{198} the court ruled that allocations under the Republican River Compact are the “supreme law in Nebraska,” and that any intrastate rights to use water are subject to the state’s superior obligation to ensure Compact compliance. Because Compact apportionment “is binding upon the citizens of each State and all water claimants, . . . the apportionment made by the [c]ompact cannot have taken ... any vested right.”\textsuperscript{199}

   In the end, the interstate compact cases and their intrastate progeny illustrate two related points. First, state water rights yield to interstate compacts, whatever the forum. By the same token, though, federal interests may be sidelined while inter- and intrastate rights are reconciled. On the Republican, irrigators wanted to compel federal involvement and were rejected, probably for good reason, as the states worked out their issues over groundwater pumping without the Bureau (which manages surface water impoundments), but, ultimately, with Compact reformation by the U.S. Supreme Court.\textsuperscript{200} On the Rio Grande, by contrast, the United States recognized that the dispute between Texas and New Mexico had significant implications for federal interests and willingly subjected itself to the original action.\textsuperscript{201}

   C. Missed Opportunities for Constructive Federal Involvement

   When both federal and state prerogatives are at stake, one would expect to see at least some appetite, if not outright enthusiasm, for interstate-federal compacts.\textsuperscript{202} Although the Council of State Governments got on board in the mid-twentieth century, some critics “objected sharply” to extending federal participation in river basin development through multi-party compacts. Others voiced concern that such compacts would improperly delegate federal administrative and regulatory duties to a compact commission “on which the federal representative is in the minority.”\textsuperscript{203} As a result, examples are few and far between.

   The Delaware River Basin Compact is one of those rare examples.\textsuperscript{204} Its origin story springs from a Supreme Court decree, a devastating flood, and a handful of committed proponents.\textsuperscript{205} The

\begin{itemize}
\item \textsuperscript{195} Id.
\item \textsuperscript{196} Hill v. State, 296 Neb. 10, 11–12, 894 N.W.2d 208, 211 (2017).
\item \textsuperscript{197} Id.
\item \textsuperscript{198} Id. at 212 (citing Kansas v. Nebraska, 135 S. Ct. 1042 (2015)).
\item \textsuperscript{199} Id. at 215 (citing Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 106-108 (1938)).
\item \textsuperscript{200} 974 F.Supp. 2d at 1280-1281. For commentary on how “interstate lawsuits derive essentially from deeper conflicts rooted in the clash between surface-water and groundwater irrigation communities,” see Burke Griggs, The Political Cultures of Irrigation and the Proxy Battles of Interstate Water Litigation, 57 Nat. Res. J. 1 (2017).
\item \textsuperscript{201} Texas v. New Mexico, 138 S.Ct. at 957-958.
\item \textsuperscript{202} Frank P. Grad, Federal-State Compact: A New Experiment in Co-Operative Federalism, 63 Colum. L. Rev. 825, 839 (1963).
\item \textsuperscript{203} Id. at 846. Grad warns that state members of a compact commission will sacrifice the national interest to their own “particularistic interests.” Id.
\item \textsuperscript{204} Public Law 87-328, 75 Stat. 688 (Sept. 27, 1961).
\item \textsuperscript{205} See Jill Elaine Hasday, Interstate Compacts in a Democratic Society: The Problem of Permanency, 49 Fla. L. Rev. 1, 35 (1997) (citing New Jersey v. New York, 347 U.S. 995 (1954)). Hasday notes, “all compact agencies with real authority sprang from unusual circumstances and pure chance.” Id. (citing MARTHA DERTHICK, BETWEEN STATE & NATION: REGIONAL ORGANIZATIONS OF THE UNITED STATES 192 (1974)).
\end{itemize}
Compact Commission claims that its creation in 1961 “marked the first time since the nation's birth that the federal government and a group of states joined together as equal partners in river basin planning, development, and regulatory agency.” It is unique not only from the standpoint of federal engagement as an equal partner, but also due to its comprehensive coverage of both water allocation and water quality.

