

A Seat at the Table: How *Texas v. New Mexico* Provides Tribes a Potential Route to Assert Outstanding Water Rights Claims in Water Compact Disputes

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Across the United States today, water compacts—legally binding agreements between states that apportion a river’s water usage—allocate much of our nation’s water. However, Native American tribes, despite having some of the most senior water rights in the country, have never been accounted for in water compacts. As a result of being entirely excluded from water compacts, tribes have faced significant water shortages and have spent years trying to get their fair share of water.

However, a recent Supreme Court case, Texas v. New Mexico, may provide tribes an avenue to finally assert their water rights claims in water compacts. In the case, the Court held that the federal government was allowed to independently intervene in a dispute over a water compact between two states and, once the government had intervened, the states involved in the original compact dispute could not resolve their claims without the federal government’s consent. Texas v. New Mexico, then, may open up a pathway for tribes to assert their water rights claims in future water compact disputes. If two states began litigating over a water compact that had long ignored Native American water rights, could a tribe intervene in the dispute in the same way the federal government did? And, if so, could the tribe also prevent the states from resolving the dispute until the compact was amended to account for the tribe’s water rights? This Note answers both these questions in the affirmative, arguing that, while it is far from guaranteed, Texas v. New Mexico may present tribes with a unique way to finally see their water rights addressed in water compacts.

DOI: <https://doi.org/10.15779/Z384Q7QS7D>

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* J.D., University of California, Berkeley, School of Law, 2025. I would like to thank several key individuals who generously lent their time and expertise in pulling this Note together: Professor Seth Davis who gave me invaluable direction and advice early on in this Note’s creation; Professor

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INTRODUCTION

On November 24, 1922, delegates from seven Western states—Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming—gathered in Santa Fe, New Mexico to sign the Colorado River Compact.¹ Following years of disagreement between the states over rights to the river’s water, the Compact represented a historic agreement. In its signing, the states agreed to divide the entirety of the Colorado River between themselves “in perpetuity,” thereby guaranteeing each state a set amount of the Colorado’s water for present and future uses.²

Compacts, legally binding agreements between states which allocate the waters of interstate rivers, have become one of the primary frameworks through which water is allocated in the Western United States.³ Indeed, since the Colorado River Compact was first signed in 1922, water compacts have been established on twenty-one other rivers across the United States.⁴ In many ways,

Sharon Jacobs who guided my writing and editing process—including encouraging me to write far more succinctly—and made this Note much better; and the Ecology Law Quarterly Senior Publishing Board for their feedback on this Note—especially the exceptional edits of Payson Mayerle, Sarah O’Farrell, Dex Lim, and Jordan Perry. The analysis included in this article reflects my views alone and does not reflect the perspective of my current employer. This Note does not claim to speak for tribes. All errors my own.

1. Colorado River Compact art. 10, Dec. 21, 1928. The compact was signed on November 24, 1922, but was not fully ratified until Arizona became the last state to do so in 1944. Colorado River Compact Ratification, 1944 Ariz. Sess. Laws 428 (codified at ARIZ. REV. STAT. ANN. § 45-1311 (2006)).

2. Colorado River Compact, *supra* note 1, at art. 3.

3. See STEPHEN P. MULLIGAN, CONG. RSCH. SERV., LSB10807, Interstate Water Compacts: An Overview 1-2 (June 15, 2023).

4. *Interstate Water Agreements of the United States: Interstate Water Allocation Compacts*, INTERNATIONAL WATER LAW PROJECT, <https://www.internationalwaterlaw.org/documents/>

water compacts have been effective for managing limited water resources in arid states, where community needs are most pronounced. They provide a mechanism for states to handle water disputes outside the court system⁵ and, as some scholars have argued, help promote interstate cooperation on developing “beneficial” water use practices.⁶ However, especially as climate change has caused prolonged drought in much of the American West (where water compacts are primarily utilized), scientific and equitable shortcomings of long-standing interstate water compacts have been put on full display. Commentators have noted how compacts systematically and fundamentally fail to consider the importance of groundwater,⁷ give short shrift to the ecological benefits of rivers,⁸ fail to protect fish and wildlife,⁹ and do not actually prevent litigation between states and other water users.¹⁰ Moreover, due to prolonged droughts in much of the Western United States, many compacts, created before these droughts began, allocate more water than the rivers actually contain. The Colorado River Compact, for example was created during an unusually wet period in U.S. history¹¹ and, as a result, the Compact overestimates yields and allocates more water than actually exists in the rivers today.¹²

These shortcomings place pressure on water access for frontline communities within and among states. The impact is even further amplified by the significant failing of interstate water compacts in the United States to consider Native American water rights. Many Native American tribes having some of the most senior water rights in the nation and quantified claims—claims which state the specific amount of water a user can consume—to many of the rivers that the compacts govern.¹³ Despite this fact, thirteen of the twenty-two

interstate_us.html (last visited Apr. 6, 2025).

5. Amelia I.P. Frenkel, *Interstate Water Rights: Take No Drop for Granted*, 40 HARV. ENV'T L. REV. 253, 259-60 (2016); Emma Easley, *Improving Interstate Water Compacts One ADR Provision at a Time*, 37 OHIO ST. J. ON DISP. RESOL. 368, 372 (2022).

6. See, e.g., Joe Norris, *Montana v. Wyoming: Is Water Conservation Drowning the Yellowstone River Compact?*, 15 U. DENV. WATER L. REV. 189, 190, 196 (2011).

7. DOUGLAS S. KENNEY, WATER ALLOCATION COMPACTS IN THE WEST: AN OVERVIEW 4-5 (2002).

8. *Id.* at 5-6.

9. *Id.* at 6.

10. Connor B. Egan, *Shaping Interstate Water Compacts to Meet the Realities of the Twenty-First Century*, 6 KY. J. EQUINE, AGRIC., & NAT. RES. L. 327, 334 (2014); Easley, *supra* note 5, at 373.

11. Noah D. Hall, *Interstate Water Compacts and Climate Change Adaptation*, 5 ENV'T L. & ENERGY L. & POL'Y J. 237, 285 (2010); see also Shemin Ge et al., *Fixing the Flawed Colorado River Compact*, EOS (June 16, 2023), <https://eos.org/features/fixing-the-flawed-colorado-river-compact> (articulating that the Colorado River Compact “relied on optimistic estimations of the amount of water the river could supply that were not supported by existing surveys or science”).

12. Hall, *supra* note 11, at 284.

13. In *Winters v. United States*, the U.S. Supreme Court held that, when the federal government created reservations, it implicitly reserved the Tribe’s right to use a sufficient amount of water to fulfill the purposes of the reservation as a homeland. 207 U.S. 564, 576-77 (1908). Later cases noted that these reserved water rights were established as of the date the federal government created a tribe’s reservation and cannot be forfeited by non-use. See, e.g., *Arizona v. California* [*Arizona v. California III*], 373 U.S. 546, 600-01 (1963).

water compacts in the United States fail to mention tribal water interests.¹⁴ The nine compacts that do mention tribal interests do so in cursory, boilerplate language, simply mentioning that “[n]othing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.”¹⁵ No compact, then, takes steps to protect tribal water rights.¹⁶ Such exclusion is particularly troubling when considering the extent to which tribal safety and self-determination is intertwined with the established allocations of water compacts which limit a tribe’s ability to access enough water. On the Colorado River, for example, over twenty tribes with reservations hold quantified rights to about 20 percent of the river’s annual average water supply while another thirteen tribes have unresolved water right claims.¹⁷ However, despite tribes having claims to significant amounts of the Colorado River’s water, the Compact allots no water to these tribes.¹⁸

Excluded from the guarantee of compacts, Native American tribes have instead had to rely on a range of complex policy and litigation strategies to ensure their reserved water rights are protected—often with limited success.¹⁹ However, a recent U.S. Supreme Court case, *Texas v. New Mexico*, may provide an avenue for Native American tribes to ensure their interests are considered in any litigation surrounding interstate water compacts.²⁰

Texas v. New Mexico began in 2013 when Texas brought suit against New Mexico for violating the Rio Grande Compact by allowing its water users to siphon off more water than allowed by the Compact.²¹ In *Texas v. New Mexico I*, the U.S. government moved to intervene in the dispute to protect federal interests at stake in the litigation, including its treaty obligations to Mexico and the operation of a federally owned reservoir along the Rio Grande.²² In a unanimous decision, the Supreme Court permitted the federal government to participate in the litigation as an independent, intervening party.²³ Then, in 2024, Texas and New Mexico reached a proposed consent decree that would have resolved the entire case.²⁴ However, the federal government did not agree to the states’ settlement. In *Texas v. New Mexico II*, the U.S. Supreme Court noted that

14. See KENNEY, *supra* note 7, at 5.

15. See, e.g., Colorado River Compact, *supra* note 1, at art. 7.

16. See *id.*

17. COLORADO RIVER RESEARCH GROUP, TRIBES AND WATER IN THE COLORADO RIVER BASIN 1-4 (2016), https://scholar.law.colorado.edu/cgi/viewcontent.cgi?article=1177&context=books_reports_studies.

18. See Colorado River Compact, *supra* note 1, at art. 7. The Compact did not include any tribal perspective, did not allocate any water to tribes, and simply states that “Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.”

19. See discussion *infra* Part I.

20. See *Texas v. New Mexico* [*Texas v. New Mexico II*], 602 U.S. 943, 965 (2024).

21. *Id.* at 947.

22. *Texas v. New Mexico* [*Texas v. New Mexico I*], 583 U.S. 407, 411-12 (2018).

23. *Id.* at 413.

24. *Texas v. New Mexico II*, 602 U.S. at 947.

because the United States was a proper party to the litigation and the states' consent decree would collaterally resolve the United States' own claims, the consent decree could not stand without the federal government's agreement.²⁵

This decision granted substantial new power to the federal government in resolving interstate water compact disputes. Now, anytime the federal government successfully intervenes in litigation over an interstate water compact dispute, it can ensure that a settlement reached between states that disposes of any of the federal government's claims does not proceed without federal approval.²⁶ However, *Texas v. New Mexico* may also enable Native American tribes to wield similar power to vindicate their consent in water compact disputes. If a tribe successfully intervened in a water compact dispute, could it prevent any settlement that did not properly consider its tribal water rights?

