

# Allocating Water Rights, Causing Litigation, and Ignoring Conservation: *Montana v. Wyoming*

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## I. INTRODUCTION

Despite the ever-increasing national and global demands for water resources, the United States continues to entertain decades-long negotiation and litigation to solve interstate water disputes. These mechanisms may address who has a right to use what water, and how much of that water, but fail to encourage states to work together to deal with water scarcity and conservation. Given that Alaska and Hawaii are the only two states within the United States that do not share ground or surface water with others, it is no surprise that the majority of states have, at one point, been involved in a conflict over interstate waters.<sup>1</sup> Because of the United States Supreme Court's original jurisdiction in these disputes,<sup>2</sup> the Court has long advocated that states try to prevent these disputes by entering into interstate water compacts.<sup>3</sup> However, the compacts often take several years to negotiate, if not decades, and instead become a source of litigation.<sup>4</sup> The Yellowstone River Compact ("Compact") is no exception.

After sixteen years of drafting and negotiation, Montana, Wyoming, and North Dakota finally ratified the Compact in 1951.<sup>5</sup> Sixty years later, two of the Compact's parties, Montana

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1. George William Sherk, *The Management of Interstate Water Conflicts in the Twenty-First Century: Is It Time to Call Uncle?*, 12 N.Y.U. ENVTL. L.J. 764, 765 (2005); see Josh Clemons, *Interstate Water Disputes: A Road Map for States*, 12 SOUTHEASTERN ENVTL. L.J. 115, 115 (2004).

2. See U.S. CONST. art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.").

3. Sherk, *supra* note 1, at 766.

4. See Clemons, *supra* note 1, at 129-31. Thirty years after the ratification of the Colorado River Compact, Arizona and California endured twelve years of litigation over a water dispute. Lawrence J. MacDonnell, *Arizona v. California Revisited*, 52 NAT. RESOURCES J. 363, 365 (2012); see *Arizona v. California*, 373 U.S. 546 (1963).

5. *Montana v. Wyoming*, 131 S. Ct. 1765, 1770 (2011) (citing Yellowstone River Compact, art. V(A)-(B), codified in MONT. CODE ANN. § 85-20-101 (2005); N.D. CENT. CODE §61-23-01 (2005); WYO. STAT. ANN. § 41-12-601 (2005) [hereinafter Compact]).

and Wyoming, litigated a dispute in the Supreme Court despite the Compact's goal "to remove all causes of present and future controversy."<sup>6</sup> The result in *Montana v. Wyoming* hinged on the Court's interpretation of the Compact's language and incorporation of vague, indefinite, and centuries-old water law doctrines. The issue in the case, one of first impression, was whether Wyoming could utilize more efficient irrigation systems even though these improvements reduce the amount of river flow available to Montana; the Court concluded this did not violate Montana's rights under the Compact and was permissible.<sup>7</sup>

*Montana* demonstrates that interstate water compacts play a large role in water usage rights but do little to resolve larger issues such as water scarcity and conservation. Before states enter into interstate water compacts, they should clearly define their purpose for entering into a compact and realize that interstate compacts will seldom help resolve water scarcity issues. States should also study our nation's past water disputes in an effort to form better-drafted compacts and hopefully avoid litigation. Furthermore, as demands for water increase and appear to be reaching no plateau with the global population climbing to over seven billion,<sup>8</sup> the United States should examine the needs of its regions and attempt to develop a unified, national approach to conservation given the inevitable global disputes that will arise over this precious resource.<sup>9</sup>

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6. See Compact pmbl.

7. *Montana*, 131 S. Ct. at 1779.

8. U.S. CENSUS BUREAU, *U.S. & World Population Clocks*, <http://www.census.gov/main/www/popclock.html> (last visited Jan. 29, 2013).

9. See Montgomery F. Simus & James G. Workman, *The Water Ethic: The Inexorable Birth of a Certain Alienable Right*, 23 TUL. ENVTL. L.J. 439, 444 (2010) (referring to water as one of the "world's two most precious liquid resources").

## II. WATER RIGHTS IN THE UNITED STATES

### A. *Water Law Doctrines*

The two major water law doctrines are riparianism and prior appropriation.<sup>10</sup> Water law in America began to develop before our nation's birth when England granted property rights to settlers to establish colonies in the eastern regions.<sup>11</sup> Like our mother country, our eastern states have always had readily available water.<sup>12</sup> After the American Revolutionary War, the colonies acquired sovereignty over waters, an ultimate power that had solely belonged to the English Crown,<sup>13</sup> and each eastern state had broad control over water within its borders.<sup>14</sup> These states inherited the English common law doctrine of riparianism, which viewed the right to use resources on property as inherent in land ownership.<sup>15</sup> This riparian right is therefore determined by geography; if a person owns property abutting a source of water, the right to use the water is included.<sup>16</sup> The right to use the water does not mean that the landowner has the right to use a certain volume of that water; rather, the landowner must put the water to a "reasonable use."<sup>17</sup> As long as the use is reasonable, the landowner can use whatever amount of water is needed is for that use.<sup>18</sup>

Unlike the eastern states, the West has always suffered from limited water and was never under English rule.<sup>19</sup> Because of few water sources, irrigation was, and remains, a necessity in

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10. Realize this paper describes water doctrines in a general sense and does not attempt to address or discuss differences in state law systems, such as states with dual systems or California's "plural system." See LAUREL A. VIETZEN, PRACTICAL ENVIRONMENTAL LAW 228 (2008) (briefly describing California's system).

11. STEVEN FERREY, ENVIRONMENTAL LAW: EXAMPLES & EXPLANATIONS 280 (4th ed.).

12. *Id.* at 280; see ERIC PEARSON, ENVIRONMENTAL AND NATURAL RESOURCES LAW 296 (2008).