By contrast, the Missouri River Basin Compact, which was proposed in 1953 in the wake of catastrophic flooding, is an example of a failed federal-interstate compact. It was mothballed in 1955 when the states walked away from the table. Interests are exceptionally diverse in the basin. There are nine interested states, along with as many as thirty Indian tribes, raising potentially prohibitive transaction costs and cultural divides. Relatively few stakeholders are interested in appropriations of water for consumption while many are interested in maintaining the flow in different portions of the system for vastly different purposes.

The Flood Control Act of 1944, which was at issue in the ACF litigation, also undergirds the law of the Missouri River. As on the ACF, the Act delegates decision-making over water uses and streamflows to the Corps, which can make independent decisions to allocate water to project purposes without engaging in meaningful consultation with states and tribes. As a result, “there is an absence of a strong sense that the waters of the basin ‘are interconnected and part of a single hydrologic system.”

As Davison explains:

[T]he Corps has been piecing decisions together in an ad hoc manner, in effect an informal system of de facto allocations and reallocations made possible by the abundance of flows. Over the decades, the Corps has, in increments, been passing water downstream in the Missouri River Basin in response to increased demand there for groundwater irrigation, power plant cooling, and municipal and industrial (M&I) uses. When a new downstream use is accommodated, however, the user becomes reliant and the river is effectively reallocated to support the use . . . without consideration of possible upstream claims of states and Indian tribes.

As Davison observes, “Conflict in the Missouri River Basin . . . likely cannot be resolved by the usual avenues of compact or judicial decree.” Absent a compact, litigation under the FCA and other federal statutes presents an alternative, yet it ultimately leaves water-related decision-
making in the hands of the Corps. Indeed, disgruntled stakeholders have brought an arsenal of statutory and takings claims against the Corps, the Bureau, and other federal agencies, as discussed in the next Part.

IV. Immunity Waivers Drag the United States to the Dance in the Lower Courts

Although the United States cannot be forced to participate in state versus state actions before the U.S. Supreme Court, there are a variety of situations where it can be dragged into other types of litigation in the lower courts. In addition to the McCarran Amendment’s waiver of federal sovereign immunity for GSAs in state courts, Congress has waived immunity for actions brought under the Administrative Procedure Act, many environmental statutes, and the Tucker Act. The irony becomes apparent when we look at federal reserved rights on the Milk River, and lawsuits against the United States on the Platte, the Missouri, and the Klamath Rivers, all of which have had immense implications for water management as well as for sovereignty, federalism, and the judiciary.

A. Federal Reserved Rights and McCarran Amendment Waivers

The story of the Milk River Basin includes international, tribal, and intrastate chapters. For water law aficionados, the Milk is familiar as the birthplace of the Winters Doctrine, which first recognized reserved rights for federal Indian reservations. The federal government can be found at the confluence of this doctrine and related controversies, going back well over a century.

The Milk River arises on the Blackfeet Reservation within the state of Montana, where it is supplemented with water from the St. Mary River as part of the Milk River Reclamation Project, approved in 1903 by the newly minted U.S. Reclamation Service. The St. Mary leaves the United States and runs through Alberta, while the Milk River leaves the United States but, after traversing Alberta and Saskatchewan for some 200 miles, it turns south again, where it eventually joins the Missouri River below Fort Peck Dam. Before reaching the Missouri, the Milk flows past three Indian reservations and two National Wildlife Refuges, and it provides water to eight irrigation districts, one of which is operated by the U.S. Bureau of Indian Affairs (BIA). As Barbara Cosens noted, this makes one heck of a “jurisdictional morass.”

At the turn of the last century, two significant legal developments arose in the Milk River Basin. The first has an international dimension; the second involves federal, tribal, and state interests.

