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Renegotiating the Colorado River Compact: How a One Size Fits All Approach Has Led to a State Centric Future, and How the Commerce Clause Can Solve It

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Renegotiating the Colorado River Compact: How a One Size Fits All Approach Has Led to a State Centric Future, and How the Commerce Clause Can Solve It

ERICA PORVAZNIK*

While equitable division of water supplied by the Colorado River has been dictated by the Colorado River Compact for over one hundred years, this agreement has only served to create an unequal, power dynamic amongst all the states and parties to the Compact.

The current provisions controlling the apportionment and usage of the water are set to expire in 2026. Therefore, there is a path forward for the water to be divided in a new way, specifically, by Congress. I argue that Congress should assume authority over the Colorado River and apportion the water under their Commerce Clause power, as Congress has the sole ability to regulate commerce amongst states, foreign nations, and tribes. Though this provision was not used to originally allocate the water from the river, it is imperative that it is relied upon for any future apportionment in order to prevent any one state from monopolizing a share of the river's water.

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I. INTRODUCTION

One of the foremost questions when the population first began to surge in the western United States was where new territories and states would get their water from. That answer would be contained in the sprawling Colorado River. Spanning approximately 1,450 miles, including seven western states in the United States, and the country of Mexico, the river now supplies water to over 36 million people.¹ In the beginning however, the question of who owned what amount of the waters of the river was highly debated. In response to this question, Congress authorized those seven states, in which the river spanned, to create an agreement “respecting the disposition and apportionment of the waters of the Colorado River. . . .”² Little did Congress know, they were authorizing what would become one of the most well recognized and infamous compacts concerning water rights in the United States. On November 24, 1922, the states of Arizona, California, Colorado, New Mexico, Nevada, Utah, and Wyoming, would meet and create The Colorado River Compact (hereinafter “the Compact”).³ Over the years, the Compact has evolved into what has collectively become known as “The Law of the River.”⁴ What was once a treaty entered into by seven western states, has now become an amalgam of case law, treaties –including international treaties– legislation, and further agreements.⁵

1. *Colorado River*, AM. RIVERS, <https://www.americanrivers.org/river/colorado-river/> (Last visited Feb. 23, 2023) [<https://perma.cc/F4VY-D5MZ>].

2. Federal Water Powers Act, chs. 273, 285, 41 Stat. 1063 (1920).

3. Colorado River Compact of 1922, 70 Cong. Rec. 324 (1928).

4. *The Law of the River*, U.S. DEPT. OF THE INTERIOR BUREAU OF RECLAMATION, <https://www.usbr.gov/lc/region/g1000/lawofrivr.html> (Last updated Mar. 2008) [<https://perma.cc/HD6P-UQAP>].

5. *Id.*

While the Compact may seem everlasting, a monolith in western American water rights, the current agreements centering around the Compact are set to expire on January 1, 2026.⁶ The states are presented with three options regarding the expiration: (1) they may either renew the Compact, keeping with the status quo set forth in the original; (2) renegotiate the compact; or (3) with Congressional approval, they may seek to create a new compact.⁷ While the states have already begun talks regarding their options, the increasing droughts and water shortages in the West have led states to take an everyman for themselves approach in regard to their own share of the water.⁸ While some states are implementing drought measures and conservation solutions to help with the shortage, this will not be enough to prevent an all-out water war among the states when these negotiations inevitably breakdown. Specifically, I discuss that all Compact states should adopt the measures imposed by some of the hardest hit states in taking steps to limit their reliance on the water from the river. I further argue that renegotiation or re-adoption of the Compact will not be sufficient in equally distributing the water in the future, whether or not it is divided among similar lines as the original compact. As such, Congress should step in under its Commerce Clause authority to regulate and equitably re-apportion the river over the states reaching a new agreement or re-adopting the existing one.

II. THE HISTORY AND CREATION OF THE COMPACT AND THE STATE OF THE COMPACT TODAY

A. *WYOMING V. COLORADO* AND THE DOCTRINE OF PRIOR APPROPRIATION

The issue over how water was to be divided in the West began, as so many things do, with a dispute. States were increasingly concerned about the population growth of the West, and the effect it would have on competing water supplies to an already tenuous sharing system.⁹ As such, Colorado began construction on the Laramie-Poudre Diversion Tunnel in order to

6. *Colorado River Compact Agreement*, LAS VEGAS NEV. (Aug. 26, 2021), <https://www.lasvegasnevada.gov/News/Blog/Detail/colorado-river-compact-agreement> [<https://perma.cc/FG6E-R86W>].

7. Nick Bowlin, *Will the Climate Crisis Tap Out the Colorado River?*, HIGH CNTY. NEWS (Feb. 24, 2021), <https://www.hcn.org/issues/53.3/south-colorado-river-will-the-climate-crisis-tap-out-the-colorado-river> [<https://perma.cc/Z5HD-5RH3>].

8. Luke Runyon, Ariana Brocius & Lexi Peery, *A Colorado River Showdown is Looming. Let the Posturing Begin*, KUNC (Mar. 19, 2021, 10:07 AM), <https://www.kunc.org/environment/2021-03-19/with-a-colorado-river-showdown-looming-let-the-posturing-begin> [<https://perma.cc/GK63-T5A4>].

9. Joe Gelt, *Sharing Colorado River Water: History, Public Policy and the Colorado River Compact*, 10 WATER RES. RSCH. CTR. 1, 2-3 (1997).

increase the access to water for their state.¹⁰ The tunnel, completed in 1911, would divert water from the Laramie River, an interstate stream, which flows from Colorado and into Wyoming.¹¹ Colorado's proposed diversion was for the irrigation of land over fifty miles away from the diversion point.¹² The problem with the diversion lied in the fact that none of the water could ever return to the Laramie River or reach Wyoming, burdening Wyoming's supply of the water from the river.¹³ Wyoming brought suit against Colorado to prevent the diversion of the water from the river. Wyoming argued that it was entitled to use of the water as Wyoming had appropriated the rights to the river first, which made their right to the water superior to that of Colorado's.¹⁴ Conversely, Colorado argued that it was their right as a state to "dispose . . . of any part or all of the waters flowing in the portion of the rivers within her borders. . . ."¹⁵ Colorado further argued that it was entitled to equitable apportionment of the river and that the proposed diversion, along with the appropriations that they held prior, would not exceed this share. Finally, Colorado argued that even after their share of the diversion was taken, there would be sufficient water left to satisfy the appropriations in Wyoming.¹⁶

The lawsuit itself lasted numerous years, in which the Court analyzed flows from the river over periods of time in order to decide the *amount* of water that could be appropriated.¹⁷ The Court was then presented with two choices in determining *how* this water could be appropriated according to common law water rights. Generally, in the United States, states had either used a "riparian system" or a "prior appropriation system" to share water.¹⁸ Under a riparian system, the users have "an equal claim to a reasonable use of the resource."¹⁹ "The fundamental concept of riparian doctrine is that the owner of land adjacent to a waterbody (e.g., lake, river, stream) has the right to use the water."²⁰ However, under a prior appropriation system, the first to

10. *Laramie-Poudre Diversion Tunnel*, COLO. STATE UNIV. PUB. LAND HIST. CTR., https://publiclands.colostate.edu/digital_projects/dp/poudre-river/moving-storing/ditches-dams-diversions/laramie-poudre-diversion-tunnel/ (Last visited Feb.23, 2023) [<https://perma.cc/7E6G-CGGU>].

11. *Id.*

12. *See Wyoming v. Colorado*, 259 U.S. 419, 456 (1922).

13. *Id.*

14. *Id.*

15. *Id.* at 554.

16. *Id.* at 555.

17. *See Wyoming v. Colorado*, 259 U.S. at 555.

18. *See generally* 3 Amy K. Kelley, *Water and Water Rights Treatise* §§ 6.01- 11.08 (Matthew Bender eds., 3rd ed. 2021); *Water Law: An Overview*, THE NAT'L AGRIC. L. CTR., <https://nationalaglawcenter.org/overview/water-law/> (Last visited Feb. 23, 2023) [<https://perma.cc/PUM5-GN2V>].

19. Kelley, *supra* note 19, § 6.01.

20. *Introduction to Riparian Doctrine*, ND WTR L. <https://www.ag.ndsu.edu/ndwaterlaw/acquiringwater/easternlaw/ripariandoctrine> (Last Visited Mar. 2, 2023) [<https://perma.cc/DP9S-ATD5>].

appropriate the right to the water has the better, and therefore, superior right over junior appropriators (those who appropriate after the first user).²¹ “[A]pplication of the water to a beneficial purpose constituted an appropriation, and the appropriator was treated as acquiring a continuing right to divert and use the water to the extent of his appropriation, but not beyond what was reasonably required and actually used.”²² A beneficial purpose typically consists of those such as domestic, municipal, agricultural, industrial, and recreational uses.²³

In determining which water doctrine to apply, the Court looked at the history of water usage in the territories in the West. Prior to statehood, these territories codified the prior appropriation doctrine, treating the right as one of property, where the first to use would prevail, even if it was outside territory lines.²⁴ Following this precedent, when these states entered the Union, no other water right doctrine was recognized. In fact, under the National Reclamation Act, Congress stated in pertinent part that:

Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.²⁵

The Court also looked at the decisions of both Wyoming and Colorado’s Supreme Courts to conclude that “[t]he common-law rule respecting riparian rights in flowing water [was] never obtained in either state. It always was deemed inapplicable to their situation and climatic conditions.”²⁶ Therefore,

21. See *Wyoming v. Colorado*, 259 U.S. at 465.

22. *Id.* at 459.

23. Kelley, *supra* note 19, § 6.01.

24. *Id.*

25. National Reclamation Act, ch. 1093, 32 Stat. 388 (1902).

26. *Wyoming v. Colorado*, 259 U.S. at 458-59.

a prior appropriation system would govern the dispute over the share of the water, not a riparian system.