13. Clemons, *supra* note 1, at 116.

14. *Id.*

15. FERREY, *supra* note 11, at 280-81.

16. *Id.* at 281. This does not mean that a landowner also owns the water. Rather, the landowner has a right to use it. *Id.*

17. PEARSON, *supra* note 12, at 297.

18. *Id.*

19. FERREY, *supra* note 11, at 280.

the West.<sup>20</sup> According to one author, with respect to the various activities for which water is used, irrigation is the “most massive use by quantity.”<sup>21</sup> Riparianism made little sense in the West because of widespread irrigation.<sup>22</sup> Instead, western states, with some under Spanish control, adopted a prior appropriation system similar to Spain’s permit system.<sup>23</sup> Under the permit system, “implied” water rights based on land ownership did not exist, but rather, a private person was awarded water rights by obtaining a permit, or grant, from the Crown.<sup>24</sup> The extent, or nature, of the rights was simply the “practices [at] the time” the grant was issued.<sup>25</sup> Like this permit system, the doctrine of appropriation does not allocate water rights based on property ownership.<sup>26</sup> Rights are established when water is diverted and put to a beneficial use on a first-in-time, first-in-right basis.<sup>27</sup>

Under prior appropriation, the first person to divert, or appropriate,<sup>28</sup> water from a source and put it to a beneficial use acquires superior rights and is known as the senior user.<sup>29</sup> Three elements must be met before the right is perfected: (1) notice, (2) diversion, and (3) beneficial use.<sup>30</sup> The first is that the user must give notice of intent to appropriate by filing an application to withdraw water with the state administrative agency that manages water priority rights in the state where the user plans to appropriate the water.<sup>31</sup> Within a reasonable time after giving

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20. PEARSON, *supra* note 12, at 298.

21. *Id.* at 296.

22. *Id.* at 298.

23. Eric B. Kunkel, *The Spanish Law of Waters in the United States: From Alfonso the Wise to the Present Day*, 32 MCGEORGE L. REV. 341, 347 (2001).

24. *Id.* at 349-50 (citing DON DOMINGO LASSO DE LA VEGA, REGLAMENTO GENERAL DE MEDIDAS DE LAS AGUAS, reprinted in GALVAN, ORDENANZAS DE TIERRAS Y AGUAS, 155-57 (1844)).

25. *Id.* at 350 (quoting *State v. Valmont Plantations*, 346 S.W.2d 853, 876 (Tex. Civ. App. 1961)).

26. *See* FERREY, *supra* note 11, at 280.

27. *Id.*

28. The terms “take,” “divert,” and “appropriate” are used interchangeably throughout this paper.

29. FERREY, *supra* note 11, at 280; PEARSON, *supra* note 12, at 300.

30. FERREY, *supra* note 11, at 291.

31. *Id.* at 292.

notice, a user must divert the water, which occurs when water is removed from its source.<sup>32</sup> The final element the user needs to perfect the right is to put the water to a beneficial use, which covers a wide variety of activities including domestic and municipal use, irrigation, mining, power generation, and recreation, to name a few.<sup>33</sup>

One significant difference between riparianism and prior appropriation is that unlike riparianism, prior appropriation rights are quantified.<sup>34</sup> This means the right is not only to divert water from a particular source, but also the right is to divert a quantity of water from that particular source. The senior user only acquires a prior right to the volume of water the senior user does in fact divert.<sup>35</sup> If the amount diverted is less than what the senior user claimed in the filing, subsequent appropriators, called junior appropriators, may be permitted to divert whatever water is left. Not all states follow this; some states refuse to allow junior appropriators to divert if the claimed amounts appear to leave the water source empty.<sup>36</sup>

#### *B. Allocating Water Rights and Resolving Disputes*

Although the previous section outlined the two major water law doctrines, each state employs its own variation of those and has the power to control water within its borders and resolve conflicts between or among private persons.<sup>37</sup> However, a state does not have the same authority over intrastate waters as compared to interstate waters.<sup>38</sup> When conflicts between states arise, a state will be unable to apply its particular water law against another state and vice versa.<sup>39</sup> To deal with the allocation of interstate waters, states have turned to creating interstate water compacts and in future disputes, states sometimes choose to litigate the matter in the

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32. *Id.*

33. *Id.*

34. *See* PEARSON, *supra* note 12, at 300.

35. FERREY, *supra* note 11, at 292.

36. *Id.*

37. Clemons, *supra* note 1, at 118.

38. *Id.*

39. *Id.*

Supreme Court.<sup>40</sup> These two routes are more common than another mechanism: federal legislation. Congress has the power to apportion interstate waters via creating legislation, based largely on its power to regulate commerce.<sup>41</sup> Because of the Supremacy Clause,<sup>42</sup> Congressional apportionment supersedes interstate compacts, and in litigation over apportionment, the Supreme Court has been more concerned about the constitutionality of the apportionment rather than in questioning Congress' substantive decisions.<sup>43</sup> Despite this seemingly absolute power over interstate waters, Congress has only exercised it twice.<sup>44</sup>

The Supreme Court has had more involvement in apportioning interstate waters than Congress. The Constitution gives the Supreme Court original jurisdiction over disputes involving states, allowing the Court to resolve interstate water disputes.<sup>45</sup> Thus far, the Court has been willing to decide disputes involving interstate surface waters but has recently refused to do so for groundwater.<sup>46</sup> In the first dispute the Court resolved, which was in 1907 and involved the Arkansas River, it announced the doctrine of equitable apportionment, deciding that states

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40. Sherk, *supra* note 1, at 765.

