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Toward a Rational Scheme of Interstate Water Compact Adjudication

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The scarcity of water has always presented difficulties for the development of the western United States, and the problem shows no sign of abating.\(^1\) As a result, each of the water-scarce states constantly must seek further reliable and accessible sources of water, primarily to support agriculture.\(^2\)

The western states have developed elaborate schemes to apportion intrastate waters for their own users.\(^3\) In addition, these states have developed arrangements to apportion surface waters among themselves.\(^4\) They have allocated water by agreement (compact),\(^5\) and by judicial resolution (equitable apportionment).\(^6\) A third method, little used and external to the states (but almost certainly influenced by them), is division by congressional mandate.\(^7\)
Of the three methods, the compact is of the greatest future importance. Congressional mandate, although the most authoritative alternate, is the least employed method. The states have readily sought judicial equitable apportionment; this method, though, is plagued by delay in adjudication and lack of litigants' control over the eventual outcome.

An interstate compact, however, finds the middle ground. Compacting states more often than not seek congressional approval of their compacts, a step that may or may not be constitutionally mandated, yet is nearly always taken. By involving Congress in the process of compact formation, national concerns may be aired, obviating the need for congressional statutory pre-emption. Additionally, as the states themselves engage in the actual arm's length bargaining over an optimal division of waters, an "equitable apportionment" takes place without resort to the courts, thus conserving time and resources.

Interstate compacts, however, have difficulties of their own. Consider the following not-so-hypothetical disputes:

*** Two or more states agree to divide the waters of a river flowing across their mutual boundaries. The states, however, reach an impasse over the details of the division, and one decides to litigate the issue rather than pursue further negotiations for a compact. The states may ask the United States Supreme Court to decide the case under its original jurisdiction, binding each state by the terms of the judgment.

*** Two or more states agree on a compact, ratify it, and submit it to Congress, which assents to the compact. Subsequently, one of the states discovers an inequitable allocation due to errors in calculating the flow of the

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8. See Sporhase v. Nebraska, 458 U.S. at 952-53. Congress has traditionally deferred to the states regarding water law; it is suggested, however, that Congress does have the power to preempt the states in this area and has merely declined to exercise this right. Id. at 953-54; cf. Dunn, Cooperative Federalism in the Acquisition of Water Rights: A Federal Practitioner's Point of View, 19 PAC. L.J. 1323 (1988).

9. See Meyers, supra note 7, at 48, 51. Dean Meyers presents a compelling case against Supreme Court adjudication of these controversies, denoting equitable apportionment schemes as "a vague set of standards that are impossible to quantify." Id. at 49. He notes that, as a result of these vague standards, courts are reluctant to proceed in water dispute cases. This inaction favors the upstream states, which are allowed to proceed as they please with the water regardless of the merits of the downstream state's case. Id. at 49-50.

10. See infra, notes 22, 26.

11. For a concise description of the compacting process, see P. Hardy, INTERSTATE COMPACTS: THE TIES THAT BIND (1982).
river, to bad faith on the upstream state’s part or both. The state alleging the shortfall then appeals to the other signatory state(s) to honor the terms of the compact, a request that is refused. Because the states are equally represented on the body that administers the terms of the compact, a stalemate ensues. The protesting state’s only recourse is litigation.

This Note argues that the current method of resolving interstate water compact disputes is seriously flawed, and that the current practice of invoking the Supreme Court’s original jurisdiction to resolve these cases should be altered. This Note contends that the compact itself should contain structural dispute resolution procedures insisted upon by Congress before any grant of approval is given to the agreement. Part I of this Note examines the history of the compact clause of the Constitution and its application in interstate relations. Part II explores how a poorly drafted, yet fairly representative, water allocation compact led two states to the Supreme Court in search of relief. After analyzing the Supreme Court’s decisions and orders attempting to resolve the issue, Part II concludes that the Court has no intrinsically satisfactory remedy and must merely make the best of a poor situation. Part III then examines alternative methods of resolving these disputes, including federally mandated tiebreakers for deadlocked compact commissions, administrative resolution of compact disputes, and insistence by Congress on a mandatory arbitration clause to be included in all future compacts ratified by it. Part IV concludes that, for both legal and practical reasons, arbitration constitutes the most suitable of the three alternatives.

I. HISTORICAL BACKGROUND OF THE COMPACT CLAUSE

In order to understand the complex interplay of the federal and state spheres of interest in problems of river and stream allocation and the almost accidental circumstances that produced the present system, one must examine the history of the compact clause and its predecessors in the Articles of Confederation and British Colonial rule.
A. The Compact Clause and its Precursors

The compact clause\(^\text{12}\) articulates one of the great themes of the Constitution. Specifically, it forbids a state from making any agreement with a foreign nation or with another state of the union without first obtaining the consent of Congress.\(^\text{13}\) The clause codifies those shackles placed upon the states that distinguish state sovereignty from national sovereignty. Without these restrictions a lasting union seems unlikely.

The compact clause has its roots in the adjudicative system employed by Great Britain in the administration of the thirteen colonies that became the original United States. Although Great Britain treated the American Colonies in many respects as though they were quasi-nations, disputes were mediated through the Crown's intervention.\(^\text{14}\)

The Declaration of Independence\(^\text{15}\) and the revolution, however, wrought great changes in the existing dispute resolution system. Where previously the colonies could seek the guidance of the Crown, the new states could only rely upon their relative strength—politically, militarily, and economically—to enforce their claims against others. The drafters of the Articles of Confederation\(^\text{16}\) recognized that under these conditions a simple territorial dispute might jeopardize the entire war effort against Great Britain. As a result the Articles provided for an interstate

\[^{12}\] U.S. CONST. art. I, § 10.
\[^{13}\] Id. ("No State shall, without the Consent of Congress, ... enter into any Agreement or Compact with another State, or with a foreign Power . . . .")
\[^{14}\] The colonies were administered separately; save for their common relation to the mother country, they were wholly independent of one another. In keeping with their acknowledged quasi-national status, the colonies possessed those avenues of dispute resolution—vis-à-vis one another—open to completely sovereign nations. The colonies could pursue the negotiation of settlements between themselves; they could appeal to the crown for mediation that would take the form of a royal commission with appeal to the Privy Council; or they could fight. See generally Frankfurter & Landis, The Compact Clause of the Constitution—A Study in Interstate Adjustments, 34 YALE L.J. 685, 692-93 (1925); see also Chapman, Where East Meets West in Water Law: The Formulation of an Interstate Compact to Address the Diverse Problems of the Red River Basin, 38 OKLA. L. REV. 1, 18-19 (1985).

Border disputes between the colonies were particularly fruitful sources of intercolony dispute. Frankfurter & Landis, supra, at 692-93. Notable controversies of this sort arose between Massachusetts and New Hampshire from 1762 to 1768; between Massachusetts and Rhode Island in 1740; and between New York and New Jersey in 1771. Id. at 754-57.

If the colonies decided to negotiate a settlement, that fact alone did not necessarily conclude the issue. The Crown retained the right to review the agreement before granting its approval. Id. at 692 & n.29.

\[^{15}\] The Declaration of Independence (U.S. 1776).
\[^{16}\] U.S. Articles of Confederation (1781).
dispute resolution system. This system expressly limited the states' rights to pursue agreements among themselves, and also provided for a new external adjudicator: the Congress. By reducing the threat of state self-help, the Articles of Confederation ensured that petty boundary disputes would not fragment the nation in its effort to attain independence from Great Britain.

