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Tripartite Water Cosovereignty

ABSTRACT. Former U.S. Supreme Court Justice Felix Frankfurter and former Harvard Law School Dean James M. Landis published in 1925 the seminal work on the U.S. Constitution's Compact Clause. Their article focused on cosovereignty within the United States, but only in a binary sense. While indelibly shaping interstate and federal-state relations, North America's original sovereigns – Native nations – were not visible within this influential piece. So, too, with the approximately two dozen compacts later formed to apportion water from rivers running across and along state lines, agreements that acknowledged Native nations and their water rights only at the margins, if at all. Revisiting Frankfurter and Landis's pivotal piece one century later, this Article urges advocates and scholars to look beyond the binary conception of cosovereignty apparent in that piece and entrenched in the suite of compacts created in its wake. Tracking Native nations' growing calls for inclusion in transboundary water management, the Article contends that these cosovereigns must be respected as what they are – sovereigns – and afforded opportunities for direct representation on compact commissions beside their state and federal counterparts. The Article outlines several ways to achieve this indigenization and, ultimately, move from binary to tripartite water cosovereignty.

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INTRODUCTION

A little more than a decade before Felix Frankfurter ascended to the Supreme Court in 1939[1] and James M. Landis became the dean of Harvard Law School in 1937,[2] the professors coauthored a seminal piece about cosovereignty in the United States.[3] As reflected by its title, *The Compact Clause of the Constitution* centered on a constitutional provision that, although historically utilized to address state-boundary conflicts, had expanded over time to a host of other realms.[4] By the mid-1920s, the Compact Clause had begun playing a pivotal role in managing the many North American rivers to which Native peoples have been connected for centuries[5]—particularly, *Pisísvayu* (the Colorado River), *Tsé Dogoi Ńlíní* (the La Plata River), and *Niinéniiniicíihéhe'* (the South Platte River).[6] Yet, despite their age-old relationships with these waterbodies, Native nations remained at the periphery of these burgeoning compacts; only state and federal actors received a voice in shaping these cosovereign agreements.

Nested within the allotment and assimilation era of federal Indian policy,[7] Frankfurter and Landis's piece advocated effusively for an expansive vision of the Compact Clause, heralding countless "potentialities . . . left largely unexplored"

1. *Justices 1789 to Present*, SUP. CT. U.S., https://www.supremecourt.gov/about/members_text.aspx [https://perma.cc/MG5X-ANS8].
2. *History of Harvard Law School & Harvard University: Selected Resources*, HARV. L. SCH. LIBR., https://guides.library.harvard.edu/law/hlshistory [https://perma.cc/9Z93-PQ4W].
3. Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685 (1925).
4. The Compact Clause provides, "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power." U.S. CONST. art. I, § 10, cl. 3. An overview of this provision's history appears *infra* Section I.A.
5. A digital interactive map displaying traditional Native territories in North America can be accessed at NATIVE LAND DIGIT., https://native-land.ca [https://perma.cc/Z5KQ-CV4T]. For pronouncements expressing Indigenous Peoples' deep connections to waterbodies within these territories, see *A Common Vision for the Colorado River System: Toward a Framework for Sustainability*, WATER & TRIBES INITIATIVE 4 (2020), https://naturalresourcespolicy.org/docs/policybrief3finalweb.pdf [https://perma.cc/8X6J-NKKN]; and Jason Anthony Robison, Barbara Cosens, Sue Jackson, Kelsey Leonard & Daniel McCool, *Indigenous Water Justice*, 22 LEWIS & CLARK L. REV. 841, 852, 855-57 (2018).
6. *Pisísvayu* is the Hopi name for the Colorado River. FRANK WATERS, BOOK OF THE HOPI 343 (Penguin Books 1977) (1963). *Tsé Dogoi Ńlíní* is the Diné (Navajo) name for the La Plata River. LAURANCE D. LINFORD, NAVAJO PLACES 227 (2000). *Niinéniiniicíihéhe'* is the Arapaho name for the South Platte River. Tershia d'Elgin, *South Platte River*, COLO. ENCYCLOPEDIA (2026), https://coloradoencyclopedia.org/article/south-platte-river [https://perma.cc/4HGL-GYZE].
7. For further discussion of this era's policies, see *infra* Section II.A.

under "[t]he combined legislative powers of Congress and of the several States."[8] This enthusiasm extended to cosovereign relations over the life-giving, prosperity-yielding rivers running across and along state boundaries.[9] Frankfurter and Landis did not equivocate in their prescription for mediating such relations: "Collective legislative action through the instrumentality of compact by States constituting a region furnishes the answer."[10] As the twentieth century unfolded, this vision shaped reality, with more than two dozen compacts emerging to apportion transboundary waters following *The Compact Clause of the Constitution*'s 1925 publication.[11]

But where were Native nations—"the land's original sovereign political entities"[12]—within this vision? One need only look two sections away from the Compact Clause, to the Indian Commerce Clause,[13] for clear indicia that "[t]here are three branches of sovereignty within the American constitutional system: the United States, the states . . . , and the Indian tribes."[14] This tripartite perspective—recognizing that tribal sovereignty preexists the U.S. Constitution[15]—diverges from traditional principles of federalism.[16] Indeed, only the federal and state cosovereigns played a visible role in Frankfurter and Landis's advocacy, and only those cosovereigns developed the ensuing wave of water-apportionment compacts. The exclusion of Native peoples in this context throws into relief a fallacy as historically pervasive as it is unduly narrow: a binary conception of cosovereignty.

This Article therefore intervenes to call for greater inclusion of Native nations within the "emotional, contentious field of play" that is American sov-

8. Frankfurter & Landis, *supra* note 3, at 688.

9. *Id.* at 699-703.

10. *Id.* at 708.

11. *See infra* note 104.

12. David E. Wilkins, Indigenous Governance: Clans, Constitutions, and Consent 152 (2023).

13. The Indian Commerce Clause provides, "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3; *see also* Cohen's Handbook of Federal Indian Law § 5.01[1][b] (2024) ("The Indian commerce clause recognizes tribes as sovereigns along with foreign nations and the several states . . . .").

14. Charles Wilkinson, Blood Struggle: The Rise of Modern Indian Nations 249 (2005).

15. *See* Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

16. *See, e.g.*, Erwin Chemerinsky, Constitutional Law: Principles and Policies 3-6 (7th ed. 2023) (discussing the U.S. Constitution's approach to separation of powers and federalism).

ereignty.[17] Revisiting *The Compact Clause of the Constitution* one century after its publication, this Article offers a novel exposition and critique of the binary conception of cosovereignty at the core of the seminal piece itself and, even more importantly, within the water-apportionment compacts that subsequently spawned in and adjacent to the American West. With climate change bringing sobering, unpredictable pressures to bear upon the precious waterbodies of this arid and semiarid region, cosovereign relations over water apportionment and management have never been more important.[18] And compacts have been the principal instruments deployed to mediate these relations for transboundary waters by a gaping margin.[19] Yet a common thread runs through all existing compacts: Native nations are present along the margins, if at all, undermining their status as the "original nations of North America."[20]

This Article contributes to a growing body of scholarship addressing settler states' persistent exclusion of Indigenous peoples from decision-making bodies and processes utilized to manage transboundary waters.[21] These commentators

17. Wilkinson, *supra* note 14, at 249.

18. *See generally* Bureau of Reclamation, West-Wide Climate and Hydrology Assessment (2021) (addressing risks posed by climate change for water supply and demand in the western United States).

19. Approximately two dozen water-apportionment compacts have been formed in and adjacent to the West. *See infra* note 104. Statutory apportionments by Congress and equitable-apportionment decrees from the Supreme Court serve as the other instruments used for this purpose. Barton H. Thompson, Jr., John D. Leshy, Robert H. Abrams & Sandra B. Zellmer, Legal Control of Water Resources: Cases and Materials 902-31, 958-61 (6th ed. 2018). Congress has enacted only two statutory apportionments. Thompson et al., *supra*, at 958-61. And the first statutory apportionment was arguably only a judicial construction in *Arizona v. California*, 373 U.S. 546 (1963). *See generally* Norris Hundley, Jr., *Clio Nods:* Arizona v. California *and the Boulder Canyon Act—A Reassessment*, 3 W. Hist. Q. 17 (1972) (critiquing the statutory-apportionment holding). The Court has entered equitable-apportionment decrees in only three cases: *Wyoming v. Colorado*, 259 U.S. 419 (1922); *New Jersey v. New York*, 283 U.S. 336 (1931); and *Nebraska v. Wyoming*, 325 U.S. 589 (1945). Christine A. Klein, *Groundwater Exceptionalism: The Disconnect Between Law and Science*, 71 Emory L.J. 487, 522 & n.216 (2022).

20. Wilkins, *supra* note 12, at 20.

21. For a recent report synthesizing international and comparative scholarship in this area, see Katie Goldie-Ryder, David Hebart-Coleman & Tania Eulalia Martinez-Cruz, *Supporting the Inclusion of Indigenous Peoples in Transboundary Water Cooperation*, Stockholm Int'l Water Inst. (2024), https://siwi.org/wp-content/uploads/2024/08/supporting-the-inclusion-of-indigenous-peoples-in-twc.pdf [https://perma.cc/9DZ2-YCNN]. *See also* Robison et al., *supra* note 5, at 859-99 (utilizing the U.N. Declaration on the Rights of Indigenous Peoples to examine issues of water justice facing Indigenous peoples in the Colorado, Columbia, and Murray-Darling basins).

seek to indigenize water governance,[22] building on a growing grassroots movement for the inclusion of Indigenous peoples in transboundary water management.[23] Inspired by Native nations' ongoing mobilization for greater inclusion across North America – along major rivers such as the Colorado,[24] Columbia,[25] and Rio Grande,[26] and also vis-à-vis the Great Lakes[27] – this Article offers a comprehensive analysis of water-apportionment compacts' historical marginalization of tribal cosovereigns, followed by a blueprint to transcend this marginalization via indigenization. Much of the Article's prescriptive content stems from insights kindly shared during original interviews with seasoned scholars and practitioners who have devoted their careers to the fields of water law, federal Indian law, and tribal law.[28]

Beyond the context of water, this Article also engages with the growing body of scholarship and advocacy involving general natural-resource management. This wide-ranging work has called for the inclusion of Native nations for over half a century through theories of "comanagement" and "costewardship."[29] This

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22. As used here, "indigenization" refers to increasing the "presence of Indigenous people in an institution . . . previously dominated by colonial settlers or their descendants." *Indigenization*, OXFORD ENG. DICTIONARY (2024), https://www.oed.com/dictionary/indigenization_n [https://perma.cc/2UK8-8G67].

23. Goldie-Ryder et al., *supra* note 21, at 3, 13-14. For recent scholarship focusing on the inclusion of tribal sovereigns in water governance under compacts, see Jason Anthony Robison, *Equity Along the Yellowstone*, 96 U. COLO. L. REV. 601, 654-57, 672 (2025); Zachary Pavlik, *Interstate Water Compacting and the Silenced Sovereign: Federal Appointees as a Trigger for the Federal Trust Responsibility*, 27 U. DENV. WATER L. REV. 67, 77-83, 93 (2024); and Matthew McKinney, Jay Weiner & Daryl Vigil, *First in Time: The Place of Tribes in Governing the Colorado River System*, 63 NAT. RES. J. 153, 154-56, 165-67 (2023).

24. *See infra* notes 299-312 and accompanying text.

25. *See infra* note 298 and accompanying text.

26. *See infra* notes 313-320 and accompanying text.

27. *See, e.g.*, Tribal and First Nations Great Lakes Water Accord 2 (Nov. 23, 2004), https://static1.squarespace.com/static/54ade7ebe4b07588aa079c94/t/54ea4fa3e4b06d2d72224dc0/1424641955323/Tribal-and-First-Nations-Great-Lakes-Water-Accord.pdf [https://perma.cc/P4A6-B8VU] ("It is thus our right, our responsibility and our duty to insist that no plan to protect and preserve the Great Lakes Waters moves forward without the equal highest-level participation of Tribal and First Nation governments with the governments of the United States and Canada.").

28. A reiteration of my gratitude to these interviewees is appropriate – namely, Barbara Cosens, John E. Echohawk, Burke Griggs, Douglas S. Kenney, Lawrence J. MacDonnell, Daniel McCool, Anthony Dan Tarlock, John E. Thorson, and David E. Wilkins. Full citations to the interviews appear *infra* notes 154, 225, 382, 385, 387, 388, 396, 397, and 402.

29. *E.g.*, Kevin K. Washburn, *Landback as Federal Policy*, 71 UCLA L. REV. 1, 35-38 (2025) (discussing comanagement and costewardship as concepts); Monte Mills, *The Supreme Court's Old Habits in a New Era? Native Nations, Statehood, and an Indigenous-led Future for Natural*

Article adds to this critical yet underexplored area by invoking tribal sovereignty and the federal-tribal trust relationship as guiding principles not only for the indigenization of water-apportionment compacts but also for comanagement and costewardship writ large.[30]

Set against the backdrop of pervasive settler-state water colonialism,[31] this Article introduces a new concept: tripartite water cosovereignty. In line with this concept, Native nations and their water rights must be treated equitably under existing and future water-apportionment compacts, with tribal cosovereigns afforded opportunities for direct representation beside their state and federal counterparts on compact commissions.

In support of this position, the Article proceeds in three Parts. Part I revisits Frankfurter and Landis's pathbreaking intervention, along with the Compact Clause's subsequent transplantation to North America's rivers, revealing how the prevailing binary conception of cosovereignty became entrenched. Part II then inventories the suite of water-apportionment compacts that emerged in and adjacent to the western United States over the twentieth century. This Part contextualizes the compacts temporally within the oscillating eras of federal Indian policy and spatially through original digital mapping of tribal lands and areas within North American river basins. This analysis lays bare the persistence of Frankfurter and Landis's binary conception of cosovereignty in the negotiation and administration of modern compacts. Rebuking this narrow perspective, Part III calls for a paradigm shift from binary to tripartite water cosovereignty. Written with humility and respect towards Native nations and their cosovereigns, this Part emphasizes compact commissions' capacity-enhancing value for adaptive water management; argues for the inclusion of tribal cosovereigns on commissions; and presents novel pathways to indigenize commissions. But as a starting point, Frankfurter and Landis should have the first word.

Resources, 77 STAN. L. REV. ONLINE 139, 157 (2025) ("[C]oncurrent with the rise of domestic Indigenous sovereignty, the last half century has drastically reshaped the role of tribal governance in the management of natural resources that had previously been entirely the province of the state and federal governments.").

30. *E.g.*, Monte Mills & Martin Nie, *Bridges to a New Era: A Report on the Past, Present, and Potential Future of Tribal Co-Management on Federal Public Lands*, 44 PUB. LAND & RES. L. REV. 49, 148-51 (2021) (discussing and building on foundational principles for comanagement set forth in Ed Goodman, *Protecting Habitat for Off-Reservation Tribal Hunting and Fishing Rights: Tribal Comanagement as a Reserved Right*, 30 ENV'T L. 279, 342-49 (2000)).

31. *See* Robison et al., *supra* note 5, at 899-904 (deconstructing the concept of "water colonialism" into constituent elements apparent within the Colorado, Columbia, and Murray-Darling basins).

I. FRANKFURTER AND LANDIS AND THE GENESIS OF WATER COMPACTS

"[N]o one State can control the power to feed or to starve, possessed by a river flowing through several States."[32] Latent within this quote's admonition about hegemony over transboundary rivers was Frankfurter and Landis's broad, optimistic view of compacts' capacity to mediate cosovereign relations, particularly for the purpose of conserving natural resources.[33] Section I.A illustrates how, within their 1925 publication, Frankfurter and Landis conceived of the Compact Clause as an integral mechanism for resolving historical and contemporary transboundary disputes. Section I.B turns to the practical impact of this novel conception, demonstrating how these scholars laid the groundwork for nascent compacting efforts involving North America's waterbodies—and the marginalization of Native peoples within these agreements. This Part therefore traces the exclusionary roots of binary water cosovereignty back to Frankfurter and Landis's 1925 piece and the early compacts that influenced their work.

A. *Revisiting* The Compact Clause of the Constitution

Even a cursory reading of *The Compact Clause of the Constitution* reveals why it has become a foundational text. The article harnessed research spanning several centuries of U.S. history, from the colonial period up to 1925, to advocate for the realization of what Frankfurter and Landis regarded as the Compact Clause's as-yet-untapped potential. Compacts, according to Frankfurter and Landis, furnished an optimal solution for contemporary U.S. regionalism and promised to move away from a false federal-state binary and toward the mutualism of compacts. Yet, while they viewed compacts as approaching cosovereignty in a novel, cooperative way, this approach accounted exclusively for state and federal actors, overlooking North America's "first sovereigns"[34]—Native nations—with respect to compacts drafted for natural-resource conservation.[35] In this way, their landmark piece perpetuated another binary: an exclusionary conception of cosovereignty that would indelibly shape future water-apportionment compacts.

History anchored Frankfurter and Landis's conceptualization of compacts. "[T]he Compact Clause has deep roots in colonial history," they explained, as

32. Frankfurter & Landis, *supra* note 3, at 701.

33. *Id.* at 699-703.

34. WILKINS, *supra* note 12, at 29.

35. Notably, Felix Frankfurter was the namesake of visionary federal Indian law scholar and practitioner Felix S. Cohen. DALIA TSUK MITCHELL, ARCHITECT OF JUSTICE: FELIX S. COHEN AND THE FOUNDING OF AMERICAN LEGAL PLURALISM 17 (2007).

"part and parcel of the long and familiar story of colonial boundary controversies."[36] One "peaceful mode[]" of dispute resolution in this context—"the obvious way out" as Frankfurter and Landis conceived of it—was "[n]egotiation between the contending colonies . . . carried on usually through joint commissions" with the Crown's approval.[37] Hanging over such negotiations, however, was an alternative: "appeal to the Crown, followed normally by a reference of the controversy to a Royal Commission," a process bearing the hallmarks of litigation.[38] This pairing of consensual and adversarial approaches would later make its way into the constitutional text.[39]

The Compact Clause's legal roots in the Articles of Confederation also shaped Frankfurter and Landis's understanding of the provision. As they chronicled, the Framers in 1787 incorporated into the Constitution variations of the foregoing colonial practices and their post-Revolution successors under the Articles of Confederation. Prompted by concerns over political rivalry—that is, the need "to protect the new Union of States . . . from the destructive political combination of two or more States"—the Articles contained two provisions significant to not only these persistent boundary conflicts but also the broader course of U.S. history.[40] First, Article IX positioned Congress as the last resort on appeal "in all disputes and differences . . . between two or more states concerning boundary, jurisdiction, or any other cause."[41] Second, Article VI likewise provided, "No two or more states shall enter into any treaty, confederation, or alliance whatever between them, without the consent of the [U]nited [S]tates, in [C]ongress assembled."[42] Here again, a legal precedent was set. As highlighted by Frankfurter and Landis, "This curb upon political combinations by the States was retained almost *in haec verba* by the Constitution."[43]

36. Frankfurter & Landis, *supra* note 3, at 692.

37. *Id.* Colonial examples include negotiations between Connecticut and New York in 1664, 1683, 1700, and 1725. *Id.* at 692 n.28.

38. *Id.* at 692-93. Boundary disputes between New Hampshire and Massachusetts, Massachusetts and Rhode Island, Massachusetts and New York, and New York and New Jersey made use of this process. *Id.* at 693 n.30.

39. *Id.* at 694 ("Historically the consent of Congress, as a prerequisite to the validity of agreements by States, appears as the republican transformation of the needed approval by the Crown.").

40. *Id.* at 693.

41. ARTICLES OF CONFEDERATION of 1781, art. IX, para. 2; *see also* Frankfurter & Landis, *supra* note 3, at 693 (analyzing this provision).

42. ARTICLES OF CONFEDERATION of 1781, art. VI, para. 2.

43. Frankfurter & Landis, *supra* note 3, at 694; *see also* U.S. CONST. art. I, § 10, cl. 1 ("No State shall enter into any Treaty, Alliance, or Confederation . . . .").

Noting the persistence of state-boundary conflicts in 1787,[44] Frankfurter and Landis offered this synthesis of the historical backdrop: "The framers were familiar with the modes of settlement prior to the Revolution—that controversies were determined partly through agreements confirmed by the Crown, and partly by litigation on appeal to the Privy Council. The Philadelphia Convention wrote both methods practised by the Colonies into the Constitution."[45] On the one hand, Article III extended the judicial power "to Controversies between two or more States," placing such controversies within the Supreme Court's original jurisdiction[46] and creating an analogue to the colonial method of dispute resolution involving referrals to a Royal Commission and appeals to the Privy Council.[47] On the other hand, and of even greater import to Frankfurter and Landis's historical research, "[t]he power to negotiate settlements between the Colonies, subject to the sanction of the royal prerogative," transformed into the Compact Clause.[48]

Glancing across the almost century and a half between the Framing and their piece's 1925 publication, Frankfurter and Landis saw in the Compact Clause an elastic yet underutilized potential.[49] Compacts had been used to mediate cosovereign relations over a broad array of subjects during this period, including "[b]oundaries and cessions of territory" and the "[c]onservation of natural resources."[50] Indeed, Frankfurter and Landis effused about the value of compacts in these contexts. "The inventive powers exacted from modern State legislatures must grapple with problems whose stage is an interstate region," they explained, and "collective legislative action through the instrumentality of compact by States constituting a region furnishes the answer."[51]

Plain from this advocacy was the importance of compacts in resolving burgeoning regional conflicts. "[N]othing is clearer than that in the United States there are being built up regional interests, regional cultures and regional

44. Eleven state-boundary conflicts existed at the Constitution's adoption. Frankfurter & Landis, *supra* note 3, at 694 (citing Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657, 723 (1838)).

45. *Id.*

46. U.S. CONST. art. III, § 2, cl. 1.

47. Frankfurter & Landis, *supra* note 3, at 694.

48. *Id.*

49. *Id.* at 695.