On the international chapter, a dispute over the St. Mary diversion provided the impetus for the 1909 Boundary Waters Treaty between Great Britain (for Canada) and the United States. When the United States began to divert water from the St. Mary into the Milk River, indignant Albertans took matters into their own hands, lining up bulldozers on the Canadian side of the

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216 Id.
217 5 U.S.C. § 704.
218 See, e.g., Endangered Species Act, 16 U.S.C. § 1540(g); Clean Water Act, 42 U.S.C. § 7604(a).
219 28 U.S.C. § 1491.
220 Winters v. United States, 207 U.S. 564 (1908).
221 Barbara Cosens, Water Dispute Resolution in the West: Process Elements for the Modern Era in Basin-Wide Problem Solving, 33 Envtl. L. 949, 986 (2003).
222 Id. at 956.
223 Treaty between the United States and Great Britain relating to boundary waters between the United States and Canada. U.K.-U.S., Jan. 11, 1909, 36 Stat. 2448.
border and digging a “Spite Canal” to demonstrate their ability to divert the water back to the St. Mary River.\textsuperscript{224}

Pursuant to Art. VI of the Boundary Waters Treaty, the newly formed International Joint Commission (IJC) issued an order distributing the waters of the St. Mary and Milk Rivers between the United States and Canada.\textsuperscript{225} Canada has not yet developed its full share and the potential for “a simmering international conflict” still exists “despite the IJC's best efforts to manage it over the past century.”\textsuperscript{226}

Around the same time as the Spite Canal incident, the federal-state-tribal chapter over appropriations from the Milk River was being written, ultimately spawning the doctrine of reserved rights in \textit{Winters v. United States}.\textsuperscript{227} In the 1888 treaty creating Fort Belknap Reservation, the Gros Ventre and Assiniboine tribes ceded their rights to a much larger portion of land in exchange for the United States’ creation of a “permanent home and abiding place” within Montana.\textsuperscript{228} Although the treaty was silent with respect to water, prior to the treaty, the “Indians had command of the lands and the waters, [and] of all their beneficial use. . . .”\textsuperscript{229} The Supreme Court found that the treaty lands were “practically valueless” without water, and that the tribes would not have agreed to a treaty that failed to provide water; therefore, sufficient water for their survival had been implicitly reserved.\textsuperscript{230} This meant that appropriators with legally recognized water rights under Montana state law were enjoined from interfering with the flow into Fort Belknap.\textsuperscript{231} Despite damage to the upstream appropriators’ investments and the affront to state sovereignty,\textsuperscript{232} the Court insisted that “[t]he power of the [federal] government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be.”\textsuperscript{233}

Much more recently, after decades of litigation and negotiations, the United States, the State of Montana, and the Blackfeet Tribe concluded a settlement of water rights for the Milk, memorialized in the Blackfeet-Montana Water Rights Compact of 2009.\textsuperscript{234} Congress took nearly

