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Till the Rivers All Run Dry: Equal Sovereignty and the Western Water Crisis

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Abstract

Across the United States, a countless number of people rely on groundwater for basic necessities such as eating, drinking, agriculture, and energy-creation. At the same time, overuse combined with increasingly dry conditions throughout the country, tied to the increasingly unpredictable and devastating impacts of climate change, threaten this fundamental building block of society. Nowhere is this problem more pernicious than the American Southwest. The Colorado River Basin has always been the epicenter of water disputes between communities and states. Bad policies, unhelpful federal actions, and sluggish Supreme Court decisions stop the painful but necessary steps to address the increasingly dire water shortage. At the center of this crisis are two opposing camps that stand to gain or lose much. California, with the weight of history is on one side, while Arizona and Nevada, often disadvantaged, occupy the other. Yet these underdog states may have a way to escape the unjust outcomes that have hounded them to this point. If Arizona and Nevada choose, recent Supreme Court decisions provide the

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ammunition needed to finally create a fair and equitable distribution of water in the Southwest, and break California's oppressive control over the lion's share of Colorado River Basin water.

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Poor Arizona—so far from God, so close to California.

Josh Patashnik[1]

Water is like air: We take it for granted until it's not there. And if we don't make hard decisions across the West to allocate water more rationally, nature won't hesitate to make them for us.

Nicholas Kristof[2]

INTRODUCTION

A pall is cast on the western United States. For over twenty years, a crippling drought has plagued the Colorado River (the "River") and the forty million people who depend on it.[3] The River is shared by Mexico[4] and seven states split into two regions: the Upper Colorado River Basin states of Colorado, New Mexico, Utah, and Wyoming, (the "Upper Basin States"), and the Lower Colorado River Basin States of Arizona, California, and Nevada (the "Lower Basin States").[5] Not only has the drought reduced water necessary for life in Basin states generally, but it has increased tension amongst the states as they bicker over water cuts before the lakes supplying them dry

1. Josh Patashnik, Arizona v. California *and the Equitable Apportionment of Interstate Waterways*, 56 ARIZ. L. REV. 1, 2 (2014) (adapting a quote by Mexican President Porfirio Díaz).

2. Nicholas Kristof, *When One Almond Gulps 3.2 Gallons of Water*, N.Y. TIMES (May 13, 2023), https://perma.cc/Z26P-KNCU.

3. *See* The Daily, *7 States, 1 River and an Agonizing Choice*, N.Y. TIMES, at 16:50 (Jan. 31, 2023), https://perma.cc/6PL6-KXF3 [hereinafter The Daily, *7 States, 1 River and an Agonizing Choice*] ("[California's] main argument is on the law. And . . . on the law itself, California's mostly right. . . . [Arizona's] main [argument] is what's practical? And what's fair?").

4. While Mexico is impacted by water reductions in times of shortage, it will not feature prominently as a major player in this Note. *See* Partlow, *infra* note 42 and accompanying text.

5. *See* U.S. DEPT. INTERIOR BUREAU RECLAMATION, BASIN REPORT: COLORADO RIVER 1, https://perma.cc/F8PM-H46M (PDF) ("The Colorado River is a critical resource in the West, because seven basin states . . . depend on it for water supply, hydropower production, recreation, fish and wildlife habitat, and other benefits.").

up completely.[6] Nowhere is this tension more profound than in the Lower Basin. There, the competition for water can only be described as a clash between David and Goliath.

California, the Goliath of this story, is a lumbering behemoth that has consistently benefited from the "Law of the River."[7] Over the history of the Lower Basin States, California has reaped the advantages of being a powerful state with senior rights to water, all because it was a state before Arizona and Nevada.[8] It has justified its outsized advantage in the competition for water through an "outdated interpretation of the river's allocation laws," with its essential arguments premised on the strength of the flawed legal framework that has supported it for so long, as well as the fact that it is in many ways a breadbasket of the United States.[9] California argues that, because of its senior rights, it should be the last state to make water reductions in times of shortage.[10] To date, California has not made a single reduction in its water use.[11]

Arizona and Nevada, on the other hand, have faced adversity from the beginning. Because they were admitted as states decades after California, they lack the senior rights that would afford them more water.[12] Worse, their junior status means they are frequently the first to face heavy water cuts during severe drought.[13] Arizona, which is frequently at the forefront of water disputes with California, argues that the well-being of its citizens, and fundamental standards of fairness of justice, mean it should not be forced to teeter on the edge of disaster if and when water levels continue to drop.[14]

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6. *See infra* Part 0.

7. *See infra* Part II.

8. *See infra* Part 0.

9. John Fleck, Opinion, *California Wants to Keep (Most of) the Colorado River for Itself*, N.Y. TIMES (Feb. 23, 2023), https://perma.cc/ZSU2-6TWF.

10. *See* The Daily, *7 States, 1 River and an Agonizing Choice*, *supra* note 3, at 15:58 ("[S]outhern California has really the most senior rights in the system. Before California gets cut, others, in particular Arizona, are supposed to get cut first . . . . And only once Arizona goes dry do you come to [California]").

11. *See* Briscoe, *infra* note 44 and accompanying text.

12. *See infra* Part 0.

13. *See infra* Parts 0–0.

14. *See* The Daily, *7 States, 1 River and an Agonizing Choice*, *supra* note 3, at 17:55 ("You would be causing significant health harms to these cities. And

As this Note argues, Arizona and Nevada must be relieved of the undue burden imposed upon them by California's obstinance in refusing to share the burden of water reductions.[15] I propose that Arizona and Nevada bring suit against California in the Supreme Court to seek injunctive relief premised on the legal doctrine of equal footing and practical needs of water conservation.[16] Under the principle of equal footing as articulated in the Supreme Court's recent *Shelby County v. Holder*[17] decision, Arizona and Nevada are owed equality with California under the law. That equality can only be realized through a more equitable allocation of water and enforcement of fair water allocation finally cuts against California.

To be sure, Colorado River water law and the legal frameworks surrounding it are a morass of legal doctrines, caselaw, interstate agreements, and more. I will therefore do my best to guide the reader through this morass while also showing how, at each stage, the systems meant to effectively govern the Colorado River have failed to create equitable or conservation-oriented water allocation or reductions. In Part I, I discuss the nature of the current water crisis and the principles that generally govern water law in the United States. [18] In Part II, I describe the various foundational rights, compacts, and agreements the Lower Basin States use to resolve water disputes. [19] In Part III, I detail the attempts of the federal government to resolve the current water crisis.[20] And in Part IV, I review the Supreme Court's involvement in dispute resolution

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the government would be violating its obligations to tribes . . . . [D]on't just look at the law. Look at what makes sense. . . . [Y]ou cannot cut us that deep because people would suffer too much.").

15. *See* Fleck, *supra* note 9 ("If we approach the challenge with a sense of fairness and shared sacrifice it will be possible to save the West . . . . But this can only happen if California joins in, rather than trying to hoard the water for itself."); *Water: Last Week Tonight with John Oliver*, YOUTUBE, at 8:04 (June 27, 2022), https://perma.cc/28NG-BZSN ("The immovable fact is: cities in the desert can't grow without limit and hard sacrifices will have to be made.").

16. *See infra* Part 0.

17. 570 U.S. 529 (2013).

18. *See infra* Part 0.

19. *See infra* Part 0.

20. *See infra* Part 0.

to date, and how the Court should finally resolve this dispute where all other efforts have failed.[21]

At this point, there is no doubt that difficult choices and shared sacrifices will have to be made to ease the burden of less water in the West. How the states choose to divide that burden will have far-reaching implications for the people who depend on the Colorado River. Unless that division is done fairly and with an eye toward long-term water conservation, far more sacrifices that are far less pleasant than the water cuts currently in effect will be required of the Lower Basin States. Such an outcome would not be beneficial for any party.

I. THE WATER CRISIS

The conflict among the Lower Basin States is at an impasse. After multiple demands from the federal government to reach a consensus on shared water cuts, the Basin states have failed to come to an agreement, largely because "California, the river's largest water user, refuses to play fair."[22] California's water reduction proposal would cut Arizona's allocation in half while reducing California's already larger share by only 17%—ensuring that it still receives more water than the entire state of Arizona.[23] California is talking out of both sides of its mouth, with the state's municipal and agricultural water agencies pointing to the fact that the state has done much to reduce its water use, while still protecting its "outsize water supply at the expense of others in the region."[24] For their part, Arizona and Nevada have already made up to 25% reductions in water consumption.[25]

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21. *See infra* Part 0.

22. *See* Fleck, *supra* note 9 ("[S]ix of the seven [Basin states] proposed a sweeping plan to share the burden [of cutting water allocation] and bring the river's supply and demand into balance.").

23. *See id.* ("That would mean central Arizona's cities, farms and Native American communities would suffer, while California's farmers in the large desert agricultural empire of the Imperial Valley . . . would receive more water from Lake Mead than the entire state of Arizona.").

24. *See id.* (explaining that Native American communities as well as fish, birds, and vegetation of the Colorado River, historically marginalized by the water rights framework, are in a worse position due to "California's intransigence").

25. *See infra* note 215 and accompanying text.

None of the Lower Basin States have commenced formal legal action against one another to force more equitable cuts or to increase their shares of water from the Colorado River. Indeed, demand is increasing for access to vital water resources that are currently drying up.[26] There is little sense in allowing a state as large as California, with such a large draw on precious water resources, to avoid contributing to water reductions while the other Lower Basin States shoulder such a heavy burden.[27] Before analyzing the inherent issues and potential solutions to the existing water dispute framework, this Part presents the facts of the ongoing drought, lays the foundations of water law and water rights in the West, and introduces the concept of equal footing among the states.

A. *The Drought in the West*

The American West is currently undergoing the driest period in at least 1,800 years.[28] The "megadrought,"[29] having started in 2000, is now in its twenty-third year.[30] The period has been so unusually severe that scientists are debating whether

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26. *See As the Climate Dries the American West Faces Power and Water Shortages, Experts Warn*, U.N. ENV'T PROGRAM (Aug. 2, 2022), https://perma.cc/9QV5-UAU8 ("Two of the largest reservoirs in America . . . are in danger of reaching 'dead pool status.'").

27. *See* Rachel Becker, *How Bad Is Water Use in California? March Is the Worst So Far, Up 19%*, CALMATTERS (May 10, 2022), https://perma.cc/55L5-QUMF (detailing California's water usage and its increase during more serious drought conditions in 2022 to the highest point since 2015).

28. *See* Kristof, *supra* note 2 ("Wells have been drying up as far north as Oregon, and the Great Salte Lake in Utah has shrunk by two-thirds."); Subhrendu Gangopadhyay et al., *The Colorado River Basin's Worst Known Megadrought Was 1,800 Years Ago, Scientists Discover*, AM. GEOPHYSICAL UNION (June 9, 2022), https://perma.cc/J8PU-NZKT ("At just 68% of the river's average flow rate, the megadrought is the most severe drought discovered in the arid region yet."); *See* Henry Fountain, *How Bad Is the Western Drought? Worst in 12 Centuries, Study Finds.*, N.Y. TIMES (Feb. 14, 2022), https://perma.cc/LH9V-YT46 ("2000-21 is the driest 22-year period since 800 A.D., which is as far back as the data goes.").

29. *See* Fountain, *supra* note 28 ("Although there is no uniform definition, a megadrought is generally considered to be one that is both severe and long, on the order of several decades.").

30. *See id.* ("The drought . . . , which began in 2000 and has reduced water supplies, devastated farmers and ranchers and helped fuel wildfires across the region . . . .").

"aridification" would be a more appropriate classification given its long-term nature, exacerbated by human-induced climate change.[31] Regardless of its name, there are now first-year law students who have only been alive in a time of scarcity. As shortages have mounted, so have the consequences of the drought and the policies made—or not made—to address it.

There is no sign that conditions will improve. As of May 2022, the National Weather Service has suggested that these persistent drought conditions will continue across most of the western United States and Great Plains.[32] A new study has shown that due to the warming climate, western water drought is 40% more severe and 75% more likely to continue through 2030 than in years past.[33] Others predict a 20–45% decline in overall water flow by 2030 and beyond.[34] The Bureau of Reclamation has predicted that Lakes Powell and Mead "may never again be full."[35]

Recent major rain and snowfall events are unlikely to help the drought conditions.[36] In fact, erratic rainfall or snowfall

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31. *See* Joan Meiners, *Scientists See Silver Lining in Fed's Efforts at Lake Powell*, AP (Jan. 15, 2022, 8:00 AM), https://perma.cc/ULW6-8M5A ("The term 'aridification' is gaining traction as the better way to describe what might be a long-term drying of the American West, influenced by climate change.").

32. *See* BRAD PUGH, NAT'L WEATHER SERV., CLIMATE PREDICTION CTR., U.S. SEASONAL DROUGHT OUTLOOK, https://perma.cc/FF28-VS9D (PDF) (displaying an up-to-date image of the national seasonal drought outlook graphic created by the National Weather Service).

33. *See* Alejandra Borunda, *The Drought in the Western U.S. Could Last Until 2030*, NAT'L GEOGRAPHIC (Feb. 14, 2022), https://perma.cc/FT7E-B63A ("Even absent climate change, there's a very high chance the drought would last through 2023; in 94 percent of their simulations, it goes on through next year, and in 33 percent . . . it lasts all the way to 2030.").

34. *See* NAT'L RSCH. COUNCIL, COLORADO RIVER BASIN WATER MANAGEMENT: EVALUATING AND ADJUSTING TO HYDROCLIMATIC VARIABILITY 87–92 (2007) (analyzing the hydrologic implications of warming temperatures on the Lower Basin, and specifically a predicted 45% decline in streamflow by 2030 and flows insufficient to meet consumptive use as of 2007, possibly by 2027).

35. *See* Borunda, *supra* note 33 ("Thus, rather than searching for a quick fix to this problem, states affected by water shortage . . . must search for solutions that will continue to address this problem on a larger scale.").

36. *See* Alex Hager, *Why Heavy Winter Rain and Snow Won't Be Enough to Pull the West out of a Megadrought*, NPR (Jan. 22, 2023, 12:04 PM), https://perma.cc/NN2R-43XE ("A string of wet years is unlikely because of rising temperatures . . . . The ground has become parched and soaks up snowmelt before the water has a chance to reach the places where people

could be a complicating development given growing concerns that such conditions would force officials to habituate annual water policies around mountain precipitation, leaving too little time to plan flexibly.[37] In other words, if the drought continues, officials will only be able to plan near-sighted water policies to sustain local populations. But the problem is not isolated to a lack of rainfall or natural scarcity.

These distressed conditions have been compounded by nonsensical policies and antiquated legal structures.[38] Indeed, initial policies and laws were based upon the false assumption that the Colorado River carried three million more acre-feet of water[39] than it actually did.[40] Many western states still maintain "use it or lose it" clauses for farmers and ranchers, pushing them to use as much water as possible, even during a drought.[41] Furthermore, state attempts to negotiate a solution have come to naught. In June 2022, and again in August 2022, the federal government told the Colorado River Basin states to come to an agreement on water cuts to address increasing shortages. [42] The most recent federally-imposed deadline was

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divert and collect it. . . . Because of that, snowpack data tells a somewhat deceptive story."); *see also* Neel Dhanesha, *California's Deadly Floods Won't Break the Megadrought*, VOX (Jan. 6, 2023, 11:40 AM), https://perma.cc/KHX6-XZZ5 (listing the reasons greater rainfall won't resolve the megadrought, including: too much water at once, too little water altogether, and snowpack melting earlier than it used to due to climate change).

37. *See* Hager, *supra* note 36 (explaining how planning water policies around precipitation means only planning a year at a time, which is "just not enough time to make changes that you would have to make . . . ." (internal quotations omitted)).

38. *See infra* Part 0, 0–0.

39. For an explanation of acre-feet, *see infra* note 101 and accompanying text.

40. Jeff Gardner, *Deception and Science in the Colorado River*, DESERT TIMES (JAN. 1, 2022), https://perma.cc/6EDY-83JR (last updated Oct. 11, 2022) ("The problem is that the Colorado River only carries around 12 to 13 million acre feet of water.").

