

University of Michigan Journal of Law Reform

Volume 53

2020

Waiving Federal Sovereign Immunity in Original Actions Between States

Sandra B. Zellmer

Alexander Blewett III School of Law, University of Montana

Follow this and additional works at: <https://repository.law.umich.edu/mjlr>



Part of the [Legal Remedies Commons](#), [Litigation Commons](#), [Rule of Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Sandra B. Zellmer, *Waiving Federal Sovereign Immunity in Original Actions Between States*, 53 U. MICH. J. L. REFORM 447 (2019).

Available at: <https://repository.law.umich.edu/mjlr/vol53/iss2/5>

<https://doi.org/10.36646/mjlr.53.2.waiving>

This Article is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

WAIVING FEDERAL SOVEREIGN IMMUNITY IN ORIGINAL ACTIONS BETWEEN STATES

Sandra B. Zellmer*

ABSTRACT

There are tremendous disparities between high stakes original actions between states before the U.S. Supreme Court, where there is no waiver of federal sovereign immunity, and other types of cases in the lower courts, where a plethora of immunity waivers allow states and other parties to seek relief from the federal government for Fifth Amendment takings, unlawful agency action, and tort claims. Federal actions or omissions are often at the heart of the dispute, and federal involvement may be crucial for purposes of providing an equitable remedy to the state parties, but there is no reliable mechanism for bringing the federal government to an original action before the Supreme Court. This Article shows how federal sovereign immunity stands in the way of comprehensive resolution of interstate water rights and highlights the need for reforms to facilitate meaningful participation by the United States. In particular, it investigates the merits of a waiver of federal sovereign immunity in original actions between the states. Although federal immunity is a staple of our nation's jurisprudence, it has no constitutional basis and it serves little purpose in this context. The Article concludes that a congressional waiver of federal sovereign immunity would be appropriate and would have few downsides, at least in the case of original actions between states before the U.S. Supreme Court.

TABLE OF CONTENTS

INTRODUCTION.....	448
I. SOVEREIGN IMMUNITY AND ORIGINAL ACTIONS	452
A. <i>Original Actions Between Sovereigns</i>	452
B. <i>Shielding the Sovereign from Liability: The Good, the Bad, and the Ugly</i>	454
C. <i>Waivers of Federal Sovereign Immunity</i>	460
II. THE SUPREME COURT ATTEMPTS TO MEDIATE WAR THROUGH EQUITABLE APPORTIONMENT.....	465
A. <i>The Arkansas River: Kansas v. Colorado</i>	466
B. <i>The ACF: Florida and Alabama v. Georgia</i>	467
III. ATTEMPTS AT PEACE-MAKING THROUGH INTERSTATE COMPACTS.....	471

* Professor, Alexander Blewett III School of Law, University of Montana. I am grateful to Justice Gregory Hobbs, Heather Elliott, Reed Benson, and Eric Berger for their insightful comments and to the American Bar Association for inviting me to present a paper on this topic at its 2019 Water Law Conference.

A. *Rio Grande: Texas v. New Mexico* 472
 B. *Republican River: Kansas v. Nebraska* 475
 C. *Missed Opportunities for Constructive Federal Involvement* 479
 IV. IMMUNITY WAIVERS DRAG THE UNITED STATES TO THE DANCE IN THE LOWER COURTS 481
 A. *Federal Reserved Rights and McCarran Amendment Waivers* 481
 B. *Waivers of Immunity in Federal Regulatory Cases*..... 485
 C. *Waivers of Immunity in Takings Cases* 487
 V. CONGRESSIONAL SOLUTION..... 489
 CONCLUSION 493

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.”¹ To eradicate this disincentive and to stimulate comprehensive resolution of interstate battles over one of the world’s most precious resources—water—this 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 ex-

1. Burke W. Griggs, *Interstate Water Litigation in the West: A Fifty-Year Retrospective*, 20 U. DENV. WATER L. REV. 153, 211 (2017).

licity required by the U.S. Constitution.² While there may be good reasons for shielding state governments from litigation by aggrieved individuals, shielding the federal government from suit, and especially in 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, including the Hoover, Grand Coulee, and Bonneville Dams. Meanwhile, nearly 30,000 miles of federal levees armor the nation's riverbanks and coastlines.³

A federal agency's decisions in operating its dams, reservoirs, navigational channels, and related infrastructure may obstruct comprehensive adjudications of states' rights on transboundary water bodies, not because of any actual conflict with federal objectives, but because the agency refuses to participate or to be bound in original action litigation.⁴ As a consequence, on many river systems, leaving the federal players out of the mix will allow upstream states to exceed their fair share of a resource, simply because of the federal presence in the basin. The nationwide implications are enormous. Given the number of federal dams situated all across

2. See, e.g., Helen Hershkoff, *Waivers of Immunity and Congress's Power to Regulate Federal Jurisdiction-Federal-Tort Filing Periods as a Testing Case*, 39 SETON HALL LEGIS. J. 243, 258 (2015) (referencing *Anderson v. Hayes Constr. Co.*, 153 N.E. 28, 29-30 (1926)).

3. AMERICAN SOCIETY OF CIVIL ENGINEERS, INFRASTRUCTURE REPORT CARD: LEVEES 2 (2017), <https://www.infrastructurereportcard.org/wp-content/uploads/2017/01/Levees-Final.pdf>.

4. See, e.g., Reed D. Benson, *Can a State's Water Rights Be Damned? Environmental Flows and Federal Dams in the Supreme Court*, 8 MICH. J. ENVTL. & ADMIN. L. 371 (2019).

the nation, equitable apportionment may be a pipe dream on most interstate rivers.

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, an area purported to be within the states' traditional authorities.⁵ 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.⁶ 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."⁷ 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 several 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

5. Cf. Reed D. Benson, *Deflating the Deference Myth: National Interests vs. State Authority Under Federal Laws Affecting Water Use*, 2006 UTAH L. REV. 241, 242 (noting that states "have jealously guarded their water allocation authority against real or imagined federal interference, and the federal government has largely (though not entirely) let them make their own decisions regarding water rights").

6. See U.S. CONST. art. III, § 2, cl. 2.

7. Susan Randall, *Sovereign Immunity and the Uses of History*, 81 NEB. L. REV. 1, 6 (2002).

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.

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,⁸ the Tucker Act,⁹ the Administrative Procedure Act,¹⁰ and federal environmental statutes.¹¹

Part V lays out two potentially viable solutions to the federal sovereign immunity problem. First, the executive branch, through the Department of Justice, could encourage immunity waivers on a case-by-case basis. This notion is unsatisfactory because any solution that relies on discretionary immunity waivers would lead to uncertainty among the parties and unpredictable, possibly inequitable, results. A more effective pathway would be a congressional waiver of federal sovereign immunity for water allocation original actions between states. The waiver should apply regardless of whether the cases originate as compact disputes or equitable apportionment litigation. Although pushing legislation through Congress is a big ask, this particular legislative proposal may not be terribly controversial. States would likely support it, and the federal government would seemingly have little reason to oppose it.

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 par-

8. 43 U.S.C. § 666(a) (2018).

9. 28 U.S.C. §§ 1346(a)(2), 1491 (2018).

10. 5 U.S.C. §§ 701–706 (2018).

11. *See, e.g.*, Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2018).

ticipation 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.”¹² 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.”¹³

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 original¹⁴ and exclusive¹⁵ jurisdiction over cases brought by a state against another

12. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); *accord* *R.R. Co. v. Tennessee*, 101 U.S. 337, 339 (1879) (“Adjudication is of no value as a remedy unless enforcement follows.”).

13. U.S. CONST. amend. XI.

14. *See* U.S. CONST. art. III, § 2, cl. 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. 28 U.S.C. § 1251 (2018). 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).

15. *See, e.g.,* *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992); *Texas v. New Mexico*, 462 U.S. 554, 570 (1983) (citing 28 U.S.C. § 1251(a) (1982)).

state. To invoke the Court's jurisdiction, the state itself must be the party of record, and the suit must be authorized by the governor or another competent state official.¹⁶ The state must bring suit in its capacity as the representative of its citizens,¹⁷ and it must assert "quasi-sovereign" interests, rather than proprietary or individual interests.¹⁸ In addition, original actions must be civil in nature, rather than penal,¹⁹ and they must involve a justiciable case or controversy under Article III.²⁰

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.²¹ 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.²²

Even if all of the requisites are met, the Supreme Court can refuse jurisdiction.²³ 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.²⁴ Among other things, the Court will dismiss the complaint if it cannot fashion appropriate relief.²⁵

16. *Florida v. Anderson*, 91 U.S. 667 (1875).

17. *Id.*

18. *See, e.g., Georgia v. Tenn. Copper Co.*, 206 U.S. 230 (1907); *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976).

19. *See Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888), *overruled in part on other grounds*, *Milwaukee Cty. 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).

20. *Mississippi v. Louisiana*, 506 U.S. 73 (1992).

21. Daniel J. Meltzer, *State Sovereign Immunity: Five Authors in Search of a Theory*, 75 NOTRE DAME L. REV. 1011, 1039 (2000).

22. *See, e.g., Maryland v. Louisiana*, 451 U.S. 725 (1981); *Kansas v. Colorado*, 206 U.S. 46 (1907).