41. Clemons, *supra* note 1, at 128 (citing U.S. CONST. art. I, § 8).

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

43. Clemons, *supra* note 1, at 128.

44. *Id.* The first time Congress exercised its power to pass federal legislation over interstate waters was with the passing of the Boulder Canyon Project Act in 1928, which apportioned the Colorado River among Arizona, California, and Nevada. *See* Boulder Canyon Project Act, 43 U.S.C. § 617 (2006) (originally enacted as Act of Dec. 21, 1928, ch. 42, § 1, 45 Stat. 1057). However, Congressional action did little to prevent future litigation as decades later, Arizona sued California over the amount of water California was taking from the Colorado River. *Arizona v. California*, 373 U.S. 546, 551 (1963). Although the parties involved pushed for the Court to apply the doctrine of appropriation as followed by the states involved or exercise equitable appropriation, the Court held that the Act governed. *Id.* at 563-65. The second time Congress exercised apportionment was in 1990, passing legislation apportioning the Truckee and Carson Rivers and Lake Tahoe between California and Nevada. Pub. L. No. 101-618, § 204, 104 Stat. 3289, 3295-304 (1990) (*cited in* Clemons, *supra* note 1, at 128 & n.87). This legislation took years to achieve as California and Nevada initially negotiated a compact from 1955 to 1968, but Congress refused to ratify it, fearing the effects it could have had on a Native American tribe. *Id.*

45. U.S. CONST., art. III, § 2, cl. 2: "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction."

46. Justin Newell Hesser, *The Nature of Interstate Groundwater Resources and the Need for States to Effectively Manage the Resource through Interstate Compact*, 11 WYO. L. REV. 25, 36 & n.85 (citing *Mississippi v. Memphis*, 130 S. Ct. 1317 (2010)).

should equally share benefits of the interstate water.<sup>47</sup> Kansas brought suit against Colorado for diverting water from the Arkansas River and diminishing the flow, thereby infringing on Kansas' rights.<sup>48</sup> Each state tried to argue that its system of water allocation governed. Kansas argued that the riparian doctrine governed, while Colorado asserted the doctrine of appropriation.<sup>49</sup> The Court created the doctrine of equitable apportionment because although states can determine water allocation methods, their laws cannot bind other states.<sup>50</sup> Because the benefit to Colorado from diverting the water significantly outweighed the harm done to Kansas, Colorado was allowed to continue appropriating water from the Arkansas River.<sup>51</sup> Later, the Court would describe equitable apportionment as a flexible doctrine that "calls for the exercise of an informed judgment on a consideration of many factors"<sup>52</sup> including

physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, [and] the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former . . . .<sup>53</sup>

Although the Court used equitable apportionment in *Kansas v. Colorado*, in another dispute involving Colorado, the Court applied the doctrine of appropriation.<sup>54</sup> In *Wyoming v. Colorado*, Wyoming sought a ruling that Colorado was precluded from carrying out its proposed plan to divert substantial amounts of water from the Laramie River for irrigation.<sup>55</sup> Because both states had historically followed the doctrine of appropriation, unlike the states in *Kansas*, the

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47. *Kansas v. Colorado (Kansas I)*, 206 U.S. 46, 117 (1907).

48. *Id.* at 85.

49. *Id.* at 95, 98.

50. *Id.* at 95.

51. *Id.* at 117.

52. *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945).

53. *Id.*

54. *Wyoming v. Colorado*, 259 U.S. 419 (1922).

55. *Id.* at 455.

Court decided to follow appropriation and allocated the water based on priorities.<sup>56</sup> Yet, subsequently in *Nebraska v. Wyoming*, quoted above, the Court did not apply appropriation in a dispute among Nebraska, Wyoming, and Colorado over the North Platte River even though all three states followed the doctrine of appropriation.<sup>57</sup> Instead, the Court returned to its equitable theory of apportionment from *Kansas*.<sup>58</sup> The Court reaffirmed its adherence to equitable apportionment in *Colorado v. New Mexico*, establishing that interstate water allocation must be based on a balance of benefits and burdens.<sup>59</sup>

While the Supreme Court has employed equitable appropriation in interstate water disputes, it urges states to resolve conflicts themselves by creating interstate compacts.<sup>60</sup> According to the Compact Clause of the Constitution, compacts require congressional consent, but the Court will uphold compacts in the absence of congressional consent so long as the compact does not allow a state's political power to increase to the point of harming the federal government.<sup>61</sup> However, this rarely is the case because of the federal powers to regulate navigation and interstate commerce.<sup>62</sup> Therefore, congressional consent is almost always required.<sup>63</sup>

The first interstate water compact was the Colorado River Compact of 1922.<sup>64</sup> Early compacts, in general, only allocated water, whereas more recent compacts have created

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56. *See id.* at 470.

57. *Nebraska*, 325 U.S. at 592, 617-18.

58. *Id.* at 617-18.

59. *Colorado v. New Mexico*, 459 U.S. 176, 186 (1982).

60. Hesser, *supra* note 46, at 34; Sherk, *supra* note 1, at 766.

61. Clemons, *supra* note 1, at 130. The Compact Clause gives states the authority to create interstate compacts: “No state shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State . . . .” *Id.* at 129 & n.95 (quoting U.S. CONST. art. I, § 10, cl. 3).

62. *Id.* at 130.

63. *Id.*

64. *Id.* at 129 (citing COLO. REV. STAT. § 37-61-101 (2003)); Hesser, *supra* note 46, at 35.

administrative entities to manage the interstate water in addition to allocating the water.<sup>65</sup> Although interstate water compacts can be a valuable tool in preventing disputes, litigation between state parties over compacts obviously has not been eliminated.

After only a few years of negotiations between Texas and New Mexico, Congress approved the Pecos River Compact, and it was ratified in 1949.<sup>66</sup> In addition to allocating the Pecos River between Texas and New Mexico, the Compact also established the Pecos River Commission to administer the Compact.<sup>67</sup> On the surface, the Commission functioned well, but it had been ignoring an ongoing problem.<sup>68</sup> The original data used to determine the allocations listed in the Compact were incorrect. In trying to resolve this problem and come up with an accurate way to allocate the water, the Commission could not agree because one method favored Texas and the other New Mexico.<sup>69</sup> In 1974, Texas moved forward and sued New Mexico, alleging that New Mexico had been over-depleting water based on the terms of the Compact.<sup>70</sup> The Court appointed a Special Master who concluded in his report in 1982 that in order to resolve the dispute, the Court would have to go beyond the judicial authority of the Compact by usurping administrative power granted only to the Pecos River Commission.<sup>71</sup> In *Texas v. New Mexico*, New Mexico filed exceptions to the 1982 report.<sup>72</sup> Because the Congress had approved the Compact, the Court decided that altering the language of the Compact was beyond its authority and in order for the states to resolve this matter, renegotiation of the Compact was necessary.<sup>73</sup>

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65. Clemons, *supra* note 4, at 131.