41. *See* Abrahm Lustgarten, *Use It or Lose It*, PROPUBLICA (June 9, 2015), https://perma.cc/H23M-ZGCQ ("Use it or lose it clauses . . . give the farmers, ranchers and governments holding water rights a powerful incentive to use more water than they need. Under the provisions of these measures, people who use less water than they are legally entitled to risk seeing their allotment slashed." (internal quotations omitted)).

42. *See* Joshua Partlow, *As the Colorado River Dries Up, States Can't Agree on Saving Water*, WASH. POST (Jan. 31, 2023, 12:22 PM),

January 31, 2023, which resulted in split proposals being offered by six of the Basin states on one side, and California on the other.[43] Tensions continued to rise "as Arizona and Nevada have already endured a previous round of water reductions."[44] In May 2023, the Lower Basin States finally reached an agreement, but one that will at best only last until 2026.[45]

The compounding effects of the megadrought are numerous and worrying. Given the increasingly dry conditions, wildfires,[46] water-pumping-induced sinkholes,[47] and the drought conditions threatening "dead pool,"[48] have surpassed all historical records.

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https://perma.cc/9YUL-86FZ (last updated Feb. 1, 2023, 1:09 PM) ("For the second time in six months, states that depend on the Colorado River to sustain their farms and cities have failed to reach an agreement on restricting water usage . . . .").

43. *See* The Daily, *7 States, 1 River and an Agonizing Choice*, *supra* note 3, at 2:38 (describing how the two most recent federal deadlines imposed on the Basin states have passed as of January 31, 2023, and the fact state negotiators believe it is "extremely unlikely" they will reach an agreement).

44. *See* Tony Briscoe, *As Talks on Colorado River Water Falter, U.S. Government Imposes New Restrictions*, L.A. TIMES (Aug. 16, 2022), https://perma.cc/W8BZ-PNYJ (reporting on the growing severity of the drought and run-on effects of federal management amid tensions between affected states).

45. *See* Christopher Flavelle, *A Breakthrough Deal to Keep the Colorado River from Going Dry, for Now*, N.Y. TIMES (May 22, 2023), https://perma.cc/J74V-KCTS ("The agreement, struck over the weekend runs only through the end of 2026 and still needs to be formally adopted by the federal government. At that point, all seven states that rely on the [Colorado] river . . . could face a deeper reckoning, as its decline is likely to continue."); Rachel Becker, *Colorado River Cut Back—Except for California*, CALMATTERS (Aug. 16, 2022), https://perma.cc/A4TV-5FY5 (explaining how and why California was not similarly impacted by initial or secondary federally-imposed water cuts with the other Lower Basin states).

46. *See* NAT'L OCEANIC & ATMOSPHERIC ADMIN., *Wildfire Climate Connection*, https://perma.cc/48FU-WPJB (last updated Jul. 24, 2023) ("Drought and persistent heat set the stage for extraordinary wildfire seasons from 2020 to 2022 across many western states, with all three years far surpassing the average of 1.2 million acres burned since 2016.").

47. *See* Trevor English, *How Over-Pumping of Underground Aquifers Can Cause Land to Sink*, INTERESTING ENG'G (July 29, 2020, 11:33 AM), https://perma.cc/G2ES-DFZD ("When over-pumping occurs, large swaths of soils underground that previously were saturated with water are now left dried out permanently. . . . [such that] now-dry soil starts compacting down and down. . . . [W]hat we've seen in California . . . is the dropping of the surface elevation over a period of years, often by hundreds of feet or meters.").

48. *See* Anna Skinner, *What Happens if Lake Powell Becomes a 'Dead Pool'?*, NEWSWEEK (Jan. 20, 2023, 11:19 AM), https://perma.cc/WN3E-C3JD

Not only this, but the western states, and especially California's Imperial Valley, grow almonds, alfalfa, and other forage grasses, which all require significant amounts of water to cultivate.[49] All these factors have contributed to falling water levels in Lakes Mead and Powell—which supply and regulate the water of the Lower Colorado River Basin States, and—leading to sensational news headlines.[50] As of late February 2023, Lake Mead was at just 29% capacity, the lowest level since it began filling in the 1930s, while Lake Powell is only 23% full, the lowest since it filled in the 1960s.[51]

1. Poor Arizona

Perhaps no Basin State has been as historically and severely impacted as that of Arizona. Since 2000, Arizona's population has exploded nearly 50% without any signs of stopping.[52] Indeed, Arizona's recent identity has been associated

("As the drought continues and global warming evaporates water supplying the reservoirs, each reservoir isn't far from dead pool, which is when the water level is too low to flow downstream or power the turbines that provide hydroelectric power.").

49. *See* Alastair Bland, *Growers Brace to Give up Some Colorado River Water*, CALMATTERS (Jan. 17, 2023), https://perma.cc/7XT3-BC95 ("Alfalfa, [the Imperial Valley's] leading crop, is notorious for using lots of water, as much as 10 acre-feet per acre each year. Statewide, large acreage coupled with a long growing season make alfalfa the largest agricultural user of water."); Julian Fulton et al., *Water-Indexed Benefits and Impacts of California Almonds*, 96 ECOLOGICAL INDICATORS 711, 713 (2019) (finding a single California almond requires 3.2 gallons of water in order to cultivate).

50. *See* Raymond Zhong, *The Grand Canyon, a Cathedral to Time, Is Losing Its River*, N.Y. TIMES (Jun. 6, 2023), https://perma.cc/ERG5-65TW ("Our species' mass migration to the West was premised on the belief that money, engineering and frontier pluck could sustain civilization in a pitilessly dry place. More and more, that belief looks as wispy as a dream."); Joe Hernandez, *Authorities Find Human Remains in Lake Mead Twice in One Week*, NPR (May 9, 2022, 3:33 PM), https://perma.cc/5UEM-V5PY ("Authorities had warned the public that Lake Mead's falling water levels could lead to the discovery of more bodies hidden below the surface."); *see also*, *supra* note 15, at 12:50 (explaining how some western state residents had to use Craigslist to find functioning showers to properly bathe).

51. *See* Fleck, *supra* note 9 ("The precarious state of the two reservoirs is why the U.S. Bureau of Reclamation called last year for deep cuts in water use—as much as 30 percent—from the seven states that depend on the river . . . .").

52. Christopher Flavelle, *Arizona, Low on Water, Weighs Taking It From the Sea In Mexico.*, N.Y. TIMES (Jun. 10, 2023), https://perma.cc/5NSC-C57A.

with growth and development.[53] At the same time, the state was abruptly forced to end further development in cities like Phoenix due to extreme water shortages.[54] Arizona already had some of the strictest water regulations in the country, requiring new developments to show a 100-year supply of water before they sell lots or break ground.[55] Because of these recent developments, "housing costs have already increased by 51 percent over the past four years," seriously harming current and future residents.[56] Not only are housing prospects impacted, but basic living conditions such as bathing, showering, and flushing toilets have been threatened to a shocking degree.[57] For many, water bills exceed electricity costs and at times are nearly comparable to mortgage payments.[58]

In a development that ventures almost into the ridiculous, Arizona state officials have started to seriously consider a $5

53. *See* The Daily, *Arizona's Pipe Dream*, N.Y. TIMES, at 5:25 (Sept. 1, 2023), https://perma.cc/VUM4-BQED [hereinafter The Daily, *Arizona's Pipe Dream*] (noting a shift that impacts Arizonans' ability to rely on enough water to prepare their food, bathe, wash their clothes, and water their lawns would depart from the identity and underpinning of growth and economic development the state has gained for itself).

54. *See* Jack Healey, *A Puzzle in Arizona's Boom Towns: How to Keep Growing With Less Water*, N.Y. TIMES (Jun. 12, 2023), https://perma.cc/4H9B-YBFQ ("[A] new state study found that groundwater supplies in the Phoenix area were about 4 percent short of what is needed for planned growth over the next 100 years."); Press Release, Ariz. Dept. of Water Resources, Phoenix AMA Groundwater Supply Updates, https://perma.cc/R7N4-5RUD (notifying citizens and developers that there is no longer enough groundwater for housing construction approved in the Phoenix area, putting an end to further development and growth); Christopher Flavelle and Jack Healey, *Arizona Limits Construction Around Phoenix as Its Water Supply Dwindles*, N.Y. TIMES (Jun. 1, 2023), https://perma.cc/2EX5-LAHC ("And the water shortage could be more severe than the state's analysis shows because it assumes that Arizona's supply from the Colorado River would remain constant over the next 100 years, something that is uncertain at best.").

55. Healey, *supra* note 54.

56. *See id.* ("[Price increases] sap Arizona's appeal as an affordable destination for businesses and new residents.").

57. *See* Kristof, *supra* note 2 ("When interviewing people in their homes here, I didn't have the heart to ask them if I could use the bathroom. There's no water to spare, so some families flush only once a day. As for showers, they're rationed and timed.").

58. *Id.*

billion pipeline project that would reach from Mexico to Phoenix, covering 200 miles and climbing 2,000 feet in elevation.[59]

B. *The Future of the "Big Three" Principles*

There are three overarching but distinct common law approaches to allocating water rights in the United States. The first is the riparian doctrine, also known as the "reasonable use" doctrine, which governs water disputes in eastern, southern, and midwestern states.[60] Under the riparian system, "a landowner . . . has the right to use the water by any use that is reasonable with respect to all others who also have a right to that water."[61] These rights are based in ownership of the land that borders a water source. The reason the riparian doctrine is primarily used in the East is because it does not logically lend itself to western climate. It was an unworkable doctrine in the West due to lack of water and the need for irrigation.[62]

The second doctrine of water law, favored in the western states, is the doctrine of "prior appropriation," also known as "first-in-time, first-in-right." Prior appropriation became the bedrock of early western expansion in the United States because its principles facilitated settlement and development of western

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59. *See* Flavelle, *supra* note 52 ("[The pipeline] would flood the northern Gulf of California with waste brine . . . . carve a freeway-sized corridor through a U.S. national monument and UNESCO site . . . . [with] water provided [costing] roughly ten times more than water from the Colorado River.").

60. *See* Colorado v. New Mexico, 459 U.S. 176, 194 n.4 (1982) ("Under the riparian doctrine, recognized primarily in the eastern, midwestern and southern states, the owner of land contiguous to a watercourse is entitled to have the stream flow by or through his land undiminished in quantity and unpolluted in quality, except that any riparian proprietor may make whatever use of the water that is reasonable with respect to the needs of other appropriators.").

61. E. Tate Crymes, *Who Gets the Drought: The Standard of Causation Necessary in Cases of Equitable Apportionment*, 73 MERCER L. REV. 423, 433 (2021).

62. Bernadette R. Nelson, *Muddy Water Blues: How the Murky Doctrine of Equitable Apportionment Should Be Refined*, 105 IOWA L. REV. 1827, 1834 (2020) ("The riparian system did not allow for irrigation . . . [and] was ill adapted for the western landscape. It required land ownership along a watercourse in order to claim rights to the water, which was nearly impossible in the West where the vast majority of land was not located along water bodies.").

lands.[63] This doctrine was designed to "efficiently and effectively divide property rights" of water.[64] Under the prior appropriation doctrine, "the rights of water users are ranked by seniority—first in time to use the rights—and . . . are ranked and measured by actual use of the water."[65]

The third doctrine, called "equitable apportionment," is the mechanism that the Supreme Court traditionally uses to resolve water disputes between states.[66] A paradigmatic example of the Court's equitable apportionment doctrine is the 1907 case, *Kansas v. Colorado*.[67] In that case, the Court first articulated the doctrine when it resolved a dispute between Kansas and Colorado over the Arkansas River.[68] The Court held that the river should be allocated "according to the equitable apportionment of benefits between the two states resulting from

63. *See* Reed D. Benson, *Alive but Irrelevant: The Prior Appropriation Doctrine in Today's Western Water Law*, 83 U. COLO. L. REV. 675, 676–77 (2012) ("[Prior Appropriation] was soon embraced by the courts and legislatures of the western states and territories . . . by the early twentieth century, many western rivers were fully apportioned." (internal quotations omitted)).

64. *See* Crymes, *supra* note 61, at 430 ("Traditionally, western states are faced with a more arid climate than states in the east. The foundations of the prior appropriation doctrine are built upon the anxieties surrounding the allocation of this scarce resource.").

65. *See id.* ("Most of the states located west of the 100th meridian follow this doctrine and rights to water are acquired by diverting water and using it for a beneficial purpose.").

66. *See* Connecticut v. Massachusetts, 282 U.S. 660, 670–71 (1931) ("[T]he principles of right and equity shall be applied having regard to the equal level or plane on which all the States stand, in point of power and right, under our constitutional system and that, upon a consideration of the pertinent laws of the contending States and all other relevant facts, this Court will determine what is an equitable apportionment of the use of such waters." (internal quotations omitted)).

67. 206 U.S. 46 (1907).

68. *See* Robert Glennon & Jacob Kavkewitz, *"A Smashing Victory"?: Was* Arizona v. California *a Victory for the State of Arizona?*, 4 ARIZ. J. ENV'T. L. & POL'Y 1, 29 (2013) ("The *Kansas v. Colorado* decision established the Court's jurisdiction over interstate water disputes and announced a sharing rule, which was essentially a crude cost-benefit analysis of alternative water uses.").

the flow of the river."[69] Though the doctrine changed over time, it still governs interstate water disputes today.[70]

To request the exercise of equitable apportionment by the Court, a state must demonstrate: (i) a real, substantial injury; and (ii) equitable apportionment of resources.[71] When ruling on a water dispute, the Court analyzes various factors, including the doctrine governing the states' water management.[72] Ultimately, the Court must "equally balance [the] rights of each State while establishing an outcome that brings justice for both."[73]

While these doctrines broadly apply to water rights and water disputes between the states, the Lower Basin is a unique case. Currently, the most influential and relevant litigation to come out of the Lower Basin state water disputes is that of the 1964 case *Arizona v. California*.[74] At the time, the decision was seen as a major victory for Arizona's water claims, securing the

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69. Burke W. Griggs, *Interstate Water Litigation in the West: A Fifty-Year Retrospective*, 20 U. DENV. WATER L. REV. 153, 162 (2017) (internal quotations omitted)).

70. *See* Bean v. Morris, 221 U.S. 485, 497 (1911) (refusing to consider local water law as a factor in equitable apportionment); Wyoming v. Colorado, 259 U.S. 419, 455 (1922) (integrating state water laws into equitable apportionment); Nebraska v. Wyoming, 325 U.S. 589, 618 (1945) (downgrading local law to a "guiding principle"); Mississippi v. Tennessee, 595 U.S. 15, 20 (2021).

71. *See* Rebecca Yang, *The American Southeast and South Sudan: The Emergence of Environmental Factors in Transboundary Water Law*, 38 N.C. J. INT'L L. 233, 239–40 (2012) (detailing how the first prong requires proof by clear and convincing evidence of a real and substantial injury or damage while the second prong looks to "ameliorate present harm and prevent future injuries to the complaining State . . . ." (internal quotations omitted)).

72. *See* Colorado v. New Mexico, 459 U.S. 176, 183–84 (1982) (noting that the laws of contending states are an important consideration in the equitable apportionment analysis and that when both states recognize prior appropriation, as is the case here, "priority becomes the guiding principle in an allocation between competing states." (internal quotations omitted)).

73. Crymes, *supra* note 61, at 429 ("However, equitable apportionment is directed at alleviating the complaining State's present harm and preventing its alleged future harm. Equitable apportionment is not used to compensate a State for a prior injury.").

74. 376 U.S. 340 (1964); *see also* Lawrence J. MacDonnell, Arizona v. California*: Its Meaning and Significance for the Colorado River and Beyond After Fifty Years*, 4 ARIZ. J. ENV'T. L. & POL'Y 88, 91 (2013) ("The legal battles between Arizona and California in the U.S. Supreme Court represent one of the great contests over use of water in U.S. history.").

state "a substantial water supply."[75] But this decision, while the first and arguably only victory for Arizona, has not finally settled the Lower Basin water disputes. Ultimately, the Colorado River's "inherent inconsistencies combined with increased variability in future years due to climate change and the looming issue of the Upper Basin's [water] rights" meant the water war was only beginning.[76] While these principles are traditionally used by the Supreme Court to resolve interstate water disputes, the Lower Basin States' unique legal framework must be explored further.

