HOLY MOSES: GUIDING THE RIO GRANDE OUT OF THE DESERT

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I. INTRODUCTION

The Rio Grande is a major North American river that flows south and west from its headwaters in the Rocky Mountains for

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nearly 1,900 miles, ultimately draining into the Gulf of Mexico after its final 1,250 miles serve as the eastern portion of the international border between the United States and Mexico.[1] Its watershed covers 335,000 square miles, serving as a prime water source that has facilitated westward expansion and fostered massive settlement along its banks.[2]

The flow of the Rio Grande itself is somewhat divided into an upper and a lower basin.[3] The upper basin begins at the river's headwaters in the Colorado Rockies and continues south through New Mexico and ultimately downstream of El Paso, Texas.[4] However, around Fort Quitman, Texas, located just south of El Paso, the river's flows are no longer notably attributable to its origin or even to return flows from the upper basin.[5] Rather, downstream of Fort Quitman, the Rio Grande's flows are supplied from tributary streams rising mainly in Mexico but also in the United States, which all ultimately drain into the river's main channel.[6]

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1. Allie Alexis Umoff, *An Analysis of the 1944 U.S.-Mexico Water Treaty: Its Past, Present, and Future*, 32 U.C. DAVIS ENVTL. L. & POL'Y J. 69, 71 (2008); Gabriel E. Eckstein, *Rethinking Transboundary Ground Water Resources Management: A Local Approach Along the Mexico-U.S. Border*, 25 GEO. INT'L ENVTL. L. REV. 95, 98-99 (2012); Cathaleen Qiao Chen, *Texas Hoping for Edge over New Mexico in Water Battle*, TEX. TRIB. (Apr. 2, 2014), https://www.texastribune.org/2014/04/02/texas-hoping-edge-over-new-mexico-water-battle/; Robert J. McCarthy, *Executive Authority, Adaptive Treaty Interpretation, and the International Boundary and Water Commission, U.S. – Mexico*, 14 U. DENV. WATER L. REV. 197, 249-50 (2011); *About the Rio Grande*, INT'L BOUNDARY & WATER COMM'N, http://www.ibwc.gov/crp/riogrande.htm (last visited Feb. 18, 2016).

2. *See* Noah D. Hall, *Interstate Water Compacts and Climate Change Adaptation*, 5 ENVTL. & ENERGY L. & POL'Y J. 237, 304-05 (2010) (noting the Rio Grande's usefulness within agricultural, domestic, and industrial spheres). The Rio Grande's importance in the region cannot be overstated. It currently "supplies water for drinking and irrigation uses for more than 6 million people and 2 million acres of land." *About the Rio Grande*, INT'L BOUNDARY & WATER COMM'N, http://www.ibwc.gov/crp/riogrande.htm (last visited Jan. 12, 2015).

3. DOUGLAS R. LITTLEFIELD, CONFLICT ON THE RIO GRANDE: WATER AND THE LAW, 1879-1939, at 18-19 (2008); NICOLE CARTER, CLARE RIBANDO SEELKE, & DANIEL T. SHEDD, CONG. RESEARCH SERV., R43312, U.S.-MEXICO WATER SHARING: BACKGROUND AND RECENT DEVELOPMENTS 10 (2015) [hereinafter CRS Report].

4. LITTLEFIELD, *supra* note 3; CRS Report, *supra* note 3.

5. LITTLEFIELD, *supra* note 3, at 19, 208.

6. *Id.* at 18-19.

Unfortunately, due in large part to the river's importance in the region, allocation of its water has proven to be a source of repeated conflicts, both upstream of the international border, where the river's upper basin crosses state boundaries, and also in the lower basin, between the United States and Mexico.[7] Any and all efforts to impound and divert flows necessarily implicate the interests of other users in the basin, inevitably leading to destructive competition and generating mistrust over usage of the common resource.[8]

Recently, Texas and New Mexico have reignited their contentious disagreement, this time over New Mexico's authority to increase state-permitted surface diversions and groundwater pumping in the upper Rio Grande basin just north of their shared border.[9] Domestic apportionment of the river's water rights in its upper basin is governed by the Rio Grande Compact ("Compact"), an interstate agreement between Colorado, New Mexico, and Texas that was ratified by the U.S. Senate in 1939 and limits each party's usage of the river's flows.[10] The Compact requires that the state of Colorado deliver

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7. Letter from Texas Congressional Delegation, to President Barack Obama (Sept. 17, 2014) [hereinafter Letter to Obama] (on file with the Tex. Comm'n on Envtl. Quality); Philip Dunlap, *Border Wars: Analyzing the Dispute over Groundwater Between Texas and Mexico*, 12 L. & BUS. REV. AM. 215, 216 (2006); Tiffany Dowell Lashmet, *Texas Water Wars: Texas v. New Mexico*, TEX. AGRILIFE EXTENSION SERV.: TEX. AGRIC. L. BLOG (Sept. 18, 2013), http://agrilife.org/texasaglaw/2013/09/18/texas-water-wars-texas-v-new-mexico/; *see* Tarryn Johnson, Comment, *What's Yours is Mine and What's Mine is Mine: Why* Tarrant Regional Water District v. Hermann *Signals the Need for Texas to Initiate Interstate Water Compact Modifications*, 46 TEX. TECH L. REV. 1203, 1223 (2014) (describing the duality of conflicts over flows in the same river).

8. *See* Joseph W. Dellapenna, *Treaties as Instruments for Managing Internationally-Shared Water Resources: Restricted Sovereignty vs. Community of Property*, 26 CASE W. RES. J. INT'L L. 27, 56 (1994) (lamenting the pattern of transboundary watercourse negotiations falling into destructive zero-sum affairs).

9. Brief in Support of Motion for Leave to File Complaint at 14-16, Texas v. New Mexico, 133 S. Ct. 1855 (2013) (No. 22-O141) [hereinafter Brief in Support]; April Reese, *Stakes High as Supreme Court Weighs Intervention in N.M.-Texas Dispute*, ENV'T & ENERGY PUBL'G (Mar. 12, 2013), http://www.eenews.net/stories/1059977697; Lashmet, *supra* note 7.

10. An Act Giving the Consent and Approval of Congress to the Rio Grande Compact, Pub. L. No. 76-96, 53 Stat. 785 (1939); Noah D. Hall, *Political Externalities, Federalism, and a Proposal for an Interstate Environmental Impact Assessment Policy*,

a certain minimum amount of water at the New Mexico state line and that the state of New Mexico deliver a certain minimum amount of water to the Rio Grande Project at the Elephant Butte Reservoir, located in southern New Mexico.[11]

The Rio Grande Project ("Project"), which administers the upper river basin downstream of Elephant Butte, is a U.S. Bureau of Reclamation water supply project that designed and funded the Elephant Butte Dam.[12] Now it apportions water usage from the resulting reservoir between downstream irrigation districts in southern New Mexico and West Texas, based upon its calculations of irrigable acreage within each district.[13] The Bureau's Rio Grande Project apportionment predates and was, therefore, ultimately incorporated into the states' Rio Grande Compact.[14] Currently, the state government of New Mexico, in an effort to relieve drought-stricken farmers below Elephant Butte, is permitting an increasing amount of surface and groundwater diversions by its citizens downstream of the Elephant Butte Dam and Reservoir, a practice which state officials in Texas argue violates the spirit of the apportionment agreement originally reached by the Bureau of Reclamation and then reaffirmed by the Rio Grande Compact.[15]

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32 HARV. ENVTL. L. REV. 49, 77 (2008); Marty Schladen, *El Paso Jumps into Fight over Rio Grande Water*, EL PASO TIMES (June 21, 2014, 7:53 PM), http://www.elpasotimes.com/news/ci_ 26010024/el-paso-jumps-into-fight-over-rio-grande.

11. An Act Giving the Consent and Approval of Congress to the Rio Grande Compact, Pub. L. No. 76-96, 53 State. 785 (1939); Chen, *supra* note 1; Lashmet, *supra* note 7; Schladen, *supra* note 10; Jeremy Brown, *105 Miles: The Rio Grande Compact and the Distance from Elephant Butte Reservoir to the Texas Line*, KAY BAILEY HUTCHISON CTR. FOR ENERGY, L. & BUS. (Feb. 26, 2014), https://kbhenergycenter.utexas.edu/2014/02/26/105-miles-the-rio-grande-compact-and-the-distance-from-elephant-butte-reservoir-to-the-texas-line/.

12. Robert Autobee, *Rio Grande Project*, U.S. BUREAU OF RECLAMATION 7 (1994), http://www.usbr.gov/projects//ImageServer?imgName=Doc_1305577076373.pdf; LITTLEFIELD, *supra* note 3, at 166–67.

13. *Rio Grande Project – Operations Manual*, U.S. BUREAU OF RECLAMATION (Jan. 12, 2010), http://www.usbr.gov/uc/albuq/rm/RGP/pdfs/RGP-Ops-Manual-2010.pdf; LITTLEFIELD, *supra* note 3, at 158-159.

14. LITTLEFIELD, *supra* note 3, at 13, 127, 220.

15. Brief in Support, *supra* note 9, at 3; Johnson, *supra* note 7, at 1222; Reese, *supra* note 9; Schladen, *supra* note 10; Brown, *supra* note 11.

Simultaneously, downstream in the lower Rio Grande basin, the United States and Mexico have begun a similar quarrel, disagreeing over Mexico's compliance with delivery of minimum flows of Mexican tributaries into the main channel of the river.[16] Despite its exclusive impact on the State of Texas, the downstream apportionment of the river is an international affair, governed by the 1944 Treaty between the United States and Mexico, entitled Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande ("Treaty"), in which both countries agreed to mutually restrict sovereignty over tributaries draining into the lower Rio Grande basin.[17] More specifically, under the Treaty, the United States is entitled to a minimum amount of flows from the Rio Grande tributaries that rise in Mexico, just as Mexico is entitled to a minimum amount of flows from the Rio Grande tributaries that rise in the United States.[18] The agreement was reached to preserve the two nations' ongoing uses of the water at the time the Treaty was made.[19]

The current international dispute focuses on a provision of the Treaty that requires Mexico to supply the United States

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16. Johnson, *supra* note 7, at 1223; Letter from Carlos Rubinstein, Chairman, Tex. Water Dev. Bd., to Hon. Edward Drusina, Comm'r, Int'l Boundary & Water Comm'n (Sept. 3, 2014) [hereinafter Letter to Drusina] (on file with the Tex. Comm'n on Envtl. Quality); Tiffany Dowell Lashmet, *Texas Water Wars: United States v. Mexico*, TEX. AGRILIFE EXTENSION SERV.: TEX. AGRIC. L. BLOG (Aug. 4, 2013), http://agrilife.org /texasaglaw/2013/08/04/texas-water-wars-united-states-v-mexico/.