This Note makes such an argument. In Part I, this Note provides a brief overview of tribal water rights and the difficulties tribes have endured in ensuring those rights are respected in the divvying of critical resources by interstate water compacts. Part II then provides an in-depth overview of *Texas v. New Mexico* and explores the decision's potential implications for tribal water rights. Next, Part III articulates how tribes may be able to intervene in water compact disputes. This Part begins by outlining an argument for independent tribal intervention in water compact disputes. However, recognizing the uncertainty regarding whether the U.S. Supreme Court would approve such intervention in a water compact between two or more states,²⁷ this Part also considers an alternative path: tribes relying on the federal government to intervene on their behalf. Finally, Part IV examines how tribes may use this new power in the future, with a particular emphasis on the current negotiations over the Colorado River Compact. Ultimately, this Note concludes that, while the outcome is far from certain, *Texas v. New Mexico* may have opened a pathway at long last for tribes to have an equal legal voice in water compact issues.

I. TRIBAL WATER RIGHTS

In the United States, Native American tribes hold among the most "senior" water rights in the nation, granting them priority access to a guaranteed volume

25. *Id.* at 965 ("Having acknowledged [the United States'] interests, and having allowed the United States to intervene to assert them, we cannot now allow Texas and New Mexico to leave the United States up the river without a paddle."). The Court articulated that, if Texas and New Mexico's settlement had not disposed of the United States own claims, the states' settlement could proceed without the federal government's consent. Here, however, the states' settlement disposed of all claims in the case, including the federal governments. As a result, the federal government's consent to the settlement agreement was needed. *Id.* at 953-54.

26. *See id.* at 953-65.

27. The Supreme Court has original jurisdiction over water compact disputes between states pursuant to Clauses I and II of Article III, Section 2 of the U.S. Constitution which states that "[t]he judicial Power shall extend to... Controversies between two or more States..." and that "[i]n all Cases... in which a State shall be Party, the supreme Court shall have original Jurisdiction." U.S. CONST. art. III, § 2, cls. 1-2.

of water before most other users.²⁸ Tribal senior water rights were first recognized by the Supreme Court in its 1908 decision *Winters v. United States*.²⁹ In *Winters*, the Court held that when the U.S. federal government set aside land for Native American reservations, the government impliedly reserved sufficient water for tribes to make their reservation lands a home.³⁰ Because the reservation lands that tribes were forcibly relocated onto were often “arid and, without irrigation... practically valueless,” the Court found that tribes had a right to an adequate water supply to sustain their communities.³¹ Later courts further clarified that these “reserved” water rights can be asserted at any time, do not require continued use to remain in force, and must provide enough water to support all “practical irrigable acreage” on a reservation, including enough water to provide for the present and future needs of the tribe.³² Moreover, because *Winters* water rights are established as of the date a tribe’s reservation was created, and most reservations were established before most non-Indigenous settlements in the Western United States, tribal water rights generally have priority over the claims of most other water users.³³

Despite having such senior water rights, tribes have not been allocated water in any of the twenty-two water compacts established in the United States.³⁴ Excluded from these foundational water agreements, tribes have had to pursue three alternative routes to secure the water promised to them when their reservations were created: relying on the federal government to honor its word, litigating independently, or negotiating settlements with individual states and water users. All three options present significant hurdles for tribes to overcome.

First, tribes can try to rely on the federal government to assert their *Winters* water rights on their behalf under the federal government’s trust obligations to tribes. This path was originally articulated in *Cherokee Nation v. Georgia* in 1832, and since then, courts have held that the federal government owes a

28. Most western states follow prior appropriation doctrine: a priority-rights system for water allocation with a “first come, first served” principle that creates “senior” and “junior” users on a hierarchy of how much water the user can consume and when. *See Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51 (9th Cir. 1981).

29. *Winters v. United States*, 207 U.S. 564, 576-77 (1908).

30. *Id.*

31. *Id.*

32. *Colville Confederated Tribes*, 647 F.2d at 48, 51; *Arizona v. California III*, 373 U.S. 546, 600-01 (1963). Courts have also noted that water allocations need not be limited to enough water for a lifestyle when a reservation was established but can also take into account water needs in the twenty-first century. *New Mexico ex rel. State Eng’r v. United States*, 425 P.3d 723, 734 (N.M. Ct. App. 2018) (noting that “reservation allocations should not be limited to only an amount of water sufficient to support the pastoral lifestyle contemplated in the nineteenth century, but rather calculated to provide the tribes with water in quantities sufficient to promote survival and the success of the reservations”).

33. CYNTHIA M. BROUGH, CONG. RSCH. SERV., RL32198, INDIAN RESERVED WATER RIGHTS UNDER THE *WINTERS* DOCTRINE: AN OVERVIEW 2 (June 8, 2011).

34. KENNEY, *supra* note 7, at 5.

fiduciary obligation to protect tribal treaty rights, lands, assets, and resources.³⁵ Congress has noted that this trust responsibility extends to the protection of tribal water rights and has recognized that the federal government has a “trust responsibilit[y] to protect Indian water rights.”³⁶

However, in the time since *Cherokee Nation*, the United States government has often failed to meet its obligation to adequately secure and protect tribal rights.³⁷ This injustice is equally visible in the context of tribal water rights. One notable cause for this is the U.S. government’s institutional burden that often requires it to protect multiple interests in water disputes.³⁸ While the federal government can cite its trust responsibility to a tribe to intervene in water rights litigation to help codify a tribe’s water rights, it typically has other, sometimes conflicting interests in the dispute, such as reclamation and irrigation projects.³⁹ This can seriously hamper the federal government’s ability to effectively advocate for tribal water rights.⁴⁰ Moreover, in a recent 2023 decision, the Supreme Court weakened the extent of the federal government’s trust obligation to tribes in the context of water rights.⁴¹ In *Arizona v. Navajo Nation*, the Court noted that the federal government’s trust responsibility does not require the United States government to “take affirmative steps to secure water for individual tribes.”⁴² Thus, a tribe cannot compel the federal government to pursue a tribe’s water rights; the federal government is only obligated to act if it independently chooses to do so.⁴³

When faced with inadequate federal representation, tribes can intervene in lawsuits directly or bring independent action against states or water users in

35. See *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831); *Worcester v. Georgia*, 31 U.S. 515, 551-52 (1832); see also 1 COHEN’S HANDBOOK OF FEDERAL INDIAN LAW § 6.04(3)(b)(ii), Lexis (2025) (noting that “the government’s role is most akin to that of a private fiduciary” in its trust responsibility to tribes).

36. Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. No. 102-575, § 3002(9) 106 Stat. 4600 (1992).

37. See, e.g., *United States v. Sioux Nation of Indians*, 448 U.S. 371, 409, 421-22 (1980) (supporting the Courts of Claims’ finding that Congress “had not made a good-faith effort to give the Sioux the full value of the Black Hills” in violation of its fiduciary duties).

38. Ann C. Juliano, *Conflicted Justice: The Department of Justice’s Conflict of Interest in Representing Native American Tribes*, 37 GA. L. REV. 1307, 1307-10 (2003) (noting that the U.S. Department of Justice is charged with representing tribal water interests alongside all federal interests in water rights litigation, which often leads to inadequate outcomes for tribes).

39. *Id.* at 1307-10, 1341; see also Harold Shepherd, *Conflict Comes to Roost! The Bureau of Reclamation and the Federal Indian Trust Responsibility*, 31 ENV’T L. 901, 914-15 (2001) (noting federal preference for reclamation and irrigation projects); Daniel McCool, *The BIA Water Development Program*, in *COMMAND OF THE WATERS: IRON TRIANGLES, FEDERAL WATER DEVELOPMENT, AND INDIAN WATER* 139-142 (Univ. Ariz. Press 1994) (finding that the federal government often fails to provide enough funding for tribal water projects).

40. See Juliano, *supra* note 38, at 1334-36; Harold, *supra* note 39, at 916; McCool, *supra* note 39, at 147.

41. See *Arizona v. Navajo Nation*, 599 U.S. 555, 569-70 (2023).

42. *Id.*

43. See *id.* at 562, 569-70.

district court.⁴⁴ However, independent litigation also poses difficulties for tribes. For example, legal cases brought by tribes seeking adjudication of their *Winters* water rights are expensive,⁴⁵ take years to adjudicate,⁴⁶ and often involve a huge number of conflicting water claims.⁴⁷ Moreover, with the passage of the McCarran Amendment in 1952 and the Supreme Court's subsequent interpretation of the amendment in 1976, tribes are required to bring any water rights cases in state court rather than federal court.⁴⁸ State courts, scholars have noted, are often "ill-equipped to deal with the political pressures arrayed against tribal efforts to reclaim water."⁴⁹ As a result, state courts have often developed "strong incentives to discriminate against [tribal water rights] claims in favor of state and private uses."⁵⁰

Furthermore, even if a tribe successfully navigates these hurdles and wins confirmation of their *Winters* water rights, many tribes lack the resources to make use of those rights.⁵¹ If a tribe is successful in court, they only gain "paper" rights to water—that is, they may be awarded a legal claim to water but lack the financial capital to develop those water resources.⁵² Turning these paper water

44. *New Mexico v. Aamodt*, 537 F.2d 1102, 1106 (10th Cir. 1976) (noting that tribes have the right to intervene under Fed. R. Civ. P. 24(a) when the federal government has conflict of interest); *United States v. Gila Valley Irrigation Dist.*, 31 F.3d 1428, 1432, 1443 (9th Cir. 1994) (permitting the tribe to intervene despite the federal government's opposition).

45. Leslie Sanchez et al., *Beyond "Paper" Water: The Complexities of Fully Leveraging Tribal Water Rights*, FED. RSRV. BANK OF MINN. <https://www.minneapolisfed.org/article/2022/beyond-paper-water-the-complexities-of-fully-leveraging-tribal-water-rights> (May 3, 2022).

46. *See Overview of General Stream Adjudications*, JUD. BRANCH OF ARIZ. IN MARICOPA CNTY., <https://www.superiorcourt.maricopa.gov/SuperiorCourt/GeneralStreamAdjudication/faq.asp#:~:text=of%20claimant%20were:,Gila%20River%20Adjudication,the%20Little%20Colorado%20River%20Adjudication> (last visited Apr. 6, 2025) (mentioning that the Gila River General Steam Adjudication and the Little Colorado River Adjudication, which both began in Arizona courts in the 1970s after Tribes asserted their reserved water rights, are still ongoing).