50. *Id.* at 695-96. The additional six subjects were control and improvement of navigation, penal jurisdiction, uniformity of legislation, interstate accounting, utility regulation, and taxation. *Id.* at 696.

51. *Id.* at 708.

interdependencies," Frankfurter and Landis declared.[52] "Our regions are realities."[53] In Frankfurter and Landis's view, compacts served as the optimal means to navigate these varied regional interests, stepping in when negotiations required more robust tools than those available to the states and "national action [was] either unavailable or excessive."[54] In Frankfurter and Landis's estimation, "The imaginative adaptation of the compact idea should add considerably to resources available . . . in the solution of problems presented by the growing interdependence . . . of groups of States forming distinct regions."[55] A fair question thus arises: who was visible within these regions?

Their enthusiasm notwithstanding, Frankfurter and Landis omitted any reference to the third sovereign within the United States (the "senior sovereigns by their longevity and persistence"[56]): Native nations. One will search *The Compact Clause of the Constitution* in vain for "Indian," "Native," "tribe," or similar terms. Rather, the "two categories of lawmaking agencies" emphasized throughout were "the individual States and the United States—with their respective fields of action not definitively delimited by law and yet constantly interacting in fact."[57] Frankfurter and Landis thus conceived of compacts as tools to transcend the "exclusive duality"[58] placing "modern society . . . at the mercy of the false antithesis embodied in the shibboleths 'States-Rights' and 'National Supremacy.'"[59] In this way, Frankfurter and Landis sought to move legal and political consciousness within the United States away from a wholly binary conception of law and instead toward the mutualism promised by compacts.[60] At the same time, however, Frankfurter and Landis's fixation on state and federal governments as the only active, interested sovereigns in this space perpetuated a binary conception

52. *Id.* at 729. "[C]limate, geography, economic specialization, and social habits" generally distinguished U.S. regions from one another, according to Frankfurter and Landis. *Id.* at 717. In reference to water compacts and equitable-apportionment suits, Frankfurter and Landis conceived of regions as watersheds encompassing the territory of multiple states. *Id.* at 702, 707.

53. *Id.* at 729.

54. *Id.* at 707.

55. *Id.* at 729.

56. WILKINS, *supra* note 12, at 20.

57. Frankfurter & Landis, *supra* note 3, at 687.

58. *Id.* at 688.

59. *Id.* at 729.

60. Compacts exist as both federal and state law. THOMPSON ET AL., *supra* note 19, at 932-33. It is only in this sense that Frankfurter and Landis attempted to move beyond a wholly binary conception of law. Full realization of this principle would require paying proper attention and respect to tribal law. *See generally* Elizabeth A. Reese, *The Other American Law*, 73 STAN. L. REV. 555 (2021) (advocating for tribal law to be understood as part of American law in contrast to mainstream exclusionary conceptions advanced throughout history).

of cosovereignty. North America's rivers would come to reflect this narrow mindset.

B. Transplanting the Compact Clause to Water

Then-emerging water compacts, designed in ways that crystallized the binary conception of cosovereignty, factored prominently in *The Compact Clause of the Constitution*.[61] This Section offers a snapshot of this inflection point—the genesis of water-apportionment compacts—and sets the stage for Part II's survey of these instruments.

As recounted by Frankfurter and Landis, "The reclamation of arid territory through irrigation and the fullest possible satisfaction of the competing demands on a limited water-supply by an increasing population, present one of the most permeating aspects of the conservation problem."[62] Their intervention, with its regionally driven, procompact position, was part and parcel of a growing movement during the twentieth century's early decades to transplant the Compact Clause to the western waterscape.[63]

And there was no mistaking which river, more than any other, precipitated this movement. "The Colorado River is the Nile for the Southwest," wrote Frankfurter and Landis.[64] "Measured by the vastness of the region and the magnitude of the interests regulated," they asserted, "the Colorado Compact represents, thus far, the most ambitious illustration of interstate agreements."[65] As captured by these excerpts, *The Compact Clause of the Constitution*'s 1925 publication arrived midway between the Colorado River Compact's negotiation and signing by the Colorado River Commission in 1922 and Congress's ratification of the compact via the Boulder Canyon Project Act in 1928.[66] Also in 1925, Congress ratified the La Plata River Compact[67]—the first water-apportionment compact enacted in U.S. history[68]—and a half dozen others were at various stages of

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61. Frankfurter & Landis, *supra* note 3, at 695-96, 699-703.

62. *Id.* at 700.

63. *See infra* notes 83-97 and accompanying text.

64. Frankfurter & Landis, *supra* note 3, at 701.

65. *Id.* at 702.

66. *See* NORRIS HUNDLEY, JR., WATER AND THE WEST: THE COLORADO RIVER COMPACT AND THE POLITICS OF WATER IN THE AMERICAN WEST 138-281 (2d ed. 2009). The Colorado River Basin's thirty tribal sovereigns were excluded from the compact negotiations. McKinney et al., *supra* note 23, at 155, 163-65.

67. Frankfurter & Landis, *supra* note 3, at 702, 747-48.

68. *See infra* note 104.

consideration.[69] As Frankfurter and Landis observed, "The widespread public discussion elicited by the evolution of the Colorado River Compact has served to educate the irrigation States to the possibilities of the compact idea."[70] The Compact Clause's transplantation was well underway.

Frankfurter and Landis firmly rejected a litigation-oriented approach to water apportionment. Two decades prior, the U.S. Supreme Court had announced, in litigation between Kansas and Colorado over the Arkansas River, a new doctrine whereby the Court could exercise its original jurisdiction to craft an "equitable apportionment" of a river's flows.[71] The Court did just that, for the first time ever, along the Laramie River in 1922.[72] But Frankfurter and Landis regarded this approach to interstate water conflicts as a "failure," praising instead "the present movement towards solution by interstate treaties [as] a decisive recognition that the instrument of state-craft in this field is not court but compact."[73] They argued that constant shifts in human populations, technology, and natural conditions precluded any "definitive settlement" through adjudication and or implementation through "isolated acts of administration."[74] These dynamic and ever-changing conditions instead required "[a]greement among the affected States and the United States, with an administrative agency for continuous study and continuing action."[75] Frankfurter and Landis, in other words, favored federal-state negotiation of water-apportionment compacts—and establishment of formal bodies for compact administration—as the optimal approach for addressing cosovereign relations over transboundary rivers.

This advocacy drew upon the work of several luminaries who had been pushing in a similar direction since the turn of the twentieth century.[76] Responding

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69. The statuses of these compacts in 1925 appear in Frankfurter & Landis, *supra* note 3, at 748-49.

70. *Id.* at 702.

71. Kansas v. Colorado, 206 U.S. 46, 118 (1907); Kansas v. Colorado, 185 U.S. 125, 145 (1902).

72. Wyoming v. Colorado, 259 U.S. 419, 495-96 (1922). For insightful accounts of this case, see generally JAMES H. DAVENPORT, WESTERN WATER RIGHTS AND THE U.S. SUPREME COURT (2020); and DANIEL TYLER, SILVER FOX OF THE ROCKIES: DELPHUS E. CARPENTER AND WESTERN WATER COMPACTS (2003).

73. Frankfurter & Landis, *supra* note 3, at 707.

74. *Id.* at 701.

75. *Id.*

76. In addition to the materials discussed below, Frankfurter and Landis relied on the REPORT OF THE COMMITTEE ON INTER-STATE COMPACTS TO THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1921). Regarding conservation of transboundary waters, the report provided: "Administrative regulation will undoubtedly be the means of control; and joint action in such regulation will be inevitable. Here, again, the natural and effective means will be to make a legislative compact authorizing and directing the Commissions to make uniform regulations." *Id.* at 306.

to the Arkansas River litigation, Carman F. Randolph contemporaneously published two companion pieces in the *Columbia Law Review*, devoting a modest portion of the latter piece, *Notes on Suits Between States: Kansas v. Colorado II*, to the Compact Clause and its application to transboundary waters.[77] Acknowledging how interstate compacts historically had been formed to address "boundary questions," Randolph advocated for their expansion to the water-apportionment context, contending that "there is no reason why States should not combine to secure a more equitable enjoyment of a common interest in water than is attainable by independent action."[78] Randolph then sketched the contours of a potential water compact. His envisioned agreement would create "a public corporation for the promotion of irrigation," charged "with the general apportionment of water among the several parties to the compact."[79] The corporation's governing body would include federally appointed members who were "non-residents of the States interested," and each interested state would have "a representative near the governing body for purposes of suggestion and consultation."[80] While Randolph did not elaborate further on what the compact, public corporation, or governing body might entail—including the "practical rule for the just apportionment of water"[81]—his article nonetheless offered the seed of an idea.

Yet Frankfurter and Landis did not rely upon Randolph's work when advocating for the Compact Clause's transplantation to transboundary rivers.[82] Instead, the earliest source cited was the 1911 edition of Samuel C. Wiel's epic treatise, *Water Rights in the Western States*.[83] Wiel noted the legal doctrine governing water use along interstate streams was then "in a stage of development"—so "any conclusions must be tentative only"—and proceeded to present suggestions that would later appear in Frankfurter and Landis's advocacy.[84] "Between States, each is entitled to have for its prosperity an equitable apportionment of benefits from

77. *See* Carman F. Randolph, *Notes on Suits Between States:* Kansas v. Colorado II, 2 COLUM. L. REV. 364, 377-80 (1902) [hereinafter Randolph, *Kansas v. Colorado II*]; *see also* Carman F. Randolph, *Notes on Suits Between States:* Kansas v. Colorado, 2 COLUM. L. REV. 283 (1902) (serving as the companion piece to *Kansas v. Colorado II*).

78. Randolph, *Kansas v. Colorado II*, *supra* note 77, at 377.

79. *Id.* at 378.

80. *Id.*

81. *Id.* at 379.

82. Randolph's work was, however, quoted and discussed in the 1921 report of the Committee on Inter-State Compacts on which Frankfurter and Landis relied. *See* REPORT OF THE COMMITTEE ON INTER-STATE COMPACTS, *supra* note 76, at 306-08; Frankfurter & Landis, *supra* note 3, at 691 n.26, 735.

83. Frankfurter & Landis, *supra* note 3, at 707 n.93 (citing 1 SAMUEL C. WIEL, WATER RIGHTS IN THE WESTERN STATES 372 (3d ed. 1911)).

84. WIEL, *supra* note 83, at 372-73.

an interstate stream,"[85] Wiel submitted, tracking the second *Kansas v. Colorado* decision.[86] Wiel also added an administrative perspective to this distributional one: "Consequently, control of interstate streams is likely to gravitate toward the formation of joint commissions between the States to supervise their use and make regulations."[87] In this prediction was an antecedent, more closely connected than Randolph's public-corporation idea had been,[88] to Frankfurter and Landis's proposal for a compact-based "administrative agency for continuous study and continuing action."[89]

But the luminary with arguably the greatest influence on Frankfurter and Landis's advocacy had yet to take the stage. Delphus E. Carpenter, known variously as "the father of the compact idea" and the "Silver Fox of the Rockies,"[90] remained chiefly responsible for designing the Colorado River Compact.[91] It was Carpenter's lengthy 1921 address to the Colorado Bar Association[92] that Frankfurter and Landis cited for their position that equitable-apportionment suits constituted "failure."[93] Carpenter produced eloquent, zealous, and persistent arguments in favor of negotiating water-apportionment compacts rather than resorting to court.[94] Focusing narrowly on his influence on Frankfurter and Landis, two aspects of this advocacy stand out.

On one hand, Carpenter agreed with Frankfurter and Landis that compacts were preferable to courts for addressing interstate water conflicts, relying on two strands of reasoning in support of this position. The first analogized water compacts among state sovereigns to water treaties among federal sovereigns. Carpenter argued that "controversies respecting international rivers are settled . . . by treaty," and "States possess all the powers of independent sovereignties not surrendered to the United States by the Constitution."[95] Thus,

85. *Id.* at 372.

86. *See* Kansas v. Colorado, 206 U.S. 46, 117-18 (1907) (dismissing Kansas's complaint but prospectively emphasizing the importance of an "equitable apportionment of benefits between the two states resulting from the flow of the river").

87. WIEL, *supra* note 83, at 372.

88. *See* Randolph, *Kansas v. Colorado II*, *supra* note 77, at 378-79.

89. Frankfurter & Landis, *supra* note 3, at 701.

90. TYLER, *supra* note 72, at 108, 287.

91. HUNDLEY, *supra* note 66, at 222.

92. Delphus E. Carpenter, Interstate Compact Comm'r for Colo., Application of the Reserve Treaty Powers of the States to Interstate Water Controversies: Address to the Colorado Bar Association 45, 82-88 (June 4, 1921) (on file with Colo. St. U., Libraries, Carpenter (Delph E. and Family) Papers, Series 2, Subseries 2.2).

93. Frankfurter & Landis, *supra* note 3, at 707 & n.93.

94. This advocacy is chronicled in TYLER, *supra* note 72, at 3-6.

95. Carpenter, *supra* note 92, at 17, 23.

Carpenter proffered, "The factors which prompt [water treaties] between independent nations should apply between States of separate sovereignties and exclusive jurisdictions, yet bound together in a Federal Union of limited and delegated powers under a Constitution."[96] As for the second strand, Carpenter argued that water apportionment fit squarely within the range of subjects for which compacts had historically been formed. Given how existing compacts addressed "boundaries, fisheries, harbour control and pollution, interstate easements and servitudes, and like subjects," Carpenter contended, "there can be no logical objection to the application of like methods of solution to all problems growing out of the use and distribution of the waters of interstate streams."[97]

On the other hand, despite this close alignment, Carpenter diverged somewhat from Frankfurter and Landis on the topic of commissions. Carpenter agreed that commissions were essential for negotiating compacts. "Undoubtedly all matters respecting navigable rivers and the use of waters thereof," he explained, "may properly be considered and settled through the instrumentality of joint compact commissions constituted by the United States and the interested State or States."[98] Beyond compact negotiations, however, Carpenter did not share Frankfurter and Landis's perspective on the need for *permanent* commissions for administration. Indeed, Carpenter was quite apprehensive about the prospect of a permanent Colorado River Commission, dismissively referring to such an entity as a "super-government," "super-power," and "super-agency" which would erode local control.[99] By contrast, Frankfurter and Landis considered an "administrative agency for continuous study and continuing action"[100] integral to the Compact Clause's successful application to transboundary waters.

Thus, even as the Compact Clause expanded to reach new contexts, it remained moored in a binary conception of cosovereignty—in spite of a Supreme Court decision suggesting a tripartite approach would be appropriate. In 1908, nearly two decades before Frankfurter and Landis published their article, the

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96. *Id.* at 30.

97. *Id.* at 29-30.

98. *Id.* at 19-20.

99. *Minutes of the 11th Meeting*, COLO. RIVER COMM'N 37, 40, 45-48, 52-53 (Nov. 11, 1922), https://www.ucrcommission.com/wp-content/uploads/2022/04/1922-Colorado-River-Compact-Commission-Meeting-Minutes-Volumes-1-18.pdf [https://perma.cc/PXE5-5LDE]. For additional examples of Carpenter's apprehension about a permanent Colorado River Commission, see *Minutes and Report of the 7th Meeting*, COLO. RIVER COMM'N 127-28, 133-36, 140 (1922), https://www.ucrcommission.com/wp-content/uploads/2022/04/1922-Colorado-River-Compact-Commission-Meeting-Minutes-Volumes-1-18.pdf [https://perma.cc/682D-MSM8].

100. Frankfurter & Landis, *supra* note 3, at 701.

Supreme Court decided *Winters v. United States*.[101] For the first time in U.S. history, the Court recognized the existence of tribal water rights grounded in treaties and treaty substitutes (e.g., statutes and executive orders) establishing reservations whose purposes necessitate water.[102] *Winters*'s pronouncement acknowledging these sovereign property rights arrived after Randolph's 1902 articles, but there is little doubt that *Winters* was known to Wiel, Carpenter, Frankfurter, and Landis.[103] Nevertheless, Native nations remained at the margins of these nascent efforts to transplant the Compact Clause to the Colorado and other transboundary rivers. This bounded approach to cosovereignty would set a precedent—a precedent crystallized in the many compacts formed along North America's rivers during the remainder of the twentieth century—which necessitates the reforms proposed in Part III.

II. NATIVE NATIONS AND WATER COMPACTS: TIME, SPACE, AND DOCTRINE

During the six decades following Frankfurter and Landis's publication of *The Compact Clause of the Constitution*, water-apportionment compacts proliferated in and adjacent to the West. Between 1925 and 1984, twenty-five such compacts came into being,[104] commonly motivated by states' interests in securing cong-

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

102. *Id.* at 575-77. For further discussion of the *Winters* doctrine, see *infra* Section II.C.1.

103. Wiel wrote about *Winters* in the 1911 edition of his treatise. WIEL, *supra* note 83, at 176. Carpenter's awareness of *Winters* is apparent from his negotiation of the Colorado River Compact in 1922, which implicitly acknowledged the existence of Indian reserved rights in Article VII. Colorado River Compact art. VII, COLO. REV. STAT. § 37-61-101 (2024) ("Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes."). Frankfurter and Landis's intensive study of the Colorado River Compact and Carpenter's writings strongly suggest that they too would have been aware of *Winters*.

104. The chronological appearance of these compacts is as follows: La Plata River Compact, ch. 110, 43 Stat. 796 (1925); South Platte River Compact, ch. 46, 44 Stat. 195 (1926); Colorado River Compact, ch. 42, 45 Stat. 1057 (1928); Rio Grande Compact, ch. 155, 53 Stat. 785 (1939); Republican River Compact, ch. 104, 57 Stat. 86 (1943); Belle Fourche River Compact, ch. 64, 58 Stat. 94 (1944); Costilla Creek Compact, ch. 328, 60 Stat. 246 (1946), *amended by*, Amended Costilla Creek Compact, Pub. L. No. 88-198, 77 Stat. 350 (1963); Upper Colorado River Basin Compact, ch. 48, 63 Stat. 31 (1949); Arkansas River Compact, ch. 155, 63 Stat. 145 (1949); Pecos River Compact, ch. 184, 63 Stat. 159 (1949); Snake River Compact, ch. 73, 64 Stat. 29 (1950); Yellowstone River Compact, ch. 629, 65 Stat. 663 (1951); Canadian River Compact, ch. 306, 66 Stat. 74 (1952); Sabine River Compact, ch. 668, 68 Stat. 690 (1954); Klamath River Basin Compact, Pub. L. No. 85-222, 71 Stat. 497 (1957); Bear River Compact, Pub. L. No. 85-348, 72 Stat. 38 (1958), *amended by*, Amended Bear River Compact, Pub. L. No. 96-189, 94 Stat. 4 (1980); Arkansas River Basin Compact, Kan.-Okla., Pub. L. No. 89-789,

ressional approval of federal water projects.[105] By the end of this sixty-year period, approximately two-thirds of the compacts formed would exist in basins containing Native American reservations or other tribal lands and areas.[106] However, this reality is not always apparent from the compacts themselves, particularly those provisions addressing water apportionment and compact administration. Instead, these compacts reflect a steady adherence to the binary conception of cosovereignty emphasized in 1925 by Frankfurter and Landis. The Sections below trace this pattern—examining it from temporal, spatial, and doctrinal angles—and, in doing so, lay the foundations for Part III's prescriptive intervention.

A. Water Compacts and the Federal Indian Policy Pendulum

Since the nation's Founding, federal "Indian policy has been cyclic," animated by "the tension between two conflicting forces—separatism and assimilation."[107] When recounting the more than five centuries since initial contact between European peoples and Native Americans, scholars periodize the historical eras based upon widely fluctuating policies devised by colonizing nations to address

80 Stat. 1409 (1966); Animas-La Plata Project Compact, Pub. L. No. 90-537, 82 Stat. 898 (1968); Upper Niobrara River Compact, Pub. L. No. 91-52, 83 Stat. 86 (1969); Kansas-Nebraska Big Blue River Compact, Pub. L. No. 92-308, 86 Stat. 193 (1972); Arkansas River Basin Compact, Ark.-Okla., Pub. L. No. 93-152, 87 Stat. 569 (1973); Red River Compact, Pub. L. No. 96-564, 94 Stat. 3305 (1980); and Goose Lake Basin Compact, Pub. L. No. 98-334, 98 Stat. 291 (1984).

The Amended Bear River Compact and Amended Costilla Creek Compact are counted as separate compacts in the total. Two water-apportionment compacts were also formed in the northeastern United States. *See* Delaware River Basin Compact, Pub. L. No. 87-328, 75 Stat. 688 (1961); Susquehanna River Basin Compact, Pub. L. No. 91-575, 84 Stat. 1509 (1970).

As reflected in the list of citations, Congress ratified all of these compacts, a point worth considering in relation to the Supreme Court's construction of the Compact Clause as applying solely to those compacts "tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States." Virginia v. Tennessee, 148 U.S. 503, 519 (1893).

These compacts are distinct from tribal-state cooperative agreements, including the seven tribal-state water compacts negotiated from 1979 to 2015 by the state of Montana and Native nations. *Compact Implementation Program*, MONT. DEP'T NAT. RES. & CONSERVATION, https://dnrc.mt.gov/Water-Resources/Compacts [https://perma.cc/GGJ7-MCMD]. While these agreements did receive federal approval, *id.*, such endorsement was not required by the Compact Clause, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 13, § 7.02.

105. *See* Douglas L. Grant & Brett C. Birdsong, *Water Apportionment Compacts Between States*, *in* 3 WATERS & WATER RTS. § 46.05(d) (Amy K. Kelley & Jesse J. Richardson, Jr. eds., 3d ed. 2025) (citing Charles J. Meyers, *The Colorado River*, 19 STAN. L. REV. 1, 48 (1966)).

106. *See infra* Section II.B.

