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## The Supreme Court's Problematic Deference to Special Masters in Interstate Water Disputes

L. Elizabeth Sarine

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# The Supreme Court's Problematic Deference to Special Masters in Interstate Water Disputes

*L. Elizabeth Sarine\**

*When interstate water disputes come before it, the U.S. Supreme Court can order states to pay large damage awards or to forfeit use of a significant amount of water. The high stakes in these original jurisdiction cases make the Court's use of and deference to Special Masters problematic for states, which need litigation to produce reasonably predictable outcomes so that litigation is as a viable alternative to negotiated agreements. The Court does states a great disservice by handling cases involving interstate water disputes in a seemingly unpredictable and unstructured manner. The Court's deference to the Special Master in *Montana v. Wyoming* is the latest example of a pattern of judicial abdication in interstate water disputes. This Note presents several specific recommendations, proposes a rule for analyzing exceptions to a Special Master's report, and discusses the potential for instituting a two-person panel of Special Masters that includes an Article III judge. If the Supreme Court is unwilling to make changes to better address states' substantial interests in original jurisdiction cases, future Special Masters should exert their considerable influence to encourage the Court's comprehensive engagement with interstate water disputes.*

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## INTRODUCTION

Justice Holmes wrote, “[a] river is more than an amenity, it is a treasure.”<sup>1</sup> In arid western states, intense struggles over the allocation of water between neighboring states and among in-state users started in the late 1800s and have shown no signs of abating.<sup>2</sup> Even in eastern states, where water is more abundant year-round than in the west, interstate water conflicts have increased in recent decades.<sup>3</sup> Growing populations in most states have bred “competing demands for water from cities, agriculture, industry, environmental protection, fisheries, power generation, navigation,” and other uses.<sup>4</sup> Rivers, lakes, and groundwater aquifers have no regard for neatly drawn state lines and other geopolitical boundaries. Consequently, interstate waters are a “necessity of life that must be rationed among those who have power over” them<sup>5</sup> because the actions of an upstream state can profoundly affect the welfare of a downstream state’s residents and economy.

The Supreme Court’s deference to Special Masters<sup>6</sup> in original jurisdiction cases<sup>7</sup> involving existing interstate water compacts or equitable apportionment decrees is problematic. As adjudication before the Court becomes more time-consuming, costly, and unpredictable, states are forced to resort to the negotiating table to resolve interstate water disputes. While the Supreme Court may want states to resolve complicated water conflicts on their own,<sup>8</sup> the Court should still provide states with a reasonable alternative to negotiated agreements.<sup>9</sup>

In *Montana v. Wyoming*,<sup>10</sup> the Supreme Court’s deference to the Special Master effectively allowed a non-Article III actor to decide an important

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1. *New Jersey v. New York*, 283 U.S. 336, 342 (1931).

2. Josh Clemons, *Interstate Water Disputes: A Road Map for States*, 12 SOUTHEASTERN ENVTL. L.J. 115, 115 (2004).

3. *Id.*

4. *Id.*

5. *New Jersey v. New York*, 283 U.S. 336, 342 (1931).

6. Special Masters are individuals appointed by courts to help receive evidence, make findings of fact and conclusions of law, and prepare a preliminary report for a particular case. *See* Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Court’s Original Jurisdiction Cases*, 86 MINN. L. REV. 625, 654 (2002). The court retains authority to approve, revise, or reject any findings, conclusions, or recommendations in a Special Master’s report. *See id.* at 655. This paper focuses on the Supreme Court’s use of Special Masters. A discussion of the use of Special Masters by other federal courts and state courts lies outside the scope of this Note. *See infra* Part III (discussing the Supreme Court’s use of Special Masters).

7. U.S. CONST. art. III, § 2, cl. 2; 28 U.S.C. § 1251 (2006) (providing that “[t]he Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States”).

8. *See New York v. New Jersey*, 256 U.S. 296, 313 (1921) (stating that interstate conflicts are “more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted”).

9. *See* ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 97–107 (2d ed. 1991) (discussing why it is important for parties to identify a “Best Alternative To a Negotiated Agreement” in a negotiation).

10. *Montana v. Wyoming*, 131 S. Ct. 1765 (2011).

question of law affecting sovereign states. The Court should have given less deference to the Special Master, who is a non-judge, water law expert. Instead, it failed to give the Special Master the necessary guidance for answering a question of law that could not be conclusively resolved through analysis of the compact's text and legislative history. As a result, the Special Master's conclusion that Wyoming's pre-1950 users could change their irrigation methods to the detriment of Montana's pre-1950 users<sup>11</sup> was based on a survey of admittedly murky state law and background appropriation doctrine. Even assuming the Special Master's analysis was the most accurate possible, the Supreme Court set an unfortunate example by delegating a question of law to the Special Master and effectively rubberstamping his conclusion.

In Part I, this Note provides background on interstate water allocation and the adjudication of interstate water conflicts. Part II explores the perspective of states in adjudicating interstate water disputes. Part III analyzes the Supreme Court's use of Special Masters in original jurisdiction cases. Part IV summarizes *Montana v. Wyoming*. Finally, Part V argues the Supreme Court should adopt new procedures and standards to increase uniformity and predictability in its treatment of interstate water disputes.

#### 1. AN INTRODUCTION TO INTERSTATE WATER ALLOCATION

Interstate waters are allocated in three main ways: equitable apportionment by the Supreme Court, Congressional apportionment, or apportionment through a negotiated interstate water compact.<sup>12</sup> By the 1950s, states seeking to establish a system of clear entitlements to water favored interstate water compacts over other methods of apportionment because negotiating gave them more control over the outcome.<sup>13</sup> While the Supreme Court can decree an equitable apportionment,<sup>14</sup> it has explicitly done so for only a handful of rivers<sup>15</sup> because the process generally proved to be too expensive, time-consuming, and fraught with uncertainty for states.<sup>16</sup>

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11. See *id.* at 1769.

12. John B. Draper & Jeffrey J. Wechsler, *Gunboats on the Colorado: Interstate Water Controversies, Past and Present*, 55 ROCKY MTN. MIN. L. INST. 18-1, § 18.03 (2009); Clemons, *supra* note 2, at 119-31; Robert Haskell Abrams, *Interstate Water Allocation: A Contemporary Primer for Eastern States*, 25 U. ARK. LITTLE ROCK L. REV. 155, 156-57, 159 (2002) (discussing also a fourth way of allocation by judicial decisions in private litigation and citing *Bean v. Morris*, 221 U.S. 485 (1911), as the "leading case" in which individual water users needed "resolution of disputes in advance of any such overarching interstate allocation").

13. See *infra* Table 1 (showing only two attempted equitable apportionment and no successful equitable apportionments after 1945).

14. See U.S. CONST. art. III, § 2, cl. 2 (providing that the Supreme Court has original jurisdiction in "all Cases . . . in which a State shall be a Party"); 28 U.S.C. § 1251(a) (2006); Douglas L. Grant, *The Future of Interstate Allocation of Water*, 29 ROCKY MTN. MIN. L. INST. 22-1, 2 (1983).

15. The Supreme Court equitably apportioned the Laramie River, the Delaware River, and the North Platte River. Douglas L. Grant, *Interstate Water Allocation Compacts: When the Virtue of Permanence Becomes the Vice of Inflexibility*, 74 U. COLO. L. REV. 105, 105 n.6, 173 & 173 n.382 (2003).

16. Clemons, *supra* note 2, at 142.

Similarly, Congress has directly legislated interstate apportionment only twice<sup>17</sup> (or, at most, three times<sup>18</sup>) because it has been reluctant to use its power of apportionment in intense regional disputes.<sup>19</sup> In contrast, numerous states have entered into twenty-four interstate water compacts since the 1920s.<sup>20</sup>

A. *The Supreme Court's Role in Resolving Interstate Water Disputes*

Because it has exclusive original jurisdiction over all cases between two or more states,<sup>21</sup> the Supreme Court plays two important roles in interstate water disputes. First, the Court can decree initial apportionments of interstate waters.<sup>22</sup> In past cases of such “equitable apportionment,” the states likely chose adjudication over negotiation because they believed negotiating a compact would take longer or would not be as fair to all parties as a decree by the Supreme Court.<sup>23</sup> Second, the Court can resolve disputes over the interpretation or enforcement of prior allocations by decree or compact.<sup>24</sup> In past cases of dispute resolution, states likely chose adjudication over negotiation because prior negotiations failed and/or a state party breached a negotiated term.<sup>25</sup>

A state invokes the Supreme Court’s original jurisdiction by making a motion for leave to file a suit against another state.<sup>26</sup> The Court then evaluates whether it should grant leave by “scrutiniz[ing] the pleading under a heightened ‘clear and convincing’ standard,” which imposes a greater burden of proof on the complaining state than that “imposed on ordinary plaintiffs in a suit between private individuals.”<sup>27</sup> While only four votes are needed to grant a writ of certiorari invoking the Court’s appellate jurisdiction, a majority of the Court must vote to grant leave to file an original jurisdiction case.<sup>28</sup> Some scholars argue that the Court may not deny leave to file cases falling within its exclusive

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17. See Grant, *supra* note 15, at 105 n.6, 174 (describing Congressional apportionment in the 1963 Boulder Canyon Project Act of the Lower Colorado River, and the Truckee-Carson-Pyramid Lake Water Rights Settlement Act of 1990).

18. See Draper & Wechsler, *supra* note 12, § 18.03(3)(c) (arguing that a 1905 Act of Congress did initially apportion the Rio Grande River, and thus should also be considered an instance of congressional apportionment).

19. See Grant, *supra* note 14, at 8.

20. See Draper & Wechsler, *supra* note 12, § 18.03(2)(a) n.74; Grant, *supra* note 15, at 105 n.6.

21. 28 U.S.C. § 1251(a) (2006). Note that the Supreme Court has original, but not exclusive, jurisdiction over actions between a state and a citizen of another state, and over controversies between a state and the United States. *Id.* § 1251(b)(2)–(3).

22. Draper & Wechsler, *supra* note 12, § 18.03(1); Clemons, *supra* note 2, at 119–31.

23. See discussion *infra* Part II.A.

24. Draper & Wechsler, *supra* note 12, § 18.04; Clemons, *supra* note 2, at 119–31.

25. See discussion *infra* Part II.A.

26. Carstens, *supra* note 6, at 639.

27. *Id.* at 639–40.

28. *Id.* at 640.

original jurisdiction; however, the Court has refused to grant leave in at least two such cases.<sup>29</sup>

Special Masters are extremely influential actors in original jurisdiction cases, including those involving interstate water conflicts.<sup>30</sup> After granting leave to file a bill of complaint in an original jurisdiction case, the Supreme Court generally appoints a Special Master and directs him to “receive evidence, make findings of fact and conclusions of law, and draft a proposed” report.<sup>31</sup> A Special Master may invite parties to file letter briefs addressing their concerns with the Master’s first report and then produce a supplemental report responding to potential challenges the parties have raised.<sup>32</sup> Once the Special Master has submitted his report(s) to the Court, the parties may file exceptions challenging all or part of the Master’s findings, conclusions, and recommendations.<sup>33</sup> Finally, the Court has the authority to sustain or overrule any exceptions and to revise or approve any of the Special Master’s findings, conclusions, or recommendations in whole or in part.<sup>34</sup>

### *B. Comparing Apportionment by the Supreme Court and by Compact*

A brief discussion of equitable apportionment by the Supreme Court and interstate water compacts is necessary to explain the different roles the Supreme Court plays in various interstate water disputes.

#### *1. Equitable Apportionment by the Supreme Court*

The Court’s treatment of equitable apportionment cases has changed over time. In *Wyoming v. Colorado*, the first case in which the Supreme Court explicitly apportioned an interstate river, the Court applied the doctrine of prior appropriation across state lines.<sup>35</sup> The Court found it “eminently just and

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29. See *California v. West Virginia*, 454 U.S. 1027, 1027 (1981) (refusing to grant leave to file an original jurisdiction case involving an alleged breach of contract between two state universities and their football teams); *Massachusetts v. Missouri*, 308 U.S. 1, 18–19 (1939) (refusing to grant leave to Massachusetts to adjudicate its right to collect inheritance taxes from Missouri citizens).

30. See discussion *infra* Part III.A.

31. Carstens, *supra* note 6, at 654 (noting that in some original jurisdiction cases, the Court has instructed the Special Master to “receive and report evidence, but without conclusions of law or findings of fact, or [to] report findings of fact without advancing any conclusions of law”).