47. *See id.* ("As of June 30, 2015, 83,876 statements of claimant had been filed in the Gila River Adjudication and 14,654 claims in the Little Colorado River Adjudication.")

48. *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 809-14 (1976) (noting that the McCarran Amendment, which waived the United States' sovereign immunity in suits concerning ownership or management of water rights, also included consent by Congress for state court determinations of reserved water rights held by the United States on behalf of Native Americans); *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 667-70 (1983) (holding that concurrent federal suits brought by tribes were subject to dismissal).

49. Scott B. McElroy & Jeff J. Davis, *Revisiting Colorado River Conservation District v. United States—There Must be a Better Way*, 27 ARIZ. ST. L. J. 597, 600 (1995).

50. Robert H. Abrams, *Reserved Water Rights, Indian Rights and the Narrowing Scope of Federal Jurisdiction: The Colorado River Decision*, 30 STAN. L. REV. 1111, 1111 (1978).

51. This situation often occurs because courts, unlike Congress, cannot authorize new water projects to provide for tangible "wet water." *See, e.g.*, Mark Olalde et al., *The Colorado River Flooded Chemehuevi Land. Decades Later, the Tribe Still Struggles to Take Its Share of Water*, PROPUBLICA <https://www.propublica.org/article/chemehuevi-tribe-reservation-water-colorado-river-california> (July 5, 2023) (outlining how the Chemehuevi Indian Tribe, despite securing their water rights in court, have been unable to effectively transport most of this water to their reservation).

52. *See id.*

rights into “wet” water on their reservation that tribes can actually make use of often requires significant infrastructure investment and upkeep.⁵³ Thus, if a tribe lacks the resources to build pumps, pipes, canals, and other necessary infrastructure, their reservations may still be left without critical water despite their success in court.⁵⁴ This disconnect between the justice system and tangible environmental justice is exemplified in the Chemehuevi Indian Tribe, which, despite having its water rights to the Colorado River codified in a 1960 judicial decision, sees 97 percent of the water it is entitled to remain in the river since the Tribe lacks the resources to build the infrastructure necessary to pump and transport it.⁵⁵

Finally, tribes can also move outside the courts and try to negotiate settlements with states, the federal government, and other water users to vindicate their water rights.⁵⁶ Negotiations between other water users can allow tribes to secure additional funding for water infrastructure, allowing tribes to not only secure “paper” rights to water, but also receive funding to practically secure water resources guaranteed by law.⁵⁷ Utilizing negotiations instead of litigation can further avoid the “all or nothing” stakes some tribes view litigation to create⁵⁸ and, unlike litigation, avoids the risk of a court ruling against a tribe and granting them no water.⁵⁹

Despite these benefits, pursuing negotiated settlements for water rights still poses a range of difficulties for tribes. Settlements take many years to come to fruition, with the average settlement—including any litigation that occurred before settlement negotiations commenced—lasting twenty-two years.⁶⁰ Scholars have also noted that many states often negotiate in bad faith, exploiting concessions from parched tribes and stalling negotiations.⁶¹

In all, despite having more senior water rights than nearly every other water user in the United States, tribes have been left out of water compacts and have

53. *See id.*

54. *See id.*

55. *See id.*

56. In recent years, tribes have begun to increasingly use settlements with states and other water users as a primary mechanism to secure their water rights. *See* Max Clayton, *A New Moment for Indian Water Rights Settlements*, 64 NAT. RES. J. 33, 34-35 (2024). As of 2021, there have been thirty-nine approved water rights settlements and, since 1990, it has been the Department of Interior’s policy that tribal water rights should be resolved through negotiated settlements rather than litigation. CHARLES V. STERN & MARIEL J. MURRAY, CONG. RSCH. SERV., R44148, INDIAN WATER RIGHTS SETTLEMENTS 4, 7 (Dec. 3, 2024).

57. *See* Sanchez et al., *supra* note 45.

58. *See* Robert T. Anderson, *Indian Water Rights, Practical Reasoning, and Negotiated Settlements*, 98 CALIF. L. REV. 1133, 1134 (2010).

59. *See id.* at 1133-34, 1156; *see also* Nevada v. United States, 463 U.S. 110, 120, 145 (1983) (holding that the Pyramid Lake Paiute Tribe was unable to relitigate their water rights and claim additional water due to them under the *Winters* doctrine because the federal government had already litigated the Tribe’s water rights for them in a case where final judgement was entered).

60. Sanchez et al., *supra* note 45.

61. Mark Olade et al., *How Arizona Stands Between Tribes and Their Water*, PRO REPUBLICA (June 14 2023), <https://www.propublica.org/article/how-arizona-stands-between-tribes-and-their-water>.

faced significant obstacles in turning their *Winters* water rights into “wet” water to meet their needs. Consequently, more than a century after *Winters*, 170 of 226 American Indian reservations still have unresolved water claims in 2025.⁶²

II. *TEXAS V. NEW MEXICO* AND THE PRECEDENT IT SETS

A. *Texas v. New Mexico I: A Right to Federal Intervention*

In light of these hardships, a recent U.S. Supreme Court decision, *Texas v. New Mexico*, may provide tribes a path forward to effectively assert their reserved *Winters* water rights in the context of water compact disputes.⁶³ The case involved the Rio Grande River and its associated water compact.⁶⁴ Flowing from its headwaters in southern Colorado, the Rio Grande cuts through New Mexico into Texas, where it traverses the U.S.-Mexico international border before emptying into the Gulf of Mexico, 1,885 miles away.⁶⁵ The third longest river in the continental United States, the Rio Grande provides water to over six million people in the arid Southwestern United States, and even more in Mexico.⁶⁶

Being such a vital river, the Rio Grande has been the subject of substantial debate and numerous agreements among powerful entities seeking to divide its waters. First, in 1906, the United States entered into a treaty with Mexico in which the United States promised to deliver Mexico 60,000 acre-feet of water from the Rio Grande annually.⁶⁷ To ensure sufficient annual water deliveries to Mexico and to control the Rio Grande’s natural ebb and flow for more consistent irrigation, the U.S. government constructed the Elephant Butte Reservoir in southern New Mexico.⁶⁸ Upon completing the reservoir, the U.S. government entered into agreements called the Rio Grande’s “Downstream Contracts,” with two irrigation districts in New Mexico and Texas.⁶⁹ In these Downstream Contracts, the United States promised to release set amounts of water from the Elephant Butte Reservoir for the irrigation districts to use each year.⁷⁰

About three decades later, Colorado, New Mexico, and Texas entered into the Rio Grande Compact, recognizing the need to settle their own water rights claims on the Rio Grande.⁷¹ The Compact apportioned the remainder of the Rio

62. Leslie Sanchez et al., *The Economics of Indigenous Water Claim Settlements in the American West*, 15 ENVTL RSCH. LETTERS 1, 1 (2020).

63. See *Texas v. New Mexico II*, 602 U.S. at 965.

64. *Id.* at 947.

65. *Rio Grande in High Demand*, AMERICAN RIVERS, <https://www.americanrivers.org/river/rio-grande> (last visited Apr. 6, 2025).

66. *Id.*

67. See *Texas v. New Mexico II*, 602 U.S. at 948.

68. *Id.* at 949.

69. *Id.*

70. *Id.*

71. Rio Grande Compact, Mar. 18, 1938.

Grande's waters between the three states.⁷² Relevant to the dispute in *Texas v. New Mexico*, the Compact requires New Mexico to deliver a specified amount of water to Texas each year.⁷³ With infrastructure in place at Elephant Butte Reservoir, the two states agreed that Texas's share of Rio Grande river water would be released at the reservoir, nearly 100 miles upstream from the state line.⁷⁴

Although measuring Texas's water at the existing reservoir made practical sense at the time, this choice became the center of the present-day dispute between Texas and New Mexico.⁷⁵ In 2013, Texas filed an original action before the U.S. Supreme Court alleging that New Mexico was breaching the Rio Grande Compact by failing to deliver sufficient water to Texas.⁷⁶ Texas alleged that although New Mexico released the correct amount of water at the reservoir, by the time the water travelled 100 miles downstream to the Texas border, water users in southern New Mexico had siphoned off so much water that Texas was not receiving its promised share under the Compact.⁷⁷ Because New Mexico was allowing residents downstream of the Elephant Butte Reservoir to engage in groundwater pumping beyond what the Rio Grande Compact allowed, Texas alleged that aquifers in the region were being overly depleted by those water users.⁷⁸ As a result of this increased groundwater pumping, water released from the reservoir and intended for Texas was being absorbed by the now-depleted aquifers before it could reach Texas.⁷⁹

While Texas only sued New Mexico,⁸⁰ one year into the litigation the United States filed a motion for leave to intervene in the case as an independent party.⁸¹ Like Texas, the United States government was concerned that increased water use in southern New Mexico violated the Compact and could potentially infringe on the federal government's ability to deliver water to Mexico and the two downstream irrigation districts.⁸²

New Mexico opposed the United States' motion to intervene, arguing that the United States failed to state a claim because they were not a signatory to the

72. *Id.* at art. 1.

73. *Id.* at art. 4.

74. *See id.* at art. 1, 5.

75. *See Texas v. New Mexico I*, 583 U.S. 407, 411 (2018).

76. *Id.* The Supreme Court has original jurisdiction over all water compact disputes under the Compact Clause of the United States Constitution at Art. III, § 2, Cl. 2. As a result, all water compact disputes are heard in the federal court system directly by the Supreme Court.

77. *See Texas v. New Mexico II*, 602 U.S. 943, 947, 949-951 (2024) (articulating Texas's claims in the earlier case).

78. *Id.* at 950-51.

79. *Id.*

80. Technically, Texas also sued Colorado as a signatory state to the treaty, but did not pursue any claims against the state. *See id.*

81. Motion of the United States for Leave to Intervene as a Plaintiff at 1, *Texas v. New Mexico*, 572 U.S. 1032 (2014) (No. 141).

82. *See Texas v. New Mexico I*, 583 U.S. 407, 410-11 (2018).