23. *See, e.g., Kansas v. Colorado*, 206 U.S. 46, 113 (1906) (dismissing a suit by Kansas to enjoin Colorado's diversion of Arkansas River water because Kansas failed to prove that the diversions caused substantial injury to Kansas); *Missouri v. Illinois*, 200 U.S. 496, 521 (1906) (dismissing Missouri's nuisance claim against Illinois for lack of proof that Illinois' sewage discharges caused substantial injury to Missouri, explaining that not "every matter which would warrant a resort to equity by one citizen against another . . . would warrant an interference by this court with the action of a State"); *New York v. New Jersey*, 256 U.S. 296, 309 (1921) (dismissing New York's nuisance claim against New Jersey because New York failed to show by clear and convincing evidence that the threatened invasion of its rights was of serious magnitude).

24. *Arizona v. New Mexico*, 425 U.S. 794, 796-797 (1976) ("[t]he question . . . concerns . . . the seriousness and dignity of the claim . . . [and] it necessarily involves the availability of another forum . . .").

25. *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972); *see Florida v. Georgia*, 138 S. Ct. 2502, 2516 (2018); *Texas v. New Mexico*, 462 U.S. 554, 568-69 (1983) (rejecting New Mexico's argument that the Court was powerless to hear a dispute over the Pecos River Compact because the Compact Commission had exclusive jurisdiction: "[a]s New Mexico is the upstream State, with effective power to deny water altogether to Texas except under extreme

Original proceedings are “basically equitable in nature,” in which the Court may “mould the process . . . [to] best promote the purposes of justice.”²⁶ 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.”²⁷ Original jurisdiction is also designed to ensure that federal law can be enforced effectively against the states, given the constraints of state sovereign immunity.²⁸ 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.²⁹ The pitfalls and virtues of state and federal sovereign immunity are examined in the next two Sections.

B. *Shielding the Sovereign from Liability:
The Good, the Bad, and the Ugly*

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.³⁰ The Court has characterized the doctrine as “universal” in the states at the time the Constitution was ratified.³¹ Yet, among foundational doctrines of jurisprudence, none is more hotly contested than sovereign immunity, and few have less solid grounding in constitutional text.³² The history of the nation’s founding helps fill in these 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 remedied by private lawsuits.³³ In olden days, the only recourse British subjects had

flood conditions, the Commission’s failure to take action to enforce New Mexico’s obligations . . . would invariably work to New Mexico’s benefit. . . . [but] this Court would be powerless to grant Texas relief on its claim under the Compact.”)

26. *Kansas v. Nebraska*, 574 U.S. 445, 453 (2015) (citations omitted); *id.* at 455 (“[The Court] may invoke equitable principles, so long as consistent with the compact itself, to devise ‘fair . . . solution[s]’ to the state-parties disputes . . .”) (citing *Texas v. New Mexico*, 482 U.S. 124, 134 (1987)).

27. *Id.* at 453 (citing *North Dakota v. Minnesota*, 263 U.S. 365, 372–373 (1923)).

28. James Pfander, *Rethinking the Supreme Court’s Original Jurisdiction in State-Party Cases*, 82 CAL. L. REV. 555, 559–60 (1994).

29. *Cf.* *Florida v. Georgia*, 138 S. Ct. 2502, 2514 (2018) (explaining that a state bears a heightened initial burden of demonstrating that it has suffered a serious harm).

30. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 411–12 (1821).

31. *Alden v. Maine*, 527 U.S. 706, 715–16 (1999).

32. Hershkoff, *supra* note 2, at 257.

33. *Id.*

against the crown was a petition of right.³⁴ 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.”³⁵ 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.”³⁶

In Federalist No. 81, Alexander Hamilton assured the colonies that they would continue to be protected by immunity upon ratification of the Constitution: “[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*.”³⁷ However, the U.S. Supreme Court observed in 1882 in *United States v. Lee*, “[a]s no person in this government 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.”³⁸

Whether it is 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.³⁹ 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. Instead, 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 decision-making and the balance of powers among the three branches of government. Absent sovereign immunity, “policy-making decisions by the democratic branches of government may be second-guessed and subjected to chilling interference by the courts.”⁴⁰ It should not be easy for aggrieved individuals to defeat decisions made by the peo-

34. See *United States v. Lee*, 106 U.S. 196, 205 (1882) (“[F]rom 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 . . .”).

35. See *id.* at 205–06; *Kawananakoa v. Polyblank*, 205 U.S. 349, 353 (1907) (“[T]here can be no legal right as against the authority that makes the law on which the right depends.”).

36. *Lee*, 106 U.S. at 205 (citing *United States v. O’Keefe* 78 U.S. (11 Wall.) 178, 184 (1870)).

37. THE FEDERALIST No. 81, at 455 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

38. *Lee*, 106 U.S. at 205 (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”).

39. Cf. Gregory C. Sisk, *The Continuing Drift of Federal Sovereign Immunity Jurisprudence*, 50 WM. & MARY L. REV. 517, 544 (2008).

40. *Id.*

ple 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."⁴¹ This rationale suggests, then, that sovereign immunity should only shield government actions that are intimately tied to policy determinations.⁴²

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."⁴³ States have duties to their citizens, too, but there is no constitutional equivalent to the Eleventh Amendment for the federal government. If anything, the 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 the idea of federal immunity.⁴⁴ However, in *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."⁴⁵

In *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 they apply to the political body corporate which we call the United States of

41. *Id.* at 529.

42. Hershkoff, *supra* note 2, at 268.

43. Vicki C. Jackson, *Suing the Federal Government: Sovereignty, Immunity, and Judicial Independence*, 35 GEO. WASH. INT'L L. REV. 521, 607-08 (2003).

44. *See* U.S. CONST. art. III, § 2, cl. 1-2 (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"); *see also* 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."); *cf.* U.S. CONST. art. I, § 8, cl. 9 (enumerating Congress' power to "constitute tribunals inferior to the Supreme Court").

45. *See* *United States v. Lee*, 106 U.S. 196, 205-06 (1882).

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. *No such reason exists in our government*, as process runs in the name of the President and may be served on the Attorney General⁴⁶

It seems curious, then, that the *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: "it 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 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."⁴⁷

The Court concluded its comparative analysis with a metaphorical turn through the Queen's garden, where the judiciary is naught but a careful gardener:

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.⁴⁸

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

46. *Id.* at 206 (emphasis added); see John Paul Stevens, SIX AMENDMENTS: HOW AND WHY WE SHOULD CHANGE THE CONSTITUTION 82 (2014) (arguing that sovereign immunity may have made sense in England, where the monarchy ruled by divine right and punishment could be meted out only by God, but it has no place in the U.S.).

47. 106 U.S. at 206 (quoting *Briggs v. The Light Boats*, 11 Allen 162 (Mass. 1865)).

48. *Id.* at 208.

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.”⁴⁹

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.⁵⁰ It has also insisted that such consent must come from legislation enacted by our democratically elected Congress.⁵¹

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 judgment for choices made by the elected branches.⁵² 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.”⁵³ 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.”⁵⁴ Sisk ultimately concludes that federal sovereign immunity has a legitimate place in our jurisprudence. By his account, “federal sovereign im-

49. *Id.* 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.”).

50. See Sisk, *supra* note 39, at 529. Constitutional claims are an exception to this rule. See Kathryn E. Kovacs, *Revealing Redundancy: The Tension Between Federal Sovereign Immunity and Nonstatutory Review*, 54 *DRAKE L. REV.* 77, 124 (2005) (discussing non-statutory review); see also David Cole, *Jurisdiction and Liberty: Habeas Corpus and Due Process as Limits on Congress’s Control of Federal Jurisdiction*, 86 *GEO. L.J.* 2481, 2507 (1998) (noting that “[C]ourts interpret jurisdictional statutes to preserve constitutional claims unless Congress clearly and explicitly expresses its intention to deny review of such claims.”).

51. Sisk, *supra* note 39, at 529; see also *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. 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.”).

52. See Gregory C. Sisk, *The Inevitability of Federal Sovereign Immunity*, 55 *VILL. L. REV.* 899, 900 (2010) (“[F]ederal sovereign immunity . . . fortifies the separation of powers between the political and judicial branches.”).

53. *Id.* at 904.

54. *Id.* at 905.

munity fits comfortably with popular sovereignty, divided and diminished government power, and political accountability for public officers.”⁵⁵

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.⁵⁶ Congress has authority over appropriations.⁵⁷ Courts “cannot compel payments from the Treasury absent statutory authority.”⁵⁸ 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.”⁵⁹ Understandably, courts wish to avoid issuing judgments that will not be enforced.⁶⁰ To do otherwise would erode public faith in the judiciary and, more broadly, the rule of law.⁶¹

It is worth noting that a mere legal right or cause of action “is not enough to guarantee judicial review on its own, nor is it sufficient to guarantee an appropriate remedy, even if there is review.”⁶² Despite appearances, “*Marbury*’s apparent promise of effective redress for all constitutional violations reflects a principle, not an ironclad rule.”⁶³ As for claims against the federal government, two competing interests must be weighed: “the individual’s interest in receiving compensation for a meritorious claim and society’s interest in maintaining democratic control over the allocation of limited public funds.”⁶⁴

In a democracy based on federalism, suits by states against the federal government raise unique concerns. Vertical separation of powers—*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 them out.⁶⁵

55. *Id.* at 900.