32. See Supplemental Opinion of the Special Master on Wyoming’s Motion to Dismiss Bill of Complaint, *Montana v. Wyoming*, No. 137, 2009 WL 6984024, at \*2 (U.S. Sept. 4, 2009) (explaining that the Special Master received letter briefs from the parties and filed a supplemental report months before the parties filed an exception with the Supreme Court).

33. *Maryland v. Louisiana*, 451 U.S. 725 (1981) (sustaining in part and overruling in part exceptions to the Special Master’s report); *Montana’s Exception and Brief, Montana v. Wyoming*, No. 137, 2010 WL 4132841 (U.S. May 13, 2010).

34. See Carstens, *supra* note 6, at 655.

35. See *Wyoming v. Colorado*, 259 U.S. 419, 470 (1922) (apportioning the Laramie River through determination of the relative priorities of individual Colorado and Wyoming appropriators using the appropriation doctrine of “first in time, first in right,” without regard for state boundaries). In the earlier case of *Kansas v. Colorado*, the Court did not issue an equitable apportionment decree and instead dismissed Kansas’s attempt to enjoin diversions in Colorado. 206 U.S. 46, 117–18 (1907).

equitable” to apply prior appropriation in this manner because both states had used the doctrine since the “time of the first settlements.”<sup>36</sup> The Court distinguished *Kansas v. Colorado*, in which the two states recognized different doctrines and the Court found elevating one system over the other would have been unfair.<sup>37</sup>

In later cases, the Court considered various factors, seeking to make determinations of a “highly equitable nature.”<sup>38</sup> For example, in *Colorado v. New Mexico*, the Court used priority of appropriation as a “guiding” principle, but also considered other factors, including “the efficiency of current [water] uses in New Mexico and the balance of benefits to Colorado and harm to New Mexico.”<sup>39</sup> In *Washington v. Oregon*, the Court compared relative harms and benefits, ultimately finding that “limit[ing] the long established use in Oregon would materially injure Oregon users without a compensating benefit to Washington users.”<sup>40</sup> In *Nebraska v. Wyoming*, the Court found return flows to be “relevant,” stating that substantial return flows “should be taken into account in balancing the equities” between the states.<sup>41</sup> In other cases, the Court has weighed conservation and efficiency considerations, as well as the availability of substitute supplies.<sup>42</sup>

In recent years, two states brought or attempted to bring original jurisdiction cases seeking equitable apportionment, but neither succeeded in getting the Court to issue a decree. In 2007, the Supreme Court granted South Carolina leave to file a complaint against North Carolina in a suit seeking apportionment of the Catawba River.<sup>43</sup> However, after several years and numerous motions before the Special Master, the states settled out of court,<sup>44</sup>

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36. *Wyoming v. Colorado*, 259 U.S. 419, 465, 470 (1922); Clemons, *supra* note 2, at 121.

37. *See Wyoming v. Colorado*, 259 U.S. 419, 464–65 (1922). Kansas followed the common-law rule of riparian rights, whereby landowners whose property adjoins a surface water source have the right to use that water but cannot sell this right, unlike right holders under the appropriation doctrine in Colorado. *See Kansas v. Colorado*, 206 U.S. 46, 114 (1907) (concluding that “equality of right and equity between the two States forbids any interference with the present withdrawal of water in Colorado for purposes of irrigation”).

38. Draper & Wechsler, *supra* note 12, § 18.03(1)(a)–(b).

39. *Colorado v. New Mexico*, 459 U.S. 176, 183–84 (1982) (apportioning the Vermejo River, where both states recognized the prior appropriation doctrine).

40. *Washington v. Oregon*, 297 U.S. 517, 523 (1936) (apportioning the Walla Walla River). The Court used similar reasoning in *Nebraska v. Wyoming*, 325 U.S. 589, 619 (1945) (apportioning the North Platte River and considering “whether the closing of the Colorado canal would work more hardship there than it would bestow benefits in Nebraska”).

41. *Nebraska v. Wyoming*, 325 U.S. 589, 644–45 (1945). The Court considered return flows from three sources: “natural drainage” resulting from “seepage from irrigated lands,” drainage facilities and artificial channels that allow unused water to return to the river, and stored water that saturates the subsoil and affects water tables. *Id.* at 596, 634–35, 637 (explaining that “[r]eturn flows once returned to the river and abandoned are part of the natural flow available for use by all” appropriators).

42. *See Colorado v. New Mexico*, 467 U.S. 310, 320 (1984); *Colorado v. New Mexico*, 459 U.S. 176, 189 (1982).

43. *See South Carolina v. North Carolina*, 552 U.S. 804 (2007); Draper & Wechsler, *supra* note 12, § 18.03(1)(c).

44. *See South Carolina v. North Carolina*, 131 S. Ct. 855 (2010) (announcing dismissal upon agreement of the parties).



presumably because the process was taking so long. In another case, the Supreme Court denied outright Mississippi's motion to file a complaint against Tennessee seeking apportionment of the Memphis Sand Aquifer.<sup>45</sup> Mississippi's Attorney General had originally filed the lawsuit in federal district court against the City of Memphis and a Memphis utility company.<sup>46</sup> When the Fifth Circuit Court of Appeals affirmed the district court's decision to dismiss the case because the state of Tennessee was an absent indispensable party, it encouraged Mississippi to either file an original jurisdiction case before the Supreme Court or negotiate an interstate compact.<sup>47</sup> Unfortunately, the Supreme Court denied Mississippi's writ of certiorari to review the Fifth Circuit's decision<sup>48</sup> and the state's motion to file an original jurisdiction suit against Tennessee,<sup>49</sup> thereby leaving Mississippi with the sole viable option of negotiating an interstate compact.<sup>50</sup>

## 2. *Interstate Water Compacts*

The states watched the Supreme Court's treatment of equitable apportionment cases carefully, and some states began to think that negotiating a compact would be a better, more predictable alternative to litigation.<sup>51</sup> In particular, the Court's application in *Wyoming v. Colorado* of the doctrine of prior appropriation to determine priority of use without regard to state lines alarmed some states, motivating them to enter into negotiated compacts to avoid the same result.<sup>52</sup> Other states looked at the multiple factors the Court might consider in making an equitable apportionment and decided that compact negotiations offered greater control over and reduced uncertainty in eventual outcomes.<sup>53</sup>

### a. *Initial Apportionment by Compact*

The U.S. Constitution's Compact Clause requires states to get congressional consent for interstate compacts that implicate federal interests.<sup>54</sup> First, states need congressional approval to negotiate; then, after negotiating,

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45. Michael Tauer, *Evolution of the Doctrine of Equitable Apportionment—Mississippi v. Memphis*, 41 U. MEM. L. REV. 897, 922 (2011).

46. Hood *ex rel.* Mississippi v. City of Memphis, 533 F. Supp. 2d 646 (N.D. Miss. 2008).

47. See Hood *ex rel.* Mississippi v. City of Memphis, 570 F.3d 625, 633 n.7 (5th Cir. 2009).

48. See Mississippi v. City of Memphis, 130 S. Ct. 1319 (2010).

49. Michael D. Tauer, *Memphis in the Law: Evolution of the Doctrine of Equitable Apportionment*, 41 U. MEM. L. REV. 897, 922–23 (2011).

50. While congressional apportionment is theoretically possible, it does not appear to be a viable option for most states because Congress has only used its power of apportionment twice. See *supra* note 17 and accompanying text.

51. See Draper & Wechsler, *supra* note 12, § 18.03(2)(a)–(b).

52. See *id.* § 18.03(2)(b).

53. See Clemons, *supra* note 2, at 129; Draper & Wechsler, *supra* note 12, § 18.03(1)(a), 18.03(2)(a)–(b).

54. See U.S. CONST. art. I, § 10, cl. 3; see also Clemons, *supra* note 2, at 130.

states must get congressional consent to the terms of the compact.<sup>55</sup> The interstate compact becomes federal law when Congress ratifies it by statute.<sup>56</sup>

Apportionment by compact involves multi-party negotiations that tend to follow general governing principles rather than set rules or standards. One fundamental principle is that a state “may not invade another state’s allocation” following interstate allocation by Supreme Court decree, congressional apportionment, or compact.<sup>57</sup> Additionally, some compacts establish that existing uses must be preserved and protected.<sup>58</sup> For instance, Article V of the Yellowstone River Compact explicitly states that “[a]ppropriative rights to the beneficial uses of the water . . . existing in each signatory State . . . shall continue to be enjoyed.”<sup>59</sup>

Compacts use a variety of allocation methods.<sup>60</sup> For example, the Upper Colorado River Basin Compact allocated the consumptive use of waters of the interstate basin by percentage,<sup>61</sup> the Canadian River Compact limited the amount of water each state could store,<sup>62</sup> and the Rio Grande Compact and the Pecos River Compact used indices of inflows and outflows.<sup>63</sup>

Many compacts create a commission with “authority to manage the shared water resource,” thus providing states with a framework “for true regional resource management.”<sup>64</sup> Typically, the commission contains a voting representative of each state and a non-voting federal representative.<sup>65</sup> For example, under the Pecos River Compact, New Mexico and Texas each name a

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55. Carl Erhardt, *The Battle over “The Hooch”: The Federal-Interstate Water Compact and the Resolution of Rights in the Chattahoochee River*, 11 STAN. ENVTL. L.J. 200, 215 (1992); Clemons, *supra* note 2, at 130.

56. *See* Cuyler v. Adams, 449 U.S. 433 (1981); Texas v. New Mexico, 462 U.S. 554, 564 (1983); Clemons, *supra* note 2, at 130.

57. Draper & Wechsler, *supra* note 12, § 18.03(2)(c).

58. *See id.* § 18.03(2)(c).

59. Yellowstone River Compact, MONT. CODE ANN. § 85-20-101 (West 2011) (consent granted by Congress Oct. 30, 1951, Pub. L. No. 82-231, 65 Stat. 663).

60. Draper & Wechsler, *supra* note 12, § 18.03(2)(c).

61. *See* Upper Colorado River Basin Compact, COLO. REV. STAT. § 37-62-101, art. III(a)(2) (2012) (consent granted by Congress Apr. 6, 1949, 63 Stat. 31) (giving the signatory states “the consumptive use per annum of the quantities resulting from the application of the following percentages to the total quantity of consumptive use per annum”).

62. *See* Canadian River Compact, TEX. WATER CODE ANN. § 43.006, art. IV(b), art. V(b) (West 1971) (consent granted by Congress May 17, 1952, 66 Stat. 74) (limiting New Mexico’s conservation storage to “an aggregate of 200,000 acre feet,” and applying similar limitations to Texas).

63. *See* Rio Grande Compact, NM STAT. ANN. § 72-15-23, art. III, art. IV (2011) (consent granted by Congress May 31, 1939, 53 Stat. 785) (describing Colorado’s and New Mexico’s obligations as related to the “sum of those quantities set forth in the two following tabulations of relationship, which correspond to the quantities at the upper index [or gauging] stations”); Pecos River Compact, NM STAT. ANN. § 72-15-19, art. VI (2011) (consent granted by Congress June 9, 1949, 63 Stat. 159) (noting that the “principles” governing the apportionment were quantified in a referenced engineering report rather than being established in the Compact text).

64. JOSEPH L. SAX ET AL., *LEGAL CONTROL OF WATER RESOURCES: CASES AND MATERIALS* 736–37 (2d ed. 1991).

65. Clemons, *supra* note 2, at 131.

commissioner, and the President names a non-voting commissioner to act as chair.<sup>66</sup>

Compacts give states more control over the outcomes of water disputes, but states must be willing to risk having initial apportionment negotiations drag on for twenty years.<sup>67</sup> In contrast, the Supreme Court has never taken longer than eleven years to resolve an equitable apportionment case regarding initial apportionment.<sup>68</sup>

*b. Subsequent Adjudication to Interpret or Enforce a Compact*

After compacts or court decreed apportionments established state water rights to most interstate lakes and river systems, states began fighting over compact interpretation or the enforcement of those initial apportionments.<sup>69</sup> Some states fought to protect the quantity and quality of the water they had grown accustomed to using, while other states sought to introduce flexibility to aging interstate compacts.<sup>70</sup>

In 1974, Texas became the first state to invoke the Supreme Court's original jurisdiction in a suit over the interpretation and enforcement of an interstate water compact.<sup>71</sup> Since then, Kansas, Nebraska, Oklahoma, New Mexico, Colorado, Wyoming, and Montana have sought relief in the Supreme Court's original jurisdiction over prior allocations by compact on the Arkansas River, the Canadian River, the Republican River, and the Yellowstone River.<sup>72</sup>

66. Joseph Girardot, *Toward a Rational Scheme of Interstate Water Compact Adjudication*, 23 U. MICH. J.L. REFORM 151, 159 (1989).