Ultimately then, the Court framed the legal issue as “not what one state should do for the other in regard to the water usage”, but how each state “should exercise [their] relative rights in the waters of this interstate stream.”²⁷ It was evident that the prior appropriation doctrine would govern the control states would have over all water distribution in the West, not just this distribution. Rights to the River would be determined on the basis of who claimed what first, regardless of state lines and boundaries. Therefore, Wyoming was recognized as being the senior appropriator of the water rights to the River and Colorado as that of the junior appropriator, subject to use of the water only *after* Wyoming’s share was fulfilled.²⁸

Interestingly, the Court held that the states had a duty to conserve the “common supply” of the interstate water²⁹, yet their decision helped to set the stage for a state-centric future. By framing their question as one in which the states are able to exercise their own rights to interstate waters, the Court unknowingly opened the door for future disputes over the appropriation of interstate waters, as applying the prior appropriation doctrine begs the questions of who has what rights, and how much are they entitled to?

B. THE CREATION OF THE COLORADO RIVER COMPACT

In the aftermath of *Wyoming v. Colorado*, one of the attorneys for the state of Colorado, Delph Carpenter, felt there was a better way to solve the issue of water appropriation than through litigation.³⁰ The decision in *Wyoming v. Colorado* established that prior appropriation would govern any dispute that the Supreme Court would litigate between the states in the future, which was highly concerning to those states who were not as large as California and therefore, did not manage to claim as many rights first.³¹ Widely considered the “architect” of the Compact, Carpenter was the one to initially propose that equitable apportionment of the river was the best compromise between all the states, and urged that they come together to reach such an agreement.³² In January of 1922, the Colorado River Commission was created and all seven states named a delegate to represent their state’s interests

27. *Id.* at 484.

28. *Id.* at 495-96.

29. *Id.* at 484.

30. *Delph E. Carpenter (1877-1951)*, COLO. STATE UNIV. PUB. LANDS HIST. CTR., https://publiclands.colostate.edu/digital_projects/dp/poudre-river/moving-storing/biographies/delph-e-carpenter/ [https://perma.cc/P2GA-ZMSH] (Last visited Feb. 23, 2023).

31. *Colorado River Compact*, WATER EDUC. FOUND., <https://www.watereducation.org/aquapedia-background/colorado-river-compact> [https://perma.cc/T27Q-R4FF] (Last visited Feb. 23, 2023).

32. *Delph E. Carpenter*, *supra* note 31.

in the negotiations.³³ The then United States Secretary of Commerce, Herbert Hoover, was appointed to represent the federal government's interest in the negotiations.³⁴ The delegates first met in Washington D.C. to discuss how to allocate the water from the Colorado River Basin.³⁵ Negotiations at this time failed to produce an agreement that all states supported, and they arranged to meet in Santa Fe, New Mexico later in the year, to again try to discuss allocation of the water.³⁶

When the delegates of the states came together that November, it took them fifteen days to discuss, negotiate, and sign the agreement that would become The Colorado River Compact.³⁷ Eleven articles govern the Colorado River Compact, which includes provisions as to how the water was to be apportioned, and to whom the water first flows.³⁸ Foremost, the Compact provided for the "equitable division and apportionment of the use of the waters of the Colorado River system[.]" as Carpenter had initially proposed.³⁹ However, the states could not come to an agreement on how or what amount would equitably apportion the water.⁴⁰ Population growth in places such as California, drove other states to push for a greater share of water and made them less willing to compromise, out of concern that California would receive the largest share of the water due to its sheer size.⁴¹ It was Herbert Hoover however, who suggested that the Colorado River system be divided into an "Upper Basin" and "Lower Basin", with Lees Ferry, Arizona serving as the dividing line between the two.⁴² The Upper Basin included the parts of Arizona, Colorado, New Mexico, Utah, and Wyoming, in which water drained into the Colorado River *above* Lees Ferry.⁴³ The Lower Basin, then, would include the parts of Arizona, California, Nevada, New Mexico, and Utah, in which water would drain into the river *below* Lees Ferry.⁴⁴ The states were also divided into divisions, consisting of an "Upper Division" and a "Lower Division".⁴⁵ The Upper Division would include the states of Colorado, New Mexico, Utah, and Wyoming, while the Lower Division would include the states of Arizona, California, and Nevada.⁴⁶ Hoover also suggested the water be equitably apportioned at a consumptive use of 7.5 million

33. *Id.*

34. *Id.*

35. *Colorado River Compact*, *supra* note 32.

36. *Id.*

37. *See id.*

38. 70 Cong. Rec. 324-25 (1928).

39. *Id.* at Art. I.

40. *The Law of the River*, *supra* note 5.

41. Gelt, *supra* note 10, at 2.

42. *Colorado River Compact*, *supra* note 32.

43. 70 Cong. Rec. 324-25 (1928) at art. II, § (f).

44. *Id.* at art. II, § (g).

45. *Id.* at art. II, §§ (c-d).

46. *Id.*

acre-feet of water per year to each basin.⁴⁷ In addition to this, the Lower Basin, mainly at the behest of California, was given the right to increase this use by one million acre-feet per year.⁴⁸

As to other parties' claims to the water, the compact also addressed the rights of Mexico, holding in relevant part that the water to the country

shall be supplied first from the waters which are surplus over and above the aggregate of the quantities of the 7.5 m.a.f. and the one million acre feet per annum, and if such surplus shall prove insufficient for this purpose, then, the burden of such deficiency shall be equally borne by the Upper Basin and the Lower Basin, and whenever necessary the States of the Upper Division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).⁴⁹

Later, in the Mexican Water Treaty of 1944, this would be cemented as 1.5 million acre-feet (m.a.f.) of the river's annual flow.⁵⁰ Mexico's role in future negotiations, therefore, is also important, as they have a vital claim to the water, and the basins are required to provide the country with water if their share is unmet.⁵¹ Also briefly mentioned was the right of Native American tribes to the water, noting that nothing in the Compact should "be construed as affecting the obligations of the United States of America to Indian tribes", a source of much tension and litigation at the present.⁵² Any future negotiation of the Compact will include this key community as certain Native American tribes now have recognized claims to the River's waters, furthering the competing demands that were not a mainstay in the original agreement, and one that has complicated the negotiations towards a renewal.⁵³

Signed by all seven delegates of each state, the Compact was a feat of its time. For the first time in United States history, more than three states had come together to negotiate and equitably agreed to share a much-needed

47. *Id.* at art. III § (a).

48. 70 Cong. Rec. 325 (1928), at § (b).

49. *Id.* art. III, § (c).

50. *The Law of the River*, *supra* note 5.

51. NICOLE T. CARTER ET AL., CONG. RSCH. SERV., R43312, U.S.-MEXICAN WATER SHARING: BACKGROUND AND RECENT DEVELOPMENTS 1 (2017); *Minute 319*, INT'L BOUNDARY AND WATER COMM'N U.S. AND MEX., https://www.ibwc.gov/Files/Minutes/Min319_Env_Fact_Sheet.pdf [<https://perma.cc/XDG3-NBQP>] (Last visited Dec. 24, 2021).

52. Colorado River Compact of 1922, *supra* note 4, at Article VII; *see supra* Section II.a.

53. *See supra* Section II.a.

resource.⁵⁴ Nevertheless, in a just a short amount of time, there would be disputes as to key provisions of the Compact.

C. THE BOULDER CANYON PROJECT ACT OF 1928 AND *ARIZONA V. CALIFORNIA*

The impact of the Compact was far reaching, and for a time, the states were content with the share of water they were receiving. However, the discussions and future issues would show that this was anything but a show of state comradery. Although it demonstrates that states have come together before, and may do so again, history has indicated that states are unwilling to compromise, especially in a more drought fraught world. A few years after the Compact's enactment, issues began to arise over the apportionment of the water, as the initial amount of 7.5 m.a.f. was based on an incorrect calculation of the flow of the Colorado River.⁵⁵ The states had not prepared for the fact that over the next few years, after the Compact was ratified, the flow would be lower than expected due to its fluctuation.⁵⁶ The erratic nature of the flow therefore, posed problems to the states in regards to constructing dams that could control and distribute the water.⁵⁷ These dams would also be costly endeavors that the states, by themselves, were unwilling to undertake.⁵⁸ On top of the droughts that were plaguing the region, there were also floods from snowmelts that furthered the difficulty of fully monopolizing the river's water source potential.⁵⁹

In order to alleviate the issues that the states were facing, the Boulder Canyon Project Act was enacted by Congress in 1928.⁶⁰ The Act, which would also serve as Congress's ratification of the original 1922 agreement, was passed in order to control the floods and to help regulate the flow of the river, by constructing a dam at or near Boulder Creek, Arizona.⁶¹ The dam, which would later become known as "The Hoover Dam", was authorized, along with a reservoir that would be used for water storage, which was to be built at Lake Mead, Arizona.⁶² The construction of the dam would also provide for hydroelectric power, which would offer another beneficial use of the dam to the states.⁶³ Of the two provisions that would be a source of contention, Section 4 of the Act authorized Arizona, California, and Nevada to enter into an agreement to apportion the 7,500,000 acre-feet of water initially given

54. *Colorado River Compact Agreement*, *supra* note 7.

55. *Colorado River Compact*, *supra* note 32.

56. *Id.*

57. *See Arizona v. California*, 373 U.S. 546, 553 (1963).

58. *Id.*

59. *Id.*

60. *See* 43 U.S.C. §§ 617–617v (1928).

61. *See id.* § 617l.

62. *See id.* § 617e.