\begin{itemize}
\item \textsuperscript{224} Nigel Banks and Elizabeth Bourget, \textit{Apportionment of the St. Mary and Milk Rivers}, in \textit{WATER WITHOUT BORDERS} 163 (2013); Mary Ellen Wolfe, \textit{The Milk River: Deferred Water Policy Transitions in an International Waterway}, 32 Nat. Resources J. 55 (1992).
\item \textsuperscript{225} Int'l Joint Comm'n [IJC], \textit{In the Matter of the Measurement and Apportionment of the Waters of the St. Mary and Milk Rivers and their Tributaries in the United States and Canada}, (Oct. 6, 1921), available at http://www.ijc.org-/php/publications/pdf/ID52.pdf. The two countries agreed to share the rivers equitably, with Alberta taking a larger share of the St. Mary and Montana taking a larger share of the Milk. B. Timothy Heinmiller, \textit{The Boundary Waters Treaty and Canada-U.S. Relations in Abundance and Scarcity}, 54 Wayne L. Rev. 1499, 1507 (2008).
\item \textsuperscript{226} \textit{Id.} at 1520. Montana has sought IJC review of the St. Mary-Milk apportionment several times. \textit{Id.} at 1519.
\item \textsuperscript{227} 207 U.S. 564 (1908).
\item \textsuperscript{228} 207 U.S. at 565-68. The Fort Belknap, Blackfeet, and Fort Peck reservations were carved out of a much larger reservation that had encompassed the entire Milk River Basin in the U.S. Act of May 1, 1888, ch. 213, 25 Stat. 113.
\item \textsuperscript{229} \textit{Id.} at 576.
\item \textsuperscript{230} \textit{Id.} at 577.
\item \textsuperscript{231} \textit{Id.} at 565, 578. The background of the \textit{Winters} case is derived from Justin Huber and Sandra Zellmer, \textit{The Shallows Where Federal Reserved Water Rights Founder: State Court Derogation of the Winters Doctrine}, 18 Den. W. L. Rev. 261 (2013).
\item \textsuperscript{232} \textit{Id.} at 569-70, 576-78 (state appropriators alleged that they had invested more than $100,000 and that “[i]f they [were] deprived of waters ‘their lands [would] be ruined, it [would] be necessary to abandon their homes, and they [would] be greatly and irreparably damaged[,]’”).
\item \textsuperscript{233} \textit{Id.} at 577 (citation omitted).
\item \textsuperscript{234} Mont. Code Ann. § 85-20-1501. For details, see Montana DNRC, Blackfeet Compact, http://dnrc.mt.gov/divisions/reserved-water-rights-compact-commission/blackfeet-tribe-compact (visited Jan.
a decade, but eventually passed the Blackfeet Settlement Act of 2016, which, at $422 million, is the largest federal allocation in an Indian reserved rights settlement to date.\textsuperscript{235}

This landmark agreement is expected to resolve some of the thorny intrastate issues that remained in the wake of \textit{Winters}.\textsuperscript{236} At least two unique factors paved the way. First, by agreeing to provide funding for the settlement, Congress played a significant role in its completion.\textsuperscript{237} For its part, Montana took a proactive step by commencing general stream adjudications in every basin of the state, with a target date of 2028 for entering final decrees.\textsuperscript{238} In effect, the state committed itself to settling federal reserved rights through negotiation rather than litigation.\textsuperscript{239}

The state could have tied up federal reserved rights, including Fort Belknap’s, in state court under the McCarran Amendment’s waiver of federal sovereign immunity.\textsuperscript{240} Situating these important federal rights in a state forum, generally seen as adverse to them, could have jeopardized both national and tribal interests.\textsuperscript{241} In addition to judicial bias,\textsuperscript{242} general stream adjudications (GSAs) are notorious for their “inefficiency and interminability.”\textsuperscript{243} They are “so over-litigated, unpredictable, and interminable” that claimants are driven to settling disputes out of court at almost any cost.\textsuperscript{244} GSA disputes, especially those involving federal interests, “have yielded a uniquely tangled jurisdictional landscape.”\textsuperscript{245} As Professor Tarlock argued decades ago, as modes of dispute resolution, GSAs “were barely fit to a distant past and completely unfit for the hand-to-hand combat” of modern water rights disputes.\textsuperscript{246}

GSAs do hold promise, however, for requiring federal involvement in disputes where federal actions have immense effect but where other avenues to force the United States to court are

\textsuperscript{235} See Aubrey Ryan Bertram, \textit{Western States Water Conference and Native American Rights Fund 15th Biennial Symposium on the Settlement of Indian Reserved Water Rights Claims}, 21 U. Denv. Water L. Rev. 119, 120 (2017) (“The Tribe can continue to use its historic Winters rights in the Milk River, but can only initiate new uses authorized in the Compact or through processes specified in the Compact. . . [T]ribal rights to all surface and groundwater within the exterior boundaries of the reservation . . . [are] subject only to previously established state rights on a few rivers that support irrigation in highly profitable agricultural lands, which are protected from calls by the Tribe.”).