17. Carolyn Cadena, *A Minute of Clarity After Decades of Confusion: "Extraordinary Drought" in the Lower Rio Grande Basin*, 24 GEO. INT'L ENVTL. L. REV. 605, 605 (2012); *see* Dellapenna, *supra* note 8, at 36 (defining the doctrine of restricted sovereignty and explaining how riparian nations cooperate under the theory to share a common water source over which neither claims exclusive control). *See generally* Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, U.S.-Mex., Feb. 3, 1944, T.S. No. 994 [hereinafter 1944 Treaty].

18. Damien M. Schiff, *Rollin', Rollin', Rollin' on the River: A Story of Drought, Treaty Interpretation, and Other Rio Grande Problems*, 14 IND. INT'L & COMP. L. REV. 117, 128-29 (2003); Umoff, *supra* note 1, at 74-75. *See generally* 1944 Treaty, *supra* note 17.

19. *See* Schiff, *supra* note 18, at 124 (documenting America's insistence that the Treaty be designed to preserve the status quo as it existed at the time of its drafting, mostly to protect American agricultural interests in the Lower Rio Grande Valley).

with one third of the inflows from six specific Mexican tributaries to ensure an adequate irrigation supply for the agricultural industry in southern Texas.[20] In the guarantee clause of this provision, the Treaty explains that regardless of how much water actually makes it into the Rio Grande's main channel from those six named Mexican tributaries, the United States remains entitled to a yearly average of at least 350,000 acre-feet of water, though any water debt accrued during a five year cycle of extraordinary drought may carry over and be repaid during the subsequent five year cycle.[21] Mexico has repeatedly failed to deliver its minimum annual requirement, particularly in four of the five years in the 2010-2015 five year cycle.[22] However, its government maintains the position that, rather than owing tributary flows on an annual basis, the Treaty only requires that it deliver a single minimum amount at the end of every five year cycle.[23] Therefore, according to the

20. Letter to Drusina, *supra* note 16; Letter to Obama, *supra* note 7; Schiff, *supra* note 18, at 129; Umoff, *supra* note 1, at 74-75; Lashmet, *supra* note 16.

21. Cadena, *supra* note 17, at 608; Schiff, *supra* note 18, at 129-30; Umoff, *supra* note 1, at 74-75; Lashmet, *supra* note 16; *see* Letter to Obama, *supra* note 7 (dismissing Mexico's claim that the country is currently experiencing a period of extraordinary drought that would entitle it to an extension to deliver its required flows); McCarthy, *supra* note 1, at 249 (criticizing the International Boundary & Water Commission for its failure to clearly define and recognize times of extraordinary drought that enable water debt extensions under the Treaty). *See generally* 1944 Treaty, *supra* note 17.

22. *Water Shortage Issue Related to the Mexican Water Deficit*, TEX. COMM'N ON ENVTL. QUALITY, https://www.tceq.texas.gov/border/water-deficit.html (last visited Sept. 4, 2015) [hereinafter *Water Shortage Issue*]; Lashmet, *supra* note 16.

23. *Water Shortage Issue*, *supra* note 22; Lashmet, *supra* note 16; *see* CRS Report, supra note 3, at n.50 (explaining that the issue of the countries' different interpretations of how the 1944 Treaty requires Mexico to pay its water debt remains unresolved, even after the 1992-2002 water cycles); Schiff, *supra* note 18, at 129 n.53 ("[T]he 350,000 acre-foot figure is not an entitlement per se but merely a baseline to be compared with an average over five years of actual Mexican contributions."). It is by this logic that Mexico insists that, no matter how little water it delivers into the Rio Grande, any water debt it may incur during a given five year cycle does not become payable until the end of that cycle; therefore, Mexico argues that it cannot be held liable for breaching the Treaty before such time. Lashmet, *supra* note 16.

Mexican interpretation of the Treaty, it is only held accountable for its water debt once every five years.[24]

Taking the downstream complainants' positions in both disputes, both New Mexico and Mexico are, in effect, executing efficient breaches of the interstate Compact and the international Treaty, respectively.[25] It is a rational economic decision for each of them to breach and accept the consequences of doing so, rather than meet their agreed-to obligations.[26] To prevent an efficient breach, either the negative consequences of breaching or the benefits of compliance must be increased, in order to incentivize adherence to an agreement's terms.[27]

The collective significance of these conflicts stems from the fact that drought conditions and explosive population growth are already putting unprecedented demands on the regional water supply.[28] As a downstream riparian in both Rio Grande basins, Texas remains uncomfortably dependent on the restricted sovereignty of its upstream neighbors for the preservation of flows from streams rising outside its state boundaries.[29] Current

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24. *Water Shortage Issue*, *supra* note 22; Lashmet, *supra* note 16; *see* Schiff, *supra* note 18, at 129 n.53 ("Mexico had claimed that it was not legally obligated to pay its current water debt until the conclusion of the five-year accounting period.").

25. Johnson, *supra* note 7, at 1222-23.

26. *See* Joshua Cender, *Knocking Opportunism: A Reexamination of Efficient Breach of Contract*, 1995 ANN. SURV. AM. L. 689, 698 (1995) ("[T]he 'efficient breach,' is the situation in which one party to a contract can make a profit by breaching the contract, even though that party will have to pay damages."). If the net value a party gains by breaching its agreement and accepting the negative consequences still exceeds the value it gains by complying with the agreement and avoiding negative consequences, then the party will have an economic incentive to breach the agreement. *Id.*

27. *See* William S. Dodge, *The Case for Punitive Damages in Contracts*, 48 DUKE L.J. 629, 680 (1999) (justifying the awarding of punitive damages to incentivize compliance of contracts and preserve parties' benefits of their bargain). To force a breaching party to comply with the agreement, either the negative consequences of breaching or the positive benefits of compliance must be increased to render any breach inefficient. *Id.*

28. Neena Satija, *Water Planners Focus on Bigger Texas, Not a Hotter One*, TEX. TRIB. (July 14, 2014), http://www.texastribune.org/2014/07/14/state-only-planning-bigger-texas-not-hotter-one/.

29. *See* Letter to Obama, *supra* note 7 (recognizing the negative externalities imposed upon the Texas economy by Mexico's failure to deliver annual minimum flows into the main channel of the Rio Grande); Lashmet, *supra* note 16 ("Economists estimate

conditions have severely stressed the two existing agreements governing one of the state's most important rivers, to the point that both the Compact and the Treaty have been left behind by reality. But that does not mean agreement is now unreachable.

This Comment proceeds in three parts. Sections II and III interpret the meanings of the original agreements by establishing the contexts in which they were made. Then, Section IV, starting with the interstate Compact and then proceeding to the international Treaty, analyzes the modern conflicts, taking heed of changes in circumstances since the agreements were reached. Section IV offers suggestions to the present-day adversaries as well as to the entities ultimately charged with mediating the disputes, so that they might all resolve their disagreements in the same spirit as their predecessors, who managed to set aside their differences for the greater good.

II. BACKGROUND OF THE INTERSTATE COMPACT CONFLICT

A. Legal Backdrop

1. Riparian Rights & Prior Appropriation Doctrines

Two doctrines of water law dominate American water rights jurisprudence.[30] First, the doctrine of riparian rights is used in places like England, France, and the eastern United States,

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that the lack of water could cost Texas farmers $395 million in economic output and that 5,000 jobs could be lost in the valley."). *But see* Dellapenna, *supra* note 8, at 40 (noting that the inequity in advocating the doctrine of absolute integrity of a watercourse is made apparent by the reality that downstream states tend to be more economically developed than upstream states, where rivers actually rise). Transboundary rivers like the Rio Grande present multiple issues of law and equity as riparians are forced to negotiate fair divisions despite their competing interests. *Id.*

30. *See* Sarah Bates, *Water in the West: The Evolving Prior Appropriation Doctrine*, *in* WHOSE DROP IS IT, ANYWAY?: LEGAL ISSUES SURROUNDING OUR NATION'S WATER RESOURCES 3, 4-5 (Megan Baroni ed., 2011) (contrasting the dual guiding principles of water rights that have taken hold in the eastern states and in the American West).

where water is relatively abundant and inexpensive.[31] The riparian doctrine "ties one's water rights to accompanying ownership of the land along the watercourse and requires that one's use be 'reasonable' in relation to the needs of others on the stream."[32] In practice, it treats water as common public property and limits owners of property abutting streams to reasonable use of the flows, applying an enforceable duty not to use the streams in a way that would impede other water rights holders' similar usage.[33] However, this doctrine did not suit the American West's more arid climate where water is much more scarce, so another doctrine was created out of necessity.[34]

The doctrine of prior appropriation developed when western prospectors in states like California found the rules of discovery and appropriation that applied to their mineral and property rights more useful than the doctrine of riparian rights to the capture of water.[35] According to the rules of prior appropriation, "one's right to use the water is based solely on capture and possession (appropriation); if there is not enough water, the earlier (prior) users have better rights than later users."[36] Miners found this 'first in time, first in right' concept more applicable to their needs than the riparian system, because their operations often took place far from any stream.[37] Without owning property abutting a waterway, the discovery doctrine proved to be a useful alternative for organizing early westerners' water rights.[38]

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31. *See generally* Joseph W. Dellapenna, *The Evolution of Riparianism in the United States*, 95 MARQ. L. REV. 53, 53-64 (2011) (explaining the origins of riparian rights in the United States).

32. Bates, *supra* note 30, at 5.

33. Dellapenna, *supra* note 31, at 54.

34. Bates, *supra* note 30, at 5.

35. LITTLEFIELD, *supra* note 3, at 7; Bates, *supra* note 30, at 4.

36. Bates, *supra* note 30, at 4; *see* Connor B. Egan, *Shaping Interstate Water Compacts to Meet the Realities of the Twenty-First Century*, 6 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. 327, 329 (2013) ("Based on property law's first-in-time theory, the prior appropriation doctrine reasons that the first person to put a water source to a beneficial use has a superior claim to later consumers.").