107. CHARLES F. WILKINSON, AMERICAN INDIANS, TIME, AND THE LAW 13 (1987).

the "Indian problem."[108] Commencing around the same time as *The Compact Clause of the Constitution*, the emergence of water-apportionment compacts in and adjacent to the West occurred during four eras: (1) allotment and assimilation (1871-1934); (2) Indian reorganization (1934-1945); (3) termination (1945-1970); and (4) self-determination (1970-present).[109] A total of eighteen water-apportionment compacts implicating tribal lands and areas originated over this time frame.[110]

Yet, throughout this extended trajectory, paradigm shifts in federal Indian policy failed to impact the respective compacts' treatment of Native nations. Instead, these cosovereigns and their water rights continuously remained at the margins of water apportionments and administrative schemes, despite progressive developments (and regressions) in other areas of federal Indian law. As the following analysis shows, the binary conception of cosovereignty remained entrenched in this arena through each historical era and continues to facilitate the exclusion of Native nations from the realm of water apportionment.

Only two of the early water-apportionment compacts, drafted toward the end of the allotment and assimilation era, involved basins containing tribal lands: the La Plata River Compact (1925) and the Colorado River Compact (1928).[111] Crucially, these initial compacts took shape amidst a period of massive tribal land loss caused by two conjoined mechanisms of federal Indian policy. The first measure was allotment: "eliminating the communal ownership of tribal lands in favor of individual property ownership" by tribal members.[112] The second measure involved federal disposition of "surplus lands"—that is, the federal government's opening of communal lands not allotted to individual tribal members to non-Indian settlement.[113] Through these mechanisms, approximately

108. *See* RESTATEMENT OF THE L. OF AM. INDIANS ch. 1, reps.' intro., hist. note (A.L.I. 2022) ("Federal policy toward Indian tribes has moved in various decades from removal to measured separatism to physical extirpation to assimilation to self-determination—sometimes at the same time.").

109. For further discussion of these eras, see *id.*

110. *See infra* Table 1. Only seventeen of the compacts are effective, as the Amended Bear River Compact (1980) supplanted the original Bear River Compact (1958). *See supra* note 104.

111. La Plata River Compact, ch. 110, 43 Stat. 796 (1925); Colorado River Compact, COLO. REV. STAT. § 37-61-101 (2024).

112. RESTATEMENT OF THE L. OF AM. INDIANS ch. 1, reps.' intro., hist. note § 4(b) (A.L.I. 2022). The 1887 General Allotment Act officially authorized the practice, but allotment had been "employed in some treaties in the early nineteenth century, and . . . regularly pressed upon tribes [since] 1853." WILKINSON, *supra* note 107, at 19 (discussing the General Allotment Act, ch. 119, 24 Stat. 388 (1887)).

113. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 13, § 2.08[1][d]. Checkerboard land ownership commonly exists on contemporary reservations, "with individual Indian, non-Indian, and corporate ownership interspersed." WILKINSON, *supra* note 107, at 20.

two-thirds of tribal lands moved into non-Indian ownership between 1887 and 1934, with the tribal land base shrinking drastically from 138 to 48 million acres.[114] Allotment was a tool ("a mighty pulverizing engine to break up the tribal mass," according to President Theodore Roosevelt[115]) with objectives recited plainly by the Supreme Court: to "extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large."[116] As examined in greater detail below, this disregard of tribal sovereignty and property rights is evident in the early compacts' treatment of tribal water rights within apportionments and tribal sovereigns within administrative structures.[117]

From 1934 to 1945, the Indian reorganization era brought about significant changes in federal policy toward Native nations. However, the state and federal cosovereigns only created two water-apportionment compacts implicating tribal lands during this time: the Rio Grande Compact in 1939 and the Belle Fourche River Compact in 1944.[118] Prior to these compacts, Congress had enacted the era's namesake measure, the Indian Reorganization Act (IRA) of 1934.[119] The IRA reversed course with respect to the prior era's drastic diminution of the tribal land base.[120] Not only did the IRA end the policy "failure" that was allotment,[121] it also authorized the Secretary of the Interior to restore tribal ownership over remaining surplus lands and to repurchase some tribal lands previously lost by allotment.[122] Further, beyond addressing the tribal land base, the IRA has been hailed as "the first major omnibus Indian-affairs legislation designed to promote tribal self-government."[123] The statute permitted tribes to adopt constitutions

114. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 13, § 2.08[3][b]; RESTATEMENT OF THE L. OF AM. INDIANS ch. 1, reps.' intro., hist. note § 4(c) (A.L.I. 2022).

115. WILKINSON, *supra* note 107, at 19 (noting that Roosevelt borrowed this phrase from Merrill E. Gates, chairman of the Board of Indian Commissioners).

116. County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251, 254 (1992).

117. *See infra* Section II.C.

118. Rio Grande Compact, ch. 104, 57 Stat. 86 (1943); Belle Fourche River Compact, ch. 64, 58 Stat. 94 (1944).

119. Indian Reorganization Act, ch. 576, 48 Stat. 984 (1934).

120. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 13, § 2.09[2]; RESTATEMENT OF THE L. OF AM. INDIANS ch. 1, reps.' intro., hist. note § 5(c) (A.L.I. 2022).

121. The Indian Reorganization Act's origins trace to the 1928 Meriam Report, which "offered significant empirical evidence that the allotment and assimilation policies . . . were failures." RESTATEMENT OF THE L. OF AM. INDIANS ch. 1, reps.' intro., hist. note § 5 (A.L.I. 2022).

122. Indian Reorganization Act §§ 1, 5, 7, 48 Stat. at 984-86.

123. RESTATEMENT OF THE L. OF AM. INDIANS ch. 1, reps.' intro., hist. note § 5(c) (A.L.I. 2022).

and bylaws (albeit subject to secretarial approval)[124] and to form charters of incorporation (albeit subject to secretarial petition).[125] The IRA also represented the first piece of "plenary congressional legislation aimed at Indian affairs [that] allowed for tribes to opt out."[126] Where a majority of tribal members voted against the statute's application, it did not apply.[127]

Taken together, these approaches to tribal sovereignty and property rights marked a sharp departure from those they supplanted. But the same cannot be said when comparing this era's compacts with their predecessors. Rather, tribal sovereigns remained invisible in the structures built for compact administration, and tribal water rights continued to be marginalized in water apportionments.[128]

With the onset of the termination era, extending from 1945 to 1970, federal Indian policy swung forcefully back in the opposite direction.[129] Ten water-apportionment compacts involving tribal lands or areas in and adjacent to the West emerged from this era: the Upper Colorado River Basin Compact (1949); Pecos River Compact (1949); Snake River Compact (1950); Yellowstone River Compact (1951); Canadian River Compact (1952); Sabine River Compact (1954); Klamath River Basin Compact (1957); Bear River Compact (1958); Arkansas River Basin Compact, Kansas-Oklahoma (1966); and Animas-La Plata Project Compact (1969).[130]

This surge in compacting occurred amidst major changes in federal Indian policy, with this period known as "the most concerted drive against Indian property and Indian survival since the removals following the act of 1830 and the liquidation of tribes and reservations following 1887."[131] True to its title, term-

124. Indian Reorganization Act § 16, 48 Stat. at 987. "Many tribes had constitutions that predated the IRA by many decades." RESTATEMENT OF THE L. OF AM. INDIANS ch. 1, reps.' intro., hist. note § 5(c) (A.L.I. 2022).

125. Indian Reorganization Act § 17, 48 Stat. at 988.

126. RESTATEMENT OF THE L. OF AM. INDIANS ch. 1 (A.L.I. 2022).

127. Indian Reorganization Act § 18, 48 Stat. at 988. "A majority of tribes elected to come under the provisions of the Act." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 13, § 5.03[2][a][i].

128. *See infra* Section II.C.

129. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 13, § 2.10.

130. Full citations for these compacts appear *supra* note 104. Although not counted here as a separate compact, an amended version of the Sabine River Compact appeared in 1962. Act of Mar. 16, 1962, Pub. L. No. 87-418, 76 Stat. 34, 34.

131. ANGIE DEBO, A HISTORY OF THE INDIANS OF THE UNITED STATES 349 (1970); *see also* DAVID H. GETCHES ET AL., CASES AND MATERIALS ON FEDERAL INDIAN LAW 247 (7th ed. 2017) (describing how termination was "seen by many Indians as the greatest threat to tribal existence since the end of military action against them").

ination was the era's core focus.[132] Congress explicitly articulated this goal in a 1953 House resolution[133] and, through successive statutes, terminated the federal-tribal trust relationship with a total of 109 tribes.[134] In so doing, Congress ended federal trusteeship over all lands held by the tribes and their members, rendered tribal governments dysfunctional due to the lack of any continuing tribal land base, discontinued federal social programs previously provided to tribes, and imposed upon them state legislative and adjudicatory jurisdiction.[135] Also in 1953, Congress enacted Public Law 280, facilitating the transfer of civil and criminal jurisdiction over tribal lands from the federal government to the states without tribal consent.[136] Initially mandatory in five states, Alaska was added as a sixth mandatory state in 1959, and nine additional states later opted into Public Law 280 in some fashion, further diminishing Native nations' control over their own affairs.[137] Termination was nothing less than devastating for tribes and their sovereignty.[138] Unsurprisingly, general disregard of their sovereignty and water rights persisted during this era in the design of compact apportionments and administrative schemes.[139]

Then, in 1970, President Nixon repudiated termination in a special message to Congress, announcing a fundamental shift to tribal self-determination[140] and

132. RESTATEMENT OF THE L. OF AM. INDIANS ch. 1, topic 6, hist. note (A.L.I. 2022) ("Congress . . . began the process of choosing individual Indian tribes and terminating them. Congress targeted tribes mostly in California, Oklahoma, Oregon, Utah, and Wisconsin for termination, which consisted of cutting off federal appropriations, disbanding tribal government, and privatizing tribal businesses.").

133. *See* H.R. Con. Res. 108, 83d Cong. (1953).

134. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 13, § 2.10[3]. For further discussion of the trust relationship, see *infra* notes 345-365 and accompanying text.

135. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 13, § 2.10[3]; RESTATEMENT OF THE L. OF AM. INDIANS ch. 1, topic 6, hist. note (A.L.I. 2022).

136. Act of Aug. 15, 1953, ch. 505, 67 Stat. 588; COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 13, § 2.10[4].

137. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 13, § 2.10[4]. Congress enacted a statute in 1968 requiring tribal consent to state assumption of jurisdiction, but by then all fifteen states had assumed partial or full jurisdiction over tribal lands. *Id.* § 7.04[3][f][ii].

138. *Id.* § 7.04[3][f][ii].

139. *See infra* Section II.C.

140. H.R. DOC. NO. 91-363 (1970). Notably, "[b]y the mid-1960s, President Johnson [had] called for the end of the termination era. . . . President Johnson's 1968 Message to Congress on Goals and Programs for the American Indians, titled The Forgotten American, proposed a new goal of ending the debate about termination and stressed self-determination." RESTATEMENT OF THE L. OF AM. INDIANS ch. 1, topic 7, hist. note (A.L.I. 2022).

marking the federal Indian policy pendulum's most recent swing.[141] During the initial decades of the current era, state and federal cosovereigns formed four water-apportionment compacts in and adjacent to the West that implicate tribal lands and areas: the Arkansas River Basin Compact, Arkansas-Oklahoma (1973); Amended Bear River Compact (1980); Red River Compact (1980); and Goose Lake Basin Compact (1984).[142]

These compacts emerged during a period reflecting many of the policy objectives of the Indian reorganization era.[143] Top priorities—at least aspirationally—include respect for tribal self-governance, sovereignty, and self-determination.[144] Tribal sovereigns have come to be understood as the primary governmental unit of federal Indian policy and have been empowered to administer on their reservations federal programs involving economic development, education, health, and social services, all of which were previously administered by the Bureau of Indian Affairs or other federal agencies.[145] In this way, key statutes of this era have spurred the creation of increasingly complex tribal governance structures.[146] But the compacts formed during this era do not reflect these laudable, landmark policy changes. Provisions involving apportionment and administration instead reflect a continued emphasis on binary cosovereignty.[147]

Table 1 categorizes existing water-apportionment compacts—formed in and adjacent to the West and implicating tribal lands or areas—within their respective eras of federal Indian policy.[148]

141. RESTATEMENT OF THE L. OF AM. INDIANS ch. 1, topic 7, hist. note (A.L.I. 2022). Some scholars argue that the self-determination era has morphed into an era of Native nation-building. GETCHES ET AL., *supra* note 131, at 273-76.

142. For full citations of these compacts, see *supra* note 104.

143. RESTATEMENT OF THE L. OF AM. INDIANS ch. 1, topic 7, hist. note (A.L.I. 2022).

144. *See* MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW 103 (2016) (describing "self-determination" as constituting "the strongest expression of Congressional and Executive branch support for the development of tribal governments, reservation economies, and Indian people, as well as recognition of the importance of tribal sovereignty").

145. RESTATEMENT OF THE L. OF AM. INDIANS ch. 1, topic 7, hist. note (A.L.I. 2022); *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 13, § 2.11[5] (describing federal statutes empowering tribes to directly administer federal programs, such as the Indian Self-Determination & Educational Assistance Act of 1975).

146. GETCHES ET AL., *supra* note 131, at 274.

147. *See infra* Section II.C.

148. For full citations of these compacts, see *supra* note 104.

TABLE 1. WATER-APPORTIONMENT COMPACTS WITH TRIBAL LANDS OR AREAS IN COMPACTED BASINS

Era of Federal Indian Policy	Water-Apportionment Compacts
Allotment & Assimilation (1871–1934)	• La Plata River Compact (1925) • Colorado River Compact (1928)
Indian Reorganization (1934–1945)	• Rio Grande Compact (1939) • Belle Fourche River Compact (1944)
Termination (1945–1970)	• Upper Colorado River Basin Compact (1949) • Pecos River Compact (1949) • Snake River Compact (1950) • Yellowstone River Compact (1951) • Canadian River Compact (1952) • Sabine River Compact (1954) • Klamath River Basin Compact (1957) • Bear River Compact (1958) • Arkansas River Basin Compact, Kansas-Oklahoma (1966) • Animas-La Plata Project Compact (1968)
Self-Determination (1970–Present)	• Arkansas River Basin Compact, Arkansas-Oklahoma (1973) • Amended Bear River Compact (1980) • Red River Compact (1980) • Goose Lake Basin Compact (1984)

B. Tribal Lands and Areas in Compacted and Uncompacted Basins

Complementing this temporal perspective is a spatial one. Millennia before the arrival of European explorers and colonists, Native peoples have been connected to the rivers, creeks, springs, and lakes of North America.[149] In recent years, eye-opening digital interactive maps of tribal territories and language

149. *See* WILKINS, *supra* note 12, at 273-74. *See generally* ANTON TREUER, ATLAS OF INDIAN NATIONS (2013) (chronicling Native peoples' time-immemorial presence in North America and landmark events in European and American colonization).

groups have revealed a commonsense yet often-overlooked truth[150]: every basin in the present-day United States, compacted or uncompacted, is Native homeland.[151]

Diverse in nature, Native connections to North America's waterbodies trace back long before the ancient Chinese, Egyptian, or Phoenician civilizations and long before human beings inhabited the British Isles.[152] Across this vast timeframe, "[l]ifeways and religious practices were rooted to place and formed by the land."[153] Native connections to the land have always involved deep relationality, with waterbodies and other aspects of the land serving "as the foundation of [Native peoples'] kinship relations to one another and the natural world."[154]

Today, Native peoples are fighting to keep these connections alive. As just one example, recall Frankfurter and Landis's "Nile for the Southwest."[155] Along the Lower Colorado River, tribes have spoken powerfully about the river as "integral to our past as peoples, our present, and our future," invoking "a timeless flow of oral traditions and cultural connections to the River that needs to be passed on to preserve our cultures and languages for our future generations."[156] Channeling these enduring relationships, the tribes have called upon "all peoples to learn about and understand our historical and present connections to the River and to make a shift in thinking about the River."[157] Within this vein, the Tribal Council of the Colorado River Indian Tribes adopted a resolution in November 2025 that recognizes the river's legal personhood under tribal law.[158] "[T]he Colorado River is a living being carrying and sustaining life as it flows through the reservation and our ancestral lands," provides the resolution, adding that "personhood status is a reflection of our values and responsibilities as a

150. Digital interactive maps of traditional Native territories and languages in North America can be accessed at NATIVE LAND DIGIT., *supra* note 5. Maps of Native languages, population densities, and the post-1775 diminishment of tribal territories in the United States can be found in TREUER, *supra* note 149, at 14, 15, 18.

151. NATIVE LAND DIGIT., *supra* note 5.

152. TREUER, *supra* note 149, at 9.

153. *Id.* at 10.

154. WILKINS, *supra* note 12, at 273-74; *see also* Zoom Interview with David E. Wilkins, E. Claiborne Robins Distinguished Professor in Leadership Studies, Univ. of Richmond (Nov. 26, 2024).

155. Frankfurter & Landis, *supra* note 3, at 701.

156. *A Common Vision for the Colorado River System*, *supra* note 5, at 2.

157. *Id.* (emphasis omitted).

158. Colo. River Tribal Council, Resolution No. 375-25 (Nov. 6, 2025), https://critmanatabamessenger.com/wp-content/uploads/2025/11/personhood-resolution.pdf [https://perma.cc/FX6C-WU39].

people and our spiritual, cultural, and religious connection to the Colorado River from the beginning of time through the end of time."[159]

These modern tribal perspectives reflect a sobering reality: Euro-American colonization of compacted and uncompacted basins has drastically altered traditional tribal territories, cultures, and connections to water.[160] Compacted basins' contemporary spatial mapping—stemming not only from the allotment and assimilation era[161] but also from prior Indian removal and reservation policies[162]—is entirely different from the precolonization landscape. Residual tribal lands and areas occupy portions of basins that once represented vast traditional homelands. And tribal connections to waterbodies, long considered relational by Native nations, are now mediated by compacts that marginalize these sovereigns and their water rights.

Spatial analysis of these ideas is worth a thousand words. But first, a few definitions are in order. Federal and state agencies have engaged in cutting-edge digital interactive mapping in recent years, displaying in unprecedented detail and in publicly accessible formats the presence of tribal lands and areas across all of the United States' compacted and uncompacted basins.[163] These agencies utilize several classifications for the diverse tribal lands and areas: (1) Indian

159. *Id.* at 2.

160. *See, e.g.*, WILKINS, *supra* note 12, at 50 ("In virtually every respect imaginable—political, economic, cultural, sociological, physiological, psychological, geographical, and technological—the years from Columbus' arrival in 1492 to the 1930s Indian Reorganization Act . . . brought massive upheaval and transformation for Indigenous peoples.").

161. *See supra* notes 114-117 and accompanying text.

162. For historical surveys of these policies, see COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 13, §§ 2.05-.06.

163. Incorporating federal- and state-agency data, the University of Wyoming College of Law's Gina Guy Center for Land and Water Law has produced maps depicting tribal lands and areas in all compacted and uncompacted basins. Noninteractive versions of these maps appear *infra*, while interactive versions can be accessed at *Interstate Water Compacts*, GINA GUY CTR. FOR LAND & WATER L., https://www.uwyo.edu/law/centers/center-for-land-and-water-law/research/water-compacts.html [https://perma.cc/J7C8-62MG].

reservations,[164] (2) off-reservation trust lands (ORTLs),[165] (3) Oklahoma Tribal Statistical Areas (OTSAs),[166] and (4) State Designated Tribal Statistical Areas (SDTSAs).[167]

Relying on these classifications and associated agency data, Figure 1 below focuses on compacted basins in and adjacent to the West containing tribal lands and areas.[168] Figure 2 complements this perspective by displaying uncompacted basins in and adjacent to the West which contain tribal lands.[169]

164. Reservations consist of "land set aside by the United States by treaty, statute, or executive order for the exclusive use of Indian nations, usually but not always with tribal agreement," where the United States holds title to the land in trust for the tribe(s). RESTATEMENT OF THE L. OF AM. INDIANS § 3 cmt. c (A.L.I. 2022); Bureau of Indian Affs., *What Is a Federal Indian Reservation?*, U.S. DEP'T INTERIOR (Aug. 19, 2017, 2:53 PM), https://www.bia.gov/faqs/what-federal-indian-reservation [https://perma.cc/9H6Q-5QXK]. Reservations include "colonies, communities, Indian colonies, Indian communities, Indian rancherias, Indian reservations, Indian villages, pueblos, rancherias, ranches, reservations, reserves, settlements, or villages." *My Tribal Area*, U.S. CENSUS BUREAU, https://www.census.gov/tribal/tribal_glossary.php [https://perma.cc/5ZDQ-KEWF].

165. Off-Reservation Trust Lands (ORTLs) comprise tribal lands located outside reservations held in trust by the federal government on behalf of tribes or individual tribal members. *My Tribal Area*, *supra* note 164.

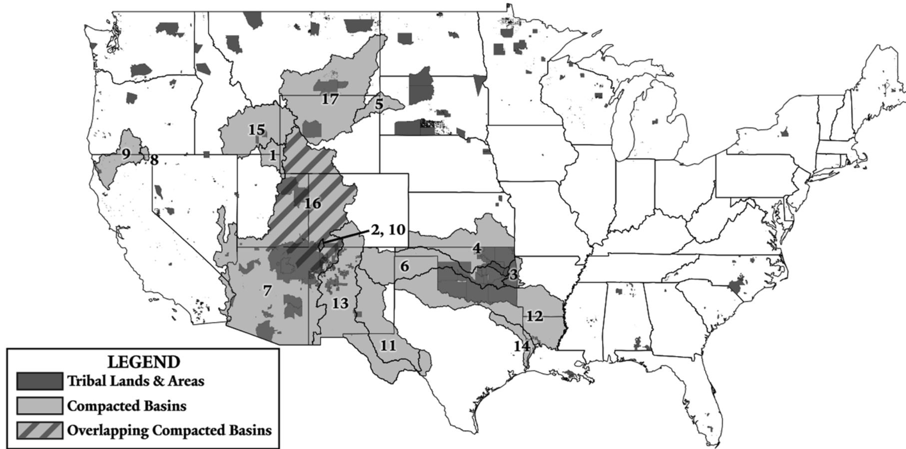
166. Oklahoma Tribal Statistical Areas (OTSAs) are "statistical areas that were identified and delineated by the Census Bureau in consultation with federally recognized American Indian tribes based in Oklahoma." *Id.* Each OTSA represents "the former American Indian reservation that existed in Indian and Oklahoma territories prior to Oklahoma statehood in 1907." *Id.*

167. State Designated Tribal Statistical Areas (SDTSAs) are "statistical geographic areas identified and delineated for state recognized tribes that are not federally recognized" and do not have a reservation or ORTLs. *Id.* Demarcated by the Census Bureau in consultation with state liaisons, SDTSAs provide tribes with "statistical data for a geographic area that encompasses a substantial concentration of tribal members." *Id.*

168. *Interstate Water Compacts*, *supra* note 163.