II. THE LAW OF THE RIVER

A water dispute's life begins with the Law of the River, which is a complex collection of numerous interstate compacts, federal laws, caselaw, and an international treaty.[77] Chief among these are the governing interstate compacts, which are simply contractual agreements between multiple states regarding specific policy objectives.[78] While this patchwork of governing law tends to create an ambiguous, complex framework,[79] interstate compacts are the preferred mechanism used to handle regional issues like water disputes.[80] Since 1922,

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75. *See* Glennon & Kavkewitz, *supra* note 68, at 36 (describing the decision as "the first major setback to California's water seekers and . . . a tremendous victory for Arizona . . . help[ing] secure for Arizona a substantial water supply, thereby removing the only obstacle to growth and prosperity in Arizona." (internal quotations omitted)).

76. *Id.* at 34.

77. *See* Jason A. Robison & Douglas S. Kenney, *Equity and the Colorado River Compact*, 42 ENV'T L. 1157, 1159 (2012) ("Paralleling the significance of the Colorado River to the U.S. Southwest is the complexity of the body of laws devised for its governance.").

78. *See Interstate Compact*, BALLOTPEDIA, https://perma.cc/37X7-QZ8W (last updated Mar. 17, 2023) ("An interstate compact is a contractual arrangement made between two or more states in which the assigned parties agree on a specific policy issue and either adopt a set of standards or cooperate with one another on a particular regional or national matter.").

79. *See* Warren J. Abbott, *California Colorado River Issues*, 19 PAC. L. J. 1391, 1392 (2013) (listing the regulatory measures that ultimately govern the Colorado River, which serves as "the source and the solution to the many allocation problems today.").

80. *See* Arizona v. California, 373 U.S. 546, 564 (1963) ("[W]e are mindful of this Court's often expressed preference that, where possible, States settle

the Upper and Lower Basin States have pursued their own regional agreements under one of the most important cornerstones of the Law of the River—the Colorado River Compact.[81] The other significant legal cornerstone of the Colorado River is the doctrine of Present Perfected Rights ("PPRs").[82] More recent temporary agreements have arisen within this enduring structure of the Law of the River to manage water supply at times of high demand, low supply, and unprecedented drought.[83]

As the realities of the drought conditions and water reductions demonstrate,[84] the self-interest of the drought-afflicted states and the legal ambiguities of the governing interstate compacts lead to the conclusion that, without genuine efforts, interstate solutions have and will continue to fail to address water inequity. This Part describes and analyzes the deficiencies of interstate attempts to resolve the water crisis through: (A) present perfected rights; (B) historical compacts; and (C) recent interstate agreements.

A. *Present Perfected Rights*

The concept of Present Perfected Rights ("PPRs") perfectly illustrates how legal doctrines attempting to solve the issues of Colorado River water usage hinder equitable and commonsense apportionment for the Lower Basin States. Generally speaking, PPRs are the most senior water rights of water users on the Colorado River, owned by individuals, states, and the federal government, and curtailed last in times of water shortage.[85]

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their controversies by mutual accommodation and agreement." (internal quotations omitted)).

81. *See* Emily Halvorsen, *Compact Compliance as a Beneficial Use: Increasing the Viability of an Interstate Water Bank Program in the Colorado River Basin*, 89 U. COLO. L. REV. 937, 948 (2018) ("The Compact divides the Colorado River Basin in two: the Upper Basin and the Lower Basin . . . ."); *see generally* Colorado River Compact, 70 Cong. Rec. 324 (1928).

82. *See* Jonathan R. Schutz, *Present Perfected Rights: The Most Senior Undefined Water Rights on the Colorado River*, 16 U. DENV. WATER L. REV. 381, 381 (2013) ("[PPRs] are water rights on the Colorado River that predate the compacts, making them the most senior water rights on the river.").

83. *See infra* Part 0.

84. *See supra* Part 0.

85. *See* Schutz, *supra* note 82, at 381–83, 388 (describing PPRs as "high-priority water rights" which stem from state law and include "land that the

Because PPRs are preeminent among the foundational water rights on the Colorado River, they also tend to be the least legally assailable.[86] And while PPRs appear well-defined, they are actually muddled when explored in depth.[87] This is compounded by the sparse amount of jurisprudence addressing and interpreting PPRs.[88]

While Article VIII of the Colorado River Compact,[89] and Section VI of the Boulder Canyon Project Act[90] articulated the term "present perfected rights" in the 1920s, the Supreme Court in *Arizona v. California*[91] eventually defined a PPR as,

[A] water right acquired in accordance with State law, which right has been exercised by the actual diversion of a specific quantity of water that has been applied to a defined area of land or to definite municipal or industrial works, and in addition shall include water rights created by the reservation of mainstream water for the use of federal establishments under federal law whether or not the water has been applied to beneficial use.[92]

The Court then declared that the rights defined in its judgment existed as of June 25, 1929.[93] Once the Supreme Court set forth how to determine PPRs, each Lower Basin State was required to prove possession of PPRs, which could be quantified

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federal government withdraws from the public domain" to fulfill federal water policies or needs).

86. *Id.* at 381 ("As a general matter, PPRs are the most senior rights on the Colorado River and are the last rights subject to curtailment in times of shortage.").

87. *See id.*, at 385 ("While on the surface PPRs are well-defined, high-priority water rights . . . they quickly become less certain in the details.").

88. *See id.* ("Beyond *Arizona v. California*, there is very little case law addressing PPRs.").

89. Colorado River Compact, art. VIII (1922) (describing present perfected rights as water rights claimed by "appropriators or users of water" and protected by the Compact).

90. Boulder Canyon Project Act § 6 (1928) (noting that the dam and reservoir provided in section 1 of the Act would be used in part to satisfy the present perfected rights pursuant to Article VIII of the Colorado River Compact).

91. 376 U.S. 340 (1964).

92. *Id.* at 341.

93. *See id.* ("'Present perfected rights' means perfected rights, as here defined, existing as of June 25, 1929, the effective date of the Boulder Canyon Project Act.").

and calculated to establish baseline curtailment protections.[94] Nonetheless, several issues immediately arose when states attempted to determine their PPRs. Many parties asserting PPRs were unable to find proof of their water usage prior to 1929, and even if they did find such proof, it was unclear whether calculations had to be proven for individual parcels or for district-wide use.[95] Additionally, it was unclear to which states the PPRs articulated in *Arizona v. California* actually applied.[96] But the greatest issue regarding PPRs was the simple fact that they necessarily benefited California more than Arizona or Nevada.

California was the thirty-first state to join the Union, admitted in 1850.[97] Nevada and Arizona were admitted in 1864 and 1912, respectively. [98] While 14 years may seem an inconsequential amount of time, it led to a sharp discrepancy when determining which parties in each state were entitled to PPRs, and the relevant priority dates for those PPRs. Indeed, even construing early priority dates liberally, California had a significant advantage over Arizona and Nevada in which to

94. *See* Schutz, *supra* note 82, at 384 ("In Article VI of its 1964 Decree in *Arizona v. California*, the Supreme Court set forth the manner in which . . . PPRs would be determined, stating that within two years Arizona, Nevada, and California and the federal government should each present to the Court a list of the PPRs in their state.").

95. *See id.* (detailing the numerous and consequential issues in how states could determine PPRs).

96. *See id.* at 387

> It is unclear whether *Arizona v. California* is binding on New Mexico and Utah, or on any of the Upper Basin states. . . . Furthermore, *Arizona v. California* only addressed the Boulder Canyon Project Act, not the Upper Colorado River Basin Compact. It is unclear whether the date for perfection of PPRs is [1922 or 1929].

97. *See California 170th Anniversary of Statehood (1850): September 9, 2020*, U.S. CENSUS BUREAU (Sept. 9, 2020), https://perma.cc/S3XP-X7K7 (last revised Dec. 16, 2021) ("California was admitted to the Union on September 9, 1850, as the 31st state.").

98. *See History of Nevada*, STATE NEV. JOINT INFO. CTR., https://perma.cc/QE3C-DK6S ("Nevada became the 36th state on October 31, 1864 . . . ."); *see also New Mexico and Arizona Statehood Anniversary (1912-2012)*, THE CTR FOR LEGIS. ARCHIVES, https://perma.cc/4SSX-NRJ8 (last reviewed Aug. 17, 2016) ("[O]n February 14, 1912 Arizona became the 48th state in the Union.").

amass a large number of PPRs.[99] Ultimately, California amassed 3,019,573 acre-feet of water designated as PPRs, with Nevada's PPRs at 13,034 acre-feet, and Arizona's at 1,077,971 acre-feet.[100] For some perspective, California's approximately three million acre-feet of water is the equivalent of five showers per person on the planet.[101] Taking into account the various states' difficulties in assessing PPRs, this system inherently protects California from water curtailment far more than its neighbors for no other reason than the fact that California was established first. The far-reaching consequences of this unequal framework, which became the cornerstone of the Law of the River, have allowed interstate compacts to develop similarly inequitable outcomes. And, while it would be wise for the River Basin states to address the nature and calculation of PPRs with equity in mind, it is unlikely that the issues will be resolved because of the entrenched, advantageous positions occupied by the Upper Basin states and California.

B. *The Early Compacts*

While foundational legal doctrines like PPRs or prior apportionment hindered the equitable development of western water law, the initial Colorado River compacts attempted to flesh out contractual agreements between the states. The Colorado River Basin states understood early on that, because of their water needs and the interstate nature of the Colorado River, they would have to make agreements on sharing and

99. *See* Arizona v. California, 439 U.S. 419, 423–36 (1979), *amended by* 466 U.S. 144 (1984) (detailing the PPRs for the Lower Basin States through tracking of diversions, net acres, and priority dates).

100. *See* Schutz, *supra* note 82, at 385 ("In its 1979 decision, the Court determined the PPRs in California (3,019,573 acre-feet), Nevada (13,034 acre-feet), and Arizona (1,077,971 acre-feet). The Court also determined the parties in each state entitled to PPRs and the priority dates of each party's PPRs.").

101. *See* Nick Stockton, *Here's How Much Water California Needs to Save This Year*, WIRED (Apr. 1, 2015, 7:56 PM), https://perma.cc/R67R-DB9Y ("An acre foot is literally an acre of land covered with one foot of water. Multiplied by 1.5 [half of California's three million acre-feet of water designated by PPRs] million, that's about 490 billion gallons of water[,] . . . 7.1 billion [bath tubs,] . . . [o]r about 500 billion tooth brushing sessions. . . . That's roughly the same volume as 1,766 Empire State Buildings.").

apportionment.[102] The three most significant agreements to arise from interstate negotiations were the Colorado River Compact of 1922 (the "Compact"),[103] the Boulder Canyon Project Act of 1928,[104] and the Colorado River Basin Project Act of 1968.[105]

1. The Colorado River Compact of 1922

On November 22, 1922, Arizona, California, Nevada, New Mexico, Utah, and Wyoming negotiated the Compact,[106] the first interstate compact in the United States.[107] Many legal scholars have since recognized the Compact as seminal to the development of the Law of the River and as the basis for future agreements.[108] Generally speaking, the Compact divides the states into Upper Basin and Lower Basin, each of which receives an equal portion of the river water.[109] Among other provisions, the Compact provides that each Basin is allowed the beneficial consumptive use of 7,500,000 acre-feet of water per year and

102. *See* Halvorsen, *supra* note 81, at 947 ("Because the Colorado River is not confined to state lines, multiple interstate agreements have been made over the years regarding Colorado River water sharing and apportionment.").

103. Colorado River Compact (1922).

104. Boulder Canyon Project Act, 43 U.S.C. § 617 (1928).

105. Colorado River Basin Project Act, 43 U.S.C. §§ 1501–56 (1968).

106. Colorado River Compact (1922).

107. *See* Halvorsen, *supra* note 81, at 948 ("The Compact was the first interstate compact in the United States.").

108. *See, e.g.*, *id.* at 948 ("The Colorado River Compact of 1922 is the seminal piece of water legislation in the West. . . . [A]nd its purpose was to provide for the equitable division and apportionment of the use of the waters of the Colorado River System." (internal quotations omitted)); Abbott, *supra* note 79, at 1394 ("The Colorado River Compact is the cornerstone to the Law of the River and was intended to meet or assist in meeting several Colorado River Basin needs. The Lower Basin states . . . desperately needed river regulation, flood control and water storage for development."); Eric L. Garner & Michelle Ouellette, *Future Shock—The Law of the Colorado River in the Twenty-First Century*, 27 ARIZ. ST. L.J. 469, 471 (1995) ("The Compact . . . is perhaps the most important element of the Law of the River.").

109. *See* Garner & Ouellette, *supra* note 108, at 471 (describing how the Compact splits the two regional divisions, which receive 7,500,000 acre-feet of water per year).

that neither Basin may hoard or waste water.[110] Unfortunately, several issues immediately arose, some of which would play out over the coming decades.

First, an atmosphere of distrust and conflict permeated the negotiation process. Distinguishing itself as the "thirstiest" state, California "had already gained a reputation for shady dealings in water rights negotiations . . . [that] did not help to create good will."[111] The general distrust underlying the negotiation process was exacerbated by the Supreme Court's decision in *Wyoming v. Colorado*.[112] In an opinion decided just six months prior to the completion of the Compact's negotiations, the Court held that prior apportionment applied to a conflict over interstate rivers.[113] Because prior appropriation's "first in time, first in right" policy was adopted by California early on in its statehood, there was a concern that it would make greater and greater water acquisitions.[114] The ruling alerted the six other Basin states to the urgency of guarding against California's "rapidly increasing water diversions."[115]

Second, the ambiguous language of the Compact leaves its principles of apportionment unexplained. The term generally used for determining water apportionment is "beneficial consumptive use," rather than actual ownership of water.[116] Yet

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110. *See* Abbott, *supra* note 79, at 1396 (noting key provisions of the Colorado River Compact, such as how "neither Basin is to hoard or waste water.").

111. *See* Glennon & Kavkewitz, *supra* note 68, at 5 ("Arizona's angst with regard to the Compact was the prospect of losing out to California. It did not want its economic growth to be stunted so that Southern California could continue to prosper.").

112. 259 U.S. 419 (1922), *vacated*, 353 U.S. 953 (1957).

113. *See id.* at 470 ("The cardinal rule of the [prior appropriation] doctrine is that priority of appropriation gives superiority of right. Each of these states applies and enforces this rule in her own territory . . . . The principle on which it proceeds is not less applicable to interstate streams and controversies than to others.").

114. *See* Glennon & Kavkewitz, *supra* note 68, at 6 (pointing to a 1922 Supreme Court decision, in which the Court found that states must apply the prior appropriation doctrine to interstate water disputes when both states subscribed to that doctrine).

115. *See id.* ("This ruling alerted the Upper Basin States of the urgency of protecting themselves . . . and was undoubtedly influential in the Basin States representatives finally coming to an agreement.").

116. Colorado River Compact, art. III, § a (1922) ("There is hereby apportioned from the Colorado River System . . . the exclusive beneficial

the term "beneficial consumptive use" is never actually defined. Whether the Compact's negotiators intended to suggest a riparian-esque principle is unclear, although some of the provisions include mechanisms to create an equal distribution, which suggests this possibility.[117] Additionally, the Compact further developed the PPR system, the inherent issues of which are described above.[118] Regardless, the undefined standard of "beneficial consumptive use" has only contributed to the vagaries of interpreting and implementing the Compact today.

Third, the data used for the apportionment was simply inaccurate. When the Compact was negotiated in 1922, the parties believed, and the measurements as of that time demonstrated, that the River could provide enough water for each state, with a surplus remaining.[119] But the Compact apportioned water to the Upper and Lower Basins based on data from 1899 to 1922, now considered to be an "unusually wet period."[120] Unfortunately, this apportionment cannot be fairly sustained during unusually dry periods, like from 2000 to 2015, the fifth driest sixteen-year period within the past 1,200

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consumptive use of 7,500,000 acre-feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist."); *see* Abbott, *supra* note 79, at 1396 ("This phrase, 'beneficial consumptive use,' appears repeatedly in Law of the River documents and plays a major role in the analysis of many Colorado River issues.").

117. *See* Abbot, *supra* note 79, at 1396 ("The Upper Basin is also obligated to release 75,000,000 acre-feet of water every continuing 10-year period at . . . the dividing line between the two basins.").

118. *See supra* Part 0.