56. *See* Jackson, *supra* note 43, at 539.

57. U.S. CONST. art. I, § 9, cl. 7.

58. Jackson, *supra* note 43, at 539.

59. *Id.*

60. *Id.* at 540.

61. *See* ROBERT V. REMINI, *THE LIFE OF ANDREW JACKSON* 216 (1988) (quoting a statement of Andrew Jackson about the Supreme Court’s ruling in *Worcester v. Georgia*, 31 U.S. 515 (1832): “John Marshall has made his decision; now let him enforce it!”).

62. Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493, 530 (2006).

63. *Id.*

64. *Id.*

65. U.S. CONST. art. VI, cl. 2.

In *McCulloch v. Maryland*, 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."⁶⁶ In addition to state taxation, the United States is immune from state regulation that undermines federal supremacy.⁶⁷ For example, a federal agency "is under no obligation to submit the plans and specifications to the State Engineer for approval" of a proposed federal dam.⁶⁸ Likewise, federal agencies may take action to protect federal public lands and resources from destruction despite prohibitory state regulations.⁶⁹

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 1887,⁷⁰ Congress has allowed "a broad tapestry of [] judicial actions against the federal government."⁷¹ The Tucker Act authorizes contract claims and takings claims against the United States in the Court of Federal Claims.⁷² Until 1946, when Congress passed several others in order to effectuate the New Deal administrative state, it was the only significant waiver of federal immunity.⁷³ 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

66. 17 U.S. (4 Wheat.) 316, 341 (1819); *see also* *United States v. New Mexico*, 455 U.S. 720 (1982).

67. *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.").

68. *Id.* at 451–52.

69. *See* *Hunt v. United States*, 278 U.S. 96, 100 (1928).

70. 28 U.S.C. §§ 1346(a)(2), 1491 (2018); *United States v. Mitchell*, 463 U.S. 206, 215 (1983) ("Government liability in contract is viewed as perhaps the widest and most unequivocal waiver of federal immunity from suit.") (internal quotations omitted).

71. 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).

72. *See* 28 U.S.C. §§ 1346(a)(2), 1491 (2018). 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.. *See* Act of Feb. 24, 1855, ch. 122, 10 Stat. 612.

73. David H. Rosenbloom, *1946: Framing a Lasting Congressional Response to the Administrative State*, 50 ADMIN. L. REV. 173, 174 (1998) (arguing that with the New Deal's creation of dozens of new federal agencies, "Congress was searching for means to maintain legislative supremacy in the face of the growing strength of the Presidency lest it lose its constitutional place in the Federal scheme.") (internal quotations omitted).

Act (APA). The FTCA authorizes tort claims for compensatory damages to be brought against the federal government,⁷⁴ while the APA authorizes claims for non-monetary relief to be brought against federal agencies.⁷⁵ For purposes of complex litigation over water rights, a fourth provision—the McCarran Amendment of 1952—waives federal immunity for adjudications in state court.⁷⁶ This Part of the Article looks at each of these statutory waivers, as well as waivers found in federal environmental statutes like 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.”⁷⁷ 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.⁷⁸ Gregory Sisk characterizes the Tucker Act as the “foundation stone” in the adjudication 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 treasury.⁷⁹

When injured parties seek damages for torts committed by the federal government, they may bring suit under the FTCA.⁸⁰ 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.⁸¹ While the FTCA has become the most comprehensive and commonly invoked waiver of federal sovereign immunity,⁸² there are several broad exceptions. The statute bars strict liability claims, claims for assault, libel, and misrepresentation, and claims for interference with contract.⁸³ In addition, the FTCA’s “discretionary function” exception preserves federal im-

74. 28 U.S.C. §§ 1346(b), 2671 (2018).

75. 5 U.S.C. § 702 (2018).

76. 43 U.S.C. § 666(a) (2018).

77. 28 U.S.C. § 1491(a)(1) (2018).

78. *United States v. Mitchell*, 463 U.S. 206, 216 (1980).

79. Sisk, *supra* note 39 at 532; *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 . . .”).

80. 28 U.S.C. § 1346(b) (2018).

81. *Id.* § 1346(b).

82. Sisk, *supra* note 39, at 536.

83. 28 U.S.C. § 2680(h) (2018).

munity from liability based upon an employee's "exercise or performance or failure to exercise or perform a discretionary function or duty on the part of" the Government.⁸⁴ 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."⁸⁵ In the past two decades, it has become "[t]he most gaping and frequently litigated of the FTCA's exceptions"⁸⁶

For suits seeking declaratory or injunctive relief instead of monetary damages, the APA waives sovereign immunity for challenges to federal agency action.⁸⁷ It authorizes claims that the government has acted "contrary to constitutional right, power, privilege, or immunity."⁸⁸ 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 their authority.⁸⁹ However, if the officer acted consistently with federal law, or if a judgment would operate against the government itself, the suit would be dismissed.⁹⁰ 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."⁹¹ 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"⁹² Moreover, judgments issued under the APA bind the federal government, not just the agency official.⁹³ APA litigation has become one of the most significant avenues for

84. 28 U.S.C. § 2680(a) (2018).

85. *Berkovitz v. United States*, 486 U.S. 531, 536–37 (1988) (citing *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984)).

86. James R. Levine, *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, *Overview of the Federal Tort Claims Act*, 34 Energy and Min. L. Instit. § 9.02 (2013).

87. 5 U.S.C. §§ 702, 704 (2018).

88. 5 U.S.C. § 706(2)(B) (2018).

89. See Kathryn E. Kovacs, *Scalia's Bargain*, 77 OHIO ST. L. J. 1155, 1159–60 (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 *Ex Parte Young* doctrine, which allows suits against state officials for prospective injunctive and declaratory relief. *Id.* at 1159 (citing *Ex Parte Young*, 209 U.S. 123 (1908)).

90. *Dugan v. Rank*, 372 U.S. 609, 621 (1963).

91. 5 U.S.C. § 702 (2018).

92. *Id.* § 702; see Kovacs, *supra* note 89, 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").

93. 5 U.S.C. § 702 (2018).

obtaining relief against federal agencies, including those in charge of federal dams and other infrastructure.⁹⁴

More specifically, with respect to resource management and allocation, Congress has provided discrete waivers of federal immunity in a variety of modern environmental statutes.⁹⁵ 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.⁹⁶ As a practical matter, “[i]f 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.”⁹⁷ 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.”⁹⁸ By requiring federal agencies to comply with permit requirements imposed by states that have assumed the responsibility of implementing federal environmental laws, immunity waivers level the playing field between agencies and other regulated entities.⁹⁹

When it comes 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”¹⁰⁰ Remarkably, the McCarran Amendment waives federal immunity for general stream adjudications (GSAs) in *state* court.¹⁰¹ Congress was concerned that the United States had been acquiring an ever-increasing number of state law water rights, while refusing to participate in state court

94. Sisk, *supra* note 39, at 540.

95. *Id.*; see also 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).

96. Murchison, *supra* note 95, 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 394–95.

97. *Id.* at 394.

98. *Id.*; see also *Bennett v. Spear*, 520 U.S. 154, 164–66 (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. Kempthorne*, 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) (2006)).

99. Murchison, *supra* note 95, at 394–96.

100. 43 U.S.C. § 666(a) (2018).

101. *Id.* § 666(a)

proceedings to either adjudicate or administer those rights.¹⁰² As the federal government's footprint grew in river basins all across the American West, water users became alarmed that federal sovereign immunity would prevent state courts from administering state water law, causing the "the years of building the water laws of the Western States in the earnest endeavor . . . to effect honest, fair and equitable division of the public waters . . . [to] be seriously jeopardized."¹⁰³ The Senate Report for the McCarran Amendment opines that "*all* water users on a stream, in practically every case, are interested and necessary parties to any court proceedings . . ."¹⁰⁴ Since the passage of the Amendment, there have only been a dozen or so state court adjudications of federal reserved water rights.¹⁰⁵

Congress has not always been so open-minded when it comes to waivers of sovereign immunity. In the McCarran Amendment itself, Congress refused to waive federal immunity for "the joinder of the United States in any suit or controversy in the Supreme Court of the United States involving the right of States to the use of the water of any interstate stream."¹⁰⁶ This reinforces the limited nature of McCarran's authorization for GSAs in state courts, and reflects congressional deference to state laws and procedures related to water allocation: "Congress was most careful not to upset, in any way, the irrigation and water laws of the Western States."¹⁰⁷

In the context of federal water management, Congress was especially stingy about exposing the federal government to liability when it passed the Flood Control Act.¹⁰⁸ That Act states, "No liability of *any* kind shall attach to or rest upon the United States for *any* damage from or by floods or flood waters at *any* place."¹⁰⁹ The Supreme Court construed the terms of this provision expansively in *United States v. James*.¹¹⁰ There, the Court found that the Act barred

102. Dylan R. Hedden-Nicely, *The Legislative History of the McCarran Amendment: An Effort to Determine Whether Congress Intended for State Court Jurisdiction to Extend to Indian Reserved Water Rights*, 46 ENVTL. L. 845 (2016).

103. *Id.* at 883 (citing S. Rep. No. 82-755, at 5 (1951)).