37. LITTLEFIELD, *supra* note 3, at 6-7; Bates, *supra* note 30, at 4-5.

38. LITTLEFIELD, *supra* note 3, at 6-7; Bates, *supra* note 30, at 4-5.

2. The United States Supreme Court's Original Jurisdiction

Application of these doctrines to water allocations between states has generated an interesting body of law through the Supreme Court's exercise of original jurisdiction over disputes arising from disagreement over interstate river compacts.[39] While states generally have endorsed either the doctrine of riparian rights or that of prior appropriation within their borders, the Supreme Court has taken a more functionalist approach to resolving disputes between states on a case by case basis, without specifically endorsing one doctrine over the other as the law of the land.[40]

In *Kansas v. Colorado*, the Supreme Court, while cognizant of Congress's limited ability to interfere with a state's jurisdiction over its own waters, nevertheless affirmed its original jurisdiction over disputes between states.[41] However, rather than electing to use the opportunity to try to endorse one doctrine of water rights allocation over the other in the context of interstate river allocation, the Court applied a more functionalist approach, known as equitable apportionment.[42] Recognizing that the existence of competing water law doctrines proved the unworkability of a single set of rules to be applied when streams cross state lines, the Supreme Court wisely focused upon the interstate agreement at issue, ultimately

39. *See* U.S. CONST. art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction."); Douglas L. Grant, *Limiting Liability for Long-Continued Breach of Interstate Water Allocation Compacts*, 43 NAT. RESOURCES J. 373, 374-75 (2003) (noting the increasing frequency with which compacts that were designed to avoid cumbersome litigation are now finding their ways before the Supreme Court).

40. Bates, *supra* note 30, at 8-9; *see* Charlotte Benson Crossland, Note, *"Breach" of an Interstate Water Compact*, 28 NAT. RESOURCES J. 849, 852 (1988) (explaining that the Court's "goal is always to 'achieve an equitable apportionment,' without quibbling over formulas").

41. Kansas v. Colorado, 206 U.S. 46, 58 (1907).

42. *See id.* at 99-100 (explaining that apportioning the river equitably is the most favorable method to allocate flows in light of each state's vital interest in attaining a fair share of the finite resource).

finding that Kansas was not burdened by any inequity due to Colorado's increased surface diversions of the Arkansas River.[43]

In *Texas v. New Mexico*, a case between the same parties to the present disagreement, the Court heard a water allocation dispute over the Pecos River Compact.[44] While the facts substantively differ from their dispute over the Rio Grande, the procedures applied to resolving the case are relevant to this topic. Most notably, Texas sought the Supreme Court's original jurisdiction to enforce the river compact, shedding light on valuable procedures to guide future conflict resolution.[45] In this case, because of the Pecos River's irregular flows, the compact apportioning the river specified no minimum flow to be delivered at the state line; both states merely pledged to protect the status quo, so, absent any express allocation requirement for minimum delivery, the Court looked beyond the compact's terms to give effect to the parties' intentions.[46]

Furthermore, "unlike the appellate cases the Supreme Court reviews, original jurisdiction cases do not arrive at the Court with a factual record," so the Court, since the start of the twentieth century, has increasingly delegated "its fact-finding and legal decision-making authority to Special Masters" in cases of original jurisdiction.[47] In *Texas v. New Mexico*, the Supreme

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43. *Id.* at 117-18; *see* Crossland, *supra* note 40, at 852-53 (comparing the disputes over the Pecos and Arkansas rivers in an analysis of Supreme Court remedies granted for breach of interstate water compacts).

44. Texas v. New Mexico, 482 U.S. 124, 126 (1987). *See generally* Pecos River Compact, Pub. L. No. 81-91, 63 Stat. 159 (1949).

45. Texas v. New Mexico, 482 U.S. at 128.

46. *Id.* at 124-25; *see* Grant, *supra* note 39, at 378-79 ("New Mexico agreed in the compact not to 'deplete by man's activities the flow of the Pecos River at the New Mexico-Texas state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition.'"); Crossland, *supra* note 40, at 859-60 (insisting that the Court's decree to resolve the Pecos River dispute orders New Mexico to comply with terms not expressly required under the original interstate agreement because the Pecos River Compact is not sufficiently specific to find a breach). *See generally* Pecos River Compact, Pub. L. No. 81-91, 63 Stat. 159, 161 (1949).

47. L. Elizabeth Sarine, *The Supreme Court's Problematic Deference to Special Masters in Interstate Water Disputes*, 39 ECOLOGY L.Q. 535, 550 (2012). *See* Mississippi v. Arkansas, 415 U.S. 289, 297 n.1 (1974) (Douglas, J., dissenting) ("While

Court appointed a Special Water Master to independently examine and calculate the damages owed to Texas, subject only to the Court's approval.[48] The Court then rejected both states' appeals to the Master's approved report and recommended damages assessment.[49] However, the Court, despite approving the Master's fact-finding, rejected much of the recommended damages assessment.[50] Here, the Master had endorsed a requirement that New Mexico pay *in specie* water damages, with water interest, believing this sort of unique remedy would ensure future compliance with both the compact and the Court's order.[51] The Court reluctantly compromised by approving of water damages, but rejecting water interest on such an *in specie* award.[52] Nevertheless, Texas and New Mexico should expect a similar procedure in the Supreme Court's exercise of original jurisdiction over the Rio Grande dispute.[53]

B. History of the Rio Grande Compact

1. Arrival at the 1904 Compromise

The current manifestation of Texas and New Mexico's water rights conflict represents friction that has existed for over a century, since settlers arrived in the Elephant Butte and El

commissioners were appointed in the early years, the practice this century has been to use Special Masters.").

48. Texas v. New Mexico, 423 U.S. 942 (1975).

49. Texas v. New Mexico, 482 U.S. at 128; Crossland, *supra* note 40, at 850.

50. Texas v. New Mexico, 482 U.S. at 132 n.8 (1987); Chad O. Dorr, *"Unless and Until it Proves to be Necessary": Applying Water Interest to Prevent Unjust Enrichment in Interstate Water Disputes*, 101 CAL. L. REV. 1763, 1767 (2013).

51. Crossland, *supra* note 40, at 850; Dorr, *supra* note 50, at 1806.

52. Texas v. New Mexico, 482 U.S. at 130 (1987); *see* Crossland, *supra* note 40, at 850 ("The Supreme Court decided that 'lack of a specific provision for a remedy in case of breach does not, in our view, mandate repayment in water and preclude damages.' The Court can thus grant relief to Texas in either form."); Dorr, *supra* note 50, at 1816 ("With in-kind awards established, the Court's hasty disposal of the Special Master's proposal for water interest has left litigants unclear about when and how to apply water interest.").

53. *See* Sarine, *supra* note 47, at 553-55 (noting that the Supreme Court, in a case involving an interstate river dispute, will commonly appoint a Special Master because of the individual's expertise in water law).

Paso valleys of the upper Rio Grande Basin.[54] Disagreement first arose when settlers in New Mexico and Texas mutually recognized the need to dam the river, to collect flood waters and expand irrigable property in their fledgling frontier communities.[55] The El Paso community wanted a federally-funded international dam immediately north of the city and used its congressmen in Washington to try to acquire the necessary appropriation.[56] However, landowners in the territory of New Mexico, which lacked representation in the federal government, wanted a privately owned and operated dam built farther upstream of El Paso, in the community of Elephant Butte, New Mexico, to irrigate their otherwise arid lands.[57] This dispute took form in the *United States v. Rio Grande Dam and Irrigation Company* case, expensive and ultimately fruitless litigation that pitted Texan and federal government interests against private interests in New Mexico.[58] With no end in sight, the newly formed federal Reclamation Service stepped in to mediate a resolution at the beginning of the twentieth century.[59]

The Reclamation Service's scientists and engineers studied the region and developed a plan which it offered to both sides at the 1904 National Irrigation Conference, a convention held in El Paso and attended by officials and landowners from both New Mexico and Texas.[60] The 1904 Reclamation Service plan stated that the federal government would fund construction of a dam and reservoir at Elephant Butte, New Mexico, and the downstream communities in the Elephant Butte and El Paso valleys would set aside their already heavily-litigated water rights claims based upon each jurisdiction's prior appropriation

54. LITTLEFIELD, *supra* note 3, at 18; Reese, *supra* note 9.

55. LITTLEFIELD, *supra* note 3, at 36-37.

56. *Id.* at 24.

57. *Id.* at 42.

58. *Id.* at 56-57. *See generally* United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690 (1899).

59. LITTLEFIELD, *supra* note 3, at 96.

60. *Id.* at 104-05; *see also* Schladen, *supra* note 10 ("Meeting in El Paso in 1904, an irrigation congress decided that the Elephant Butte area would be ideal for a reservoir to store water from the Upper Rio Grande to meet the seasonal needs of Southeastern New Mexico, Southwest Texas and Northern Mexico.").

systems; instead, under the new plan, they agreed to allocate the Rio Grande's upper basin flows downstream of the dam according to each valley's irrigable acreage, to be determined and supervised by the federal Reclamation Service's Rio Grande Project.[61] Crucial to the federal dam project at Elephant Butte was support of the El Paso Valley users, who spent the previous decade staunchly opposed to plans for a dam at the same location; the key to securing Texas's agreement to the 1904 plan, despite El Paso officials' obvious preference for a dam further downstream, was the federal Reclamation Service's design and supervision of a scientifically-based and federally ensured apportionment schedule.[62]

The Reclamation Service, later renamed the U.S. Bureau of Reclamation, married the principles of decentralized, local control of natural resources to Progressive-era centralized, scientific planning and federal supervision.[63] Following these guiding principles, the Bureau negotiated a truce among the region's water users to construct a federally-funded dam, and designed an allocation ratio based on irrigation and hydrologic studies, rather than priority.[64] However, because it was admitted to the United States as its own sovereign nation rather than as a territory, public lands in Texas were not included in the original Reclamation Act, and finalization of the 1904 Rio Grande Project compromise required federal extension of the Reclamation Act by Congress, to cover the El Paso Valley in Texas.[65]

Congress's subsequent extension of the Reclamation Act legislatively confirmed the 1904 compromise and the Rio Grande

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61. LITTLEFIELD, *supra* note 3, at 158; *see also* Schladen, *supra* note 10 ("[T]he U.S. Bureau of Reclamation would build infrastructure and operate a system to allocate irrigation water from the Rio Grande."). *See generally Official Proceedings*, TWELFTH NAT'L IRRIGATION CONG. 210-221 (1904) (presenting the Reclamation Service's plan for water allocation downstream of the dam site at Elephant Butte) [hereinafter 1904 Plan].

62. LITTLEFIELD, *supra* note 3, at 107.

63. *Id.* at 96, 114 (explaining that the founders of the Reclamation Service favored the Progressive-era philosophy of scientifically designing and supervising natural resource projects ultimately left to local control and operation).