The Framers of the Constitution generally adopted the structure of interstate dispute resolution enunciated in the Articles of Confederation. One significant change, however, altered the status of appeal in matters of multi-state controversy. Whereas the power to hear appeals lay with the Congress under the Articles, the states must resort to the Supreme Court for adjudicatory relief under the Constitution. Moreover, the Constitution affords the Supreme Court original, rather than appellate, jurisdiction in any dispute between two or more states.

These changes have channelled most, if not all interstate disputes to the Supreme Court at some stage. For example, if two states elect to settle their differences in the form of a compact, they may do so, subject to the will of Congress. Nevertheless,

17. "No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled . . . ." Id. at art. VI, cl. 2.
18. "The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other cause whatever . . . ." Id. at art. IX, cl. 2. See also Frankfurter & Landis, supra note 14, at 693.

Notably, however, the procedures specified by the Articles for appeals to the Congress were so convoluted and time-consuming that one writer suggests that the intent was "to delay congressional action" in addition to assuring absolute impartiality on the part of the committee Congress designated to hear the appeal. See M. Jensen, The Articles of Confederation—An Interpretation of the Social-Constitutional History of the American Revolution 1774-1781 180 (1940) (discussing art. IX appeals procedure). Jensen notes further that Congress was intended to act as an arbitrator "rather than to make a decision or enforce a decision after it had been made." Id. at 181. The practical import of the congressional role was that the drafters of the Articles may well have wished to continue emphasizing the compacting process over the quasi-judicial process. Given the numerous shackles placed upon Congress as an instrument of effective governance by the Articles, this conclusion seems quite plausible.

19. Frankfurter & Landis, supra note 14, at 694; see also U.S. Const. art. III, § 2.
21. Id.
22. See supra note 5. Congressional assent to a compact is not required, however, if the net effect of the compact does not cause an "increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States." United States Steel Corp. v. Multistate Tax Comm'n, 434 U.S. 452, 468 (1978) (quoting Virginia v. Tennessee, 148 U.S. 503, 519 (1893)). The Court has developed a three-factor test to determine whether compacting states have, in fact, enhanced their political power at the expense of the federal government or the other states. The first factor is whether the compact "purport[s] to authorize the member States to exercise any powers they could not exercise in its absence." Id. at 473. Secondly, the Court will inquire whether
should their attempt at conciliation fail, either pre- or post-compact formation, the state's only recourse would be to the Supreme Court. The states may also elect to bypass the compact process altogether and seek a hearing before the Court at the outset. Regardless of the route chosen, the Supreme Court virtually always has the last say in a dispute between states.

B. The Compact Clause in Operation

Regardless of its shortcomings the states have often relied upon the compact clause to accomplish a great number of diverse goals, many of which "may not call for, nor be capable of, national treatment." Notably, states have employed the compact clause to allocate debt, to establish an authority for the any of the states' sovereign power has been delegated to the body established by the compact. Id. The final consideration is whether the states may withdraw at will from the compact. Id. Absent any of these conditions a compact does not enhance the states' political leverage and hence does not intrude upon the domain of Congress. The need for approval is thus obviated in these circumstances. Accord Northeast Bancorp v. Board of Governors, 472 U.S. 159, 175-76 (1985).

23. If no compact has been agreed to, or if a compact does not specify the contrary, the Supreme Court has jurisdiction pursuant to article III. U.S. CONST. art. III, § 2. The Constitution, however, describes the Court's jurisdiction in these matters solely in nonexclusive terms; no mention of plenary jurisdiction is made. The language granting the Supreme Court original jurisdiction, therefore, does not prevent Congress from asserting its own Article III powers and granting concurrent jurisdiction over these disputes to the courts it is empowered to establish. Nevertheless, Congress, possibly because of turmoil that might result from such an arrangement, has enacted legislation granting exclusive jurisdiction to the Supreme Court in these instances. See 28 U.S.C. § 1251 (a) (1966).

24. See supra note 6 and accompanying text.

25. The Supreme Court has some discretion in deciding whether to hear cases brought under § 1251. This discretion, however, seems to be limited to deciding the appropriateness of the suit; i.e., it is limited to considerations of ripeness and standing, rather than assessments of the merits, as when a writ of certiorari is considered. See California v. Texas, 457 U.S. 164, 168 (1982).


27. See, e.g., Virginia v. West Virginia, 206 U.S. 290, 321 (1906) (upholding the jurisdiction of the Supreme Court to resolve questions regarding interstate compacts). The "compact" in this case actually consisted of the Virginia enactment authorizing West Virginia to establish itself as a state. See U.S. CONST. art. IV, § 3, W. VA. CONST. art. 8, § 8 (the provision of the West Virginia Constitution promising repayment of that portion of Virginia's debt allocable to West Virginia); 12 Stat. 633 (1862) (the Act of Congress recognizing the new state). According to some commentators on the subject, a compact need not be a written document, but merely an understanding of some sort between states as to a course of action. J. Nowak, R. Rotunda & J. Young, Handbook of Constitutional Law § 9.5(a), at 300 (3d. ed. 1986). The Constitution itself seems to bear out this distinction. Compare U.S. Const. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation . . . .") with U.S. Const. art I, § 10, cl. 3 ("No state
operation of an interstate port, to provide for the construction of a bridge spanning interstate waters, and to provide for the extradition of felons. These possibilities are by no means exhaustive.

States have negotiated many compacts allocating the waters of interstate rivers and streams. River allocation compacts, though not unique to the western states, are most prevalent in that region. The relative scarcity of water in the western United States necessitated the use of many water conservation and allocation measures, including the compact, to a far greater extent than in other regions. For example, Texas alone has entered into five separate water allocation compacts, each pertaining to different rivers and river systems.

It seems clear, especially in light of the recent drought experienced throughout much of the nation, that water compacts will become increasingly important in the years and decades to

shall, without the consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power . . . .")


30. Agreement on Detainers, U.S., ch. 406, 48 Stat. 909 (1934); see also Cuyler v. Adams, 449 U.S. 433 (1981). The Detainer compact is unusual in that Congress ratified it first and allowed the states to join the pre-approved compact at their discretion. Id. at 441. Forty-six states have done so.

31. See generally, The Council of State Gov'ts, Interstate Compacts and Agencies (1983) (describing the uses to which interstate compacts have been put).

32. For a detailed list of water allocation compacts and their signatories current to 1983, see id.


35. Goodgame, supra note 1, at 16.
come. Unless a coherent scheme is devised to resolve compact disputes quickly and easily, the continued use of the compact mechanism will become futile. The ongoing Texas v. New Mexico dispute before the Supreme Court provides a graphic example of this futility.

II. AN EXAMINATION OF THE DIFFICULTIES OF A MODERN INTERSTATE COMPACT: Texas v. New Mexico

Like most contracts, the great majority of compacts function as their signatories intend. Nevertheless, a water compact, like a contract, may run afoul of its purpose and lead to litigation. Compacts have failed as a result of 1) poor draftsmanship, 2) lack of sufficient foresight by the compacting states, or 3) a combination of the two. The controversy surrounding the Pecos River Compact illustrates the third possible cause of failure. In the Pecos River case, the flaw in the compact is so egregious that the case has been before the Supreme Court twice for argument and will return at least once more. This protracted litigation has rendered the compact virtually useless.