66. *Texas v. New Mexico*, 462 U.S. 554, 558-59 (1983).

67. *Id.* at 559-60.

68. *Id.* at 560.

69. *Id.*

70. *Id.* at 562.

71. *Id.* at 562-63.

72. *Id.* at 564.

73. *Id.* at 569-71.

While the *Texas* case concerned a dispute involving the enforcement of a compact, *Oklahoma v. New Mexico* was a conflict over the interpretation of the Canadian River Compact.<sup>74</sup> The Canadian River Compact, which is among Oklahoma, New Mexico, and Texas, was ratified by Congress in 1952.<sup>75</sup> New Mexico had been in the process of building the Ute Dam along the Canadian River, and completed it in 1963.<sup>76</sup> In 1982, New Mexico enlarged the dam and reservoir. Oklahoma and Texas sued, saying that the enlargement surpassed the reservoir's water storage "capacity" as allowed in the Compact.<sup>77</sup> Oklahoma and Texas filed this complaint regardless of the measure of water that was actually stored in the reservoir.<sup>78</sup> The Court, yet again, appointed a Special Master who advised the Court to find that the Compact's language did not support Oklahoma's view that there was a limitation on physical capacity.<sup>79</sup> Rather, the limitation was on the actual amount of water stored.<sup>80</sup> The Court agreed after looking at the terminology used in the Compact.<sup>81</sup>

After two Supreme Court cases involving disputes between Kansas and Colorado over the Arkansas River, the Court suggested that the states create an interstate water compact.<sup>82</sup> Acting on the suggestion, Kansas and Colorado created the Arkansas River Compact, and Congress ratified it in 1949.<sup>83</sup> Although its purpose was to prevent future disputes, in 1985, Kansas brought suit against Colorado alleging, among other things, that Colorado had increased its post-Compact-creation well-pumping, significantly depleting river flow in violation of the

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74. *Oklahoma v. New Mexico*, 501 U.S. 221 (1991).

75. *Id.* at 225-26.

76. *Id.* at 226.

77. *Id.* at 226-27.

78. *Id.* at 227.

79. *Id.* at 228.

80. *Id.*

81. *Id.* at 229-30.

82. *Kansas v. Colorado (Kansas III)*, 514 U.S. 673, 678 (1995) (citing *Kansas v. Colorado (Kansas I)*, 206 U.S. 46 (1907); *Colorado v. Kansas*, 320 U.S. 383 (1943)).

83. *Id.*

Compact.<sup>84</sup> The Court appointed a Special Master who recommended that the Court find that Colorado was in violation of the Compact.<sup>85</sup> The primary reason was that the Compact did not allow “future beneficial development” if that development “materially deplete[s]” river flow.<sup>86</sup> The states agreed that some well-pumping was allowed.<sup>87</sup> However, Colorado tried to argue that it was allowed to pump the maximum amount possible because that is what Colorado state law would allow, but the Court rejected this argument and instead focused on the phrase “materially depleted” in the Compact.<sup>88</sup> Following the Special Master’s recommendations, the Court ruled that post-Compact well-pumping was allowed so long as the activity did not materially deplete the river flow, but Colorado had violated this.<sup>89</sup>

The cases about disputes over interstate water compacts not only show that compacts cannot prevent all litigation, but also demonstrate the wide range of issues that surface from interstate water governance. While some cases may have clear precedent to which the Court can adhere, *Montana* was a case of first impression and may alert future compact-drafters to include provisions dealing with future technological improvements.

### III. THE YELLOWSTONE RIVER COMPACT AND *MONTANA V. WYOMING*

#### A. *The Compact and the Case*

The issue of more efficient irrigation systems in connection with an interstate water compact and the doctrine of appropriation had never been addressed by any court, let alone the Supreme Court, until the Yellowstone River Compact (“Compact”) was analyzed in *Montana v.*

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84. *Id.* at 679.

85. *Id.* (citing *Kansas v. Colorado (Kansas II)*, 478 U.S. 1018 (1986)).

86. *Id.* at 689 (quoting Arkansas River Compact, art. IV-D).

87. *Id.*

88. *Id.* 689-90.

89. *Id.* at 690-91.

*Wyoming*.<sup>90</sup> The Yellowstone River System (“River”) flows north out of Wyoming and into Montana, and much of it is used for irrigation.<sup>91</sup> When the Compact was created, flood irrigation was used, which allowed a third of the appropriated water to return to the River.<sup>92</sup> Now, sprinkler irrigation is used, which yields, at most, ten percent returning runoff.<sup>93</sup> The State of Montana sued the State of Wyoming, claiming that Wyoming’s use of sprinkler irrigation violated Montana’s rights under the Compact.<sup>94</sup> Montana alleged that because these systems yield less runoff, its downstream appropriators had less water available to them than before Wyoming appropriators has switched from using flood irrigation to the more efficient sprinkler irrigation.<sup>95</sup>

The Compact, ratified by Montana, Wyoming, and North Dakota in 1951, establishes three tiers of priority for water usage rights to the River.<sup>96</sup> Tier one ensures that the signatory states’ users are able to exercise their acquisition and beneficial use rights as they existed on January 1, 1950, pursuant to the doctrine of appropriation.<sup>97</sup> The second tier deals with

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90. Shiran Zohar, *A Deal is a Deal in the West, or is It?* *Montana v. Wyoming and the Yellowstone River Compact*, 6 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 160, 165 (2011) (“No court in any jurisdiction, has adjudicated a case where—(1) an agricultural appropriator, (2) increases his or her consumption of water, (3) on the same irrigated acreage to which the appropriative right attaches, (4) to the detriment of downstream appropriators, (5) in the same water system from which the water was originally withdrawn.”) (quoting First Interim Report of the Special Master at 66, *Montana v. Wyoming*, No. 137 (U.S. Feb. 10, 2009)); see *Montana v. Wyoming*, 131 S. Ct. 1765 (2011).

91. *Id.* at 161.

92. *Id.* at 162.