67. See, e.g., *Texas v. New Mexico*, 462 U.S. 554, 557 & n.3, 558–59 (1983) (stating that Pecos River Compact negotiations started in 1925, but a compact was not approved until 1949); *Montana v. Wyoming*, 131 S. Ct. 1765, 1770 (2011) (stating that Yellowstone River Compact negotiations started in 1932, but a compact was not approved until 1951).

68. See, e.g., *Washington v. Oregon*, 297 U.S. 517, 518 (1936) (resolving after five years an equitable apportionment suit originally filed in 1931); *Colorado v. New Mexico*, 459 U.S. 176, 179–80 (1982), 467 U.S. 310, 323–24 (1984) (using equitable apportionment principles to dismiss the case and denying Colorado the right to divert water to the detriment of existing users in New Mexico six years after Colorado filed an action in 1978 seeking to divert Vermejo River water); *Wyoming v. Colorado*, 259 U.S. 419, 455 (1922) (resolving after eleven years a case originally filed in 1911); *Nebraska v. Wyoming*, 325 U.S. 589, 591 (1945) (resolving after eleven years a case originally filed in 1934).

69. See *infra* Table 1.

70. See *infra* Part II.B.

71. See *Texas v. New Mexico*, 462 U.S. 554, 562 (1983) (regarding the 1949 Pecos River Compact, NM STAT. ANN. § 72-15-19 (2011)); Douglas L. Grant, *Limiting Liability for Long-Continued Breach of Interstate Water Allocation Compacts*, 43 NAT. RESOURCES J. 373, 374 n.9 (2003).

72. See *Kansas v. Colorado*, 475 U.S. 1079 (1986) (regarding the 1949 Arkansas River Compact); *Oklahoma v. New Mexico*, 484 U.S. 1023 (1988) (regarding the 1951 Canadian River Compact); *Kansas v. Nebraska*, 525 U.S. 1101 (1999) (regarding the 1943 Republican River Compact); *Montana v. Wyoming*, 552 U.S. 1175 (2008) (regarding the 1951 Yellowstone River Compact); see also Draper & Wechsler, *supra* note 12, § 18.04(2). The 1785 Compact at issue in *Virginia v. Maryland* was not technically an interstate water compact, but a compact settling navigational and jurisdictional issues. See 540 U.S. 56, 61–62, 69–70 (2003) (explaining that an 1877 arbitration award, and not the 1785 Compact, gave Virginia, “as a sovereign State, the right to use the River beyond the low-water mark” and that Virginia’s “riparian rights are limited only by Maryland’s right of ‘proper use’ and the proviso that Virginia not ‘imped[e] . . . navigation’”).

More compacts are likely to be litigated because “compacts typically allocate water for the long term, and limits of human foresight can result in unintended drafting omissions and ambiguities.”<sup>73</sup>

Alternatively, compact negotiators may have deliberately “omit[ted] contentious points or plaster[ed] them over with ambiguity,” setting the stage for eventual conflict.<sup>74</sup> This is particularly likely where the federal government forced states to enter a compact before it would agree to fund federal water projects with interstate features.<sup>75</sup> Indeed, a desire to obtain such projects motivated the signatory states of the Arkansas River Compact, the Republican River Compact, and the Yellowstone River Compact<sup>76</sup> and these compacts have all subsequently been adjudicated.<sup>77</sup>

## II. SUPREME COURT ADJUDICATION OF INTERSTATE WATER DISPUTES: A STATE’S PERSPECTIVE

### A. *How States Evaluate the Choice Between Negotiation and Adjudication*

Conflicts over the alleged breach of interstate water compacts or equitable apportionment decrees present states with three main options: negotiate a new compact, renegotiate an existing compact, or bring case to the Supreme Court under its original jurisdiction.<sup>78</sup> Where it is possible to renegotiate an existing compact, the process should ideally be less difficult than the original negotiation. If, however, the initial negotiation was lengthy and subsequent breaches of the compact have eroded trust between the parties, a state may not believe attempting to renegotiate the compact will be productive.

A state’s best alternative to negotiating or renegotiating a compact is to file an original jurisdiction suit.<sup>79</sup> Therefore, states that choose to adjudicate are likely looking for a more efficient and equally fair (if not more fair) resolution than direct bargaining could bring. This means states need the Supreme Court to present a workable alternative to the negotiating table by resolving disputes in a reasonable amount of time and in a reasonably predictable fashion, so states can make informed decisions about whether or not to litigate.

Considering the Court’s exclusive jurisdiction over interstate water controversies, it does states a great disservice by handling cases in what

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73. Grant, *supra* note 71, at 375.

74. *Id.* (explaining further that some conflicts arise because compact negotiators relied on “data and assumptions that later proved erroneous, and the compacting states could not agree on how the new information should affect their duties”).

75. *Montana v. Wyoming*, 131 S. Ct. 1765, 1770 (2011); S. REP. NO. 883, 82d Cong., 1st Sess., at 6 (1951); JOINT APPENDIX TO HOUSE REP. NO. 1118, 82d Cong., 1st Sess., at 17 (1951).

76. Draper & Wechsler, *supra* note 12, § 18.03(2)(b).

77. *See* *Kansas v. Colorado*, 475 U.S. 1079 (1986) (Arkansas River Compact); *Kansas v. Nebraska*, 525 U.S. 1101 (1999) (Republican River Compact); *Montana v. Wyoming*, 552 U.S. 1175 (2008) (Yellowstone River Compact).

78. *See* discussion *supra* Part I.A.

79. *See* discussion *supra* Part I.A.

appears to be an unpredictable and unstructured way. First, the Court has not made public its process for selecting and appointing a Special Master, and parties have no way of knowing the identity of the Special Master (or the pool of potential Special Masters) before filing suit.<sup>80</sup> Second, the Court primarily appoints non-judges as Special Masters for cases involving water apportionment or water compact disputes.<sup>81</sup> This is especially problematic because the Court appears willing to defer to Special Masters even on questions of law central to motions to dismiss.<sup>82</sup>

The value of pursuing an original jurisdiction claim is directly proportional to how fair the process appears to each party. Because interstate water disputes before the Court inevitably result in one or both parties having to do something they do not want to do, it is important that all parties believe the process, if not the outcome, is fair. A state may not like the Court's decision, but if it agrees that the process used to reach the decision was fair, it may be more willing to honor the restrictions and requirements imposed upon it. In contrast, if a state believes that the selection of the Special Master—or the actual proceedings—unfairly prejudiced the outcome against it, that state may be more likely to breach the compact or court decree in the future.

*B. States Desire Certainty About and Control over the Outcomes of Interstate Disputes*

States want certainty about and control over the outcomes of interstate water conflicts in order to achieve administrative efficiency, minimize their own costs, and address water conservation and/or environmental concerns.<sup>83</sup>

First, when a state is uncertain about its share of interstate river flows, it encounters significant administrative difficulties. Since states must manage and allocate in-state water in a manner consistent with the terms of relevant interstate compacts and Court decrees,<sup>84</sup> uncertainty about the size of the pie to

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80. See Carstens, *supra* note 6, at 644–45; see also *infra* Part III. The inability to know the identity of the Special Master prior to litigation contrasts with the public identities of the judges in a particular jurisdiction. While a party might not know ahead of time which judge will be assigned to its case, it at least knows the field of possibilities and can become familiar with past decisions from the judges in the relevant jurisdiction. With Special Masters, there is no list of individuals for parties to research and no past decisions to analyze.

81. See Carstens, *supra* note 6, at 648.

82. See *id.* at 655–56 (noting that “[p]ractice and time have shown that the Court generally adopts the Special Masters’ reports, even when those reports make conclusions of law in addition to resolving issues of fact”); see also, Draper & Wechsler, *supra* note 12, § 18.04(2)(d) (explaining that the Supreme Court adopted the Special Master’s recommendation on a motion to dismiss in *Kansas v. Nebraska & Colorado*); *Montana v. Wyoming*, 131 S. Ct. 1765, 1770–71 (2011) (noting that the Special Master recommended denying Wyoming’s motion to dismiss, but not discussing further the decision to deny the motion to dismiss because the exception before the Court was limited to a narrower question).

83. A survey of the specific interests of all fifty states in interstate water disputes exceeds the scope of this Note. This Part simply contains my inferences about states’ interests.

84. See *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938) (stating that “[w]hether the apportionment of the water of an interstate stream be made by compact . . . or by a decree of this Court,” it “is binding upon the citizens of each state and all water claimants, even where the State had granted the water rights before it entered into the compact”).

be divided among in-state water users could lead to more in-state litigation<sup>85</sup> and a mismatch between “paper” water and “wet” water,<sup>86</sup> as well as lost opportunities to invest in economic growth or energy infrastructure dependent on reliable water supplies.

States likely seek apportionment by compact or decree mainly to reduce this uncertainty. Apportionment of either type allows states to “confidently grant water rights to users within a state that, in total, do not exceed that state’s allocation.”<sup>87</sup> Allocation by compact “confirm[s] that the status quo is not violative of the principles the Court now uses in equitable apportionment cases,” which should (but do not always) protect uses existing at the time of ratification.<sup>88</sup> Additionally, apportionment give states the ability to conduct long-range water project planning.<sup>89</sup>

Second, states are understandably anxious about the prospect of paying large monetary damages or, worse, having to deliver repayment in water for breach of compact obligations. Where the Supreme Court has found breach of a defendant state’s water delivery obligations, it has been willing to award damages in the amount of the plaintiff state’s losses plus compound prejudgment interest.<sup>90</sup> For example, in *Texas v. New Mexico*, the Court found that the compact did not preclude the award of monetary damages where mandated repayment in water would be inequitable or infeasible.<sup>91</sup> After the Court returned to the Special Master the matter of determining the appropriateness and size of monetary damages<sup>92</sup> for a breach spanning thirty-four years,<sup>93</sup> the parties settled the case for \$14 million.<sup>94</sup> Importantly, the Court held that a state was liable even if it had acted in good faith and breached only because it had interpreted ambiguous compact language in a way that the Court later rejected.<sup>95</sup>

In *Kansas v. Colorado*, the Court divided over how to determine the proper period of prejudgment interest for losses from compact violations by Colorado that began in 1950.<sup>96</sup> Kansas sought \$62 million in damages, with \$41 million representing prejudgment interest compounded from 1950

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85. See Draper & Wechsler, *supra* note 12, § 18.05.

86. “Paper water” is commonly used to refer to water that users theoretically have a right to consume (but which is not necessarily available), while “wet water” is water that actually exists in rivers or lakes in any particular year for consumption. See, e.g., ELLEN HANAK, WHO SHOULD BE ALLOWED TO SELL WATER IN CALIFORNIA? THIRD-PARTY ISSUES AND THE WATER MARKET 9 (2003), available at [http://web.ppic.org/content/pubs/report/R\\_703EHR.pdf](http://web.ppic.org/content/pubs/report/R_703EHR.pdf).

87. Abrams, *supra* note 12, at 169.

88. *Id.*; see also *supra* text accompanying notes 57–59 (discussing some of these principles).

89. See DAVID H. GETCHES, WATER LAW IN A NUT SHELL 407 (1997).

90. Grant, *supra* note 71, at 375–76.

91. See *Texas v. New Mexico*, 482 U.S. 124, 130–31 (1987).

92. *Id.* at 132.

93. *Id.* at 124, 127–28 (Special Master determined that the breach started in 1950).

94. *Texas v. New Mexico*, 494 U.S. 111 (1990).

95. See *Texas v. New Mexico*, 482 U.S. 124, 129 (1987) (explaining that “good faith differences about the scope of contractual undertakings do not relieve either party from performance”).