A. A History of the Pecos River Compact Litigation

Desiring to apportion the waters of the Pecos River, the states of Texas and New Mexico entered into the Pecos River Compact. The arrangement failed to fulfill its promise and led to litigation in the Supreme Court—litigation that has endured for well over a decade and only now shows signs of abatement.

1. History of the compact— The Pecos River rises in East Central New Mexico and flows through that state and through Southwest Texas, discharging into the Rio Grande near Langtry, Texas. The states of Texas and New Mexico elected to bind themselves in a compact for its division, hoping to maximize the

river's benefits to both. After some lengthy delays, including Texas' failure to ratify an earlier agreement in 1925, the two states ratified the Pecos River Compact in 1948, and Congress approved it the next year.\textsuperscript{40}

One of the prime functions of the compact was to furnish a workable guide to the amount of water New Mexico owed Texas in a given year. The most significant aspect of the Pecos River Compact, however, was the creation of a three-member commission to administer the compact's terms. The compact empowered each state to name one commissioner, each entitled to a vote. In addition, the President might also name one commissioner, possessing no vote but acting as chair.\textsuperscript{41} The compact required the commission to "'[e]ngage in studies of water supplies of the Pecos River' and to 'c[ol]lect, analyze, correlate, preserve and report on data as to the stream flows, storage, diversions, salvage, and use of the waters of the Pecos River and its tributaries.'"\textsuperscript{42}

Significantly, the structure of the Compact Commission required that any action taken receive the consent of both voting commissioners.\textsuperscript{43} Presumably, the two states failed to foresee that an issue where they could not reach agreement would arise.

\textsuperscript{40} Id. at 557-59.

Among other things, the Compact established the amount of water owed by New Mexico to Texas each year from New Mexico's portion of the river. The compact defined this amount in terms of the "1947 Condition." This was, in essence, an expression of the percentage of total water in New Mexico's portion of the stream that it was bound to deliver to Texas regardless of the total water in the Pecos. This percentage was based upon a study completed in 1947. New Mexico, therefore, was not bound to deliver an absolute amount each year but rather an amount based upon the amount of water in the basin that year. See Pecos River Compact, 63 Stat. 159, art. III (allocating water according to the 1947 study), \textit{reprinted in} S. Doc. No. 109, 81st Cong., 1st Sess. 4 (1949) [hereinafter S. Doc. No. 109]; Texas v. New Mexico, 462 U.S. at 558 n.4.

\textsuperscript{41} The President has the option to appoint a federal commissioner, who is charged with presiding over meetings of the commission, albeit without a vote. Pecos River Compact, 63 Stat. 159, art. V(a); S. Doc. No. 109, \textit{supra} note 40, at 5.

The other Texas water compacts feature similar structures. Canadian River Compact, 66 Stat. 74 (providing for one commissioner per state and one non-voting federal commissioner); Red River Compact, 94 Stat. 3305, (providing for two commissioners per state and one non-voting federal commissioner); Rio Grande Compact, 53 Stat. 785 (providing for one commissioner per state and one non-voting federal commissioner); Sabine River Compact, 68 Stat. 690 (providing for two commissioners per state and one non-voting federal commissioner). Most other water compacts provide for a federal commissioner's presence as well.

\textsuperscript{42} 462 U.S. at 560 (quoting Pecos River Compact, 63 Stat. 159, art. V(d)(3)-(4)).

\textsuperscript{43} Id. Other water allocation compacts have employed the unanimous consent provision as well. See, e.g., Canadian River Compact, 64 Stat. 93 (requiring each of the three voting commissioners to approve of actions); Rio Grande Compact, 53 Stat. 785 (requiring approval of each of three state-appointed commissioners). But see, e.g., Red River Compact, 94 Stat. 3305 (mandating that six of eight voting commissioners approve).
This piece of poor drafting, by creating the conditions for an insoluble impasse, eventually led Texas to the Supreme Court in search of relief.

2. History of the litigation—Following its ratification in 1948 and congressional approval in 1949, the Compact Commission performed as envisioned for about fifteen years. This period of seeming goodwill, however, belied the very real difficulties experienced by the Commission in administering the compact. The basis of the compact's apportionment scheme, the 1947 Condition, contained flaws that rendered the accurate gauging of the river's true flow rate virtually impossible, understating the flow by a significant amount. Correspondingly, as the Commission later determined, the amount of water delivered at the state line each year fell far short of the compact requirements. Despite efforts on the part of both states to revise the assumptions of the original engineering report, the amounts of water delivered by New Mexico at the state line continued to fall short of the specified amounts until the early 1970s. The failure of the states to agree to the actual amount of the shortfalls, if any, created an impasse between the two commissioners and a stalemate on issues presented to the commission. Texas responded to the deadlock by initiating a suit in the United States Supreme Court in 1974, alleging that New Mexico had breached its obligation to deliver water under article III of the Pecos River Compact.

Following Texas' invocation of the Supreme Court's original jurisdiction, the Court assigned the case to a special master for a hearing of the evidence, as is the Court's custom in cases

44. Indeed, the Special Master in his 1979 Report expressed doubts as to whether the compact could ever be workable given its structure. Comment, supra note 38, at 410 (quoting REPORT OF THE SPECIAL MASTER, Texas v. New Mexico (1979) [hereinafter SPECIAL MASTER'S 1979 REPORT]).

45. 462 U.S. at 560.

46. Id. at 560-61. The Commission determined in a 1962 study that the cumulative shortfall for the years 1950-1961 was approximately 53,000 acre-feet. Id. An acre-foot is the unit of measurement denoting the volume of water necessary to cover an acre to a uniform depth of one foot. This is roughly 325,000 gallons. Goodgame, supra note 1, at 16 n*.

47. Texas wanted the Court to analyze the shortfalls in terms of the Double Mass Analysis method devised by Texas to measure inflows to the Pecos over a three-year period. The Court declined, adopting New Mexico's view that Texas' system did not fall within the guidelines established by the compact. Hence the Court itself, even if it desired to, could not adopt Texas' plan. 462 U.S. at 571-74.

48. Id. at 562.

49. The Supreme Court will not automatically hear interstate dispute cases, despite its original and exclusive jurisdiction in these matters. See supra note 25. The "model case ... is a dispute between States of such seriousness that it would amount to casus
where it has been called upon not only to settle questions of law but also to find fact. After producing a technical report addressing the proper method of measuring the actual flow of the river, the special master produced a report in 1982 recommending that the Court utilize its equitable powers to appoint a tiebreaker, whose decision would be “final, subject only to appropriate review by the Court.”

The United States, as intervenor, and the State of New Mexico excepted to this recommendation and the Court sustained their exceptions. In so holding, the Court noted that the compact, by virtue of its approval by Congress, no longer possessed the attributes of a mere contract. Had Congress not granted its approval to the compact, the Court might equitably have modified the agreement and, for example, inserted a tiebreaker, as it might have done were the compact an ordinary contract between the states. Once Congress acted favorably upon the compact, however, it was transformed into a validly enacted law that the Court could not modify.