63. *See id.* § 617r.

to the Lower Basin in the original Compact.⁶⁴ 300,000 acre-feet would be given to Nevada, and 2,800,000 acre-feet would be given to Arizona plus half of any surplus waters un-apportioned by the Compact.⁶⁵ The section also gave Arizona the “exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State. . . .”⁶⁶ Moreover, Section 5 of the Act authorized the Secretary of the Interior to contract for the storage of the water in the reservoir, along with any delivery of said water for irrigation or domestic uses.⁶⁷ While the Secretary of Interior had the sole contracting authority over the water in the reservoir, they were subject to provision (b) of Section 5 in the Act.⁶⁸ This provision stated that if Arizona, California, and Nevada did enter into an agreement, as Section 4 authorized, the contracts made by the Secretary of the Interior would be reliant on that agreement.⁶⁹

While the Act provided some relief for the issues of how to control the river, the problems between the states still persisted. Take, for instance, the pivotal Supreme Court decision of *Arizona v. California*, which was a landmark water rights case dealing directly with the Compact and the Boulder Canyon Project Act.⁷⁰ Although all states, including Arizona, signed the original agreement, Arizona would not officially ratify the Compact until 1944.⁷¹ Arizona was concerned that the initial Compact did not allocate water to the states, but rather to the basins, which would create potential problems in the future.⁷² In particular, Arizona was concerned that the size and population of California would give California more power to monopolize a larger share of the water apportioned to the Lower Basin, leaving little, if any, to Arizona and Nevada.⁷³ Although the Boulder Canyon Project Act gave Arizona more entitlement of the water than the initial 1922 Compact, population growth in the two largest cities in Arizona, Phoenix and Tucson, led Arizona to begin looking at ways to bring more water into their state.⁷⁴ Arizona began developing the Central Arizona Project, which would deliver water directly from their apportionment of the Colorado River, mainly from the Gila River, to the most arid regions of the state.⁷⁵ California was vehemently opposed to the project, as the state felt that Arizona’s use of the water interfered with

64. *Id.* § 617c.

65. 43 U.S.C. § 617c.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *See generally* *Arizona v. California*, 373 U.S. 546 (1963).

71. *Colorado River Compact*, *supra* note 32.

72. *Id.*

73. *Arizona v. California*, 373 U.S. at 556.

74. *Central Arizona Project*, U.S. BUREAU OF RECLAMATION, <https://www.usbr.gov/projects/index.php?id=504> [<https://perma.cc/7HTP-6DK6>] (Last visited Nov. 10, 2021).

75. *Id.*

California's rights as a prior appropriator, and therefore, Arizona had no right to begin the project.⁷⁶ Arizona brought suit against California in the Supreme Court, and once again, the Court would play peacemaker in a long, drawn-out case between two states fighting over water resources.⁷⁷ Similar to *Wyoming v. Colorado*, the Court would hand down a ruling that would greatly impact how the states were to negotiate in the future, once again showing the need for federal overhead, as it would create issues as to future claims to the water.

The Court was asked to determine how much water each state had a right to use out of the Colorado River and its subsequent tributaries, which the Court deemed to be rested solely upon the interpretation of the Boulder Canyon Project Act.⁷⁸ The Court, albeit in the moment, yet also prophetically, claimed that the problems in the suit stemmed from "the inability of local groups or individual States to deal with these enormous problems [and] the continued failure of the States to agree on how to conserve and divide the waters."⁷⁹

A special master was appointed by the Court, in which they spent four years conducting a trial, interviewing over 340 witnesses, analyzing exhibits, and conclusively releasing a 433-page report detailing their findings as to the share of each state's portion of the water.⁸⁰ The special master rejected California's argument that prior appropriation controlled the issues between the states.⁸¹ The reason: the states of Arizona, California, and Nevada had failed to make an agreement as they were authorized to do in Section 4 of the Boulder Canyon Project Act.⁸² As such, Section 5 of the Act would control over the doctrine of prior appropriation.⁸³ Therefore, on the recommendation of the special master, the Court determined that "Congress in passing the Project Act 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 mainstream waters of the Colorado River, leaving each State its tributaries."⁸⁴ The division of the water, the Court held, was not dependent on these states' agreeance to and formation of a compact. Rather, it was accomplished through giving the Secretary of the Interior the authority to "make contracts for the delivery of water and by providing that no person could have water without a contract."⁸⁵

76. *The Law of the River*, *supra* note 5.

77. *Arizona v. California*, 373 U.S. at 546.

78. *Id.* at 551-52.

79. *Id.* at 552 (in reference to the water disputes and shortages).

80. *Id.* at 551.

81. *Id.* at 562.

82. *Arizona v. California*, 373 U.S. at 562; 43 U.S.C. § 617 (1928).

83. *Arizona v. California*, 373 U.S. at 562.

84. *Id.* at 565.

85. *Id.*

Ultimately, the Court decided that a fair division of the 7,500,000 acre-feet of water given to the Lower Basin should be as follows: 1) California would receive 4,400,000 acre-feet; 2) Arizona would receive 2,800,000 acre-feet; and 3) Nevada would receive the remaining 300,000 acre-feet, and if any surplus existed, then Arizona and California would each be entitled to half.⁸⁶ Another source of issue in the case was the fact that the United States also asserted claims for use of water on Indian Reservations.⁸⁷ While the original Compact specifically noted that nothing in the agreement concerned these rights, the Court held that Congress had the right, under its Commerce Clause authority, to reserve water rights “for its reservations and its property.”⁸⁸ In determining the amount of water to be given to the reservations, the prior appropriation doctrine would not apply, further complicating the apportionment scheme of the river.⁸⁹

The Court in *Arizona v. California* lambasted the failure of the Colorado River Compact to divide the water between the Lower Basin States, or to control any future apportionment or distribution of water between the states.⁹⁰ The Court even noted that “negotiations [surrounding the 1922 Compact] would have broken up but for Mr. Hoover’s proposal. . . .”⁹¹ As history will inevitably repeat itself, the focus should be on how to prevent any current or future negotiations from stalling. The Court seemingly provides the answer in recognizing that “where Congress has so exercised its constitutional power over waters, courts have no power to substitute their own notions of an ‘equitable apportionment’ for the apportionment chosen by Congress.”⁹² Therefore, the Court admits that if Congress steps in under its Commerce Clause authority, to regulate and reapportion the river, the Court will defer to their authority. This will lead to less lawsuits between the states and others who have claim to the water, and recognizes Congress’s broad authority to control how the waters should be shared.

86. *Id.* at 592.

87. *Id.* at 595-97.

88. *Arizona v. California*, 373 U.S. at 598.

89. *Id.* at 597.

90. *Id.* at 566.

91. *Id.* The Court was referring to Herbert Hoover’s proposal that the water be equitably apportioned at 7.5 m.a.f. per basin. *Arizona v. California*, 373 U.S. at 557.

92. *Id.* at 566.

III. WHAT HAD LED TO INCREASING DEMANDS FOR COLORADO RIVER WATER?

A. RECOGNITION OF THE RIGHTS OF TRIBAL NATIONS TO ACCESS COLORADO RIVER WATER

In *Winters v. United States*, the Supreme Court first recognized the right of Congress to reserve land for reservations, and to also reserve the water that will be sufficient to sustain the reservation.⁹³ Also known as the *Winters* Doctrine, the rights to the water are not quantified, but rather apportioned, on what Congress believes is necessary.⁹⁴ These rights are senior to those of junior rights, which has convoluted traditional apportionment schemes when rights to water are exercised.⁹⁵ While Congress should have negotiated and appropriated for the reservations during the original 1922 agreement, there was one major reason they did not. At the time, Native Americans were not considered citizens of the United States, and as such, had no say or ability to take part in the negotiations.⁹⁶ It was not until the decision in *Arizona v. California*, that the Court reaffirmed the *Winters* Doctrine and recognized tribal rights to the water for irrigation purposes, holding that “[the] tribal water rights should be charged against the apportionment made to the state in which a tribe’s water use occurs.”⁹⁷ Therefore, if a tribal right is recognized, a state would have to share their apportionment with the tribes that have received recognition to the water in their state, further limiting the amount a state can access.

Since the decision in *Arizona v. California*, thirty tribes in the region of the Colorado River presently have recognized water rights to the River.⁹⁸ Annually, they are entitled to 3.2 m.a.f. of the River’s water, which equates to

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

94. CYNTHIA BROUGH, CONG. RSCH. SERV., RL32198, INDIAN RESERVED WATER RIGHTS UNDER THE *WINTERS* DOCTRINE: AN OVERVIEW 1 (2011) https://www.everycrsreport.com/files/20110608_RL32198_07a81581479b3130f87af9a80f794b296061e6ba.pdf [<https://perma.cc/T53E-Z7N4>].

95. *Id.* at 2-3.

96. Michael Elizabeth Sakas, *Historically Excluded from Colorado River Policy, Tribes Want a Say in how the Dwindling Resource is Used. Access to Clean Water is a Start*, COLO. PUB. R NEWS (Jan. 7, 2021), <https://www.cpr.org/2021/12/07/tribes-historically-excluded-colorado-river-policy-use-want-say-clean-water-access/> [<https://perma.cc/2BXN-FZCR>].

97. Alex Hager, *Tribes in the Colorado River Basin Say They’re ‘in the Dark’ as States Discuss Water Conservation*, KUNC (Aug. 5, 2022) <https://www.kunc.org/environment/2022-08-05/tribes-in-the-colorado-river-basin-say-theyre-in-the-dark-as-states-discuss-water-conservation> [<https://perma.cc/AR4U-6N8R>].