\textsuperscript{236} Id. at 121. The Congressional Research Service reports that, “as of 2018, 36 Indian water rights settlements had been federally approved, with total costs in excess of $5.8 billion.” CRS, Indian Water Rights Settlements, R44148, at 2 (2018). Efficiency, fairness, and durability require greater involvement by the U.S. in Indian water rights settlements, see Cosens, supra note 221, at 1017-18, but the lack of federal funds to implement ongoing and future agreements is a significant challenge. CRS, supra, at 2.

\textsuperscript{237} 405 U.S.C. § 666. See supra notes 94-96.

\textsuperscript{238} Justin Huber & Sandra Zellmer, \textit{The Shallows Where Federal Reserved Water Rights Founder: State Court Derogation of the Winters Doctrine}, 16 U. Denv. Water L. Rev. 261, 276 (2013).

\textsuperscript{239} Id. at 282-287 (providing examples).

\textsuperscript{240} Jamison Colburn, \textit{To Drain a Swamp} 20 (Jan. 5, 2019 draft on file with author). See, e.g., Joseph M. Feller, \textit{The Adjudication That Ate Arizona Water Law}, 49 ARIZ. L. REV. 405 (2007).

\textsuperscript{241} Colburn, supra note 243, at 23.

\textsuperscript{242} Id. at 30.

\textsuperscript{243} A. Dan Tarlock, \textit{The Illusion of Finality in General Water Rights Adjudications}, 25 ID. L. REV. 284, 284 (1988).

Electronic copy available at: https://ssrn.com/abstract=3367817
limited.\textsuperscript{247} For its part, the U.S. Supreme Court seems convinced that the federal interest in protecting its water rights and in avoiding piecemeal litigation can be adequately protected by state courts complemented by the Court’s own certiorari jurisdiction.\textsuperscript{248}

\subsection*{B. Waivers of Immunity in Federal Regulatory Cases}

Two rivers in the country’s midsection illustrate the depth and breadth of federal participation in regulatory cases. Waivers of sovereign immunity can be found in the APA, the ESA, and other federal environmental statutes.\textsuperscript{249}

The Platte River was the venue for the first major battle between water rights and the ESA when, in Dan Tarlock’s words, “Nebraska discovered that downstream irrigators could be better protected under the wing of the endangered whooping crane” than by a compact or equitable apportionment.\textsuperscript{250} Nebraska sought to enjoin construction of a dam on the North Platte in Wyoming, using the regulatory hook of the ESA to achieve its purpose: protecting downstream agricultural diversions. As Tarlock explains, “it proved easier to get water for this purpose than to reopen a 1945 equitable apportionment. . . .”\textsuperscript{251} A settlement was reached that benefited both the whooping crane and Nebraska irrigators, with the Federal Energy Regulatory Commission, the Rural Electrification Administration, and the Corps playing a major role in its resolution.\textsuperscript{252}

The Missouri River features prominently in this Part, too. As the longest river in North America, the Missouri travels 2,600 miles from its source in Montana to its mouth near St. Louis, draining over 500,000 square miles of land in ten states and one Canadian province. The upper and lower basin states have wildly divergent interests, ranging from water supply and reservoir recreation in the upper basin to navigation and river recreation in the lower basin.\textsuperscript{253} The states do, however, have a common concern: flood control.\textsuperscript{254} Yet they “have proved consistently incapable of joint action.”\textsuperscript{255}