The 1983 opinion in Texas v. New Mexico, therefore, clearly articulates the Court’s view that any potential remedy to the difficulties encountered in the administration of the Pecos River Compact must be limited to that contemplated within the compact itself. On that basis, the Court remanded the case to the special master to determine whether New Mexico had actually breached its obligations under article III(a) of the compact.

On remand, the special master conducted the hearings and concluded that New Mexico had not fulfilled its obligations to Texas, and thus, had breached the compact. The master’s findings of fact revealed that from 1950 to 1983, New Mexico wrongfully had denied Texas approximately 340,100 acre-feet of water. The master then recommended that New Mexico com-

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52. Id. at 564.
53. Id. (citing Cuyler v. Adams, 449 U.S. 433, 438 (1981) (holding that congressionally approved Interstate Detainer Compact has the force and effect of federal law)). Moreover, the states and Congress might have provided for alternative methods of resolving disputes between the states, even to the extent of foreclosing Supreme Court review. See id. at 568-69; J. NOWAK, R. ROTUNDA & J. YOUNG, supra note 27, § 9.5(b), at 303.
54. 462 U.S. at 568-71.
55. Id. at 576.
pensate Texas for the accumulated shortfall by delivering one-tenth of that amount each year for ten years, in addition to its normal requirements.  

The Court, however, did not agree that specific performance constituted the only possible relief available—the Court saw nothing to preclude an award of damages should it be determined that the legal remedy was more appropriate. The Supreme Court noted that the contractual nature of the compact permitted damages for past breaches as well as prospective relief. Therefore, the Court remanded the case to the special master yet again to determine the merits of each of the possible remedies.

B. An Examination of Possible Remedies Available to the Court for the Breach of an Interstate Water Compact

Each remedy the Court might impose in Texas v. New Mexico presents both advantages and disadvantages. This section will examine both monetary damages and specific performance, weighing each for its suitability in resolving the dispute between Texas and New Mexico.

1. Monetary Damages—One avenue open to the Court in Texas v. New Mexico involves levying damages against New Mexico for its failure to deliver adequate supplies of water to Texas. The imposition of damages against New Mexico would compensate Texas for the damage to its economy and its citizens.

57. Id. at 128. The Special Master declined to award monetary damages, concluding that “the Compact contemplated delivery of water and that the Court could not order relief inconsistent with the Compact terms.” Id. at 130; see also REPORT OF THE SPECIAL MASTER, Texas v. New Mexico 31-32 (1986) [hereinafter SPECIAL MASTER’S 1986 REPORT] (copy on file with Government Documents Librarian, University of Michigan Law School Library).

58. 482 U.S. at 132. It is noteworthy that the Court is unwilling to invoke equity to reform the “contract”—a statutory enactment—but says that specific performance, itself an equitable remedy, is entirely appropriate. The compact’s nature as a positive enactment of law probably explains this dichotomy. Rather than commanding specific performance, the Court would actually be issuing an order similar to mandamus.

59. Id. at 130 & n.8.

60. See SPECIAL MASTER’S 1986 REPORT, supra note 57, at 31-32. Not only does the compact itself not foreclose monetary relief, see supra text accompanying note 58, previous decisions of the Court have upheld the “propriety of money judgments against a state in an original action.” 482 U.S. at 130 (citing Virginia v. West Virginia, 246 U.S. 565 (1918) (holding damages applicable in the case of a breached interstate compact); South Dakota v. North Carolina, 192 U.S. 286 (1904) (awarding South Dakota damages for North Carolina’s failure to redeem bond obligations); and United States v. Michigan, 190 U.S. 379 (1903)).
caused by New Mexico's breach of the compact's terms. Moreover, a damage award could accomplish this substantive good without adversely affecting the water supply of users on New Mexico's stretch of the river, as would be the case were New Mexico forced to "pay" water to Texas. New Mexico could purchase compliance with the compact without harming its own residents, who rely on a continued source of water.

Closer scrutiny, however, reveals distinct flaws in this approach. A lump sum payment to the State of Texas by the State of New Mexico would do little to benefit those most harmed by the thirty-year cumulative shortfall. The region most greatly affected by New Mexico's breach of the compact constitutes a small portion of Texas. Assuming that any damages awarded are absorbed into the state's general operating budget these individuals would receive only a small portion of the benefits obtained as a result of a lump sum payment.

Practical and legal difficulties, however, preclude an attempt to compensate directly those individuals and businesses adversely affected by New Mexico's breach. The shortfalls created by the breach have occurred over the span of three decades. The very length of time may preclude full compensation of those who at one time or another were affected by New Mexico's noncompliance. Some may have left the area and prove impossible to locate, and others may have died. Businesses in operation at some time during New Mexico's breach may no longer exist, perhaps even as the result of insufficient water.

Moreover, it is not necessarily certain that an award of damages that is distributed to affected citizens would pass constitutional muster. Ordinarily, the eleventh amendment forbids a citizen from suing a state unless the state waives its immunity.

61. For a more complete discussion of the impact of water damages on the environs of New Mexico within the watershed of the Pecos, see Joint Brief of Amici Curiae, The Incorporated Municipalities of Alamogordo, Artesia, Capitan, Pecos, Roswell, Ruidoso, Ruidoso Downs and Santa Rosa, New Mexico in Support of the State of New Mexico at 4-6, Texas v. New Mexico, 482 U.S. 124 (1987) (No. 65) [hereinafter Joint Brief].
62. 482 U.S. 131-32.
64. 482 U.S. at 132 n.7.
65. SPECIAL MASTER'S 1986 REPORT, supra note 57, at 31.
66. U.S. Const. amend. XI. Some commentators note that a state may waive its immunity solely by engaging in activities subject to federal regulation. They conclude, however, that it is unlikely that a waiver will be found unless the activity is "admittedly
This prohibition presumably extends to suits where the state, acting in its capacity as *parens patriae*, asserts the rights of its citizens against another state. In cases where states have sued another state, not in its own right, but on the right of its citizens, the Supreme Court has suggested that the suing state's motives must be carefully scrutinized.67

A final reason for finding monetary damages unsatisfactory is that the imposition of monetary damages would destroy any incentive New Mexico might have to comply with the compact in the future.68 In times of plentiful water, New Mexico would have no reason not to grant Texas its fair share of the waters of the Pecos. New Mexico's willingness to comply with the terms of the compact, however, is likely to be directly proportional to the total available supply of water. In times of drought, New Mexico could hardly be expected to supply irreplaceable water to Texas when it can "purchase" compliance. New Mexico would always substitute money for water in times of shortage, as the latter is more precious to it.69 A remedy that substitutes money for water clearly frustrates congressional intent, for Congress has stated that it intends the compact to provide for the equitable distribution of the present available water supply.70

2. Specific Performance— As another alternative, the Supreme Court could order New Mexico to fulfill its back-obligations under the terms of the compact. A remedy of specific performance has several advantages. Texas would receive what it bargained for under the compact—water. Moreover, "water damages"71 would inure directly to the benefit of those adversely affected by the shortfalls. Specific performance would also avoid the possibility of placing New Mexico in the disconcerting position of having to raise additional revenues for the payment of

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68. See Texas v. New Mexico, 482 U.S. at 132.