98. *Colorado River Basin Ten Tribes Partnership*, U.S. BUREAU OF RECLAMATION (Dec. 13, 2018), <https://www.usbr.gov/lc/region/programs/crbstudy/tws/finalreport.html> [<https://perma.cc/W99B-3DWG>].

approximately one-fourth of the total region's annual water supply.⁹⁹ This share of the water supply is greater even than that of some of the states' supplies.¹⁰⁰ However, even though these tribes have a federally recognized claim to the water, it is largely going unused, which is an increasing source of dispute between the states and the tribes. Because of this, tribes want guaranteed recognition in any negotiations going forward to ensure that they can access their full claims.¹⁰¹ There is a prevalent lack of infrastructure that has made it extremely challenging for tribes to access their share of the water, a concern that the states do not share or are even willing to support. If the tribes were to access the full potential of their rights, it would strain other states' already limited supplies, making states fearful of letting the tribes access their full water rights. As such, some states have enacted policies to basically estop the tribes from "accessing federal funding to build their own reservoirs, pipes and treatment facilities to direct clean water to their citizens," and from taking part in the upcoming negotiations surrounding reallocation of the water.¹⁰²

There are still twelve tribes in the region that have unresolved water rights claims, which could change the landscape of negotiations again, if they are apportioned any amount of the River's supply before the Compact's 2026 expiration.¹⁰³ The Navajo Nation for instance, is currently embroiled in a lawsuit against the Department of Interior, the Bureau of Reclamation, and the Bureau of Indian Affairs, seeking to address whether they are entitled to water from the mainstream of the River.¹⁰⁴ The case is ongoing in the Ninth Circuit, and has been litigated in some form since 2003.¹⁰⁵ The length of the lawsuit is not uncommon, as tribes have had to fight years, sometimes decades, in order to be granted access to the water.¹⁰⁶ If the Nation is recognized as having rights to the mainstream of the Colorado River, it will again mean that the share of the water must be split amongst one more user, adding more strain in deciding a fair amount between all users.¹⁰⁷

The Native American tribes are concerned, wisely so, as they may once again be excluded from vital negotiations about the River's water, since states are currently mobilizing to exclude them from any talks.¹⁰⁸ As such, the Nations are looking at measures to ensure their voices are heard. The tribes have petitioned the Secretary of the Interior, Deb Haaland, in order to

99. Sakas, *supra* note 97.

100. Sakas, *supra* note 97.

101. *Id.*

102. *Id.*

103. Sakas, *supra* note 97.

104. *Navajo Nation v. US Dept. of Interior*, 26 F.4th 794, 810 (9th Circ. 2022).

105. *Id.*

106. Sakas, *supra* note 97.

107. *See generally* Hager, *supra* note 98.

108. Sakas, *supra* note 97.

guarantee that they will be involved in the negotiations, rather than empty promises that they will.¹⁰⁹ It remains to be seen if the Secretary of Interior will honor this request and hold that the Nations *must* be included in the negotiations.¹¹⁰

Time and time again, these Nations have been barred from participating in negotiations, including during the 2007 drought negotiation agreements, which currently govern all those presently receiving water from the Colorado River.¹¹¹ If allowed to continue, state-based negotiations will omit an entire community that has every right to access the waters of the Colorado River. Injustice has already been done to the tribal nations for over a century of exclusion, which has led to depleted water resources for these communities as well.¹¹² Some could argue the depletion is on a larger scale than that of the states, as states have made it more difficult for the Nations to develop infrastructure to access their given apportionment of the water. In order for tribes to not only access their full potential, but to keep states from blocking their funding to build the infrastructure to support their share, Congress needs to maintain control and reapportion the River's water among *all* those that have rights, without the capacity to exclude members. It is Congress' duty under the Commerce Clause and under the *Winters* Doctrine to provide for and ensure that this group has access to the appropriate amount of water. Without congressional oversight, there is every possibility that the states will seek to exclude this group once again, out of fear that they will receive less share of the water if they have to recognize the tribes' rights.

B. ENVIRONMENTAL CHANGES

Of the foremost pressing problems facing the renegotiations of the River's water is the impact of environmental change on the water supply. While the initial Compact overallocated the water, based on rainfall that was higher than usual, recent years have put a strain on the water supply that was completely unforeseen at the time of the original Compact.¹¹³ The water in the River is dwindling, meaning that states will not be able to receive their allocated share of the water agreed upon in the original Compact, as it just does not exist.

Since the year 2000, long-term droughts have been plaguing the water supply in the region, which has included the driest sixteen-year period in over

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. See generally *Colorado River Compact*, *supra* note 31; Drought in the Colorado River Basin, U.S. DEPT. OF INTERIOR, <https://www.doi.gov/water/owdi.cr.drought/en/#SupplyDemand> [<https://perma.cc/8DBD-CVH2>].

one hundred years.¹¹⁴ This has equated to a twenty percent decline in average annual rainfall, with an alarming prediction of roughly a nine percent decline for every degree Celsius of warming.¹¹⁵ This is a worrisome projection, as the decline in the water supply can no longer be supported by reserved water. While the reservoir at Lake Mead had been able to manage and provide a makeup-supply of water to the states, mainly due to its large storage capacity, the reservoir is at an all-time low.¹¹⁶ Since its peak in January 2000, the water level has fallen 146 feet, bringing its storage to roughly thirty-five percent capacity.¹¹⁷ This is the lowest level in the reservoir since the lake was filled after the construction of the Hoover Dam in 1935.¹¹⁸ The reservoir at Lake Powell fairs no better, sitting at just thirty-two percent of its capacity.¹¹⁹

While drought measures have been implemented in the past, which included negotiations and agreements made between the states to scale back on their dependency on the River's water, these were short-term solutions made when a makeup-supply of water could still be given to the states.¹²⁰ Yet, in August of 2021, the Bureau of Reclamation declared its first ever shortage, which triggered the largest ever mandated water cuts.¹²¹ These cuts were implemented on January 1, 2022, and are based on troublesome projections by the Bureau, which estimates that the River is only at forty percent of its capacity.¹²² Under these new measures, Arizona will see the largest reduction to their supply of the River, at a roughly eighteen percent decline of their entitled share of the water.¹²³ The next largest cut falls on the state of Nevada, which will be required to make a seven percent reduction in their state's supply of the water. Finally, Mexico is also required to reduce its supply of the water by five percent.¹²⁴

114. *Drought in the Colorado River Basin*, U.S. DEPT. OF INTERIOR, <https://www.doi.gov/water/owdi.cr.drought/en/#SupplyDemand> [https://perma.cc/8DBD-CVH2] (Last visited Dec. 24, 2021).

115. Annie Snyder, *Drought Forces First Water Cuts on the Colorado River. They're Just Beginning*, POLITICO (Aug. 16, 2021, 6:21 PM), <https://www.politico.com/news/2021/08/16/megadrought-colorado-river-505190> [https://perma.cc/XW4Q-7G8G].

116. *Drought in the Colorado River Basin*, *supra* note 114.

117. Rachel Ramirez, *First-Ever Water Cuts Declared for Colorado River in Historic Drought*, CNN (Aug. 17, 2021, 8:30 AM), <https://www.cnn.com/interactive/2021/08/us/colorado-river-water-shortage/> [https://perma.cc/5TXK-RKY6].

118. *Id.*

119. *Drought in the Colorado River Basin*, *supra* note 114.

120. *Id.*

121. Ramirez, *supra* note 118; *Reclamation Announces 2022 Operating Conditions for Lake Powell and Lake Mead*, U.S. BUREAU OF RECLAMATION (Aug. 16, 2021), <https://www.usbr.gov/newsroom/#/news-release/3950> [https://perma.cc/A8JY-RD49].

122. *Reclamation Announces 2022 Operating Conditions for Lake Powell and Lake Mead*, *supra* note 122.

123. *Id.*

124. *Id.*

With predictions of rainfall estimated to be the same or lower in the next few years, the water in the River will continue to diminish, impacting states' ability to fulfill their apportionments.¹²⁵ As of the writing of this Article, the Bureau of Reclamation has already announced cuts for 2023, brought on by worsening drought conditions.¹²⁶ Beginning January 2023, states are slated to take an even higher percentage of cuts than the 2022 measures, and an additional 480,000 acre-feet of water will be held back in the reservoirs.¹²⁷ The hardest hit states in drought and cutback measures will aim to negotiate for a higher percentage of the water, as competing demands will continue to increase as access dries up. The longer it is left to the states to negotiate, the harder it will be to find an equal solution to the predicament the West is facing. It is imperative that Congress take the steps necessary to maintain authority of the River's waters and to apportion out this ever-scarce resource.

IV. THE STATE OF NEGOTIATIONS AND WHAT STATES ARE DOING IN RESPONSE TO CUTBACKS

Negotiations for reapportionment are beginning, and the question of who will be included still remains. As of now, the original negotiators, the seven states and Mexico, will be involved, along with the Bureau of Reclamation.¹²⁸ These states have at least indicated an initial willingness to begin conversations with each other in regard to negotiations past 2026.¹²⁹ It remains to be seen however, how many others will be involved.¹³⁰

Many states have begun to limit their reliance on the River and are implementing solutions to begin to find ways to receive water from means other than the River itself.¹³¹ While some states have implemented measures that have seen a dramatic decrease in reliance on the water, other states have undertaken measures that are too costly or uncertain to be attainable long-term solutions.¹³² Furthermore, some of these measures have yet to be put in place,

125. *Reclamation Announces 2022 Operating Conditions for Lake Powell and Lake Mead*, *supra* note 122.

126. *Interior Department Announces Actions to Protect Colorado River System, Sets 2023 Operating Conditions for Lake Powell and Lake Mead*, U.S. DEPT. OF THE INTERIOR (Aug. 16, 2022), <https://www.doi.gov/pressreleases/interior-department-announces-actions-protect-colorado-river-system-sets-2023> [<https://perma.cc/K9GV-4TY2>].

127. *Id.*

128. Runyon et al., *supra* note 9.

129. Luke Runyon, *In Rapidly Warming Colorado River Basin, The Negotiating Table is Being Set*, KUNC (Mar. 2, 2021, 8:51AM), <https://www.kunc.org/environment/2021-03-02/in-rapidly-warming-colorado-river-basin-the-negotiating-table-is-being-set> [<https://perma.cc/6EKE-CUYJ>].