96. See *Kansas v. Colorado*, 533 U.S. 1, 15 n.5 (2001).

“intended to compensate for lost investment opportunities.”<sup>97</sup> The Special Master recommended an award of damages that included prejudgment interest from 1969—the time when Colorado knew or should have known about the violations.<sup>98</sup> Even though the four plurality Justices agreed with the Special Master in order to “produce a majority for the judgment,” the Court ultimately decided to allow prejudgment interest to run only from 1985, when Kansas filed the complaint.<sup>99</sup> Professor Douglas Grant has commented that the Court failed to provide a rational basis for why prejudgment interest should not begin to run until one state has filed suit, leaving open the question of whether this approach is narrowly confined to the facts of the case or is a broad rule applicable in all breach of compact cases.<sup>100</sup>

Finally, states want certainty about the outcomes of interstate water disputes because many water conservation and environmental concerns have grown in importance since the initial apportionment by compact or decree. The compact mechanism has always been seen as an answer to “wasteful non-action or wasteful conflict,”<sup>101</sup> a classic “tragedy of the commons.”<sup>102</sup> In other words, without a compact, a state that wants to “conserve [its] water resources for either future intrastate use or for present in situ use [is] at risk of having sister states use that water in other inconsistent ways.”<sup>103</sup> Furthermore, within the last forty years, after most compacts were created, new environmental awareness and legislation have emerged.<sup>104</sup> More people now support “maintaining instream flows to promote recreational and ecological values.”<sup>105</sup> Environmental legislation, such as the federal Endangered Species Act, now imposes additional responsibilities on states and new restrictions on water use.<sup>106</sup> Similarly, Indian-reserved water rights have become better defined and better protected.<sup>107</sup> Unfortunately, as Professor Robert Abrams asserts, under current precedent, it appears that states engaged in present development and use of water will be the “winners,” while states favoring conservation are likely to be “losers.”<sup>108</sup>

Increased knowledge about hydrology and society’s desire for more efficient use of water have led to conflicts between compact states. For

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97. *Id.* at 10 n.2.

98. *Id.*

99. *Id.* at 15 n.5.

100. See Grant, *supra* note 71, at 384.

101. Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 699 (1925).

102. Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243, 1244–45 (1968).

103. Abrams, *supra* note 12, at 155.

104. See, e.g., National Environmental Policy Act, 42 U.S.C. §§ 4321–4370h (2006); Clean Air Act of 1970, 42 U.S.C. §§ 7401–7700 (2006); Clean Water Act, 33 U.S.C. §§ 1251–1387 (2000); Endangered Species Act, 16 U.S.C. §§ 1531–1544 (2006).

105. Grant, *supra* note 15, at 107; Joseph L. Sax, *Environmental Law at the Turn of the Century: A Reportorial Fragment of Contemporary History*, 88 CALIF. L. REV. 2375, 2377–78 (2000).

106. Grant, *supra* note 15, at 107; Endangered Species Act, 16 U.S.C. §§ 1531–1544 (1994).

107. Grant, *supra* note 15, at 107.

108. Abrams, *supra* note 12, at 155.

example, in *Kansas v. Colorado*, better understanding of the interconnectedness of surface water and groundwater led Kansas to claim that increased groundwater pumping in Colorado had materially depleted the waters of the Arkansas River in violation of compact.<sup>109</sup> However, during the early years of the compact, neither state “had any thought” that groundwater pumping might reduce stream flow.<sup>110</sup> In *Montana v. Wyoming*, on the other hand, Montana claimed that the switch from flood to sprinkler irrigation by appropriators in Wyoming had harmed Montana appropriators because sprinklers increased irrigation efficiency, reducing runoff that had previously contributed to river return flows—thereby increasing Wyoming’s net consumption of water and decreasing the amount available for Montana to use.<sup>111</sup>

For the foregoing reasons, states desire certainty about and control over the outcomes of interstate water conflicts. The Supreme Court could better meet states’ needs by adopting new procedures and standards to increase the uniformity and predictability of interstate water dispute decisions.<sup>112</sup> First, the Court could use a consistent procedural framework<sup>113</sup> and provide more active oversight of the Special Masters appointed to cases involving interstate water disputes.<sup>114</sup> The Court could refrain from delegating questions of law to Special Masters, while allowing them to fulfill the traditional fact-finding functions of a Special Master.<sup>115</sup> Most importantly, the Court could become more comfortable plunging into the deep end of water compacts.<sup>116</sup> The familiar tools of statutory construction, principles of contract law, and various constitutional arguments are more than enough to ensure the Court does not drown in complicated state water law.<sup>117</sup>

### III. THE SUPREME COURT’S UNCHALLENGED USE OF SPECIAL MASTERS

Knowing the reasonable range of potential outcomes from adjudication helps individual states better decide whether renegotiation is worth their time and effort. While direct negotiations will always afford states more certainty and control than litigation,<sup>118</sup> states still need original jurisdiction cases before the Supreme Court to be a reasonable alternative that provides some assurance about the range of possible outcomes. Unfortunately, the Court’s use of Special Masters gives states no such assurance.

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109. See *Kansas v. Colorado*, 533 U.S. 1, 14 (2001).

110. *Id.*

111. See *Montana v. Wyoming*, 131 S. Ct. 1765, 1771 (2011); see also discussion *infra* Part IV.

112. See *infra* Part V.

113. Carstens, *supra* note 6, at 695–98; see also discussion *infra* Part V.B.2.

114. See discussion *infra* Parts V.B.1, V.C.

115. See discussion *infra* Part V.B.3.

116. See discussion *infra* Part V.B.1.

117. See discussion *infra* Part V.B.4.

118. See Clemons, *supra* note 2, at 129 (stating that “[c]ommon sense suggests that the compact mechanism guarantees that a state will get at least some of what it wants, whereas with litigation it could get all or it could get nothing”).



*A. Use of Special Masters in Original Jurisdiction Cases*

Unlike the appellate cases the Supreme Court reviews, original jurisdiction cases do not arrive at the Court with a factual record. Historically, the Court had to delegate certain functions in original jurisdiction cases because of time, efficiency, and travel constraints.<sup>119</sup> In 1791, the Supreme Court established a seven-member commission and authorized them to travel to Holland to take testimony from witnesses<sup>120</sup> in the case of *Vanstophorst v. Maryland*.<sup>121</sup> During the nineteenth and twentieth centuries, the Court appointed commissioners, often acting as “technicians responsible for demarcating a border [or boundaries between states] consistent with a Court decree,” in several more original jurisdiction cases.<sup>122</sup>

Near the beginning of the twentieth century, the Court began vesting fact-finding functions in Special Masters.<sup>123</sup> In 1908, the Court referred a dispute between Virginia and West Virginia to a Special Master.<sup>124</sup> Since then, appointment of Special Masters in original jurisdiction cases has become standard practice, with the Court delegating progressively “greater pockets of its fact-finding and . . . legal decision-making authority” to Special Masters.<sup>125</sup> Today, they may take evidence, summon witnesses, issue subpoenas, “fix the time and conditions for the filing of additional pleadings,” “direct subsequent proceedings,” and entertain motions to intervene or dismiss.<sup>126</sup>

Although “no rule governing Supreme Court practice expressly provides for the appointment of Special Masters,”<sup>127</sup> the Court can appoint one at its own discretion<sup>128</sup> or upon the motion of a party.<sup>129</sup> Parties have no formal way of objecting to or appealing an appointment.<sup>130</sup> Once appointed, Special Masters are subject to few rules<sup>131</sup> and the parties pay a Master’s compensation

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119. Carstens, *supra* note 6, at 642–44.

120. *Id.* at 642.

121. *Vanstophorst v. Maryland*, 2 U.S. 401 (1791).

122. Carstens, *supra* note 6, at 643.

123. *Id.* at 644.

124. *See Virginia v. West Virginia*, 209 U.S. 514, 534–37 (1908).

125. Carstens, *supra* note 6, at 628.

126. *Id.* at 654–55.

127. *Id.* at 653.

128. *See, e.g., South Carolina v. North Carolina*, 552 U.S. 1160 (2008); *Kansas v. Colorado*, 478 U.S. 1018 (1986).

129. *See, e.g., Maryland v. Louisiana*, 445 U.S. 913, 913 (motion for appointment of Special Master granted); *New Jersey v. New York*, 50 S. Ct. 84, 85 (1929) (motion denied).

130. *But cf. Margaret G. Farrell, Coping with Scientific Evidence: The Use of Special Masters*, 43 EMORY L.J. 927, 950 (1994) (explaining that appointment of Special Masters by federal district courts may be appealed to the court of appeals).

131. *See SUP. CT. R. 17* (containing only one substantive mandate: the Federal Rules of Civil Procedure govern the form of pleadings); *see also* Carstens, *supra* note 6, at 653, 697 (asserting that “[u]nder current practice, two sources direct the Special Master in the discharge of his duties: Rule 17 of the Supreme Court Rules, a one-page delineation of rules governing original actions, and the boilerplate language used in the appointment memorandum”).

and expenses “in such proportion as the Court may . . . direct.”<sup>132</sup> The Supreme Court is the only judicial body that can review a Master’s conclusions and orders, yet it is not unusual for proceedings to continue before a Special Master for years before the Supreme Court ever issues a substantive opinion.<sup>133</sup> In contrast, the appointment of Special Masters in federal district courts, authorized by Rule 53 of the Federal Rules of Civil Procedure, is subject to more limitations and more intense judicial scrutiny.<sup>134</sup>

In an original jurisdiction case, the Special Master can conduct informal proceedings and make decisions that may never be available to the public.<sup>135</sup> Only the Supreme Court’s opinion when ruling on objections to the Master’s report or adopting or revising the Master’s findings and recommendations becomes precedent and public law.<sup>136</sup> This veil over Special Master proceedings, in addition to the uncertainty surrounding the identity of future Special Masters, makes it challenging for parties to predict in any meaningful way the outcome of adjudicating an interstate water dispute.

### *B. Selection of Special Masters*

Given the scope of a Special Master’s duties and powers in an original jurisdiction case, it is alarming that the process for choosing a Special Master is not more transparent.<sup>137</sup> Professor Anne-Marie Carstens has speculated that the

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132. *Oklahoma v. New Mexico*, 484 U.S. 1023 (1988) (mem.); *see also, e.g.*, *Montana v. Wyoming*, 131 S. Ct. 497 (2010) (mem.) (granting the motion of the Special Master “for allowance of fees and reimbursement of expenses” in the amount of “\$72,008.74 for the period of June 13, 2009, through July 9, 2010, to be paid equally by Montana and Wyoming”); *Montana v. Wyoming & North Dakota*, 129 S. Ct. 480 (2008); *Texas v. New Mexico*, 468 U.S. 1202 (1984) (directing “compensation of the Special Master, the allowances to him, the compensation paid to his legal, technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses [to] be charged against and [ ] borne by the parties in such proportion as the Court” decided).

133. Carstens, *supra* note 6, at 655 (explaining that “[o]nce the Special Master’s report is transmitted to the Court, the Court exercises its authority in reviewing the report, revising or approving the Master’s findings, conclusions, or recommendations in whole or in part”).

134. *See* FED. R. CIV. P. 53(a) (providing that federal district courts may appoint a special master to “perform duties consented to by the parties” or to “hold trial proceedings and make or recommend findings of fact” if “some exceptional condition” or “need to perform an accounting or resolve a difficult computation of damages” exists); FED. R. CIV. P. 53(f)(4) (requiring district courts to consider objections to a master’s conclusions of law *de novo*); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957) (explaining that “[t]he use of masters [in federal district court] is ‘to aid judges in the performance of specific judicial duties . . .’ and not to displace the court”); *In re Bituminous Coal Operators’ Ass’n, Inc.*, 949 F.2d 1165, 1169 (D.C. Cir. 1991) (holding the district court could not grant a special master authority to decide genuinely disputed dispositive issues of law and fact); *Burlington N. R.R. Co. v. Dep’t of Revenue*, 934 F.2d 1064, 1072 (9th Cir. 1991) (concluding the “district court’s ‘rubber stamp’ of the master’s order is an inexcusable abdication of judicial responsibility and a violation of article III of the Constitution”); CAL. CIV. PROC. CODE § 639 (West 2008) (supplying an example of a state statute providing for the appointment of a Special Master, or “referee”).

135. Carstens, *supra* note 6, at 653 (explaining that Special Masters are able “to craft the proceedings and to define the scope of discovery in a manner unlike the rules that govern litigation in the lower federal courts,” and may even “direct witnesses and call [their] own witnesses”).

136. *See* *Draper & Wechsler*, *supra* note 12, § 18:02(3)(d).