69. *But see id.* (ignoring obligation to deliver water not a substantial concern in light of the "authority to order remedying shortfalls to be made up in kind").


71. This is the term used to designate specific performance of the compact. The Supreme Court uses the term "water interest" to denote the payment of accrued shortfalls in kind rather than in the form of monetary compensation. Texas v. New Mexico, 482 U.S. 124, 128 (1987).
damages. New Mexico could satisfy the compact by opening the sluice gates on a few dams. The special master, perhaps finding these arguments persuasive, in addition to believing that the Supreme Court could not order money damages in this case, recommended that the Court order water damages.

Regardless of the strength of the arguments in favor of that remedy, the distinct disadvantages of specific performance probably more than offset the benefits. Specific performance of a contract is an extraordinary remedy, which the Court has stated it will employ only if equitable. The Supreme Court must therefore first find that a money judgment would not put the parties in the best possible position. Additionally, enforcement of the compact's terms must not "involve disproportionate hardship to the defendant."

As discussed above, a money judgment would not fully satisfy Texas' claim against New Mexico. This factor militates in favor of specific performance. On the other hand, large areas of the Pecos Valley in New Mexico have developed since 1947, the effective date of the compact. Residents and businesses gravitated to the area on the supposition that a ready source of water would remain available for their use. This supposition was, in turn, implicitly premised on the assumption that New Mexico had complied with the terms of the compact and that Texas would make no additional claims on the river's waters. The Court, however, found that New Mexico had not complied with the terms of the compact. As a result, large areas of east central New Mexico may be faced with a serious water crisis if the Court orders restitutionary water deliveries, and, the expectations of residents and businesses will have been breached. Viewed in this light, a decree of specific performance certainly causes "disproportionate harm" to New Mexico. At the very least, this draws into question the equity of such a decree.

Specific performance might not be a panacea for Texas either. Texas does appear to have more than adequate reservoir capac-

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72. This was one of the concerns voiced by the Supreme Court in its various Virginia v. West Virginia opinions. See, e.g., Virginia v. West Virginia, 246 U.S. 565, 592 (1918); Virginia v. West Virginia, 206 U.S. 290, 318-19 (1907).
73. SPECIAL MASTER'S 1986 REPORT, supra note 57, at 31-32.
74. 482 U.S. at 131.
75. A. CORBIN, CORBIN ON CONTRACTS § 1136, at 95 (1964) (footnote omitted).
76. See discussion supra notes 60-70 and accompanying text.
77. See discussion supra notes 56-59 and accompanying text.
78. See Joint Brief, supra note 61, at 6.
79. Id.
ity to handle larger water deliveries.\textsuperscript{80} It is unlikely, however, that the water, if stored, would benefit many of those harmed by non-delivery in the past.\textsuperscript{81} Ability to store water, alone, will not make whole those who required the water in the past and were unable to obtain it.

III. ALTERNATIVES TO LITIGATION

The Supreme Court faces a Hobson's Choice. It may award monetary damages to Texas, a step that would benefit the state but fail to compensate the true victims. Choosing monetary damages would also provide further disincentive to New Mexico to comply with the literal terms of the compact requiring the delivery of water. On the other hand, were the Court to order specific performance, Texas would perhaps receive its due, but the citizens of New Mexico would suffer greatly in the execution of judgment. This dilemma easily might have been avoided had the drafters of the compact foreseen the implications of a deadlock and acted to prevent it.

In the sections to follow, three possible solutions to the Court's dilemma are suggested. These solutions are dispute resolution systems that might be built into the compact itself, defusing controversies before litigation becomes necessary. The primary benefit would be to expedite the process of allocating interstate waters. None of them, of course, will be of any use in resolving \textit{Texas v. New Mexico}, which has already proceeded past the point where such alternatives to conventional litigation would be useful. Nevertheless, Congress might profit from the lessons of that case and employ one of the alternatives in future compacts it is asked to ratify.\textsuperscript{82}

The three possible solutions are 1) requiring that the compact provide for a federal commissioner who would cast a tie-breaking vote when the compact commission is otherwise deadlocked;\textsuperscript{83} 2) establishing a federal agency that would have powers

\textsuperscript{80} Special Master's 1986 Report, supra note 57, at 42.
\textsuperscript{81} This parallels the concerns articulated supra notes 62-65 and accompanying text.
\textsuperscript{82} This assumes an activist role on the part of Congress. Water compact legislation to date frequently resembles private legislation with little regard for the national interests at stake. See generally S. Doc. No. 109, supra note 40; see also 132 Cong. Rec. 12,326-01 (1986) (remarks of Sen. Cranston on proposed Nevada-California Compact). In the future members of Congress must recognize the public-law nature of these compacts and appreciate the gravity of the situation they are asked to legislate upon.
\textsuperscript{83} This Note contemplates a compact similar to the Pecos River Compact—a bilateral agreement with each side supplying one commissioner to the compact commission. This discussion would apply with equal force, however, to other types of compact commission structures, as long as a tie is possible in a vote on commission action.
analogous to those of the Supreme Court to equitably apportion interstate waters; and 3) requiring that all future water allocation compacts contain clauses binding the signatories to seek arbitration before resorting to the Supreme Court. Each of these options will be examined in turn, focusing on the relative advantages and disadvantages.

A. Federal Tiebreaker

The idea of "tiebreaking" a deadlocked compact is not new. The Supreme Court was presented with this possibility in 1983 in *Texas v. New Mexico.* The Court declined the invitation to cast a tie-breaking vote, citing the compact's status as congres-sonally enacted legislation. The Court noted that this would amount to a usurpation of the legislative process. Congress, however, as the enactor of laws, may impose such terms as it sees fit prior to authorizing a specific compact. Congress has shown no reluctance to employ similar tie-breaking procedures for various federal commissions structurally comparable to a compact commission. The question thus becomes not "Can Congress provide for a tiebreaker?" but rather, "Should Congress do so?"

1. Advantages inherent in a federal tiebreaker system—
The most obvious advantage of a federally imposed tiebreaker is the elimination of a compact commission deadlock. Moreover, a tie-breaking mechanism would entail only minimal deviation

84. The Supreme Court was presented with the opportunity to create a tiebreaker in *Texas v. New Mexico*, 462 U.S. 554, 568-69 (1983), but, as indicated *supra* text accompanying notes 51-53, declined to do so. This device has, however, been adopted in several compacts. See, *e.g.*, Arkansas River Compact, ch. 155, 63 Stat. 145, 149-51 (1949), Snake River Compact, 62 Stat. 294 (1943), and Yellowstone River Compact, ch. 629, 65 Stat. 663, 665-66 (1951).

85. 462 U.S. at 554, 564-65.

86. "It can hardly be doubted that in giving consent Congress may impose conditions." *James v. Dravo Contracting Co.*, 302 U.S. 134, 148 (1937); *see also* Act of Dec. 21, 1928, ch. 42, 45 Stat. 1057 (imposing conditions on Colorado River Compact before Congress would consent to its approval); V. THURSBY, INTERSTATE COOPERATION, A STUDY OF THE INTERSTATE COMPACT 74-75 (1953).

from current practice.⁸⁸ Congress merely would have to insist that, as a condition of approval, all future compacts must provide for a federal commissioner who would be allowed to vote, at the very least, whenever the states have reached an impasse.