119. *See* Garner & Ouellette, *supra* note 108, at 472 ("From 1906 to 1921, the average natural flow of the River was 18 Million acre-feet. . . . However, the average natural flows from 1906 to 1990 were only 15.2 million acre-feet. Therefore, the surplus expected to make any supply deficit no longer exists, placing water supplies in jeopardy.").

120. *See* Douglas Kenney et al., *The Colorado River and the Inevitability of Institutional Change*, 32 PUB. LAND & RES. L. REV. 103, 131 (2011) ("The data prompted negotiators to believe the river featured an average virgin flow of (at least) 16.4 MAF [million acre-feet] per year.").

years.[121] Because of these water level discrepancies, the Colorado River is now significantly over-allocated.[122]

Perhaps anticipating this and other issues, Arizona refused to sign the initial Compact.[123] As such, the negotiators did not reach a final agreement on apportionment between the States, causing the Upper Basin to create its own regional compact, and the Lower Basin to resolve its disputes via Supreme Court interpretation of a Congressional act.[124] Most concerning is the fact that underlying all these issues, the Compact appears designed to be unchanging and has been consistently treated as such.[125] This notion rings particularly true considering the fact that the Compact and its progeny have been used as the basis for both federal mediation[126] and Supreme Court decisions[127] in Lower Basin water disputes. Given that this Compact between the Basin states is the cornerstone of current western water law, serious questions persist about whether it could ever create equitable outcomes on the state level.

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121. *See* Thomas Buschatzke & Nicole D. Klobas, *Ensuring Arizona's Future Today: The Lower Basin Drought Contingency Plan and Its Implementation in Arizona*, 8 ARIZ. J. ENV'T L. & POL'Y 29, 29 (2018) (describing how the Colorado River was allocated during one of the highest flow periods in its known history).

122. *See* Kenney et al., *supra* note 120, at 131 ("Exacerbating the problem are apportionment commitments under the Treaty with Mexico, and the Supreme Court's decision to exclude Lower Basin tributaries from the basic apportionment.").

123. *See* Glennon & Kavkewitz, *supra* note 68, at 7 ("Six state legislatures unconditionally approved the Compact; Arizona did not.").

124. *See* Abbott, *supra* note 79, at 1396–97 ("The negotiators . . . were unable to agree on an apportionment between the states within each Basin, but this was subsequently resolved by another compact for the Upper Basin and by an act of Congress, as interpreted by the Supreme Court for the Lower Basin.").

125. *See* Steve Ferguson, *Legal Solutions in the Face of an Impending Water Crisis: Re-Evaluating the Southwest's Approach to Water Management*, 40 U. LA VERNE L. REV. 109, 120 (2019)

> Some commentators have said the Colorado River Compact is more like a statute etched in stone—not subject to revisions and periods updates—than as a contract whose terms are open to renegotiation. This view is consistent with how the Colorado Compact has been viewed by politicians, legislatures, and judges thus far.

126. *See infra* Part 0.

127. *See infra* Part 0.

2. The Boulder Canyon Project Act of 1928

After the groundwork for regulation of the Colorado River Basin was laid by the Basin states, but before the Compact's final ratification, Congress considered the development of a regulatory storage and hydroelectric project throughout the whole Basin.[128] Initially, these legislative attempts failed because the Upper Basin states wanted Congress to impose limits to California's apportionment of water. [129] The states feared that if Congress implemented waterway controls before the Colorado River Compact was ratified, California would take more water than was contemplated in the Compact.[130] Eventually, the Boulder Canyon Project Act ("BCPA") balanced the Lower Basin's need for canal and storage projects with the Upper Basin's desire for protection against water grabs.[131]

The BCPA included two significant provisions that would impact water allocation to the Lower Basin States. Chiefly, and when the water was available, the distribution of water was to be as follows: 2,800,000 acre-feet per year would be allocated to Arizona, plus half of any surplus water. [132] This number would be reduced by 4% if Nevada entered into a surplus contract with the Secretary of the Interior. [133] 4,400,000 acre-feet per year plus half of any surplus went to California. Finally, 300,000 acre-feet per year plus 4% of any water surplus went to Nevada.[134] In anticipation of Arizona's disapproval of the BCPA, the Act would become effective either if all seven Basin states ratified it or, in the alternative, with ratification by six states including California, but only if California's state legislature passed an act specifically limiting itself to its 4,400,000 acre-feet

128. *See* Abbott, *supra* note 79, at 1399 ("The Boulder Canyon Project Act authorized the construction and operation of a massive storage and hydroelectric project in a canyon on a stretch of the Colorado River . . . .").

129. *See* Garner & Ouellette, *supra* note 108, at 474 (detailing the concerns and considerations of the Upper Basin states as they related to a perceived overuse of water by California).

130. *Id.*

131. *Id.*

132. *See* Abbott, *supra* note 79, at 1400 (describing the Supreme Court's interpretation of the BCPA allocation terms in *Arizona v. California*).

133. *Id.*

134. *Id.*

apportionment.[135] In 1929, California's legislature did so when the state "irrevocably and unconditionally agree[d] with the United States and for the benefit of the other Basin states to comply with the limitation" of its water allotment.[136]

The legacy of the BCPA was division among the states and federal intervention in the water rights in question in the Lower Basin. While the BCPA attempted to balance the concerns of the Basin states, particularly as they related to California, the ultimate outcome was the exclusion of Arizona, a member state. Expediency came at the cost of an act that did not balance every state's concern equally and would only be resolved once the Supreme Court stepped in to resolve the issue in *Arizona v. California*. Importantly, the BCPA represented a dramatic increase in Congressional oversight of the Colorado River, specifically in its allocation, regulation, and management.[137] This involvement helped cement the basis for future federal actions surrounding the Lower Basin States' water apportionments.

3. The Colorado River Basin Project Act of 1968

In 1968, following the result in *Arizona v. California*, Congress authorized the implementation of the Central Arizona Project ("CAP") through the Colorado River Basin Project Act ("CRBPA"), which allowed Arizona to divert water along the Colorado River.[138] Previously, the dispute over allocation between Arizona and California had prevented the CRBPA from being functional.[139] Besides giving several directives to the Secretary of the Interior to coordinate operation of federal

135. *See id.* (noting the approval conditions contingent upon California if and when one state—namely, Arizona—did not agree to ratify the BCPA).

136. *Id.* at 1401.

137. *See* James S. Lochhead, *An Upper Basin Perspective on California's Claims to Water from the Colorado River Part I: The Law of the River*, 4 U. DENV. WATER L. REV. 290, 307 (2001) ("[T]he Boulder Canyon Project Act also represented a major step by Congress in the imposition of federal authority (albeit with the consent of and in coordination with the states), in the allocation, regulation, and management of the Colorado River.").

138. *See* Abbott, *supra* note 79, at 1407–08 ("The *Arizona v. California* decision perhaps set the stage for the development of the [CAP]. In 1968, after the States had settled the water rights issue, Congress authorized the CAP with the passage of the Colorado River Basin Project Act.").

139. *See id.* at 1407.

reservoirs on the River, the Act gave the Secretary the power to prepare consumptive use and loss reports every five years, which would account for beneficial consumptive uses state-by-state.[140] The Act also required the Secretary to make annual operating plans on Lakes Mead and Powell.[141] These measures granted the Secretary of the Interior broad powers of oversight over the River Basin states and their policies.

Nonetheless, "California's price for support for the [CRBP] and the [CAP] was severe."[142] Water delivery to the CAP during shortage years was conditioned on California receiving its 4,400,000 acre-feet appropriation, regardless of whether the Secretary of the Interior allocated the remaining supply after providing for PPRs.[143] The ramifications of this absolute appropriation were significant. Of Arizona's 2,800,000 acre-feet entitlement, one million acre-feet—nearly one third of Arizona's total entitlement—is allocated to the CAP.[144] Given such a massive demand on a meager allocation, the CAP essentially became dependent on surplus water flows from the River or any water from the Upper Basin states that went unused at any given time.[145]

Perhaps more perverse was California's ability to consistently take more than its 4,400,000 acre-feet of water by seizing unclaimed CAP water, averaging almost five million acre-feet from 1987 to 1993.[146] During the same time period, Arizona used 800,000 acre-feet less than its entitlement under

140. *See* Lochhead, *supra* note 137, at 314 (defining the scope of the powers of the Secretary of the Interior as granted to him by the CRBPA).

141. *See id*.

142. *See* Abbott, *supra* note 79, at 1408; *accord* Lochhead, *supra* note 137, at 313 ("The 1968 Act also authorized the construction of the Central Arizona Project, but at a heavy price to Arizona."); Garner & Ouellette, *supra* note 108, at 479 ("Section 301(b) of the Act subordinate CAP water to California's entitlement as well as to present perfected rights in Arizona and Nevada and to those with diversion works prior to the Act.").

143. *Id.*

144. *See* Garner & Ouellette, *supra* note 108, at 479.

145. *See* Abbott, *supra* note 79, at 1408 ("In sum, the continued usefulness of the [CAP] and its repayment became largely dependent on surplus waters and the flow of unused Upper Basin water. The planning for the project acknowledges this fact.").

146. *See* Garner & Ouellette, *supra* note 108, at 479.

the BCPA.[147] This issue was compounded when, in 1992, Arizona's CAP subcontractors experienced "serious financial distress," causing them to be unable to afford the CAP water while Nevada sought more water for its growing population.[148]

Of all the state compacts and federal legislation enacted, the CRBPA and the CAP are distinguished as the most detrimental precursors to the current unequal footing between California and the other Lower Basin States. Indeed, the concerns the Basin states noted during consideration of the CRBPA and the BCPA came to fruition when California imposed significant conditions on Arizona's access to CAP water. Taken together, these three acts form the policy that continues to advance the notion that, at least for water rights, the Lower Basin States are not treated as equal sovereigns.

In sum, rather than providing either a fair or a conservation-oriented contract between the parties, the early compacts[149] only served to enshrine the unresolved ambiguities in water apportionment that perpetuated the unequal outcomes that exist to this day. Regrettably, the effects of these compacts underlie federal mediation and litigation even today and have become building blocks of inequity in their own right. This fact is particularly apparent in the modern interstate agreements governing the immediate crisis.

C. *The Current "Compacts"*

The more recent agreements perpetuate the issues of their earlier counterparts. In the decades following *Arizona v. California*, additional policies have been created by the federal government through the Department of the Interior and the Bureau of Reclamation to address the growing water shortages in the Lower Colorado River Basin brought on by climate change.[150] These policies are not interstate compacts per se, but

147. *Id.* at 480.

148. *See id.* ("In 1992, Arizona's agricultural CAP subcontractors fell into serious financial distress. Currently, the subcontractors cannot afford CAP water, crating uncertainty over the future of Arizona's Colorado River entitlement. In the meantime, Nevada is growing rapidly and seeking additional water.").

149. *See supra* Part 0.

150. *See infra* Part 0–0.

are state actions, compelled by the federal government in response to the inability of the Lower Basin States to reach an accord.[151] Federal intervention is meant to offer an equitable solution to issues the states could not resolve themselves. Regardless of which parties enter the process to address the growing water crisis, the same inequities are placed on Arizona and Nevada, while California remains far less accountable for water conservation and the creation of a more just water policy.[152] This Part addresses the 2007 Colorado River Interim Guidelines and the 2019 Drought Contingency Plan, which facilitated this outcome.

1. The Colorado River Interim Guidelines of 2007

In 2000, the Colorado River Basin began experiencing some of the worst recorded drought conditions in over a century.[153] Following hotter, drier conditions, and in order to "share the risk of shrinking water supplies" between the Upper and Lower Basins, the Basin States adopted the Colorado River Interim Guidelines ("Interim Guidelines" or the "Guidelines") in 2007.[154] The Interim Guidelines were implemented after the Secretary of the Interior invited the Basin states to propose a new framework for handling water level declines.[155] In turn, the states submitted to the federal government the "Seven Basin States' Proposal," which became the foundation for the Interim Guidelines.[156] What made the Interim Guidelines unique was the period of collaboration among the Basin states in reaching an agreement and the implementation of water-conservation

151. *See infra* Part 0.

152. *See infra* Part 0–0.

153. *See* Buschatzke & Klobas, *supra* note 121, at 34–35 (explaining the necessity of the Interim Guidelines due to historic drought conditions).

154. *See* Laura Paskus, *As 2020 Kicks in, Historic Colorado River Drought Plan Will Get Its First Test*, WATER EDUC. COLO. (Jan. 8, 2020), https://perma.cc/Y9UM-SHCK ("Written in 2007, the operating guidelines were designed to address the Colorado River's deteriorating storage levels.").

155. *See id.* ("In 2013, then-Secretary of the Interior Sally Jewell directed states to consider additional measures . . . .").

156. *See* Buschatzke & Klobas, *supra* note 121, at 35 ("Against the background of historic reservoir declines, the Secretary [of the Interior] invited the seven Basin States to propose a framework for action. . . . That Proposal was the foundation for the Secretary's adoption in December 2007 of the Colorado River Interim Guidelines . . . .").

and augmentation measures through newly developed mechanisms,[157] coordination between reservoirs, and definitions of the criteria for shortages based on water elevation levels in Lake Mead.[158]

Further, the Guidelines created an updated curtailment schedule to support the seven and a half million acre-feet consumption allotment envisioned in the Colorado River Compact.[159] Under the Guidelines, the water level in Lower Basin reservoirs determined the new water curtailment schedule, which primarily targeted water delivered from the CAP.[160] Yet even as the Basin states negotiated, it was inevitable that California's senior status would impede efforts toward equitable reduction commitments during shortages. Indeed, the Guidelines created a shortage sharing strategy for the first time, with water shortages to be "shared between the Lower Division States of Arizona and Nevada, while California does not take any shortages."[161] In fact, if the Secretary of the Interior had determined there to be a shortage under the Interim Guidelines, Arizona would have borne the highest

157. *See* Emily Halvorsen, *A History of Collaboration: Twenty Years of Drought Response in the Management of the Colorado River*, 25 U. DENV. WATER L. REV. 271, 281 (2022) ("The 2007 Interim Guidelines created an additional mechanism for the storage and release of water in Lake Mead to minimize shortage conditions, known as the Intentionally Created Surplus.").

158. *See* Buschatzke & Klobas, *supra* note 121, at 35 ("The 2007 Interim Guidelines . . . incentivized conservation and augmentation through the creation of Intentionally Created Surplus[,] . . . defined the criteria for shortages in the Lower Basin based on elevations in Lake Mead, implemented closer coordination of operations of Lake Powell and Lake Mead, and preserved flexibility to deal with further challenges such as climate change and deepening drought.").

159. *See* Kenney et. al., *supra* note 120, at 108 ("[The Interim Guidelines] update the approach to reservoir operations during shortage conditions and feature a schedule of Lower Basin curtailments when insufficient storage exists in Lake Mead to support 7.5 [million acre-feet] of Lower Basin consumption from the mainstream.").

160. *See id.* at 108 (explaining that the CAP was targeted because of its "junior" status to California's water apportionment and other Arizona water uses).

161. *See* Halvorsen, *supra* note 157, at 281 ("2007 Interim Guidelines further addressed operations under drought conditions by creating, for the first time, a shortage sharing strategy in the Lower Basin. The Guidelines established escalating reductions in Lower Basin water allocations based on elevation levels in Lake Mead.")

reductions of water amongst the Lower Basin States.[162] These reductions were to be prioritized in order of sources with lowest to the highest protections. Priority classifications from lowest to highest under the CAP are as follows: surplus water contracts, contracts for unused entitlement water, contracts established after 1968, contracts established before 1968, federal reservations and rights established prior to 1968, and PPRs.[163] Even if the Interim Guidelines required water reductions in times of shortage from California, the historical disadvantage of early water allocation in the courts and compacts made Arizona and Nevada clear losers in water cuts. It seemed that the "sharing" strategy of this agreement still served California's water interests alone.

As the term "Guidelines" suggests, these measures were intended to be temporary, remaining in effect through 2025 for water supply allocations and through 2026 for reservoir operations,[164] thus allowing the Basin states to gain experience in conservation and augmentation while adjusting to new conditions.[165] Yet the measures "ultimately proved insufficient to offset the effects of persistent drought conditions that continued beyond the first decade of the twenty-first century."[166] Because the Guidelines did not anticipate the severity of the current drought impacting the Basin states, in 2013, former Secretary of the Interior Sally Jewell directed the states to consider additional reduction measures or be faced with unilateral federal action in order to avoid a water crisis.[167]

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162. *See* Buschatzke & Klobas, *supra* note 121, at 39 ("If a shortage is declared on the Colorado River, Arizona would bear the largest volumes of shortage reductions. . . . The system is based primarily on the Supreme Court's decisions in *Arizona v. California* and the [CAP] . . . . During a shortage determination, Arizona's lower priority users would be reduced first.").