104. *Id.* at 860 (citing S. Rep. No. 82-755, at 4-5) (emphasis added).

105. *See, e.g.*, *United States v. Idaho*, 508 U.S. 1, 3 (1993); *United States v. Dist. Court In & For Eagle City, 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).

106. 43 U.S.C. § 666(c) (2018).

107. S. Rep. No. 82-755, at 3 (1951).

108. 33 U.S.C. § 702c (2018).

109. *Id.* § 702c (emphasis added).

110. *United States v. James*, 478 U.S. 597 (1986).

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 ‘flood waters’ apply to all waters contained in or carried through a federal flood control project for purposes of or related to flood control”¹¹¹ The Court added, “Congress’ choice of the language ‘any damage’ and ‘liability of any kind’ further undercuts a narrow construction” of this immunity provision.¹¹²

The Supreme Court subsequently disavowed the dicta of *James* that may have immunized projects merely “related to flood control.”¹¹³ 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.”¹¹⁴ If “flood waters” caused the harm, the government enjoys statutory immunity from tort claims for both property damage and personal injury under the FCA.¹¹⁵ 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.¹¹⁶

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.¹¹⁷ The United States sometimes seeks to intervene in the dispute, but it frequently sits on the sidelines, despite palpable federal interests and exten-

111. *Id.* at 605.

112. *Id.*; see also Sandra B. Zellmer, *Takings, Torts & Background Principles*, 52 WAKE FOREST L. REV. 193, 202 (2017).

113. *Cent. Green Co. v. United States*, 531 U.S. 425, 430–31 (2001).

114. *Id.* at 434 (“[T]o characterize every drop of water that flows through that immense project as ‘flood water’ simply because flood control is among the purposes served by the project unnecessarily dilutes the language of the statute.”).

115. *Id.*; *James*, 478 U.S. at 608.

116. See *Ark. 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).

117. See *Tarrant Reg’l Water Dist. v. Herrmann*, 569 U.S. 614, 619 (2013); *supra* Part I.A (discussing original actions under Art. III). Equitable apportionment is a federal common law doctrine that allocates competing states’ rights to use interstate waters and other natural resources. See *Kansas v. Colorado*, 185 U.S. 125, 143–44 (1902).

sive federal involvement in water management.¹¹⁸ This Part of our interstate odyssey navigates original actions between the states over the waters of the Arkansas River and the ACF.

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. *Kansas v. Colorado*¹¹⁹ forced the Supreme Court to grapple with the immutable forces of geography and gravity and to conclude that equitable apportionment must be a necessary outgrowth of federal common law. The Court asked whether 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.¹²⁰ The Court pointed out that 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.¹²¹

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.¹²² 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.”¹²³ Since then, the Court has issued only a scant handful of equitable apportionment decrees.¹²⁴

The United States sought to intervene in the dispute, claiming a “superior right . . . to control the whole system of the reclamation

118. Cf. Rhett B. Larson, *Interstitial Federalism*, 62 UCLA L. REV. 908, 918 (2015) (describing the management of shared water resources “under the cloud of interjurisdictional politics” as “one of the most formidable governance challenges in the United States”).

119. 185 U.S. 125.

120. *Id.* at 143–45.

121. *Id.* at 143–44.

122. *Id.* at 144.

123. *Kansas v. Colorado*, 206 U.S. 46, 117–18 (1907).

124. 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).

of arid lands.”¹²⁵ 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.”¹²⁶ 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.¹²⁷ *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 and Florida have been fighting over the ACF for decades.¹²⁸ 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 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.¹²⁹

In addition to mounting litigation worthy of a Charles Dickens novel,¹³⁰ 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.¹³¹ 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.¹³² When

125. *Kansas v. Colorado*, 206 U.S. at 87.

126. *Id.* at 87.

127. *Id.* at 87, 117. The Court noted that the federal government has superior rights to control navigation but not reclamation. *Id.* at 92–94 (citing Act of June 17, 1902, sec. 8, 32 Stat. 388).

128. Heather Elliott, *The Court's Original Jurisdiction Doctrine Discriminates Against Downstream States*, ABA 37th WATER L. CONFERENCE 5–6 (Mar. 26, 2019). Alabama has been involved, too, but in a more tangential way than Georgia and Florida. *Id.*

129. Benson, *supra* note 4, at 391.

130. *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 Litig.*, 644 F.3d 1160, 1174–78 (11th Cir. 2011).

131. See Apalachicola-Chattahoochee-Flint River Basin Compact, Pub. L. No. 105-104, 111 Stat. 2219 (1997).

132. *Id.*

the states failed to adopt an equitable allocation formula, the Compact lapsed in 2003.¹³³

On major river systems like the ACF, the Corps develops “master manuals” to coordinate the operations of its projects.¹³⁴ 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.¹³⁵ 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.¹³⁶

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.¹³⁷ Georgia’s response was twofold. First, according to Georgia, Florida suffered no significant harm that would rise to a level requiring 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.¹³⁸ In either event, Georgia said, the suit must be dismissed.¹³⁹

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.¹⁴⁰ His report pointed to Georgia’s “remarkably ineffective” approach to its internal management of irrigation water as a source of Florida’s harm.¹⁴¹ 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—

133. *In re: MDL-1824 Tri-State Water Rts. Litig.*, 644 F.3d at 1175.

134. Benson, *supra* note 4, at 392.

135. *In re: MDL-1824 Tri-State Water Rights Litigation*, 644 F.3d at 1195.

136. *Id.* at 1186–92.

137. *Florida v. Georgia*, 138 S. Ct. 2502, 2509 (2018).

138. *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 also* Richard D. Freer, *Rethinking Compulsory Joinder: A Proposal to Restructure Federal Rule 19*, 60 N.Y.U. L. REV. 1061, 1078 (1985).

139. *Florida v. Georgia*, 138 S. Ct. at 2511.

140. *Id.* at 2512.

141. Report of the Special Master at 33, *Florida v. Georgia*, 138 S. Ct. 2502 (February 14, 2017) (No. 142).

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.”¹⁴²

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.¹⁴³ The United States was deemed a necessary and indispensable party but could not be joined because of sovereign immunity.¹⁴⁴

Fortunately for Florida, the Supreme Court disagreed, and denied Georgia’s motion to dismiss in a 5-4 decision, allowing Florida to continue its quest for equitable apportionment.¹⁴⁵ 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.”¹⁴⁶ According to the majority, at this stage of the proceeding Florida need only establish a likelihood that the Court could issue a workable decree.¹⁴⁷

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.¹⁴⁸ 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.¹⁴⁹ In other words, without the Corps, Florida might win the lawsuit but still lose the water war.¹⁵⁰

142. *Id.* at 34.

143. *See id.* at 31.

144. *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.”).

145. *Florida v. Georgia*, 138 S. Ct. 2502, 2527 (2018).

146. *Florida v. Georgia*, 138 S. Ct. at 2516.

147. *Id.* at 2526–27.

148. Benson, *supra* note 4, at 398.

149. *Florida v. Georgia*, 138 S. Ct. at 2540.

150. *Id.* As this Article went to press, the special master issued a new report, which, as before, recommended dismissal of Florida’s complaint. He concluded that Florida had not proven that Georgia’s consumption caused it harm, in part because the Corps had not exer-

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,”¹⁵¹ 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.¹⁵² In almost the same breath, however, the brief voiced reservations as to whether the Corps could (or would) provide higher releases to benefit Florida “under its existing authorities.”¹⁵³

[U]nlike 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 . . .*¹⁵⁴

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 will choose not to change its practices.”¹⁵⁵

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.¹⁵⁶ 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.¹⁵⁷

Ironically, if this litigation were a general stream adjudication in *state* court, the United States could be forced to join the proceed-

cised (and presumably would not exercise) “discretion to release significantly more water than the minimums required by its operational rules.” Report of the Special Master, *Florida v. Georgia*, No. 142, at 58 (Dec. 11, 2019). He added, “I do not reach the question whether the Corps could make reasonable modifications to its Master Manual so that flows would pass through to Florida during drought.” *Id.* at 61.

151. Brief for the United States as Amicus Curiae in Support of Overrule of Florida’s Exception 2C to the Report of the Special Master at 30, *Florida v. Georgia*, 138 S. Ct. 2502 (Aug. 7, 2017) (No. 142).

152. *Id.* at 32.

153. *Id.* at 31.

154. *Id.* at 32 (emphasis added).

155. Benson, *supra* note 4, at 404–05.

156. *Id.*

157. *Id.* at 37.

ing—and be bound by it—under the McCarran Amendment.¹⁵⁸ This paradox is assessed below, along with similar phenomenon in takings and regulatory cases.¹⁵⁹

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”¹⁶⁰ 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.¹⁶¹ 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.”¹⁶²

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.¹⁶³ And when push comes to shove, both wind up before the Supreme Court.¹⁶⁴ Each state’s right to invoke the Court’s original jurisdiction “is an important part of the context” in which compacts are made.¹⁶⁵ 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.”¹⁶⁶ With this unique authority and responsibility, the Court occasionally permits the United States to participate in suits in order 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.

158. See *supra* notes 100–107 and accompanying text.

159. See *infra* Part IV.

160. U.S. CONST. art. I, § 10, cl. 3.

161. *Texas v. New Mexico*, 138 S. Ct. 954, 958 (2018) (quoting 58 U.S. 478 (1855)).