Nor would a tiebreaker impose additional efficiency costs upon the compact signatories. Most water compacts to date have provided for the appointment of a commissioner by the federal government, in most cases by the President.⁸⁹ There is no reason to believe this practice will change. Thus, in the majority of instances, a federal commissioner already would be privy to the relevant data. This would mitigate the need for the states to present additional facts.

Finally, the federally appointed commissioner likely would be free of the partisan concerns that caused the initial deadlock, particularly if the commissioner is not a resident of the compacting states.⁹⁰ A congressional requirement that commissioners, to be qualified for such service, may not reside in the compacting states would help to ensure that the actions taken are objective and equitable. An impartial nonresident federal commissioner would prevent one state from dominating the commission merely because the federal commissioner, as a resident of that state, has an interest in the outcome of the dispute.

2. Disadvantages inherent in the tiebreaker system— Notwithstanding the advantages, a federal tiebreaker might not be the best solution to compact commission deadlocks. Many existing water compacts cite the equitable apportionment of a given river's waters as their primary purpose.⁹¹ The establishment of a tiebreaking procedure might not present the most efficacious means by which to accomplish that end. The federal commissioner, by casting the tie-breaking vote on a given issue, may prevent the commission from binding itself in an inextricable knot. This might, however, be done at considerable cost to the compact's stated goal of equitable water apportionment. The federal commissioner, as here envisioned, must commit himself to only one position regardless of the equities of the other. Con-

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⁸⁸. Most compacts already provide for a federal official to act as nonvoting chairman of the compact commission. Each water allocation compact to which Texas is a party, for example, contains a provision of this sort. See supra note 41.

⁸⁹. Id.

⁹⁰. This is particularly true if the federal commissioner is not "a domiciliary of or [does not] reside in either State." Sabine River Compact, 68 Stat. 690, art. V(b).

⁹¹. See, e.g., Pecos River Compact, 63 Stat. 159, art. I ("major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Pecos"); see also Red River Compact, 94 Stat. 3305, preamble; Rio Grande Compact, 53 Stat. 785, preamble; Sabine River Compact, 68 Stat. 690, preamble.
Water Compact Adjudication

cededly, a situation where neither alternative presented to a compact commission is palatable might occur only infrequently. Nevertheless, as amply demonstrated by the protracted litigation over the Pecos River Compact in Texas v. New Mexico, such situations do arise.

The shift in control over interstate rivers resulting from a federal tiebreaker's presence also presents difficulties under the posited tiebreaker system. Under a system utilizing a federal tiebreaker, the effective power to allocate the river's waters passes from the states, which have traditionally held this power, to the federal government, in the person of the federal commissioner. In times of plentiful water, one would anticipate no real dispute arising between the states. Ties would not develop in the usual case, and the commission would function smoothly. When, however, water has become scarce, there is an ever-increasing likelihood that the states will not be able to agree upon a course of action. The incentive for cooperation in the administration of the compact diminishes greatly and deadlocks become increasingly likely. The federal commissioner, as tiebreaker, assumes increasing importance. Ideally under the tiebreaker scheme, the federal commissioner would not be infected with local prejudices. By the same token, however, the commissioner may not possess an adequate sense of local concerns. As a result, the commissioner, who was appointed to represent the interests of the federal government on the compact commission, holds the real power over the fate of the river system. The power not only shifts away from the states at the time they are most in need of it, but the new wielder of power may lack a sufficient comity of interest with those affected by her decision to make up for its loss.

A federal tiebreaker, therefore, does not solve the problem. Although this device would ameliorate many of the difficulties associated with bilateral water compacts, a tiebreaker also seems to raise as many issues as it answers. Other devices must be examined to see if they might prove more beneficial in the long run.

B. Federal Water Agency

Another possible solution lies in the creation of a federal water agency. Congress could establish this agency along the
lines of the traditional administrative model, for example the National Labor Relations Board (NLRB). Like the NLRB, the hypothetical "Federal Water Agency" would hear disputes, sitting as an administrative law tribunal.

On its face a proposal for a water agency does not appear to be a significant improvement over the existing method of resolving water disputes. Hearings before administrative personnel would still be time-consuming. The states would still be forced to assume a litigative posture, with the concomitant costs involved.

One change to the NLRB-type structure could reduce the time required. Rather than insisting upon typical adversarial proceedings, Congress might ordain that the states proceed on a non-adversarial basis. This would allow the Administrative Law Judge (ALJ) to conduct her own independent investigation of the claims made. Water compact disputes often turn on questions of fact, so arguments of law might remain adversarial without fear that the states would unduly skew the proceedings.

The nonadversarial process of factual development would be appropriate in these cases for several compelling reasons. The gravity of the issue requires a method of developing facts that will most likely lead to a just and equitable division of water. Moreover, the parties in these cases are on relatively equal foot-

93. The National Labor Relations Board model was chosen because labor relations law provides a situation analogous to interstate water law. Labor law was once the exclusive domain of the common law courts. During the early part of this century, however, it was recognized that it would be simpler to handle labor cases through an administrative agency, subject to the oversight of the federal courts. This procedure was adopted piecemeal until the administrative structure emerged in its present form after the passage in 1935 of the National Labor Relations Act. 29 U.S.C. § 151 (1982). See generally R. Smith, L. Merrifield, & T. St. Antoine, Labor Relations Law: Cases and Materials (6th ed. 1979).

Similarly, water disputes between states have been adjudicated by the courts. Strong arguments, however, support the contention that an administrative agency could better dispose of these cases. See infra text accompanying notes 95-98.

94. See 29 C.F.R. § 101 (1988) (statements of Procedure of the National Labor Relations Board and associated entities). Basically, this would involve a preliminary hearing before an Administrative Law Judge (ALJ). Compare 29 C.F.R. § 101.10 (1988) (should either party disagree with the findings of the ALJ, the decision might then be reviewed by the agency head or a commission) with 29 CFR § 101.12 (1988) (only after exhausting the administrative process could the parties bring suit in the Supreme Court).

95. For a favorable critique of this system, see Langbein, The German Advantage in Civil Procedure, 52 U. Chi. L. Rev. 823, 833-35 (1985). The states might still be able to skew the proceedings because they control the source of information available to the administrative fact finder. This argument, however, ignores the presence of the federal commissioner, who would be ideally suited to making an objective presentation of the facts. Although this elevates the status of the federal commissioner, it does not grant the commissioner the objectionably broad decision-making powers discussed supra text accompanying notes 91-92.
ing and are among the most sophisticated of litigants. The need for the safeguards that the adversary system provides civil litigants is thus much reduced.66 Additionally, expert triers of fact could supply their own peculiar knowledge of water allocation issues to the situation, placing them in a better position to accurately gauge the merits of each side's position.

In light of these considerations, "water board" adjudication would be superior to Supreme Court adjudication in two ways. The board would possess expertise that the Court lacks.67 This contention is probably true of many, if not most, of the subjects the Court must deal with; parties whose economic vitality may depend on a knowledgeable decision, however, should not have to depend on a nonexpert body if a suitable alternative exists. The agency format would also be better than the use of special masters. The master, employed by the Supreme Court to evaluate highly technical matters in those cases in which it sits as a trial court, is nonetheless hampered by the adversarial mode of evidence production. The master is limited to making a determination on the basis of the facts presented to him. A nonadversarial process, where the finder of fact controls all facets of the evidence production process,68 on the other hand, could lead to a fuller development of the evidence and produce more equitable results. Interests may thus be represented that might otherwise be ignored if the states themselves are permitted to control the process.