64. *Id.* at 112-13.

65. *Id.* at 115.

Project, including the Bureau of Reclamation's allocation of the upper Rio Grande basin's interstate flows.[66] But, it must be noted that "the 1905 allocation of the Rio Grande was not merely a recognition that interstate river priorities could be enforced where both states accepted the doctrine of appropriation and that those rights could be compromised."[67] Instead, as the federal legislative history makes clear, the bill extending the Reclamation Act and endorsing the 1904 compromise was an agreement to subordinate all claims of prior appropriation in the area covered by the Project to the division of the river's flow by the Bureau, which was to be based upon its determination of irrigable land within the downstream Elephant Butte and El Paso valleys.[68] Predating *Kansas v. Colorado*, it implicitly represented the first federal allocation of an interstate river in America.[69] The next decade witnessed construction of the dam, but increasing federal interference, particularly on other western rivers, motivated the states on the upper basin of the Rio Grande to create a comprehensive compact, in order to protect their water rights from intrusive federal controls.[70]

2. Passage and Ratification of the Rio Grande Compact

The resulting Rio Grande Compact, agreed to in 1938 and ratified the following year, is an interstate compact between Colorado, New Mexico, and Texas that allocates the river's waters in its upper basin by setting required minimum flow deliveries at the Colorado – New Mexico state line and at the

66. An Act to Extend the Irrigation Act to the State of Texas, Pub. L. 225, 34 Stat. 259 1906); LITTLEFIELD, *supra* note 3, at 115.

67. LITTLEFIELD, *supra* note 3, at 128.

68. 40 CONG. REC. 5,488-99 (1906) (explaining that extending the Reclamation Act of 1902 to include public lands in Texas would enable funding of the plan presented by the Reclamation Service and adopted at the 12th Irrigation Congress); LITTLEFIELD, *supra* note 3, at 128.

69. *See* LITTLEFIELD, *supra* note 3, at 115, 174-75 ("More noteworthy, however, was that this legislative approval of the 1904 accord – passed by the U.S. Congress in 1905 – authorized the Reclamation Service to carry out the first true apportionment of any interstate stream."). *See generally* Kansas v. Colorado, 206 U.S. 46 (1907).

70. LITTLEFIELD, *supra* note 3, at 177.

Elephant Butte Reservoir.[71] Following the model of the Colorado River Compact, an agreement reached in 1922 by the states along that western river's basin, delegates from the three states of the Rio Grande's upper basin met to set a permanent allocation schedule that would insulate their water rights from the threat of future federal regulation.[72] However, unlike the Colorado River, the Rio Grande's flows had already been apportioned downstream of the Elephant Butte Dam, between users in Texas and New Mexico.[73] So the delegates followed the advice of the federal Natural Resources Committee, which recommended following the Supreme Court's decision in *Kansas v. Colorado*, and equitably apportioned the remaining upper basin flows.[74]

The Compact also formed the Rio Grande Compact Commission, a small regulatory oversight body for administering the Compact.[75] It was made in the spirit of western self-reliance, as "a means to maintain state sovereignty over water by establishing a body to settle disputes before they went to venues in which the federal courts or U.S. agencies might be able to impose their own solutions."[76] It is comprised of one representative from each state and another from the federal government, and is charged with monitoring compliance with the accord's minimum flow delivery requirements at the state line between Colorado and New Mexico and at the Elephant Butte Reservoir, where downstream flows are subject to the Rio Grande Project's federal apportionment.[77] However, "all three states concurred that the [C]ompact did not preclude future legal action if the quantity or quality of the Rio Grande water

71. Brown, *supra* note 11; Lashmet, *supra* note 7; Chen, *supra* note 1.

72. *See* LITTLEFIELD, *supra* note 3, at 177 ("Although none of these U.S. attempts to gain greater control over western rivers has been successful, the relentless federal attacks . . . led western authorities in the early 1920s to view compact deliberations as the best way to solve their problems with a minimum of federal interference.").

73. *Id.* at 179.

74. *Id.* at 201.

75. *Id.* at 216.

76. *Id.* at 205.

77. LITTLEFIELD, *supra* note 3, at 206.

changed," so, in the event an impasse is reached in that body, the Compact allows any member to take their quarrel to federal court.[78]

By the time the Compact was made in 1938, the irrigation districts of the Elephant Butte and El Paso valleys had already signed multiple interdistrict agreements, formally accepting, even at the local level, the Rio Grande Project's apportionment schedule.[79] Therefore, given the interdistrict agreements and the federal legislative endorsement in 1905, the need for a specific schedule of deliveries at the state line between New Mexico and Texas had been rendered irrelevant.[80] This lack of express minimum flows delivery schedule into Texas at the state line alarmed state and federal congressmen, mostly because other western river compacts included deliveries at every state line.[81] They failed to grasp that no other river compact sent to them for approval was predated by a federal allocation like the 1905 extension of the Reclamation Act.[82] Once the Compact's proponents quelled these concerns, the Compact passed all three

78. *Id.*; *see* U.S. CONST. art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction."); Lashmet, *supra* note 7 ("It may seem strange that the lawsuit was actually filed in [as opposed to being appealed to] the United States Supreme Court. The reason for this is that the United States Constitution provides original jurisdiction to the Supreme Court for all disputes between states.").

79. LITTLEFIELD, *supra* note 3, at 167; *see* Brown, *supra* note 11 ("Since a political subdivision of Texas – El Paso County Water Improvement District No. 1 [EPCWID] – has a contract with the [B]ureau for reservoir water, the [C]ompact indirectly ensures that Texas receives a certain amount of Rio Grande water.").

80. *See* LITTLEFIELD, *supra* note 3, at 203, 214 (explaining that rather than specifically identifying a state line delivery allocation for Texas, the Rio Grande Compact relied upon the existing Rio Grande Project apportionment legislatively endorsed by Congress in 1905).

81. *Id.* at 207; *see* Brown, *supra* note 11 ("[Concerned] water users urged Texas' principal [C]ompact negotiator, attorney Frank Clayton, to revise the [C]ompact to include an express guarantee, but he said that New Mexico and Colorado could not make a guarantee because the Bureau of Reclamation controlled releases from Elephant Butte.").

82. *See* LITTLEFIELD, *supra* note 3, at 207 (describing the Rio Grande Compact as unique because of its implicit incorporation of the Rio Grande Project apportionment of upper Rio Grande basin flows downstream of the Elephant Butte dam).

state legislatures and was ratified by Congress in 1939.[83] It has been in effect now for 75 years, and the history and legal doctrines behind it must not be obfuscated by modern concerns.

III. BACKGROUND OF THE INTERNATIONAL TREATY CONFLICT

A. Legal Backdrop

1. Restricted Sovereignty creates Equitable Apportionment

Whereas American water rights law is dominated by competing theories that have taken hold in isolated jurisdictions, so too is international water allocation supported by common yet inconsistently applied doctrines.[84] Apart from international agreements, international law consists of customary rules "undertaken [by states] out of a sense of legal obligation."[85] However, due to the absence of mechanisms endowed with effective enforcement authority, "customary international law has proven unable by itself to solve the problems that arise in the management of transboundary water resources."[86]

The body of customary law applied to international rivers includes different, often competing concepts of stream management.[87] On one end of the spectrum, upstream states generally endorse the doctrine of absolute sovereignty, which

83. Colo. Rev. Stat. § 37-66-101 (1938); N.M. Stat. Ann. § 72-15-23 (1938); Tex. Water Code Ann. § 41 (West 1938); An Act Giving the Consent and Approval of Congress to the Rio Grande Compact, 76 Pub. L. No. 76-96, 53 Stat. 785 (1939); LITTLEFIELD, *supra* note 3, at 213-14.

84. *See* Bates, *supra* note 30, at 4-5 (discussing the two main principles of water rights in the United States); Dellapenna, *supra* note 8, at 33-35 (examining the problems with the current processes in international water management).

85. Dellapenna, *supra* note 8, at 33.

86. *Id.* at 34-35.

87. *See id.* at 35-36 (explaining that, although two nations may share a river, depending on their respective locations, they generally base their claims on conflicting logic). Upper-riparian countries claim absolute territorial sovereignty over the water, and lower-riparian countries claim that the upper-riparians cannot cause changes to the quality or quantity of the water available. *Id.*

imposes no duty upon the state in which a stream rises to supply any flows to its riparian neighbors downstream.[88] However, downstream riparian states advocate the diametrically opposite doctrine of absolute integrity, which prohibits upstream basin states from impeding a stream's natural flows bound for a downstream state.[89] Given the impracticability of either of these two concepts, international agreements, following the guidance of bodies such as the United Nations, generally compromise upon some form of restricted sovereignty which guarantees equitable apportionment of international stream flows.[90]

2. United Nations Convention

Recently, however, the United Nations has clarified its position on this area of natural resources law, in the form of its Convention on the Law of the Non-navigational Uses of International Watercourses ("Convention"), which is meant to facilitate nations' implementation of the equitable participation doctrine, an offshoot of the equitable apportionment theory that dominated international water agreements throughout the twentieth century.[91] The U.N.'s position accommodates existing arrangements based upon restricted sovereignty but encourages the progressive "transition of treaty practice from the traditional model compromises of restricted sovereignty (equitable apportionment) to the theory of community of property (equitable participation)."[92]

This new theory reflects the necessity of not only sharing, but also optimizing usage of an international stream, which is achieved using the community of property model.[93] Under the new model, "a waterbasin is jointly developed and managed as a

88. *Id.* at 35.

89. *Id.* at 35-36.

90. Dellapenna, *supra* note 8, at 36.

91. *Id.* at 38. *See generally* G.A. Res. A/51/229, Convention on the Law on the Non-Navigational Uses of International Watercourses (July 8, 1997) (declaring the United Nation's position on apportionment of international rivers) [hereinafter U.N. Convention].

92. Dellapenna, *supra* note 8, at 42; *see* U.N. Convention, *supra* note 91, arts. 8, 26 (promoting the transboundary river management theory of equitable participation).