162. *Id.* (quoting *Texas v. New Mexico*, 462 U.S. 554, 564 (1983)).

163. *Tarrant Reg’l Water Dist. v. Herrmann*, 569 U.S. 614, 631 (2013).

164. See *e.g.*, *Kansas v. Nebraska*, 135 S. Ct. 1042, 1052 (2015).

165. *Id.*

166. *Texas v. New Mexico*, 138 S. Ct. at 958 (quoting *Kansas v. Nebraska*, 135 S. Ct. at 1042).

“[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.”¹⁶⁷

This Part 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, and the Missouri River Compact as a failure.

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.¹⁶⁸ “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.”¹⁶⁹

In writing the unanimous opinion for the Court in *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.”¹⁷⁰ 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

167. *Id.* at 959.

168. Richard Parker, *The Rio Grande Is Dying. Does Anyone Care?*, NYTIMES, Sept. 28, 2018.

169. *Id.*

170. *Texas v. New Mexico*, 138 S. Ct. at 956. 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. See *The Official Website of Will Rogers*, CMG WORLDWIDE, <https://www.cmgww.com/historic/rogers/about/biography/> (last visited Jan. 22, 2019).

and guarantee Mexico a regular and regulated release of water.¹⁷¹

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.¹⁷² 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 1939.¹⁷³ 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 Elephant Butte, some of which would be delivered downstream to Texas. As the Court noted, “[i]n 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.”¹⁷⁴ 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.¹⁷⁵ The United States sought to intervene, and was allowed to file a complaint with allegations that parallel Texas’s.¹⁷⁶

On New Mexico’s motion, the special master recommended dismissal of the United States’ complaint, reasoning “the Compact does not confer on the United States the power to enforce its

171. *Texas v. New Mexico*, 138 S. Ct. at 957.

172. *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).

173. Rio Grande Compact, ch. 155, 53 Stat. 785 (1939).

174. *Texas v. New Mexico*, 138 S. Ct. at 957–58.

175. *Id.* at 957–58.

176. *Id.* at 958.

terms.”¹⁷⁷ 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.¹⁷⁸ 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.”¹⁷⁹ Third, New Mexico’s failure to deliver water to the reservoir “could directly impair the federal government’s ability to perform its obligations under the treaty.”¹⁸⁰ Finally, the United States sought substantially the same relief as Texas.¹⁸¹

The Court cautioned that, “[n]othing 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.”¹⁸² Notably, if the United States had not sought to intervene, important federal interests would have gone unheard and the states would not have been able to obtain complete relief on one of America’s most famous—and most abused—rivers.¹⁸³

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.¹⁸⁴ 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.

177. *Id.*

178. *Id.* at 959 (“[T]he 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.”). *But see supra* Part II.B (showing that this is by no means a forgone conclusion).

179. *Texas v. New Mexico*, 138 S. Ct. at 959.

180. *See id.* at 959–60 (explaining that New Mexico’s breach could prevent the U.S. from delivering water to Mexico from Elephant Butte).

181. *Id.* at 960.

182. *Id.*

183. *See Parker, supra* note 168.

184. *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 *6. I thank Reed Benson for bringing this case to my attention.

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.¹⁸⁵ As if water scarcity were not hardship enough, the Republican River experienced a deadly flood in 1935.¹⁸⁶ 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.¹⁸⁷

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 to the negotiating table.¹⁸⁸ Ultimately, they defined the respective state and federal interests "in a satisfactory manner,"¹⁸⁹ which paved the way for enactment in 1943.¹⁹⁰

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.¹⁹¹ As used in the Compact, "virgin water supply" means "the water supply within the Ba-

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

186. *Republican River Flood of 1935*, NAT'L WEATHER SERV., <https://www.weather.gov/gld/1935flood-aftermath> (last visited Jan. 24, 2019).

187. *See* *Weiland v. Pioneer Irrigation 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.

188. Sandra Zellmer, *Boom and Bust on the Great Plains: Déjà Vu All Over Again*, 41 CREIGHTON L. REV. 385, 399 (2008) (citing 88 Cong. Rec. 3286 (1942)).

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

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

191. Republican River Compact, ch. 104, 57 Stat. 86, art. III (1943) (dividing the water supply between Nebraska (49%), Kansas (40%), and Colorado (11%)).

sin,” in both the River and its tributaries, “undepleted by the activities of man.”¹⁹²

When Kansas experienced a shortfall in the late 1990s it brought an original action, alleging that it had been harmed by groundwater pumping from hydraulically connected wells upstream in Nebraska.¹⁹³ 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.”¹⁹⁴

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.¹⁹⁵ 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.¹⁹⁶ 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.”¹⁹⁷

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.¹⁹⁸ As such, even in compact litigation, the Court will “invoke equitable principles, so long as consistent with the compact itself, to devise ‘fair . . .

192. *Kansas v. Nebraska*, 135 S. Ct. 1042, 1049 (2015) (citing Republican River Compact, ch. 104, 57 Stat. 86, art. II).

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

194. *Id.* at 1054.

195. *Id.* at 1053–1054.

196. *Id.* at 1063.

197. *Id.* at 1062 (citing *Texas v. New Mexico*, 482 U.S. 124, 134); *cf.* *Kansas v. Colorado*, 543 U.S. 86, 102 (“After all, a ‘credit’ for surplus water that rests upon *inaccurate* measurement is not really a credit at all.”) (emphasis in original)).

198. *Kansas v. Nebraska*, 135 S. Ct. 1042, 1052 (2015).

solution[s]’ to the state-parties’ disputes and provide effective relief for their violations.”¹⁹⁹

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.²⁰⁰ 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.²⁰¹ 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.”²⁰²

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.”²⁰³ Importantly, in contrast to the Rio Grande litigation, the Court could grant a meaningful remedy without drawing the United States into the fray, largely because the Republican River shortages were caused by groundwater pumping and not federal reservoir operations.²⁰⁴

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,

199. *Id.* (citing *Texas v. New Mexico*, 482 U.S. at 134 (supplying an “additional enforcement mechanism” to ensure an upstream state’s compliance with a compact)).

200. *Id.* at 1066–67 (Thomas, J., concurring in part, dissenting in part).

201. *Id.* at 1066.

202. *Id.* at 1067 (citing *Missouri v. Jenkins*, 515 U. S. 70, 131 (1995)).

203. *See 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.*

204. *See supra* notes 177–181 and accompanying text (addressing the Court’s reasons for allowing the U.S. to lodge its complaint).

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.²⁰⁵ First, the appropriators sought an injunction to stop the Bureau of Reclamation from interfering with their water rights.²⁰⁶ This novel theory quickly failed for an inability “to show an unequivocal waiver of the United States’ sovereign immunity.”²⁰⁷ Alternatively, the allegation that the Bureau 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.²⁰⁸

Federal interests were only indirectly involved in the second lawsuit of note, *Hill v. State*.²⁰⁹ There, Nebraska appropriators alleged both regulatory and physical takings claims against the State of Nebraska for taking their water and giving it to Kansas.²¹⁰ The Nebraska Supreme Court rejected these claims. Citing *Kansas v. Nebraska*,²¹¹ the court ruled that allocations under the Republican River Compact are the “supreme law in Nebraska,” and that any intrastate rights to use the 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.”²¹²

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, 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. Su-

205. Frenchman Cambridge Irrigation Dist. v. Heineman, 974 F. Supp. 2d 1264 (D. Neb. 2013).

206. *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.

207. *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.

208. *Id.*

209. *Hill v. State*, 894 N.W.2d 208, 211 (Neb. 2017).

210. *Id.*

211. *Id.* at 217 (discussing *Kansas v. Nebraska*, 135 S. Ct. 1042 (2015)).

212. *Id.* at 215 (citing *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106–108 (1938)).

preme Court.²¹³ 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.²¹⁴

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.²¹⁵ 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.”²¹⁶ As a result, examples are few and far between.

The Delaware River Basin Compact is one of those rare examples.²¹⁷ Its origin story springs from a Supreme Court decree, a devastating flood, and a handful of committed proponents.²¹⁸ The 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.”²¹⁹ It is unique not only from the standpoint of federal engagement as an equal part-

213. Frenchman Cambridge Irrigation Dist. Heineman, 974 F. Supp. 2d at 1280–1281 (D. Neb. 2013). 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).

214. See *Texas v. New Mexico*, 138 S. Ct. 954, 957–958 (2018).

215. Frank P. Grad, *Federal-State Compact: A New Experiment in Co-Operative Federalism*, 63 Colum. L. Rev. 825, 839 (1963).

216. *Id.* at 846. Grad warns that state members of a compact commission will sacrifice the national interest to their own “particularistic interests.” *Id.*

217. Public Law 87-328, 75 Stat. 688 (Sept. 27, 1961).

218. See Jill Elaine Hasday, *Interstate Compacts in a Democratic Society: The Problem of Permanency*, 49 FLA. L. REV. 1, 35 (1997). Hasday notes, pointing to the Delaware River Basic Compact as an example, that “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)).