163. *See id.* at 39–40 (listing the first through sixth priority categories starting with PPRs as the highest priority and ending with surplus water contracts as the lowest priority).

164. *Id.*

165. *See* Halvorsen, *supra* note 157, at 281 ("The 2007 Interim Guidelines are interim in nature, expiring at the end of 2025, and are intended to provide the Basin States time to gain experience, adjusting as needed.")

166. *Id.*

167. *See* Paskus, *supra* note 154 ("With its own interests to protect, including water deliveries to contractors and tribal water rights, the federal government needed states to put a more robust plan in place.").

Unfortunately, the same throughline that underpinned the earlier state compacts of the Lower Basin States permeated the Interim Guidelines as well. In designating Arizona's junior status water rights, a harmful dynamic of prioritization was perpetuated by the Lower Basin States. A lack of equity in allocation, removed from the concept of equal footing amongst the affected states, allowed faulty legal and environmental policies to persist. Moreover, because the issue of equal footing remained unresolved, it poisoned the framework the federal government eventually used to resolve these serious legal and ecological questions in the future iterations of water policy, namely the Drought Contingency Plan of 2019.[168]

2. The Drought Contingency Plan of 2019

Due to rapidly developing drought conditions, the Basin states needed to create additional drought contingency and response planning in 2013.[169] By 2017, with even more severe drought conditions impacting the region, the Department of the Interior called on the Basin states to enact drought contingency plans before the end of 2018 to conserve water.[170] Accordingly, the Interim Guidelines became the predecessor to the 2019 Colorado River Drought Contingency Plan ("DCP"). Although one plan in name and goal, the DCP is split into two components, the Upper Basin DCP and the Lower Basin DCP, each of which addresses the needs of its region separately on a Basin level.[171] For example, both DCPs recognize the need for expediency in

168. *Colorado River Drought Contingency Plan*, NAT'L INTEGRATED DROUGHT INFO. SYS., https://perma.cc/ZN9A-GWHB.

169. *See* Halvorsen, *supra* note 157, at 282 ("The Lower Division States began working with the Department of the Interior on drought contingency planning in 2013, and the Upper Division States developed a drought contingency planning resolution in 2014.").

170. *See Colorado River Drought Contingency Plan*, NAT'L INTEGRATED DROUGHT INFO. SYS., https://perma.cc/9VWU-HW75 ("To reduce the risk of Lake Powell and Lake Mead declining to critically low levels, in December 2017, the U.S. Department of the Interior called on the seven Colorado River Basin States . . . to put drought contingency plans in place before the end of 2018.").

171. *See* Halvorsen, *supra* note 157, at 282 ("In 2017, the seven Basin States worked together and requested support from the Department of the Interior . . . and in 2019, the seven basin States agreed to the Upper and Lower Basin Drought Contingency Plans.").

handling the already excessive allocations of water in the Lower Basin States.[172] Procedurally, the DCP requires the Department of the Interior, through the Bureau of Reclamation, to execute the DCP immediately, and to operate applicable Colorado River System reservoirs accordingly.[173]

The primary intent of the DCP is to protect Lake Mead from declining below a water elevation of 1,020 feet through additional use of reduction and conservation measures implemented by the Lower Basin States and the federal government.[174] The Lower Basin DCP includes several key measures, adapted from the Interim Guidelines. First, a voluntary water contribution by California if and when Lake Mead falls below 1,045 feet of elevation was agreed upon.[175] Second, if the Lake Mead elevation ever drops below 1,030 feet, this discussions would begin between the Lower Basin States and the federal government concerning additional, emergency measures.[176] Third, the DCP required water reductions by each state at certain elevations.[177] The reductions outlined in the third DCP component, which are largely based on the 2007 Interim Guidelines, implement threshold marks that would trigger water cutbacks to cities and farms in the Lower Basin

172. *See* Paskus, *supra* note 154 ("In the lower basin, the process needed to move more quickly because water use already exceeds allocations.").

173. *Id.*

174. *See* Buschatzke & Klobas, *supra* note 121, at 45 ("The [DCP] is intended to supplement the 2007 Interim Guidelines (replacing provisions where necessary) and would be in place through the year 2026, when the 2007 Interim Guidelines expire.").

175. *See id.* at 45 ("One of the most significant components of the [DCP] is an agreement by California to contribute water when Lake Mead is below elevation 1,045'. . . . Additional reductions by Arizona and Nevada, above those contemplated in the 2007 Interim Guidelines are another primary component of the [DCP].").

176. *See id.* ("[W]henever any August 24-Month Study projects the elevation of Lake Mead to fall below 1030' during the subsequent two years, the Lower Basin States and the United States would consult to determine what additional measures are required to protect Lake Mead from falling below elevation 1020'.").

177. *See id.* at 46 ("[T]he [DCP] would require water contributions by each Lower Basin State at certain trigger elevations.").

States.[178] Because of continually decreasing water levels, the first threshold was triggered in the summer of 2020, causing Arizona, Nevada, and Mexico to implement cutbacks, followed by a second threshold being triggered in 2022.[179] California escaped water reductions in both rounds of cuts.[180]

The issue with the DCP and previous measures reflects the underlying problem that, regardless of the terms, there has been an unequal distribution of water based on vague suggestions that may or may not be amended in the future. That California, which consumes far and away the largest amount of water in the Lower Basin,[181] has not made any water reductions whatsoever after two rounds of water cuts under the DCP illustrates a serious deficiency in recent federal shortage policies. Not only does the lack of water reduction by the highest-use state defy reason on a conservation level, but it also flies in the face of the notion that states are and ought to be treated before the law as equal sovereigns on equal footing.

3. The Colorado River Deal of 2023

On May 22, 2023, the Lower Basin States reached an agreement to take less water from the Colorado River.[182] Due to

178. Paskus, *supra* note 154; Buschatzke & Klobas, *supra* note 121, at 45 (displaying a table of the projected reduction amounts by state depending on Lake Mead water-elevation levels).

179. *See* Partlow, *supra* note 42 and accompanying text.

180. Paskus, *supra* note 154 ("Arizona, Nevada and Mexico will see cuts this year, while California could follow in future years . . . .").

181. *See Total Water Use*, U.S. GEOLOGICAL SURV. (Mar. 3, 2019), https://perma.cc/6EG6-SYP6 (displaying a chart of each state's water withdrawals in million gallons per day, a chart of top state withdrawals, and noting that "[a]s in 2010, water withdrawals from four States—California, Texas, Idaho, and Florida—accounted for more than one-quarter of all fresh and saline water withdrawn in the United States in 2015. California accounted for 9 percent of the total withdrawals for all categories and 9 percent of total freshwater withdrawals for all categories nationwide."); Rachel Becker, *How Bad is Water Use in California? March Is the Worst So Far, up 19%*, CALMATTERS (May 10, 2022), https://perma.cc/N9B2-6Z9J ("Californians emerged from the driest January, February and March on record with the biggest jump in water use since the drought began: a nearly 19% increase . . . . Despite urgent pleas of water officials, California's water use in March is the highest since 2015 . . . .").

182. Letter from Thomas Buschatzke, Dir. Of Ariz. Dep't. of Water Res., J.B. Hamby, Chairman & Comm'r, Colo. River Bd. of Cal., and John J.

an unusually wet winter, the Department of the Interior was able to negotiate less drastic cuts than originally expected.[183] The agreement, which must still be formally approved, opens approximately $1.2 billion of President Biden's "Investing in America" agenda to irrigation districts, cities, and Native American tribes in the Lower Basin States if they temporarily reduce water usage.[184] Together, reductions total to 13% of water use in the Lower Basin, likely to require further significant water restrictions for both residential and agricultural uses.[185] While this plan is a positive development, its temporary nature belies the deeper inequities that plague every step of the drought apportionment process. Importantly, an additional 700,000 acre-feet reduction must still be worked out by the Lower Basin States.[186] As soon as the deal was announced, some scholars questioned whether the Lower Basin States "could be back in that danger zone again,"[187] recognizing that the agreement amounts to a mere "sidestep" of which states take the brunt of the water cuts.[188] Not only this, but the deal provides California a far better alternative to what might have

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Entsminger, Gen. Manager, S. Nev. Water Auth., to Camille Calimlim Touton, Comm'r, U.S. Bureau of Reclamation (May 22, 2023) https://perma.cc/E5M6-YBVR (PDF).

183. *See* Flavelle, *supra* note 45 ("That [snowpack] is expected to significantly increase the amount of water in the river, at least temporarily.").

184. *See* Press Release, U.S. Dept. of the Interior, Biden-Harris Administration Announces Historic Consensus System Conservation Proposal to Protect the Colorado River Basin (May 22, 2023), https://perma.cc/EU2G-T279 ("Funding from President Biden's Investing in America agenda combined with voluntary commitments will conserve 3-million-acre feet of water through 2026."); Flavelle, *supra* note 43 ("The states have also agreed to make additional cuts beyond the ones tied to the federal payments to generate the total reductions needed to prevent the collapse of the river.").

185. Flavelle, *supra* note 45.

186. *See* Flavelle, *supra* note 45 ("If the states don't identify those 700,000 acre-feet in additional cuts, the Interior Department said it would withhold the water, a move that could face legal and political challenges. . . . [F]inding the additional 700,000 acre-feet remains a problem for the three lower-basin states to solve.").

187. See Flavelle, *supra* note 45 (quoting Sarah Porter, the director of the Kyl Center for Water Policy at Arizona State University).

188. Flavelle, *supra* note 45.

been the case.[189] The major gaps in the 2023 deal beg the question of how the Lower Basin States will address a renewed and potentially worse crisis in three years, when the federal government may not be willing to provide as much money to conserve water, and when heavy snow and rainfall may not allow the States to dodge the ultimate water allocation issue.[190]

Consequently, water disputes in times of shortage have not been solved by the state compact system conceptualized to fairly address them. Once states have been unable to conclude agreements based on these fundamental structures, the federal government has intervened. Yet the results of federal intervention have largely proven ineffective in addressing the underlying issues of sovereignty and equality in the Lower Basin.

III. THE FEDERAL INTERVENTION

Traditionally, principles of federalism and the lack of express constitutional power meant the federal government left the issue of water control and allocation to the states.[191] Yet, in part because of the complex relationship between water and the Constitution, and in part because of the western state compacts themselves, the role of managing the Basin states' water resources and disputes has increasingly included federal agencies.[192] Initially, federal and state authorities placed a

189. *See* Flavelle, *supra* note 45 ("Because California uses more water from the Colorado River than any other state, it would have lost the most . . . . Relying largely on voluntary reductions gets around that concern.").

190. See Flavelle, *supra* note 45 (quoting Bill Hasencamp, manager of the Colorado River resources for the Metropolitan Water District of Southern California, who noted "[W]e know that the future is going to be drier than the past").

191. *See* Paul T. Babie et al., *Federalism Fails Water: A Tale of Two Nations, Two States, and Two Rivers*, 35 J. ENV'T. L. & LITIG. 1, 15 (2020) ("While the federal government enjoys paramount power with respect to any powers conferred upon it, powers either implied or not expressly granted to the federal government are reserved . . . to the states or to the people, making water largely a matter of state competence.").

192. *See* Ferguson, *supra* note 125, at 120 ("[T]he Department of Interior and Reclamations Services assumed the responsibility for coming up with a comprehensive plan [for] the development of the basin's water resources."); Babie et al., *supra* note 191, at 16 ("The place of water in U.S. constitutional law is the subject of great complexity, allowing for extensive administrative institutional bodies with power over the allocation of water.").

strong emphasis on cooperation as evidenced by the Interim Guidelines and the DCP.[193] But this collaborative relationship has already started to strain. Because of the continuous drop in water levels and the glaring issues in foundational water law, it is "an almost impossible task[] for the states to come to a reasonable solution . . . ."[194] This puts pressure on federal agencies to force the states to resolve their disputes.

The federal government likely noted at an early stage that given the economic and population growth of the Lower Basin region, its effective water management was not merely of regional concern but a national interest, justifying further federal involvement over time.[195] Unfortunately, federal action has been too little too late, and its approach often defers to the flawed principles underlying the interstate compacts and their foundational western water doctrines.[196] This Part explains why the federal government is involved in water dispute resolution and how its intervention has failed to resolve the underlying issues of the dispute.

A. *Powers and Procedures*

Broadly, only Congress may legislate appropriations for water control projects, with Colorado River management requiring significant federal investment and funding.[197] Based on *Arizona v. California*, however, the Secretary of the Interior acts as the leading federal representative influencing Basin

193. *Supra* Part 0–0.

194. *See* Ferguson, *supra* note 125, at 120 ("The situation would have to devolve into an all-out crisis that would influence the entire country before political leaders would be willing to take such drastic measures.").

195. *See id.* ("Because of the past involvement of the federal government in the management of the [Colorado] river, and the devastating consequences that a large scale water shortage could have on all Americans, the entire nation has a vested interest in the fair and accurate allocation of water.").

196. *See* Bruce Babbitt, *Before Western States Suck the Colorado River Dry, We Have One Last Chance to Act*, N.Y. TIMES (Apr. 15, 2023), https://perma.cc/L36F-EJ6S (Former Arizona Governor Bruce Babbitt recounts how Secretary of the Interior Deb Haaland declared an emergency in 2022, threatening Basin States to come up with a revised water reduction plan before "retreating to the sidelines" rather than taking the lead).

197. *See id.* ("The federal government has played a large role in the development of management for the River and has invested heavily in constructing its infrastructure.").

State water policy.[198] While the Court imposed discretionary restrictions upon the Secretary,[199] the position has become very influential in water policy and has played an especially important role in the current water crisis.

Since the enactment of the DCP in 2019, Congress authorized general efforts in the Colorado River Basin to fund programs encouraging water conservation agreements between the impacted states.[200] The agencies tasked by Congress to oversee water management include the Department of the Interior and the Bureau of Reclamation, which led the construction of major projects in the western states that in turn led to their initial economic development.[201] Currently, the Bureau oversees the western states and is the largest wholesaler of water and second largest producer of hydroelectric power in the United States.[202] Its stated goals are to "manage, develop, and protect water and related resources in an environmentally and economically sound manner in the interest of the American public."[203] Additionally, the Department of the

198. *See* Halvorsen, *supra* note 157, at 276 ("The BCPA further authorized the Secretary of the Interior to contract for water deliveries to Lower Basin entities from Lake Mead, effectively making the Secretary the water master in the Lower Basin.").

199. *See* Buschatzke & Klobas, *supra* note 121, at 33–34 ("For example, in years when less than 7.5 [million acre-feet] is available for apportionment among the three Lower Basin States, the Secretary has broad discretion to apportion shortage reductions but may not apportion more than 4.4. [million acre-feet] to California during shortage years. Additionally . . . surplus waters must be distributed in proportion to each State's normal year apportionment: 46% to Arizona, 50% to California, and 4% to Nevada.").

200. *See* Charles V. Stern, CONG. RSCH. SERV., IN11982, RESPONDING TO DROUGHT IN THE COLORADO RIVER BASIN: FEDERAL AND STATE EFFORTS 1, 5 (2023), https://perma.cc/VEV2-NGXJ (PDF) ("[R]ecent regular and supplemental appropriations included funding for Colorado River water conservation efforts. . . . Congress provided $4.0 billion for drought mitigation in the West, with priority given to Colorado River Basin activities.").

201. *See About Us—Mission*, BUREAU RECLAMATION, https://perma.cc/RGU2-4GXY ("Established in 1902, the Bureau of Reclamation is best known for the dams, powerplants, and canals it constructed in the 17 western states.").

202. *See id.* ("We bring water to more than 31 million people, and provide one out of five Western farmers . . . with irrigation water for 10 million acres of farmland . . . . Our 53 powerplants . . . produce enough electricity to serve 3.5 million homes.").