As desirable as those results appear, however, there seems to be little likelihood that Congress would consider this proposal seriously. The adversary process is well entrenched in our legal system.69 Congress has moved with the greatest of caution in accepting even the most limited of encroachments on the adver-

66. Currently, when a case comes before the Supreme Court on original jurisdiction, the Court will assign the case to a special master to develop findings of fact and preliminary findings of law rather than holding a trial itself. The parties may take exception to the findings. The Court will then consider both the master's findings and any exception to them and render judgment on that basis. It may choose, as it did in Texas v. New Mexico, to remand the case to the special master for additional findings of fact. See supra note 59.


68. The closest possible analog to this example in current use in the United States is the grand jury. See 18 U.S.C. § 3332 (1982) (providing for the ability to compel evidence).

sartrial ideal in its own domain, the statutory federal courts. It is, therefore, unlikely that it would relegate water disputes, a subject area that has long endured within the adversary arena, to a unique forum as contemplated here.

Even were Congress more visibly receptive to the nonadversarial fact-finding concept, the idea would probably face a stiff challenge from various vested interests. The states, for instance, have traditionally held some measure of control over the allocation of interstate waters and streams, and would not be likely to approve of an agency of the sort contemplated here. Although state disapproval should theoretically provide no impediment to Congress's enactment of this concept, in practice the states would probably be able to exercise enough political leverage to block passage of any bill of this sort.

Finally, the current trend in government indicates tighter fiscal management. It appears unlikely that Congress would establish a new agency to accomplish what is already handled by the courts, no matter how poorly.

C. Arbitration Clause

The third possible solution to the compact deadlock problem lies in congressional approval of interstate water compacts subject to the inclusion of an arbitration clause. Under such a scheme, Congress would require each interstate compact to contain a provision similar to that found in the Sabine River Compact:

In the case of a tie vote on any of the [commission's] determinations, orders or other actions subject to arbitration, then arbitration shall be a condition precedent to any right of legal action. Either side of a tie vote may, upon request, submit the question to arbitration. If there shall be arbitration there shall be three arbitrators: one named in writing by each side, and the third chosen by the two arbitrators so elected. If the arbitrators fail to

100. See, e.g., Fed. R. Civ. P. 26(f)(5) (providing for judicial intervention in the discovery process only "after the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion"). The Advisory Committee stated that it thought motions under this provision would not "be made routinely". Fed. R. Civ. P. 26, advisory committee's note.

select a third within ten days, then he shall be chosen by the Representative of the United States.\textsuperscript{102}

Among the principal difficulties inherent in Supreme Court litigation of water allocation issues are the extremely burdensome costs, both in terms of funds consumed and the time involved.\textsuperscript{103} In a case such as Texas \textit{v.} New Mexico, the parties may spend more than a decade and hundreds of thousands of dollars seeking a solution. The parties must petition the Court to assume jurisdiction over the case, make the requisite presentations to a special master, and might then have to file briefs and argue before the Court itself if the master's report contains findings to which they object.

As an alternative, however, "[a]rbitration is often a valuable tool in stabilizing ongoing contractual relationships because it can often provide a final result in less time and with less expense than required for protracted litigation."\textsuperscript{104} In the commercial sector, federal policy supports arbitration,\textsuperscript{105} and Congress affirmed its support for the procedure via the Federal Arbitration Act, encouraging arbitration to the maximum extent possible.\textsuperscript{106}

The advantages of arbitration in the commercial sector might be equally obtainable in the water dispute setting. Arbitration might then prove to be a suitable alternative to protracted litigation in the Supreme Court. The first obvious advantage lies in the speed with which an issue may be resolved in the arbitration forum. Unlike a hearing before the Supreme Court, which requires an extensive delay between the time of petition for assumption of jurisdiction and the actual hearing, arbitration

\textsuperscript{102} See \textit{id.} Sabine River Compact, 68 Stat. 690 at art. VII(j). Although the Sabine River Compact is one of the few compacts that has adopted an arbitration system for the resolution of compact commission deadlock, this clause has never been used. This may be attributed to the abundance of water in this particular river. Interview with Max Forbes, Commission Secretary, Sabine River Compact (Feb. 8, 1988). Thus, while it is not possible to study empirically the benefits that may accrue from this arbitration clause, it is still possible to hypothesize as to probable advantages and disadvantages. See also Klamath River Basin Compact, Pub. L. No. 85-222, 71 Stat. 497 (1957); CAL. WATER CODE § 5900 (West 1971); Or. Rev. Stat. § 542.610 (1959).

\textsuperscript{103} The costs incurred by the special master alone have been extremely high—so high as to merit a stinging dissent from Justice Blackmun when the Supreme Court granted an order allowing those costs. Texas \textit{v.} New Mexico, 485 U.S. 953, 953 (1988) (Blackmun, J., dissenting from order granting costs). At that time, the expenses claimed by the special master throughout the entire litigation amounted to over $175,000.


\textsuperscript{105} Fuller \textit{v.} Guthrie, 565 F.2d 259, 261 (2d Cir. 1977) (involving Arlo Guthrie).

\textsuperscript{106} 9 U.S.C. §§ 1-208 (1982). This Act provides that a party to an agreement containing an arbitration clause may petition the federal courts for its enforcement as long as the other jurisdictional requirements for those courts are met. \textit{id.} at § 4.
might occur within a matter of weeks, if not days. The arbitration panel need only be convened for the hearings to begin. Moreover, the actual proceedings are far simpler. Compared to the elaborate briefs, joint appendices, reply briefs, and other paraphernalia required by the Supreme Court for its adjudications, arbitration proceedings are the essence of simplicity. One experienced labor arbitrator has noted that the record might only consist of depositions taken prior to the arbitration. The briefs may then be taken straight from those depositions.  

Briefs in water compact cases might depend upon technical factual development to a greater extent than labor cases do, requiring briefs based upon data in addition to depositions. These requirements are, however, comparatively insignificant when contrasted with the requirements for a case presented before the Supreme Court. Oral argument is informal, if required at all.

Furthermore, the states will, in all likelihood, choose the arbitration panel for its expertise in the area of water allocation and management. Any special master appointed by the Supreme Court is also undoubtedly chosen for expertise in a particular field, but his findings are reviewed by a panel of nonexperts—the Supreme Court. The same shackles that bind a special master do not, however, bind an arbitration panel. It need not tailor its decision to fit legal precedent. The panel's only constraints are the four corners of the compact, which ideally should provide all necessary guidance.

In addition to time and cost savings and procedural efficiency gains, compact arbitration clauses would present certain other advantages. Adjudication would not necessarily result in an "all-or-nothing" verdict for either party. An arbitration clause could quite conceivably instruct the arbitrators to "split the difference" between each state's position to achieve the most equita-

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108. Id. at 529.