219. *About DRBC*, DELAWARE RIVER BASIN COMM’N, <https://www.state.nj.us/drbc/about/> (last visited Jan. 19, 2019).

ner,²²⁰ but also due to its comprehensive coverage of both water allocation and water quality.²²¹

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.²²² 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.²²³ 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.²²⁴ As with 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.²²⁵ 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.’”²²⁶ John Davidson 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

220. Even before the Compact, federal involvement was key. The Supreme Court decree appointed a federal “River Master”—the Chief Engineer of the U.S. Geological Survey—to ensure implementation. Grad, *supra* note 189, at 845.

221. Joseph W. Dellapenna, *Interstate Struggles Over Rivers: The Southeastern States and the Struggle Over the ‘Hooch*, 12 N.Y.U. ENVTL. L. J. 828, 845 (2005). For analysis of federal involvement in the Great Lakes-St. Lawrence River Basin Compact, see Noah D. Hall & Benjamin Houston, *Law and Governance of the Great Lakes*, 63 DEPAUL L. REV. 723, 746 (2014).

222. Grad, *supra* note 189, at 839 (citing HENRY C. HART, *THE DARK MISSOURI* 204–06 (1957)).

223. Sandra B. Zellmer, *A New Corps of Discovery for Missouri River Management*, 83 NEB. L. REV. 305, 359 (2004).

224. See *supra* Part II.B; see also *In re: MDL-1824 Tri-State Water Rights Litigation*, 644 F.3d 1160, 1191 n. 25 (11th Cir. 2011) (discussing the role of the Flood Control Act in ACF operations).

225. See John H. Davidson, *De Facto Allocation of Missouri River Water: The Emergence of Legal Process*, ABA WATER RESOURCES COMMITTEE NEWSL. (ABA Section of Env’t, Energy, & Res., Chicago, IL), March 2018, at 12.

226. John H. Davidson, *Missouri River Reservoirs in a Century of Climate Change: National or Local Resource?*, 20 J. ENVTL. & SUSTAINABILITY L. 2, 20 (2014) (citation omitted).

(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.²²⁷

Davidson concludes that “[c]onflict in the Missouri River Basin . . . likely *cannot be resolved by the usual avenues of compact or judicial decree.*”²²⁸ 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.²²⁹ 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 haled into 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,²³⁰ many environmental statutes,²³¹ and the Tucker Act.²³² 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

227. Davidson, *supra* note 225 (citation omitted).

228. *Id.* at 13 (emphasis added).

229. *See id.*

230. 5 U.S.C. § 704 (2012).

231. *See, e.g.*, Endangered Species Act, 16 U.S.C. § 1540(g) (2012); Clean Water Act, 42 U.S.C. § 7604(a) (2012).

232. Tucker Act, 28 U.S.C. § 1491 (2012).

reserved rights for federal Indian reservations.²³³ 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.²³⁴ 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, along the way providing 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.”²³⁵ 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.²³⁶ 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 border and digging a “Spite Canal” to demonstrate their ability to divert the water back to the St. Mary River.²³⁷

Pursuant to Article VI of the Boundary Waters Treaty, the International Joint Commission (IJC) issued an order distributing the waters of the St. Mary and Milk Rivers between the United States and Canada.²³⁸ Canada has not yet developed its full share and the

233. *Winters v. United States*, 207 U.S. 564 (1908).

234. Barbara Cosens, *Water Dispute Resolution in the West: Process Elements for the Modern Era in Basin-Wide Problem Solving*, 33 ENVTL. L. 949, 956 (2003).

235. *Id.*

236. 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.

237. Nigel Banks and Elizabeth Bourget, *Apportionment of the St. Mary and Milk Rivers*, in WATER WITHOUT BORDERS 163 (2013); Mary Ellen Wolfe, *The Milk River: Deferred Water Policy Transitions in an International Waterway*, 32 NAT. RESOURCES J. 55 (1992).

238. Int'l Joint Comm'n [IJC], 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, *The Boundary Waters Treaty and Canada-U.S. Relations in Abundance and Scarcity*, 54 WAYNE L. REV. 1499, 1507 (2008).

potential for “a simmering international conflict” still exists “despite the IJC’s best efforts to manage it over the past century.”²³⁹

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 *Winters v. United States*.²⁴⁰ 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.²⁴¹ Although the treaty was silent with respect to water, prior to the treaty, “[t]he Indians had command of the lands and the waters, [and] of all their beneficial use”²⁴² 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.²⁴³ This meant that appropriators with legally recognized water rights under Montana state law were enjoined from interfering with the flow into Fort Belknap.²⁴⁴ Despite damage to the upstream appropriators’ investments and the affront to state sovereignty,²⁴⁵ the Court insisted that “[t]he power of the [federal] [g]overnment to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be.”²⁴⁶

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 2009.²⁴⁷

239. *Id.* at 1520. Montana has sought IJC review of the St. Mary-Milk apportionment several times. *Id.* at 1519.

240. 207 U.S. 564 (1908).

241. 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.

242. *Id.* at 576.

243. *Id.* at 577.

244. *Id.* at 565, 578. For background on the *Winters* case, see Justin Huber and Sandra Zellmer, *The Shallows Where Federal Reserved Water Rights Founder: State Court Derogation of the Winters Doctrine*, 18 U. DENV. WATER L. REV. 261 (2013).

245. *Winters*, 207 U.S. 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.’”).

246. *Id.* at 577 (citation omitted).

247. 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> (last visited Jan. 17, 2019). A separate compact with the Gros Ventre and Assiniboine for the Fort Belknap Reservation has been adopted and was introduced to Congress in 2011, but Congress has not yet acted. Mont. Code Ann. 85-20-1001. For details, see Mon-

Congress took nearly a decade, but eventually passed the Blackfeet Settlement Act of 2016, which, at \$422 million, is one of the largest federal allocations in an Indian reserved rights settlement to date.²⁴⁸

This landmark agreement is expected to resolve some of the thorny intrastate issues that remained in the wake of *Winters*.²⁴⁹ 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.²⁵⁰ 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.²⁵¹ In effect, the state committed itself to settling federal reserved rights through negotiation rather than litigation.²⁵²

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.²⁵³ Situating these important federal rights in a state forum could have jeopardized both national and tribal interests.²⁵⁴ In addition to judicial bias,²⁵⁵ GSAs are notorious for their "inefficiency and interminability."²⁵⁶ They are so

tana DNRC, Fort Belknap Compact, <http://dnrc.mt.gov/divisions/reserved-water-rights-compact-commission/fort-belknap-indian-reservation-compact> (last visited Jan. 17, 2019).

248. Water Infrastructure Improvements for the Nation Act, Pub. L. No. 114-322, §§ 3701-3724, 130 Stat. 1628 (Dec. 16, 2016); see CONG. RES. SERV., INDIAN WATER RIGHTS SETTLEMENTS 6-8 (2019), <https://fas.org/sgp/crs/misc/R44148.pdf> (table listing "Enacted Indian Water Rights Settlements" by state and tribe).

249. See A. DAN TARLOCK, INDIAN RESERVED WATER RIGHTS—INDIAN WATER RIGHTS SETTLEMENTS—OFF-RESERVATION AND INSTREAM USES, § 9:48 (2019) (noting that, under the agreement, the Blackfeet 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"); Aubrey Ryan Bertram, *Western States Water Conference and Native American Rights Fund 15th Biennial Symposium on the Settlement of Indian Reserved Water Rights Claims*, 21 U. OF DENV. WATER L. REV. 119, 120 (2017) (explaining that, although the agreement reserves tribal rights to surface and groundwater within the boundaries of the reservation, "previously established state rights on a few rivers that support irrigation in highly profitable agricultural lands . . . are protected from calls by the Tribe").

250. Bertram, *supra* note 249, at 121. The Congressional Research Service reports that, "as of 2019, 36 Indian water rights settlements had been federally approved, with total costs in excess of \$5.8 billion." See CONG. RES. SERV., *supra* note 248, at 2. Efficiency, fairness, and durability require greater involvement by the U.S. in Indian water rights settlements. See Cogens, *supra* note 234, at 1017-18. However, the lack of federal funds to implement ongoing and future agreements is a significant challenge. CONG. RESEARCH SERV., *supra* note 248, at 2.

251. Mont. Code Ann. § 85-2-212.

252. Michelle Bryan, *At the End of the Day: Are the West's General Stream Adjudications Relevant to Modern Water Rights Administration?*, 15 Wyo. L. Rev. 461, 462 (2015).

253. 43 U.S.C. § 666(a). See *supra* notes 100-05.

254. Huber & Zellmer, *supra* note 244, at 276, 278.

255. *Id.* at 282-287 (providing examples).

256. Jamison E. Colburn, Don't Go in the Water: On Pathological Jurisdiction Splitting 19 (Feb. 27, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3343705.

expensive, lengthy, and unpredictable that claimants are driven to settling disputes out of court at almost any cost.²⁵⁷ GSA disputes, especially those involving federal interests, “have yielded a uniquely chaotic jurisdictional landscape.”²⁵⁸ 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.²⁵⁹

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 limited.²⁶⁰ 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.²⁶¹

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.²⁶²

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.²⁶³ 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

257. *Id.* at 24. *See, e.g.*, Joseph M. Feller, *The Adjudication That Ate Arizona Water Law*, 49 ARIZ. L. REV. 405 (2007) (describing the decades-long Gila River Adjudication).