169. *Id.*

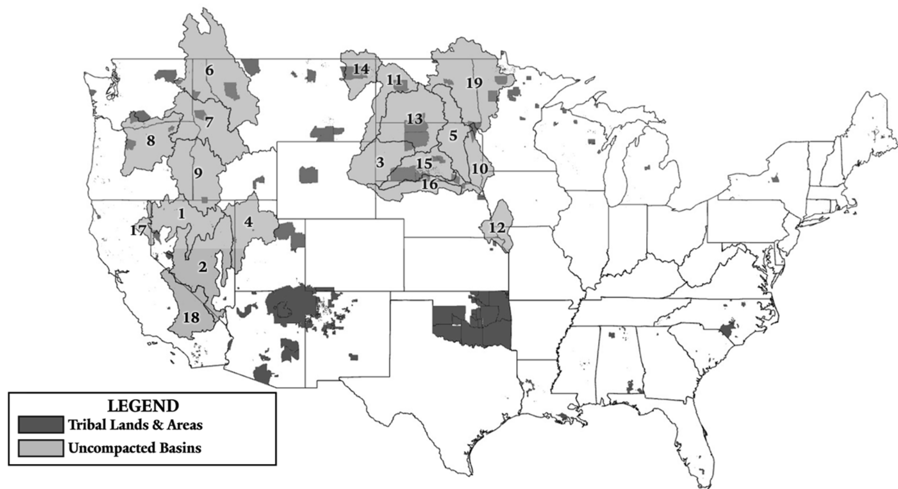
FIGURE 1. COMPACTED BASINS WITH TRIBAL LANDS AND AREAS



	Compact	Reservations	ORTLs	OTSAs	SDTSAs
1	Amended Bear River Compact	1	0	0	0
2	Animas-La Plata Project Compact	2	0	0	0
3	Arkansas River Basin Compact, AR-OK	0	0	2	0
4	Arkansas River Basin Compact, KS-OK	3	0	16	0
5	Belle Fourche River Compact	0	1	0	0
6	Canadian River Compact	4	1	10	0
7	Colorado River Compact	29	11	0	0
8	Goose Lake Basin Compact	2	0	0	0
9	Klamath River Basin Compact	7	2	0	0
10	La Plata River Compact	2	0	0	0
11	Pecos River Compact	1	0	0	0
12	Red River Compact	4	1	8	4
13	Rio Grande Compact	23	12	0	0

14	Sabine River Compact	0	0	0	3
15	Snake River Compact	1	1	0	0
16	Upper Colorado River Basin Compact	5	3	0	0
17	Yellowstone River Compact	3	3	0	0

FIGURE 2. UNCOMPACTED BASINS WITH TRIBAL LANDS



	Compact	Reservations	ORTLs	OTSAs	SDTSAs
1	Black Rock Desert-Humboldt Basin	10	3	0	0
2	Central Nevada Desert Basin	5	1	0	0
3	Cheyenne Basin	2	3	0	0
4	Great Salt Lake Basin	2	0	0	0
5	James Basin	1	0	0	0
6	Kootenai-Pend Oreille-Spokane Basin	5	3	0	0
7	Lower Snake Basin	3	0	0	0
8	Middle Columbia Basin	3	4	0	0
9	Middle Snake Basin	2	1	0	0
10	Missouri-Big Sioux Basin	5	1	0	0

11	Missouri-Little Missouri Basin	1	1	0	0
12	Missouri-Nishnabotna Basin	3	2	0	0
13	Missouri-Oahe Basin	2	2	0	0
14	Missouri-Poplar Basin	1	1	0	0
15	Missouri-White Basin	5	2	0	0
16	Niobrara Basin	3	2	0	0
17	North Lahontan Basin	4	2	0	0
18	Northern Mojave-Mono Lake Basin	6	2	0	0
19	Red Basin	5	3	0	0

This spatial mapping adds a geographic dimension to the temporal evolution of water-apportionment compacts presented in Section II.A. What emerges from this analysis is a simple yet significant point: tribal lands and areas pervade compacted and uncompacted basins in and adjacent to the West. While all of these basins constitute Native homelands,[170] those governed by compacts reflect the binary conception of cosovereignty espoused by Frankfurter, Landis, and others. Section II.C will now explore exactly how that misconception has shaped these compacts and what it means as a practical matter for Native nations.

C. Crystallization of Binary Cosovereignty

Regardless of precisely when they originated[171] or to which specific basin they apply,[172] existing water-apportionment compacts exhibit two overarching features concerning Native nations. First, tribal water rights are visible only in general terms along the periphery of these agreements, if at all.[173] Second, unlike their state and federal cosovereigns, Native nations have no direct, formal role in compact administration, including on commissions.[174] These features are at once troubling and unsurprising. As noted above, Frankfurter, Landis, and their counterparts did not consider North America's "senior sovereigns"[175] when advocating for water-apportionment compacts during the initial decades of the

170. NATIVE LAND DIGIT., *supra* note 5.

171. *See supra* Section II.A.

172. *See supra* Section II.B.

173. *See infra* Section II.C.1.

174. *See infra* Section II.C.2.

175. WILKINS, *supra* note 12, at 20.

twentieth century, and this binary conception of cosovereignty molded the provisions of the more than two dozen compacts formed over the subsequent sixty years. In this sense, these compact provisions crystallized the binary conception of cosovereignty espoused in these early works. This Section details how these dynamics play out in contemporary apportionments and administrative schemes.

1. *Tribal Water Rights and Apportionment*

Water apportionments are never identical, yet all aspire to a common goal: equitable apportionment of the use of a river system's water among the compacting parties.[176] As noted in Section I.B, this emphasis on equity reflects the historical origin of compacts as alternatives to equitable-apportionment suits before the Supreme Court.[177] Precisely how compacts purport to realize the goal of equitable apportionment is inherently basin-specific. Some agreements set percentages governing how much water each state is allowed to divert or consume from particular segments of a river system.[178] Others establish fixed quantities that must be delivered or undepleted by states at discrete points along a river system or, alternatively, the amounts of water that states can divert or consume from segments of a river system on some temporal basis.[179] And some apportionments combine percentage-based and fixed-quantity methods.[180] For

176. Equitable apportionment is not the only stated goal of these compacts, but illustrations of this principle appear throughout the historical line of compacts. Examples include the Colorado River Compact, COLO. REV. STAT. § 37-61-101 (2024); La Plata River Compact, ch. 110, art. II, 43 Stat. 796, 797 (1925); Upper Colorado River Basin Compact, ch. 48, art. I, 63 Stat. 31, 31 (1949); Yellowstone River Compact, ch. 629, 65 Stat. 663, 663 (1951); Arkansas River Basin Compact, Kan.-Okla., Pub. L. No. 89-789, art. I(B), 80 Stat. 1405, 1409 (1966); and Red River Compact, Pub. L. No. 96-564, § 1.01(b), 94 Stat. 3305, 3305 (1980).

177. *See supra* notes 71-76 and accompanying text.

178. Examples include Upper Colorado River Basin Compact art. III(a), 63 Stat. at 32; Snake River Compact, ch. 73, art. III(A), 64 Stat. 29, 30 (1950); Yellowstone River Compact art. V(B), 65 Stat. at 666; Amended Bear River Compact, Pub. L. No. 96-189, arts. IV(A)(1)(a), V(A)(4), 94 Stat. 4, 7-8, 10 (1980); and Red River Compact art. VI, §§ 6.01(b), 6.02(b), 7.02(b), 94 Stat. at 3312-14.

179. Examples include Colorado River Compact art. III(a)-(d), COLO. REV. STAT. § 37-61-101 (2024); La Plata River Compact art. II(2)(b), 43 Stat. at 797; Rio Grande Compact, ch. 155, arts. III, IV, 53 Stat. 785, 787-88 (1939); Republican River Compact, ch. 104, art. IV, 57 Stat. 86, 88-89 (1943); Upper Colorado River Basin Compact art. III(a)(1), 63 Stat. at 32; Sabine River Compact, ch. 668, art. V(b), 68 Stat. 690, 692 (1954); and Amended Bear River Compact art. V(A)(1)-(3), 94 Stat. at 10.

180. *See, e.g.*, Amended Bear River Compact art. V(A)(1)-(4), 94 Stat. at 10 (establishing fixed-quantity and percentage-based apportionments for the use of remaining water in Idaho and Utah).

present purposes, the goal is not to create a typology of these arrangements but rather to highlight their common function: defining state sovereigns' corollary legal rights and obligations with regard to transboundary waters.

With this basic goal in mind, the Supreme Court's landmark decision in *Winters* must be revisited to appreciate how existing apportionments address tribal water rights. As outlined in Section I.B,[181] *Winters* built on seminal turn-of-the-century cases—*United States v. Rio Grande Dam and Irrigation Co.*[182] and *United States v. Winans*[183]—to recognize for the first time the existence of federal law-based water rights ("Indian reserved rights") on reservations whose purposes require water.[184] Nuanced doctrine spawned from *Winters* in the decades that followed, often posing serious challenges to Native nations seeking legal recognition of their reserved rights. Illustrative doctrinal obstacles include the jurisdiction of state courts to adjudicate reserved-rights claims;[185] the proper standards for quantifying reserved rights;[186] and the federal government's trust responsibilities vis-à-vis tribal water rights and resources, including federal conflicts of interest.[187] Stemming from these issues and related concerns, most

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181. *See supra* note 103 and accompanying text.

182. 174 U.S. 690, 703 (1899) (recognizing "the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters . . . as may be necessary for the beneficial uses of the government property").

183. 198 U.S. 371, 381 (1905) (construing the 1855 treaty with the Yakima—specifically, Article 3 addressing "the right of taking fish"—as constituting "not a grant of rights to the Indians, but a grant of rights from them," such that the treaty had secured "reserved rights . . . to every individual Indian, as though named therein").

184. Winters v. United States, 207 U.S. 564, 576 (1908); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 13, § 21.02; *see also* John E. Thorson, *Reflections on Western General Stream Adjudications upon the Signing of Wyoming's Big Horn River Adjudication Final Decree*, 15 WYO. L. REV. 383, 388 (2015) ("*Winters*, because of its affirmation that tribal lands would have water, is one of the most influential water law decisions in American history." (citation omitted)).

185. Construing a federal appropriations rider called the McCarran Amendment, the Supreme Court has held that state courts administering general stream adjudications can exercise jurisdiction over Indian reserved-rights claims. *See* Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 548-50 (1983) (citing Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 809 (1976)). For an insightful article challenging the Court's interpretation of the McCarran Amendment, see generally Dylan R. Hedden-Nicely, *The Legislative History of the McCarran Amendment: An Effort to Determine Whether Congress Intended for State Court Jurisdiction to Extend to Indian Reserved Water Rights*, 46 ENV'T L. 845 (2016).

186. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 13, § 21.03[5] (surveying quantification standards).

187. *Arizona v. Navajo Nation*, 599 U.S. 555, 558-59 (2023), is the most recent Supreme Court precedent in this vein, though it is most notable for Justice Gorsuch's dissent, *id.* at 599 (Gorsuch, J., dissenting). *See generally* Jason Anthony Robison, *Relational River*: Arizona v. Navajo

tribes came to regard negotiated settlements as the preferred path for resolving reserved-rights claims under *Winters*, a trend spanning from the late 1970s up to the present.[188]

More important here than the *Winters* doctrine's evolution,[189] however, is its temporal overlap with existing compacts. *Winters* was handed down in 1908.[190] As such, it gained precedential status roughly fifteen years before the negotiation of the first water-apportionment compact, the Colorado River Compact, in 1922.[191] From the mid-1920s onward, *Winters* prompted a substantial body of litigation in lower federal and state courts.[192] Across the 118-year timeframe since this decision, some tribes' reserved rights have been recognized and quantified through adjudication,[193] and an even greater number have formed negotiated settlements.[194] Yet other tribes still hold unresolved reserved-rights claims.[195] From a timing perspective, the existence of *Winters* and the wide-ranging doctrinal and practical developments following it suggest that state and federal officials negotiating and ratifying water-apportionment compacts had to have

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Nation *& the Colorado*, 72 UCLA L. REV. 116 (2025) (contextualizing and critiquing the Court's decision). An overview of the case law appears in COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 13, § 21.06. For insightful articles on the trust relationship and tribal water rights, see generally Robert T. Anderson, *Indian Water Rights and the Federal Trust Responsibility*, 46 NAT. RES. J. 399 (2006); Judith V. Royster, *Indian Water and the Federal Trust: Some Proposals for Federal Action*, 46 NAT. RES. J. 375 (2006); and Judith V. Royster, *Equivocal Obligations: The Federal-Tribal Trust Relationship and Conflicts of Interest in the Development of Mineral Resources*, 71 N.D. L. REV. 327 (1995).

188. An overview of the thirty-nine settlements formed as of June 2025 can be found in CHARLES V. STERN & MARIEL J. MURRAY, CONG. RSCH. SERV., R44148, INDIAN WATER RIGHTS SETTLEMENTS 7-11 (2025). To be clear, settlements are not panaceas in either process or substance. *See generally* DANIEL MCCOOL, NATIVE WATERS: CONTEMPORARY INDIAN WATER SETTLEMENTS AND THE SECOND TREATY ERA (2002) (assessing the benefits and drawbacks of resolving reserved-rights claims via adjudications versus settlements).

189. For a centennial perspective on this evolution, see generally Barbara Cosens, *The Legacy of* Winters v. United States *and the* Winters *Doctrine, One Hundred Years Later*, *in* THE FUTURE OF INDIAN AND FEDERAL RESERVED WATER RIGHTS: THE WINTERS CENTENNIAL 5, 5-14 (Barbara Cosens & Judith V. Royster eds., 2012).

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

191. *See supra* note 66 and accompanying text.

192. An eye-opening figure depicting this pattern appears in Thorson, *supra* note 184, at 388 fig. 1.

193. *See* Arizona v. California, 373 U.S. 546, 595-601 (1963) (recognizing and quantifying the reserved rights of five federally recognized tribes with reservations along the Lower Colorado River).

194. *See generally* STERN & MURRAY, *supra* note 188 (surveying thirty-nine existing settlements).

195. *See Policy Brief #4: The Status of Tribal Water Rights in the Colorado River Basin*, WATER & TRIBES INITIATIVE 7 tbl. 3 (2021), https://www.naturalresourcespolicy.org/publications/policy-brief-4-final-4.9.21-.pdf [https://perma.cc/NQ8R-AK4Y] (surveying basin tribes' unresolved claims).

been aware of the actual or potential existence of Indian reserved rights on the no fewer than eighty-seven reservations within compacted basins.[196]

So how exactly did this awareness shape the compacts? More precisely, how did state and federal officials negotiating and ratifying compacts design apportionments to account for Native nations' *Winters* rights in compacted basins? To answer these questions, one must consider the two key types of compact provisions relevant to tribal water rights: disclaimers and accounting provisions. Shedding light on their distinct nature and relative prevalence (or absence) within compacts, the following analysis illustrates how these provisions entrenched a binary conception of cosovereignty in spite of tribes' *Winters* rights.

For starters, disclaimers generally consist of provisions succinctly disclaiming that an apportionment adversely affects or impairs certain types of water rights that exist within the compacted basin. Relevant to tribal water rights, disclaimers exist in two basic forms: (1) specific disclaimers that expressly reference tribal water rights or tribes in some manner and (2) general disclaimers that omit express references yet may nevertheless apply to tribal water rights. Several compacts contain both types of disclaimers, while others include neither.

As for specific disclaimers, perhaps the best example comes from the Rio Grande Compact in 1939: "Nothing in this Compact shall be construed as affecting the obligations of the United States of America . . . to the Indian tribes, or as impairing the rights of the Indian tribes."[197] The latter clause's reference to nonimpairment of "the rights of the Indian tribes" appears to extend to tribal water rights, and similar text emerged in four subsequent compacts.[198] With respect to the disclaimer's initial clause referencing nonimpairment of "the obligations of the United States . . . to the Indian tribes," its bearing on tribal water rights is less clear. What is evident is its lineage. The text traces back to the Colorado River Compact in 1922[199] and later appeared verbatim (or in nearly identical form) in five additional compacts.[200] In total, approximately half of the water-

196. *See supra* Figure 1.

197. Rio Grande Compact, ch. 155, art. XVI, 53 Stat. 785, 792 (1939).

198. *See* Klamath River Basin Compact, Pub. L. No. 85-222, art. X(A)(1), 71 Stat. 497, 505 (1957); Snake River Compact, ch. 73, art. XIV(A)(1), 64 Stat. 29, 34 (1950); Upper Niobrara River Basin Compact, Pub. L. No. 91-52, art. IX(D), 83 Stat. 86, 90 (1969); Yellowstone River Compact, ch. 629, art. VI, 65 Stat. 663, 668 (1951).

199. Colorado River Compact art. VII, COLO. REV. STAT. § 37-61-101 (2024). The Colorado River Commission's federal representative and chair, then-Secretary of Commerce Herbert Hoover, disparagingly referred to this provision as the "wild Indian article." HUNDLEY, *supra* note 66, at 212.

200. *See* Amended Bear River Compact, Pub. L. No. 96-189, art. XIII(1), 94 Stat. 4, 15 (1980); Canadian River Compact, ch. 306, art. X(a), 66 Stat. 74, 77 (1952); Klamath River Basin Compact art. X(A)(3), 71 Stat. at 505; Upper Colorado River Basin Compact, ch. 48, art. XIX(a), 63 Stat. 31, 42 (1949); Upper Niobrara River Basin Compact art. IX(D), 83 Stat. at 90.

apportionment compacts applicable to basins with tribal lands or areas—eight of those seventeen compacts—contain specific disclaimers referencing tribal water rights or tribes.[201]

Turning to general disclaimers, a 1943 example from the Republican River Compact is illustrative: "Nothing in this compact shall be deemed . . . [t]o impair or affect any rights . . . of the United States, or those acting by or under its authority, in, over, and to the waters of the Basin . . . ."[202] Three additional compacts later incorporated this disclaimer.[203] Another example, with slightly different phrasing, comes from the Belle Fourche River Compact in 1944: "Nothing in this compact shall be deemed . . . [t]o impair or affect any rights or powers of the United States, its agencies, or instrumentalities, in and to the use of the waters of the Belle Fourche River . . . ."[204] Six subsequent compacts include similar disclaimers.[205] The applicability of these general disclaimers to tribal water rights is uncertain yet seems to hinge on whether such rights constitute (1) rights "of the United States" (both versions); (2) rights "of those acting by or under its authority" (first version); or (3) rights of its "agencies" or "instrumentalities" (second version). In total, approximately half of the water-apportionment compacts implicating tribal lands and areas—eight of those seventeen compacts—include such general disclaimers, with the types of tribal lands and areas within the relevant basins consisting partly of reservations but also of ORTLs, OTSAs, and SDTSAs.[206]

201. *See supra* Figure 1 (entries for Amended Bear River Compact, Canadian River Compact, Colorado River Compact, Klamath River Basin Compact, Rio Grande Compact, Snake River Compact, Upper Colorado River Basin Compact, and Yellowstone River Compact). The Upper Niobrara River Basin Compact is excluded from this total because no tribal lands or areas exist in that basin. *See supra* Figure 1.

202. Republican River Compact, ch. 104, art. X-X(a), 57 Stat. 86, 90 (1943).

203. *See* Arkansas River Basin Compact, Ark.-Okla., Pub. L. No. 93-152, art. XI(A), 87 Stat. 569, 575 (1973); Arkansas River Basin Compact, Kan.-Okla., Pub. L. No. 89-789, art. XIII(A), 80 Stat. 1409, 1414 (1966); Red River Compact, Pub. L. No. 96-564, art. II, § 2.07, 94 Stat. 3305, 3306 (1980).

204. Belle Fourche River Compact, ch. 64, art. XIII-XIII(A), 58 Stat. 94, 98 (1944).

205. *See* Goose Lake Basin Compact, Pub. L. No. 98-334, art. VIII(A), 98 Stat. 291, 293 (1984); Kansas-Nebraska Big Blue River Compact, Pub. L. No. 92-308, art. VII, § 7.2, 86 Stat. 193, 198 (1972); Pecos River Compact, ch. 184, art. XI(b), 63 Stat. 159, 165 (1949); Sabine River Compact, ch. 668, art. X, 68 Stat. 690, 697 (1954); Upper Colorado River Basin Compact art. XIX(c), 63 Stat. at 42; Upper Niobrara River Basin Compact art. XI(A), 83 Stat. at 90. A general disclaimer solely referencing the rights of the United States also appears in the Arkansas River Compact, ch. 155, art. IX(A), 63 Stat. 145, 151 (1949).