93. *Id.*

94. *Montana*, 131 S. Ct. at 1769. The decision was seven to one, and Justice Kagan did not participate. *Id.* Appropriator means one who diverts water from a natural stream and puts it to a beneficial use. *Id.* at 1771.

95. *Id.* at 1771. The Court accepted Montana’s claim that sprinkler systems do in fact result in less river flow. *Id.* at 1771 n.3. Specifically, Montana claimed the use of sprinkler irrigation systems reduced the amount of water returning to the River by one-fourth. *Id.* at 1771.

96. *Id.* at 1770 (citing Compact, art. V(A)-(B), codified in MONT. CODE ANN. § 85-20-101 (2005); N.D. CENT. CODE §61-23-01 (2005); WYO. STAT. ANN. § 41-12-601 (2005)).

97. *Id.* “Appropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory state as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.” See Compact at art. V(A).

supplemental water supplies,<sup>98</sup> and tier three assigns between Montana and Wyoming, by percentage, any unused water.<sup>99</sup> Specifically, Montana claimed that Wyoming’s pre-1950 users had appropriated water for activities that the users did not practice prior to 1950—that is, sprinkler irrigation rather as opposed to flood irrigation—violating Montana’s rights under tier one.<sup>100</sup>

Sprinkler irrigation is more efficient because crops are able to consume more of the water appropriated for the irrigation process, resulting in less wastewater.<sup>101</sup> Because of this, less runoff and seepage returned to the River.<sup>102</sup> Montana argued that its pre-1950 users were unable to continue exercising their full rights under the Compact, and in order for Wyoming to legally use the water that would have been returned to the River when flood irrigation was used, the rights of Montana’s pre-1950 users would first need to be fulfilled.<sup>103</sup> The Court framed the issue as whether Wyoming could—by diverting the same quantity of water but by using more efficient irrigation systems—consume more water for irrigation, even though less water was available for Montana’s pre-1950 users.<sup>104</sup>

### *B. The Opinions in Montana*

In *Montana*, the Supreme Court was unable to apply the doctrine of equitable apportionment because the Compact stated that the doctrine of appropriation applied.<sup>105</sup>

Therefore, the Court had to follow the doctrine of appropriation under Montana and Wyoming

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98. *Id.* Signatory states are allocated the “quantity of that water as shall be necessary to provide supplemental water supplies for the rights” established in tier one. *Id.* (quoting Compact at art. V(B)).

99. *Id.* For example, Wyoming has rights to sixty percent of any unused water from the Clarks Fork River, and Montana would have rights to forty percent. *Id.* Other rivers include the Tongue and the Powder. *Id.* (citing Compact at art. AV(B)(1)-(4)).

100. *Id.* These activities include “irrigating new acreage; building new storage facilities; conducting new groundwater pumping; and increasing consumption on existing agricultural acreage.” *Id.* (quoting Complaint at 1, *Montana v. Wyoming*, 131 S. Ct. 1765 (2011) (Jan. 31, 2007) (No. 137), 2007 WL 4947613, at \*3-4, ¶¶ 9-12).

101. *Id.* at 1771 n.1.

102. *Id.* at 1771. The Court accepted this as true. *Id.* at 1771 n.3.

103. *Id.* at 1770-71 (citing Complaint, *supra* note 21, at\*3, ¶ 8).

104. *Id.* at 1771.

105. *Id.* at 1773 n.5; *see* Compact at art. V(A).

state law and acknowledged that its “assessment of the scope of these water rights [was] merely a federal court’s description of state law.”<sup>106</sup>

*1. Justice Thomas’ Majority Opinion*

Montana’s first argument was that the doctrine of appropriation, as incorporated in the Compact, prevents Wyoming’s increased consumption of the River because it is an improper enlargement of the state’s water use under the Compact.<sup>107</sup> Justice Thomas initially explained that under the doctrine of appropriation, which Montana and Wyoming have followed,<sup>108</sup> the first person to divert the water as it is found and put it to a beneficial use, meaning a reasonable use, is given senior rights.<sup>109</sup> Those rights are above any subsequent appropriators’ rights, and before subsequent, or junior, appropriators can use any water, senior rights must be fulfilled.<sup>110</sup> Like senior rights, junior rights are to the river as it exists at the time the junior appropriators find it.<sup>111</sup> However, once the senior rights are fulfilled, the no-injury rule does not allow senior appropriators to enlarge their rights by changing the place of diversion; doing so unlawfully interferes with junior rights.<sup>112</sup>

The Court compared Montana’s downstream pre-1950 users to junior appropriators, but noted that the Compact raises this status to that of Wyoming’s upstream pre-1950 users, granting equal seniority between the states.<sup>113</sup> Because both states have equal rights, Montana cannot

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106. *Montana*, 131 S. Ct. at 1773 n.5.

107. *Id.*

108. *Id.* at 1772 (citing *Basey v. Gallagher*, 87 U.S. 670 (1875)).

109. *Id.* (citing, inter alia, WYO. CONST. art. 8, § 3; *Hinderlider v. LaPlata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 98 (1938); *Arizona v. California*, 298 U.S. 558, 565-66 (1936); *Bailey v. Tintinger*, 122 P. 575, 583 (Mont. 1912); *Quinn v. John Whitaker Ranch Co.*, 92 P.2d 568, 570-71 (Wyo. 1939)).

110. *Id.*

111. *Id.* (citing C. KINNEY LAW OF IRRIGATION AND WATER RIGHTS § 803, 1403-04 (2d ed. 1912)).

112. *Id.* (citing W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 573 (1971)).