130. *Id.*

131. *Drought and Conservation Measures*, LAS VEGAS VALLEY WATER DIST., <https://www.lvwwd.com/conservation/measures/index.html> [<https://perma.cc/RMR7-5RFN>] (Last visited Feb. 10, 2023).

132. Ramirez, *supra* note 118.

which means these states are still relying on access to the water of the Colorado River for their immediate needs and cannot afford to lose any of their share of the water until their solutions are implemented.¹³³

A. ARIZONA, MEXICO, AND DE-SALINATION PLANTS

In May of 2021, Arizona announced a partnership with Mexico in which they would build and operate a de-salination plant on the Sea of Cortez, located in Mexico.¹³⁴ Once fully operational, the desalination plant would allow both Arizona and Mexico to limit their reliance on the water from the Colorado River, yet provide increasing access to water for millions of people, especially as the population of Arizona continues to increase.¹³⁵

The desalination plants would take water from the Sea of Cortez, as well as water from salinated areas in Arizona, and using reverse osmosis, remove the salt from the water, turning it into fresh water.¹³⁶ The idea has gained traction throughout the world as an alternative for countries that are facing water shortages such as Brazil, Israel, and Australia.¹³⁷ Once the plant is built, it is estimated that it could provide at least fifty thousand acre-feet of water per year, significantly increasing the amount of water available to the Arizona population.¹³⁸

Nonetheless, while the process sounds like a long-term solution, it is a costly endeavor to undertake, and one that uses a great amount of energy just to convert the water.¹³⁹ The plant could cost up to three billion dollars to build, and carries an operational cost of 71 to 119 million dollars a year, in order to produce a fraction of the supply of water that Arizona receives from the River.¹⁴⁰ Another issue is that while the cost itself to treat the salt water has decreased, it is still nonetheless, more expensive of a method.¹⁴¹ It costs about twice as much to pump the water for desalination than it does for the Colorado River.¹⁴² As such, Arizona is also experimenting with the idea of treating their brackish water, which is surface or groundwater that has been

133. *Id.*

134. *Governors Ducey, Pavlovich Sign Water, Air Quality Agreement*, OFF. OF THE GOVERNOR DOUG DUCEY (May 18, 2021) <https://ictnews.org/the-press-pool/governors-ducey-pavlovich-sign-water-air-quality-agreement> [<https://perma.cc/767S-QTLQ>].

135. Mark Brodie, *Arizona Explores Desalination Options to Help Water Issues*, KJZZ (July 30, 2019, 11:50AM), <https://kjzz.org/content/1064026/arizona-explores-desalination-options-help-water-issue> [<https://perma.cc/6ZYG-W577>].

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. Brodie, *supra* note 136; Drew Kahn et al., *The Southwest's Most Important River is Drying Up*, CNN (Aug. 21, 2021), <https://www.cnn.com/interactive/2021/08/us/colorado-river-water-shortage/> [perma.cc/TW8D-ZXB5].

141. Brodie, *supra* note 136.

142. *Id.*

mixed with sea water.¹⁴³ The cost is much less expensive to treat this type of water, as there is less salt to remove in order to make it freshwater, and therefore more cost effective.¹⁴⁴ Furthermore, Arizona has large levels of brackish water deposits throughout the state, which can be treated more cheaply than that of the saltier Sea of Cortez water.¹⁴⁵

In theory, the use of desalination plants to provide water has worked in countries that have seen water depletion with little or no other access to water.¹⁴⁶ However, the costs to build and operate the plant, as well as to find and pump the water to treat, may not outweigh the supply of water that will come from the plant. It remains to be seen if this is a smart move on Arizona's part to limit its reliance on the River, or a risky one. Nonetheless, Arizona still currently relies on the water from the Colorado River for its immediate water supply and are in dire need of its share.¹⁴⁷ Without a stable plan to replace the water, they will need more access as their population continues to grow. Arizona refused to ratify the original agreement out of concern that it did not give each state a portion of the water, rather it apportioned it out to each basin.¹⁴⁸ History may repeat itself in negotiations if the state once again feels that it's not being apportioned an equitable share of the water, as it's in a more tenuous positions than before, with an increasing population and a continuing rise in average temperatures.

B. NEVADA AND PROOF THAT CONSERVATION EFFORTS WORK

Out of all the states and entities that rely on the River water, Nevada has seen the most success in decreasing its consumption simply by using conservation efforts.¹⁴⁹ In 2002, Nevada recognized that it was using more water from the River than ever before, and all during one of the driest periods of the River's history.¹⁵⁰ In order to ensure that the population of Nevada had enough water to meet its needs, the state enacted major conservation efforts in the following year.¹⁵¹ The efforts have been touted as one of the most comprehensive water conservation programs in the entire United States, and has

143. See generally *Brackish Water as a Resource*, FLUENCE (Mar. 3, 2020), <https://www.fluencecorp.com/what-is-brackish-water/#:~:text=Brackish%20water%20is%20water%20with,precipitation%20percolates%20down%20into%20aquifers> [https://perma.cc/V6HL-H6JW].

144. *Id.*

145. Brodie, *supra* note 136.

146. *Id.*

147. *Id.*

148. See *supra* Section II.c.

149. *Drought and Conservation Measures*, *supra* note 132.

150. *Id.*

151. *Id.*

helped to greatly reduce Nevada's reliance on water from the Colorado River.¹⁵²

The state implemented *mandatory* conservation measures, which included "seasonal watering restrictions, golf course water budgets, a grass replacement program, water waste penalties, and changes to municipal codes that significantly reduced the impact of new development on [its] water supply."¹⁵³ These cumulative efforts resulted in Nevada using twenty-four billion gallons of water less than its all-time high in 2002, all while its population increased by almost 800,000 residents.¹⁵⁴ This equates to a forty-seven percent reduction in reliance on the Colorado River supply since these measures were implemented in 2003.¹⁵⁵ What is more, Nevada has continued to enact new legislation to decrease its usage even further.¹⁵⁶ In 2020, the state enacted legislation banning the use of water from the River to irrigate approximately 4,000 acres of unused grass, areas such as medians, homeowner's associations, and business centers, by the end of 2026.¹⁵⁷ These simple measures are ones that other states can enact as well in order to reduce their Colorado River reliance, as they involve cutting back on using the water for purposes that are mostly recreational.

While these cuts have been labelled as "drastic," the decrease in reliance on the water from the Colorado River is a testament to how well these measures have, and will, continue to work. If states can take the same steps to limit their dependence on the River, it would alleviate the amount that would need to be apportioned, which in turn would lead to fewer disputes among the states. It would also facilitate greater ease for Congress to divvy up the water if the states are equally sharing the burden in how to limit their reliance on the water, as the supply continues to diminish.

C. UTAH'S LAKE POWELL PIPELINE AND COLORADO RIVER AUTHORITY

If Nevada is taking measures to decrease its share of the Colorado River water, Utah is trying to do the exact opposite. Fearful of how much water the state might receive, as well as the fact that its share has decreased due to drought, Utah has created a plan in order for its state to receive an even greater share of the water from the River.¹⁵⁸ Concerned because Utah has not used its full allocation established by the original Compact, the state has

152. *Id.*

153. *Id.*

154. *Drought and Conservation Measures*, *supra* note 132.

155. *Id.*

156. *Id.*

157. *Id.*

158. Lexi Peery, *Renegotiations Related to the Colorado River are Coming Up, How is Utah Approaching Them?*, KUER (Mar. 3, 2021, 2:35 PM), <https://www.kuer.org/health-science-environment/2021-03-03/renegotiations-related-to-the-colorado-river-are-coming-up-how-is-utah-approaching-them> [<https://perma.cc/A6CE-CRG7>].

begun to undertake projects to fully access and utilize its share of the agreement.¹⁵⁹ Two of the most controversial projects are the Lake Powell Pipeline, and the creation of a Colorado River Authority.¹⁶⁰ Both projects make the message from Utah very clear: the state is developing projects because it feels it's entitled to the full amount of the water and is willing to ensure that the state is forefront in any negotiation going forward.

The Lake Powell Pipeline project was first introduced in 2008 as a way for Utah to access more water from the Colorado River.¹⁶¹ The proposed pipeline would span a 140-mile stretch of land and divert water from Lake Powell, located in Arizona, to Southwest Utah.¹⁶² The proposed diversion is one of largest new diversions from the Colorado River, with a projected 28 billion gallons of water being taken each year.¹⁶³ Similar to the desalination plants proposed in Arizona, the pipeline would be a costly endeavor for the state to undertake, as the pipeline is estimated to cost upward of 2 billion dollars.¹⁶⁴ The project is also extremely controversial, as the water would not be diverted for Utah residents to use for basic water needs; it would be used for golf courses and lawns for approximately 16,000 residents.¹⁶⁵ Furthering the controversy, Utah has not and will not consider alternatives or water conservation efforts, and has already spent millions on paperwork and planning alone for the project.¹⁶⁶ While the project has garnered support in Utah, it still faces challenges on a federal level, as the Bureau of Reclamation must approve of the project before the pipeline can be constructed.¹⁶⁷ The concerns from the federal government are primarily environmental, especially with the amount that the pipeline proposes to divert.¹⁶⁸ The federal government has yet to rule on whether the pipeline can progress, but has recently released a report on the environmental impact of the project, hinting towards a possible

159. *Id.*

160. *Id.*

161. *The Lake Powell Pipeline*, WASH. CNTY WATER CONSERVANCY DIST., <https://lpputah.org/what-is-the-lake-powell-pipeline/> (Last visited Feb. 10, 2023) [<https://perma.cc/6FBK-BVFF>].

162. *Lake Powell Pipeline*, Utah Rivers Council, <https://utahrivers.org/lake-powell-pipeline> (Last visited Feb. 10, 2023) [<https://perma.cc/4BUE-868C>].