206. *See supra* Figure 1 (entries for Arkansas River Basin Compact, Ark.-Okla.; Arkansas River Basin Compact, Kan.-Okla.; Belle Fourche River Compact; Goose Lake Basin Compact; Pecos River Compact; Red River Compact; Sabine River Compact; and Upper Colorado River

Beyond these specific and general disclaimers—all of which were negotiated and ratified with *Winters* as a backdrop—four water-apportionment compacts contain no disclaimers at all.[207] Only two of these compacts, however—the La Plata River Compact and Animas-La Plata Project Compact—apply to compacted basins with tribal lands.[208]

Accounting provisions, on the other hand, clarify how water use by Native nations pursuant to tribal water rights should be accounted for under apportionments. As with the disclaimers, accounting provisions exist in two basic forms: (1) specific forms that explicitly mention tribal water rights and (2) general forms that lack express references but may nevertheless apply to tribal water rights. Many water-apportionment compacts contain neither form.

Only one specific accounting provision has been adopted to date, appearing in the Snake River Compact of 1950.[209] Immediately following a provision disclaiming any adverse effects on the "rights to the use of the waters of the Snake River . . . owned by or for Indians, Indian tribes and their reservations," the compact adds: "The water required to satisfy these rights shall be charged against the allocation made to the State in which the Indians and their lands are located."[210] In this way, water used to fulfill the Shoshone-Bannock Tribes' water rights on the Fort Hall Reservation counts against Idaho's allocation.[211]

Basin Compact). Excluded from this total are the Republican River Compact, Upper Niobrara River Basin Compact, and Kansas-Nebraska Big Blue River Compact, as tribal lands or areas do not exist in those basins. *See supra* Figure 1. A different type of general disclaimer appears in the Colorado River Compact art. VIII, COLO. REV. STAT. § 37-61-101 (2024), which states, "Present perfected rights to the beneficial use of waters of the Colorado River System are unimpaired by this compact." The compact does not define "[p]resent perfected rights," Colorado River Compact art. VIII, but assuming that pre-1922 Indian reserved rights qualify, this disclaimer adds another to the total.

207. *See* Amended Costilla Creek Compact, Pub. L. No. 88-198, 77 Stat. 350 (1963); Act of Sep. 30, 1968, Pub. L. No. 90-537, 82 Stat. 885, 897 (1969) (referring to the "Animas-La Plata Federal reclamation project"); La Plata River Compact, ch. 110, 43 Stat. 796 (1925); South Platte River Compact, ch. 46, 44 Stat. 195 (1926).

208. *See supra* Figure 1.

209. *But see* Klamath River Basin Compact, Pub. L. No. 85-222, art. X(B), 71 Stat. 497, 505 (1957) (providing that "[l]ands within the Klamath Indian Reservation which are brought under irrigation after the effective date of this compact . . . shall be taken into account" vis-à-vis the state of Oregon's allocation in Article III(C)(1) of the compact). The Klamath Tribe of Indians were subject to termination in 1954. Act of Aug. 13, 1954, ch. 732, 68 Stat. 718, 718.

210. Snake River Compact, ch. 73, art. XIV(A)(1), 64 Stat. 29, 34 (1950).

211. These tribes' water rights are set forth in Fort Hall Indian Water Rights Settlement. *The 1990 Fort Hall Indian Water Rights Agreement*, IDAHO DEP'T WATER RES. (July 5, 1990), https://idwr.idaho.gov/wp-content/uploads/sites/2/adjudication/1990-Fort-Hall-Indian-Water-Rights-Agreement.pdf [https://perma.cc/7RPD-3VXJ].

General accounting provisions are slightly more prevalent yet vary in phrasing. Ratified in 1944, the Belle Fourche River Compact's provision appears to have been the first of this kind:

> Any beneficial uses hereafter made by the United States, or those acting by or under its authority, within a State, of the waters allocated by this compact, shall be within the allocations hereinabove made for use in that State and shall be taken into account in determining the extent of use within that State.[212]

Another subsequent compact also mentions "the United States, or those acting by or under its authority," in its counterpart provision.[213] Other compacts' provisions reference "the United States" alone;[214] "the United States of America or any of its agencies or instrumentalities";[215] or, most notably, "the United States or any of its agencies, instrumentalities or wards."[216] The term "wards," as used in this context, reflects an ethnocentric, condescending view of Native nations that can be traced to the Supreme Court's 1831 decision in *Cherokee Nation v. Georgia*.[217] Accounting provisions that use this term therefore appear applicable to tribal water rights—clarifying that water use pursuant to them must be counted against the allocation of the state in which the water use occurs—while all other accounting provisions' applicability to tribal water rights seems to hinge on whether Native nations' water use is considered attributable to one of the named entities. In total, the foregoing general accounting provisions appear in

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212. Belle Fourche River Compact, ch. 64, art. XIV(A), 58 Stat. 94, 98 (1944).

213. Upper Niobrara River Compact, Pub. L. No. 91-52, art. IX(A), 83 Stat. 86, 90 (1969).

214. Red River Compact, Pub. L. No. 96-564, art. II, § 2.02, 94 Stat. 3305, 3305 (1980).

215. Yellowstone River Compact, ch. 629, art. VII(D), 65 Stat. 663, 668 (1951). The applicability of this provision to tribal water rights is unclear; while it refers to "[t]he use of water allocated under Article V," Article V expressly applies to state-law-based appropriative rights as distinguished from Indian reserved rights (governed separately by Article VI). *See* Robison, *supra* note 23, at 668.

216. *See* Arkansas River Basin Compact, Ark.-Okla., Pub. L. No. 93-152, art. VI(B), 87 Stat. 569, 571 (1973); Arkansas River Basin Compact, Kan.-Okla., Pub. L. No. 89-789, art. VII(B), 80 Stat. 1409, 1411 (1966); Pecos River Compact, ch. 184, art. XII, 63 Stat. 159, 165 (1949); Upper Colorado River Basin Compact, ch. 48, art. VII, 63 Stat. 31, 35 (1949).

217. 30 U.S. (5 Pet.) 1, 17 (1831) (describing Native nations as "domestic dependent nations" in a "state of pupilage," with their relationship to the United States resembling "that of a ward to his guardian").

seven water-apportionment compacts that apply to basins with tribal lands or areas.[218]

Finally, approximately half of existing water-apportionment compacts within basins containing tribal lands and areas—at least nine of those seventeen compacts—do not contain any accounting provisions addressing the relationship between tribal water rights and the apportionments.[219] In other words, these compacts fail to specify how Native nations' water uses pursuant to their *Winters* rights are supposed to be accounted for under these apportionments.

Zooming out to consider both types of provisions, traces of binary cosovereignty can be found all throughout existing compacts. *Winters* stood as a landmark Supreme Court precedent during the entire period that state and federal officials negotiated and ratified these compacts.[220] Relying on *Winters*, many Native nations residing on lands or areas within compacted basins secured and quantified their reserved rights through adjudications and negotiated settlements.[221] Yet, although state and federal officials designed apportionments in diverse, basin-specific forms with respect to state allocations,[222] the same attention to detail is nowhere to be found regarding the water rights of tribal cosovereigns, as shown through the preceding analysis of disclaimers and accounting provisions.

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218. *See supra* Figure 1 (entries for Arkansas River Basin Compact, Ark.-Okla.; Arkansas River Basin Compact, Kan.-Okla.; Belle Fourche River Compact; Pecos River Compact; Red River Compact; Upper Colorado River Basin Compact; and Yellowstone River Compact). The Upper Niobrara River Compact is excluded from this total because that basin does not contain tribal lands or areas. *See supra* Figure 1.

219. *See* Amended Bear River Compact, Pub. L. No. 96-189, 94 Stat. 4 (1980); Act of Sep. 30, 1968, Pub. L. No. 90-537, 82 Stat. 885, 897 (1968) (referring to the "Animas-La Plata Federal reclamation project"); Canadian River Compact, ch. 306, 66 Stat. 74 (1952); Goose Lake Basin Compact, Pub. L. No. 98-334, 98 Stat. 291 (1984); Klamath River Basin Compact, Pub. L. No. 85-222, 71 Stat. 497 (1957); La Plata River Compact, ch. 110, 43 Stat. 796 (1925); Rio Grande Compact, ch. 155, 53 Stat. 785 (1939); Sabine River Compact, ch. 668, 68 Stat. 690 (1954); *see also supra* Figure 1 (providing corresponding compact entries). The Colorado River Compact does not establish state allocations, but it provides that claims of present perfected rights "by appropriators or users of water in the Lower Basin, against appropriators or users of water in the Upper Basin shall attach to and be satisfied from water that may be stored not in conflict with" the basin-wide apportionment in Article III. Colorado River Compact art. VIII, COLO. REV. STAT. § 37-61-101 (2024). Assuming pre-1922 tribal water rights qualify as "present perfected rights," this provision is a distinct accounting provision. In addition, as noted above, it is unclear whether the Yellowstone River Compact's accounting provision applies to tribal water rights. *See supra* note 215.

220. *See supra* notes 193-208 and accompanying text.

221. *See supra* notes 193-195 and accompanying text.

222. *See supra* notes 178-180 and accompanying text.

Concise clauses disclaiming in broad, sometimes vague terms the impairment of rights held by tribes—or rights held by the United States on behalf of tribes—could (and hopefully would) be invoked protectively if apportionments adversely affect tribal water rights.[223] From a drafting perspective, however, such disclaimers fall far short of provisions spelling out exactly where tribal water rights fit within apportionment schemes. Simply put, provisions clearly addressing how tribal water rights translate into apportionments are critical, particularly those clarifying the hierarchical status of tribal water rights vis-à-vis other water rights during climate-change-induced water shortages.

Accounting provisions may fill this gap to some extent, depending upon whether their particular phrasing suggests that they do extend to tribal water rights. Even with this assumption, however, such provisions are absent in roughly half of the compacts applicable to basins containing tribal lands and areas.[224] Further, where these provisions do exist, they lend themselves to a zero-sum mentality. States seeking to maximize the water available under their allocations face significant incentives to minimize the water afforded to tribes.[225] Wholly subsuming the water rights of one cosovereign (a Native nation) within the water rights of another (a state) is a distinct drafting strategy as compared to setting forth a tribal cosovereign's water right expressly and independently within the apportionment.

The preceding analysis reveals how tribal water rights are visible, if at all, along the periphery of apportionments. Unfortunately, this marginalization does not exist in isolation, instead bleeding through to compact administration.

2. *Tribal Sovereigns and Administration*

Compact administration refers to the *sui generis* bodies and processes used to administer water-apportionment compacts. While designed in basin-specific ways, these systems often serve common functions, such as measuring flows, uses, diversions, and consumption of water; adopting rules and regulations on subjects inadequately addressed by the compact's text; and providing space for deliberation, voting, and dispute resolution among cosovereigns.[226] Existing administrative schemes can be broken into three categories: (1) compacts with no

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223. Tribal water rights are property rights, and these disclaimers are subject to the Indian canons of construction, including the interpretive rule that "tribal property rights and sovereignty are preserved unless Congress's intent to the contrary is clear and unambiguous." COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 13, § 3.01[1].

224. *See supra* note 219 and accompanying text.

225. Zoom Interview with Daniel McCool, Professor Emeritus, Univ. of Utah Dep't of Pol. Sci. (Nov. 22, 2024).

226. *See infra* notes 256-263 and accompanying text.

administrative provisions, (2) compacts with administrative provisions but no formal administrative body, and (3) compacts with administrative provisions *and* a formal administrative body. Sketches of each scheme appear below and account comprehensively for the compacts in and adjacent to the West implicating tribal lands and areas.[227] The *Winters* doctrine again loomed in the background of these compacts' creation.[228] Even more so than with apportionments, however, this backdrop is nowhere to be found in these administrative schemes.

Glancing briefly at the first category, only two compacts lie within it: the Animas-La Plata Project Compact and Goose Lake Basin Compact.[229] The former does not directly address administration,[230] while the latter omits administrative processes and provides that "[n]o commission or administrative body is necessary to administer this compact."[231]

The second category is marginally larger. It includes the La Plata River Compact and Colorado River Compact—two of the three earliest water-apportionment compacts, both formed during the 1920s[232]—joined by the Belle Fourche River Compact and Snake River Compact. None of these compacts creates a formal administrative body. Yet they do contain administrative provisions addressing topics such as the production of data for flows, water uses, and consumption,[233] as well as the formulation of rules and regulations to carry out the compacts' provisions.[234] Whereas the La Plata River Compact relies solely on state engineers for these tasks,[235] the other three compacts call for cooperation between state and federal water officials.[236] As far as dispute resolution, the Colorado River Compact provides for establishment of ad hoc commissions of

227. *See supra* Figure 1.

228. *See supra* notes 181-196 and accompanying text.

229. *See* Animas-La Plata Project Compact, Pub. L. No. 90-537, 82 Stat. 885, 898 (1968); Goose Lake Basin Compact, Pub. L. No. 98-334, art. IV, 98 Stat. 291, 292 (1984).

230. To clarify the meaning of "directly address," this compact incorporates, in reference to New Mexico's allocation, Articles III and XIV of the Upper Colorado River Basin Compact, administered by the Upper Colorado River Commission. Animas-La Plata Project Compact art. I, 82 Stat. at 898; Upper Colorado River Basin Compact, ch. 48, art. VIII, 63 Stat. 31, 35 (1949).

231. Goose Lake Basin Compact art. IV, 98 Stat. at 292.

232. *See supra* note 111.

233. La Plata River Compact, ch. 110, art. I, 43 Stat. 796, 796 (1925); Colorado River Compact art. V(a)-(b), COLO. REV. STAT. § 37-61-101 (2024); Belle Fourche River Compact, ch. 64, arts. III-IV, 58 Stat. 94, 95-96 (1944); Snake River Compact, ch. 73, art. VI(A)-(B), 64 Stat. 29, 31-32 (1950).

234. La Plata River Compact art. III, 43 Stat. at 797; Belle Fourche River Compact art. III, 58 Stat. at 95-96; Snake River Compact art. VI(A), 64 Stat. at 31.

235. La Plata River Compact arts. I, III, 43 Stat. at 796-97.

236. *See* Colorado River Compact art. V, COLO. REV. STAT. § 37-61-101 (2024); Belle Fourche River Compact art. III, 58 Stat. at 95-96; Snake River Compact art. VI(A)-(B), 64 Stat. at 31-32.

gubernatorially appointed basin-state representatives to address compact-related claims or controversies.[237] The Snake River Compact, by contrast, calls for ad hoc appointment of a federal representative if the two state officials reach an impasse on administrative matters, with "points of disagreement . . . decided by majority vote."[238]

That leads to the third and largest category, encompassing eleven compacts that not only include provisions on administrative processes but also establish formal governing bodies generally denominated as "commissions." These bodies include the Arkansas-Oklahoma Arkansas River Compact Commission,[239] Bear River Commission,[240] Canadian River Commission,[241] Kansas-Oklahoma Arkansas River Commission,[242] Klamath River Compact Commission,[243] Pecos River Commission,[244] Red River Compact Commission,[245] Rio Grande

237. Colorado River Compact art. VI, COLO. REV. STAT. § 37-61-101 (2024); *see also id.* arts. VI, IX (referencing the possibility of adjusting "any . . . claim or controversy by any present method," legislation, and litigation).

238. Snake River Compact art. VI(C), 64 Stat. at 32. This process does not preclude litigation. *Id.* art. XIII, 64 Stat. at 34.

239. Arkansas River Basin Compact, Ark.-Okla., Pub. L. No. 93-152, arts. VIII-IX, 87 Stat. 569, 572-74 (1973); *Interstate Water Compact Participation*, ARK. DEP'T AGRIC., https://agriculture.arkansas.gov/natural-resources/water-management/interstate-water-compact-participation [https://perma.cc/TT5P-LJ4U] (noting that the Arkansas-Oklahoma Arkansas River Compact Commission administers the compact).

240. Amended Bear River Compact, Pub. L. No. 96-189, art. III, 94 Stat. 4, 7 (1980); *Welcome*, BEAR RIVER COMM'N, https://bearrivercommission.org [https://perma.cc/79SZ-28C4] (stating that the Bear River Commission is responsible for "carry[ing] out the provisions of the Bear River Compact").

241. Canadian River Compact, ch. 306, art. IX, 66 Stat. 74, 76-77 (1952); *Canadian River Compact Commission*, TEX. COMM'N ON ENV'T QUALITY (Oct. 28, 2025), https://www.tceq.texas.gov/permitting/compacts/canadian.html [https://perma.cc/SM6U-JNHM] ("The Canadian River Commission administers the Canadian River Compact . . . .").

242. Arkansas River Basin Compact, Kan.-Okla., Pub. L. No. 89-789, art. X, 80 Stat. 1405, 1412-13 (1966); *Kansas-Oklahoma Arkansas River Compact*, KAN. DEP'T AGRIC., https://www.agriculture.ks.gov/divisions-programs/division-of-water-resources/interstate-rivers-and-compacts/kansas-oklahoma-arkansas-river-compact [https://perma.cc/ZBY4-LCLQ].

243. Klamath River Basin Compact, Pub. L. No. 85-222, art. IX, 71 Stat. 497, 502-05 (1957); *Klamath River Compact Commission*, OR. WATER RES. DEP'T, https://www.oregon.gov/owrd/programs/regulation/klamathregulation/pages/klamathrivercompactcommission.aspx [https://perma.cc/AMV6-8NBM].

244. Pecos River Compact, ch. 184, art. V, 63 Stat. 159, 162-63 (1949); *Pecos River Compact Commission*, TEX. COMM'N ON ENV'T QUALITY (Apr. 3, 2025), https://www.tceq.texas.gov/permitting/compacts/pecos.html [https://perma.cc/M84U-X25U].

245. Red River Compact, Pub. L. No. 96-564, art. IX, 94 Stat. 3305, 3315-16 (1980); *Red River Compact Commission*, TEX. COMM'N ON ENV'T QUALITY (Apr. 18, 2025), https://www.tceq.texas.gov/permitting/compacts/redriver.html [https://perma.cc/645D-9BQX].

Compact Commission,[246] Sabine River Compact Administration,[247] Upper Colorado River Commission,[248] and Yellowstone River Compact Commission.[249] A full survey of these bodies lies beyond this Article's scope, but even basic information about their composition and activities reveals their roots in a binary conception of cosovereignty.[250]

In terms of composition, state representation on these administrative bodies is dominant, while federal representation is far more modest. Six bodies are composed of single state representatives, each of whom possesses voting power during deliberations.[251] The other five bodies consist of multiple representatives from each state and contemplate either that each representative can cast one vote[252] or that each state can cast one vote based upon the majority opinion of that state's representatives.[253] As for federal representation, all of the bodies provide for a single federal representative appointed by the president or another official, with three notable distinctions vis-à-vis the state representatives: (1) the federal representative is optional rather than mandatory in all cases,[254] (2) the

246. Rio Grande Compact, ch. 155, art. XII, 53 Stat. 785, 791 (1939); *Rio Grande Compact Commission*, TEX. COMM'N ON ENV'T QUALITY (Jan. 13, 2026), https://www.tceq.texas.gov/permitting/compacts/riogrande.html [https://perma.cc/3DTF-UZSM].

247. Sabine River Compact, ch. 668, art. VII, 68 Stat. 690, 694-96 (1954); *Sabine River Compact Commission*, TEX. COMM'N ON ENV'T QUALITY (May 29, 2025), https://www.tceq.texas.gov/permitting/compacts/sabine.html [https://perma.cc/V3RU-CZTU].

248. Upper Colorado River Basin Compact, ch. 48, art. VIII, 63 Stat. 31, 35-37 (1949); *About the UCRC*, UPPER COLO. RIVER COMM'N, https://www.ucrcommission.com/about-us [https://perma.cc/ZZ66-7ERJ].

249. Yellowstone River Compact, ch. 629, art. III, 65 Stat. 663, 665-66 (1951); Water Res. Mission Area, *Yellowstone River Compact Commission*, U.S. GEOLOGICAL SURV. (Nov. 21, 2023), https://www.usgs.gov/mission-areas/water-resources/science/yellowstone-river-compact-commission [https://perma.cc/DLP9-FERN].

250. *See infra* Sections III.B-C.

251. *See* Canadian River Compact, ch. 306, art. IX(a), 66 Stat. 74, 76-77 (1952); Klamath River Basin Compact, Pub. L. No. 85-222, art. IX(A)(1)-(2), 71 Stat. 497, 502-03 (1957); Pecos River Compact, ch. 184, art. V(a), 63 Stat. 159, 162 (1949); Rio Grande Compact art. XII, 53 Stat. at 791; Upper Colorado River Basin Compact art. VIII(a), 63 Stat. at 35; Yellowstone River Compact art. III(A), 65 Stat. at 665.

252. *See* Amended Bear River Compact, Pub. L. No. 96-189, art. III(A), 94 Stat. 4, 7 (1980); Red River Compact, Pub. L. No. 96-564, art. IX, §§ 9.01, 9.03, 94 Stat. 3305, 3315-16 (1980); Sabine River Compact art. VII(b), (e), 68 Stat. at 694-96.

253. *See* Arkansas River Basin Compact, Ark.-Okla., Pub. L. No. 93-152, art. VIII(A), (D), 87 Stat. 569, 572 (1973); Arkansas River Basin Compact, Kan.-Okla., Pub. L. No. 89-789, art. X(A), (D), 80 Stat. 1405, 1412-13 (1966).

254. *See* Amended Bear River Compact art. III(A), 94 Stat. at 7; Arkansas River Basin Compact, Ark.-Okla., art. VIII(A), 87 Stat. at 572; Arkansas River Basin Compact, Kan.-Okla., art.

federal representative in all but two cases does not possess voting power, and (3) the federal representative's voting power in one of the two outlier cases is highly restricted.[255] These representational structures thus reflect a state-centric conception of cosovereignty from which Native nations are as invisible as they were in Frankfurter and Landis's seminal piece.