113. *Id.* (citing Brief for Petitioner at 23, *Montana v. Wyoming*, 131 S. Ct. 1765 (2011) (May 13, 2010) (No. 137), 2010 WL 4132841, at \*23).

prevent Wyoming's pre-1950s users from enjoying their full rights, which could mean that when the River is low, Montana's users would be without water.<sup>114</sup>

Despite the protection of the no-injury rule, the Western States, including Montana and Wyoming, generally have applied the no-injury rule only to situations where the appropriator had changed the point where water is being diverted or the purpose for which the water is being diverted.<sup>115</sup> The majority cited a Utah Supreme Court decision in support of the fact that farmers are free to irrigate more water-intensive crops<sup>116</sup> and noted that in Wyoming and Montana, increased consumption via adding farm acreage is allowed so long as the farmer intended to do so at the onset and made an effort throughout the years.<sup>117</sup> Aside from the case law, the Court discussed the fact that, prior to the 1950s, both Montana's and Wyoming's statutes governing changes to water rights contained no regulations as to changes in irrigation.<sup>118</sup> Therefore, the Court concluded that the no-injury rule does not apply to irrigation improvements and that improvements fall under the original appropriative right.<sup>119</sup>

In continuing the analysis of appropriation law, the majority next looked to the doctrine of recapture where appropriators have the right to reuse runoff and seepage from water they have diverted.<sup>120</sup> Montana argued that an exception exists and the rule is inapplicable when the water

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114. *Id.* Because snow melt is a primary factor in the River's flow, the year-to-year flow can vary greatly. *Id.* at 1770.

115. *Id.* at 1773 (citing *Quigley v. McIntosh*, 103 P.2d 1067, 1072 (Mont. 1940)).

116. *Id.* at 1774 (citing *E. Bench Irrigation Co. v. Deseret Irrigation Co.*, 271 P.2d 449, 455 (Utah 1954)). "Would the fact that my pump has for years dripped water onto a neighbor's ground give him a right to say that my pump must go on leaking?" *Id.* (quoting S. WIEL, *WATER RIGHTS IN THE WESTERN STATES* § 56, 51 (3d ed. 1911)).

117. *Id.* (citing *St. Onge v. Blakely*, 245 P. 532, 539 (Mont. 1926); *Van Tassel Real Estate & Live Stock Co. v. Cheyenne*, 54 P.2d 906, 913 (Wyo. 1936)).

118. *Id.* at 1774 & n.6 (citing MONT. CODE ANN. § 89-803 (1947); WYO. STAT. ANN. § 71-401 (1945)).

119. *Id.*

120. *Id.* at 1775 (citing *Ide v. United States*, 263 U.S. 297, 506 (1924)). The majority also quoted the Arizona Supreme Court: "'No appropriator can compel any other appropriator to continue the waste of water which benefits the former. If the senior appropriator, through scientific and technical advances, can utilize his water so that none is wasted, no other appropriator can complain.'" *Id.* (quoting *Ariz. Pub. Serv. Co. v. Long*, 773 P.2d 998, 996-

would naturally return to the stream but for recapture, however, it failed to cite any Montana or Wyoming authorities recognizing this exception.<sup>121</sup> The Wyoming Supreme Court has held that a person does not have a continued right to returning runoff if another finds a better way to use the water, resulting in less waste or even no waste.<sup>122</sup> In an early case, the Montana Supreme Court explained that while a person has possession of water, it is that person's private property and is subject to recapture and reuse.<sup>123</sup> Despite other courts recognizing the exception, the Court here concluded that the doctrine of recapture implies that irrigation improvements are within the original appropriative right.<sup>124</sup> The Court acknowledged that the doctrine of appropriation and its rules are confusing, but noted that water law scholars, who have addressed the issue of more efficient irrigation systems, have reached the same conclusion as the Court.<sup>125</sup>

Montana's second argument, in the alternative, was that even if the doctrine of appropriation does not bar Wyoming from using more efficient irrigation technology, the Compact's definition of "beneficial use" narrows the scope of the states' appropriative rights because the term as in the Compact actually means the "*amount of depletion*" rather than the "*type of use*" depleting the water supply.<sup>126</sup> In a plain reading of the Compact's definition, the majority determined that "beneficial use" refers to a type of use because the phrasing uses the word "depleted" to describe what happens to the River when a "type of use" occurs.<sup>127</sup> In addition, interpreting "beneficial use" as "amount" would depart from the term's traditional

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97 (1989)). Note that this paper does not attempt to explain all state law differences regarding the doctrine of recapture.

121. *Id.*

122. *Id.* (citing *Bower v. Big Horn Canal Assn.*, 307 P.2d 593, 601 (Wyo. 1957)). The majority also discussed other Wyoming Supreme Court cases. *See Id.* at 1775-76 (citing *Fuss. v. Franks*, 610 P.2d 17 (Wyo. 1980); *Binning v. Miller*, 102 P.2d 54, 63 (Wyo. 1940)).

123. *Id.* at 1776 (citing *Rock Creek Ditch & Flume Co. v. Miller*, 17 P.2d 1074, 1080 (Mont. 1933)).

124. *Id.* at 1775-76.

125. *Id.* at 1777 (citing Mark Squillace, *A Critical Look at Wyoming Water Law*, 24 LAND & WATER L. REV. 307, 331 (1989)). "Montana has not identified any scholars who have reached the opposite conclusion." *Id.*

126. *Id.* at 1777-78 (emphasis in original).

127. *Id.* at 1778.

meaning of some sort of activity with a useful purpose.<sup>128</sup> A departure would conflict with the Compact’s declaration that the doctrine of appropriation controls.<sup>129</sup> Furthermore, the Court reasoned that it would expect the Compact to have clearer language, such as defining “beneficial use” in terms of the volume depleted if actually departing from the traditional meaning.<sup>130</sup> The majority also reasoned that it could have indicated a departure even more plainly as it did in establishing the third tier of water rights, in which the Compact explicitly allocates rights to any unused water by percentage.<sup>131</sup> In addition, other similar compacts have described rights in terms of depletion, measuring usage by acre-feet of water per temporal unit.<sup>132</sup> The Court rejected Montana’s argument and held that Wyoming’s use of sprinkler irrigation systems does not violate the Compact, overruling Montana’s exception.<sup>133</sup>

## 2. Justice Scalia’s Dissenting Opinion

Justice Scalia, the sole dissenter, focused on the difference between the words “divert” and “deplete” as used in the Compact and rejected the Court’s interpretation of the meaning of “beneficial use.”<sup>134</sup> Scalia simply defined common law appropriative water rights as first-in-time, first-in-right when the diverter puts the water to a beneficial use.<sup>135</sup> In disagreeing with the

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128. *Id.*

129. *Id.* at 1778-79.