163. *The Lake Powell Pipeline*, *supra* note 162; Brian Bahouth, *Lake Powell Pipeline a "Monkey Wrench" in the Future of Colorado River Management*, SIERRA NEV. ALLY (Sept. 10, 2020), <https://www.sierranevadaally.org/2020/09/10/lake-powell-pipeline-a-monkey-wrench-in-the-future-of-colorado-river-management/> [<https://perma.cc/97D5-CAGX>].

164. Lexi Peery, *Lake Powell Pipeline Environmental Analysis Highlights Region's Projected Demand for Water*, KUER (Jun. 9, 2020, 5:51 PM), <https://www.kuer.org/energy-environment/2020-06-09/lake-powell-pipeline-environmental-analysis-highlights-regions-projected-demand-for-water> [<https://perma.cc/WA8Y-XPVQ>].

165. *Lake Powell Pipeline*, *supra* note 162; Bahouth, *supra* note 164.

166. *Lake Powell Pipeline*, *supra* note 162.

167. Peery, *supra* note 165.

168. Bahouth, *supra* note 162.

“no” in letting it move forward.¹⁶⁹ Further opposed are the other six basin states, who have stated that they will bring suit against Utah if the project moves forward.¹⁷⁰ With such resounding opposition, it remains to be seen if this project will continue to be developed, although Utah has still indicated that they wish to move forward with the project, seemingly unconcerned with the opposition from the other basin states.¹⁷¹

It is further evident that Utah is trying to monopolize their share of the water by the creation of a Colorado River Authority.¹⁷² The authority consists of six members, who would represent and negotiate Utah’s interests in any negotiations going forward.¹⁷³ The main goal is to again ensure that Utah is able to maximize their full potential of their share of the water.¹⁷⁴ As with other Utah projects, it is not without its’ cost or controversy either. The authority was estimated to cost approximately 9 million dollars just to start.¹⁷⁵ Furthermore, there is concern about the ability of the authority to shut out key players in negotiations, which Utah says will protect their state’s interest.¹⁷⁶ Opponents argue, however, that this will allow Utah to essentially hide their strategy for negotiations to gain a potential advantage against the other states as to how Utah can access more of the water from the River.¹⁷⁷ The creation of the authority was authorized by the Utah State Legislature, and the authority has already met to discuss their stance on upcoming negotiations.¹⁷⁸ However, the authority has been tight-lipped about what those plans

169. See generally *Lake Powell Pipeline Project Environmental Impact Statement*, U.S. BUREAU OF RECLAMATION (Sept. 29, 2020), <https://www.usbr.gov/uc/DocLibrary/EnvironmentalImpactStatements/LakePowellPipeline/index.html> [<https://perma.cc/4DS6-9J7C>] (detailing the reported environmental impact from the proposal, including any proposed alternatives).

170. *Lake Powell Pipeline*, *supra* note 162.

171. Lindsey Aerts, *A Pipeline from Lake Powell to Washington County is Taking Shape*, KSL NEWS RADIO (Sept. 15, 2022, 5:18 PM), <https://kslnnewsradio.com/1975278/a-pipeline-from-lake-powell-to-washington-county-is-taking-shape/> [<https://perma.cc/H37T-UU6H>].

172. Lexi Peery, *Utah Legislative Leaders Propose Bill to Create Colorado River Authority*, KUER (Feb. 5, 2021, 5:00 AM), <https://www.kuer.org/politics-government/2021-02-05/utah-legislative-leaders-propose-bill-to-create-colorado-river-authority> [<https://perma.cc/HT6D-PFBR>].

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Utah Legislative Leaders Propose Bill to Create Colorado River Authority*, *supra* note 173.

178. Lexi Peery, *Utah’s New Colorado River Authority Meets to Discuss West’s Water Woes*, KUER (Sept. 1, 2021, 5:01 AM), <https://www.kuer.org/health-science-environment/2021-09-01/utahs-new-colorado-river-authority-meets-to-discuss-wests-water-woes> [<https://perma.cc/JLT4-M3LT>]; H.B. 297, 2021 Gen. Sess. (Utah 2021).

may be, only hinting that the plans may include future water deliveries to the state.¹⁷⁹

Utah's plans are not without debate, and it is quite clear that most of the basin states are opposed to what Utah has proposed and already accomplished. Utah has been the most vocal at the current moment of their plans to garner a large amount of Colorado River water resources in any future negotiations. This has already made states wary about trusting Utah and has even already led to a threat of lawsuits against the state. It is evident that if the states move forward without Congress taking over the negotiations, Utah will not be willing to compromise with other states if it will affect its share of the water that it feels entitled to.

D. "GRAND BARGAIN"- AN EASY SOLUTION WITHOUT MUCH SUPPORT

One of the solutions that has been proposed regarding redistribution of the Colorado River, is that of a "grand bargain."¹⁸⁰ The grand bargain suggests a new way to approach the negotiations, and a way to fairly re-allocate the River and fix the issues that have persisted since the original 1922 agreement.¹⁸¹

The brainchild of John Fleck, a director of the University of New Mexico's water resources program, and Eric Kuhn, a former general manager of the Colorado River District, the bargain could possibly correct what the authors deem as "imbalances" between the states.¹⁸² The concept that Fleck and Kuhn have proposed would require the Lower Basin to agree to give up their right to request that the Upper Basin provide them with water if they run short.¹⁸³ In return for this, the Upper Basin would agree to place a cap on any future water development, which the Upper Basin has begun in order to access its full Compact agreement amount (such as the projects Utah has proposed).¹⁸⁴ Fleck and Kuhn argue that if the basins give up their major rights under the agreements, they may be able to reach a compromise that will prevent any disputes over the water in the future.¹⁸⁵

While the proposal is seemingly an easy solution for all states, and could solve what is a looming crisis, it still needs the support of all states to work,

179. *Utah's New Colorado River Authority Meets to Discuss West's Water Woes*, *supra* note 179.

180. ERIC KUHN & JOHN FLECK, *SCIENCE BE DAMNED* (THE UNIVERSITY OF ARIZONA PRESS, 2021).

181. KUHN & FLECK, *supra* note 189; Bret Jaspers, *As Southwest Water Managers Grapple with Climate Change, Can A 'Grand Bargain' Work?*, KUNC (July 22, 2019, 2:23 PM), <https://www.kunc.org/environment/2019-07-22/as-southwest-water-managers-grapple-with-climate-change-can-a-grand-bargain-work#stream/0> [<https://perma.cc/P7LX-LMLB>].

182. Jaspers, *supra* note 182.

183. *Id.*

184. *Id.*

185. *Id.*

which it has of yet to garner.¹⁸⁶ States are hesitant to agree when, according to Fleck, “both sides are giving up a cherished right. . . .”¹⁸⁷ What is most obvious about the grand bargain, is that states do not have to agree to much in order to make the proposal work. However, states are reticent to enter into a simple agreement over the concern that they will be giving up what they deem to be critical access to their share of the River.¹⁸⁸ States being so hesitant to negotiate over this proposal lays the groundwork for negotiations in the future. If states feel their access to their share of the water is being threatened, by states or other entities, they will be less willing to compromise.

While states have taken active approaches to find alternative solutions for their continuing water shortages, most states are falling woefully short of finding long-term, sustaining solutions that will solve their problems. Even a basic proposal among the states will fail if states cannot agree to give up some of their share in order to conserve for the future. While Nevada has made great strides that have proven effective, it is clear that not all states are willing to sacrifice any portion of their reliance on the River. With so much left unknown, and states already taking an “everyman for themselves” approach, it is evident that there needs to be another way to equally ensure that the dwindling water supply can be accessed by everyone who needs it.

V. APPORTIONMENT OF THE COLORADO RIVER BY THE COMMERCE CLAUSE

Article 1, Section 8, Clause 3 of the United States Constitution grants Congress the power to “regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”¹⁸⁹ Therefore, in order for the Colorado River to be apportioned fairly after the 2026 expiration, Congress should use their Commerce Clause authority to regulate the water over any new negotiations the states may make, as Congress has exclusive control to regulate the articles of commerce, over all parties involved.¹⁹⁰ This is also the only way to ensure that states receive an equal share and to prevent any future disputes and lawsuits over the dwindling supply of the Colorado River. Congressional apportionment will also ensure that the water is divided among *all* those that have recognized rights to the River, rather than allowing states to choose who to include and who to exclude during vital negotiations. With the amount of the water predicted to continually decrease in the Colorado River, there is less to apportion, yet more at stake for key players to lose. As such, Congressional apportionment under its Commerce Clause authority is

186. *Id.*

187. Jaspers, *supra* note 182.

188. *Id.*

189. U.S. CONST. art. 1, § 8, cl. 3.

190. *Id.*

the only way to ensure not only conservation of the vital resource, but fairness among all users.

The Court has made it clear that Congress has the authority to create their own apportionment scheme for interstate water, and has further clarified that water is a good of commerce for purposes of the Commerce Clause.¹⁹¹ Without congressional apportionment, the negotiations will break down, as evidenced by the fact that most other water compact resolutions in the United States have failed. Congress has also been successful in apportioning interstate water before, as demonstrated by the landmark Truckee-Carson Lake Pyramid Water Settlement.¹⁹² Therefore, there is little choice but to defer to congressional Commerce Clause authority to re-apportion the waters of the Colorado River as the only viable solution.