With the Flood Control Act of 1944,\textsuperscript{256} Congress provided the Missouri River Basin states with some relief from flooding. It gave the Corps control over six mainstem dams and reservoirs for flood control and navigation purposes, and authorized the Bureau of Reclamation to promote

\begin{itemize}
\item See, e.g., In re Gen. Adjudication of All Rights to Use the Gila River Sys. & Source, 989 P.2d 739, 745-49 (Ariz. 1999); United States v. City & Cnty. of Denver, 656 P.2d 1 (Colo. 1982).
\item Colburn, supra note 243, at 21-24 (citing Colorado River Water Conserv. Dist. v. United States, 424 U.S. 800, 812-18 (1976); Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 564 (1983)).
\item See supra Part I.C.
\item A. Dan Tarlock and Jason Robison, Federal Regulatory Rights, L. of Water Rights & Res. § 9:32 (2018).
\item Id. Nebraska took the latter path in Nebraska v. Wyoming, No. 108 (1987). The Court acknowledged that it would consider environmental harm in deciding whether to enjoin proposed water projects in Wyoming, but only if Nebraska could show substantial injury. Nebraska v. Wyoming, 515 U.S. 1, 12 (1995).
\item See Nebraska v. Rural Elec. Admin., 23 F.3d 1336 (8th Cir. 1994); Platte River Whooping Crane Trust v. FERC, 962 F.2d 27 (D.C. Cir. 1992); Nebraska v. Rural Elec. Admin., 12 E.R.C. 1156 (D. Neb. 1978).
\item Sandra B. Zellmer, Mudslinging on the Missouri: Can Endangered Species Survive the Clean Water Act?, 16 Drake J. Ag. L. 89, 92-94 (2011); John E. Thorson, River of Promise, River of Peril: The Politics of Managing the Missouri River 185 (1994).
\item John H. Davidson, Missouri River Reservoirs in a Century of Climate Change: National or Local Resource?, 20 J. Envtl. & Sustainability L. 1, 7 (2014).
\item Id. at 8.
\item Flood Control Act of 1944, ch. 665, 58 Stat. 887 (codified as amended in U.S.C. titles 16, 33, and 43).
\end{itemize}
irrigation through projects on the tributaries. The Missouri River system is regulated by the Corps’ Master Water Control Manual and Annual Operating Plans.

In the 1990s, it became clear that operations-as-usual were wreaking havoc on the Missouri River ecosystem. Faced with jeopardy to ESA-listed species (pallid sturgeon, least interior tern, and piping plover), the Corps revised its Master Manual for the system in 2004 in an effort to comply with both the authorized purposes of the Flood Control Act and the jeopardy-avoiding measures specified in a biological opinion. The Corps had previously attempted to shield itself from judicial review by arguing that its operating decisions were “committed to agency discretion,” but the Eighth Circuit held that the Master Manual was binding and therefore reviewable.

C. Waivers of Immunity in Takings Cases

The Corps’ operational approach on the Missouri River was put to the test soon after its 2004 Master Manual was signed. Floods caused property damage in 2007, 2008, 2010, 2013, and 2014. But the notion that the Corps could meet the requirements of both the FCA and the ESA was most severely tested in 2011, when the basin experienced unprecedented amounts of precipitation and snowmelt. That spring brought the highest runoff volume since 1898—148% higher than the historical median—requiring record releases from the reservoirs. Although the Missouri River reservoir system is the largest in the United States, with about 73 million acre-feet of storage capacity, it was not enough to hold back the floodwaters. Downstream, floodwater carved fifty-foot deep gouges in the land and amassed sand dunes up to fifteen feet high, some of which are still present on farm fields.

Some four hundred landowners and two Indian tribes sued the Corps for Fifth Amendment takings in Ideker Farms v. United States. They alleged that the Corps damaged their property by mismanaging the system in order to prioritize listed species over people. Although the claims are couched in the language of negligence (duty, breach, causation, and damages), plaintiffs sued for takings rather than torts, because—like equitable apportionment or compact litigation before the Supreme Court—tort claims against the U.S. for its flood control acts or omissions are barred by sovereign immunity.