130. *Id.* at 1778.

131. *Id.* at 1779; Compact at art. AV(B)(1)-(4).

132. *Montana*, 131 S. Ct. at 1779 The majority discussed the Colorado River Compact of 1922, which Wyoming had entered into before ratifying the Yellowstone River Compact. *Id.* The Colorado River Compact measured depletion in terms of acre-feet of water per year. *Id.* (citing National Resources Planning Bd., Water Resources Comm., Interstate Water Compacts, 1785-1941, 8 (1942)). The Court also cited to the Republican River Compact of 1943, which also allocates usage by acre-feet. *Id.* (citing KAN. STAT. ANN. § 82a-518 (1997)).

133. *Id.*

134. *Id.* at 1780-81(Scalia, J., dissenting).

135. *Id.* at 1780 (citing *Hinderlider v. LaPlata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 98 (1938); *Wyoming v. Colorado*, 259 U.S.419, 459 (1922)).

majority, he wrote that “beneficial use” not only means the type of use permitted,<sup>136</sup> but also, a measurement of the volume of water taken for that use.<sup>137</sup>

In addition to differing on the interpretation of the common law, Scalia contended that the Compact does alter the common law.<sup>138</sup> The Compact contains a definition of “divert,” which allows an appropriator to use all the water taken, regardless of what typically returns to the River.<sup>139</sup> Yet, the Compact’s definition of “beneficial use” does not contain a form of the word “divert,” but rather employs the word “depleted.”<sup>140</sup> Scalia believed this difference was intentional and criticized the majority for deciding the difference was irrelevant.<sup>141</sup> According to Scalia, it followed that the “beneficial uses” referred to in tier one of the Compact regarding the pre-1950 users’ rights do not include recapture.<sup>142</sup> The only issue was whether the Compact, using its definitions, allowed Wyoming to divert a certain volume of water or deplete a certain volume, and because the definition of “beneficial use” in the Compact contains “depleted,” he firmly stated that Wyoming only has the right to deplete a certain volume of water.<sup>143</sup>

Finally, Scalia attacked the majority’s reasoning that if the Compact departs from traditional common law, clearer language should have been used such as percentage allocations

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136. *Id.* (citing *United States v. Willow River Power Co.*, 324 U.S. 499, 504 (1945)).

137. *Id.* (Scalia, J., dissenting) (citing *Ide v. United States*, 263 U.S. 297, 505 (1924); *Quinn v. John Whitaker Ranch Co.*, 92 P.2d 568, 570-71 (Wyo. 1939)).

138. *Id.*

139. *Id.* “The terms ‘divert’ and ‘diversion’ mean the taking or removing of water from the Yellowstone River or any tributary thereof when the water so taken or removed is not returned directly into the channel of the Yellowstone River or of the tributary from which it is taken.” *Yellowstone River Compact* at art. II(G).

140. *Id.* (“Article II(H) elaborates that a ‘[b]eneficial [u]se’ is one ‘by which the water supply of a drainage basin is depleted when usefully employed by the activities of man.’” (quoting *Yellowstone River Compact* at art. II(H)).

141. *Id.* at 1781.

142. *Id.* at 1780 (“Article V(A) promises that ‘[a]ppropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.’” (quoting *Yellowstone River Compact* at art. V(A))).

143. *Id.* at 1781.

or usage measurements as in other compacts.<sup>144</sup> Scalia called this a “strawman” because Montana has never demanded a certain volume of water and has only asked that whatever water returned to the River in 1950 after Wyoming’s beneficial uses will continue to return, provided the annual flows were the same.<sup>145</sup>

## VI. ANALYSIS OF *MONTANA*

In this case of first impression, Justice Thomas could have justified his conclusions in the majority opinion by simply re-quoting Wiel: ““Would the fact that my pump has for years dripped water onto a neighbor’s ground give him a right to say that my pump must go on leaking?””<sup>146</sup> Because water has always been scarce in the West, western water law developed with conservation and responsible use in mind.<sup>147</sup> The fact that more efficient irrigation systems caused this dispute is ironic, to say the least. Even though the Court arrived at the common sense conclusion that yes, society can use improved technology, *Montana v. Wyoming* demonstrates that some of the common law lacks common sense.

### A. *Meaning of Beneficial Use: Could Scalia be Correct?*

The majority and dissenting opinions split over whether the Compact altered the meaning of “beneficial use” under the doctrine of appropriation. Justice Thomas, for the majority, concluded that it did not and that it simply meant a “reasonable use.”<sup>148</sup> However, Justice Scalia questioned the majority’s confidence in interpreting the common law.<sup>149</sup> Not only did Justice Scalia

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144. *Id.* at 1781-82.

145. *Id.* at 1782 (citing Transcript of Oral Argument at 13, 16, 24, *Montana v. Wyoming*, 131 S. Ct. 1765 (2011) (No. 137), 2011 WL 65029).

146. *See id.* at 1774. Justice Thomas parenthetically quoted this in the majority opinion. *Id.*

147. *See* Janet C. Neuman, *Beneficial Use, Waste, and Forfeiture: The Inefficient Search for Efficiency in Western Water Use*, 28 ENVTL. L. 919, 920-22 (1998).

148. *Montana*, 131 S. Ct. at 1771 (citing, inter alia, WYO. CONST. art. 8, § 3; *Hinderlider v. LaPlata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 98 (1938); *Arizona v. California*, 298 U.S. 558, 565-66 (1936); *Bailey v. Tintinger*, 122 P. 575, 583 (Mont. 1912); *Quinn v. John Whitaker Ranch Co.*, 92 P.2d 568, 570-71 (Wyo. 1939)).