Rio Grande Compact.⁸³ In *Texas v. New Mexico I*, the Supreme Court disagreed with New Mexico, unanimously finding that the United States could pursue its claims against New Mexico even though it was not a signatory and party to the Rio Grande Compact.⁸⁴ As the Court noted, in the past, it had “sometimes permitted the federal government to participate in compact suits” when there were “distinctly federal interests” at stake.⁸⁵ Here, the Court found that there were distinctly federal interests at stake in the litigation between Texas and New Mexico.⁸⁶ Namely, the Court found the federal government had distinct interests in its treaty obligations to Mexico, its obligation to irrigation districts in the Downstream Contracts, and the federal government’s operation and ownership of the Elephant Butte Reservoir.⁸⁷ As a result, the United States became a party to the litigation between Texas and New Mexico regarding the Rio Grande Compact despite not being an original signatory to the Compact or being named in Texas’s original complaint.⁸⁸

B. Texas v. New Mexico II: Intervenor Veto Power?

In the years that followed, litigation and negotiation continued with no resolution.⁸⁹ Then, in November 2022, Texas and New Mexico reached a breakthrough, agreeing to a consent decree that would resolve all claims in the dispute.⁹⁰ In the decree, both states made compromises and gains. Under the agreement, Texas agreed to adjust the Rio Grande Compact to allow more groundwater pumping to occur in southern New Mexico, while New Mexico agreed to measure its required water deliveries to Texas at the state line rather than at the upstream reservoir.⁹¹ As a result, New Mexico no longer had to reduce its groundwater pumping and water consumption to the stringent levels established when the Compact was signed in 1938, and Texas was assured it would receive the full amount of water stipulated by the Compact.⁹²

Upon reaching this agreement, the states moved for the Supreme Court to approve the proposed consent decree and dispose of the case.⁹³ However, citing a number of concerns, the United States government objected to the consent

83. New Mexico’s Motion to Dismiss Texas’ Complaint and the United States’ Complaint in Intervention at 1, *Texas v. New Mexico I*, 583 U.S. 407 (2018) (No. 141).

84. *Texas v. New Mexico I*, 583 U.S. at 408, 415.

85. *Id.* at 412-13; *see, e.g.*, *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21, (1981); *Arizona v. California* [*Arizona v. California I*], 344 U.S. 919, 920 (1953); *Oklahoma v. Texas*, 253 U.S. 465, 465 (1920).

86. *Texas v. New Mexico I*, 583 U.S. at 413.

87. *Id.* at 407, 415.

88. *Id.*

89. *Texas v. New Mexico II*, 602 U.S. 943, 952 (2024).

90. Consent Decree Supporting the Rio Grande Compact at 2, *Texas v. New Mexico*, 602 U.S. 943 (2024) (No. 141).

91. *Id.* at 6-7.

92. *See id.*

93. *See Texas v. New Mexico II*, 602 U.S. at 947-48.

decree and argued that, because the federal government was now a party to the litigation, the states could not independently dispose of the federal government's Compact claims without its consent.⁹⁴ In a 5-4 decision in *Texas v. New Mexico II*, the Court held that since the U.S. was a party to the water compact dispute and the states' settlement would resolve the federal government's own claims in the dispute, Texas and New Mexico could not enter into the consent decree without the United States government's own consent.⁹⁵

In reaching this decision, the Court first looked to precedent established in *Firefighters v. Cleveland*.⁹⁶ In *Firefighters*, the Court considered whether or not a consent decree could survive the objections of an intervenor, holding that an intervenor generally cannot block a decree that would settle solely *other* parties' claims "merely by withholding its consent."⁹⁷ However, when the proposed consent decree would also affect the intervenors' own claims, the settlement could not be approved without the affected intervenors' consent.⁹⁸ In the Court's own words, a "court's approval of a consent decree between some of the parties . . . cannot dispose of the valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor."⁹⁹ Thus, taking the lead from *Firefighters*, the Court noted that it could not approve Texas and New Mexico's consent agreement if (1) the United States had valid Compact claims and (2) the proposed consent decree would dispose of those claims.¹⁰⁰

The Court affirmatively answered the first question, noting that, just like in 2018, the United States had valid Compact claims due to its involvement in the Downstream Contracts, its treaty with Mexico, and operation of Elephant Butte Reservoir: "Our 2018 decision leads inexorably to the same conclusion today: The United States has its own, uniquely federal claims under the Compact."¹⁰¹ The Court also affirmatively answered the second question, finding that the proposed consent decree would dispose of the federal government's claims in the dispute.¹⁰² Specifically, the Court noted that the consent decree between Texas and New Mexico proposed to "resolv[e] all of the Compact claims stated by any party."¹⁰³ As a result, because the consent decree would allow New Mexico to increase its water use beyond the amounts allowed under the Compact, "the United States would be precluded from claiming what it

94. Exception of the United States at 16, *Texas v. New Mexico*, 602 U.S. 943 (2024) (No. 141).

95. *Texas v. New Mexico II*, 602 U.S. at 965.

96. *Id.*; *Local No. 93, Int'l Ass'n of Firefighters, ALF-CIO C.L.C. v. Cleveland*, 478 U.S. 501, 529 (1986).

97. *Local No. 93, Int'l Ass'n of Firefighters, ALF-CIO C.L.C. v. Cleveland*, 478 U.S. at 528-29.

98. *Id.* at 529.

99. *Id.*

100. *Texas v. New Mexico II*, 602 U.S. 943, 954 (2024).

101. *Id.* at 957.

102. *Id.* at 962.

103. *Id.*

argues now—that New Mexico’s present degree of [water use] . . . violates the Compact.”¹⁰⁴

As a result of the decision, Texas, New Mexico, and the United States were forced to return to the negotiating table to reach a consent decree acceptable to all three parties—or continue litigating the dispute until the Court reached a final judgement. Viewed in a wider lens, however, the Court’s decision in *Texas v. New Mexico II* created a potentially powerful precedent going forward: If the United States or another party properly intervened in a water compact dispute, any settlement that resolved all parties’ claims over the compact could not be approved without the intervening party’s consent.

Such a precedent will certainly have broad implications for the United States’ ability to influence water compact litigation going forward. But it may also have significant impacts for Native American tribes seeking to litigate their reserved water rights. Just as the United States was able to intervene in the Rio Grande Compact dispute to protect “distinctly federal interests,” could a tribe likewise intervene in a future compact dispute that impacts tribal water rights to protect “distinctly tribal interests?” If so, could a tribe use the precedent of *Texas v. New Mexico II* to more favorably shape the outcome of the dispute? The remainder of this Note considers these questions.

III. THE ABILITY OF A TRIBE TO INTERVENE IN WATER COMPACT DISPUTES

A. *Independent Tribal Intervention*

The first step for a tribe to assert its reserved *Winters* rights in a water compact dispute is to properly intervene in litigation.¹⁰⁵ To do so, a tribe must first show that it has an independent right to intervene in water compact disputes and, second, that a court should allow a tribe to assert that right because sufficient tribal interests are at stake in the ongoing dispute.¹⁰⁶ To date, the Court has only considered these questions once, in a dispute over the Colorado River Compact, where tribes tried to intervene on two occasions.¹⁰⁷ While the Court largely

104. *Id.* at 963.

105. *See, e.g.*, Motion on Behalf of Navajo Tribe of Indians of the Navajo Reservation, Arizona, New Mexico and Utah, for Leave to Intervene [hereinafter Navajo Motion for Intervention], *Arizona v. California*, 368 U.S. 917 (1961) (No. 8) (laying out the Navajo Nation’s argument for their right to intervene in a dispute over the Colorado Compact in 1961). The Navajo Nation’s motion to intervene was ultimately denied by the Supreme Court, but it articulates the procedural pathway a tribe could take to seek intervention in a future water compact dispute. *See id.*

106. *See Texas v. New Mexico I*, 583 U.S. 407, 412-413 (2018) (articulating that the federal government first had to show that they had a right to intervene in the interstate water compact dispute—noting how the federal government in some instances can “participate in compact suits to defend ‘distinctively federal interests’”—and second that the Court must decide that enough interests are at stake to allow intervention—noting that its “role in compact cases differs from [its] role in ordinary litigation” and thus it can “regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice.”).

107. *See Arizona v. California [Arizona v. California II]*, 368 U.S. 917, 917 (1961); *Arizona v. California [Arizona v. California IV]*, 460 U.S. 605, 614-15 (1983).

looked unfavorably on independent tribal intervention then, recent changes in law and policy make it far more likely that the Court would reach a different conclusion today and allow for independent tribal intervention.

1. Precedent From Arizona v. California

Arizona v. California, a dispute over the Colorado River Compact that stretched on for nearly fifty years, provides some indication of how the Supreme Court (which has original jurisdiction over all water compact disputes) might rule on those two questions. The case began in 1952 when Arizona invoked the original jurisdiction of the Supreme Court, seeking to confirm its rights to the Colorado River and accusing California of using more than its fair share of water.¹⁰⁸ The case soon grew into a much larger dispute over the Colorado River Compact as Nevada, New Mexico, and Utah joined the case.¹⁰⁹ With the lawsuit now encompassing most of the basin states, the United States government intervened in the case, citing, among other federal interests, the water rights of twenty-five tribes in the Lower Basin of the Colorado River.¹¹⁰ Not only did the federal government intervene on behalf of all tribes in the Lower Basin, but the federal government also asserted in their original court filing that the tribes' water rights were "prior and superior" to all other water users in the basin, even states.¹¹¹

However, just a month later (and after intense pressure from western state politicians), the federal government refiled its petition for intervention without any assertion that the tribes' water rights were "prior and superior."¹¹² Further, as the case drew on, the dispute between the states narrowed to focus not on the entire Lower Basin of the Colorado, but specifically on how water should be divided up below Lake Mead and the Hoover Dam. With the case progressively narrowing in scope and tribal interests coming under distinct scrutiny, the federal government shifted course and only asserted the water rights of five tribes whose reservations were located along the Colorado River below Lake Mead: the Fort Mojave, Fort Yuma (Quechan), Chemehuevi, Colorado River, and Coocopah

108. *Arizona v. California IV*, 460 U.S. at 608.