109. Even in the less than ideal situation where the express terms of the contract do not appear to cover the situation, the arbitrator should attempt to reach a solution that harmonizes with the purpose of the contract. See Note, Labor Law—Arbitration—Arbitrator Exceeds Authority by Reading Requirements for Progressive Discipline into Labor Agreements—County College of Morris Staff Association v. County College of Morris, 100 N.J. 383, 495 A.2d 865 (1985), 17 SETON HALL L. REV. 307, 315 (1987) (applying to the labor context). An arbitral decision may be said to be within the essence of a contract—or in this case, a compact—if the decision has a "rationally inferable basis in the purpose of the agreement." Id. at 315-16 n.49 (citing Brotherhood of R.R. Trainmen v. Central of Ga. Ry. 415 F.2d 403, 411-12 (5th Cir. 1969), cert. denied, 396 U.S. 1008 (1970).
ble result. If both states presented the arbitrators with unreasonable requests, nothing would prevent the panel from crafting an equitable award.

Arbitration would also further Congress’s implicit goal of permitting the states to exercise primary control over water allocation matters. Federal power would only be exercised in the event both states are ultimately unable to agree, first as to a course of action and then as to a third arbitrator. Only then would the federal government become involved, in the person of the federal commissioner, who would choose the third arbitrator. The intervention of the federal government would thus be two decisional steps removed from the process.

In many ways, this mirrors the commonly held image of federal-state relations. In those areas in which the states may claim some sovereignty, the states may exercise power. When the states prove unable to exercise their dominion over a subject area in which either state or central government can act, however, the federal government may properly step in and assume the task. A required compact arbitration clause would recognize and codify this fact.

These advantages do not imply that an arbitration clause is a cure-all, however. There are potential drawbacks. One disadvantage is the non-lawyer status of the arbitrators. There are undeniably lawyers who are experts in water law. Many cases arising from interstate water compacts would turn on the facts in light of the legal standards, however, and not upon questions of purely legal significance. Although the task of an arbitrator is to adjudicate a claim, a task for which lawyers are trained, the need is greater for individuals schooled in the hydrological sciences than in the law.

Another concern expressed about arbitration, at least as employed in the labor setting, is that it might deny the parties due process rights. This, it is claimed, can occur in two manners. The first is that the parties often do not seek counsel to represent them before the arbitration panel. This may be

110. See J. Madison, Resolutions Proposed by Mr. Randolph in Convention, reprinted in 1 THE RECORDS OF THE FEDERAL CONVENTION, at 21 (M. Farrand ed.) (1937) (“to legislate in all cases to which the separate States are incompetent”).
112. Id. at 112-13.
113. Id. at 112.
quickly dismissed, however, because the context in which that argument is framed—labor disputes—is so dissimilar from that posed here as to be irrelevant. It seems extremely unlikely that a state with as much at risk as it would have in a water dispute of this magnitude would proceed without counsel, as might an ill-informed labor-grievant.

The second argument is potentially more problematic. In essence, that argument questions the propriety of proceeding on the legal issues presented in these cases considering the necessarily limited discovery and relative lack of power to compel testimony inherent to the arbitration process.\(^{114}\) Although the crux of each dispute should turn upon factual determinations, the states must still determine what the legal position of the other party will be so that they can develop their strategies accordingly.\(^ {115}\) Congress has emphasized over the years, via the Federal Rules of Civil Procedure, that it does not favor courtroom surprise, and that full disclosure provides the optimal method of determining the truth of a matter.

Regardless of the strength of that argument, however, a convincing case can be made that it does not apply in the arbitration context considered here. At trial, it is unlikely that the parties would engage in much, if any, discovery; the facts of the case would be known to both. Inability to compel testimony likewise should present no obstacle to the implementation of arbitration, as the arbitrators' decision would likely be based on the affidavits supplied by the parties in their factual presentations. Arbitration is not a trial, but an alternative to a trial. The same doctrine that in many cases hamstrings a court of law should not act to frustrate a finder of fact.

\section*{IV. Comparison of the Three Alternatives}

Each of the three possible alternatives open to Congress for the resolution of the difficulties of water allocation compact commission deadlock must be analyzed in light of the others. A tie-breaking requirement, although the most cost efficient and expeditious, fails to account for the traditional goal of water allocation compacts—equitable apportionment. A tiebreaker is forced into accepting one position or the other, regardless of the

\(^{114}\) \textit{Id.} at 112-13.

\(^{115}\) At the very least, the parties must familiarize the arbitrators with the law pertaining to construction of the compact.
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In light of the extreme importance attached to equitable apportionment, the cost and time savings fostered by a tiebreaker fail to tip the balance in the tiebreaker's favor.

A federal water agency, designed to adjudicate water compact disputes administratively, also appears to be a less than favorable alternative. An agency could, if it were granted the power to make determinations on a nonadversarial basis, decrease the time necessary for hearing and decision. Moreover, a nonadversarial fact-finding mechanism could result in greater objective fairness to the party-states. Nevertheless, establishment of a federal water agency is not a truly feasible alternative. Congress has been reluctant to find new, innovative ways to spend limited dollars. This proposal, admittedly a costly one, probably would not be popular as a result. Perhaps more importantly, Congress has also shown great reluctance to allow nonadversarial factfinders in legal settings. Congress has made limited use of nonadversarial fact finding, but it is unlikely to part with the adversary system entirely. Absent this crucial element, the water agency plan is no longer desirable. An agency dependent upon adversarial fact-finding methods is virtually indistinguishable from the current system.

Arbitration, however, fulfills the goals of cost and time savings, in addition to efficiently accomplishing the equitable apportionment of river waters. Although there are concerns with this proposal, in particular with the due process limitations engendered by a system where the factual-legal presentation is much abbreviated, it is nevertheless the most sound of the three alternatives presented. An arbitration clause alone would truly allow for equitable apportionment of interstate river waters, while preserving the values of a federal system. A tiebreaker, as noted above, could only choose between alternatives; it could not craft its own solution to the problem. A water agency could do the job, but only at considerable cost, both to state autonomy and to the U.S. Treasury. An arbitration panel, however, could obviate each of these concerns. The panel would be bound by the spirit, if not the letter, of the compact. This fact alone would reduce the uncertainties created by allowing non-lawyers to adjudicate legal claims. The arbitrators would have the body of relevant law before them and could likely base their decision on the face of the compact alone.

Time and cost savings present subsidiary reasons for acceptance of arbitration as the most suitable alternative to Supreme Court litigation. Although not as expeditious and inexpensive as
a tiebreaker, it does seem likely that an arbitration panel could convene more quickly and resolve the issue with less expense than could a water board, particularly given the possibility of intra-agency appeals. In light of the other advantages of arbitration in this context, any disadvantages vis-à-vis a tiebreaker is of little or no consequence.

**Conclusion**

With a resource as important as water is to the continued development of the western United States becoming a more frequent subject of interstate dispute, it is necessary to reexamine the current mode of resolving allocation disputes. The current system, placing primary emphasis upon the Supreme Court as referee, appears to be failing. Disputes not only heap great expenses on the litigating parties, but also consume equally huge amounts of time.

Given the constitutional framework involved, as well as a sense of the congressional mood, three possible alternatives to the present system exist: a tiebreaker, a federal water agency, and an arbitration clause. Of these three alternatives, arbitration is the best solution available. It best preserves the federal values embodied in the compact clause and improves the cost and time efficiency of the adjudication. Finally, arbitration allows individual compacts to fulfill their *raison d'être*: equitable apportionment.