As for their activities, some variation exists across these administrative bodies, but there are many common threads. Technical administration is one broad domain, involving the completion of essential tasks for compact implementation—collecting and reporting data on consumption, uses, and water quality, for example, along with research initiatives focused on these subjects.[256] Compact compliance and enforcement represents a related function that, depending upon the body, can involve fact-finding regarding compact compliance;[257] issuing

X(A), 80 Stat. at 1412; Canadian River Compact art. IX(a), 66 Stat. at 76-77; Klamath River Basin Compact art. IX(A)(1), 71 Stat. at 502; Pecos River Compact, ch. 184, art. V(a), 63 Stat. 159, 162 (1949); Red River Compact art. IX, § 9.01, 94 Stat. at 3315; Rio Grande Compact art. XII, 53 Stat. at 791; Sabine River Compact art. VII(b), 68 Stat. at 694; Upper Colorado River Basin Compact art. VIII(a), 63 Stat. at 35; Yellowstone River Compact art. III(A), 65 Stat. at 665-66.

255. The federal representative lacks voting power under the Amended Bear River Compact art. III(A), 94 Stat. at 7; Arkansas River Basin Compact, Ark.-Okla., art. VIII(A), 87 Stat. at 572; Arkansas River Basin Compact, Kan.-Okla., art. X(A), 80 Stat. at 1412; Canadian River Compact art. IX(a), 66 Stat. at 76-77; Klamath River Basin Compact art. IX(A)(2), 71 Stat. at 502; Pecos River Compact art. V(a), 63 Stat. at 162; Red River Compact, Pub. L. No. 96-564, art. IX, § 9.01, 94 Stat. at 3315; Rio Grande Compact art. XII, 53 Stat. at 791; and Sabine River Compact art. VII(b), 68 Stat. at 694. The federal representative possesses voting power solely to break impasses between the two state representatives under the Yellowstone River Compact art. III(F), 65 Stat. at 666. The federal representative is entitled "to the same powers and rights" as the state commissioners under the Upper Colorado River Basin Compact art. VIII(a), 63 Stat. at 35.

256. Illustrations can be seen in Arkansas River Basin Compact, Ark.-Okla., art. IX(B)(1)-(3), 87 Stat. at 574; Arkansas River Basin Compact, Kan.-Okla., art. XI(B)(1)-(2), 80 Stat. at 1413; Canadian River Compact art. IX(d)(1), 66 Stat. at 77; Klamath River Basin Compact arts. V(B), IX(A)(8)(d), 71 Stat. at 500, 504; Pecos River Compact art. V(d)(2)-(10), 63 Stat. at 162-63; Red River Compact art. X, § 10.02(a)-(b), 94 Stat. at 3317; Rio Grande Compact arts. II, IV(6), 53 Stat. at 786-88; Sabine River Compact art. VII(g)(1)-(6), 68 Stat. at 695; Upper Colorado River Basin Compact, art. VIII(d)(2)-(7), (9), 63 Stat. at 36; and Yellowstone River Compact arts. III(C)-(D), IV, 65 Stat. at 665-66.

257. For examples, see Amended Bear River Compact art. IV(B)-(D), 94 Stat. at 9-10; Arkansas River Basin Compact, Ark.-Okla., art. IX(A)(8), 87 Stat. at 574; Pecos River Compact art. V(d)(5)-(10), (f), 63 Stat. at 162-63; Red River Compact art. X, § 10.01(g), 94 Stat. at 3316; Rio Grande Compact art. XII, 53 Stat. at 791; Sabine River Compact art. VII(g)(3)-(4), (7), (i), 68 Stat. at 695-96; and Upper Colorado River Basin Compact art. VIII(d)(6)-(10), (g), 63 Stat. at 36.

orders and related documents in response to potential compact violations;[258] and bringing administrative or judicial actions for compact enforcement.[259] Internal dispute-resolution processes like arbitration may also be prescribed in certain cases.[260] In addition, several bodies can develop compact amendments and similar measures that will become effective if ratified by the basin-state legislatures and Congress.[261] Other bodies are likewise authorized to adopt supplementary rules and regulations for compact implementation.[262] All told, these

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258. For examples, see Amended Bear River Compact art. IV(B), 94 Stat. at 9; Arkansas River Basin Compact, Ark.-Okla., art. IX(A)(7), 87 Stat. at 573; Red River Compact art. X, § 10.01(g), 94 Stat. at 3316; and Sabine River Compact art. VII(g)(7), 68 Stat. at 695.

259. For examples, see Amended Bear River Compact arts. III(D)(1), IV(B), 94 Stat. at 7, 9; Arkansas River Basin Compact, Ark.-Okla., art. IX(A)(7), 87 Stat. at 57; and Red River Compact arts. IX, X, §§ 9.03, 10.01(g), 94 Stat. at 3315-16.

260. Arbitration is provided for in the Arkansas River Basin Compact, Ark.-Okla., art. VIII(E), 87 Stat. at 572; Klamath River Basin Compact art. IX(A)(10), 71 Stat. at 504; and Sabine River Compact art. VII(j), 68 Stat. at 696. As noted, the Yellowstone River Compact calls for the federal representative to cast a tie-breaking vote if the two state commissioners reach an impasse "on any matter necessary" to the compact's proper administration. Yellowstone River Compact art. III(F), 65 Stat. at 666. The compact commission has adopted dispute-resolution rules implementing this provision, but the federal representative nonetheless adheres to an abstention policy under which tie-breaking votes will not be cast. Robison, *supra* note 23, at 639-41.

261. *See* Amended Bear River Compact art. XIV, 94 Stat. at 9; Arkansas River Basin Compact, Ark.-Okla., art. X(A), 87 Stat. at 575; Arkansas River Basin Compact, Kan.-Okla., art. XII(A), 80 Stat. at 1414; Rio Grande Compact art. XIII, 53 Stat. at 791-92. The jurisdiction of the Rio Grande Compact Commission and Yellowstone River Compact Commission similarly includes making "recommendations" to the respective states about matters of compact administration. Rio Grande Compact art. XII, 53 Stat. at 791; Yellowstone River Compact art. III(C), 65 Stat. at 665. The Yellowstone River Compact Commission is also called upon to "re-examine" the apportionment from "time to time" and "upon unanimous agreement . . . recommend modifications therein as are fair, just, and equitable." Yellowstone River Compact art. V(F), 65 Stat. at 667-68.

262. Several compacts specifically connect these rules and regulations to the compact's administration, enforcement, or purposes. *See* Klamath River Basin Compact art. IX(C)(1), 71 Stat. at 505 (authorizing rulemaking to "effectuate the purposes of this compact"); Red River Compact art. X, § 10.01(a), 94 Stat. at 13-14 (authorizing rulemaking for the "enforcement of the terms of the Compact"); Sabine River Compact art. VII(f)(1), 68 Stat. at 694 (authorizing rulemaking for the "administration of" the compact); Yellowstone River Compact art. III(E), 65 Stat. at 666 (authorizing rulemaking as "necessary to carry out" compact provisions). Other compacts reference the rules and regulations in general terms. *See* Amended Bear River Compact art. III(C)(1), 94 Stat. at 7; Arkansas River Basin Compact, Ark.-Okla., art. IX(A)(5), 87 Stat. at 575; Arkansas River Basin Compact, Kan.-Okla., art. XI(A)(4), 87 Stat. at 1413; Pecos River Compact art. V(d)(1), 63 Stat. at 147; Rio Grande Compact art. XII, 53 Stat. at 791; Upper Colorado River Basin Compact art. VIII(d)(1), 63 Stat. at 36.

diverse administrative tasks have the potential to impact Native nations' water rights in numerous ways.[263]

Yet, despite this crucial fact, water-apportionment compacts currently exclude Native nations from the foregoing schemes. Tribal representation on these commissions is purely aspirational—at least for now. Thus, a binary conception of cosovereignty—captured by Frankfurter and Landis in *The Compact Clause of the Constitution* during the 1920s[264]—persisted in water-apportionment compacts even as historical trends in federal Indian policy suggested potential alternatives for the numerous compacts spawning in and adjacent to the West.[265] Existing apportionments and administrative schemes highlight the continued prevalence of this pattern.[266] It suffers from a fundamental flaw: the binary conception of cosovereignty is legally and morally wrong—Native nations are cosovereigns, too. The next Part considers the normative and prescriptive implications of this truth for future transboundary water management.

III. TOWARDS TRIPARTITE WATER COSOVEREIGNTY

The *Restatement of the Law of American Indians* plainly proclaims, "There are three kinds of sovereigns within the United States—federal, state, and tribal."[267] The binary conception of cosovereignty, as embedded in existing water-apportionment compacts, openly defies this principle. This Part explores ways to rectify that problem, offering, with humility and respect, reforms for consideration by Native nations and their federal and state cosovereigns. Drawing on principles from federal Indian law and water law, this Part fleshes out the legal and policy justifications supporting recent tribal mobilization in support of their inclusion in transboundary water management.

In essence, this Part argues that contemporary management of transboundary waters should be undertaken by newly formed or reconfigured commissions on which basin tribes possess opportunities for direct representation beside their state and federal cosovereigns, in accordance with a "one sovereign, one representative" default rule.[268] Realizing this vision would require new investments in tribal water-management capacity on the part of the federal trustee, as well as the formation of new commissions—or the alteration of existing ones—comp-

263. *See infra* notes 360-365 and accompanying text.

264. *See supra* Section I.B.

265. *See supra* Sections II.A-B.

266. *See supra* Section II.C.

267. RESTATEMENT OF THE L. OF AM. INDIANS ch. 1, intro. (A.L.I. 2022).

268. *See infra* notes 393-394 and accompanying text.

osed to achieve "sovereign parity."[269] In the aggregate, these proposals reach toward a unified goal: transitioning from binary to tripartite water cosovereignty.

A. Commissions, Capacity, and Constant Change

Returning to *The Compact Clause of the Constitution*, Frankfurter and Landis argued that constantly changing "[p]opulation, engineering, [and] irrigation conditions . . . cannot be cast into a stable mould by . . . isolated acts of administration."[270] Beyond the historical evidence presented in their 1925 publication, this position has gained even greater salience in light of modern technological, environmental, and legal change. Two points illustrate commissions' unique capacity to tackle these contemporary problems.

First, transboundary water management is inherently dynamic.[271] Frankfurter and Landis were not physical scientists, but their reference to constantly changing "irrigation conditions"[272] can be construed to encompass a host of priorities for modern water management, including climate adaptation, ecosystem protection, and pollution control.[273] Beyond these environmental factors, Frankfurter and Landis's focus on "[p]opulation" and "engineering" conditions[274] speaks not only to population trends and technological developments but also to evolving human values and epistemologies attached to water.[275] None of the variables associated with transboundary water management are static—they must be approached adaptively.[276]

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269. *See infra* notes 430-431 and accompanying text.

270. *See infra* notes 430-431 and accompanying text.

271. The classic piece on this topic is P.C.D. Milly et al., *Stationarity Is Dead: Whither Water Management?*, 319 SCI. MAG. 573, 573-74 (2008).

272. Frankfurter & Landis, *supra* note 3, at 701.

273. The modern paradigm of integrated water-resources management encompasses these priorities. *See Integrated Water Resources Management*, U.N. ENV'T PROGRAMME (Jan. 3, 2024, 9:28 AM), https://www.unep.org/topics/fresh-water/water-resources-management/integrated-water-resources-management [https://perma.cc/WFM6-MGS6].

274. Frankfurter & Landis, *supra* note 3, at 701.

275. Most relevant here are Indigenous peoples' distinct water-related values and epistemologies, as discussed in *A Common Vision for the Colorado River System*, *supra* note 5, at 4-5; and Robison et al., *supra* note 5, at 852, 855-57.

276. For insightful scholarship addressing adaptation of water-apportionment compacts to climate change, see generally Jerome C. Muys, Jr. & George William Sherk, *The Dogmas of the Quiet Past: Potential Climate Change Impacts on Interstate Compact Water Allocation*, 34 VA. ENV'T L.J. 297 (2016); and Noah D. Hall, *Interstate Water Compacts and Climate Change Adaptation*, 5 ENV'T & ENERGY L. & POL'Y J. 237 (2010).

Second, commissions are instrumental in managing the tensions that inevitably arise between cosovereigns navigating complex modern problems.[277] Although presently composed exclusively of state and federal representatives,[278] compact commissions can bolster the capacity of all three types of cosovereigns to address the varied challenges of transboundary water management. Indeed, as surveyed earlier, these commissions conduct essential technical monitoring and reporting on transboundary waters, assess compact compliance, and provide a deliberative space for implementing or even potentially amending compacts.[279]

Historical practice reinforces this added value. Commissions do not exist uniformly in all compacted basins with tribal lands and areas,[280] but their continued presence in nearly two-thirds of water-apportionment compacts suggests that they offer some utility to interested cosovereigns.[281] From a temporal perspective, these commissions became increasingly common as policymakers gained more experience with compact design and administration. Only one compact established a commission during the allotment and assimilation and Indian reorganization eras,[282] while ten commissions emerged from compacts formed amidst the termination and self-determination eras.[283] Additional causal factors could be at play, but on its face, this pattern implies a growing appreciation for commissions' practical functions and capacity-enhancing value for transboundary water management.

Supporting this reading of the history are two developments which followed the formation of the most recent water-apportionment compact in 1984.[284] On the domestic front, lawyers and scientists from across the United States came together in 2002 to draft the Model Interstate Water Compact.[285] This five-year endeavor stemmed from congressional concerns about the growing frequency of interstate water conflicts, as well as the "realization that most of the existing

277. Frankfurter and Landis, *supra* note 3, at 701.

278. *See supra* notes 251-255 and accompanying text.

279. *See supra* notes 256-263 and accompanying text.

280. *See supra* notes 226-250 and accompanying text.

281. *See supra* notes 239-250 and accompanying text.

282. Rio Grande Compact, ch. 155, art. XII, 53 Stat. 785, 791 (1939).

283. These ten commissions are identified *supra* notes 239-249 and accompanying text. The Bear River Commission is counted only once in this total, although it was established in both the original and amended versions of that compact. Bear River Compact, Pub. L. No. 85-348, art. III(A), 72 Stat. 38, 40-41 (1958), *amended by*, Amended Bear River Compact, Pub. L. No. 96-189, art. III(A), 94 Stat. 4, 7 (1980).

284. *See supra* note 104.

285. *See* Jerome C. Muys, George William Sherk & Marilyn C. O'Leary, *Utton Transboundary Resources Center Model Interstate Water Compact*, 47 NAT. RES. J. 17, 21 (2007).

compacts appear to be inadequate to resolve these conflicts."[286] Acknowledging that "not every interstate water compact will necessarily require the establishment of a commission," the Model Compact's commentary nonetheless notes that "some type of administrative entity will be required for implementation of most compacts."[287] The Model Compact thus prescribes a basin-wide commission—supported by a council and a division of scientific analysis—with wide-ranging powers and duties mirroring existing commissions' activities, including technical administration, compact compliance and enforcement, and formation of rules and regulations for compact implementation.[288] The Model Compact is a testament, forged by foremost experts in the field,[289] to the many ways that commissions enhance cosovereigns' water-management capacity.

At the international level, the United Nations Convention on the Non-Navigational Uses of International Watercourses, adopted in 1997 and effective in 2014, offers another endorsement of commissions.[290] The Convention, intended to shape basin-specific bilateral or multilateral "watercourse agreements,"[291] repeatedly emphasizes the importance of cooperation, consultation, and joint action in water management. It sets forth a general obligation to cooperate "to attain optimal utilization and adequate protection" of international watercourses and posits that "joint mechanisms or commissions" may be created to facilitate such cooperation.[292] The Convention likewise contemplates mechanisms to devise and implement sustainable development plans on watercourses and "[o]therwise promot[e] [their] rational and optimal utilization, protection and control."[293] Finally, with respect to dispute resolution, the Convention calls for parties to "make use, as appropriate, of any joint watercourse institutions that may have been established by them."[294]

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286. *Id.* at 21-23.

287. *Id.* at 47.

288. *Id.* at 41-46.

289. *Id.* at 22.

290. Convention on the Law of the Non-Navigational Uses of International Watercourses, *opened for signature* May 21, 1997, 2999 U.N.T.S. 77 [hereinafter U.N. Watercourses Convention]. The Convention's drafting spanned twenty-five years. Stephen C. McCaffrey, *Convention on the Law of the Non-Navigational Uses of International Watercourses*, AUDIOVISUAL LIBR. INT'L L. 1 (2008), https://legal.un.org/avl/pdf/ha/clnuiw/clnuiw_e.pdf [https://perma.cc/9UFS-KFRB].

291. U.N. Watercourses Convention, *supra* note 290, art. 3(3).

292. *Id.* art. 8(1)-(2).

293. *Id.* art. 24(1)-(2).

294. *Id.* art. 33(2).

In sum, Frankfurter and Landis were right: "administrative agenc[ies] for continuous study and continuing action"[295] add value for transboundary water management. While recognizing that not every basin may warrant a commission,[296] this Section offers two general prescriptions. First, cosovereigns in compacted basins with tribal lands or areas should proactively approach the twenty-first century's formidable water-management challenges by (1) creating commissions for those compacts that currently lack them and (2) expanding and refining commissions for those compacts that have established them. Second, any cosovereigns prospectively engaged in developing new compacts—or new statutory apportionments—should seriously consider creating commissions, referencing for institutional design the provisions of existing compacts and the Model Compact.[297]

And yet, for all that this Section draws from Frankfurter and Landis's foundational advocacy on commissions, it is now time to part ways. Transboundary water law must move from a binary vision of cosovereignty to one which explicitly recognizes this country's third type of cosovereigns: Native nations.

B. *Cosovereign Inclusion of Native Nations*

A century after the *Compact Clause of the Constitution*'s publication, Native nations in western North America have sought greater inclusion in decision-making bodies and processes utilized for transboundary water management. A number of normative principles support this tribal mobilization, including respect for tribal sovereignty, the federal-tribal trust relationship, and procedural equity. Building on the preceding discussion of commissions' capacity-enhancing value, this Section examines the ongoing push for inclusion of tribal cosovereigns and leverages the foregoing normative principles to advocate for such inclusion.

1. *Tribal Mobilization*

Indigenous peoples in western North America and elsewhere face a historical gap in transboundary water management. Native nations have in recent years made closing this gap an urgent priority, particularly within the compacted

295. Frankfurter & Landis, *supra* note 3, at 701.

296. Muys et al., *supra* note 285, at 47.

297. Framed by the concept of indigenization, a discussion of the potential composition and procedural formation of new and updated commissions appears *infra* Section III.C.

basins in and adjacent to the West that contain the most tribal lands: the Colorado River and the Rio Grande basins.[298]

In the Colorado River Basin, ongoing, highly politicized negotiations regarding operation of the basin's two largest reservoirs, Lake Mead and Lake Powell, have spurred advocacy for greater tribal inclusion, as existing domestic and international agreements expire at the end of this year.[299] Basin tribes have attempted to engage in this process—seeking to ensure that the new guidelines respect tribal sovereignty and tribal water rights—in a host of ways.[300] For example, twenty basin tribes submitted a joint letter to the Bureau of Reclamation

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298. *See supra* Figure 1. Although this discussion focuses on the Colorado River and Rio Grande basins, the Columbia River Basin is also notable at the international level. In recent years, Native nations in Canada and the United States have engaged in path-breaking advocacy for inclusion in transboundary water governance, in conjunction with efforts to modernize the Columbia River Treaty. Rich Native perspectives on the treaty and these efforts can be found at Columbia Basin Tribes, *Common Views on the Future of the Columbia River Treaty*, COLUM. RIVER INTER-TRIBAL FISH COMM'N (Feb. 25, 2010), https://critfc.org/wp-content/uploads/2015/05/Common-Views-statement.pdf [https://perma.cc/ZEA8-BAPJ]; *Columbia River Treaty*, OKANAGAN NATION ALL., https://syilx.org/governance/columbia-river-treaty [https://perma.cc/NM4E-NYX3]; *Columbia River Treaty*, COLUM. RIVER INTER-TRIBAL FISH COMM'N, https://critfc.org/tribal-treaty-fishing-rights/policy-support/columbia-river-treaty [https://perma.cc/9AAT-FFFJ]; and *Columbia River Treaty*, UPPER COLUM. UNITED TRIBES, https://ucut.org/project/columbia-river-treaty [https://perma.cc/6NFE-RL4V]. *See generally* MATTHEW J. MCKINNEY, RICHARD KYLE PAISLEY & MOLLY SMITH STENOVEC, A SACRED RESPONSIBILITY: GOVERNING THE USE OF WATER AND RELATED RESOURCES IN THE INTERNATIONAL COLUMBIA BASIN THROUGH THE PRISM OF TRIBES AND FIRST NATIONS (2016) (offering extensive discussion of the historical treatment of basin tribes in transboundary water governance and options for improvement). While it has not been ratified by the United States and Canada, these countries in July 2024 reached an Agreement in Principle calling for the potential creation of a Joint Ecosystem and Indigenous and Tribal Cultural Values Body. *Negotiations to Modernize the Columbia River Treaty Agreement-in-Principle Content, Can.-U.S.*, PROVINCE B.C. (July 11, 2024), https://engage.gov.bc.ca/app/uploads/sites/6/2024/09/CRT-AIP-Canada-public-description-Final_2024Aug30.pdf [https://perma.cc/6RQH-ZEAN].

299. *Colorado River Post 2026 Operations*, U.S. BUREAU RECLAMATION (2026), https://www.usbr.gov/ColoradoRiverBasin/post2026/index.html [https://perma.cc/Q6AP-CV3D].