The litigation was bifurcated, with Phase I utilizing 44 “bellwether” plaintiffs for purposes of determining liability. After a lengthy trial, Judge Firestone found that some of the plaintiffs had

257 Id.
258 See supra notes 121-123.
259 U.S. Army Corps of Engineers, Missouri River Mainstem Reservoir System Master Water Control Manual (2018), available at https://usace.contentdm.oclc.org/utils/getfile/collection/p266001coll1/id/8200.
260 Ideker Farms, Inc. v. United States, 136 Fed. Cl. 654, 667 (2018); Am. Rivers v. Corps, 271 F.Supp.2d 230 (D.D.C. 2003).
261 In re Operation of Mo. River Sys. Litig., 363 F.Supp.2d 1145, 1175 (D. Minn. 2004) (ordering the Corps to attempt to reconcile its duties under both statutes, despite the likelihood that “actions that benefited one would likely and predictably harm the other”). On appeal, the Eighth Circuit affirmed that the Corps had discretion to determine how best to fulfill the purposes of both statutes. 421 F.3d 618, 631 (8th Cir. 2005).
262 South Dakota v. Ubbelohde, 330 F.3d 1014, 1027-30 (8th Cir. 2003).
263 Sandra B. Zellmer, Takings, Torts & Background Principles, 52 Wake Forest L.Rev. 193, 197 (2017).
264 Id. at 198.
265 Ideker Farms, 136 Fed.Cl. at 654.
266 See supra notes 97-98 (citing 33 U.S.C. § 702c); United States v. James, 478 U.S. 597, 602-03 (1986) (explaining the trade-offs that led to the Flood Control Act of 1928, whereby Congress would undertake the costs of a major public works program but not the tort liability that may be caused by it).
267 136 Fed. Cl. at 659.
shown that their damages during some (but not all) of the multi-year floods were the “direct and natural consequence of the cumulative and combined effects of the System and River Changes taken by the Corps to meet its ESA obligations.” However, the court determined that flooding in 2011 was not attributable to the Master Manual’s ESA-related priorities. Rather, excessive inflows simply exceeded the amount of storage available in the reservoirs. Phase II of the Ideker Farms case will determine the amount of compensation due to each of the successful plaintiffs.

Similar litigation dynamics were at play in the Klamath River basin with respect to takings claims arising from federal operations. There, irrigators in California and Oregon claimed that, by halting water deliveries in 2001 in order to preserve habitat for listed fish species and to comply with its trust obligation to tribes, the Bureau of Reclamation took their state-sanctioned water rights and also impaired their rights in violation of the Klamath Basin Compact. The court concluded that the irrigators’ rights were subservient to the prior interests of the U.S. and the tribes, reasoning that tribal reserved rights held a priority date of time immemorial. Under established principles of prior appropriation, junior irrigators have no right to take water needed to fulfill the tribes’ senior rights to instream flows for treaty-protected fish. The compact between California and Oregon did not alter this analysis because it expressly preserved tribal rights.

The court subsequently held that the irrigators’ decision to bring takings claims for losses incurred due to ESA-mandated measures required the irrigators to proceed “on the assumption that the administrative action was both authorized and lawful.” The Klamath River irrigators at least had their day in court, which they would not have had if their respective states had attempted to bring compact-related claims against the United States.

V. Conclusion

In the modern era, with heightened demand for water supply, extreme weather events exacerbated by climate change, and ever more pressing ecological needs, one will almost always find the federal government in the thick of interstate disputes over interstate waters and other important resources. Consequently, as Jamison Colburn laments, “[P]ing-ponging between state and federal forums—which had once seemed a remote and dystopic prospect—may well become