258. Colburn, *supra* note 256, at 20.

259. *Id.* at 24 (citing A. Dan Tarlock, *The Illusion of Finality in General Water Rights Adjudications*, 25 IDAHO L. REV. 271, 284 (1988)).

260. *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 & Cty. of Denver*, 656 P.2d 1 (Colo. 1982).

261. Colburn, *supra* note 256, at 21–24 (citing *Ariz. v. San Carlos Apache Tribe*, 463 U.S. 545, 564 (1983)); *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 812–18 (1976)).

262. *See supra* Part I.C.

263. A. Dan Tarlock & Jason Robison, *Federal Regulatory Rights, L. OF WATER RIGHTS & RES.* § 9:32 (2018).

apportionment”²⁶⁴ 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.²⁶⁵

The Missouri River features prominently in this Section and Section C, 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.²⁶⁶ The states do, however, have a common concern: flood control.²⁶⁷ Yet they “have proved consistently incapable of joint action.”²⁶⁸

With the Flood Control Act of 1944,²⁶⁹ 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 irrigation through projects on the tributaries.²⁷⁰ Like the ACF,²⁷¹ the Missouri River system is regulated by the Corps’ Master Water Control Manual and Annual Operating Plans.²⁷²

In the 1990s, it became clear that operations-as-usual were wreaking havoc on the Missouri River ecosystem.²⁷³ Faced with threats 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 pur-

264. *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).

265. *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).

266. Sandra B. Zellmer, *Mudslinging on the Missouri: Can Endangered Species Survive the Clean Water Act?*, 16 *DRAKE J. AGRIC. L.* 89, 92–94 (2011); JOHN E. THORSON, *RIVER OF PROMISE, RIVER OF PERIL: THE POLITICS OF MANAGING THE MISSOURI RIVER* 185 (1994).

267. Davidson, *supra* note 226, at 12.

268. *Id.* at 8.

269. Flood Control Act of 1944, Pub. L. No. 78-534, ch. 665, 58 Stat. 887 (codified as amended in U.S.C. titles 16, 33, and 43).

270. *Id.*

271. *See Kansas v. Colorado*, 185 U.S. 125, 144 (1902); *Kansas v. Colorado*, 206 U.S. 46, 117–118; Grant, *supra* note 124.

272. U.S. ARMY CORPS OF ENGINEERS, *MISSOURI RIVER MAINSTEM RESERVOIR SYSTEM MASTER WATER CONTROL MANUAL* (2018), <https://usace.contentdm.oclc.org/utills/getfile/collection/p266001coll1/id/8200>.

273. *See, e.g., Ideker Farms, Inc. v. United States*, 136 Fed. Cl. 654, 667 (2018); *Am. Rivers v. Corps*, 271 F. Supp. 2d 230, 238 (D.D.C. 2003).

poses of the Flood Control Act and the jeopardy-avoiding measures specified in a biological opinion.²⁷⁴ 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.²⁷⁵ As a result, the Corps was ordered to attempt to reconcile its duties under both the ESA and the Flood Control Act, despite the likelihood that actions that benefited imperiled species would undermine the flood control mission and vice versa.²⁷⁶

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 Corps’ ability to 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.²⁷⁷ 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.²⁷⁸

Some four hundred landowners and two Indian tribes sued the Corps for Fifth Amendment takings in *Ideker Farms v. United States*.²⁷⁹ 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

274. See *In re Operation of Mo. River Sys. Litig.*, 363 F. Supp. 2d 1145, 1175 (D. Minn. 2004). On appeal, the Eighth Circuit affirmed that the Corps had discretion to determine how best to fulfill the purposes of both statutes. *In re Operation of Mo. River Sys. Litig.*, 421 F.3d 618, 631 (8th Cir. 2005).

275. *South Dakota v. Ubbelohde*, 330 F.3d 1014, 1027–30 (8th Cir. 2003).

276. See *id.* at 1019 (noting that “[i]n good times, the Corps can accommodate all such [competing] interests, but, when facing a continuous drought, the Corps is forced to make hard choices”); *In re Operation of Mo. River Sys. Litig.*, 363 F. Supp. 2d at 1175 (describing the “insurmountable task” of balancing “all competing river interests regardless of the weather, while simultaneously protecting and preserving the environment and the species it harbors”).

277. Zellmer, *supra* note 112, at 197.

278. *Id.* at 198.

279. *Ideker Farms*, 136 Fed. Cl. at 654.

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.²⁸⁰

The litigation was bifurcated, with Phase I utilizing forty-four “bellwether” plaintiffs for purposes of determining liability.²⁸¹ After a lengthy trial, Judge Firestone found that some of the plaintiffs had 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.”²⁸² 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.²⁸³ Phase II of the *Ideker Farms* case will determine the amount of compensation due to each of the successful plaintiffs.²⁸⁴

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.²⁸⁵ 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.²⁸⁶ Because it expressly pre-

280. See *supra* notes 108–09 (citing 33 U.S.C. § 702(c)); *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).

281. *Ideker Farms*, 136 Fed. Cl. at 659.

282. *Id.* at 678. *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.

283. *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.

284. *Id.* at 660. Phase II will also resolve any defenses raised by the United States. *Id.*

285. *Klamath Irrigation 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. United States* 134 Fed. Cl. 619 (2017).

286. *Baley*, 134 Fed. Cl. at 678–79.

served tribal rights, the compact between California and Oregon did not alter this analysis.²⁸⁷

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."²⁸⁸ 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.²⁸⁹

V. CONGRESSIONAL SOLUTION

There are two potentially viable solutions to the federal sovereign immunity problem. First, the executive branch could encourage ad hoc immunity waivers for original actions between states by executive order or other means. Such waivers would then occur on a case-by-case basis within the Department of Justice's existing litigation discretion.²⁹⁰ This authority, which is often described as plenary, is subject to few constraints.²⁹¹ Any solution that relies on discretionary immunity waivers would lead to uncertainty among the parties and unpredictable, possibly inequitable, results.²⁹²

287. *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.")).

288. *Id.* at 674 (citing *Rith Energy, Inc. v. United States*, 247 F.3d 1355, 1366 (Fed. Cir. 2001)).

289. *See supra* Part III.

290. *See* 28 U.S.C. 516 ("Except as otherwise authorized by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.").

291. *See, e.g., United States v. Newport News Shipbuilding & Dry Dock Co.*, 571 F.2d 1283, 1287 (4th Cir. 1978) (describing the authority to supervise litigation involving federal agencies as extremely broad, including authority to agree to a dismissal of actions brought by the government); *United States v. South Florida Water Management Dist.*, 847 F. Supp. 1567 (S.D. Fla. 1992), *aff'd in part, rev'd in part*, 28 F.3d 1563 (11th Cir. 1994), *cert. denied*, 514 U.S. 1107 (1995) (holding that the Attorney General could maintain the United States' breach of contract and state law claims against a local water district, and ultimately enter into a settlement, without concurrence of other federal agencies due to Attorney General's general authority to conduct and supervise litigation where the United States is a party); *The Attorney Gen.'s Role as Chief Litigator for the United States*, 6 Op. O.L.C. 47, 62 (1982), <https://www.justice.gov/file/22896/download> (stating that the "full plenary authority" of the Attorney General, as chief litigation officer for the U.S., embraces all aspects of litigation, including subpoena enforcement, prosecutions, defenses, and settlements, constrained only by other Acts of Congress and the Executive's constitutional duty to faithfully execute the laws).

292. *See generally* Todd David Peterson, *Protecting the Appropriations Power: Why Congress Should Care About Settlements at the Department of Justice*, 2009 B.Y.U. L. REV. 327, 329 (2009) (describing "innumerable ways in which the Department's control over the litigation on be-

Second, and more effective, would be a congressional waiver of federal sovereign immunity for water allocation original actions between states. Congress could include a waiver in its consent legislation for each and every new water compact.²⁹³ However, given the limited number of new interstate compacts adopted in recent years, this pathway would have limited effect, and would do nothing to resolve disputes over existing compacts or equitable apportionment.²⁹⁴

Instead, Congress should enact a sweeping waiver for all water allocation original action cases between states, whether the cases originate as compact disputes or equitable apportionment litigation.²⁹⁵ A newly enacted waiver provision should replace subsection (c) of the McCarran Amendment,²⁹⁶ which otherwise shields the federal government from original actions “involving the right of States to the use of the water of any interstate stream.”²⁹⁷

By way of example, Congress included a broad waiver of immunity in legislation governing the Colorado River in 1956,²⁹⁸ as an amendment to the 1922 Colorado River Compact.²⁹⁹ The provision reads as follows:

In the operation and maintenance of all facilities, authorized by Federal law and under the jurisdiction and supervision of the Secretary of the Interior, in the basin of the Colorado River, the Secretary of the Interior is directed to comply with the applicable provisions of the Colorado Riv-

half of the United States gives it the opportunity to respect or to evade the authority allocated so carefully by the Constitution”).