A. WATER AS AN ARTICLE OF COMMERCE

The Commerce Clause is explicit in delegating the power for Congress to regulate commerce *among* the states.¹⁹³ Furthermore, the power also allows Congress to regulate navigable waters and to regulate commerce on United States waters.¹⁹⁴ However, it has been the definition of what exactly an article of commerce is, that has been a source of great consternation to the Court. While the definition of commerce has changed over centuries, the Court has nonetheless held that water is an article of commerce in the preeminent case, *Sporhase v. Nebraska*.¹⁹⁵

In *Sporhase*, a landowner challenged the constitutionality of a Nebraska statute that prohibited the withdrawal of ground water from Nebraska, for use in another state, on the basis that it violated the Commerce Clause.¹⁹⁶ The landowner owned contiguous tracks of land in both Nebraska and Colorado, and was withdrawing groundwater from a well on his Nebraska tract, for irrigation use on both his Nebraska and Colorado tracts.¹⁹⁷ Under the statute, the landowner was required to apply for a permit in order to use the groundwater on his Colorado tract.¹⁹⁸ The grant of the permit was dependent upon whether the state in which the water was to be used, also gave reciprocal

191. *Arizona v. California*, 373 U.S. 546, 597 (1963); *Sporhase v. Nebraska*, 458 U.S. 941, 954 (1982).

192. See Fallon Paiute Shoshone Indian Tribe Water Rights Settlement Act of 1990, 101 Pub. L. No. 618, 104 Stat. 3289 (1990).

193. U.S. CONST. art. 1, § 8, cl. 3.

194. *U.S. v. Appalachian Power Co.*, 311 U.S. 377, 427 (1940), *superseded by statute*, Clean Water Act of 1972, Pub. L. No. 92-500, 86 Stat. 816, *as recognized in* *Rapanos v. United States*, 547 U.S. 715, 723-24 (2006).

195. *Sporhase*, 458 U.S. at 941.

196. *Id.* at 943.

197. *Id.* at 944.

198. *Id.*

rights to withdraw and transport ground water from the state to Nebraska.¹⁹⁹ Nebraska argued that they had a right to control the use of groundwater, as it was not an article of commerce, since it was not able to be transferred for value.²⁰⁰ Nebraska also argued that the state owned the groundwater, and as such could recognize that the surface owner who withdraws the water as having ownership over the resource, and therefore, it could be regulated by the state.²⁰¹ This was rejected by the Court, and rightfully so, as this would have been a dangerous precedent to set. The original Colorado River Compact equitably apportioned the water from the River, but if this argument held, states could in theory, argue that they owned the portions of the water that flowed within their states, and that they were entitled to full use of that water without regard to other states. The Court found the argument unpersuasive as the character of water is that of a much needed and shared resource, noting also “that there [was] a significant federal interest . . . in fair allocation of this diminishing resource.”²⁰²

The Court ultimately determined that water is an article of commerce within meaning of the Commerce Clause, and therefore able to be regulated by Congress.²⁰³ The Court in particular, found that if water was not recognized as an article of commerce, it “would . . . curtail the affirmative power of Congress to implement its own policies concerning such regulation.”²⁰⁴ Water, they held, is an article of commerce, as a majority of water is used for agricultural purposes.²⁰⁵ The Court observed that these purposes are worldwide and, as such, contemplate the exact type of commerce that the Framers meant when they included the clause in the Constitution.²⁰⁶

Some have argued that the decision in *Sporhase* opened the opportunity for the water of the Colorado River to be sold amongst the states under the Dormant Commerce Clause.²⁰⁷ The idea is that with the existing agreements, states that are accessing their full potential, yet have a surplus, can sell their excess water to other states that need more.²⁰⁸ It would allow for the establishment of a “water market” between the states, in order to buy and sell the

199. *Id.* (quoting NEB. REV. STAT. § 46-613.01 (1978)).

200. *Sporhase*, 458 U.S. at 948 (citing *West v. Kansas Nat. Gas Co.*, 221 U.S. 229 (1911)).

201. *Id.* at 950 (citing *City of Altus v. Carr*, 255 F.Supp. 828 (W. D. Tex. 1966), *summarily aff'd*, *Carr v. City of Altus*, 385 U.S. 35 (1966)).

202. *Id.* at 953.

203. *Id.* at 954.

204. *Id.* at 953.

205. *Sporhase*, 458 U.S. at 953.

206. *Id.*

207. See Christine A. Klein, *The Dormant Commerce Clause and Water Export: Toward a New Analytical Paradigm*, 35 HARV. ENVTL. L. 131, 133 (2011); Cf. Brian Singleterry, Comment, *Marketing Interstate Harmony: Interstate Water Markets as an Alternative to Resolving Water Conflicts*, 2 TEX. A&M L. REV. 527, 545-48 (2015).

208. See Klein, *supra* note 208, at 143-51; Singleterry, *supra* note 208, at 540-46.

resource as they do with other articles of commerce.²⁰⁹ The argument is that states would be able to amicably make up for their decreasing share of water, and to foster better relationships among the states as they would have a dependent, contractual relationship with one another.²¹⁰ However, the decision to monetize the water from the River would lead to more issues, as states could set the prices sky high, knowing that others would pay for this scarce resource. The use of water markets through the Dormant Commerce Clause to solve the crisis would put all states at a disadvantage. This would not lead to equitable apportionment, rather, it would allow for the monopolization of water to the highest bidder. States that do not have the means to buy more water will inevitably bring suits against other states as an unfair export of a good of commerce. Long contentious disputes over the water are what congressional apportionment is meant to protect against. Therefore, the only viable way to equitably apportion the water is for Congress to do so under *their* Commerce Clause authority, not through states circumventing this under the Dormant Commerce Clause.

B. THE CONTINUING FAILURE OF INTERSTATE WATER COMPACTS

Under the decision of *Sporhase*, and coupled with the decision in *Arizona v. California*, the Court has established that Congress has the authority to apportion the water from the Colorado River, if it sees fit.²¹¹ The Colorado River Compact, while a feat of its time, is slowly eroding. This is evidenced by the fact that states have begun to shift their resources into finding ways to corner their share of the River provided for in the original agreement.²¹² It is also evidenced in the fact that there is an increase in disputes regarding interstate water compacts, and a failure to resolve these disputes.²¹³ One such example being the Apalachicola-Chattahoochee-Flint River Basin Compact (hereinafter the “ACF” or “ACF Compact”), entered into by Alabama, Florida, and Georgia.²¹⁴ The Compact, if successful, would have meant that multiple states again successfully completed the negotiation and agreement of water rights to be shared between multiple states.²¹⁵ The ACF Compact allowed the states to negotiate an equitable apportionment of the water by a set

209. See Singleterry, *supra* note 208, at 528.

210. See *Id.* at 544-45.

211. See discussions of *Sporhase v. Nebraska* and *Arizona v. California*, *supra* Sections II.c, IV.a.

212. See *supra* Section III.a-d.

213. Chandley et al., *Disputes over Interstate Compacts Increase*, ABA (Jan. 14, 2015), <https://www.americanbar.org/groups/litigation/committees/corporate-counsel/practice/2015/disputes-over-interstate-compacts-increase/> [https://perma.cc/474D-LG7E].

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

215. See generally *id.*

deadline, if the deadline was not met, it would terminate.²¹⁶ Ultimately, the states could not agree on how to apportion the waters, resulting in multiple delays in negotiations, compromises that could not be reached, and eventually, triggering the termination.²¹⁷ The pattern seems familiar, and one that is already repeating itself in the negotiations between the Colorado River Compact states.²¹⁸ The states involved in the ACF Compact not only tried to bar key players from the negotiations, they refused to agree to any specifics for allocating the water.²¹⁹ There was also a finding that Georgia was taking too much water from the River, which was an inequitable use, yet Georgia was initiating projects to begin receiving even more water from the River.²²⁰ These are all currently happening with the renegotiations surrounding the Colorado River Compact.²²¹

Many have argued the original agreement has governed the states and other entities with relatively little issue for almost one hundred years.²²² Therefore, it is argued that renegotiation is the way to move forward, as it allows the states to resolve the issues themselves, without the need for the federal government to be excessively involved.²²³ The fact that the Colorado River Compact has lasted this long is a testament to its creation, no doubt, but it has not been without its string of issues. It also does not take into account the fact that once issues have arisen, the states have needed litigation, legislation, and continuing negotiations to resolve these disputes, because they have been unwilling or unable to resolve the issues themselves.²²⁴ While *Arizona v. California* established that the Supreme Court has original jurisdiction over any suits arising from water disputes between states, and could

216. *Id.* at Article VII(a)(3) (the Compact providing that if the states could not agree on an equitable apportionment of the water by an agreed upon deadline, the Compact would terminate).

217. *See Florida v. Georgia*, 138 S. Ct. 2502, 2510 (2018).

218. *See supra* Section IV.a-d.

219. *See Florida v. Georgia*, 138 S. Ct. at 2510.

220. *Id.* at 2526 (specifically, a special master was appointed by the Supreme Court to analyze the usage of the river in order to determine if it should be equitably apportioned. The special master found that Georgia's use injured that of Florida).

221. *See supra* section IV.a-d.

222. Sue McClurg & Rita Schmidt Sudman, *1922-2007: 85 Years of the Colorado River Compact*, WATER EDUC. FOUND. (Nov.-Dec. 2007), <https://www.watereducation.org/western-water-excerpt/1922-2007-85-years-colorado-river-compact> [<https://perma.cc/8TJA-BGJC>].

223. Daniel Craig McCool, *As climate change parches the Southwest, here's a better way to share water from the shrinking Colorado River*, THE CONVERSATION (Nov. 17, 2021, 8:18 AM), <https://theconversation.com/as-climate-change-parches-the-southwest-heres-a-better-way-to-share-water-from-the-shrinking-colorado-river-168723> [<https://perma.cc/42GS-BSZ7>].