300. Examples of this engagement can be seen in *Scoping Report for Post-2026 Colorado River Reservoir Operations*, U.S. BUREAU RECLAMATION 35-36, 53 (2023), https://www.usbr.gov/ColoradoRiverBasin/documents/post2026/scoping/Post2026Operations_ScopingReport_October2023_508.pdf [https://perma.cc/3YST-N4Y2], as well as in letters submitted by basin tribes and posted at *Alternatives Development*, U.S. BUREAU RECLAMATION (Mar. 12, 2026), https://www.usbr.gov/ColoradoRiverBasin/post2026/alternatives/index.html [https://perma.cc/UH6A-48VN]. Also notable in this vein are recent conferences convened by the Water & Tribes Initiative and the Getches-Wilkinson Center at the University of Colorado Law School to create a space for tribal leaders (and others) to share their views on tribal inclusion in water governance. *E.g.*, *2024 GWC Conference on the Colorado River*, UNIV. COLO. BOULDER (June 5, 2024), https://www.colorado.edu/center/gwc/2024/06/05/2024-gwc-conference-colorado-river [https://perma.cc/ZM7C-C95M].

in May 2024.[301] In their letter, the basin tribes called for their inclusion in transboundary water management as "governmental partners" and emphasized the importance of "a permanent formalized structure for Tribal participation in implementing [the] Post-2026 Guidelines, and in any future Colorado River policy and governance."[302] A prior letter, submitted by twenty basin tribes to the Secretary of the Interior in November 2021, espoused a similar "guiding principle": "The federal trust responsibility requires that the United States ensure Basin Tribes are included in the development and implementation of the policies and rules that will govern how the Colorado River will be managed from this point forward."[303] The message from these letters is plain: include Native nations as cosovereigns.

Parallel tribal mobilization has taken place within the Upper Colorado River Basin,[304] where the Upper Colorado River Commission (UCRC) administers a corresponding compact.[305] Five Native nations exist in the Upper Basin: the Ute Indian Tribe, Southern Ute Indian Tribe, Ute Mountain Ute Tribe, Jicarilla Apache Nation, and Navajo Nation.[306] The UCRC, however, is an exclusively state-federal body that does not afford these tribal cosovereigns representation.[307] Tribal leaders have clearly expressed interest in such representation in recent years, including in a landmark 2018 Tribal Water Study.[308] Yet such inclusion has not come to pass.

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301. Letter from Melvin Baker, Chairman, S. Ute Indian Tribe, et al., to Camille Calimlim Touton, Comm'r, Bureau of Reclamation (May 16, 2024) [hereinafter Basin Tribes' Letter], https://88163372-ff11-4309-b5e1-c06dc8806a15.filesusr.com/ugd/1c5bb7_fd474ce414224407a8f5e61339b39a8a8.pdf [https://perma.cc/GG6E-UH5G]. For a discussion of advocacy and developments preceding this letter, including the Department of the Interior's formation of a Federal-Tribes-States partnership, see Robison, *supra* note 187, at 169-72.

302. Basin Tribes' Letter, *supra* note 301, at 2, 4.

303. Letter from Melvin Baker, Chairman, S. Ute Indian Tribe, et al., to Deb Haaland, Sec'y of the Interior 2-3 (Nov. 15, 2021), https://www.naturalresourcespolicy.org/docs/letter-to-sec-haaland-11.15.2121.pdf [https://perma.cc/UFC8-42DF].

304. Upper Colorado River Basin Compact, ch. 48, art. II(f), 63 Stat. 31, 32 (1949).

305. *Id.* art. VIII(a), 63 Stat. at 35.

306. The locations of the tribes' reservations are identified on a Bureau of Reclamation map posted at *Federally Recognized Tribes in the Colorado River Basin*, U.S. BUREAU RECLAMATION (Mar. 24, 2022), https://www.usbr.gov/ColoradoRiverBasin/images/20220324-CRB-AllTribes-Map-2550x3300-LCB.png [https://perma.cc/LZ8Q-9RJJ].

307. Upper Colorado River Basin Compact art. VIII(a), 63 Stat. at 35.

308. *See* Michael Elizabeth Sakas, *Historically Excluded from Colorado River Policy, Tribes Want a Say in How the Dwindling Resource Is Used. Access to Clean Water Is a Start*, CPR NEWS (Dec. 7, 2021, 7:42 AM), https://www.cpr.org/2021/12/07/tribes-historically-excluded-colorado-river-policy-use-want-say-clean-water-access [https://perma.cc/5CJD-Y66B] (describing how Manuel Heart, chairman of the Ute Mountain Ute Tribe, "said one way to make tribal voices

Instead, the UCRC has taken an incremental "first step" aimed at "changing the status quo of excluding Tribes [from] participating in meaningful discussions about the operation of the Colorado River."[309] The UCRC and Upper Basin Tribes formed in April 2024 a memorandum of understanding (MOU) committing the parties to regular meetings "to collaborate and exchange information relevant to the Upper Colorado River Basin and to discuss potential collaborative action on interstate issues of mutual interest involving the Colorado River system as appropriate."[310] While valuable for relationship building, this MOU by no means replaces direct representation on the commission or participation in its activities. Indeed, the agreement explicitly acknowledges tribes' ongoing desire for "a permanent, structural mechanism . . . to exercise their sovereignty and self-determination by participating directly in Colorado River decision-making."[311] And following the MOU's adoption, tribal leaders have continued to express interest in UCRC representation and frustration with not being treated as equal cosovereigns.[312]

This pattern extends to the Rio Grande Basin as well. Like the UCRC, the Rio Grande Compact Commission (RGCC) consists exclusively of state and

official in river negotiations would be to appoint a tribal representative on the Upper Colorado River Commission"); *Colorado River Basin Ten Tribes Partnership Tribal Water Study*, U.S. BUREAU RECLAMATION 7-6 (2018), https://www.usbr.gov/lc/region/programs/crbstudy/tws/docs/Ch.%207%20Challenges%20and%20Opportunities%2012-13-2018.pdf [https://perma.cc/L6JV-3U3Q] (identifying as one "potential action[]" item the pursuit of "tribal representation on the Upper Colorado River Commission"). For more information on the Ten Tribes Partnership, see *Keepers of the River*, TEN TRIBES P'SHIP, https://tentribespartnership.org [https://perma.cc/RY35-GW3U].

309. *Ute Indian Tribe Business Committee Joins Historic Agreement Between Upper Basin Tribes and States of the Colorado River*, UTE INDIAN TRIBE 3 (2025) [hereinafter Ute Indian Tribe Historic Agreement], https://utetribe.com/wp-content/uploads/2025/02/MOU_Signing.pdf [https://perma.cc/3HU7-WZW5].

310. *Memorandum of Understanding Among the Upper Colorado River Basin Tribes and the Upper Colorado River Commission*, UPPER COLO. RIVER COMM'N 1 (2024), https://www.ucrcommission.com/wp-content/uploads/2024/03/UCRC-UB-Tribes-MOU.pdf [https://perma.cc/G384-FAJW]. This MOU grew out of meetings commenced by the parties in August 2022 as the "Upper Basin Tribes-States Dialogue." *Id.*

311. Ute Indian Tribe Historic Agreement, *supra* note 309, at 3.

312. *See id.* (describing the frustration of Julius T. Murray, III, chairman of the Ute Indian Tribe Business Committee, "that the Ute Indian Tribe does not have a seat on the Upper Colorado River Commission as an equal sovereign"); Brooke Larsen, *'The Time to Act is Now': Colorado River States Still Clashing as Feds Pressure Them to Reach a Deal*, SALT LAKE TRIB. (Dec. 19, 2025, 4:37 PM), https://www.sltrib.com/news/environment/2025/12/19/feds-push-colorado-river-states [https://perma.cc/U4UD-HNCL] (describing the hope of Mike Natchees, vice chairman of the Ute Indian Tribe, that "one day tribes will also have a seat at this table on the [Upper Colorado River Commission], not just the states").

federal representatives.[313] Before the RGCC, the U.S. Bureau of Indian Affairs has historically spoken on behalf of all basin tribes.[314] But for the past several years, a coalition of six Pueblos along the Middle Rio Grande—Cochiti, Santo Domingo, San Felipe, Santa Ana, Sandia, and Isleta—has called for direct inclusion. As expressed by Governor Vernon Abeita of the Pueblo of Isleta at the RGCC's May 2022 meeting, "It is now time the coalition interacts with the commission directly, and for the commission to engage the coalition Pueblos, so that our voices can be heard."[315] Two years later, at the RGCC's April 2024 meeting, the coalition reiterated their desire for "a 'seat at the table' to address the exclusion of tribal governments from the commission itself and to have more representation beyond the U.S. Bureau of Indian Affairs."[316] Another year passed, and another coalition statement followed at the RGCC's April 2025 meeting.[317]

Nevertheless, the coalition's persistence has yet to reshape the RGCC. "The position the compact commission takes is that the Pueblos [do] have representation through the Bureau of Indian Affairs," stated the RGCC's legal advisor ahead of its April 2025 meeting, "and that's the proper process for them to provide their input."[318] The legal advisor also noted incipient efforts by the RGCC to develop "a more expansive protocol for tribal input" at commission meetings, an initiative apparently begun the year prior.[319] The legal advisor then issued a tentative but significant statement for the entire Rio Grande Basin: "If there's a protocol, it needs to include all the pueblos, tribes and nations, not just the six Middle Rio Grande."[320] Where this latest strand of advocacy will lead is unclear. But the Pueblos' desire for inclusion in the RGCC's decision-making processes is undeniable.

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313. Rio Grande Compact, ch. 155, art. XII, 53 Stat. 785, 791 (1939).

314. *See* Danielle Prokop, *Pueblos Again Seek Inclusion in Rio Grande Decision-Making*, SOURCE N.M. (May 16, 2022, 4:30 AM), https://sourcenm.com/2022/05/16/pueblos-again-seek-inclusion-in-rio-grande-decision-making [https://perma.cc/44VS-DJFC].

315. *Id.*

316. Danielle Prokop, *NM to Meet with Pueblos in May on Rio Grande Governance*, SOURCE N.M. (Apr. 29, 2024, 3:35 AM), https://sourcenm.com/2024/04/29/nm-to-meet-with-pueblos-in-may-on-rio-grande-governance [https://perma.cc/D3EQ-72E2].

317. Danielle Prokop, *Interstate Board Governing Rio Grande Will Wrangle with Drought Impacts This Friday*, SOURCE N.M. (Apr. 21, 2025, 4:28 PM), https://sourcenm.com/2025/04/21/interstate-board-governing-rio-grande-will-wrangle-with-drought-impacts-this-Friday [https://perma.cc/K2FN-GU37].

318. *Id.*

319. *Id.*

320. *Id.*

2. *Foundational Principles*

Despite the historic initiatives for tribal inclusion in the Colorado River and Rio Grande basins, Native nations have yet to attain direct representation on any compact commission. Yet a number of legal principles support a transition toward tripartite cosovereignty and carry significant potential for future advocacy efforts: respecting tribal sovereignty, honoring the federal-tribal trust relationship, and promoting procedural equity.

For starters, tribal sovereigns are, indeed, *sovereigns*.[321] Native nations have existed as sovereigns – "self-governing sovereign political communities," as described by the Supreme Court[322] – since long before the onset of Euro-American colonization of North America[323] and the eventual formation of the United States.[324] Having survived half a millennium of Euro-American subjugation efforts, Native nations "warrant recognition and deep respect both from their Native constituencies and from non-Native citizens, as well as from the local, state, and federal governments with which they must invariably engage."[325] In a word, tribal sovereignty is *inherent*.[326] It is "indwelling" and intrinsically belongs to Native nations as a permanent, essential attribute,[327] rather than one bestowed by federal law.[328] The Constitution, in fact, does not directly limit or regulate Native nationhood,[329] as tribal sovereignty, by the Court's own telling, "is 'a sovereignty outside the basic structure of the Constitution.'"[330]

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321. The emphasis on tribal sovereignty here tracks one of the foundational principles for tribal comanagement of natural resources. *See* Mills & Nie, *supra* note 30, at 148.

322. United States v. Wheeler, 435 U.S. 313, 322-23 (1978).

323. *See* MATTHEW L.M. FLETCHER, AMERICAN INDIAN TRIBAL LAW 5 (3d ed. 2024) ("These American Indian governments, numbering in the hundreds over the entire continent, incorporated many similar elements, but were characterized by incredible variety and complexity.").

324. *See* RESTATEMENT OF THE L. OF AM. INDIANS § 13 (A.L.I. 2022).

325. WILKINS, *supra* note 12, at 20.

326. *See id.*

327. *Inherent*, OXFORD ENG. DICTIONARY (2024), https://www.oed.com/dictionary/inherent_adj [https://perma.cc/W9LX-T9Q3].

328. RESTATEMENT OF THE L. OF AM. INDIANS § 16 (A.L.I. 2022).

329. *Id.*

330. Plains Com. Bank v. Long Fam. Land & Cattle Co., 554 U.S. 316, 337 (2008) (quoting United States v. Lara, 541 U.S. 193, 212 (2004) (Kennedy, J., concurring in the judgment)); *see also* Santa Clara Pueblo v. Martinez, 463 U.S. 49, 56 (1978) ("As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."). Neither the Bill of Rights nor the Fourteenth Amendment applies directly to tribal sovereigns, though the

Indeed, the American legal system has since its genesis acknowledged tribal sovereignty as a foundational principle. Consider, as a powerful textual example, the Indian Commerce Clause, with its demarcation of "tribes" as existent sovereigns alongside "foreign Nations" and "the several States."[331] Several early treaties, construed by the Supreme Court as instruments of international law formed between tribal sovereigns and the United States or European imperial powers,[332] reinforce this conclusion.[333] Through its Treaty Clause, the Constitution had "adopted and sanctioned the previous treaties with the Indian nations," wrote Chief Justice Marshall in *Worcester*, thus admitting tribal sovereigns' "rank among those powers who are capable of making treaties."[334] In other words, the U.S. legal system has since the Framing recognized Native nations as "distinct, independent political communities."[335]

And tribal sovereignty persists at present. As reiterated by the Supreme Court in 2014, Native nations constitute "domestic dependent nations that exercise inherent sovereign authority."[336] Different forms of federal law can and do constrain tribal sovereignty, including treaty stipulations (often historically exacted under duress), statutes enacted pursuant to Congress's plenary power over Indian affairs, and the implicit divestiture doctrine concocted by the Court as federal common law.[337] Beyond such restrictions, however, Native nations "retain their historic sovereign authority."[338] This authority implicates what is regarded as the most basic principle of federal Indian law: "[T]hose powers law-

Indian Civil Rights Act statutorily imposed upon these sovereigns many of the Bill of Rights's guarantees. RESTATEMENT OF THE L. OF AM. INDIANS § 16 (A.L.I. 2022).

331. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . ."); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 13, § 5.01[1][b]; *see also* Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1021-23 (2015) (discussing the Clause's historical origins in the Articles of Confederation and its subsequent treatment during the Constitutional Convention and ratification debates).

332. The Marshall Trilogy consists of *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831); and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

333. Most insightful are *Worcester*'s constructions of the Treaty with the Delawares (1778), Treaty of Hopewell (1785), and Treaty of Holston (1789). *Worcester*, 31 U.S. (6 Pet.) at 549-56; *see also* Ablavsky, *supra* note 331, at 1061-67 (discussing the Washington Administration's conception of tribal sovereignty).

334. *Worcester*, 31 U.S. (6 Pet.) at 559.

335. *Id.*

336. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2014) (quoting *Cherokee Nation*, 30 U.S. (5 Pet.) at 17).

337. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 13, § 5.01[1][c].

338. *Bay Mills*, 572 U.S. at 788 (Sotomayor, J., concurring) (quoting United States v. Wheeler, 435 U.S. 313, 323 (1978)).

fully vested in an Indian nation are not, in general, delegated powers granted by express acts of Congress, but rather 'inherent powers of a limited sovereignty which has never been extinguished.'"[339]

This principle provides strong support for a shift from binary to tripartite water cosovereignty. In all compacted basins with tribal lands or areas, Native nations are unequivocally "separate sovereigns pre-existing the Constitution."[340] In other words, Native nations are separate cosovereigns preexisting those which, from 1925 through 1984,[341] negotiated and ratified compacts built without any seat at the administrative table for the third type of sovereign or any proper regard for Native peoples' longstanding connections to rivers and related waters.[342] As domestic nations with governmental authority anchored in their "pre-existing sovereignty,"[343] as well as water rights that constitute sovereign property interests,[344] tribal sovereigns should not be marginalized in this way. Respect for tribal sovereignty demands more: Native nations should be afforded opportunities for direct representation—the ability to stand shoulder to shoulder with their state and federal cosovereigns—on the administrative bodies whose activities impact tribal property rights and cultural connections to water.

Another foundational principle of federal Indian law—the trust relationship—bolsters this advocacy.[345] Also known as the trust doctrine, trust obligation, or trust responsibility,[346] the *Restatement* provides a useful overview: "The United States recognizes a general trust relationship between the United States and Indian tribes and their members arising from a government-to-government relationship with preexisting sovereigns."[347]

To be clear, history generally does *not* cast the trust relationship in a positive light, from its origins in Europeans' misconceptions of Natives' cultural inferi-

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339. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 13, § 5.01[1][b] (quoting *Wheeler*, 435 U.S. at 322-23).

340. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978).

341. *See supra* Table 1.

342. *See supra* Section II.C.2.

343. Puerto Rico v. Sanchez Valle, 579 U.S. 59, 72 n.5 (2016).

344. *See supra* notes 256-263 and accompanying text.

345. WILKINS, *supra* note 12, at 277. The emphasis on the trust relationship here reflects one of the foundational principles for tribal comanagement of natural resources. Mills & Nie, *supra* note 30, at 149.

346. *See* DAVID E. WILKINS & K. TSIANINA LOMAWAIMA, UNEVEN GROUND: AMERICAN INDIAN SOVEREIGNTY AND FEDERAL LAW 65 (2001). The term "trust relationship" "implies reciprocity," which supports Native nations articulating their own visions of the relationship in addition to that laid out by the federal government. *Id.* at 78-79.

347. RESTATEMENT OF THE L. OF AM. INDIANS § 4(a) (A.L.I. 2022).

ority[348] to the relationship's paternalistic invocation during earlier eras of federal Indian policy (e.g., *Cherokee Nation*'s previously noted conception of a guardian-ward relationship between the U.S. and Native nations).[349] That said, the Supreme Court's protectorate conception of the relationship articulated in *Worcester* – one grounded in international law and promises made by the United States to Native nations in treaties and treaty substitutes – can still prove useful to tribal sovereigns today.[350] Under this view, the United States has assumed duties to protect the property rights of Native nations and individual tribal members, along with a responsibility to promote tribal governance.[351] Congress and the Executive share these duties, albeit in different forms with distinct liabilities.[352]

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348. *E.g.*, WILKINS, *supra* note 12, at 277 (discussing trusteeship doctrine in papal bulls and contemporaneous documents).

349. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831); *see also* Robert A. Williams, Jr., *The Medieval and Renaissance Origins of the Status of the American Indian in Western Legal Thought*, 57 S. CAL. L. REV. 1, 97-98 n.410 (1983) (discussing permeation of Eurocentrism in *Cherokee Nation*'s guardianship conception of the trust relationship). During the late nineteenth and early twentieth centuries, the guardianship conception rationalized Congress's plenary power over tribes and resulted in "Congress and the Executive branch interfering with internal tribal affairs and Indian property interests to an unprecedented extent, and the Supreme Court rarely interfering in the policy choices of the United States." FLETCHER, *supra* note 144, at 178. But in the self-determination era, this guardianship conception has become antiquated. *See Report of the Commission on Indian Trust Administration and Reform*, U.S. DEP'T INTERIOR 20 (Dec. 10, 2013), https://www.doi.gov/sites/default/files/migrated/cobell/commission/upload/Report-of-the-Commission-on-Indian-Trust-Administration-and-Reform_FINAL_Approved-12-10-2013.pdf [https://perma.cc/EUA5-LWAP].

350. RESTATEMENT OF THE L. OF AM. INDIANS § 4 cmt. a (A.L.I. 2022) (describing how *Worcester* analogized the trust relationship "to a doctrine of the law of nations: that when a stronger sovereign assumes authority over a weaker sovereign, the stronger one assumes a duty of protection for the weaker one, which does not surrender its right to self-government"); Mary Christina Wood, *The Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355, 356-57 (2003) (describing how "the duty of protection . . . forms the background of every relinquishment of [N]ative property, whether accomplished by treaty, statute, or executive order"); COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 13, § 6.04[3][c] (describing how, in modern times, the trust relationship is "the source of persuasive arguments by tribes urging passage of legislation or seeking oversight of executive agencies").

351. RESTATEMENT OF THE L. OF AM. INDIANS § 4 cmts. c, d (A.L.I. 2022). The duty of protection was an essential quid pro quo: "[T]ribes sacrificed most of their ancestral lands for assurances that they would be protected in their new homelands by the 'strong fences' and 'long arms' of the Great Father in Washington." WILKINSON, *supra* note 107, at 18.

352. Congress has enacted numerous statutes during the self-determination era to fulfill the trust relationship, though it has not been held to be legally enforceable against Congress. RESTATEMENT OF THE L. OF AM. INDIANS § 4 reps.' notes, cmt. a (A.L.I. 2022). By contrast, "[t]he executive branch, most notably the Secretary of the Interior, is the administrator of the federal government's trust duties to Indians and tribes," and breach-of-trust actions can be brought

And this trust relationship indisputably applies to Native nations' water rights. Tribal water rights constitute "trust property,"[353] and federal agencies commonly refer to them as "Indian trust assets."[354] Indeed, "Congress has . . . reaffirmed the federal government's trust responsibilities to protect Indian water rights and assist Tribes in the wise use of those resources," and "[t]he Department of the Interior has also expressly acknowledged its trust responsibility for tribal water."[355]

The foregoing holds true despite the Supreme Court's recent decision in *Arizona v. Navajo Nation*.[356] The majority erred in its rejection of the Navajo Nation's water-related breach-of-trust claims—as expounded in Justice Gorsuch's dissent[357]—but nevertheless expressly acknowledged the potential viability of future claims brought in response to federal interference with tribal water rights.[358] Most important to this discussion, the Court's decision did not (and could not) extend beyond the litigation context to eviscerate within the policy sphere the trust relationship between the United States and Native nations.[359]

Thus, the trust relationship is directly relevant to water-apportionment compacts.[360] Native nations undeniably hold water rights—Indian trust assets—in compacted basins with tribal lands and areas.[361] Compact apportionments control how much water is legally available to satisfy these rights—compared with water rights held by non-Indian parties—and, as surveyed above, these apportionments are too often designed in ways that marginalize tribal water rights.[362] There are a host of apportionment-related functions performed by commissions

against federal agencies and officials. *Id.* cmt. b; COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 13, § 21.06. For discussions of water-related breach-of-trust actions, see Anderson, *supra* note 187, at 431-32; and Robison, *supra* note 187, at 176-80.