293. Marilyn O’Leary, *Reinventing the Interstate Water Compact: A New Model*, 52 RMMLEF-INST 21-1 (2006).

294. *Id.*

295. Jerome C. Muys, Jr. & George William Sherk, *The Dogmas of the Quiet Past: Potential Climate Change Impacts on Interstate Compact Water Allocation*, 34 VA. ENVTL. L.J. 297, 315 (2016). Any concerns over retroactive application of such a provision to pre-existing interstate compacts should be alleviated by the consent language of most of those compacts, in which Congress reserved the right to alter, amend, or repeal the legislation. O’Leary, *supra* note 293, at § 21.03 n.12.

296. 43 U.S.C. § 666(c) (1996).

297. *See supra* notes 106–07 (discussing 43 U.S.C. § 666(c)); O’Leary, *supra* note 293 (arguing that § 666(c) be repealed); Sara Franklin, Rebekah King, *The Nineteenth Annual Water Law Conference Watershed Management: A New Governance Trend*, 4 U. DENV. WATER L. REV. 539, 546 (2001) (conveying Jerome Muys’ recommendations that § 666(c) be repealed so that the United States gets more involved in equitable apportionment cases “[t]o negate the Supreme Court’s lack of watershed management and protection consideration within [such] cases . . . especially for the purpose of the administration and oversight of comprehensive regulatory programs that largely impact water rights”).

298. Boulder Canyon Project Act of 1928, 43 U.S.C. § 617 (2012) (authorizing construction of Hoover Dam); *see Arizona v. California*, 373 U.S. 546 (1963) (*Arizona II*) (finding that the Boulder Canyon Project Act divided the lower basin’s share of the river).

299. 43 U.S.C. § 620m.

er Compact, the Upper Colorado River Basin Compact, the Boulder Canyon Project Act . . . and the Treaty with the United Mexican States, in the storage and release of water from reservoirs in the Colorado River Basin. *In the event of the failure of the Secretary of the Interior to so comply, any State of the Colorado River Basin may maintain an action in the Supreme Court of the United States to enforce the provisions of this section, and consent is given to the joinder of the United States as a party in such suit or suits, as a defendant or otherwise.*³⁰⁰

This waiver was passed some years after Arizona had been thwarted in its attempt to bring an original action against California for apportionment of Colorado River water.³⁰¹ The Court denied Arizona's petition for leave to file the complaint because the United States—an indispensable party due to its pervasive authority to control navigation and surplus water on the river—was not a party to the suit.³⁰²

The unique history of Colorado River Basin development provides additional reasons for the waiver of federal immunity. Because the basin states were utterly incapable of reaching negotiated solutions for water allocation, and because they accepted “massive federal charity” in the form of reclamation dams and related infrastructure, when Congress authorized project construction in the Boulder Canyon Act,³⁰³ it vested authority for allocating and managing flows in the federal government.³⁰⁴ Importantly, by construing the Act as bestowing the mantle of “river master” on the Department of Interior in *Arizona v. California II*,³⁰⁵ the Supreme Court “enlisted a new institution . . . and in the process, took a very fragmented system and made it a much more holistic system.”³⁰⁶

This is not to say that Colorado River governance is perfect, but it does serve as an example where extensive federal involvement and a federal waiver of immunity go hand in hand to foster rela-

300. *Id.* (emphasis added).

301. See Larson, *supra* note 118, at 917–18 (noting that, when crews from California crossed into Arizona territory while attempting to build a dam on the Colorado River, then-Secretary of Interior Harold Ickes halted the construction to avoid a violent confrontation between the two states, and remarking that “protecting and developing these shared resources under the cloud of interjurisdictional politics is one of the most formidable governance challenges in the United States”).

302. *Arizona v. California*, 298 U.S. 558, 569–70, 572 (1936) (*Arizona I*).

303. Boulder Canyon Project Act of 1928, 43 U.S.C. §§ 617–617v (2012).

304. See David H. Getches, *Colorado River Governance: Sharing Federal Authority as an Incentive to Create a New Institution*, 68 U. COLO. L. REV. 573, 575 (1997).

305. *Arizona v. California (Arizona II)*, 373 U.S. 546, 590 (1963).

306. Barton H. Thompson, *The Role of the Courts in Water Law*, 66 S.C. L. REV. 581, 589 (2015).

tively comprehensive river governance. As the late David Getches observed, exhibiting his characteristic realism and optimism:

Though the legal arrangements made early in the century to allocate Colorado River water may seem imperfect and incomplete, it is not necessary to revamp them in order to satisfy today's values and demands. The law of the river has evolved: a broad realm of policies addressing water quality, endangered species, and recreation temper the early pre-occupation with consumptive uses. These statutory additions to the law of the river call for a more integrated consideration of resource values.³⁰⁷

In the Colorado River basin, the convergence of a clear federal role and the assurance of federal accountability through the congressional immunity waiver are facilitating negotiated solutions to a range of issues from endangered species and water quality to public lands management.³⁰⁸ For one thing, a broad coalition of stakeholders advises the Secretary on operating policies for Glen Canyon Dam to balance environmental, hydropower, and recreational interests.³⁰⁹ For another, recent proposals to reallocate and to deliver Colorado River water to more efficient, high value uses and users, such as Indian tribes, through market mechanisms like water banks, have shown some promise.³¹⁰ Meanwhile, the Bureau of Reclamation, the states, and the irrigation districts continue to work on, and to improve, salinity control measures.³¹¹ None of these initiatives would be likely to occur, much less to take root and sprout equitable, durable solutions absent strong federal leadership and a

307. Getches, *supra* note 304, at 577. Professor Getches acknowledged that "the time is ripe to encourage broadly inclusive, participatory problem-solving in the Colorado River basin," *id.* at 579–80, but warned not to throw out the baby with the bathwater, as current governance structures can serve present and future needs. Other scholars have argued that the Colorado River Compact and associated "Law of the River" "may not contain sufficient flexibility to address the magnitude of changes in scientific knowledge and understanding, social and political views and forces, and physical circumstances that have occurred since 1922." Robert W. Adler, *Revisiting the Colorado River Compact: Time for a Change?*, 28 J. LAND RESOURCES & ENVTL. L. 19, 22 (2008).

308. Getches, *supra* note 304, at 580; *see also* Thompson, *supra* note 306, at 588 ("In its Court-designated role as water-master for the Colorado River, the Department of the Interior . . . has been able to continue to help resolve the disputes that inevitably arise over interstate waters.").

309. Getches, *supra* note 304, at 597. In the wake of the Grand Canyon Protection Act of 1992, Pub. L. No. 102-575, § 1804, 106 Stat. 4669, requiring that the Secretary operate Glen Canyon dam to protect Grand Canyon National Park, the Secretary constituted a multi-party Adaptive Management Work Group to assist in coordinating technical data, to recommend adjustments in dam operations, and to monitor progress. *Id.* at 627.

310. *Id.* at 580, 605–09, 613–19.

311. *Cf. id.* at 604–05.

means of holding the federal government responsible through a waiver of sovereign immunity.

The Colorado River is unique in some respects, but it is not so unique that the lessons learned from its management cannot be extended to other basins.³¹² The United States is duty-bound to ensure that federal environmental and natural resources laws are implemented across interstate boundaries. When resource-related disputes between states arise, the states should have the opportunity to demonstrate that federal actions may have an impact on their interests, especially when it comes to Supreme Court decrees and congressionally approved allocations.³¹³

Beyond the Colorado River, Congress has adopted a number of statutes consenting to suit against the United States in original actions brought by states.³¹⁴ The Supreme Court seems to have no qualms over the validity of these provisions.³¹⁵

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, “ping-ponging between state and federal forums—which had once seemed a remote and dystopic prospect—may well become 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.”³¹⁶

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 domi-

312. See O’Leary, *supra* note 293, at § 21.03 (“There is no reason why a similar waiver should not be included in congressional consent legislation for all interstate compacts.”).

313. See *id.*

314. See, e.g., 43 U.S.C. §§ 615v, 1551(c).

315. See, e.g., *Utah v. United States*, 394 U.S. 89, 90–93 (1969) (applying a provision designed to resolve disputes between the US and Utah over ownership of the Great Salt Lake, 80 Stat. 192, as amended, 80 Stat. 349, which both authorized the Secretary of the Interior to issue a quitclaim deed to Utah for the federal interest in the lake properties and provided a mechanism by which the fair value of the federal interest could be set); *California v. Arizona*, 440 U.S. 59, 65, 68 (1979) (construing a statutory waiver of federal immunity in quiet title actions in federal district courts to authorize original actions in the Supreme Court).

316. Colburn, *supra* note 256, at 45–46.

nant actors in interstate river basins.”³¹⁷ Unless these agencies can be brought to court and bound by judicial decrees, states and other affected parties will not be able to obtain complete relief over, and management of, 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,³¹⁸ 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.”³¹⁹ 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 that preserve separation of powers and individual rights.³²⁰ 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 on 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.”³²¹ Congress should exhibit “progressive expansiveness and generosity” now, by lowering the shield with respect to original actions between the states over interstate water resources where the federal government is a necessary party.

317. Griggs, *supra* note 1, at 210–211.

318. Benson, *Deflating the Deference Myth*, *supra* note 5, at 242.

319. Benson, *supra* note 4, at 405. Benson observes that resolution of interstate water wars may require Congress to waive federal immunity, “at least on a case-by-case basis.” *Id.* at 405 n. 242.

320. Hershkoff, *supra* note 2, at 249, 262.

321. Sisk, *supra* note 39, at 605.