137. *See* Carstens, *supra* note 6, at 644–45; *see also* SUP. CT. R. 17 (explaining that, in actions invoking the Supreme Court’s original jurisdiction, the Court “may grant or deny the motion, set it for

“majority of appointments likely result from some degree of joint decision or assent among the Justices,” while the Chief Justice, acting alone, has the authority to appoint a Special Master if a vacancy occurs while the Court is in recess.<sup>138</sup>

Furthermore, Carstens has observed that the Court tends to “select[] Special Masters from the crowd of associates who have gained the Court’s confidence,”<sup>139</sup> which results in most Special Masters being Caucasian males.<sup>140</sup> This selection bias mirrors the process identified by Professor Ian Haney Lopez in his study of Los Angeles superior court judges’ selection of grand jurors during the 1960s.<sup>141</sup> Haney Lopez concluded that Mexican Americans were excluded from grand juries through the operation of institutional racism and systemic discrimination rather than purposeful discrimination and animus.<sup>142</sup> Because the judges tended to nominate their friends and social acquaintances to grand juries, few Mexican Americans were ever nominated because they tended to live and move outside of the judges’ circle of familiarity.<sup>143</sup> Similarly, a “surprising number of Special Masters, particularly . . . the non-judge Masters, had close personal or professional ties either to the Court’s Justices (current or former) or to other Special Masters in prior cases,” which suggests that Special Masters are appointed from “a short list of the Court’s intimate associates.”<sup>144</sup>

### C. Use of Non-Article III Judges as Special Masters in Interstate Water Cases

While the Supreme Court usually appoints senior or retired federal judges to be Special Masters in original jurisdiction cases,<sup>145</sup> the Court breaks with

oral argument, . . . or require that other proceedings be conducted,” but failing to explain how Special Masters are chosen and failing to describe what kinds of “other proceedings” may be conducted).

138. Carstens, *supra* note 6, at 644–45.

139. *Id.* at 653.

140. *See id.* at 652. In its history, the Court has only appointed one woman to be Special Master. *See South Carolina v. North Carolina*, 552 U.S. 1160 (2007) (relying on attorney Kristin Linsley Myles as Special Master); Draper & Wechsler, *supra* note 12, § 18.03(1)(c), n.66 (observing that “Kristin L. Myles is the first woman to serve as a Supreme Court Special Master in the history of the United States”).

141. *See* Ian F. Haney Lopez, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 YALE L.J. 1717, 1736 (2000) (finding that approximately 83 percent of the judges’ nominations for grand juries were social acquaintances, such as “friends, neighbors, or co-members of a church, civic organization, or club”).

142. *See id.* at 1806–08.

143. *Id.* at 1739. “[W]hile Mexican Americans accounted for one of every seven persons in Los Angeles County during the 1960s, they accounted for only one of every fifty-eight Los Angeles County grand jurors.” *Id.* at 1728.

144. *See* Carstens, *supra* note 6, at 649; *see also* Margaret G. Farrell, *The Function and Legitimacy of Special Masters: Administrative Agencies for the Courts*, 2-FALL WIDENER L. SYMP. J. 235, 276 (1997) (noting that Special Masters in lower federal courts are also selected from individuals the judge trusts, “based upon personal friendship, prior experience in appearing before the judge or recommendations from other judges”).

145. Carstens, *supra* note 6, at 645–48 (stating that “Special Masters today often are appointed from the ranks of senior or retired federal judges”).

tradition in cases involving interstate water disputes, frequently appointing water law experts who have never been judges.<sup>146</sup> In *Kansas v. Colorado*,<sup>147</sup> for example, the Court appointed Arthur Littleworth, a California attorney and water law expert.<sup>148</sup> Similarly, in *Oklahoma v. New Mexico*,<sup>149</sup> the Court appointed Jerome C. Muys, a water law scholar and past California deputy attorney general.<sup>150</sup> Most recently, in *Montana v. Wyoming*, the Court appointed Stanford Professor Barton H. Thompson, Jr., to be Special Master.<sup>151</sup> In my analysis of the sixteen Special Masters appointed in original jurisdiction cases involving interstate water disputes between 1933 and 2011, I discovered that twelve were attorneys or law professors specializing in water law, while only four were (retired) judges.<sup>152</sup> Furthermore, because interstate water dispute cases can last for more than a decade, non-judges replaced two of the four retired judges before the Court resolved the cases with which they assisted.<sup>153</sup>

The use of non-Article III actors as Special Masters in original jurisdiction cases collides with the ongoing debate over the legitimacy of judicial adjuncts, which also include magistrates and administrative law judges.<sup>154</sup> Federal judges have life tenure and salary protection under Article III of the Constitution,<sup>155</sup> while Special Masters “serve at the will of the court only for the duration of the suit over which they preside, and their compensation is subject to approval and diminution by the Court.”<sup>156</sup> Some argue that judicial adjuncts lack the guarantee of independence<sup>157</sup> and neutrality,<sup>158</sup> and, therefore, their use in judicial proceedings threatens the independence of the

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146. *Id.* at 648 (noting that “[o]ne of the primary areas in which the Court has appointed non-judges having specific substantive expertise is in cases involving disputes over water apportionment and diversion”).

147. *Kansas v. Colorado*, 121 S. Ct. 2023 (2001).

148. Carstens, *supra* note 6, at 648.

149. *Oklahoma v. New Mexico*, 484 U.S. 1023 (1988).

150. Carstens, *supra* note 6, at 648.

151. *See Montana v. Wyoming*, 55 U.S. 968 (2008).

152. *See infra* Table 1.

153. *See Texas v. New Mexico*, 468 U.S. 1202 (1984); *Kansas v. Colorado*, 484 U.S. 910 (1987); *see also infra* Table 1.

154. *See* Carstens, *supra* note 6, at 670–72; Farrell, *supra* note 144, at 273–83; Linda J. Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedure*, 137 U. PA. L. REV. 2131, 2137 (1989); Irving R. Kaufman, *Masters in the Federal Courts: Rule 53*, 58 COLUM. L. REV. 452, 453 (1958).

155. U.S. CONST. art III, § 1 (providing that “Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office”).

156. Carstens, *supra* note 6, at 671; *see also* *United States v. Will*, 449 U.S. 200, 217–18 (1980) (asserting that “[a] Judiciary free from control by the Executive and the Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government”).

157. *See N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 58 (1982) (stating Article III “both defines the power and protects the independence of the Judicial Branch”).

158. *See* Farrell, *supra* note 144, at 277 (arguing that “[t]he neutrality of masters is not assured by life tenure, fixed salaries, or even Special codes of professional ethics”).

federal judiciary.<sup>159</sup> Furthermore, judicial experience theoretically provides important practice in setting aside personal views, analyzing the issues as an impartial arbiter instead of an advocate for one view, and writing opinions based on precedent that will be subject to appellate review.

Although the Supreme Court has never publicly explained its reasons for appointing a particular individual to be Special Master, it appears the Court's primary consideration in cases involving interstate water disputes is the individual's expertise in water law. Special Masters with expertise can assist judges in the evaluation of scientific and technical evidence, educate them about complicated subject matters and specialized fields of knowledge, and analyze quantitative evidence that might be confusing to non-experts.<sup>160</sup> Therefore, a Special Master with relevant expertise undoubtedly provides the Court with valuable assistance.

Nonetheless, a non-Article III Special Master's lack of judicial experience is particularly alarming where the Supreme Court adopts the Master's reports wholesale, "even when those reports make conclusions of law in addition to resolving issues of fact," such as on a motion to dismiss.<sup>161</sup> Assuming that a water law expert is more qualified and better able to perform certain fact-finding functions than the Justices of the Supreme Court,<sup>162</sup> a Special Master with expertise may be necessary in equitable apportionment cases where an initial division of water depends on establishing a factual foundation about the past flow and use of water.<sup>163</sup> It is less apparent why any Special Master would be better than the Supreme Court at resolving questions of law in the interpretation of a compact or earlier decree. The Court is regularly called upon to interpret the Constitution,<sup>164</sup> which is much older than any interstate compact, and to interpret federal statutes, which can be much more complex than interstate compacts. And, the Court is certainly better situated than a Special Master to interpret or enforce a prior equitable apportionment decree issued by the Court, even if different justices now occupy the bench. It remains

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159. See *Geras v. Lafayette Display Fixtures, Inc.*, 742 F.2d 1037, 1052–53 (7th Cir. 1984) (Posner, J., dissenting); Silberman, *supra* note 154, at 2137. Silberman asserts that,

[t]o the extent that cases are shaped, ad hoc procedures embraced, settlements influenced and even coerced, and law articulated, Special masters may represent an even greater threat to the integrity of the process because they are private individuals who are not institutionally entrusted with judicial powers. The danger of a new cottage industry, enhanced by large fees for Special masters and endangered by potential cronyism and conflicts of interest, cannot be ignored when assessing the system of Special masters presently in vogue.

*Id.* at 2137.

160. See Farrell, *supra* note 130, at 953.

161. Carstens, *supra* note 6, at 655–56.

162. See Farrell, *supra* note 130, at 937–42 (explaining that scientific knowledge is different from other kinds of knowledge and discussing the epistemological premises of scientific findings).

163. See Farrell, *supra* note 144, at 284–85 (explaining that "court-appointed [Special Masters] can provide expertise that the judge lacks in a relevant area and can help bridge the gap created by epistemological differences in law and other disciplines").

164. See *Marbury v. Madison*, 5 U.S. 137, 178 (1803).

unclear exactly why the Court is reluctant to take a more active role in interstate water disputes.

IV. THE SUPREME COURT'S PROBLEMATIC DEFERENCE TO THE SPECIAL MASTER IN  
*MONTANA V. WYOMING*

On January 10, 2011, the Supreme Court heard oral arguments in *Montana v. Wyoming*, a case intended to resolve the two states' dispute over interpretation of the 1951 Yellowstone River Compact.<sup>165</sup> Montana had filed an exception to the Special Master's finding that Montana failed to state a claim for relief when it alleged that changes in irrigation techniques in Wyoming had impermissibly reduced the flow of water to water users in Montana.<sup>166</sup> For one hour and one minute, seven Justices questioned the attorneys appearing on behalf of Montana, Wyoming, and (as *amicus curiae*) the United States.<sup>167</sup> Justice Kagan did not participate in the case, and Justice Thomas, following his usual custom, did not ask a single question.<sup>168</sup> Since the case was at the motion to dismiss phase, the parties had done no discovery at all, and the case presented no questions of fact.

The Justices' questions and comments focused more on western water law than on the text of the compact, perhaps because the Special Master's report did the same. At one point, Justice Breyer asked if there was "no fair way to decide this case."<sup>169</sup> Chief Justice Roberts responded:

I thought that was the way appropriation law works in the west, I mean, the person who gets it, gets it? . . . Well, I mean, I don't mean—isn't that the difference between eastern water law and western water law? In the east, you try to allocate everything fairly so everyone is treated fairly, and I thought in the west, for reasons of efficiency, it's first come first serve.<sup>170</sup>

From this exchange, it appears that the Chief Justice had concluded that western water law was fundamentally unfair to parties, and therefore it was unnecessary to consider if the outcome of the case was fair to Montana. Despite Justice Scalia's assertion that the text of the compact should overrule state water law,<sup>171</sup> the majority appeared to agree with Chief Justice Roberts that this case was really about understanding western water law.<sup>172</sup> Consequently, the majority deferred to Special Master Barton Thompson, Jr., and his estimable expertise in water law. The text of the final majority opinion was ten pages long and consisted largely of a summary of Special Master Thompson's

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165. See Transcript of Oral Argument at 1, *Montana v. Wyoming*, 131 S. Ct. 355 (2011) (No. 137).

166. *Montana v. Wyoming*, 131 S. Ct. 1765, 1771 (2011).

167. See Transcript of Oral Argument at 1–53, *Montana v. Wyoming*, 131 S. Ct. 355 (2011) (No. 137).

168. See *id.*

169. *Id.* at 43.

170. *Id.* at 43–44.

171. See *id.* at 29.

172. See *Montana v. Wyoming*, 131 S. Ct. 1765, 1778 (2011).

arguments in his Supplemental Opinion, while Justice Scalia's three-page dissent focused on the text of the compact.<sup>173</sup>

*Montana v. Wyoming* is a perfect example of when the Supreme Court could have resolved a discrete issue in a larger interstate water dispute without relying on water law experts. Unfortunately, seven out of the eight participating Justices made little use of the familiar tools of statutory construction, principles of contract law, or constitutional arguments to answer the underlying question of law. In this case, the influence of Special Master Thompson's expert opinion appeared to overcome the Justices' own judicial training and instincts.