203. *See id.* ("Reclamation is a contemporary water management agency with a Strategic Plan outlining numerous programs, initiatives and activities

Interior has the power failed to review and alter contracts of parties using the Colorado effectively enforce conservational measures on River to ensure water is being delivered and used with maximum efficiency.[204] Despite these stated aims, however, conservation goals have not been met by the federal government, bringing into question its capability to address the growing crisis.[205] Moreover, the intransigence of the states to adapt to worsening conditions set the stage for further federal action.

B. *Mediation Efforts*

Since the early 2000s, there have been multiple federally-led attempts to improve the River Basin's water supply.[206] Yet despite attempted management by the states and the federal agencies, water storage levels at Lake Meade in the Lower Basin and Lake Powell in the Upper Basin have continued to fall.[207] As the water crisis worsens, federal agencies have increasingly taken a carrot-and-stick approach, claiming the desire to work collaboratively with the Basin states while also expressing federal authority and the intention to resolve the issue themselves.[208] More recently, the Bureau of

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that will help . . . meet new water needs and balance the multitude of competing uses of water in the West.").

204. Provisional Methods for Implementing Colorado River Water Conservation Measures with Lower Basin Contractors and Others, 43 U.S.C. § 417; Babbitt, *supra* note 184 ("The impending crisis demands that [Interior Secretary Haaland] use all powers at her disposal to force the parties to make their fair share of cuts.").

205. *See* Alex Hager & Luke Runyon, *Under Federal Pressure, Colorado River Water Managers Face Unprecedented Call for Conservation*, KUNC (June 17, 2022, 3:36 PM), https://perma.cc/EM45-BVWC ("Cajoling all the basin's big water users to participate [in conservation efforts] is no small feat. Many still feel like their water rights are legally protected . . . .").

206. *See* Stern, *supra* note 200, at 4 (2022), https://perma.cc/VEV2-NGXJ (PDF) ("[T]here have been multiple efforts to improve the basin's water supply outlook, including the 2003 Quantitative Settlement Agreement, the 2007 Interim Shortage Guidelines, and the 2019 drought contingency plans . . . .").

207. *See id.* at 4 (explaining that despite recent agreement efforts, water storage levels at both reservoirs have fallen).

208. *See* Press Release, U.S. Dep't. of the Interior, Interior Department Announces Actions to Protect Colorado River System, Sets 2023 Operating Conditions for Lake Powell and Lake Mead (Aug. 16, 2022), https://perma.cc/RR86-Q4HF ("The solution to our challenges relies on the

Reclamation has threatened and followed through in taking action to address the water crisis with little state input or consultation.[209] But neither the carrot nor the stick has yielded sustainable results.

Pursuant to the Interim Guidelines and the DCP, the Bureau of Reclamation declared a level one shortage for the Lower Basin in August 2021, and then a level two shortage in August, 2022.[210] In June 2022, Commissioner of the Bureau of Reclamation Camille Touton testified at a hearing of the Senate Committee on Energy and Natural Resources about the current water shortages in the Lower Basin.[211] Touton concluded that, "[I]f the seven states that rely on the Colorado River can't cut their own use, the federal government is prepared to do it for them."[212]

But by August 16, 2022, the Basin states were unable to agree to new water reduction terms.[213] Subsequently, the Bureau announced new water cuts for Arizona, Nevada, and Mexico.[214] Under these cuts, "Arizona's annual water

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bedrock of a century of collaboration and partnership . . . . But as water stewards, it is our responsibility to protect the system and the millions of Americans who depend on it." (internal quotations omitted)); *see also* Press Release, U.S. Dep't. of the Interior, Interior Department Initiates Significant Action to Protect Colorado River System (Oct. 28, 2022), https://perma.cc/K9W4-RQWW ("The Interior Department continues to pursue a collaborative and consensus-based approach to addressing the drought crisis afflicting the West. At the same time, we are committed to taking prompt and decisive action necessary to protect the Colorado River System and all those who depend on it." (internal quotations omitted)).

209. *See* Hager & Runyon, *supra* note 205 ("But recently the Bureau of Reclamation has shown itself ready to take matters into their own hands with minimal consultation with the states. In July 2021 the agency began emergency releases of water upstream of Lake Powell to boost its levels. Some state leaders say federal officials gave them little warning.").

210. *See* Stern, *supra* note 200, at 4 ("These declarations resulted in delivery curtailments for Arizona and Nevada.").

211. *See* Hager & Runyon, *supra* note 205 (describing water levels, Touton noted Lakes Mead and Powell were at dangerously low capacity, with expectations of continued reduction, and between two and four million acre-feet needed to protect critical levels in 2023).

212. *See id.* ("[Touton] gave a 60-day deadline to craft a deal.").

213. *See* Briscoe, *supra* note 44 (reporting on the growing severity of the drought and run-on effects of federal management amid tensions between affected states).

214. *Id.*

apportionment will be reduced by 21%, Nevada's by 8% and Mexico's by 7%" while California was not required to make *a single cut* in its water consumption.[215] After the failure of the first round of talks, the federal government implemented a deadline for a second round, due to be completed by the end of January, 2023.[216] Six of the seven Basin states crafted a joint proposal on how to meet the reduction demands of the government.[217] California did not join them, instead offering its own proposal, which ultimately benefits only itself.[218] "To date, California . . . offered insufficient reductions in its water use, claiming that a federal law enacted more than 50 years ago . . . places much of the burden of cutting back on Arizona."[219] As the states quarreled, the Department of the Interior "stood by and watched," losing time it could have used more productively in coming to an agreement.[220] Even after the recent Colorado River Deal, federal involvement in negotiations was undercut by the fact that the Colorado River Basin States came to agreement themselves, with certain water cut terms still needing to be hashed out.[221]The federal government has tried and failed to intervene at least four times within the past four years.[222] In each instance, the government has asked or cajoled the Basin states to come to agreements to reduce water consumption. Each time, the states had failed to reach a sustainable, equitable—or, recently, *any* sort of—agreement.

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215. *Id.*

216. *See supra* note 43 and accompanying text.

217. *See* Partlow, *supra* note 42 ("The proposal by the six states—Arizona, Colorado, Nevada, New Mexico, Utah and Wyoming—aims to protect the major reservoirs in Lake Powell and Lake Mead from falling below critical levels.").

218. *See id.* ("California's cuts don't kick in until later—essentially a gamble on good hydrology once again helping us avoid conflict by letting us use more water in the short term.").

219. *See* Babbitt, *supra* note 175 ("Arizona has responded that California's proposal would effectively shut down water deliveries to Phoenix, Tuscon and other cities, devastating Arizona's economy.").

220. *Id.*

221. *Supra* Part 0; *see supra* note 170 ("The Lower Colorado River Basin State Representatives . . . have reached an agreement. . . . We request the Lower Basin Plan be fully analyzed as an action alternative [to the Bureau of Reclamation draft plan].").

222. *See supra* notes 210–216 and accompanying text.

Despite efforts by the Department of the Interior to ensure the existence of effective water policy in the Basin states, current policy does not reflect a reasonable approach to water conservation among the affected states. Moreover, the fact that California is entirely exempted from mandatory water reduction at a time of severe drought suggests federal actors are still unwilling to make the broad and necessary changes to address the shortcomings of the previous agreements and compacts that underly its own policies. Therefore, a long-term and equitable solution may only be found in the Supreme Court.

IV. THE LOOMING LITIGATION

When a dispute over water between two or more states has proven unresolvable by interstate compacts or federal mediation, the only avenue left is the Supreme Court.[223] The Court maintains original jurisdiction over "controversies between two or more states" based on its Article III § 2 powers.[224] This jurisdiction, according to the Court, requires a certain type and magnitude of injury flowing from the interests properly protected there.[225] When hearing these cases, the Court often appoints "special masters" as investigators to identify and recommend findings of fact, as it did in *Arizona*.[226]

The Court is Arizona and Nevada's last line of defense to create equitable and rational outcomes. At the moment, however, the failure of litigation in resolving western interstate water disputes can simply be described as "the recurring

223. *See* Griggs, *supra* note 69, at 156 ("More broadly conceived as disputes between sovereigns, the subject of interstate water litigation falls into four main categories. The first comprises suits between states under the Supreme Court's original jurisdiction, to resolve disputes over interstate allocations established by compact or judicial decree.").

224. *See* Jamison E. Colburn, *Rethinking the Supreme Court's Interstate Waters Jurisprudence*, 33 GEO. ENV'T L. REV. 233, 236 (2021) ("For any claim that is necessarily against another state, it is the only forum unless and until Congress changes a statute first enacted in 1789.").

225. *Id.*

226. *See* Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 MINN. L. REV. 625, 627–28 (2002) ("The Court delegates many of its trial functions to Special Masters . . . the Court has delegated greater pockets of its fact-finding and its legal decision-making authority in original jurisdiction cases to Special Masters . . . ." (emphasis omitted)).

consequence of the longstanding structural relationships of western water, and of the irreconcilable conflicts among hydrological and geological facts, arbitrary and flawed political decisions, and constitutional and legal fictions."[227] Even under the Court's oft-recited "equitable apportionment" doctrine, past lawsuits in this area have been all but equitable. Regardless, the Supreme Court should resolve any upcoming litigation involving the Lower Basin States under a new doctrine. That doctrine should be informed by the Court's own longstanding principle that each state is an equal sovereign and is therefore entitled to equitable relief as it pertains to water allocation rights. This Part illustrates how the Supreme Court has been involved in the current dispute through its decision in *Arizona v. California*. It addresses how the Court's approach has only made the underlying legal and policy issues exacerbating the western water crisis worse, and how the Court can correct those missteps in the future.

A. *The Problem with* Arizona v. California

Arizona v. California "proved to be one of the most complex and fiercely contested cases in Supreme Court history," and ultimately traded a very inequitable outcome for Arizona with one that was subtly so.[228] The Court handed down a far-reaching opinion in 1963, followed by a 1964 Decree that developed over time and resulted in an updated legal framework in 2006.[229] Originally viewed as a victory for Arizona, it was eventually seen as "something of an embarrassment—a blatant misreading of an act of Congress with no basis in legislative intent, the Court's jurisprudence, or western water law."[230]

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227. *See* Griggs, *supra* note 69, at 157 ("The original sins of interstate water allocation have repeatedly required litigation brought under the original jurisdiction of the Supreme Court.").

228. Glennon & Kavkewitz, *supra* note 68, at 24.

229. *See* Buschatzke & Klobas, *supra* note 121, at 34 ("In 2006, the Supreme Court issued a Consolidated Decree, which incorporated all previous entitlements for present-perfected rights and federal reserved rights, as well as the legal framework under which the Secretary must apportion, deliver, and account for consumptive uses of Colorado River water in the Lower Basin.").

230. Patashnik, *supra* note 1, at 3.

The Court's equitable apportionment doctrine[231] was the traditionally used mechanism for resolving disputes like the one between Arizona and California in 1963. Notably, the Court's decisions from the turn of the twentieth century forward placed prior appropriation at the center of its doctrine of interstate water disputes.[232] Nonetheless, this doctrinal development "threatened to make equitable apportionment distinctly inequitable in the Colorado River case."[233] Thus, in an attempt to avoid such a blatantly unjust outcome, the Court disregarded the principles of both prior apportionment and equitable apportionment.[234] And while a wholesale miscarriage of justice was avoided, the decision did little to solve the more insidious, underlying problems of water allocation and the interstate compacts.[235]

1. The Battle

Throughout the 1930s, Arizona pursued a tactic of obstruction, particularly toward California, with respect to water rights. This culminated in Arizona filing three separate lawsuits invoking the Court's original jurisdiction, with each failing.[236] At the time, Arizona was painfully aware of California's contracts with the Secretary of the Interior calling for the release of 5,300,000 acre-feet of water annually, and of an international treaty between the United States and Mexico

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231. *See supra* notes 66–73 and accompanying text.

232. Patashnik, *supra* note 1, at 3.

233. *Id.*

234. *See* Glennon & Kavkewitz, *supra* note 68, at 29 ("The *Arizona v. California* decision allowed Congress to use principles for allocating water that were based neither on prior appropriation nor riparianism."); Abbott, *supra* note 79, at 1404 (1988) ("The Arizona Court thus disposed of arguments claiming that the doctrine of equitable apportionment applied and that the Colorado River Compact itself had caused an apportionment in the Lower Basin.")

235. *See supra* Part 0.

236. *See* Patashnik, *supra* note 1, at 9 (describing how Arizona's three lawsuits sought the following: first, a declaratory judgment that the Boulder Canyon dam was unconstitutional without Arizona's consent; then, a clarification that an additional one million acre-feet of water allocated in the Colorado River Compact was intended solely for Arizona; and finally, equitable apportionment of water between Arizona and the other Basin states).

for delivery of Colorado River water in the future.[237] At the same time, Arizona recognized that it lacked a driving force for water development, and only had vague plans for using its share of the Colorado River.[238] In 1944, after the string of setbacks and failures, Arizona gave in and ratified the Colorado River Compact, while also finalizing a water delivery contract with the Secretary of Interior.[239] But the state was immediately faced with the new obstacle of water transportation.[240] The solution to this problem was the Central Arizona Project,[241] for which Arizona's U.S. Senators attempted to build federal financial support in Washington.[242] But, "California's powerful delegation in the House of Representatives consistently blocked [the CAP]," arguing that unless and until a compact of the Lower Basin States formally quantified each state's water allocation—"a compact, of course, which California had no intention of ever entering into"—it would not approve federal funding for more water projects.[243] With nowhere left to turn, Arizona once again sought equitable apportionment of the Colorado River's water before the Supreme Court in 1952.[244] The stage was set, and between 1952 and 1963, two special masters, several years of hearings, and a massive report yielded the facts the Court would use to make its decision.[245]

The original controversy of *Arizona* was how much water each state had the legal right to use from the Colorado River and its tributaries.[246] While the proceeding began with Arizona's complaint against California and several of its agencies,

237. Glennon & Kavkewitz, *supra* note 68, at 17–18.

238. *Id.*

239. Patashnik, *supra* note 1, at 10.

240. *Id.* ("There was no way to get the water from where it was (the Colorado River) to where Arizona needed it (the Phoenix and Tucson areas, and agricultural operations in the Salt and Gila River Valleys). And sparsely populated Arizona, unlike Southern California, lacked the financial wherewithal to build a canal on its own.").

241. *See supra* Part 0.

242. Patashnik, *supra* note 1, at 10.

243. *Id.*

244. *Id.*

245. *See* Abbott, *supra* note 79, at 1404 ("Between 1952 and 1963, two special masters held several years of hearings which led to a massive report in 1961.").

246. Arizona v. California, 373 U.S. 546, 546 (1963).

Nevada, New Mexico, and the United States were added as parties.[247] On one side, Arizona, Nevada, and the United States supported the conclusions of the Special Master's report, which were that Congress did not leave the division of waters to equitable apportionment by the Court, but rather created a statutory scheme for their allocation.[248] Arizona argued the allocation formula was the one required by the BCPA.[249] California argued almost entirely against the findings of the Special Master, claiming that diversions of water by Arizona and Nevada should be charged against their allocations, increasing the likelihood of a water surplus, of which California would get half.[250] Unsurprisingly, "[t]he result of California's argument would be much more water for California and much less for Arizona."[251]

2. The Legacy

In the end, it is unhelpful to describe *Arizona* as a "victory" for its namesake. Indeed, the judgment was a success not because Arizona won what the BCPA had already awarded it, but "because Arizona lost its BCPA allocation to California largely through its own missteps."[252] Among *Arizona's* hallmarks, the Court found that Congress had allocated the use of the Colorado River through the Boulder Canyon Project Act, one of the original interstate compacts that catalyzed water inequality in the first place.[253] For this reason, the water allocations for the first seven and a half million acre-feet were divided amongst the Lower Basin States, with the addition that California and Arizona would share equally in the use of any

247. *Id.*

248. *Id.* at 562–63.

249. *See id.* at 563 ("Arizona, however, believes that the allocation formula established by the Secretary's contracts was in fact the formula required by the [BCPA].").

250. *See id.* ("California is in basic disagreement with almost all of the Master's Report. She argues that the Project Act, like the Colorado River Compact, deals with the entire Colorado River System, not just the mainstream.").