93. Dellapenna, *supra* note 8, at 41-42.

unit without regard for international borders and with an agreed sharing of the benefits of, and equitable participation in, such development and management."[94] Convention Articles 8 and 26 establish the joint management system, contemplating joint obligations of "active cooperation on the part of riparian states, rather than a mere partition of the waters."[95] Unfortunately, existing customary international law alone is insufficient to adequately erase the border between basin states, so achievement of such an end requires a progressive, formal legal framework created through treaty.[96]

B. History of the 1944 Treaty between the United States and Mexico

1. Making the 1944 Treaty

Prior to the current arrangement, the United States and Mexico's first treaty over the Rio Grande was the 1848 Treaty of Guadalupe Hidalgo, which formally ended the Mexican-American War.[97] Article VII of that agreement provided now archaic international water management rules, including an agreement to preserve the existing navigability of the Rio Grande and a requirement that no hydraulic project that would impair the river be constructed without the other nation's consent.[98] These provisions were reaffirmed in 1853 by the Gadsden Purchase, but the United States's construction of the

94. *Id.* at 40-41.

95. *Id.* at 41-42; *see* U.N. Convention, *supra* note 91, arts. 8, 26 (offering a transboundary river management framework that eliminates international borders to the extent necessary to optimize water supply and conservation).

96. Dellapenna, *supra* note 8, at 42.

97. Treaty of Peace, Friendship, Limits, and Settlement Between the United States of America and the Mexican Republic, U.S.-Mex., July 4, 1948, T.S. 207 [hereinafter Treaty of Guadalupe Hidalgo]; Schiff, *supra* note 18, at 119; *see* Dellapenna, *supra* note 8, at 43 (describing an agreement that no hydraulic project be constructed on a shared river without mutual consent of all riparians as an early step in the evolution of restricted sovereignty).

98. Treaty of Guadalupe Hidalgo, *supra* note 97; Schiff, *supra* note 18, at 119-20.

Elephant Butte Dam, based upon the theory of absolute sovereignty over the river, effectively ruined their accord.[99]

Recognizing the importance of the rivers to their economies and the necessity for a legal framework governing their international border, the American and Mexican state departments organized committees of officials representing the Rio Grande and Colorado River basins to negotiate a treaty of mutually restrictive sovereignty that would equitably apportion waters along the international border.[100] The resulting 1944 Treaty for the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, allocating the flows of the rivers constituting the international border between the United States and Mexico, is one of the many twentieth century treaties based on the principle of restricted sovereignty.[101] It also authorized a semi-legislative body, the International Boundary & Water Commission ("IBWC"), to negotiate and settle disputes between the countries.[102] As stated above, the Treaty uses the mechanism of restricted sovereignty to equitably apportion flows from Rio Grande tributaries rising in Mexico, in exchange for flows from Rio Grande tributaries rising in the United States.[103]

The relevant provision for this Comment is the guarantee clause of Article 4(B)(c), which represents the pivotal benefit of the bargain for the United States because "regardless of how much water actually flows into the Rio Grande from the named tributaries rising in Mexico, the United States remains entitled to a yearly average of no less than 350,000 acre-feet."[104] This

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99. Schiff, *supra* note 18, at 120-22.

100. Charles A. Timm, 10 DEPT. OF STATE BULL. 282, 288 (1944); Schiff, *supra* note 18, at 124-25.

101. Umoff, *supra* note 1, at 71. *See generally* 1944 Treaty, *supra* note 17.

102. 1944 Treaty, *supra* note 17, art 24; Schiff, *supra* note 18, at 128; Umoff, *supra* note 1, at 73.

103. 1944 Treaty, *supra* note 17, art 4. McCarthy, *supra* note 1, at 212; Schiff, *supra* note 18, at 128-29; Umoff, *supra* note 1, at 74-75.

104. Schiff, *supra* note 18, at 129; *see* 1944 Treaty, *supra* note 17, art. 4 ("The waters of the Rio Grande between Fort Quitman, Texas and the Gulf of Mexico are hereby allotted to the two countries in the following manner: . . . To the United States: . . . One-third of the flow reaching the main channel of the Rio Grande from the Conchos, San Diego, San Rodrigo, Escondido and Salado Rivers and the Las Vacas

sets a hard minimum requirement on the annual deliveries Mexico must make from its tributaries into the Rio Grande.[105] However, the Treaty allows that, in times of extraordinary drought, Mexico may be granted an extension for late delivery of its required flows, thereby being allowed to make up its accrued water debt during the subsequent five year cycle.[106] It is according to this language that Mexico insists it need only deliver a certain amount of water by the end of every five year cycle, without incurring any water debt.[107]

2. The International Boundary & Water Commission

In Article 24 of the Treaty, the United States and Mexico also granted the IBWC broad authority to interpret their agreement and settle disputes between the countries.[108] The IBWC congregates and passes Minutes, which authorize operational and administrative actions to address changing conditions within its jurisdiction.[109] This governing body represents a major step toward progressive international agreement over river management because it is endowed with operative, rather than merely regulatory responsibility to help it manage the water resources in its theoretically broad grant of

Arroyo, provided that this third shall not be less, as an average amount in cycles of five consecutive years, than 350,000 acre-feet annually.").

105. Letter to Obama, *supra* note 7.

106. 1944 Treaty, *supra* note 17, art. 4; Schiff, *supra* note 18, at 129-30.

107. Lashmet, *supra* note 16; *see* CRS Report, *supra* note 3, at 12 n.50 (describing the stakeholders' disagreement over the Treaty's interpretation); *cf.* Schiff, *supra* note 18, at 129 n.53 (laying out Mexico's previous defense of its interpretation of the Treaty, according to which it still insists that it cannot be liable for breaching the Treaty until the end of any given five year cycle).

108. *See* 1944 Treaty, *supra* note 17, at art. 24 ("The International Boundary [&] Water Commission shall have . . . the following powers and duties: . . . To settle all differences that may arise between the two Governments with respect to the interpretation or application of this Treaty, subject to the approval of the two Governments.").

109. Umoff, *supra* note 1, at 77.

jurisdiction.[110] Using this authority, the IBWC has addressed two major challenges in its hundred years of existence.[111]

After the Treaty's ratification and the IBWC's authorization in 1945 over the border jurisdiction, the IBWC's Minutes began setting major precedent through active cooperation dealing with international disagreements over the border rivers.[112] The first prime example was Minute 242, passed to address a decade-long salinity crisis in the Colorado River basin.[113] As a result of the state of Arizona's construction and filling of Lake Powell, in combination with increased industrial discharges, upstream American users had increased the salinity of the Colorado River to such an extent that it was unusable by the time it reached its downstream Mexican users.[114] Even though the Treaty included no water quality requirements, Mexican authorities took their complaint to the IBWC, which managed to negotiate an equitable result.[115] Despite the United States not violating an express provision of the Treaty, the IBWC's Minute 242 ordered the American government to provide non-reimbursable reparations to clean up damaged Mexican agricultural infrastructure.[116] The Commission's "ability to place these obligations on a country whose original negotiating position was that it had no water quality obligations, shows its true

110. 1944 Treaty, *supra* note 17, art. 24; *see* Dellapenna, *supra* note 8, at 56 (noting that the IBWC is a rare example of a multipurpose international body endowed with broad decision-making authority to manage an international waterbasin).

111. *See* Umoff, *supra* note 1, at 77 (citing IBWC responses to the Colorado River salinity crisis and the early 2000s Rio Grande drought conditions as examples of the Commission's willingness to use its broad and flexible authority to design equitable resolutions not expressly covered by its original charter).

112. *Id.* at 71-72.

113. International Boundary & Water Commission, Minute No. 242, Permanent and Definitive Solution to the International Problem of the Salinity of the Colorado River (Aug. 30, 1973), *available at* http://www.ibwc.gov/Files/Minutes/Min242.pdf [hereinafter Minute 242]; Schiff, *supra* note 18, at 159-61; Umoff, *supra* note 1, at 80.

114. Schiff, *supra* note 18, at 159-60; Umoff, *supra* note 1, at 78.

115. Umoff, *supra* note 1, at 78-81.

116. Minute 242, *supra* note 113; Umoff, *supra* note 1, at 80.

capabilities to provide equitable solutions to complex border issues."[117]

Having established, through its resolution of the Colorado River salinity crisis, its Article 24 authority to interpret the terms of the Treaty and to resolve each nation's complaints, the IBWC has since exercised its power to address drought problems in the late 1990s and early 2000s.[118] The IBWC's first reaction "to alleviate the severe drought conditions plaguing Mexico," was to use its own power of interpretation to find that Mexico was undergoing a period of extraordinary drought.[119] That status triggered conditional allowance provisions in both Article 4(d), which rolled the existing Mexican water debt into the subsequent five year cycle, and in Article 9(c), which "authorized Mexican use of some of the waters belonging to the United States stored in two international reservoirs."[120]

These initial reactions not being enough to solve the drought crisis, Minute 308 represented the IBWC's recognition that its powers of Treaty interpretation were insufficient and that a more functionalist exercise of its broad Article 24 authority would be required to resolve the crisis.[121] Minute 308 obligated Mexico, long struggling to pay its water debt, to make 90,000 acre-feet available to the United States immediately.[122] But, more importantly, this delivery was conditioned upon "the recognition by the United States . . . of a critical supply of water which Mexico required to meet the needs of its Rio Grande communities."[123] The United States also promised, in Minute 308, "to make available to Mexico, from waters in the

117. Umoff, *supra* note 1, at 81.

118. *Id.* at 81-82; *see* Schiff, *supra* note 18, at 162 (recognizing the IBWC's successful exercise of its interpretive powers to reach an equitable resolution of the salinity conflict).

119. Umoff, *supra* note 1, at 81-82. *See generally* International Boundary & Water Commission, Minute No. 293, Emergency Cooperation to Supply Municipal Needs of Mexican Communities Located along the Rio Grande Downstream of Amistad Dam (Oct. 4, 1995), *available at* http://www.ibwc.gov/Files/Minutes/Min293.pdf.

120. 1944 Treaty, *supra* note 17, arts. 4, 9; Umoff, *supra* note 1, at 81.

121. Schiff, *supra* note 18, at 164-65.

122. *Id.* at 163-64.