109. *Id.*

110. See Petition of Intervention on Behalf of the United States of America at 22-23, *Arizona v. California*, 334 U.S. 919 (1953) (No. 10); see *Arizona v. Navajo Nation*, 599 U.S. 555, 582 (2023) (Gorsuch, J. dissenting) (noting that the federal government first intervened in *Arizona v. California* to protect "the rights of the Navajo Nation and twenty-four other Indian [T]ribes in the Lower Basin"). The Lower Basin of the Colorado River refers to the Colorado River below Lee's Ferry, just below Lake Powell, in Arizona, Nevada, and California. *Lower Basin of the Colorado River*, AMERICAN RIVERS, <https://www.americanrivers.org/river/lower-basin-of-the-colorado-river/> (last visited Apr. 6, 2025).

111. Mark Olalde & Anna V. Smith, *Western States Opposed Tribes' Access to the Colorado River 70 Years Ago. History is Repeating Itself*, PROPUBLICA (Oct. 17, 2023), <https://www.propublica.org/article/states-tribes-water-rights-history-repeating-itself>.

112. *Id.*

Tribes.¹¹³ With the federal government no longer asserting the water rights claims of all tribes along the Colorado River, many tribes began to worry that the government was missing a key opportunity to finally have tribes' water rights accounted for in the Compact.¹¹⁴ Central among them was the Navajo Nation.¹¹⁵

The Navajo Nation, stretching over seventeen million acres between Arizona, New Mexico, and Utah, is the largest reservation in the United States.¹¹⁶ Its western boundary runs alongside the Colorado River, and the founding 1868 treaty promised the Navajo enough water “for the Navajos to return to a permanent home in their ancestral territory.”¹¹⁷ Recognizing that the federal government was no longer asserting the Navajo Nation's claim to the water rights protected by their 1868 treaty, the Navajo moved to intervene in *Arizona v. California* as an independent party.¹¹⁸

In its brief supporting the Nation's motion to intervene, the Navajo noted that the United States had failed to vigorously assert the interests of the Navajo Nation by completely abandoning “the case so far as the adjudication of the [water] rights of the Navajo Indians. . . .”¹¹⁹ Due to this failure, the Navajo argued that they were permitted to intervene in the dispute under Federal Rule of Civil Procedure (FRCP) 24(a) which allows parties that “may be bound by a judgement in the action” to intervene in a case when “the representation of the applicant's interest by existing parties is or may be inadequate.”¹²⁰ Although the Navajo Nation noted that the current dispute involved the Colorado River below Lake Mead, the Nation nonetheless argued that “in light of the controversy which has raged among the parties for many years as to this water” there was “no

113. See *Arizona v. California III*, 373 U.S. 546, 595 (1963) (noting that by the time the case first reached the U.S. Supreme Court in 1963, the federal government was only asserting the water rights of five tribes); see also Response of the United States to the Motion on Behalf of the Navajo Tribe of Indians for Leave to Intervene [hereinafter Response of the United States] at 13-16, *Arizona v. California*, 368 U.S. 917 (1961) (No. 8) (articulating how the federal government originally “urged that the rights to use water . . . [for] all . . . Indian reservations within the Lower Basin should be adjudicated in [the litigation].” However, when the Special Master determined that “mainstream and tributary uses above Lake Mead [were] now accountable in the allocation of mainstream water” the U.S. government changed course and chose not to “adjudicate the rights to use tributary waters on the Navajo and other Indian reservations” and only bring the claims of the five remaining tribes).

114. *Arizona v. Navajo Nation*, 599 U.S. at 582 (Gorsuch, J. dissenting) (“As the litigation unfolded, however, the Navajo began to worry that the United States did not have their best interests in mind.”); see Navajo Motion for Intervention, *supra* note 105, at 4 (noting that the Navajo Nation believed the federal government had “abandoned the case so far as the adjudication of the rights of the Navajo Indians is concerned”).

115. *Arizona v. Navajo Nation*, 599 U.S. at 582 (Gorsuch, J. dissenting); Navajo Motion for Intervention, *supra* note 105, at 4.

116. *Arizona v. Navajo Nation*, 599 U.S. at 559; Navajo Motion for Intervention, *supra* note 105, at 1-2.

117. Brief for the Navajo Nation at 2, *Arizona v. Navajo Nation*, 599 U.S. 555 (2023) (Nos. 21-1484 and 22-51).

118. Navajo Motion for Intervention, *supra* note 105, at 1, 4.

119. *Id.* at 4.

120. *Id.* at 12.

assurance at this stage in the litigation that the . . . Tribe [would] not be bound” by the litigation.¹²¹

The United States opposed the Navajo Nation’s motion to intervene arguing that: (1) there was no basis for the Navajo Nation’s motion to intervene as the federal government has “exclusive . . . [power] to represent the Indian tribes in litigation affecting their property rights;”¹²² (2) even if the Navajo Nation did have a basis for their intervention, they moved to intervene too late in the case;¹²³ and (3) the Navajo Nation’s claims that the government was inadequate in representing their interests were without merit.¹²⁴

The Supreme Court agreed with the federal government. On November 20, 1960, in a one-sentence ruling that gave no hint at its reasoning, the Court stated simply that “[t]he motion of the Navajo Tribe of Indians of the Navajo Reservation of Arizona, New Mexico and Utah for leave to intervene is denied.”¹²⁵

While the Navajo Nation’s motion to intervene in *Arizona v. California* was denied by the Court, the Court eventually allowed five tribes from the same case to independently intervene.¹²⁶ However, in that instance, the Court may have been influenced by the federal government’s support of the tribes’ motion for intervention. As mentioned earlier, while the federal government originally moved to intervene in *Arizona v. California* to assert the water rights of all tribes in the Colorado River Basin,¹²⁷ the federal government soon changed course in acquiescence to state pressure and only asserted the water rights of five Tribes: the Colorado River Indian Tribes, Fort Mojave Indian Tribe, Chemehuevi Indian Tribe, Cocopah Indian Tribe, and Fort Yuma (Quechan) Indian Tribe.¹²⁸ Despite the narrowed scope, the federal government’s continued intervention for these Tribes proved an effective defense for tribal water rights. In 1964, the Court found that all had “present perfected [water] rights” that were entitled to priority in the Colorado River Compact.¹²⁹ As a result, the court awarded each tribe with enough water to irrigate all “practicably irrigable” lands on their reservation.¹³⁰

However, following that 1964 decision, a protracted dispute began between the five Tribes, the United States government, and various states over the boundaries of the Tribes’ reservations and how much land on each reservation was “practicably irrigable.”¹³¹ The back-and-forth continued until, on December

121. *Id.* at 47.

122. Response of the United States, *supra* note 113, at 2-3.

123. *Id.* at 7.

124. *Id.* at 12.

125. *Arizona v. California II*, 368 U.S. 917, 917 (1961).

126. *Id.*; *Arizona v. California IV*, 460 U.S. 605, 612, 615 (1983).

127. Petition of Intervention on Behalf of the United States of America, *supra* note 110, at 22-23.

128. See Response of the United States, *supra* note 113, at 13-16.

129. *Arizona v. California IV*, 460 U.S. at 609-10.

130. *Id.*

131. *Id.* at 610-612.

23, 1977, the five Tribes filed a joint motion with the Court claiming rights to additional water and asking the court to allow them to intervene in the case as “indispensable parties.”¹³² The states impacted by the five Tribes’ claims, California, Nevada, and Arizona, opposed the Tribes’ motion for intervention, arguing that the Tribes did not qualify to intervene as a matter of right.¹³³ The U.S. government also opposed the Tribes’ motion, noting that they would assert the Tribes’ additional water rights claims in a later dispute and, as a result, independent tribal intervention was not currently needed.¹³⁴ As the dispute over tribal intervention continued, the bloc of California, Arizona, and Nevada shifted its position and stated in a 1978 motion that, if the United States supported the Tribes’ motion to intervene, the states would not oppose it—provided that intervention was limited to asserting claims to practicably irrigable land and did not extend to contesting other aspects of the Compact.¹³⁵ Soon thereafter, the United States joined the five Tribes in moving for a supplemental decree to grant additional water rights to the reservations.¹³⁶ With the U.S. government’s support, the Supreme Court allowed the Tribes to intervene in the water compact dispute.¹³⁷

While the Court’s decision granting the five Tribes’ motion to intervene provides a strong precedent for future tribal intervention in water compact disputes, the particular facts in this case provided a strong basis for Court’s allowance that may not be present in other cases. Most notably, the Court found it important that the water rights claims the five Tribes sought to assert were originally “brought by the United States.”¹³⁸ The Court noted that the Tribes were only seeking clarification of the water rights claims originally brought by the federal government earlier in the case.¹³⁹ As a result, the Tribes were “not seek[ing] to bring new claims or issues against the states, but only ask[ing] leave to participate in an adjudication of their vital water rights that was commenced by the United States.”¹⁴⁰ The Court may reach a different result if a tribe moves to intervene without the federal government having done so on their behalf earlier in the water compact dispute or if the federal government did not ultimately support the tribe’s motion for intervention.¹⁴¹

132. *Id.* at 608, 612.

133. *The Supreme Court Decree in Arizona v. California*, WYO. STATE WATER PLAN <https://waterplan.state.wy.us/plan/green/briefbook/lor/lor-11.html> (last visited Apr. 6, 2025).

134. *Id.*

135. *Id.*

136. *Arizona v. California IV*, 460 U.S. at 612.

137. *Id.*

138. *Id.* at 613-14.

139. *Id.* at 614.

140. *Id.*

141. Regrettably, the Court’s opinion granting the five Tribes’ motion to intervene is short. As a result, it is difficult to conclude what truly drove the Court’s decision to approve the Tribes’ motion to intervene. *See id.* at 613-14.