149. *See id.* at 1780 (Scalia, J., dissenting).

determine that the Compact altered the meaning of “beneficial use,”<sup>150</sup> but he also believed the common law definition encompasses both the type of use and the quantity used.<sup>151</sup>

Beneficial use is a “vague judicial concept.”<sup>152</sup> Traditionally, the concept had three requirements in order to obtain a water right: (1) one had to continue using the water, (2) the water had to be used for a productive purpose, and (3) one could not wastefully use the water.<sup>153</sup> Not only have Western states incorporated beneficial use as part of their common law, but also, they have incorporated it within their statutory codes and even state constitutions.<sup>154</sup> Some states, either in their constitution or statutory code, explicitly list uses that qualify as “beneficial” or explicitly list uses that are not “beneficial.”<sup>155</sup> These enumerations are not intended to be exhaustive.<sup>156</sup> Some states go a step further and define “beneficial use” in terms of the amount of water used.<sup>157</sup> This is not especially significant because the courts have viewed “beneficial use” as referring to both the type of use and amount of water used.<sup>158</sup> It seems then, that Justice Scalia’s conclusion is not unreasonable and perhaps, may even be correct. However, this disagreement really did not make a difference because the real issue in *Montana* was the application of the doctrine of recapture.

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150. *Id.*

151. *Id.* “Like the common law, this definition lays out the types of uses that qualify as beneficial and the volume of water an appropriator may claim through his beneficial use.” *Id.*

152. A. DAN TARLOCK, L. OF WATER RIGHTS AND RESOURCES § 5:66.

153. *Id.*

154. Neuman, *supra* note 147, at 923.

155. *Id.* at 924 (citing IDAHO CONST., art. XV, § 3; OKLA. STAT. tit. 27, § 7.6 (1997); TEX. WATER CODE ANN. §§ 11.002, 64.003(19) (West 1998)).

156. *Id.*

157. *Id.* at 925 (citing, inter alia, COLO. REV. STAT. § 37-92-103(4) (1997)).

158. *Id.* at 926.

*B. The Real Issue: The Doctrine of Recapture*

Although the doctrine of recapture is unclear, Montana and Wyoming case law are clear, and the majority simply and correctly applied it.<sup>159</sup> Yet, Scalia unnecessarily criticized the majority, calling the application of the doctrine “the Court’s best guess” and failing to explain his disagreement.<sup>160</sup> Under Montana and Wyoming state law, the doctrine of recapture allows appropriators to reuse runoff and seepage.<sup>161</sup> The Court concluded that improved irrigation systems fell within the original appropriative right.<sup>162</sup> The Court’s conclusion certainly follows established law, but it dismisses the fact that the Compact equalizes the status of Montana’s and Wyoming’s pre-1950 users; the Compact provides that both states’ users are deemed to have senior status.<sup>163</sup>

Although the Court applied the law correctly, the “senior” Montana users are at the mercy of Wyoming’s users. If beneficial use is only about a “reasonable use” and not over all consumption of water and if the doctrine of recapture allows Wyoming’s pre-1950 users to suddenly begin using runoff when they had not done so for years, then what good are Montana’s users’ rights anyway? *Montana v. Wyoming* suggests that downstream users will always have settled at the wrong end of the river. For this reason, the common law as written into the Compact seems to do a poor job of fairly allocating rights between Montana and Wyoming. Montana is left to hope for more precipitation<sup>164</sup> and hope that Wyoming refrains from using technology that does an even better job of not wasting water. Clearly, these hopes are inconsistent with the need to allocate a scarce resource, especially in the West. One third of the

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159. See discussion of the majority opinion in Part III.B.1.

160. *Montana v. Wyoming*, 131 S. Ct. 1765, 1781 (Scalia, J., dissenting).

161. *Id.* at 1775 (majority opinion) (citing *Ide v. United States*, 263 U.S. 297, 506 (1924)).

162. *Id.* at 1775-76.

163. See Compact at art. V.D.

164. The River’s flow widely varies from year to year because the main source for the flow is snowfall. *Montana*, 131 S. Ct. at 1770.

United States population lives in the West.<sup>165</sup> Furthermore, population increases are expected to exacerbate this water scarcity as the West's population growth rate has been higher than the rest of the country.<sup>166</sup>

## VII. CONCLUSION

Even though the Compact was created with the goal of “remov[ing] all causes of present and future controversy”<sup>167</sup> among the signatory states, technological improvements, such as more efficient irrigation improvements, will continue to test the Compact. The Compact did not reach its goal of preventing future disputes, but the Court in *Montana* justly interpreted the law by looking at the Compact.<sup>168</sup> However, a just interpretation does not mean that conservation and water scarcity were in the forefront of the Justices' minds. Their job is to interpret and apply the necessary law.

The number of water disputes is expected to increase, even in the East, as population grows and consequently, activities such as power generation and agriculture will place heavy demands on water resources.<sup>169</sup> In 2008, the Great Lakes-Saint Lawrence River Basin Water Resources Compact was ratified after a century of negotiating.<sup>170</sup> The Great Lakes are an abundant source of water for the surrounding states and Canadian provinces but have become the subject of many congressional proposals to supply water elsewhere.<sup>171</sup> This includes private companies bottling and selling water from the Basin, politicians from the West devising plans for the Great Lakes to provide water to the West, and that the Great Lakes should be used to increase

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165. Gregory J. Hobbs, Jr., *Priority: The Most Misunderstood Stick in the Bundle*, 32 ENVTL. L. 37, 44 (2002).

166. *Id.*

167. Compact at pmb1.

168. *See Montana*, 131 S. Ct. 1765.

169. Clemons, *supra* note 1, at 115.

170. Sonya F. Palay, *Muddy Waters: Congressional Consent and the Great Lakes-St. Lawrence River Basin Water Resources Compact*, 36 HASTINGS CONST. L.Q. 717, 717 (Summer 2009) (citing Great Lakes-Saint Lawrence River Basin Water Resources Compact, Pub. L. No. 110-342, 122 Stat. 3740 (2008)).

171. *Id.* at 737-38.

the navigability of the Mississippi River.<sup>172</sup> Despite the continued creation of water compacts, interstate water disputes are likely to remain a source of “original litigation” for the Supreme Court.<sup>173</sup> States must realize that entering into an interstate water compact is not an “end-all” and does not solve water scarcity. A compact only allocates water rights, and in the event of a dispute, those rights may be left open to the Court’s interpretation.

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172. *Id.*

173. *See* U.S. CONST. art. III, § 2, cl. 2.