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268 Id. at 692. Ideker Farms, for example, will be allowed to proceed to Phase II with respect to flood damages experienced in 2007, 2008, 2010, 2013, and 2014. Id. at 762.
269 Id. at 693. During the 2011 flood, operations for any other purpose than flood control (including ESA purposes) were suspended. Thus, “the court cannot find that ‘but for’ the new Master Manual, the Corps would have begun to make releases from the dams earlier and could have avoided the 160,000 cfs releases that resulted in devastating flooding in 2011.” Id. at 692-693.
270 Id. at 660. Phase II will also resolve any defenses raised by the United States. Id.
271 Klamath Irr. Dist. v. United States, 635 F.3d 505, 510 (Fed. Cir. 2011). The litigation has spanned sixteen years, multiple opinions, an appeal to the Federal Circuit, a diversion to the Oregon Supreme Court on a certified question of law, and a lengthy trial. For the latest chapter, see Baley v. U.S., 134 Fed. Cl. 679 (2017).
272 134 Fed. Cl. at 679.
273 Id. at 680. See id. at 635 (citing Pub. L. No. 85–222, 71 Stat. 497 (1957)) (“Nothing in this compact shall be deemed ... [t]o deprive any individual Indian, tribe, band or community of Indians of any rights, privileges, or immunities afforded under Federal treaty, agreement or statute.”).
274 Id. at 674 (citing Rith Energy, Inc. v. United States, 247 F.3d 1355, 1366 (Fed. Cir. 2001)).
275 See supra Part III.
the norm given the jurisdictional posture of so many water rights, the abundance of ‘project water’ throughout the West, and the crisscross of jurisdictional lanes for adjudicating these claims.\textsuperscript{276}

The destructive nature of federal disengagement in interstate water disputes is palpable. The U.S. Army Corps of Engineers and the Bureau of Reclamation “have become the pivotal and dominant actors in interstate river basins.”\textsuperscript{277} Unless these agencies can be brought into court, and be bound by judicial decrees, states will not be able to obtain complete relief over essential resources.

Both state and federal sovereignty, and the public interest represented by both governments, weigh in favor of more regular and predictable federal involvement in interstate water disputes. Recent scholarship by Professor Benson, who once skillfully debunked the myth of unflagging federal deference to states in the water rights arena,\textsuperscript{278} hits the mark. “Whatever else might be said about American water federalism, most observers would likely agree that the federal government should normally support a state’s water management priorities. And if a federal agency is going to frustrate a key state goal, it should be necessary to serve an important national interest.”\textsuperscript{279} If federal agencies cannot be sued, courts cannot assess and weigh the national interest against the states’ priorities, and they cannot issue appropriate, equitable remedies.

Solving wicked problems over scarce transboundary resources will require a congressional waiver of federal sovereign immunity. Congress has expansive power over the jurisdiction of the federal courts, subject to the “cases and controversies” requirement of Article III and other constitutional constraints to preserve separation of powers and individual rights.\textsuperscript{280} Waiving federal immunity for original actions in the U.S. Supreme Court poses no threat to the integrity of the judiciary, which is well suited to hearing federal-interstate controversies over natural resources. There is already a trend away from federal immunity; this proposal simply expands that trend. “Over the past 150 years, Congress has gradually and sometimes haltingly, but with progressive expansiveness and generosity, lowered the shield of federal sovereign immunity.”\textsuperscript{281} Congress should exhibit “progressive expansiveness and generosity” now, by lowering the shield with respect to original actions between the states over interstate resources where the federal government is a necessary party.

\begin{footnotesize}
\begin{enumerate}
\item Colburn, \textit{supra} note 243, at 45-46.
\item Griggs, \textit{supra} note 1, at 210–211.
\item Benson, \textit{Deflating the Deference Myth, supra} note 4, at 242.
\item Benson, \textit{Can a State's Water Rights Be Damned?}, \textit{supra} note 116, at 36-38. Benson observes that resolution of interstate water wars may require Congress to waive federal immunity, “at least on a case-by-case basis.” \textit{Id.} at 38 n.217.
\item Hershkoff, \textit{supra} note 2, at 249, 262.
\item Sisk, \textit{Continuing Drift, supra} note 36, at 605.
\end{enumerate}
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