123. *Id.* at 164.

international reservoirs allotted to the United States, sufficient amounts for Mexico to maintain its critical supply."[124] Minute 308 symbolized the IBWC's willingness and flexibility, in times of necessity, to use its broad Article 24 authority in order to reach equitable resolutions, beyond the terms of the Treaty.[125] "Though the Treaty is silent as to the manner of Mexican debt payment, the IBWC fairly implemented the framework" to design a conciliatory remedy aimed at "avoiding destruction of the Treaty or a break down in diplomatic relations."[126]

IV. ANALYSIS

A. Interstate Compact Strategy

1. New Mexico's Efficient Breach

In the upper Rio Grande basin, New Mexico is currently making its required delivery of Rio Grande flows into the reservoir at Elephant Butte.[127] From there, the Rio Grande Project releases flows through the dam for the use of its beneficiaries, irrigation districts in southern New Mexico and at El Paso, Texas.[128] However, Texas argues that in this portion of the upper Rio Grande basin, downstream of Elephant Butte but north of their state border, "New Mexico has, contrary to the purpose and intent of the Rio Grande Compact, allowed and authorized Rio Grande Project water intended for use in Texas to be intercepted and used in New Mexico."[129] This claim means that while Texas recognizes New Mexico has complied with the Compact's delivery provision in its narrowest sense, New Mexico's additional actions have rendered that delivery meaningless by ignoring the jurisdiction of the Project and the

124. *Id.*

125. Steven G. Ingram, *In a Twenty-First Century "Minute"*, 44 NAT. RESOURCES J. 163, 187-89 (2004).

126. Schiff, *supra* note 18, at 165; Umoff, *supra* note 1, at 82.

127. Lashmet, *supra* note 7; Michael Wines, *Mighty Rio Grande Now a Trickle under Siege*, N.Y. TIMES, Apr. 13, 2015, at A1.

128. Brown, *supra* note 11.

129. Complaint at 2-3, Texas v. New Mexico, 133 S. Ct. 1855 (2013) (No. 22-0141) [hereinafter Complaint].

water demands of the Project's beneficiaries, particularly those in Texas.[130]

The state of New Mexico defends its actions by predictably pointing out that Texas has failed to allege "that New Mexico has violated its obligation under the delivery requirement that the Compact imposes, i.e., to deliver an amount of water to Elephant Butte Reservoir."[131] Therefore, "Texas does not allege and cannot establish . . . that New Mexico has violated an express Compact term."[132] Furthermore, dismissing the Texas complaint that, despite not breaching an express provision, New Mexico's actions still violate the purpose and intent of the agreement, New Mexico maintains that their agreement does not consider "a 'purpose and intent' to protect a certain amount of Project water for delivery to the Texas-New Mexico state line, nor any provision prohibiting New Mexico from allowing its water users to make additional depletions between Elephant Butte and the Texas-New Mexico state line."[133]

By executing its workaround of delivering flows into the reservoir, only then to divert flows immediately downstream of the dam, New Mexico scuttles the limitation it offered in exchange for reciprocity of its neighboring Rio Grande riparian states.[134] The Rio Grande Compact is a permanent transboundary watercourse agreement to subordinate upper basin states' claims of prior appropriation over the river's flows to the comprehensive schedule of restricted sovereignty provided in the Compact.[135] That schedule represents the compromise

130. *See* Brown, *supra* note 11 (describing how the Project's contractual relationship with the El Paso County Water Improvement District No. 1 ensures that Texas will receive Rio Grande flows in the upper basin).

131. New Mexico's Brief in Opposition to Texas' Motion for Leave to File Complaint at 1, Texas v. New Mexico, 133 S. Ct. 1855 (2013) (No. 22-O141).

132. *Id.*

133. *Id.* at 2.

134. *See* Lashmet, *supra* note 7 ("Although Texas . . . does not dispute that New Mexico is delivering the correct amount of water into the Elephant Butte Reservoir, it claims that the 'purpose and intent' of the Compact is violated when New Mexico allows water to be diverted prior to delivery into Texas.").

135. *See* LITTLEFIELD, *supra* note 3, at 194-95 (explaining that, by incorporating the 1904 compromise and allocating the remaining unapportioned upstream flows, the

reached by delegates from each state, who followed the advice of the federal Natural Resources Committee and used the Supreme Court's decision in *Kansas v. Colorado* as a model for applying the theory of equitable apportionment to the remaining unallocated flows in the Rio Grande.[136]

Facing the threat of intrusive federal management over their natural resources, each party to the Compact consented to an arrangement of restricted sovereignty, in order to retain whatever local control over the river remained.[137] Of course, the Project's allocation of upper basin flows had already been reached in 1905, so the Compact merely incorporated that preexisting arrangement, of users downstream of Elephant Butte, into its comprehensive upper basin schedule upon its passage in 1939.[138] However, by its current practice of allowing flows, which the Project released for use by its beneficiaries in Texas, to be diverted downstream of Elephant Butte for use in New Mexico, the state's government is ignoring its obligation to recognize the Compact's equitable allotments.[139]

New Mexico's actions are theoretically comparable to an efficient breach, in which a party to an agreement knowingly shirks its obligations, because doing so and accepting the consequences nets greater returns than compliance.[140] Here, the

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Rio Grande Compact was intended to be the states' permanent arrangement for dividing the upper Rio Grande basin's flows).

136. *Id.* at 201.

137. *Id.* at 177.

138. *See id.* at 220 ("[The Compact] embodied the desires and compromises that had been made more than three decades earlier by incorporating into the [C]ompact the division of the river's waters below Elephant Dam that had been the fruit of a local 1904 compromise and federal legislation the following year implementing that agreement.").

139. *See* Reese, *supra* note 9 (presenting the Texas argument that increased diversions of upper basin flows between Elephant Butte and the New Mexico/Texas state line violates the Compact). *But see* Lashmet, *supra* note 7 ("In response, New Mexico claims that its only obligation under the Compact is to deliver a certain amount of water into the Elephant Butte Reservoir . . . New Mexico claims that what happens between the Reservoir and the Texas state line is governed by New Mexico law and not by the Compact.").

140. *See* Cender, *supra* note 26, at 698 ("[T]he 'efficient breach[]' is the situation in which one party to a contract can make a profit by breaching the contract, even though that party will have to pay damages.").

negative consequences of its breach evidently do not sufficiently incentivize its compliance, because the state government of New Mexico stands accused of notoriously violating its agreement to the Rio Grande Compact's apportionment schedule.[141] By maintaining the position that it disagrees not only with its downstream neighbor's interpretation of their compact, but also the legal doctrine of equitable apportionment the Compact's authors used as a drafting model, New Mexico can effectively exercise absolute sovereignty over the river and unilaterally prioritize its water rights above those of downstream upper basin users, all without incurring any liability to its fellow riparian states, so far.[142]

2. Resolution of the Compact Dispute

Evidently, New Mexico forgets, despite the Supreme Court's judgment in *Texas v. New Mexico*, that disputes over interstate compacts are resolved according to the federal government's Article III authority, and damages are enforced pursuant to those judgments.[143] Furthermore, as originally demonstrated in *Kansas v. Colorado*, the Court has chosen to shelve the doctrines of riparian rights and prior appropriations, in favor of determining whether the upstream state's actions work an inequity upon the downstream state in light of their river agreement.[144] In that case and particularly in the subsequent case over the Pecos River Compact, the Court evaluated the

141. Brief in Support, *supra* note 9, at 2-3.

142. *See* Dellapenna, *supra* note 8, at 35 (explaining that upstream riparians prefer the doctrine of absolute territorial sovereignty because it gives them the right to do whatever they choose with stream flows, no matter the effect upon downstream riparians).

143. *See* U.S. CONST. art. III, § 2, cl. 2 ("In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction."). *See generally* Texas v. New Mexico, 482 U.S. at 132-33 (finding the state of New Mexico in violation of its Pecos River Compact with the state of Texas).

144. Kansas v. Colorado, 206 U.S. at 117-18 (1907); *See* Crossland, *supra* note 40, at 860 ("[I]n interpreting a compact which purports to allocate water, the Court should follow the principles of equitable apportionment, and base its decision on equities and not on the strict construction of terms imputed to the compact when the compact itself is not clear.").

parties' actions for compliance with the spirit of their interstate agreements, giving effect to the parties' intentions, even in the absence of express minimum delivery requirements.[145] The Supreme Court has chosen to resolve water compact cases by delegating duties to Special Masters to help the court determine whether inequity has resulted due to a defendant state's actions.[146] So Texas has filed suit, triggering the Supreme Court's original jurisdiction, and the Court's appointed Special Master should correct this harm by properly incentivizing New Mexico's compliance with the Compact.[147]

Here, the Compact's drafters created the Rio Grande Compact Commission as a mechanism for settling allocation disputes without involving the federal government.[148] However, in the event the Commission is gripped with impasse, the Compact does not preclude any state from triggering the federal government's supervisory duties as final arbiter over interstate disputes.[149] Because the conflict is squarely within the original jurisdiction of the Supreme Court,[150] rather than attempt to reach some mutually agreeable settlement, Texas can and should advocate its Compact interpretation over New Mexico's, to convince the federal government to use its enforcement authority to increase the negative consequences for New

145. *See* Crossland, *supra* note 40, at 860 (explaining how the Court's decree to resolve the Pecos River dispute requires New Mexico to comply with terms not included in the states' original Compact). *See generally* Texas v. New Mexico, 482 U.S. 124 (1987).

146. *See* Texas v. New Mexico, 135 S. Ct. 474, 474 (2014) (appointing a Special Master to conduct the Court's fact-finding in the present case over the Rio Grande Compact between Texas and New Mexico); *see* Sarine, *supra* note 47, at 547-48 (recalling how the Court turned to the Special Master for his calculation of appropriate damages to be levied against New Mexico for breaching the Pecos River Compact).

147. Complaint, *supra* note 129, at 1. *See generally* Texas v. New Mexico, 135 S. Ct. at 474 (designating A. Gregory Grimsal of New Orleans as Special Master in the present case over the Compact).

148. LITTLEFIELD, *supra* note 3, at 205; *e.g.* Tex. Water Code Ann. § 41.009 (West 1938) (creating the Rio Grande Compact Commission in Article XII of the Rio Grande Compact).

149. LITTLEFIELD, *supra* note 3, at 206; Lashmet, *supra* note 7.

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

Mexico's breach of the Compact.[151] If Texas could not trigger the enforcement authority of a higher jurisdiction, like that of the federal government, then the state would lack substantial leverage to correct New Mexico's action.[152] But, armed with the threat of enforcement directed by a higher power, Texas need not negotiate a mutually agreeable settlement to placate New Mexico's position. Instead, it should strictly advocate its interpretation and the original spirit of the agreement, without fear of spurning New Mexico, to convince the federal government that a severe penalty is necessary to incentivize compliance and enforce the Compact's equitable apportionment.[153]

Efficient breaches are corrected by either increasing the negative consequences for breach or increasing the benefits for compliance.[154] Either way, the breaching party must become sufficiently incentivized to comply with the original agreement,

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151. *See* Complaint, *supra* note 129, at 15-16 (requesting that the Court command the State of New Mexico to recognize the water rights of the State of Texas, comply with the Compact, and award Texas damages with pre- and post- judgment interest).