#### A. *Background on the Yellowstone River Compact*

The Yellowstone River flows from its headwaters in Wyoming into Montana and North Dakota before joining the Missouri River.<sup>174</sup> Attempts to negotiate an interstate water compact began in 1932 because the states were interested in obtaining a federal water project with interstate features.<sup>175</sup> The federal government had apparently required the states to enter into a compact before it would agree to fund the project.<sup>176</sup> Therefore, in 1951, the three states ratified the Yellowstone River Compact,<sup>177</sup> which assigned priority to three tiers of uses: first, pre-1950 appropriative rights in each State to the beneficial use of water in the Yellowstone River system; second, supplemental water from interstate tributaries of the Yellowstone River for pre-1950 uses; and, finally, the remaining water available for beneficial use, divided among the States by specified percentages.<sup>178</sup> Of the remaining water in this last tier, Wyoming is entitled to 40 percent of the Tongue River, 42 percent of the Powder River, 60 percent of the Clarks Fork River, and 80 percent of the Bighorn River; Montana is entitled to the rest.<sup>179</sup>

#### B. *The Facts and Procedural History*

In February 2008, Montana filed a bill of complaint alleging Wyoming had breached the Compact by consuming more than its share of water from the Tongue and Powder Rivers.<sup>180</sup> Montana alleged that new surface and groundwater diversions in Wyoming and changes in pre-1950 Wyoming appropriators' irrigation methods, whereby conserved water was reapplied to acreage under prior cultivation, were harming Montana's pre-1950s appropriators.<sup>181</sup> As a remedy, Montana sought to make Wyoming release

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173. See *id.* at 1769-1779, 1779-1782.

174. *Id.* at 1769.

175. *Id.* at 1770.

176. See *id.*; S. REP. NO. 883, 82d Cong., 1st Sess., at 6 (1951); JOINT APPENDIX TO HOUSE REP. NO. 1118, 82d Cong., 1st Sess., at 17 (1951).

177. See *Montana v. Wyoming*, 131 S. Ct. 1765, 1770 (2011).

178. *Id.*

179. *Id.*

180. *Id.*

181. See *id.* at 1769-70.

water it had stored at a time when there was adequate water for those appropriators.<sup>182</sup>

After Wyoming filed a motion to dismiss, the Supreme Court appointed Barton Thompson, Jr., Special Master and referred the motion to him.<sup>183</sup> The Special Master issued his first Memorandum Opinion (also called the “First Interim Report”) on the motion to dismiss on June 2, 2009.<sup>184</sup> Ten days later, on June 12, Thompson solicited letter briefs from the parties that addressed: “(1) any corrections or clarifications of state law that should be made in the Memorandum Opinion, (2) any clarifications that should be made regarding the conclusions or recommended decision in the Memorandum Opinion, and (3) various other matters concerning the Memorandum Opinion.”<sup>185</sup> After receiving the parties’ letter briefs, Thompson issued a thirty-one-page Supplemental Opinion on September 4, 2009, addressing the three principal issues raised by the states.<sup>186</sup>

In the First Memorandum Opinion on the motion to dismiss, Special Master Thompson found that Article V of the Yellowstone River Compact protected Montana’s pre-1950 appropriators from new surface and groundwater diversions in Wyoming and thus recommended denying Wyoming’s motion to dismiss.<sup>187</sup> He also rejected Montana’s claim regarding efficiency improvements by pre-1950 appropriators in Wyoming that increased net consumption on existing agricultural acreage.<sup>188</sup> Montana filed an exception<sup>189</sup> to this finding by the Special Master on May 13, 2010, and the matter returned to the Supreme Court.<sup>190</sup> The Court’s May 2, 2011, opinion, which was limited solely to the question of whether the Court should sustain or overrule Montana’s exception, was based largely on the September 4, 2009, Supplemental Opinion of the Special Master.

Montana’s exception renewed its allegation from its initial complaint that Wyoming’s pre-1950 users had changed irrigation methods to the detriment of Montana’s pre-1950 users, claiming that Wyoming’s pre-1950 appropriators

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182. See Memorandum Opinion of the Special Master on Wyoming’s Motion to Dismiss Bill of Complaint, *Montana v. Wyoming*, No. 137, 2009 WL 6977487, at \*29 (U.S. June 2, 2009).

183. *Montana v. Wyoming*, 131 S. Ct. 1765, 1770 (2011).

184. See Memorandum Opinion of the Special Master on Wyoming’s Motion to Dismiss Bill of Complaint, *Montana v. Wyoming*, No. 137, 2009 WL 6977487 (U.S. June 2, 2009) (the opinion is forty-three pages long).

185. Supplemental Opinion of the Special Master on Wyoming’s Motion to Dismiss Bill of Complaint, *Montana v. Wyoming*, No. 137-Orig., 2009 WL 6984024, at \*2 (U.S. Sept. 4, 2009).

186. See *id.*

187. See *Montana v. Wyoming*, 131 S. Ct. 1765, 1770 (2011); Memorandum Opinion of the Special Master on Wyoming’s Motion to Dismiss Bill of Complaint, *Montana v. Wyoming*, No. 137-Orig., 2009 WL 6977487, at \*2, 14–15 (U.S. June 2, 2009).

188. See Memorandum Opinion of the Special Master on Wyoming’s Motion to Dismiss Bill of Complaint, *Montana v. Wyoming*, No. 137-Orig., 2009 WL 6977487, at \*41 (U.S. June 2, 2009). The main case proceeded with Montana’s remaining claims. *Montana v. Wyoming*, 131 S. Ct. 1765, 1771 (2011).

189. See *Montana’s Exception and Brief*, *Montana v. Wyoming*, No. 137, 2010 WL 4132841 (U.S. May 13, 2010).

190. *Montana v. Wyoming*, 131 S. Ct. 1765, 1771 (2011).



had decreased the volume of water that returned to the Tongue and Powder Rivers by 25 percent or more when they switched from flood to sprinkler irrigation.<sup>191</sup> Montana argued the more efficient irrigation systems caused less water to reach Montana and were thus prohibited by Article V(A) of the Compact, which provides for the continued enjoyment of pre-1950 appropriative rights in each signatory State.<sup>192</sup> Although Wyoming disputed the allegation of reduced return flows, the Court accepted it as true for the purposes of evaluating Montana's exception at the motion to dismiss phase.<sup>193</sup>

*C. Majority Opinion by Justice Thomas*

Writing for the Court, Justice Clarence Thomas started by addressing Montana's argument that background principles of appropriation law, as incorporated into the Compact, do not allow Wyoming's pre-1950 appropriators to increase their net consumption of water through improved irrigation systems.<sup>194</sup> As a preliminary matter, the Court stated that Montana's pre-1950 appropriators were like junior appropriators in the underlying conflict because Montana was the downstream state.<sup>195</sup> Montana had conceded that its pre-1950 appropriators had no way of preventing Wyoming's upstream pre-1950 appropriators from fully exercising their water rights when the rivers were low, effectively depriving Montana users of water.<sup>196</sup> Based on this concession, Justice Thomas effectively treated Montana's pre-1950 appropriators as junior to Wyoming's pre-1950 appropriators for the rest of the opinion.<sup>197</sup> The Court acknowledged, but did not reconcile, the fact that the Compact recognized—"[a]s between the States"—all pre-1950 water users in Montana and Wyoming have the same seniority levels.<sup>198</sup>

The Court examined the no-injury rule,<sup>199</sup> the doctrine of recapture,<sup>200</sup> and the work of water law scholars, and ultimately held the doctrine of

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191. *Id.*

192. *Id.*

193. *See id.* at 1771 n.3.

194. *See id.* at 1771–72.

195. *See id.* at 1772 (stating that, “[f]or our purposes, Montana’s pre-1950 water users are similar to junior appropriators”).

196. *Id.*

197. Note, however, that traditional prior appropriation doctrine does not base seniority on which user is farther upstream, but on the principle of “first in time, first in right”; therefore, a junior user upstream from a senior one has to restrict his usage (foregoing water altogether in some cases) in order to allow the senior user to get his allocation during a dry year. *See Memorandum Opinion of the Special Master on Wyoming’s Motion to Dismiss Bill of Complaint, Montana v. Wyoming*, No. 137, 2009 WL 6977487, at \*5 (U.S. June 2, 2009).

198. *See Montana v. Wyoming*, 131 S. Ct. 1765, 1772 (2011) (stating that “[a]s between the States, the compact assigned the same seniority level to all pre-1950 water users in Montana and Wyoming”).

199. *See Supplemental Opinion of the Special Master on Wyoming’s Motion to Dismiss Bill of Complaint, Montana v. Wyoming*, No. 137, 2009 WL 6984024, at \*14 (U.S. Sept. 4, 2009) (describing the no-injury rule as protecting “downstream appropriators from formal changes in upstream water rights that reduce return flow to the waterway and thereby reduce the amount of water available to downstream appropriators”).

appropriation in Wyoming and Montana did not prohibit Wyoming users from improving their irrigation systems to the detriment of downstream users in Montana.<sup>201</sup> While acknowledging that appropriation doctrine continues to evolve differently in individual States, resulting in a lack of clarity regarding certain appropriation principles,<sup>202</sup> the Court found the no-injury rule as it exists in Montana and Wyoming does not prevent senior appropriators from changing irrigation methods even if the change harms other appropriators.<sup>203</sup> In particular, Justice Thomas reasoned, the lack of litigation over changes to irrigation systems and the abundance of litigation over changes in the point of diversion and the purpose and place of use strongly implied that improvements to irrigation systems do not violate the no-injury rule.<sup>204</sup> The Court also cited Montana and Wyoming state cases concerning the doctrine of recapture as support for its conclusion, even though the Court noted (and promptly disregarded) that some cases from Utah and Colorado supported Montana's contention that the doctrine of recapture should not apply where the water would otherwise flow back to the same stream.<sup>205</sup> Finally, the Court quoted various water law scholars as support for its holding that, under background principles of appropriation law, more efficient irrigation systems are not prohibited merely because a downstream user will be injured.<sup>206</sup>

The Court next turned to Montana's argument that the definition of "beneficial use" in the Compact restricts the scope of pre-1950 appropriative rights to the net volume of water that was actually consumed in 1950.<sup>207</sup> Article II(H) of the Compact defines "beneficial use" to be "use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man."<sup>208</sup> Montana argued that Wyoming's pre-1950 appropriators were not entitled, under Article V(A) of the Compact, to the full scope of their appropriative rights, but instead were only entitled to the net volume of water actually being depleted in 1950.<sup>209</sup> However, Justice Thomas reasoned the Compact's language did not suggest that beneficial use was a measure of the volume of water depleted but, rather, a type of use that depletes the water supply.<sup>210</sup> Concluding that Montana's argument would drastically redefine the term "beneficial use" from its historic meaning, the Court agreed with the

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200. *See id.* at 17–19 (explaining that the doctrine of recapture allows appropriators diverting water for irrigation to recapture and reuse the water that is left over, in other words, seepage water and runoff, before it leaves their land).

201. *See Montana v. Wyoming*, 131 S. Ct. 1765, 1779 (2011).

202. *See id.* at 1773 n.5.

203. *See id.* at 1773–74.

204. *See id.* at 1774.

205. *See id.* at 1774–76.

206. *See id.* at 1777.

207. *See id.* at 1777–78.

208. Yellowstone River Compact, MONT. CODE ANN. § 85-20-101, art. II(H) (West 2011) (consent granted by Congress Oct. 30, 1951, Pub. L. No. 82-231, 65 Stat. 663); *see also Montana v. Wyoming*, 131 S. Ct. 1765, 1777–78 (2011).

209. *Montana v. Wyoming*, 131 S. Ct. 1765, 1778 (2011).