2. *Why a Tribe's Motion to Intervene May Fare Better Today*

Since the Court's decisions in *Arizona v. California*, the Court today may be more likely to grant a tribe's motion to intervene in a water compact dispute independently of the federal government because of several developments. First, there has been a major change in the law since the Navajo Nation's failure to intervene. In 1966, Congress enacted 28 U.S.C. § 1362, which extended federal jurisdiction to all civil actions brought by Indian tribes: "The district courts shall have original jurisdiction of all civil actions, brought by any Indian . . . wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." In enacting section 1362, Congress sought to give Native American tribes "access to federal courts to protect their rights in the same manner that the United States can in its capacity as trustee for tribes."¹⁴² The passage of section 1362, "reflected a congressional policy against relegating Indians to state court when an identical suit brought on their behalf by the United States could have been heard in federal court."¹⁴³ In 1976, the Supreme Court further clarified section 1362's intent, noting in *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, that "in certain respects tribes suing under . . . section [1362] were to be accorded treatment similar to that of the United States had it sued on their behalf."¹⁴⁴

The court later qualified its ruling in *Moe*, holding in *Blatchford v. Native Village of Noatak and Circle Village* that section 1362 did not embody a general authority of tribes to sue in federal court in every instance and could not overcome a constitutional bar such as the Eleventh Amendment.¹⁴⁵ Among its sovereign immunity provisions, the Eleventh Amendment bars suits by Native American tribes in federal court against states without the state's own consent, with a few notable exceptions.¹⁴⁶ Thus, according to *Blatchford*, a tribe would not be able to use section 1362 to overcome the Eleventh Amendment's constitutional bar.¹⁴⁷

However, while a tribe suing in the context of a water compact dispute would be litigating against states in federal court, a tribe could likely frame its suit to avoid being barred by the Eleventh Amendment. For instance, courts have held that suits for injunctive relief against state officers in their official capacity

142. Kaighn Smith, Jr., *Federal Courts, State Power, and Indian Tribes: Confronting the Well-Pleaded Complaint Rule*, 35 N.M. L. REV. 1, 31 (2005).

143. *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 561 n.10 (1983).

144. *Moe v. Confederated Salish & Kootenai Tribes of Flathead Rsrv.*, 425 U.S. 463, 474 (1976).

145. *Blatchford v. Native Vill. of Noatak and Circle Vill.*, 501 U.S. 775, 783, 785-86 (1991).

146. *See id.* at 779, 782 (recognizing that the Eleventh Amendment of the U.S. Constitution, which provides that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State," can bar many suits by tribes against states).

147. *See id.* at 783, 785-86.

are not barred by the Eleventh Amendment.¹⁴⁸ A tribe intervening in a water compact could likely satisfy this exception. It would be seeking injunctive relief—namely, the inclusion of their water rights in a water compact—against a state official, such as the director of the state’s Water Resources Board or a similar agency responsible for water allocation under the compact.¹⁴⁹

Thus, section 1362 opens up direct authority for tribes to intervene in water compact disputes. Rather than relying solely on FRCP Rule 24(a)—and having to demonstrate inadequate representation by the federal government, as the Navajo Nation was forced to do in 1961—a tribe could instead point to section 1362 to give them the right to intervene in the compact as if the “United States had . . . sued on their behalf.”¹⁵⁰ This is likely the authority under which the five Tribes would have sought to intervene in *California v. Arizona* had the federal government not ultimately joined their motion for intervention. Indeed, in water rights cases outside of water compact disputes, tribes have already used section 1362 to independently seek adjudication of their water rights.¹⁵¹ In *Arizona v. San Carlos Apache Tribe of Arizona*, for example, the Supreme Court, citing section 1362, noted that the San Carlos Apache Tribe’s suit against the State of Arizona seeking an independent federal determination of their water rights could be filed against the state directly in federal courts.¹⁵² Thus, the passage of section 1362 gives a tribe strong legal grounding to successfully intervene in a water compact dispute.

Beyond the enactment of section 1362, there is a second reason the Supreme Court may look more favorably on a tribes’ motion to independently intervene in a water compact dispute today. Language in recent Supreme Court decisions show a willingness to allow tribes to intervene in cases that impact their water rights.¹⁵³ In *Arizona v. Navajo Nation*, discussed briefly in Part I, the Navajo Nation sued the federal government for failing to uphold its trust

148. *Ex Parte Young*, 209 U.S. 123, 155-56 (1908); *see also* *Edelman v. Jordan*, 415 U.S. 651, 664-67 (1974); *Native Vill. of Noatak v. Blatchford*, 38 F.3d 1505, 1511, 1513 (9th Cir. 1994) (noting that the Eleventh Amendment does not bar injunctive relief against state officers in their official capacity. However, in the case, the court concluded that the plaintiff was seeking monetary relief, not specific relief, and thus their claims were barred).

149. *See Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 558 (1983) (noting that the San Carlos Apache Tribe sought solely prospective, injunctive relief when seeking independent federal determinations of their water rights); *Moe v. Confederated Salish & Kootenai Tribes of Flathead Rsrv.*, 425 U.S. 463, 468, 473-74 (1976) (finding the Tribes’ claims were not barred by the Eleventh Amendment because the Tribes were suing, not the State of Montana itself, but John C. Moe in his official capacity as sheriff of Missoula County for violating federal tribal sovereignty provisions).

150. *See Moe*, 425 U.S. at 474.

151. *E.g.*, *Petition for Writ of Certiorari at *5, Desert Water Agency v. Agua Caliente Band of Cahuilla Indians*, 2017 WL 2889284 (U.S. July 3, 2017) (No. 17-42) (noting that the federal court had jurisdiction via section 1362 over the Agua Caliente Band of Coahuila Indian’s action arguing that the Tribe had reserved water rights to groundwater underlying their reservation).

152. *San Carlos Apache Tribe*, 463 U.S. at 559 n.10 (noting that “[t]he primary ground of jurisdiction for the suits brought by the Indians is 28 U.S.C. § 1362” and that “there is no reason to think that [the McCarran Amendment] limits the jurisdictional reach of § 1362”).

153. *See, e.g., Arizona v. Navajo Nation*, 599 U.S. 568-69, 599 (2023) (Gorsuch, J. dissenting).

responsibility to the tribe by not adjudicating the Nation's reserved water rights.¹⁵⁴ While the Court, in a 5-4 decision, concluded that the United States government was not required to take affirmative steps to secure water for individual tribes under its trust obligation, the Court noted that it would be open to the Navajo Nation independently intervening in water disputes that directly affect their water rights.¹⁵⁵ Writing for the majority, Justice Kavanaugh articulated that the Court's decision did not foreclose the Navajo's ability "to assert the interests they claim in water rights litigation, including by seeking to intervene in cases that affect their claimed interests."¹⁵⁶ In recognizing the Navajo Nation's ability to intervene in cases affecting their interests, the court specifically cited section 1362 as giving them the ability to do so.¹⁵⁷ Writing for the dissent, Justice Gorsuch seized on this language in the majority's opinion, concluding that: "After today, it is hard to see how this Court (or any court) could ever again fairly deny a request from the Navajo to intervene in litigation over the Colorado River or other water sources to which they might have a claim."¹⁵⁸ While this language did not explicitly call out a tribe's right to intervene in a water compact dispute, and instead points to just "water rights litigation" in general, the Court's language is still highly persuasive for defending tribal intervention rights of action.¹⁵⁹

Finally, tribal self-determination is far more assured today than it was in 1961, when the Navajo Nation's motion to intervene in *Arizona v. California* was denied.¹⁶⁰ As scholars have noted, starting in the mid-1960s, tribal advocacy, organizing, and litigation strategies pushed the federal government from a policy of seeking the termination of any special trust relationship it had with tribes¹⁶¹ to actively supporting the recognition and exercise of tribes' sovereignty.¹⁶² Indeed, Congress has since passed laws supporting tribal self-determination, such as the Indian Civil Rights Act of 1968¹⁶³ and the Indian Self-Determination and Education Assistance Act of 1975.¹⁶⁴ Moreover, courts have issued decisions codifying tribal sovereignty and the high bar required for Congress to abridge it, such as the Court's 2020 ruling in *McGirt v. Oklahoma* where the Court affirmed the existence and importance of the rights of Native American tribes to

154. *Id.* at 558.

155. *Id.* at 569-70.

156. *Id.* at 558, 568-69.

157. *Id.* at 568-69.

158. *Arizona v. Navajo Nation*, 599 U.S. at 599 (Gorsuch, J., dissenting).

159. *See id.* at 568-69, 599 (Gorsuch, J., dissenting).

160. *Arizona v. California II*, 368 U.S. 917, 917 (1961).

161. *See* H.R. 108, 83rd Cong. (1953) (noting that Congress's new policy toward Native American tribes was one of "termination"); *A Brief History of Civil Rights in the United States: The Termination Era (1953-1968)*, VERNON E. JORDAN L. LIBR. AT HOW. L. SCH. (Jan. 6, 2023), <https://library.law.howard.edu/civilrightshistory/indigenous/termination>.

162. *A Brief History of Civil Rights in the United States: The Termination Era (1953-1968)*, *supra* note 161.

163. The Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1304.

164. Indian Self-Determination and Education Assistance Act, 25 C.F.R. pt. 900 (1996).

administer justice according to their own laws and traditions.¹⁶⁵ In light of tribal advocates' efforts to renew the legal force behind tribal sovereignty, the federal government's original argument opposing the Navajo Nation's motion to intervene in *Arizona v. California*—that the federal government has “exclusive” power to litigate a tribe's water rights¹⁶⁶—would likely be less favorably received by the Court today.¹⁶⁷ More generally, under the current level of tribal sovereignty recognition, the Court may be hard pressed to issue a decision that continues to exclude tribes from water compacts, perpetuating the exclusion of tribal water rights which harms a tribe's public health, economic development, and self-determination.

However, merely possessing the legal right to litigate may not be enough for tribal intervention and securing material water resources. Just as the federal government had to demonstrate in *Texas v. New Mexico I* that there were “distinctly federal interests” at stake in the dispute, a tribe would likely also have to demonstrate that a water compact dispute it wished to intervene in implicated “distinctly tribal interests.”¹⁶⁸ In past cases considering whether the federal government should be allowed to intervene in water compact disputes, the Supreme Court has emphasized that the federal government does not have a “blanket authority to intervene in cases concerning [water compacts].”¹⁶⁹ Instead, the federal government must show that there are “distinctly federal interests” at stake that they must defend in the dispute.¹⁷⁰ However, the Court has never specifically addressed what it means to demonstrate “distinctly federal interests” nor what a party must substantively demonstrate.