152. *Cf.* Dellapenna, *supra* note 8, at 34-35 (criticizing the ineffectiveness of customary international law for the lack of enforcement power wielded by higher supervising authority).

153. *See* LITTLEFIELD, *supra* note 3, at 201 (describing the cooperative procedures supervised by the federal government and taken by delegates representing state interests to reach an equitable apportionment of the Rio Grande's upper basin flows). *But cf.* Crossland, *supra* note 40, at 861-62 (insisting that, given the Pecos River Compact's lack of specificity regarding New Mexico's delivery obligation to Texas, a proper balance of the equities by the Court would have taken the upstream state's lack of fair notice into account and would not have imposed such drastic damages in its decree against New Mexico). This argument fails in the upper Rio Grande basin though, where New Mexico has been on clear, unwavering notice for over 110 years now that all its claims of prior appropriation to the river's flows downstream of Elephant Butte are subordinate to the Project's scientifically designed and federally supervised apportionment between irrigation districts in southern New Mexico and West Texas. 1904 Plan, *supra* note 61.

154. *See* Dodge, *supra* note 27, at 680 (advocating a new default rule awarding punitive damages for willful breach to incentivize specific performance). Here, given the federal government's authority to enforce a judicial decree against a state for breaching an interstate compact, the most reasonable strategy to incentivize New Mexico's compliance with the Rio Grande Compact is by increasing the negative consequences for its willful breach. *See id.*

rather than breach and accept the consequences.[155] Because Texas can constitutionally trigger the enforcement authority of the federal government under the Supreme Court's jurisdiction, its strategy should be to use that enforcement to penalize New Mexico enough that New Mexico's negative consequences for breaching the agreement sufficiently outweigh the benefits it gains by doing so.[156] Therefore, the penalty levied against New Mexico by the Court should make New Mexico's compliance with the Compact a rational economic decision, rendering any breach inefficient.

An award charging New Mexico with post-judgment water interest on its *in specie* debt repayment would render the breach inefficient, serving both specific and generally deterrent effects. Water interest was first recommended by the Special Master's report to the Supreme Court in the *Texas v. New Mexico* case over the Pecos River Compact, "to prevent New Mexico's procrastination in repayment."[157] However the Court "summarily disposed of the water interest issue in a footnote, saying it was unpersuaded that water interest should be awarded 'unless and until it prove[d] to be necessary.'"[158] Though the Court eventually did not approve water interest applied to Texas's award in that case, New Mexico's persistent breach of its water agreements manifested in the present dispute indicates that the time has come to impose water interest as a way of compelling New Mexico's compliance with the agreement.[159] This repeat offender's past violations have not

155. *See* Cender, *supra* note 26, at 698-99 (explaining that the rub of an efficient breach exists in the profitability of breaching). The Court can eliminate the profitability of noncompliance by increasing the penalty for willful breach of an interstate compact. *See id.*

156. *See* Brief in Support, *supra* note 9, at 18 ("This Court has original and exclusive jurisdiction over cases and controversies between two or more states . . . . The jurisdiction 'extends to a suit by one State to enforce its compact with another State or to declare rights under a compact.'").

157. Dorr, *supra* note 50, at 1794. *See generally* Texas v. New Mexico, 482 U.S. 124 (1987).

158. Texas v. New Mexico, 482 U.S. at 132 n.8; Dorr, *supra* note 50, at 1764.

159. Dorr, *supra* note 50, at 1805-06. *See generally* Texas v. New Mexico, 482 U.S. 124 (1987).

sufficiently clarified its obligations to downstream riparians, so the additional penalties are at long last proved to be necessary in order to adequately prevent subsequent knowing breaches.[160] Besides specifically deterring future breach by New Mexico, an award including water interest for damages would also set a significant precedent to urge water compact compliance generally throughout the country, not necessarily for the purpose of using New Mexico as an example, but to firmly announce the federal government's refusal to tolerate willful breach of interstate agreements.[161]

B. International Treaty Strategy

1. Mexico's Efficient Breach

What makes the conflicts fascinatingly analogous is that in each basin on the same river, the downstream party complains that its upstream neighbor is not meeting its required schedule of flows, while the upstream respondent defends that, according to its interpretation of their apportionment agreement, there is no breach.[162] Similar to the factual conflict between Texas and New Mexico over the Rio Grande Compact, the issue in the lower basin between the United States and Mexico, in some regard, also comes down to differing interpretations of their water-sharing agreement.[163] The United States believes that the language of Article 4 entitles it to not less than an annual delivery of 350,000 acre-feet from the six named Rio Grande tributary streams rising in Mexico.[164] Every year that Mexico misses that mark represents, in the eyes of American water users in the lower Rio Grande basin, a willful breach of their Treaty.[165]

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160. Dorr, *supra* note 50, at 1766-68.

161. *See id.* at 1784 n.169 ("Like punitive damages, the application of interest does have deterrent effect on the actions of potential defendants.").

162. Lashmet, *supra* note 7; Lashmet, *supra* note 16; *see* Johnson, *supra* note 7, at 1222-25 (noting the concurrence of water allocation disputes raging in the upper and lower basins of the Rio Grande).

163. Lashmet, *supra* note 16.

164. Letter to Obama, *supra* note 7; Lashmet, *supra* note 16.

165. Letter to Obama, *supra* note 7.

However, Mexico maintains the position that the Treaty's procedure for rolling over water debt that has accrued at the end of each five year cycle indicates an agreement structure that only requires it to deliver a certain minimum amount of water from its six tributaries once every five years.[166] According to this perspective, any year during which Mexico fails to deliver 350,000 acre-feet during a given five year cycle is not a breach; rather, no breach has occurred until the end of the cycle, at which time Mexico may roll its debt into the subsequent cycle if an extraordinary drought exists.[167]

In this regard, the factual conflict over the lower basin flows also takes the form of an efficient breach. Mexico is knowingly delivering less than 350,000 acre-feet into the Rio Grande because it refuses to acknowledge that its agreement with the United States requires anything more than a single delivery every five years.[168] Furthermore, just like Texas's issue with New Mexico, the status quo imposes no negative consequences upon Mexico to disincentivize its actions alarming its downstream neighbor.[169] The similarity between these two conflicts lies in the factual issues, but the difference lies in the recourses available to the downstream riparians and reflects the dichotomy of domestic and international law. The international nature of the Treaty conflict transforms the legal issue. Between two parties within a *domestic* jurisdiction, where breach of an agreement would reasonably be expected to be met with judicial enforcement to award damages, the issue would be whether the upstream riparian's actions, its failure to make annual deliveries, amounts to a breach of its obligations to its

166. Lashmet, *supra* note 16.

167. *Id.*

168. Letter to Obama, *supra* note 7; Lashmet, *supra* note 16; *see* CRS Report, *supra* note 3, at 12 n.50 (explaining that interpretation issues remain, despite the countries' demonstrated willingness to resolve their differences through IBWC Minutes); *cf.* Schiff, *supra* note 18, at 129 n.53 (providing Mexico's past defense of its interpretation of the Treaty, claiming that it cannot be held in breach of the agreement unless and until, at the conclusion of the given five year accounting cycle, an accumulated water debt remains).

169. Letter to Drusina, *supra* note 16.

downstream neighbor.[170] However, this perception of the issue at hand underestimates the forces at play. It is by considering Mexico's actions as an *international* efficient breach that the legal issue becomes broader than mere interpretation of the Treaty.[171]

Whereas Texas has elected to solve its compact dispute with New Mexico by triggering the jurisdiction of the federal courts to enforce its position to New Mexico's detriment, there exists in the lower basin no analogous enforcement authority of a higher power over the parties to the Treaty.[172] Any resolution to the international conflict over the Rio Grande must be mutually agreeable.[173] That is why Mexico's efficient breach won't be corrected by punishing Mexico to the point of rationalizing its compliance. So that international water negotiations will not settle into zero-sum affairs, instead of applying the adversarial mechanism of restricted sovereignty over a limited resource, these apportionment schemes must provide material incentives for communal management; nations using the same river should share the common goal of optimizing its flows rather than equitably apportioning its flows, because the latter arrangement naturally creates a conflict of interest between the parties.[174] Here, Mexico's compliance with the Treaty should be incentivized not by heaping penalties upon it to the United

170. *Cf.* Schladen, *supra* note 10 (framing the analogous interstate water conflict in the upper basin between Texas and New Mexico as a dispute over whether the upstream state's actions amount to a breach of their Rio Grande apportionment agreement that would entitle its downstream neighbor to damages).

171. *See* Dellapenna, *supra* note 8, at 42 ("Given the multifarious variations in waterbasins across the globe, a universal treaty perhaps could do no more to improve the situation").

172. *See id.* at 32-33 (lamenting that international law is a relatively primitive regime, lacking specialized organs for enforcing the law).

173. *See* Ingram, *supra* note 125, at 191-92 (justifying the vitality of avoiding zero-sum resolutions to water disputes).

174. *See* Dellapenna, *supra* note 8, at 51-53 (recommending that countries sharing a common river adopt the community of property model rather than cling to the restricted sovereignty mechanism of equitable apportionment, because only the former creates a natural incentive of cooperation, whereas, as many nations and international organizations have found, the latter forces fellow riparians into mutually destructive competition over their shared resource).

States's benefit, but by increasing the benefits of international cooperation.

2. Resolution of the Treaty Dispute

While their fact patterns are similar, the compelling distinction between these legal conflicts becomes apparent in each dispute when one considers what strategy the downstream riparian should adopt to reach an equitable resolution with the other party. Whereas Texas should advocate its interpretation over New Mexico's before the Supreme Court, the United States should not congruently advocate its interpretation over Mexico's. The United States must give up the idea of winning the dispute in the sense that some international arbiter or negotiation would result in Mexico being compelled to observe the American interpretation.

At first blush this strategy may seem absurd. Treaty interpretation is its whole argument against Mexico.[175] But, because the countries do not have an imposing higher authority to enforce a binding resolution, enforcement power is in many ways limited by international goodwill.[176] So an effective long-term solution must be mutually agreeable to both parties.[177] If it were to stubbornly keep advocating its Treaty interpretation, the United States would remain locked in a fruitless, zero-sum stalemate and run the risk of triggering Mexico's abdication of their whole agreement, plummeting both countries into a destructive, spiteful water war.[178] Instead, to preserve a critical mass of goodwill necessary to manage successfully its international jurisdiction, the IBWC should recognize the full extent of the countries' disagreement and

175. *See* Letter to Obama, *supra* note 7 (insisting that Article 4 of the 1944 Treaty entitles the United States to 350,000 acre-feet of water from Mexican tributaries annually).