210. *See id.*

Special Master that Article V(A) did not change the scope of protected pre-1950 appropriative rights.<sup>211</sup>

Having rejected both of Montana's arguments, the Court overruled the state's exception to the Special Master's First Interim Report.<sup>212</sup>

#### *D. Dissent by Justice Scalia*

As the sole dissenter, Justice Antonin Scalia argued the Court erroneously disregarded the significance of the Compact's definition of "beneficial use" and failed to properly ascertain the intent of the signatory states in creating the Compact.<sup>213</sup> He reasoned that the use of the word "depleted" in Article II(H) provided clear indication of the parties' intention to limit the volume of water to which pre-1950 Wyoming appropriators are entitled.<sup>214</sup>

Well known for being a judicial textualist, Justice Scalia dissented "because the Court's analysis substitutes its none-too-confident reading of the common law for the Compact's definition of 'beneficial use.'"<sup>215</sup> In particular, he found it significant that the "Compact's authors chose to define beneficial use in terms of *depletion*" instead of using words like "diverted" or "diversion" as they had done in other sections of the Compact.<sup>216</sup> As a counterargument to the majority's criticism that the word "depleted" lacked the "clarity" needed to redefine the term "beneficial use," Scalia noted that "'beneficial use' has never had the 'longstanding meaning' the Court posits."<sup>217</sup> To support this argument, Scalia quoted the majority's own language regarding the inconclusiveness of state water law and unclear areas of appropriation doctrine.<sup>218</sup>

Unfortunately, neither the ten-page majority opinion nor Scalia's three-page dissent adequately analyzed what may have been the actual intention of the Compact authors and signatory states. The majority found persuasive the fact that the Compact did not set a quantity of water to be divided between the pre-1950 users in each signatory state, and concluded that the Compact was not intended to guarantee Montana a set quantity of water.<sup>219</sup> Meanwhile, Justice Scalia called this a "straw man," briefly explaining that "Montana does *not* demand a precise volume of water each year" but, rather, asks that "its pre-

211. *See id.* at 1778–79.

212. *See id.* at 1778. Montana's claims regarding Wyoming's new surface and groundwater diversions remain active. *See* Memorandum Opinion of the Special Master on Wyoming's Motion to Dismiss Bill of Complaint, *Montana v. Wyoming*, No. 137, 2009 WL 6977487, at \*2 (U.S. June 2, 2009).

213. *See Montana v. Wyoming*, 131 S. Ct. 1765, 1779 (2011).

214. *Id.* at 1781.

215. *Id.* at 1780 (citation omitted).

216. *Id.*

217. *Id.* at 1781.

218. *See id.* (stating "[a]ccording to the Court, '(t)he amount of water put to 'beneficial use' has never been defined by net water consumption"; however, "[b]efore making this statement, the Court [] spent some 10 pages . . . conducting a 'sensitive . . . inquiry (that) counsels caution'; into a field (state water law) where the answer of this Court is not conclusive . . . resulting in the Court's best guess concerning 'an unclear area of appropriation doctrine'").

219. *See id.* at 1782.

1950 water users occupy the same position relative to Wyoming's pre-1950 users in 2011 as they did in 1950."<sup>220</sup> However, neither opinion contains further discussion of this important point or of giving effect to the intention of the Compact authors and signatory states. Instead both majority and dissent focus on the plain terms of the Compact in light of the doctrine of appropriation.<sup>221</sup>

#### *E. Deference to the Special Master's Opinion*

In overruling Montana's exception, the Court approved the Special Master's conclusion of law regarding the legal sufficiency of a novel claim that had never before been brought before the Court. Yet, Special Master Thompson's conclusion that Wyoming's pre-1950 users could change their irrigation methods to the detriment of Montana's pre-1950 users was based on a survey of admittedly murky state law and background appropriation doctrine.<sup>222</sup> The Court's adoption of the Special Master's recommendation meant that Montana would never be able to bring evidence to show whether or not—and to what extent—the change to sprinkler irrigation by Wyoming users had harmed Montana's users.

Furthermore, by approving the Special Master's report, the Court effectively announced a new rule about return flows that results in the benefits and costs being borne by different states: Wyoming gets all the benefits by virtue of being upstream, while Montana bears all the costs. If one state wants to change rules about return flows for its own (in-state) appropriators, it can do so fairly by taking into account costs and benefits to individual users and to the entire state. However, it appears unfair to insist that Montana appropriators bear all the costs and receive none of the benefits of changed practices in Wyoming. While the Court's ultimate holding may be virtuous for encouraging efficient use of water and indirectly furthering conservation values, the seemingly unfair result would be more justifiable if it had been based on an explicit weighing of equitable considerations or on the Court's interpretation of the Compact's text.

#### V. THE SUPREME COURT SHOULD ADOPT NEW PROCEDURES AND STANDARDS TO INCREASE UNIFORMITY AND PREDICTABILITY IN THE COURT'S TREATMENT OF INTERSTATE WATER DISPUTES

The Supreme Court's use of Special Masters in interstate water disputes is problematic for states that need certainty and reasonably predictable outcomes.

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220. *Id.*

221. *See supra* Part IV.C and this Part.

222. *See* Supplemental Opinion of the Special Master on Wyoming's Motion to Dismiss Bill of Complaint, *Montana v. Wyoming*, No. 137, 2009 WL 6984024, at \*10 (U.S. Sept. 4, 2009) (acknowledging that "whether and under what circumstances an appropriator can increase consumption to the detriment of downstream appropriators is not one of the clearer areas of prior-appropriation law" and, furthermore, "[n]o western state court appears to have conclusively answered the question posed").

Even if Special Masters are necessary to ensure efficient proceedings in original jurisdiction cases, the Court should adopt new procedures and standards to increase procedural uniformity and substantive predictability in its treatment of interstate water disputes. Parties to a negotiation are more likely to accept the resulting agreement as fair if they agree at the outset to some objective criteria.<sup>223</sup> Similarly, parties to an adjudication are more likely to accept the outcome if the court has followed established standards, rules, and principles of law.

Carstens has observed that restoring original jurisdiction trial functions to the Justices themselves is “so unlikely as to place it beyond consideration” because the Supreme Court has articulated its preference for its appellate docket over original jurisdiction cases.<sup>224</sup> However, at least with interstate water disputes, the Court needs to change its current practice of delegating and deferring to Special Masters. This Part presents several specific recommendations, proposes a rule for analyzing exceptions to a Special Master’s report, and discusses the potential for instituting a two-person panel of Special Masters that includes an Article III judge.

#### A. *Current Standard of Review*

In cases involving an interstate water compact, the Court and/or the Special Master should, as a matter of course, analyze the text of the compact and discuss the intent of the drafters and signatory parties.<sup>225</sup> A congressionally approved compact is a contract and a federal statute.<sup>226</sup> To interpret a compact, therefore, the Supreme Court first looks to the plain meaning of the text at issue in the context of the compact as a whole.<sup>227</sup> If the text is unambiguous, “it must be applied in accordance with its terms.”<sup>228</sup> If, however, the Court determines the text is ambiguous, it can look to extrinsic evidence of intent in the compact negotiations, just as it examines legislative history when interpreting a statute.<sup>229</sup> Therefore, the Court should look at the plain meaning of the

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223. FISHER ET AL., *supra* note 9, at 85 (explaining that, “[i]deally, to assure a wise agreement, objective criteria should be not only independent of will but also both legitimate and practical”).

224. Carstens, *supra* note 6, at 686–87 (noting that “[t]he Court—which identifies its ‘paramount role’ as that of the ‘supreme federal appellate court’—[has] already justified the ‘sparing’ exercise of its original jurisdiction as necessary ‘so that our increasing duties with the appellate docket will not suffer’”); *see also* Maryland v. Louisiana, 451 U.S. 725, 762 (1981) (Rehnquist, J., dissenting) (stating “[t]he Court has recognized that expending its time and resources on original jurisdiction cases detracts from its primary responsibility as an appellate tribunal”).

225. *See* Memorandum Opinion of the Special Master on Wyoming’s Motion to Dismiss Bill of Complaint, *Montana v. Wyoming*, No. 137, 2009 WL 6977487, at \*11–12 (U.S. June 2, 2009).

226. *Cuyler v. Adams*, 449 U.S. 433, 438 (1981); *Texas v. New Mexico*, 482 U.S. 124, 128 (1987); *New Jersey v. New York*, 523 U.S. 767, 811 (1998).

227. *See Texas v. New Mexico*, 462 U.S. 554, 567–68 (1983).

228. *Texas v. New Mexico*, 482 U.S. 124, 128 (1987).

229. *Oklahoma v. New Mexico*, 501 U.S. 221, 236 n.5 (1991); *Texas v. New Mexico*, 462 U.S. 554, 569 n.14 (1983).

compact and use extrinsic evidence when necessary to ascertain the intent of the parties.<sup>230</sup>

### *B. Specific Recommendations*

#### *1. Be Comfortable Engaging More Actively in Cases Involving Interstate Water Disputes*

First, the Justices need to become more comfortable interpreting and enforcing water compacts and the Court's own decrees. Interstate water compacts are more about specifically negotiated language than they are about any state's water law, and Supreme Court Justices are masters of the English word. However, the Justices appear to be hesitant to assert their authority in the arena of water law, perhaps because they perceive it to be an unusually complicated body of law requiring significant expertise to understand.

What the Justices should realize is that no one is truly an expert in any particular interstate water compact. Compact drafters represented different signatory states and likely possessed expertise regarding only their particular state's water law. Unless the terms of a compact explicitly establish one state's law as supreme over another, the words in the compact are much more important than the intricate details of individual states' water laws. Even the most knowledgeable water law expert is unlikely to have analyzed the exact issue presented to the Court in the context of the same compact. A compact is a carefully negotiated document, not a water law exam. While an expert may be helpful for certain fact-finding functions, every step involved in the interpretation and enforcement of a compact does not require the attention of a water law expert. In fact, Justices not well versed in water law may be better at handling some functions of interpretation.<sup>231</sup>

#### *2. Establish a Consistent Procedural Framework*

The Court should use a consistent procedural framework.<sup>232</sup> The Supreme Court Rules establish certain procedures for Special Masters to follow in original jurisdiction cases, such as the mandate that the Federal Rules of Civil Procedure govern the form of pleadings.<sup>233</sup> Carstens argues that discovery rules and other Federal Rules of Civil Procedure should also apply in original jurisdiction cases in order to "promote [the] fairness and integrity of the proceedings" as well as "predictability throughout the course of the

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230. See *Oklahoma v. New Mexico*, 501 U.S. 221, 234 (1991) (approving the Special Master's review of "considerable evidence regarding the drafters' intent" as to the meaning of a disputed article of the Canadian River Compact); *Montana v. Wyoming*, 131 S. Ct. 1765, 1779 (2011) (concluding that "the plain terms of the Compact" resolve the question presented).

231. See *supra* Part III.C.

232. Carstens, *supra* note 6, at 695–98.

233. See SUP. CT. R. 17; Carstens, *supra* note 6, at 697.

proceedings.”<sup>234</sup> Additionally, she favors adopting certain rules from the Federal Rules of Evidence, such as the Best Evidence Rule and rules governing expert testimony.<sup>235</sup> While acknowledging that standardized rules of procedure and evidence have their critics, Carstens concludes that the “need for predictability and for ensuring uniformity—as much within a case as between cases—is substantial enough to outweigh heavily these criticisms.”<sup>236</sup>

### 3. Refrain from Referring Pure Questions of Law to the Special Master

The Court should not refer pure questions of law to a Special Master. Justice Rehnquist, in a dissenting opinion in an original jurisdiction case, wrote: “It is no reflection on the quality of work by the Special Master in this case or any other Master in any other original-jurisdiction case to find it unsatisfactory to delegate the proper functions of this Court.”<sup>237</sup> Especially in interstate water disputes, where states are “suing to advance a sovereign or quasi-sovereign interest,”<sup>238</sup> pure questions of law—like a motion to dismiss—should not be delegated to a Special Master. If the Court is unwilling to alter its current practices, then Special Masters should uniformly refuse to make strong recommendations about pure questions of law, thereby forcing the Court to engage more fully with each case.

### 4. Use the Intent of the Compacting Parties to Inform Textual Interpretations

Finally, the Court should balance the plain meaning of the text with other indications of the intent of the parties. The compacting parties’ intent should always inform textual interpretations, especially when changed circumstances or new information present a question of law not explicitly answered in the compact’s text.

The Court has at its disposal contract law principles, statutory construction tools, and constitutional arguments. Contract law principles may help clarify the meaning of a particular word or phrase or otherwise help discern the intent of the parties.<sup>239</sup> Similarly, statutory construction tools (including plain meaning, *stare decisis*, and textual canons) may be used to help define a particular word or phrase, while legislative history and purpose (or, in this

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234. Carstens, *supra* note 6, at 697.

235. *See id.* at 698–99.

236. *Id.* at 700.