Lacking any clear direction from the Court, a tribe seeking to intervene in a water compact dispute would do well to articulate as many concrete tribal interests at stake in the litigation as possible. This has worked in past water compact cases when the federal government sought intervention. In *Texas v. New Mexico I*, for example, the Court found there were distinct federal interests at stake in litigation over the Rio Grande Compact because of the federal government's obligations to honor its treaty with Mexico, the Downstream Contracts, and its operation of federal dams.¹⁷¹ Likewise, in *Arizona v. California*, the Supreme Court allowed the federal government to intervene in the case because of the government's duty to protect tribal water rights as a fiduciary meant to preserve tribal interests, in addition to its responsibilities to

165. *McGirt v. Oklahoma*, 591 U.S. 894, 897-98 (2020).

166. Response of the United States, *supra* note 113, at 3.

167. See Third Amended Complaint for Declaratory and Injunctive Relief at 105, Navajo Nation v. Dept. of the Interior, 2019 WL 3997370 (No. CV-03-507 PCT-GMS) (noting that the Navajo Nation's motion to intervene was “denied on the now rejected premise that the trusteeship of the United States was a creation of the plenary power of Congress and disqualification of the trustee was ‘beyond the power of the Courts’”).

168. *Texas v. New Mexico I*, 583 U.S. 407, 413 (2018).

169. *Id.*

170. *Id.*; see also *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981).

171. *Texas v. New Mexico I*, 583 U.S. at 414-15.

federal reclamation and irrigation projects implicated in the Colorado River Compact.¹⁷²

Thus, to demonstrate that tribal interests are at stake in an ongoing water compact dispute, a tribe should lay out as many interests as possible when seeking intervention. Most notably, if a tribe holds reserved water rights to a disputed river but was excluded from the governing compact, the tribe could point to its specific water rights claims to that river as a protectable interest.¹⁷³ In *Arizona v. California*, the five Tribes' motion for intervention over the Colorado River Compact seeking confirmation of their senior rights was enough for the Court to grant intervention.¹⁷⁴ However, if a tribe can identify specific ways that the current compact dispute affects their water rights, it should also do so. For example, if the compact dispute involves a specific section of the river bordering the tribe's reservation, or if it would alter the amount of water allocated to the tribe, the tribe should explicitly highlight those impacts and the related effects on self-determination.

B. A Second Pathway: Federal Government Intervention

While there is strong reason to believe the Court would look favorably on a tribe's motion to intervene as an independent party in a water compact dispute to protect their interests for the reasons discussed above, tribes have an alternative option if such a motion is denied or if a tribe prefers not to independently assert its water rights. Namely, a tribe can rely on the federal government to intervene in the water compact dispute on their behalf.¹⁷⁵

There is no legal question as to whether the federal government could move to assert a tribe's water rights claims in an ongoing water compact dispute. The federal government has done so, and the Court has approved such action in the past.¹⁷⁶ Moreover, there may be benefits to a tribe allowing the federal government to assert its water rights on the tribe's behalf. Most obviously, a tribe could save significant financial resources by not having to litigate the dispute

172. *Arizona v. California I*, 344 U.S. 919, 920 (1953); *See* Petition of Intervention on Behalf of the United States of America at 22-23, *Arizona v. California*, 334 U.S. 919 (1953) (No. 10); *see* *Arizona v. Navajo Nation*, 599 U.S. 555, 582 (2023) (Gorsuch, J., dissenting) (noting that the federal government first intervened in *Arizona v. California* to protect "the rights of the Navajo Nation and twenty-four other Indian [T]ribes in the Lower Basin").

173. Navajo Motion for Intervention, *supra* note 105, at 36 (arguing that Navajo Nation should be allowed to intervene because their non-involvement in the Colorado River Compact forced them to "look to the States of Arizona, New Mexico and Utah for their water" instead of receiving a direct apportionment).

174. *See* Elbert P. Tuttle, Special Master, Report at 26, *Arizona v. California*, 40 U.S. 605 (1981) (No. 8) (articulating how the five Tribes were allowed to intervene in the water compact dispute because their "direct pecuniary interests [were going to] be determined by this litigation").

175. *See Arizona v. California III*, 373 U.S. 546, 595 (1963) (noting that the federal government intervened to assert the water rights claims of five Native American Tribes).

176. *See Arizona v. California I*, 344 U.S. at 920; *see also* Petition of Intervention on Behalf of the United States of America, *supra* note 110, at 22-23.

independently. Historically, tribes have had to expend substantial costs to litigate their reserved water rights.¹⁷⁷ Moreover, the cost of time bears heavily on water rights litigation, as proper access to the resource itself remains a daily necessity for the community. Involvement in a water compact dispute could prove especially expensive, and a tribe relying on the federal government to assert its water rights could avoid such costs.¹⁷⁸

Beyond mere financial resources, there is another benefit to tribes relying on the federal government to bring their water claims in a compact dispute. As discussed above, in order to properly intervene in a water compact dispute, a tribe would be required to articulate that there are distinctly tribal interests at stake in the dispute.¹⁷⁹ While a tribe would only be able to articulate its own tribal interests at stake in a water compact dispute, if the federal government intervened on the tribe's behalf, it could articulate all tribal interests at stake in addition to any other federal interests that might be at stake. For example, when the Court approved its intervention in *Arizona v. California*, the federal government was able to cite not only its interest in protecting tribal water rights ignored by the Colorado River Compact but also its interests in its international water treaty with Mexico and the ongoing operation of Lake Mead and various irrigation districts.¹⁸⁰ Thus, the federal government's ability to assert distinct interests beyond those of a tribe may persuade the Court to approve its intervention, whereas a tribe, intervening on its own—able to demonstrate only its more limited tribal interests—may be denied.

Despite the potential benefits of the federal government bringing a tribe's water rights claim on its behalf, there are significant downsides to such a proposition. Scholars have argued that, notwithstanding some positive efforts by the federal government in the self-determination era, the federal government "has repeatedly sought to avoid, reduce, and repudiate the federal trust responsibility to Indians" by "misrepresenting relevant facts and law in Indian trust litigation in an effort to limit federal liability."¹⁸¹ Put simply, the federal government has long ignored or actively worked against tribal interests.¹⁸² In

177. See Sanchez et al., *supra* note 45.

178. See *Arizona v. California*, ENV'T & NAT. RES. DIV. U.S. DEP'T OF JUST., <https://www.justice.gov/enrd/indian-resources-section/arizona-v-california> (last visited Apr. 6, 2025) (noting that the dispute over the Colorado River Compact has stretched on for over fifty years).

179. See *Texas v. New Mexico I*, 583 U.S. 407, 413 (2018).

180. See Petition of Intervention on Behalf of the United States of America at 12-23, *Arizona v. California*, 334 U.S. 919 (1953) (No. 10); see *Arizona v. California I*, 344 U.S. 919, 920 (1953).

181. Daniel I.S.J. Rey-Bear & Matthew L.M. Fletcher, "We Need Protection from Our Protectors": *The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 MICH. J. OF ENV'T & ADMIN. L. 397, 425 (2017).

182. *Id.*; see also Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555, 576-77 (2021) (articulating how the United States government systematically ignores legal structures created by tribal governments); Matthew L.M. Fletcher, *The Dark Matter of Federal Indian Law: The Duty of Protection*, 75 ME. L. REV. 306, 309 (2023) (noting that tribes have been overcome by the U.S. government, which is a larger, stronger sovereign; were forced to give up "massive, occasionally unquantifiable amounts of land and resources" in exchange from promises of protection from the U.S.).

light of this unjust pattern of conduct, tribes may not trust the federal government to effectively support their water rights claims.¹⁸³ Further, the federal government is under no obligation to intervene on a tribe's behalf; a tribe cannot compel intervention if the federal government does not want to do so.¹⁸⁴ As a result, a tribe would be left to rely on the federal government's discretion, hoping it would agree to assert the tribe's water rights claims.¹⁸⁵ Recent administrations have shown varying degrees of willingness to work alongside tribes, and there is no guarantee that a future administration would be willing to litigate on a tribe's behalf.¹⁸⁶

Moreover, even if the federal government did accept its trust obligations and asserted water rights claims on a tribe's behalf, tribes may still face an issue of ineffective federal representation of their tribal interests. As discussed in Part I, the federal government must balance multiple federal interests in water disputes.¹⁸⁷ This dynamic has, in some cases, resulted in the federal government's failure to effectively assert a tribe's water rights claims.¹⁸⁸ This could prove particularly problematic for tribes, as courts have held that the doctrine of *res judicata* can prevent a tribe from relitigating their water rights claims, even if the federal government did an inadequate job of asserting tribal rights in an earlier case.¹⁸⁹ As a result, if the federal government did elect to assert a tribe's water rights but did so inadequately, the tribe could be left with less water than it is entitled to—without any means of remedying the shortfall.¹⁹⁰ Such a situation occurred in *Nevada v. United States*, where the Pyramid Lake Paiute Tribe was barred from relitigating its water rights and claiming additional water under the *Winters* doctrine because the federal government had already litigated those rights on the Tribe's behalf in a case where final judgement was entered.¹⁹¹

government; and that “[w]hat tribal nations have received so far is a pittance compared to the value of their consideration”).

183. See Rey-Bear & Fletcher, *supra* note 181, at 425; Reese, *supra* note 182, at 628-29; Fletcher, *supra* note 182, at 307-08.

184. See *Arizona v. Navajo Nation*, 599 U.S. 599, 569-70 (2023) (holding that the U.S. government's trust responsibility does not require the United States government to take affirmative steps to secure water for individual tribes).

185. See *id.*

186. Compare Timna Axel, *The Biden Administration's Record on Tribal Rights*, EARTHJUSTICE, <https://earthjustice.org/article/the-biden-administrations-record-on-tribal-rights> (Oct. 11, 2024) (noting the Biden Administration's complex but overall positive record of working with tribes), with Anna V. Smith, *Trump's Impact on Indian Country Over Four Years*, HIGH COUNTRY NEWS, (Dec. 16 2024) <https://www.hcn.org/articles/indigenous-affairs-trumps-impact-on-indian-country-over-four-years/> (Dec. 16 2024) (articulating the Trump Administration's often actively hostile relationship with tribes).

187. See Shepherd, *supra* note 39, at 914.

188. See *id.*

189. See *Nevada v. United States*, 463 U.S. 110, 129-30, 135 (1983).

190. See *id.* at 113, 135.

191. *Id.* at 113, 120, 135.