176. *See* Dellapenna, *supra* note 8, at 53 (criticizing existing water negotiations for lacking procedure to compel parties to reach agreement).

177. *See id.* at 56 (recommending that in order to achieve lasting agreement, parties must actively cooperate, or else risk falling into destructive, zero-sum stalemate).

178. *See* Umoff, *supra* note 1, at 82 (reflecting on the possible consequences to the Treaty if the United States and Mexico had not struck the deal in Minute 308 which abated the Mexican water debt crisis in the early 2000s).

harness its broad authority to reach a mutually beneficial result.[179]

When the issue expands, away from treaty interpretation, and becomes how to maximize water supply in the lower Rio Grande basin to such a degree as to incentivize Mexico's cooperation, the American strategy is no longer encumbered by the status quo. In choosing the means of optimizing water supply in the lower basin, high priorities should be placed upon preservation of the IBWC, an admittedly valuable international body at least theoretically endowed with rare jurisdiction, and avoidance of Treaty amendment, because further politicization of this issue would most likely result in stalemate.[180] Fortunately, despite the pitfalls of continued adherence to an arguably outdated document, the countries can restructure their water-sharing arrangement to maximize supply through the IBWC without substantially amending the Treaty.[181]

The IBWC can achieve optimization without significant amendment by applying a 'community of property/interest' model to the lower Rio Grande basin and by endorsing the U.N. Convention in a policy-based Minute.[182] Under a community of property model like that endorsed by the U.N. Convention,[183] "a waterbasin is jointly developed and managed as a unit without regard to international borders and with an agreed sharing of the benefits of, and equitable participation in, such development

179. *See* Dellapenna, *supra* note 8, at 53 (emphasizing the mandate of good faith cooperation between international parties to a transboundary watercourse negotiation due to the absence of enforcement mechanisms to compel either riparian to comply); Ingram, *supra* note 125, at 209 n.298 (listing the principles of good faith and cooperation as two of the major, universally recognized principles of international watercourse law); Umoff, *supra* note 1, at 87-88 (providing examples of past Minutes that expanded the breadth of IBWC authority under the Treaty, indicating that such illustrations of the agreement's flexibility and adaptability make its continued existence more likely).

180. *See* Ingram, *supra* note 125, at 185 ("[D]espite this vigorous criticism from both sides of the Rio Grande, the solution to what ails the 1944 Treaty should come from within its existing structure."); Schiff, *supra* note 18, at 118 (warning that too drastic an amendment to the 1944 Treaty would require difficult ratification by both countries' legislatures).

181. Ingram, *supra* note 125, at 186.

182. *Id.*

183. U.N. Convention, *supra* note 91, arts. 8, 26.

and management."[184] As for incentivizing Mexico's cooperation, "[e]quitable participation is necessary in an international watercourse regime in order to produce maximum benefits while maintaining an equitable allocation of uses and also affording protection to the watercourse itself."[185] This model gives American water users the best chance to break Mexico's efficient breach.[186] On this path, the IBWC would eviscerate the international border under its jurisdiction. The international Rio Grande regime operating under modern principles of equitable participation "would shift analysis away from 'zero-sum' games toward maximizing system-wide benefits."[187] It would unify the lower basin under its sole water management authority, eliminating any and all distinctions as to the nationality of individual water users.

Past Minutes have signified the IBWC's willingness to look beyond its typical duties of Treaty administration and to use its theoretically vast authority to reach equitable resolutions to international conflict in the Rio Grande's lower basin.[188] Minute 242 issued a massive damages award to Mexico despite the Treaty not expressly guaranteeing any water quality requirements from upstream American users.[189] Minute 308 created a schedule for Mexican water debt repayment beyond the ordinary schedule expressed in the Treaty.[190] The flexibility exhibited within these Minutes and the countries' willingness to follow the IBWC's authority to design resolutions beyond the Treaty's express provisions indicate that a policy-based Minute is the next logical step in the course of the IBWC's supervision over the lower Rio Grande basin.[191] But besides following the

184. Dellapenna, *supra* note 8, at 40-41.

185. Ingram, *supra* note 125, at 186.

186. Umoff, *supra* note 1, at 82-83.

187. Ingram, *supra* note 125, at 192.

188. Umoff, *supra* note 1, at 87.

189. *Id.* at 80-81; *see* Schiff, *supra* note 18, at 159 (explaining that the initial American response to Mexico's complaint over the increased salinity in the Colorado river was that the 1944 Treaty did not provide any express guarantee of water quality).

190. Schiff, *supra* note 18, at 165; Umoff, *supra* note 1, at 82-83.

191. Umoff, *supra* note 1, at 87.

natural evolution of the IBWC's management of the river, a policy-based Minute incorporating the U.N. Convention framework of community of property/interest into the 1944 Treaty would transform the countries' arrangement from an adversarial apportionment to a new pragmatic regime of shared responsibilities aimed at their unified goal of optimal management of the entire lower Rio Grande basin.[192]

Additionally, adoption of the principles presented in the U.N.'s framework does not require replacement or even amendment of the existing Treaty.[193] Aware that incorporation into, rather than replacement of, existing international water arrangements would be critical to adoption of the modern principles advocated therein, rather than a 'model rules' format, the U.N. drafters used a more elastic 'framework' format, that provides general principles intended to be easily harmonized with existing river treaties and adjusted to meet future needs.[194] Under its theoretically vast authority to resolve all Rio Grande disputes, Article 25 of the Treaty "provides the procedural mechanism by which the IBWC can incorporate new material by issuing Minutes."[195] Given its broad grant of jurisdiction, the IBWC can implement the U.N. Convention community of property/interest model to manage the Rio Grande's lower basin through a policy-based Minute without requiring reorganization of the body itself or cumbersome amendment.[196] This approach would eliminate American and Mexican conflicts of interest over the Rio Grande's flows and optimize water supply in its lower basin.[197]

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192. *See* Dellapenna, *supra* note 8, at 41-42 (endorsing the community of property model adopted by the U.N. Convention as the best scheme for optimizing water supply in an international waterbasin); Ingram, *supra* note 125, at 186 (revealing how the IBWC can incorporate the U.N. Convention relatively easily, through a policy-based Minute).

193. Ingram, *supra* note 125, at 186.

194. *Id.* at 201.

195. *Id.* at 204.

196. *See id.* at 164-65, 183, 196 (describing the breadth of the IBWC's authority and its flexibility to easily incorporate new rules.)

197. *See* Dellapenna, *supra* note 8, at 40-41 (advocating the community of property model as a means of jointly administering a waterbasin without regard for any

V. CONCLUSION

After weighing the conflicts and contemplating their solutions, the *similarities* between the Compact and Treaty disputes, which were striking at first, now seem expected, almost archetypal in the analysis of transboundary river management; of course, a downstream riparian would object to an upstream riparian's actions reliant upon a different interpretation of their allocation agreement.[198] And it seems natural that the upstream party should maintain its position, capable of unilaterally restricting its sovereignty over the stream only to a degree to which it feels legally obligated.[199]

Now more striking are the *differences* in the problems facing users in the two Rio Grande basins. The main distinction comes down to enforcement authority. The U.S. federal government has the jurisdiction and authority to enforce a remedy sufficient to ensure New Mexico's compliance with the Compact.[200] The Supreme Court exercises original jurisdiction, meaning it will appoint a Special Master, to conduct fact-finding and to effectively recommend a ruling, for the Supreme Court's approval.[201] Its ruling should increase the negative consequences of New Mexico's breach, in order to incentivize

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international border, thereby aligning the interests of the neighboring countries under the common goal of optimizing water supply within their shared jurisdiction).

198. *Compare* Dellapenna, *supra* note 8, at 51 (explaining that the treaty governing transboundary river management of the Nile River sought to quell tension between the upstream and downstream users based on equitable participation of all states who shared the basin), *with* Egan, *supra* note 36, at 334 (describing four instances when downstream and upstream users disagreed over compact compliance).

199. *See* Schladen, *supra* note 10 (reporting on New Mexico's unilateral decision to reduce flows based on its interpretation of the Compact).

200. Brief in Support, *supra* note 9, at 18; Lashmet, *supra* note 7; Schladen, *supra* note 10.

201. *See* Texas v. New Mexico, 135 S. Ct. at 474 (2014) (appointing the Court's Special Master to conduct its fact-finding over the current Rio Grande Compact case between Texas and New Mexico); Sarine, *supra* note 47, at 550 ("[A]ppointment 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.").

their compliance with the Compact and deter future breaches of interstate agreements.

However, in international law, enforcement frequently requires mutual consent, which demands a more nuanced, if not more delicate, approach.[202] In order to reach a mutually beneficial agreement, both sides must recognize that the zero-sum game of the status quo is not working, and through the existing IBWC, they should adopt a policy Minute aimed at endorsing the community of property model and erasing the border, to optimize water resource management in the lower Rio Grande basin.[203] This may be easier said than done.

In what is generally overlooked as dictum in Garrett Hardin's widely circulated "Tragedy of the Commons," the author offers guidance which could be put to excellent use in the lower Rio Grande basin.

> As nearly as I can make out, automatic rejection of proposed reforms is based on one of two unconscious assumptions: (i) that the status quo is perfect; or (ii) that the choice we face is between reform and no action; if the proposed reform is imperfect, we presumably should take no action at all, while we wait for a perfect proposal. But we can never do nothing. That which we have done for thousands of years is also action. It also produces evils. Once we are aware that the status quo is action, we can then compare its discoverable advantages and disadvantages with the predicted advantages and disadvantages of the proposed reform, discounting as best we can for our lack of experience. On the basis of such a comparison, we can make a rational decision which will not involve the unworkable assumption that only perfect systems are tolerable.[204]

Applied to the common resource of the Rio Grande, the IBWC and both the United States and Mexico should recognize that

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202. *See* Dellapenna, *supra* note 8, at 33 (lamenting that the primitive operation of customary international law arises only from nations' sense of legal obligation).

203. Ingram, *supra* note 125, at 191.

204. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1247-48 (1968).

the current agreement is unworkable. It is action which is alarmingly imperfect. To take no action would be abdicate the Treaty altogether. To adopt the U.N. Convention and put a community of property model into practice would be reform. As such, its flaws should be considered not in isolation, but against the flaws of the existing arrangement. In such light, the rational choice should be clear to the IBWC and to both countries.