237. *Maryland v. Louisiana*, 451 U.S. 725, 762–63 (1981) (Rehnquist, J., dissenting).

238. *Id.* at 767 (Rehnquist, J., dissenting).

239. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 201 cmts. a–c (discussing general usage; variation in usage across place, context, and time; the importance of context in interpretation; and the primacy of parties’ mutual understanding of meaning, noting that “the courts do not make a contract for the parties” so that “the mutual understanding of the parties prevails even where the contractual term has been defined differently by statute or administrative regulation”); *id.* § 202 (describing rules to assist in contract interpretation); *id.* § 203 (outlining a preference for choosing among possible interpretations); *id.* § 207 (preferring an interpretation the “serves the public interest” when selecting from several reasonable meanings); *id.* § 212 (discussing interpretation of integrated agreements); *id.* §§ 219, 220 (defining usage and describing the role of “relevant usage” in contract interpretation).

context, the history of compact negotiation) can help determine the parties' intent.<sup>240</sup> Constitutional arguments,<sup>241</sup> such as originalism, could also be used to discuss the intent of the parties<sup>242</sup> and the purposes of the compact. For example, an argument could be made that the structure of the compact and the relationship of the parties reveal the original intent of the signatory states.<sup>243</sup> Or an argument from the text or context of the compact could be used to show a particular purpose of the compact.<sup>244</sup>

*C. Proposed Rule for Analyzing Exceptions to a Special Master's Opinion*

If the Court is unwilling to adopt any of these measures, then it should at least establish a clear rule for how it will analyze exceptions to a Special Master's opinion. A rule that would give states more certainty and predictability could include the following steps:

Step 1. When a state files an exception to a Special Master's opinion, the Court should first ask if the text of the Compact authorizes the Court to act with the force of law in the fashion recommended by the Special Master.<sup>245</sup> If it does not, the Court should sustain the exception. If it does, the Court should proceed to step two.

Step 2. Next, the Court should ask if the text of the Compact speaks directly and unambiguously to the question at issue. If the answer is yes, the Court must give effect to the unambiguous intent and sustain or overrule the exception accordingly. If the answer is no, then the Court should proceed to step three.

Step 3. Finally, the Court should ask if the Special Master's interpretation or recommendation is a reasonable and permissible construction of the Compact that is consistent with the Compact's purpose and the intent of the signatory states. In analyzing this question, the Court should consider multiple factors, including priority of apportionment, comparison of relative harms and

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240. See generally YULE KIM, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS (2008); 2A SUTHERLAND STATUTORY CONSTRUCTION § 45:1-§58:6 (7th ed.); Richard A. Posner, *Statutory Interpretation—In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983).

241. See MICHAEL KENT CURTIS, J. WILSON PARKER, DAVISON M. DOUGLAS, PAUL FINKELMAN, CONSTITUTIONAL LAW IN CONTEXT: VOLUME 1, 33-35 (1st ed. 2003) (describing some basic types of constitutional argument, including textual, structural, and arguments from history or public policy).

242. See *id.* at 34 (distinguishing intent of the framers from the intent of the "ratifiers in the states" or the "people they represent").

243. See *id.* at 33 (describing how an argument from structure and relationship "looks at the broader objects or purposes of the Constitution and asks how the Constitution must be interpreted to achieve these purposes").

244. See *id.* (explaining how a constitutional argument from text "seeks to find the meaning and operation of provisions of the Constitution by looking at the meaning of the words of the text," while an argument from context "focuses on the use of words in other parts of the Constitution to throw light on the clause under consideration").

245. For example, if the Special Master recommends giving a vote to a previously non-voting federal representative on a commission established by compact, the Court would find that the compact does not authorize it to act with the force of law in this way.



benefits, conservation and efficiency, availability of substitute supplies, and return flows. If the answer is yes, the Court should overrule the exception. If the answer is no, the Court should sustain the exception.

*D. Appointing an Article III Judge as One of Two Special Masters*

Critics assert that non-Article III Special Masters lack the guarantee of independence and neutrality of an Article III judge and that their use in judicial proceedings threatens the independence of the federal judiciary.<sup>246</sup> The appearance of neutrality and independence is particularly important in the context of interstate water disputes, where sovereign states have so much at stake and could be ordered to pay large damage sums or to suffer the loss of beneficial use of water. When states come before the Supreme Court in an original jurisdiction case, they have not explicitly “consented to the delegation of rights to a non-Article III actor.”<sup>247</sup> If a “losing” state does not like the outcome recommended by a Special Master and adopted—seemingly without adequate review—by the Supreme Court, that state may understandably feel the proceedings were unfair. If a state feels the outcome is unfair, the dispute will likely continue after the close of litigation. Therefore, the Court should appoint at least one Article III judge as Special Master in original jurisdiction cases involving interstate waters.

Although a fairly compelling argument can be made that water law expertise is never necessary for settling interstate water disputes, the Court is unlikely to stop turning to expert Special Masters. Furthermore, a Special Master with water law expertise may help to “bridge the gap created by epistemological differences” between water law and other legal disciplines.<sup>248</sup> Additionally, Special Masters with expertise can assist judges in evaluating scientific and technical evidence, in educating them about complicated issues of material importance, and in analyzing quantitative evidence that might be confusing to non-experts.<sup>249</sup> Given the desirability of both an Article III actor and a water law expert, the ideal Special Master would seem to be a retired federal judge with water law expertise. Unfortunately, retired federal judges who are also experts in state water law are rare, especially if they must also be capable of overseeing a case that could last for more than a decade.

Consequently, the Supreme Court should appoint a two-person panel of Special Masters, comprised of one Article III judge and one water law expert. The Court could require the two Special Masters to make all decisions together,<sup>250</sup> or it could delegate different functions to each Special Master. If

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246. See *supra* notes 156–159 and accompanying text.

246. Carstens, *supra* note 6, at 655–56.

247. *Id.* at 702.

248. Farrell, *supra* note 144, at 284.

249. Farrell, *supra* note 130, at 953.

250. The potential for the two special masters to disagree with one another would have the salutary effect of requiring the Court to engage more fully and issue an opinion based on its own analysis.

the states strongly object to the costs of having two Special Masters instead of one,<sup>251</sup> they may waive their right to a trial before an Article III judge.<sup>252</sup>

#### CONCLUSION

While the Supreme Court may want states to resolve complicated water conflicts among themselves,<sup>253</sup> states need the Court to present a good alternative to the negotiating table by resolving disputes in a more predictable fashion and in a reasonable amount of time, so that states can make informed decisions about whether or not to litigate. Unfortunately, the Supreme Court appears determined to make adjudication an unattractive option for states. In the past, when states were first choosing between filing an equitable apportionment suit or negotiating an initial interstate water compact, the Court made equitable apportionment so unattractive that states began voluntarily choosing the negotiating table. However, after entering into compacts, many states encountered problems of breach or difficulties with compact interpretation. When the states looked to the Court for help resolving these conflicts, the Court again appeared intent on making adjudication unattractive, even though it had arguably pushed states into negotiating the problematic compacts in the first place.

The Supreme Court's use of Special Masters in interstate water disputes is akin to forced arbitration, with the Court playing a minor role as referee when the ball goes out of bounds. The Court's deference to the Special Master in *Montana v. Wyoming* is just the latest example of a pattern of judicial abdication in interstate water disputes. If the Court is unwilling to make changes to better address states' substantial interests in original jurisdiction cases, future Special Masters should exert their considerable influence to encourage the Court's comprehensive engagement with interstate water disputes.

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251. See *Montana v. Wyoming*, 131 S. Ct. 497 (2010) (awarding the Special Master more than \$72,000 in fees and expenses for service provided over a one-year period).

252. See *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848–49 (1986) (explaining that, “as a personal right, Article III’s guarantee of an impartial and independent federal adjudication is subject to waiver”).

253. See *supra* note 8 and accompanying text.

## APPENDIX

**TABLE 1: Special Masters Appointed in Cases Involving  
Equitable Apportionments and Interstate Water Compacts**

<i>Case</i>	<i>Special Master</i>	<i>Subject Matter</i>	<i>Notes</i>
<i>Wyoming v. Colorado</i> , 259 U.S. 419 (1922)	Unknown	EA (Laramie River)	Applied prior appropriation across state lines.
<i>Washington v. Oregon</i> , 283 U.S. 801 (1931); 288 U.S. 592 (1933); 297 U.S. 517 (1936)	William W. Ray (Attorney)	Attempted EA (Walla Walla River)	Adopted Special Master's report and dismissed complaint, in which Washington sought to stop diversions in Oregon.
<i>New Jersey v. New York</i> , 283 U.S. 805 (1931)	Unknown	EA (Delaware River)	
<i>Nebraska v. Wyoming</i> , 296 U.S. 542 (1935); 325 U.S. 589, 591 (1945)	Michael J. Doherty (Attorney; 1936 President, Minnesota State Bar)	EA (North Platte River)	Exceptions overruled; subsequent settlement.
<i>New Jersey v. New York</i> , 347 U.S. 995, 995 (1954)	Kurt F. Pantzer (Attorney)	Enforcement of prior EA decree (Delaware River)	
<i>Wyoming v. Colorado</i> , 353 U.S. 953 (1957)	None	Vacation of 1922 EA decree	Vacated 1922 decree upon joint motion of counsel.
<i>Texas v. New Mexico</i> , 423 U.S. 942, 942 (1975)	Jean S. Breitenstein (Former Tenth Circuit judge)	1949 Pecos River Compact	Breitenstein relieved in 1984 upon his own request before resolution of the case.
<i>Colorado v. New Mexico</i> , 459 U.S. 176, 180 (1982); 467 U.S. 310, 320 (1984)	Ewing T. Kerr (Former federal district court judge)	EA (Vermejo River)	Rejected the Special Master's recommendation and refused to permit the diversion Colorado sought.
<i>Texas v. New Mexico</i> , 468 U.S. 1202 (1984); 482 U.S. 124, 134-135 (1987)	Charles J. Meyers (Former Dean, Stanford Law School)	1949 Pecos River Compact	Meyers replaced Breitenstein and filed report leading to a decree requiring the appointment of a River Master to make periodic calculations as an enforcement mechanism.
<i>Kansas v. Colorado</i> , 478 U.S. 1018 (1986)	Wade H. McCree, Jr. (Former Sixth Circuit judge)	1949 Arkansas River Compact	McCree died before resolution.
<i>Kansas v. Colorado</i> , 484 U.S. 910 (1987)	Arthur L. Littleworth (Attorney, scholar)	1949 Arkansas River Compact	Littleworth replaced McCree.
<i>Nebraska v. Wyoming &amp; Colorado</i> , 483 U.S. 1002 (1987)	Owen Olpin (Attorney)	Enforcement of prior EA decree (North Platte River)	
<i>Texas v. New Mexico</i> , 488 U.S. 917 (1988)	D. Monte Pascoe (Attorney)	1949 Pecos River Compact	Pascoe replaced Meyers.

<i>Case</i>	<i>Special Master</i>	<i>Subject Matter</i>	<i>Notes</i>
<i>Oklahoma v. New Mexico</i> , 484 U.S. 1023 (1988)	Jerome C. Muys (Attorney, scholar)	1951 Canadian River Compact	Exceptions overruled/sustained in part.
<i>Kansas v. Nebraska</i> , 528 U.S. 1001 (1999)	Vincent L. McKusick, (Former Chief Justice, Maine Supreme Court)	1943 Republican River Compact	Negotiated stipulation approved by decree in 2003.
<i>Virginia v. Maryland</i> , 531 U.S. 922 (2000); 540 U.S. 59 (2003)	Ralph I. Lancaster, Jr. (Attorney)	Dispute regarding 1785 compact and 1877 arbitration award involving Potomac River	Exceptions overruled.
<i>South Carolina v. North Carolina</i> , 552 U.S. 1160 (2008)	Kristin L. Myles (Attorney)	Attempted EA (Catawba River)	First female Special Master appointed by Supreme Court; states settled out of court.
<i>Montana v. Wyoming</i> , 129 S. Ct. 480 (2008)	Barton Thompson, Jr. (Professor, Stanford Law School)	1951 Yellowstone River Compact	Case ongoing.
<i>Kansas v. Nebraska</i> , 131 S. Ct. 1847 (2011)	William J. Kayatta, Jr. (Attorney)	Dispute regarding 2003 stipulation for Republican River	Case ongoing.

EA = Equitable apportionment.