In all, a tribe could rely on the federal government—if the federal government was willing—to litigate on their behalf. However, while there are considerable benefits with such an approach, getting the federal government to undertake such litigation could be difficult and, even the federal government chose to do so, there are still serious downsides a tribe would have to consider.

IV. WHAT TRIBAL INTERVENTION COULD MEAN

This Note has articulated a pathway for tribes to assert their water rights claims in river compacts that have long ignored tribal water rights. If states enter into litigation over a water compact regarding a river that a tribe has adjudicated water rights to, the tribe could seek to intervene in the dispute, either independently or via the federal government intervening on their behalf. In light of the Court's recent holding in *Texas v. New Mexico II*, if the Supreme Court were to approve such an intervention, a tribe could hold significant influence in any negotiations taking place during the dispute, as it would have the power to block any settlement that disposes of the tribe's water compact claims without its consent.¹⁹² The final part of this Note articulates how such a reality could unfold by examining the Colorado River Compact.

When it was first signed in 1922, the Colorado River Compact did not allocate any water to any of the twenty-five Native American tribes with reserved water rights to the Colorado River or its tributaries.¹⁹³ Over time, tribes in the Colorado River Basin slowly began to quantify their rights to the river and seek allotments of water. The Fort Mojave, Fort Yuma (Quechan), Chemehuevi, Colorado River, and Coocopah tribes—the five Tribes whose water right claims the U.S. government did not abandon in *Arizona v. California*—were the first five tribes in the river basin to have their water rights quantified when the Court allocated them a total of 905,496 acre-feet of water per year in its 1964 decision.¹⁹⁴ Other tribes, through a variety of litigation and negotiated settlements with states, followed suit and secured quantified allocations of Colorado River water.¹⁹⁵ As of 2025, twenty-one of the twenty-five tribes have at least some portion of their water claims to the Colorado River and its tributaries quantified.¹⁹⁶ However, thirteen tribes still have some or all of their claims unresolved.¹⁹⁷ These thirteen tribes who still hold unresolved claims to

192. See discussion *supra* Part II.B.

193. See COLORADO RIVER RESEARCH GROUP, *supra* note 17, at 1.

194. *Arizona v. California III*, 373 U.S. 546, 600-02 (1963) (noting that the Court agreed with the Special Master's "conclusion as to the quantity of water intended to be reserved"); Simon H. Rifkind, Special Master, Report at 267-83, *Arizona v. California*, 373 U.S. 546 (1963) (No. 8) (articulating the amount of water the Special Master concluded each tribe should receive. The Chemehuevi were allocated 11,340 acre-feet of water per year; the Coocopah, 2,744; the Fort Yuma (Quechan), 51,616; the Colorado River, 717,148; and the Fort Mojave, 122,648).

195. COLORADO RIVER RESEARCH GROUP, *supra* note 17, at 1.

196. *Id.* at 1-4.

197. *Id.* at 4. The thirteen tribes with unresolved water rights claims are the Navajo Nation, Ute Indian Tribe of the Uintah and Ouray Reservation, and Ute Mountain Ute Tribe in the Upper Basin and

the Colorado River and/or its tributaries could particularly benefit from intervening in a dispute over the Colorado River Compact.

To intervene, these thirteen tribes would have to wait until one of the seven member states to the Colorado River Compact sues another state over the Compact's operation. Such litigation may be on the horizon. Recently, prolonged drought in the Colorado River Basin has required the signatory states to rethink how water is allocated under the Compact. When signed in 1922, the Compact divided 16.4 million acre-feet of water between the seven signatory states each year.¹⁹⁸ However, from 2000 to 2018, the average amount of annual water in the Colorado River Basin has averaged only twelve million acre-feet.¹⁹⁹ To account for this shortage of water, the states entered into a temporary, twenty-year management plan in 2007 that laid out which states had to cut their water intake.²⁰⁰ That interim management plan expires at the end of 2026, and the Compact's signatory states are currently negotiating a new management plan.²⁰¹ Current negotiations between the states are breaking down because each state is increasingly reluctant to give up water they view as vital or are otherwise unwilling to cede.²⁰² California's lead negotiator recently stated that there is "quite a chasm" between the states' proposed plans and explained that recent talks have become "less focused on collaboration and compromise and became a lot more about PR and legal theories."²⁰³ Further, Arizona has recently announced it may be willing to issue a compact call, invoking the Compact's Upper Basin states (Colorado, New Mexico, Utah, and Wyoming) to deliver enough water to the Lower Basin states (Arizona, California and Nevada) as established in the Compact.²⁰⁴ Such a call would potentially decimate Upper

the Havasupai Tribe, Hopi Tribe, Hualapai Tribe, Kaibab Band of Paiute Indians, Navajo Nation, Pascua Yaqui Tribe, San Carlos Apache Tribe, San Juan Southern Paiute Tribe, Tohono O'odham Nation, Tonto Apache Tribe, and Yavapai Apache Nation in the Lower Basin. *Id.*

198. Scott Dance, *Talks to Save the Colorado River Just Hit a Logjam*, THE WASH. POST (Mar. 6, 2024), <https://www.washingtonpost.com/climate-environment/2024/03/06/colorado-river-water-conservation-state-plans>.

199. *Id.*

200. *See Colorado River 2007 Interim Guidelines And Drought Contingency Plans*, WATER EDUC. FOUND., <https://www.watereducation.org/aquapedia/colorado-river-seven-states-agreement#:~:text=Colorado%20River%202007%20Interim%20Guidelines%20Overview&text=If%20Mead%20drops%20below%201%2C050,another%203%2C000%20acre%2Dfoot%20cut> (last visited Apr. 6, 2025) (noting that Arizona and Nevada are required to reduce their intake from the Colorado River if the amount of water held in Lake Mead drops below a certain level).

201. *See* Sidney Williams, *Latest Updates in the Post-2026 Colorado River Operations Process: Post-2026 Alternatives Submitted*, GETCHES-WILKINSON CTR. UNIV. OF COLO. L. SCH. <https://www.colorado.edu/center/gwc/2024/04/23/latest-updates-post-2026-colorado-river-operations-process-post-2026-alternatives> (Apr. 23, 2024).

202. Dance, *supra* note 198.

203. *Id.*

204. Joanna Allhands, *Break the Logjam on Colorado River Water, or 40 million People Will Lose*, ARIZ. REPUBLIC (Nov. 25, 2024), <https://www.azcentral.com/story/opinion/oped/joannaallhands/2024/11/25/arizona-colorado-river-water-2026-negotiations-compact-call/76499674007>.

Basin water reserves and would almost certainly spark a “protracted court battle.”²⁰⁵

While it is too early to tell if the current negotiations over the Colorado River Compact will result in litigation, if it does, the thirteen tribes with outstanding claims to the Colorado River and its tributaries’ water may have a unique opportunity to rectify the historic exclusion of their voices and needs from the Southwest’s dominant water compact. And if the Court granted intervention—as this Note argues there is strong reason to believe it would—any of these thirteen tribes could find themselves in a position of influence in the case. Just as the federal government was able to prevent Texas and New Mexico from entering into a settlement that resolved the states’ dispute over the Rio Grande Compact without considering the federal government’s own concerns, an intervening tribe could prevent Colorado River Compact states from reaching a settlement in their dispute that could once again fail to recognize tribal water rights.²⁰⁶ As a result, any intervening tribes could wait until the case reached final judgement in front of the Supreme Court—at which point the Court would be forced to account for the tribes’ reserved water rights under the Court’s own doctrine established in *Winters*—or push for a settlement with the states that allocated water to the tribes.²⁰⁷ Thus, tribal intervention in any future water compact dispute (be it the Colorado River Compact or another water compact which fails to account for tribal water rights) could force states and the federal government to make good on their promise when the tribes’ reservations were first established: to provide enough water for the tribes to make the reservation a home.²⁰⁸

CONCLUSION

Across the United States, twenty-two water compacts divvy up large amounts of the nation’s water.²⁰⁹ However, despite having some of the most senior water rights in the country, tribes were systematically left out of these compacts.²¹⁰ As a result, tribes have had to resort to lengthy and expensive litigation and negotiation to assert their water claims. In many instances, tribes

205. *Id.*; see also *Save the Colo. v. Semonite*, No. 18-cv-03258-CMA, 2024 WL 4519201, at *14 n.24 (D. Colo. Oct. 16, 2024) (noting that “should Colorado River diversions exceed the river’s available water supply—which appears inevitable, at this rate—the 1922 Compact provides a ‘compact call’ mechanism whereby the upper basin states are bound to curtail their water users’ diversions to ensure enough water reaches the lower basin states and Mexico to satisfy the artificially inflated water delivery obligations set forth in the Compact”).

206. See *Texas v. New Mexico II*, 602 U.S. at 965.

207. See *Winters v. United States*, 207 U.S. 564, 576-77 (1908) (holding that when the U.S. federal government set aside land for Native American Reservations the government impliedly reserved sufficient water for the tribes to make their reservation lands a home).

208. See *id.*

209. *Interstate Water Agreements of the United States*, *supra* note 4.

210. See *Sanchez*, *supra* note 62, at 1 (noting that 170 of 226 American Indian reservations still have unresolved water claims).

have been unable to properly assert their reserved water rights, leaving the majority of tribes with unresolved claims.²¹¹ However, the Supreme Court's recent decision in *Texas v. New Mexico* may provide tribes a path to effectively assert and adjudicate their outstanding claims.²¹² By properly intervening in a water compact dispute, a tribe could ensure that the states do not reach a settlement disposing of the case without first accounting for the tribe's water rights. For years, tribes have sought a seat at the table in water compacts.²¹³ *Texas v. New Mexico* and the burgeoning need to reexamine water consumption in the era of climate change may just provide tribes a pathway for doing so.²¹⁴

211. *Id.*

212. *See Texas v. New Mexico II*, 602 U.S. 943, 965 (2024).

213. *See* Elise Schmelzer, *Tribes Have Rights to a Quarter of Colorado River's Water but Have Been Excluded from Decision-making. Will that Change?*, THE DENVER POST (July 3, 2024), <https://www.denverpost.com/2024/07/03/colorado-river-compact-tribes-inclusion-water-negotiations>.

214. *See Texas v. New Mexico II*, 602 U.S. at 965.

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