251. *Id.*

252. Glennon & Kavkewitz, *supra* note 68, at 33.

253. *Id.* at 111; *supra* Part 0.

surplus water available in the mainstream.[254] The Supreme Court determined that because Congress essentially permitted water allocation in accordance with the BCPA when it ratified that Act, equitable apportionment was not a controlling principle.[255]

Although the Special Masters urged the federal government to defer to state water law, the Court reinforced that the Secretary of the Interior had the authority to make water available through contracts and was not limited by state water law.[256] Importantly, the Court determined that, in the event of a water shortage, the Secretary should be "free to choose among the recognized methods of apportionment or to devise reasonable methods of his own."[257] Rather than accepting the Special Masters' proposal for pro rata water sharing, the decision conformed with the Court's "expansive view" of the Secretary's authority.[258]

The Court avoided long-term solutions to a serious issue and provided Arizona a tenuous victory that was immediately challenged. As soon as the decision was published, "[s]ome Californians began planning to block Arizona from using its full allocation of Colorado River flow."[259] The Court only ensured Arizona its guaranteed water supply once new water projects were authorized by Congress and then completed, a serious task in and of itself.[260] California, with its thirty-eight congressmen, could reject any proposed Lower Basin federal water projects if they felt the projects were disadvantageous for California.[261]

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254. *Id.*

255. *Id.*

256. Arizona v. California, 373 U.S. 546, 585–87 (1963) ("In our view, nothing in any of these [BCPA] provisions affects our decision . . . that it is the Act and the Secretary's contracts, not the law of prior appropriation, that control the apportionment of water among the States.").

257. *Id.* at 593.

258. MacDonnell, *supra* note 74, at 113.

259. Glennon & Kavkewitz, *supra* note 68, at 31.

260. *See id.* (quoting California's state attorney general as saying, "water will not be short in California until new projects in other states have been authorized by Congress and completed.").

261. *See id.* ("Californians were confident they could determine when or whether such projects were initiated because their thirty-eight congressmen could reject any proposed federal water projects on the Colorado that they felt were disadvantageous for the state.").

In 1964, the Supreme Court issued a decree defining key terms and further regulating the Colorado River.[262] The federal government, which was in control of water flows via numerous dams on the River, was prohibited from releasing water unless it conformed to the terms of the decree.[263] The Lower Basin States and named California agencies were also enjoined from diverting water from the River without federal authorization.[264] Finally, mainstream water used by a state was to be charged to that state's apportionment amount, regardless of the reason why it was used.[265]

The decree specified that in years of surplus, the Secretary of the Interior would contract 50% of the surplus water to California and 50% to Arizona.[266] If the seven and a half million acre-feet distribution plan was not met, then water would be distributed "after providing for satisfaction of present perfected rights in the order of their priority dates without regard to state lines."[267] This meant that in years of shortage, the Secretary of the Interior had discretion to allocate remaining supplies after PPRs were accounted for.[268] In 1979, the decree was amended to further enumerate the PPRs in the Lower Basin States.[269] But by that point, the damage had already been done.[270]

While foreclosing a potentially unjust and detrimental application of prior apportionment, the Court did not address the long-term troubles plaguing the Colorado River. Instead, it handed the heavy responsibility of drastic action in times of shortage to the Secretary of the Interior, to whom it also bequeathed the club of prior apportionment to wield against

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262. *See Arizona*, 376 U.S. at 342 (laying out important definitional and prohibitory terms for the Lower Basin states, their affiliates, and the federal government).

263. MacDonnell, *supra* note 74, at 114.

264. Abbott, *supra* note 79, at 1407.

265. *Id.*

266. *See* MacDonnell, *supra* note 74, at 114–15 (describing how surplus water was allocated evenly between Arizona and California "unless the U.S. contracts for 4 percent [of surplus water] with Nevada, [in which case] 46 percent [of surplus water went] to Arizona").

267. Arizona v. California, 376 U.S. 340, 342 (1964).

268. Abbott, *supra* note 79, at 1406.

269. *Id.* at 1407.

270. *See supra* Part 0.

Arizona and Nevada.[271] Further, the Court did nothing to alter the unequal and faulty basis of the BCPA over general apportionment of water in the Lower Basin. To date, none of the legal frameworks of water dispute in the Lower Basin have treated the disputing states with equity or with an eye to water conservation.

B. *The Solution*

Sixty years ago, when the Supreme Court decided *Arizona v. California*, it "acted precisely because the states and Congress did not."[272] Today, the Court could soon be in a position to hear a renewed claim by Arizona and Nevada against California as drought conditions persist.[273] But commentators and legal scholars involved in the dispute have noted that, while persuasive, Arizona's assertions about the well-being of its citizens lack the legal foundation of California's arguments, premised on senior water rights.[274] Although it might seem like Arizona lacks as strong a legal basis as California in the current dispute, such a perception overlooks both the fact that California's legal arguments are premised on flawed information[275] and poorly-written laws,[276] and the fact that Arizona has a potent legal argument. That argument is found in the Supreme Court's recent cases, particularly *Shelby County*, exploring the doctrine of equal footing among the states.[277] The recent focus of the Court on that concept means now more than ever that such a claim could be well received. In anticipation of litigation being the best and most likely pathway to equitable relief, this Part looks at potential legal arguments Arizona and

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271. *See supra* note 257 and accompanying text.

272. *See* Glennon & Kavkewitz, *supra* note 68, at 33–34 ("The reason why Arizona and California were before the Court in the first place was because the states could not agree and Congress, in 1951, refused to act on the [CAP] until the Court determined each state's rights to the River.").

273. *See supra* Part 0.

274. *See* The Daily, *7 States, 1 River and an Agonizing Choice*, *supra* note 3, at 16:50 ("[California's] main argument is on the law. And . . . on the law itself, California's mostly right. . . . [Arizona's] main [argument] is what's practical? And what's fair?").

275. *See* Gardner, *supra* note 38 and accompanying text.

276. *See supra* Part 0.

277. *See infra* Part 0.

Nevada should consider in a suit against California premised on equal footing and the practical necessity of water conservation. The culmination of this suit would be Arizona and Nevada requesting and potentially receiving temporary injunctive relief against California, such that California would be required to reduce its water usage at a rate equal to that of Arizona and Nevada, and perhaps that the allocation as required by the BCPA is adapted or changed.

1. Equal Sovereignty and Equal Footing

To determine what remedy would be appropriate for Arizona and Nevada at the Supreme Court, there must be a legal basis for their arguments. That basis lies within the doctrines of equal sovereignty and equal footing. In 1845, the Supreme Court declared: "Whenever the United States shall have fully executed these trusts, the municipal sovereignty of the new states will be complete, throughout their respective borders, and they, and the original states, will be upon an equal footing, in all respects whatever."[278] Equal footing among the states is hardly a new concept in American jurisprudence. Rather, it is "one of the pillars of American federalism," a well-established legal principle that reinforces the concept state dignity and sovereignty.[279]

As an initial matter, it is important to distinguish equal sovereignty from equal footing. While both have been used interchangeably, "sovereignty" simply refers to the basis of equal footing, where the states of the United States have inherent authority and power to rule themselves, as provided by the Tenth Amendment.[280] Out of that sovereignty arises the principle that, as entities with equal power, the states are on a level playing field. This concept of equal footing, while not

278. *See* Pollard's Lessee v. Hagan, 44 U.S. 212, 224 (1845) (concerning the nature and extent of U.S. control of newly acquired lands and the development of the sovereignty of new states).

279. *See* Patashnik, *supra* note 1, at 41.

280. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

explicitly included in the Constitution, has a "long and unbroken statutory pedigree"[281] and a "long judicial pedigree."[282]

At its inception, the doctrine of equal footing was applied by the Supreme Court in cases involving admission of new states.[283] At that time, the doctrine consisted of two elements: (i) that all states must be admitted on the same terms as the original states; and (ii) that equal footing could be a "placeholder" for unconstitutional conditions.[284] The first line of reasoning meant that the doctrine of equal sovereignty required Congress to admit all states on the same terms as original states.[285] The second line of reasoning suggested that Congress could only exercise its delegated powers and that states are sovereign and autonomous entities in certain areas.[286] These underpinnings were the foundations upon which the modern Court further developed equal footing, as seen in *Shelby County*.[287]

Lately, the modern Court's "dignitarian conception of state sovereignty has . . . acted as a formidable sword."[288] Scholars

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281. *See* Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L. J. 1087, 1104–05 (2016) (citing the admission of states under and since the 1787 Northwest Ordinance).

282. *Id.* at 1105 n.88 (quoting Utah Div. of State Lands v. United States, 482 U.S. 193, 195 (1987)); *see also id.* at 1105 n.88 (quoting *Utah Div. of State Lands* for the proposition that "[t]he equal footing doctrine is deeply rooted in history"); Jeffrey M. Schmitt, *In Defense of* Shelby County*'s Principle of Equal State Sovereignty*, 68 OKLA. L. REV. 209, 222 (2016) ("Although the principle of equal state sovereignty is not explicitly stated in the Constitution's text or required by the holding of any preexisting case, it is entirely consistent with, and perhaps even supported by, both sources.").

283. Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207, 1216 (2016).

284. *See id.* ("The second line of reasoning used equal sovereignty as a placeholder for unconstitutional conditions, meaning that conditions were invalid if they violated some other constitutional principle aside from equal sovereignty.").

285. *See id.* ("Other cases . . . disavowed this conception . . . and Congress frequently admitted the states on different terms from one another.").

286. *See id.* at 1220 ("[T]he state admission cases used equal sovereignty to refer to two constitutional limits on Congress's powers: (1) Congress may only impose laws . . . that fall within its delegated powers, and (2) Congress may not enact laws . . . that interfere with spheres in which the states are sovereign and autonomous." (internal quotations omitted)).

287. *See infra* Part 0.

288. Jamison E. Colburn, *Time to Rethink the Supreme Court's Interstate Waters Jurisprudence*, 50 ENV'T. L. REP. 10840, 10844 (2020).

have taken note of this expansion of equal sovereignty by the modern Court, particularly under *Shelby County*, the landmark voting rights case heard in 2013.[289] At the same time, there is a strong argument that equal sovereignty among the states is a tradition dating back to early American jurisprudence.[290] But the Court has altered equal sovereignty by applying it beyond admitting states to the Union. It has repeatedly used the doctrine in other recent decisions. [291] And the Court should use

289. *See* Litman, *supra* note 283, at 1252 (theorizing that *Shelby County* changed the doctrine of equal sovereignty by redefining it as a question of states' dignity, whereby states deserve to be treated with respect and cannot be differentiated in regulation); Colburn, *supra* note 288, at 10841 (highlighting a paradox between equitable apportionment and the Roberts Court's "renovations in the law of our equal sovereignty and judicial federalism . . . .").

290. *See, e.g.*, Barney v. City of Keokuk, 94 U.S. 324, 333 (1877) ("[T]he people of each State, in their sovereign character, acquired the absolute right to all their navigable waters and the soil under them. . . . [N]ew States have the same right of sovereignty and jurisdiction over the navigable waters within their limits as the original ones."); Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 451–59 (1892) (explaining how numerous cases have decided that the "bed or soil" of navigable waters is held by sovereign states, and must be respected as such); Shively v. Bowlby, 152 U.S. 1, 57 (1894) ("The new states admitted into the Union since the adoption of the constitution have the same rights as the original state in the tide waters . . . ."); Coyle v. Smith, 221 U.S. 559, 580 (1911) ("When that equality [among states] disappears we may remain a free people, but the Union will not be the Union of the Constitution."); United States v. Louisiana, 363 U.S. 1, 16 (1960) ("This Court early held that . . . each subsequently admitted State acquired similar rights as an inseparable attribute of the equal sovereignty guaranteed to it upon admission.").

291. *See, e.g.*, New York v. United States, 505 U.S. 144, 175 (1992) ("In this provision, Congress has crossed the line distinguishing encouragement from coercion [of the States]."); Printz v. United States, 521 U.S. 898, 907 (1997) ("We do not think the early statutes imposing obligations on state courts imply a power of Congress to impress the state executive into its service."); Franchise Tax Bd. of Cal. V. Hyatt, 538 U.S. 488, 498 (2003) ("Even were we inclined to embark on a course of balancing States' competing sovereign interests to resolve conflicts of laws under the Full Faith and Credit Clause, this case would not present the occasion to do so."); Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 203 (2009) ("The Act also differentiates between the States, despite our historic tradition that all States enjoy equal sovereignty." (internal quotations omitted)); Nat'l Fed'n of Indep. Bus. V. Sebelius, 567 U.S. 519, 580–81 (2012) ("In this case, the financial inducement Congress has chosen is much more than relatively mild encouragement—it is a gun to the head [of the States]." (internal quotations omitted)); *Shelby Cnty.*, 570 U.S. at 544 ("Not only do States retain sovereignty under the Constitution, there is also a fundamental principle of *equal* sovereignty among the States." (internal quotations omitted)); Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct.

it here because impending litigation in the West is a natural point of expansion for the doctrine. Indeed, Arizona and Nevada are so disadvantaged in water allocation and water reduction rates that it violates their fundamental right to equal sovereignty.

All these cases illustrate that the principles of state sovereignty, dignity, and equal footing are not limited conceptually to a particular area of law. Rather, these principles can and should be the starting point for interstate disputes, including those over water. Whether intended or not, the modern Court has provided a potential path to remedy the failures of the legal frameworks surrounding the Lower Colorado River Basin to address the current drought crisis.[292] The Court should immediately take this opportunity. Before analyzing the unique path forward, it is important to understand the development and status of the flawed system for how water allocation has been decided in the Lower Basin to date.

2. The Foundation of *Shelby County*

The current western water crisis and *Shelby County* inform one another surprisingly well. In 2013, the Court found that "[n]ot only do States retain sovereignty under the Constitution, there is also a fundamental principle of *equal* sovereignty among the States."[293] That "our Nation was and is a union of States, equal in power, dignity and authority,"[294] was the basis on which the Supreme Court decided *Shelby County v. Holder*.[295] Additionally, the Court noted the connection between the doctrine of equal sovereignty and the Tenth Amendment, finding that "States retain broad autonomy in structuring their governments and pursuing legislative objectives" by reserving to states "all powers not specifically granted to the Federal

1461, 1476 (2018) ("[C]onspicuously absent from the list of powers given to Congress is the power to issue direct orders to the governments of the States.").

292. *See supra* Part 0–0.

293. *Shelby Cnty.*, 570 U.S. at 544 (internal quotations omitted).

294. *Id.* (quoting Coyle v. Smith, 221 U.S. 559, 567 (1911)) (internal quotations omitted).

295. *See id.* ("[T]he constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized.").

Government."[296] Ultimately, the Court held that the Voting Rights Act of 1965 ("VRA") departed sharply from the two standards.[297]

Specifically in *Shelby County*, certain mandates of the Voting Rights Act of 1965[298] ("VRA") were in dispute.[299] The VRA guaranteed voting rights to millions of minority voters by not only prohibiting state discrimination, but also requiring states with a history of minority voter suppression to obtain federal approval before changing their election laws.[300] Finding that the preclearance formula did not match the current state of affairs in the affected states, the Court determined that "[t]hose extraordinary and unprecedent features [of the VRA] were reauthorized—as if nothing had changed."[301] In effect, Congress's preclearance formula, "impose[d] substantial federalism costs and differentiate[d] between the States," violating "our historic tradition that all the States enjoy equal sovereignty."[302] As such, the Court declared a large portion of the VRA unconstitutional.[303]

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296. *Id*. at 543.

297. *See id.* ("The [VRA] sharply departs from these basic principles. . . . And despite the tradition of equal sovereignty, the Act applies to only nine States . . . .").

298. *See id.* at 534–36 (recognizing that over the fifty years since the VRA was enacted, the stringent and exceptional measures placed by Congress on the southern states were no longer justified given progress made in voting participation amongst African Americans).

299. *See id.* at 536 ("The question is whether the Act's extraordinary measures, including its disparate treatment of the States, continue to satisfy constitutional requirements . . . the Act imposes current burdens and must be justified by current needs.") (internal quotations omitted).

300. *See* Jeffrey M. Schmitt, *In Defense of* Shelby County*'s Principle of Equal State Sovereignty*, 68 OKLA. L. REV. 209, 210 (2016) ("In *South Carolina v. Katzenbach*, the Supreme Court initially upheld this preclearance requirement as necessary to address the exceptional conditions of widespread disenfranchisement in the covered states." (internal quotations omitted)).