224. *See supra* Section II.c.

continue to litigate these disputes, these cases are long drawn-out processes that have taken years to settle.²²⁵

There is also an issue as to how Congress, as-a-whole, with relatively little to no stake in the water, will be able to equitably apportion the waters amongst all users. However, Congress has been successful in allocating water amongst states before, passing interstate apportionment legislation known as the Truckee-Carson-Pyramid Lake Water Settlement.²²⁶

C. THE TRUCKEE-CARSON- PYRAMID LAKE WATER SETTLEMENT

The Truckee River is an interstate river that flows across both California and Nevada, for approximately 105 miles.²²⁷ The basin itself, in which the River is located, is split disproportionately between California and Nevada.²²⁸ Whereas twenty-five percent of the basin is located in California, the overwhelming majority, at seventy-five percent, is located in Nevada.²²⁹ Interestingly, while a majority of the usage of the water comes from Nevada, most of the precipitation and the basin's water storage comes from California.²³⁰ As such, access and apportionment of the water was highly disputed, leading to numerous lawsuits and failed negotiations between the states.²³¹ Much like the disputes surrounding the Colorado River, changes to the water supply in the River, proposed diversions, and legislation complicated the apportionment scheme.²³² Furthermore, additional claimants to the water other than California and Nevada arose, such as the Pyramid Lake Indian Reservation, leading to even more difficulty in negotiating a compact.²³³

In order to avoid litigation and more failed compacts, a bill was introduced in the United States House of Representatives that would seek to solve the disputes regarding the water.²³⁴ The Act became known as the Truckee-Carson-Pyramid Lake Water Rights Settlement and was signed into law in

225. See generally *Wyoming v. Colorado*, 259 U.S. 419 (1922); *Arizona v. California*, 373 U.S. 546 (1963) *disavowed*, *California v. United States*, 438 U.S. 645 (1978) (each case having played out over a number of years).

226. Fallon Paiute Shoshone Indian Tribes Water Rights Settlement Act of 1990, Pub. L. No. 101-618, 104 Stat. 3289 (1990).

227. GARY A. HORTON, *TRUCKEE RIVER CHRONOLOGY: A CHRONOLOGICAL HIST. OF LAKE TAHOE AND THE TRUCKEE RIVER AND RELATED WATER ISSUES* 13 (Naomi S. Duerr et al. eds., 7th ed. 1997). <http://images.water.nv.gov/images/publications/River%20Chronologies/Truckee%20River%20Chronology.pdf> [<https://perma.cc/2SEV-B8GA>].

228. *Id.*

229. *Id.*

230. *Id.*

231. *Id.* at 26.

232. *Horton*, *supra* note 228.

233. *Id.* at 23.

234. *Cf.* H.R. 3941, 101st Cong. (1990).

1990.²³⁵ The Act represents a successful apportionment of interstate water under Congress' authority, and is a demonstration of how Congress can solve the issues surrounding the disputes between the Colorado River Compact states.

The Act itself provided for the *permanent* allocation of water to the states of California and Nevada, as well as placed a cap on the amount of water that could be diverted.²³⁶ It also required that the parties withdraw their outstanding lawsuits that were currently pending in the federal court, effectively ending any potential dispute that had arisen at the time of the legislation's enactment.²³⁷ It also further recognized the rights of water access to the tribes in the region as well, providing that they receive a portion of the water.²³⁸ The Act also included an environmental component, specifying for the improvement of local fish and bird habitats in the region.²³⁹ As one scholar has put it: "[t]he settlement embodie[d] a compromise between the needs, desires, and expectations of the numerous parties and serve[d] to resolve nearly a century of conflict."²⁴⁰

All the issues addressed in the settlement are ones that are of concern to those who have rights to the water under the Colorado River Compact. Congress has not only been able to amicably resolve water disputes before, but they were also successful in fairly apportioning out water between multiple states.²⁴¹ That Congress has been able to solve a centuries long dispute before is evidence of the fact that they can once again do so.

D. FRACTIONS, FACTIONS, AND FUTURE DISPUTES

Although states were originally able to negotiate and create the Colorado River Compact, there were reasons they should not have been allowed to do so in the first place: the Compact not only concerned the seven states involved, but it also involved the country of Mexico.²⁴² The country has been a part of the negotiations centering around the current drought measures and

235. Fallon Paiute Shoshone Indian Tribe Water Rights Settlement Act of 1990, *supra* note 193, at Title II.

236. *Lake Tahoe and Truckee River Basins*, CAL. WATER BD. (April 29, 2021), https://www.waterboards.ca.gov/waterrights/water_issues/programs/tahoe_truckee/ [<https://perma.cc/RG4F-2PU4>].

237. Fallon Paiute Shoshone Indian Tribe Water Rights Settlement Act of 1990, *supra* note 193, at Title II.

238. *Id.*

239. *Id.*

240. E. Leif Reid, *Ripples from the Truckee: The Case for Congressional Apportionment of Disputed Interstate Water Rights*, 14 STAN. ENV'T L.J. 145, 167 (1995).

241. *Lake Tahoe and Truckee River Basins*, *supra* note 237.

242. *See generally* U.S. Const. art. 1, § 8, cl. 3; Colorado River Compact of 1922, *supra* note 4.

is expected to be included in any future negotiations as well.²⁴³ However, it is Congress' duty under the Commerce Clause to regulate commerce with foreign nations.²⁴⁴ Furthermore, Congress has the duty to regulate commerce among Indian Tribes.²⁴⁵ Therefore, the Commerce Clause is the *only* way to re-apportion the River as the states are preempted from doing so.

That Congress must re-apportion the water under the Commerce Clause has been made clear through centuries of decisions by the Supreme Court. Beginning with *Gibbons v. Ogden*, the Court stated that commerce "comprehend[s] every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other, to which this power does not extend."²⁴⁶ Also implicated in the case was the power with respect to Indian tribes, in which the Court noted that this power should stand on equal grounds as that of foreign commerce and that among the states.²⁴⁷ The Court also went on to further express that the Commerce Clause power "like all others vested in Congress, is complete in itself, [and] may be exercised to its utmost extent."²⁴⁸

Over the years, the Supreme Court has cemented these decisions, striking down cases where states have had dealings with foreign nations.²⁴⁹ The Court has also consistently stated that under the Commerce Clause, "traffic or intercourse with an Indian tribe or with a member of such a tribe is subject to the regulation of Congress. . ."²⁵⁰ As such, Congress has the only true power to appropriate the water of the Colorado River, as the rights to the water concern the seven original states to the agreement, Mexico, and the tribes that now have recognized claims to the water. It would, therefore, be unconstitutional for the states to continue to negotiate a new agreement amongst these entities without congressional approval. As it currently stands, the states are willing to negotiate with the country of Mexico regarding any new negotiations but remain wary about allowing tribes access to the negotiations and the water.

Under the original agreement and the 1944 Treaty of Mexico, the country has a recognized contractual right to the water.²⁵¹ The same has yet to be

243. See *Minute 319*, *supra* note 51.

244. U.S. Const. art. 1, § 8, cl. 3.

245. *Id.*

246. *Gibbons v. Ogden*, 22 U.S. 1, 193 (1824).

247. See *Id.* at 228-29.

248. *Id.* at 196.

249. *Brown v. Maryland*, 25 U.S. 419 (1827) (holding as unconstitutional a state statute that required an importer of foreign goods to have a license from the state); *Japan Line v. Cnty. of Los Angeles*, 441 U.S. 434 (1979) (holding that California's imposed tax on foreign shipping companies was impermissible, as it was a violation of the Commerce Clause).

250. *Ex Parte Webb*, 225 U.S. 663, 683 (1912) (quoting *United States v. Holliday*, 70 U.S. 407, 417-18 (1866)).

251. *The Law of the River*, *supra* note 5; Colorado River Compact of 1922 *supra* note 4, at 325.

said for all the tribes in the Colorado River region. Federal recognition will only decrease the amount of water that can be apportioned out, which is why states are so willing to exclude the tribes in any existing negotiation, which, according to the Commerce Clause, they cannot do. Combined with the climate crisis causing a continuing shortage in the River's supply, and the states making a push to create projects to divert more of the River's share for themselves, it is a dangerous game to allow the states to continue negotiating any new agreement by themselves. The entities and issue involved speaks to the core of the Commerce Clause, and it is therefore, Congress' duty to control and create a fair agreement between the states, tribes, and the country of Mexico under this authority.

VI. CONCLUSION

It is evident that the need for Congress to intervene is becoming increasingly clear. While the Colorado River Compact was an achievement of its' time, it is time to recognize that it no longer holds applicable to the dire situation facing the states today. In fact, it was nothing short of a miracle that states were even willing to negotiate and reach an agreement, when the need for water was already critical at the time the compact was entered into. However, this is now reaching a perilous stage, where states are no longer receiving the same amount of water they once were, and shortages and droughts are reaching an all-time high.

The history surrounding water compacts in the western United States are an amalgam of frustration, disputes, and litigation that have come at a heavy cost to the states, which include decades long progressions of waiting for resolutions. The compact states have consistently contemplated ways to circumnavigate the decisions of the Court, which has drawn the ire of the other states. Left unchecked, the states have now found ways to exclude key players from accessing the water, even when Congress and the Supreme Court have recognized that these entities are entitled to rights. States are willing to let this dissolve into disputes, knowing that while it will take years to litigate, they are free to continue accessing their share until other portions are decided.

Arizona v. California established the Congress has the right to apportion interstate water, and water has already been recognized as an article of commerce. As such, the re-apportionment of the Colorado River by Congress is a necessity. The Truckee-Carson Settlement Agreement is evidence of the fact that Congress has been successful in using its power before to allocate water resources. Without congressional apportionment under the Commerce Clause, negotiations will stall and ultimately fail, as indicated in the beginning negotiations of the initial agreement, and as seen throughout various water compacts in the United States, such as the ACF Compact. Congressional apportionment under the Commerce Clause will also help to avoid

contentious litigation in the future, by providing a framework in which the states cannot disagree or exclude those who have a right to the water.

Therefore, congressional apportionment of the Colorado River between the states is the only viable solution to fairly resolve conflicts over a diminishing resource. Without it, the West will devolve into a series of spates, eventually leading to an all-out water war.