301. *See* Shelby Cnty. V. Holder, 570 U.S. 529, 549 (2013) ("In fact, the Act's unusual remedies have grown even stronger. When Congress reauthorized the Act in 2006, it did so for another 25 years on top of the previous 40—a far cry from the initial five-year period.").

302. *Id.* at 540 (internal quotations omitted).

303. *See id.* at 557 ("Congress could have updated the coverage formula at that time, but did not do so. Its failure to act leaves us today with no choice but to declare § 4(b) [of the VRA] unconstitutional.").

While *Shelby County* concerned voting rights in counties across the United States, its guiding principle that states are equal sovereigns proves instructive within the context of interstate water disputes. Equal footing has been a guiding legal and statutory principle throughout American history in a number of discrete legal issues and disputes.[304] The equal footing principle is what the Court attempted to establish in its original equitable apportionment doctrine.[305] Moreover, taking these bedrock principles of federalism and equality among the states at face value, it is unclear why the Court would not want "to achieve a fair and reasonable result for all the sovereigns involved, rather than applying inflexible legal rules that systematically advantage some over others."[306] Thus, the Court's interstate waters jurisprudence should stem from equal footing among the states.[307]

The relationship between this principle and the power of Congress is not particularly clear. On a theoretical level, the equal footing cases, including *Shelby County*, suggest that Congress cannot impose a burden on a newly admitted state that it has not imposed on a previously admitted state.[308] That notion also suggests that if the burden imposed is one that Congress could also impose on an original state, then Congress is not in violation of the Constitution when imposing such a burden on a new state.[309] Some scholars believe these points suggest either one of two interpretations. The narrow view is

304. *See supra* Part 0.

305. *See* Kansas v. Colorado, 206 U.S. 46, 100 (1907) (articulating what would eventually become the elements and analytical framework of equitable apportionment cases).

306. *See* Patashnik, *supra* note 1, at 46 (explaining how courts should apply approach equitable apportionment cases "with the same degree of respect and evenhandedness with which international law treats sovereign nations.").

307. *See* Colburn, *supra* note 224, at 236 ("Many of the benchmarks have arisen within the Court's original jurisdiction over controversies between two or more states and are extensions of the judge-made doctrine that the Nation was and is a union of States, equal in power, dignity and authority." (internal quotations omitted)).

308. *See* Colby, *supra* note 281, at 1107 ("A corollary of that proposition . . . is that if the burden imposed by the enabling act is one that Congress could also impose on an original state . . . then Congress does not violate the Constitution by imposing it on the new state.").

309. *See id.* ("This is a point that the cases have emphasized as well.").

that states only have a "residual degree of sovereignty" under the enumerated-powers doctrine and Tenth Amendment, and that, whenever Congress acts within a "legitimate sphere of federal power," the equal footing doctrine is not implicated at all.[310] According to the narrow view, equal footing suggests nothing about the power of Congress to discriminate between the states, or about respecting state sovereignty.[311]

The broad view of the equal footing cases is that the doctrine does not grant new states any greater protection from federal regulation than the Constitution granted to the original states.[312] The equal footing cases might in fact suggest that Congress cannot enact discriminatory, unequal burdens on the sovereignty of new states.[313] So read, Congress cannot enact legislation that treats any state, new or old, as unequal sovereigns, even when exercising a legitimate power.[314] This is both an intuitive and necessary proposition to what would otherwise be a befuddling conception of equal footing.[315] Such a

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310. *See id.* ("So whenever Congress is acting within a legitimate sphere of federal power, rather than a sphere exclusively reserved to the states under the Tenth Amendment, the equal footing doctrine does not come into play at all.").

311. *See id.* ("[I]f Congress could discriminate among the original states, then it can discriminate among the new ones too. . . . Equal footing is about discrimination against new states only.").

312. *See id.* at 1008 ("In other words, [any imposed burdens] might simply be an expression of equal sovereignty.").

313. *See id.* ("The cases could be saying that Congress cannot admit a new state without making it the sovereign equal of the other states, not simply because of a narrow equality principle . . . but rather because of a broad, generalized principle of equal state sovereignty.").

314. *See id.* at 1109 ("To say that the new states must be admitted on equal footing with the old states would seem to imply, almost by necessity, that the old states are already on equal footing with each other.").

315. *See id.* at 1109 ("If new states must be on equal footing with old states, but old states are not on equal footing with each other, then [requiring admission] on equal footing with old states is to say that new states need *not* be on equal footing with the other states—which would be gibberish."); *see also id.* (noting that James Madison's notes from the Constitutional Convention on the decision not to include equal footing explicitly in the Constitution make it clear the Framers assumed original states were all on equal footing).

broad conception of equal footing is consistent with cases throughout American jurisprudence.[316]

One may argue that equal footing among the states should be narrowly tailored by the Court, such that if Congress acts pursuant to one of its legitimate powers, it does not violate the principle. The problem with this argument is that it renders the entire purpose of the doctrine null and does not protect states from discrimination by Congress.[317]

But while the Court's various decisions regarding equal footing are consistent with the narrower view, the Court's reasoning and rhetoric behind the doctrine supports the broader view.[318] The Court has at times even recognized a somewhat broader view—that the Supremacy Clause does not still give Congress greater ultimate authority where there is concurrent sovereignty between state and federal authorities.[319] Further, the Court is reluctant to preempt state sovereignty by federal regulation when considering disputes of concurrent authority.[320] If federalism recognizes and respects state sovereignty even

316. *See id.* at 1110 ("As the Supreme Court has made clear, the equal footing doctrine has long been held to refer to political rights and to sovereignty." (internal quotations and punctuation omitted)).

317. *See id.* at 1111 ("Why would we care whether the new states are on equal footing with the old states if Congress is free to discriminate among [them]? If Congress is already free to discriminate against whatever states it wants, then telling the new states that they are on equal footing . . . does not really help them; it does not protect them from discrimination.").

318. *See id.* at 1113 ("Congress is obligated to respect a core constitutional principle that all states are entitled to equal sovereignty.").

319. *See* Colby, *supra* note 281, at 1115 ("But the states retain genuine sovereignty within those [concurrent] spheres nonetheless. . . . [F]ederal laws in those areas implicate and infringe state sovereignty, even though they do not generally violate the Constitution.").

320. *See e.g.*, Fla. Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963) ("The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons . . . ."); FERC v. Mississippi, 456 U.S. 742, 787 n.18 (1982) ("In rare instances, Congress so occupies a field that any state regulation is inconsistent with national goals. The Court, however, is reluctant to infer such expansive pre-emption in the absence of persuasive reasons." (internal citations omitted)); Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 533 (1992) (Blackmun, J. concurring in part, concurring in the judgment in part, and dissenting in part) ("The principles of federalism and respect for state sovereignty that underlie the Court's reluctance to find pre-emption where Congress has not spoken directly to the issue apply with equal force here Congress has spoken, though ambiguously.").

where Congress may act, then Congress may not use its powers to impinge upon the sovereignty of some states as compared to others.[321] As the Court stated in *Bolln v. Nebraska*,[322]

> [T]he whole Federal system is based upon the fundamental principle of the equality of the states under the Constitution. The idea that one state is debarred [by Congress], while the others are granted, the privilege of amending their organic laws . . . is so repugnant to the theory of their equality under the Constitution that it cannot be entertained . . . .[323]

In addition to *Bolln*, an even more elucidating line of cases where Congress discriminated against new states in an area of concurrent authority—cases concerning the free navigation of waterways (the "River Cases").[324] The power to regulate intrastate navigable waters that connect to interstate waterway systems is a concurrent power, shared by the federal government and the states.[325] The River Cases demonstrate the power of a state to regulate waters within its boundaries as a "necessary attribute[] as an independent sovereign Government."[326] Indeed, "navigable waters uniquely implicate state sovereign interests" and underlie a branch of the equal footing doctrine.[327] If navigable waters do in fact implicate state sovereign interest, then Congress cannot and should not be able to remove the sovereign ability of some states to control their navigable waters and not others as it would under the narrow

321. *See* Colby, *supra* note 281, at 1114 ("There can be no distinction between the several States of the Union in the character of the jurisdiction, sovereignty and dominion which they may possess and exercise over persons and subjects within their respective limits." (quoting Ill. Cent. R.R. v. Illinois, 146 U.S. 387, 434 (1892))).

322. 176 U.S. 83 (1900).

323. *Id.* at 89.

324. *See e.g.*, Withers v. Buckley, 61 U.S. 84, 88–89 (1857); Escanaba & Lake Mich. Trans. Co. v. City of Chicago, 107 U.S. 678, 688 (1883); Cardwell v. Am. River Bridge Co., 113 U.S. 205, 208 (1885); Sands v. Manistee River Improvement Co., 123 U.S. 288, 293 (1887).

325. *See* Colby, *supra* note 281, at 1118 (citing Willson v. Black Bird Creek Marsh Co., 27 U.S. 245, 252 (1829)).

326. *Withers*, 61 U.S. at 92.

327. *See* Colby, *supra* note 281, at 1121 (citing Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 284 (1997)).

view of equal footing.[328] The equal sovereignty principle concerns all states, not only new states. These are the legal principles that Arizona and Nevada must articulate to the Supreme Court if and when suit is brought against California. Granted, this line of thought suggests that Arizona and Nevada could attempt to strike down the allocations provided in the BCPA. Perhaps they should. But such a drastic measure may not be necessary if the Court grants temporary injunctive relief.

3. Future Litigation

The legal avenues open to Arizona and Nevada are not as restrictive as some might think.[329] There are many creative arguments that Arizona and Nevada could raise to the Court—this Note does not attempt to consider or suggest all of them, but simply highlights the compelling, overarching legal arguments those states could use in future litigation.

The primary argument Arizona and Nevada should raise is that Congress may not treat a state or states, new or old, as unequal sovereigns by imposing discriminatory burdens on them, even if Congress is exercising a legitimate power. When the Court heard *Arizona v. California*, its holding, and the reason it eschewed traditional water law, was based on the fact that it believed Congress, through the BCPA, had lawfully allocated use of Colorado River water.[330] The four states with separate tributaries, including Arizona and Nevada, have use of their water separate from Congress's allocation of the mainstream.[331] Here, the issue can be characterized as a concurrent power, where the sovereignty of Arizona and Nevada

328. *See id.* ("Congress can effectively remove the sovereignty of *all* states over their navigable waters through preemption. . . . What Congress cannot do is . . . preclude only one state (or several states) from building . . . while allowing other states to do so.").

329. *See* The Daily, *7 States, 1 River and an Agonizing Choice*, *supra* note 3, at 17:45 (reporting that even the Arizona negotiators attempting to revolve the current dispute do not believe they have a strong legal argument).

330. *See* MacDonnell, *supra* note 74, at 111 ("We have concluded . . . that Congress in passing the [BCPA] intended to and did create its own comprehensive scheme for the apportionment among California, Arizona, and Nevada of the Lower Basin's share of the main stream waters of the Colorado River . . . ." (quoting *Arizona*, 373 U.S. at 564–65)).

331. *Id.*

in particular is at its height. By the Court's own reasoning, Congress, whether it intended to or not, ratified an act premised on faulty logic and unequal allocations.[332] Such inequality is not simply substantial, but violates the fundamental principle that Arizona and Nevada are owed equal footing with California, either with greater water allocations to Arizona and Nevada, or with greater reductions in use by California. This is equal footing territory, and it is ripe for the Court to redress.

Therefore, Arizona and Nevada should seek a mandatory injunction from the Court, requiring California to reduce its water use under the standards of equity and justice, as premised on the right of each state to its fair share of water and under the equal footing doctrine. It should provide injunctive relief until such time (if there ever is such a time), when water reserves are more abundant and sustainable. Additionally, the Court should amend the allocation amounts of the Lower Basin States based on recent and accurate scientific reports, granting larger shares to Arizona and Nevada while reducing California's share proportionately. These data and adjudications could in part or in whole be handled by a special master, as the Court has done in the past.[333]

Importantly, the Court does not even have to overturn its precedent or undo the BCPA or any related interstate agreements and compacts. Rather, it should grant temporary relief along the lines of *Shelby County*.[334] The Court should continue to amend its original 1964 Decree or issue a ruling on litigation brought by Arizona and Nevada against California. Admittedly, the VRA in *Shelby County* was a congressional act, whereas here, the Court should facilitate change through a judicial one. But injunctive relief is entirely within the Court's power, particularly if it seeks to offer an equitable remedy for a congressional act (the BCPA) which violates equal sovereignty and equal footing.

Specifically, the Court should ensure that California reduces its water usage. The Court could even do this using the "current burdens" and "current needs" language from *Shelby*

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332. *See supra* Part 0.

333. *See supra* Part 0.

334. *See* Shelby Cnty. v. Holder, 570 U.S. 529, 538 (2013) ("Sections 4 and 5 [of the VRA] were intended to be temporary . . . .").

County, to safeguard the temporary nature of such an injunction.[335] Here, the current burdens of severe drought would justify the need to impose these restrictions and reductions on California. This measure would not be discriminatory to California alone, because it would simply adjust the status quo to incorporate California's reduction the same as the other states have already done. In other words, a mandatory injunction against California would not be offensive to equal footing or equal sovereignty because it would only level the playing field between California and the Basin states that have already sacrificed shares of their water.

Finally, Arizona and Nevada have strong policy arguments based on standards of justice, fairness, and sound water policy. That all states are equal sovereigns is an intuitive and rational notion in the American legal system.[336] Given the current state of the Colorado River, it is imperative to enact radical change through a legal framework before irreversible damage is done. One approach is through conservation-oriented policies that actually take into account the levels of the Colorado River and that require sacrifices to be both fairly distributed as well as proportionate to the size and usage of the Lower Basin States.

As of today, a sensical and just allocation plan for the diminishing Colorado River has eluded all the parties that depend on its water. Distinctly unfair and over-consumptive water policies have been the basis of all the major stages of the current water crisis at every level. The Supreme Court is the last mechanism to correct a historic, scientific, and legal wrong. The Court may be presented with such an opportunity very soon.

CONCLUSION

There should be no question that our approach to water in the West has been a history of "denial and wishful thinking" now "crashing into harsh realities."[337] The frameworks we have built to resolve the questions around water inherently favor California while harming Arizona and Nevada. The body of law that currently dictates how to resolve water disputes in the

335. *Id.* at 536.

336. *See supra* Part 0–0.

337. *Water: Last Week Tonight with John Oliver, supra* note 15, at 3:37.

Lower Basin States is flawed. From beginning to end, it is premised upon a rights system unfairly impacted by when the affected states were admitted, incorporates overly optimistic science into interstate compacts that prejudice Arizona and Nevada's consumptive use of water, and is reinforced by federal intervention that misuses these issues to perpetuate further outcomes. The only Supreme Court ruling on the matter has perpetuated the historical inconsistencies and unjust outcomes faced by Arizona and Nevada.

At any point, these parties could correct this inherently flawed system. Arizona, Nevada, and California could come to an altruistic agreement that shares the burden of significantly reduced water levels. The compacts could be amended. The Bureau of Reclamation could impose fairer reductions across the states. The Supreme Court could issue an amended decree or new ruling to correct the issues plaguing the Lower Basin of the Colorado River. Any such option would foster a fairer and more conservation-oriented approach to western water law and shortage disputes. A more equitable approach to water allocation not only has immediate import for the Colorado River Basin, but also for countless other states currently facing drastic shortages of groundwater.[338] Such principles articulated by a Supreme Court decision and/or an act of Congress could save the states and their citizens tremendous pains in the not-too-distant future.

In the meantime, it would behoove Arizona and Nevada to prepare for the next stage of the water dispute. In the same way that the Supreme Court has recognized in *Shelby County* that "the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized,"[339] so too should it recognize that ensuring equality and harmonious coexistence of the Lower Basin States demands equal footing through equal rights to water.

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338. *See* The Daily, *Arizona's Pipe Dream*, *supra* note 53, at 3:10 (describing how in almost every part of the country, there is a problem with pumping groundwater at a rate that will soon deplete supplies, "[N]ot just in the West, but across the U.S., places like Maryland and Kansas and Arkansas and New York and Minnesota").

339. *Shelby Cnty.*, 570 U.S. at 544 (quoting Coyle v. Smith, 221 U.S. 559, 567 (1911)).