353. Anderson, *supra* note 187, at 399.

354. *See* Robison, *supra* note 187, at 152, 179-80 (discussing Bureau of Reclamation documents identifying tribal water rights as "Indian Trust Assets" and committing to protect them).

355. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 13, § 21.06 (internal quotation marks omitted).

356. 599 U.S. 555 (2023).

357. *Id.* at 599 (Gorsuch, J., dissenting); *see also* Robison, *supra* note 187, at 180-88 (discussing proper application of Indian canons of construction in, and remedy-based bifurcation of, breach-of-trust analysis).

358. *Navajo Nation*, 599 U.S. at 558, 562, 563; *see also* Robison, *supra* note 187, at 177-80 (discussing the noninterference distinction drawn by the majority and dissenting opinions).

359. *See* Robison, *supra* note 187, at 167-69; *see also* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 13, § 6.04[3][a] (discussing modern commitments to the trust relationship in legislation, agency regulations, and presidential policy statements).

360. *See* Pavlik, *supra* note 23, at 82.

361. *See supra* notes 182-196 and accompanying text.

362. *See supra* Section II.C.1.

(and via alternative administrative arrangements) that could impact tribal water rights. The technical work, for example, includes measuring and reporting on water supplies and uses,[363] and compliance-oriented tasks involve assessments of whether a given state has exceeded its allocation and how such violations should be handled.[364] All of these tasks (and others) can impact the legal availability of water to fulfill tribal water rights as trust assets.

With this reality in mind, the trust relationship strengthens calls for a transition from binary to tripartite water cosovereignty. Because of the preceding activities' myriad potential impacts on tribal water rights, allowing Native nations to engage directly in these processes would fulfill the federal trustee's duties to protect tribal property rights and promote tribal governments. Conversely, depriving Native nations of such opportunities undercuts both tribal property rights and governments in derogation of what should be a sovereign trust.[365]

Finally, procedural equity is the third principle favoring the inclusion of Native nations on compact commissions. Procedural equity stems not from federal Indian law but from a fundamental norm of transboundary water law, referred to as "equitable apportionment"[366] in the United States (and "equitable and reasonable utilization"[367] internationally). The Supreme Court's jurisprudence in this area addresses "substantive equity" – that is, how the norm of equitable apportionment mandates distributional fairness in cosovereigns' use of transboundary waters.[368] "Procedural equity,"[369] by contrast, speaks to fairness in the decision-making bodies and processes utilized for transboundary water management.[370]

363. *See supra* note 256 and accompanying text.

364. *See supra* notes 257-259 and accompanying text.

365. *See* Wood, *supra* note 350, at 359.

366. *See supra* notes 71-72 and accompanying text.

367. *See* U.N. Watercourses Convention, *supra* note 290, art. 5. The equitable-utilization norm was "born largely" from the U.S. Supreme Court's early equitable-apportionment cases. *See* STEPHEN C. MCCAFFREY, THE LAW OF INTERNATIONAL WATERCOURSES 444 (2019).

368. The multifactor analyses for assessing equitable apportionment and equitable utilization illustrate this principle. *See* Nebraska v. Wyoming, 325 U.S. 589, 618 (1945); U.N. Watercourses Convention, *supra* note 290, art. 6(1); *see also* Jason Anthony Robison & Douglas S. Kenney, *Equity and the Colorado River Compact*, 42 ENV'T L. 1157, 1177-79 (2012) (conceptualizing substantive equity).

369. Procedural equity's role as a key counterpart to substantive equity shines through in the U.N. Convention's definition of these concepts: "equitable and reasonable utilization *and participation*." U.N. Watercourses Convention, *supra* note 290, art. 5 (emphasis added).

370. *See* Robison & Kenney, *supra* note 368, at 1179-81 (conceptualizing procedural equity).

Inclusivity forms a core tenet of procedural equity,[371] reflecting the basic idea that administrative bodies should be composed to provide opportunities for meaningful participation by *all* parties affected by a water apportionment (regardless of their sovereign status).[372] This principle recognizes parties' diverse yet interconnected interests in an apportionment and therefore conditions the corresponding compact's "procedural equity" upon the parties' capacity to represent their interests in an evenhanded way.[373]

It would be difficult to overstate the importance of procedural equity in efforts to achieve tripartite cosovereignty.[374] Recall the substantive equity concerns raised by existing apportionments' marginalization of tribal water rights.[375] As a procedural matter, tribally inclusive commissions could serve as invaluable spaces for Native nations to deliberate with their state and federal cosovereigns about how this marginalization should be addressed going forward.[376] More broadly, principles of inclusivity dictate that, by virtue of Native nations' diverse interests in apportionments, they must be allowed to participate directly in the varied administrative tasks performed by commissions.

Consider also the procedural concerns associated with the entrenched binary conception of cosovereignty. In compacted basins with tribal lands or areas, commissions that afford state and federal cosovereigns representation while depriving tribes of this opportunity are by definition inequitable from a procedural standpoint. Thus, just as respect for tribal sovereignty and the trust relationship support tripartite water cosovereignty, so too does procedural equity compel the reconstruction of compact commissions to treat Native nations inclusively and fairly.

C. Indigenization

The preceding Sections have emphasized the capacity-enhancing value of compact commissions for transboundary water management;[377] tracked ongoing tribal mobilization for inclusion on compact commissions;[378] and advocated

371. *Id.* at 1180.

372. *Id.*

373. *Id.*

374. *See* Muys et al., *supra* note 285, at 49 (stating that tribal representation is "equitable" and "essential").

375. *See supra* Section II.C.1.

376. *See* Robison, *supra* note 23, at 666-70 (advocating for such deliberations in an updated, tribally inclusive form of the Yellowstone River Compact Commission).

377. *See supra* Section III.A.

378. *See supra* Section III.B.

for tripartite water cosovereignty based upon the foundational principles of tribal sovereignty, the trust relationship, and procedural equity.[379] What remains are the details necessary to achieve this tripartite vision. While these decisions ultimately reside with each basin's cosovereigns, this Section offers several suggestions in line with ongoing tribal mobilization and the foregoing foundational principles, framed around the concept of "indigenization." Indigenization involves efforts to increase the "presence of Indigenous peoples in an institution . . . previously dominated by colonial settlers or their descendants."[380] The following discussion first explores how commissions might be composed as "spaces" for indigenization and then analyzes potential "pathways" for creating these spaces.

1. *Spaces*

The first consideration when creating "spaces" for indigenization is whether Native nations should have direct or indirect representation on compact commissions. Turning initially to indirect representation, all existing commissions in compacted basins with tribal lands and areas presently provide for a single federal representative.[381] However, while the federal representative may be helpful to Native nations in some circumstances,[382] there are many downsides to this approach. Among them, federal representatives are optional in existing compacts;[383] almost uniformly lack voting power;[384] and may refrain from leadership on tribal issues to avoid relational tensions with state representatives.[385] Furthermore, federal representation of tribes can pose serious conflicts of interest due to competing water-related priorities of federal agencies, particularly the Bureau of Reclamation and Army Corps of Engineers.[386] Compounding these concerns, indirect representation may imply that "tribal sovereignty is federal sovereignty"[387] and delegate tribal representation to an actor "who has no idea

379. *See supra* Section III.B.

380. *Indigenization*, *supra* note 22.

381. *See supra* notes 254-255 and accompanying text.

382. Zoom Interview with John E. Echohawk, Exec. Dir., Native Am. Rts. Fund (Nov. 22, 2024).

383. *See supra* note 254 and accompanying text.

384. *See supra* note 255 and accompanying text.

385. Zoom Interview with John E. Thorson, Former Special Master, Ariz. Gen. Stream Adjudications (Nov. 27, 2024).

386. *See* COHEN'S HANDBOOK OF FEDERAL INDIAN LAW, *supra* note 13, § 21.06; Anderson, *supra* note 187, at 420, 434. Arguably, "federal officials ought to realize [the] potential for conflicts and support tribal representation." Interview with John E. Echohawk, *supra* note 382.

387. Zoom Interview with Burke Griggs, Professor, Washburn Univ. Sch. of L. (Nov. 27, 2024).

of the cultural significance of water" to Native peoples.[388] For these reasons, federal representation appears to offer supplemental value, at best, to Native nations.

Direct representation of Native nations on compact commissions therefore appears not only optimal but necessary. Putting this idea into practice, however, requires grappling with a host of issues around the topics of eligibility and proportionality.

"Eligibility" is a shorthand for "who." It accounts for the threshold considerations of which basin tribes should be eligible for direct representation on commissions and which criteria should determine their eligibility. This Article argues that opportunities for direct representation should be afforded to all Native nations that hold legally recognized water rights or, alternatively, own land within a basin. For tribal sovereigns that currently hold water rights, direct representation is a crucial mechanism to ensure that the tribe's property rights are adequately protected when structuring the commission's varied activities.[389] And for those tribal sovereigns that, through no fault of their own, have yet to resolve their water-rights claims via adjudication or settlement,[390] land ownership within the basin would serve as an equitable alternative until these unresolved claims can be addressed.[391] Taken together, this combined approach would likely make all tribal sovereigns in the compacted and uncompacted basins containing tribal lands and areas eligible for direct representation.[392]

Shifting to proportionality, two key issues must be considered: (1) the ratio of federal, state, and tribal representatives on commissions and (2) the size and functionality of commissions based upon the scope of representation. In each context, concerns about disproportionality arise.

This Article argues for a default "one sovereign, one representative" rule. Each Native nation that is eligible for direct representation on a compact comm-

388. Zoom Interview with Barbara Cosens, Univ. Distinguished Professor Emerita, Univ. of Idaho Coll. of L. (Nov. 27, 2024).

389. *See supra* notes 256-262 and accompanying text.

390. *E.g.*, *Policy Brief #4*, *supra* note 195, at 7 tbl. 3 (surveying the Colorado River Basin tribes' unresolved claims).

391. As succinctly stated by one expert: "If [tribal sovereigns] have land and a potential water right, they deserve representation." Interview with Daniel McCool, *supra* note 225.

392. *See supra* Figures 1, 2. The only factor that could upset such an outcome would be a refusal to make state-recognized tribes eligible for representation. This criterion would affect state-recognized tribes within the seven SDTSAs in the Red River and Sabine River basins. *See supra* Figure 1.

ission should be afforded an opportunity for one representative.[393] This rule's foundation stems from its name: tribal *sovereignty*. Native nations are "separate sovereigns," endowed with living, retained sovereignty that is "inherent" rather than bestowed by federal law.[394]

Critics may challenge the default rule's political feasibility, given the novel sharing of sovereign power at stake.[395] Counterarguments may also be raised about the rule's practicality, given its potential impacts on the size and functionality of some commissions.[396] Respect for tribal sovereignty, however, mandates efforts to work through these potential difficulties. Any deviation from a "one sovereign, one representative" approach would be analogous to a rule requiring one state sovereign to be represented by a sister state with distinct and perhaps contrary interests. Forcing Native nations to settle for similar representation would constitute a "serious infringement on sovereignty."[397]

As a practical matter, the limited number of Native nations present within many basins might mitigate some of the concerns outlined above. Recall from Section II.B the significant number of compacted and uncompacted basins in which only a modest number of tribal sovereigns exist.[398] In these basins, a "one sovereign, one representative" rule seems less likely to trigger anxiety over disproportionality among state and federal cosovereigns or create unwieldy, ineffective commissions. Nevertheless, mindful that this default rule may not suit every basin, the Article outlines several alternative regimes below.

First, basin tribes might consider a system of tiered representation. A body of representatives from every basin tribe might be authorized by their respective sovereigns to elect a commissioner,[399] or perhaps a select number of commiss-

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393. This rule tracks Colorado River Basin tribal leaders' advocacy for "parity of sovereignty" during negotiations over post-2026 management rules for that river system. *See* Sharon Udasin, *Tribal Nations Push for Seats at the Table in Colorado River Negotiations*, HILL (July 3, 2023, 6:00 AM), https://thehill.com/policy/equilibrium-sustainability/4077526-tribal-nations-push-for-seats-at-the-table-in-colorado-river-negotiations [https://perma.cc/9W9P-RF76].

394. Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 788 (2014) (quoting Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla., 498 U.S. 505, 509 (1991)); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56 (1978). Tribal sovereignty is discussed more fully *supra* notes 321-344 and accompanying text.

395. Interview with Burke Griggs, *supra* note 387.

396. Zoom Interview with Lawrence J. MacDonnell, Senior Fellow, Getches-Wilkinson Ctr. for Nat. Res., Energy, and the Env't, Univ. of Colo. L. Sch. (Nov. 15, 2024).

397. Zoom Interview with Anthony Dan Tarlock, Univ. Distinguished Professor Emeritus, Chi.-Kent Coll. of L. (Nov. 19, 2024).

398. *See supra* Figures 1, 2.

399. *See* Muys et al., *supra* note 285, at 49 (calling for a single tribal representative).

ioners,[400] to represent the basin tribes as a whole on the commission. The indirect nature of this arrangement would admittedly involve a distinct approach to tribal sovereignty. Likewise, the arrangement's viability would depend upon the basin tribes' individual priorities for the waterbody's management,[401] along with the commissioners' capacity to navigate any divergence in these priorities.[402] Notwithstanding these issues, basin tribes may consider such an arrangement preferable to the status quo, where the binary conception of cosovereignty affords Native nations zero representation.

Second, basin tribes may support a system of tiered administration. The Model Compact provides a sophisticated example of this approach, supplementing the core commission with subsidiary bodies designed to support its activities in targeted areas.[403] Examples include larger councils comprising representatives from all cosovereigns, specialized bodies with expertise in Western science and traditional ecological knowledge, and advisory groups facilitating participation by stakeholders and the general public.[404] Ultimately, if a system of tiered administration were to enable all basin tribes to participate meaningfully on either the commission or its subsidiary bodies, a system of tiered representation might be more acceptable to those tribes.

2. *Pathways*

While the discussion above highlights some of the challenging institutional-design issues associated with indigenizing compact commissions, these spaces must first be brought into being. Pathways to establish these spaces turn on issues of tribal capacity, along with the portfolio of legal instruments available to establish commissions inclusive of Native nations.

As for tribal capacity, creating a commission on which tribal sovereigns possess formal representation but lack substantive voice would be nothing more than a "shell game." Some Native nations have built significant water-management capacity over the past few decades,[405] but these efforts require resources—funding, staffing, physical space, legal counsel, and technical expertise—beyond

400. *See* McKinney et al., *supra* note 23, at 190-97 (suggesting a potential group of seven tribal representatives).

401. Interview with Barbara Cosens, *supra* note 388.

402. Zoom Interview with Douglas S. Kenney, W. Water Pol'y Program Dir., Getches-Wilkinson Ctr. for Nat. Res., Energy, and the Env't, Univ. of Colo. L. Sch. (Nov. 26, 2024).

403. *See supra* notes 285-288 and accompanying text.

404. Muys et al., *supra* note 285, at 41-54.

405. Interview with Lawrence J. MacDonnell, *supra* note 396; Interview with John E. Thorson, *supra* note 385.

many tribes' means.[406] Tribal capacity is therefore "highly variable"[407] but "not sufficient"[408] in this area. This Article contends that, stemming from the trust relationship,[409] the federal trustee "ought to step up"[410] in filling these resource gaps. Congress plays a critical role in creating and funding capacity-building programs, while federal agencies must work with tribes to facilitate their implementation.[411] All told, "capacity building is a huge aspect of having tribes have an equitable seat at the table,"[412] with this inclusion itself likely to further bolster tribes' capacity as they build expertise in the diverse administrative tasks undertaken by commissions.[413]

Next turning to the legal instruments to establish these arrangements, two primary pathways exist to create tribally inclusive commissions within the nearly twenty as-yet uncompacted basins including tribal lands[414]: new compacts or new statutory apportionments. Although Congress can unilaterally enact statutory apportionments (as compared to the state-legislative support required for compacts),[415] these tools should not be thought of as end runs around lackluster state or federal enthusiasm for compacts. Rather, statutory apportionments should be viewed as an option that requires advancing through the basin states' congressional delegations, aided by federal officials and agencies, an agreement built collaboratively by the cosovereigns on the ground. Bolstered by the federal

406. *See generally* Matthew McKinney et al., *Water & Tribes Initiative, Enhancing Tribal Water Management Capacity in the Colorado River Basin: A Baseline Assessment*, WATER & TRIBES INITIATIVE (Jan. 19, 2023), https://88163372-ff11-4309-b5e1-c06dc8806a15.filesusr.com/ugd/1c5bb7_c3b7d7dbc21c4ceb9aacf49d23e6642e.pdf [https://perma.cc/BCA4-BDEK] (identifying capacity limitations amongst Basin Tribes).

407. Interview with Lawrence J. MacDonnell, *supra* note 396; McKinney et al., *supra* note 406, at 15-17.

408. Interview with John E. Echohawk, *supra* note 382.

409. Interview with Barbara Cosens, *supra* note 388; Interview with Douglas S. Kenney, *supra* note 402. The trust relationship is discussed *supra* notes 345-365 and accompanying text.

410. Interview with John E. Echohawk, *supra* note 382.

411. *See generally Bipartisan Infrastructure Law and Inflation Reduction Act Funding Handbook*, INITIATIVE ON UNIVERSAL ACCESS TO CLEAN WATER FOR TRIBAL CMTYS. (July 2024), https://static1.squarespace.com/static/6931ca704bf32c207cf34b93/t/69332497e0199f42fa73bd62/1764959383450/UACW-Funding-Handbook_FINAL_July-2024-1.pdf [https://perma.cc/YV5E-HB2M] (offering guidance to tribes seeking to utilize statutory funding available to federal agencies with programs focused on providing drinking water and sanitation services to tribal communities, including for research, planning, and technical assistance).

412. Interview with Barbara Cosens, *supra* note 388.

413. *Id.*

414. *See supra* Figure 2.

415. As noted, only two statutory apportionments have been formed in U.S. history, but *Arizona v. California* clarifies that this pathway is indeed an option. THOMPSON ET AL., *supra* note 19, at 958-61 (discussing the case).

trustee, tribal involvement is essential to the legitimacy and success of such collaborations (or compact negotiations) to ensure equitable treatment of Native nations and their water rights.[416]

Shifting to the seventeen compacted basins containing tribal lands or areas in and adjacent to the West,[417] the cosovereigns within these basins should consider creating new commissions where they do not yet exist and updating those commissions currently in place.[418] Figuring out the optimal legal instrument and associated processes for this purpose is the proverbial "one-million-dollar question,"[419] given current reliance on existing compacts and corresponding resistance to change.[420] The portfolio of options can therefore be conceptualized along a continuum.

Starting with wholesale compact renegotiation, a quote attributed to former New Mexico State Engineer Steve Reynolds captures a common sentiment: "Pigs would have to fly."[421] Yet, if climate change renders a compact's apportionment inequitable, renegotiations on that existential issue might create an opening to discuss the creation of a new or updated commission inclusive of Native nations.[422]

Turning to compact amendment or statutory modification, the core attributes of the existing compact could remain intact, updating only its administrative provisions to establish a tribally inclusive commission.[423] While the statutory-modification option only requires congressional support (without parallel basin-state legislation, as required for compact amendment), this option should still entail collaboration by all of the basin's cosovereigns to gain appropriate buy-in. Notably, the compact-amendment option is by no means unprecedented; it has been done at least three times.[424] Nonetheless, while these surgical

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416. Interview with John E. Echohawk, *supra* note 382.

417. *See supra* Figure 1.

418. *See supra* Section III.B.

419. Interview with Barbara Cosens, *supra* note 388.

420. *See* Interview with John E. Thorson, *supra* note 385.

421. Interview with Anthony Dan Tarlock, *supra* note 397; *Brief History of the Office of the State Engineer*, N.M. OFF. STATE ENG'R, https://www.ose.nm.gov/ProgramSupport/seHistory.php [https://perma.cc/RRS4-W999].

422. *See* Interview with Douglas S. Kenney, *supra* note 402.

423. *See* Robison, *supra* note 23, at 661.

424. The Sabine River, Costilla Creek, and Bear River compacts were respectively amended in 1962, 1963, and 1980. *See* Act of Mar. 16, 1962, Pub. L. No. 87-418, 76 Stat. 34, 34; Act of Dec. 12, 1963, Pub. L. No. 88-198, 77 Stat. 350, 350-58; Act of Feb. 8, 1980, Pub. L. No. 96-189, 94 Stat. 4, 4-16.

options may seem more feasible than compact renegotiation, resistance may still dampen this pathway, absent a motivating crisis like climate change.[425]

Pursuing a pragmatic substatutory alternative would steer clear of any changes to existing compacts. As illustrated by tribal mobilization in the Upper Colorado River Basin,[426] commissions and tribal sovereigns could form MOUs to facilitate collaboration over issues of mutual concern and carve out broader participatory roles for tribal sovereigns vis-à-vis commissions.[427] Similarly, commissions could adopt rules and regulations, pursuant to their existing authority,[428] for the same purposes, with these rules and regulations existing independently from, or possibly serving to implement, an MOU. As cosovereign relations gradually became normalized under these substatutory alternatives, they could be sequenced with the preceding permanent options to culminate in the creation of an updated commission inclusive of Native nations.[429]

Ultimately, in response to the "one-million-dollar question,"[430] "sovereign parity" should serve as a framing principle for indigenizing compact commissions.[431] Native nations' representational opportunities on commissions should be on par with those afforded to their state and federal cosovereigns. Any forced qualification of these opportunities for Native nations unjustly diminishes the dignity of tribal sovereignty. In this way, the principle of sovereign parity dovetails with the "one sovereign, one representative" default rule proposed for the composition of commissions. Realizing this principle is a basin-specific endeavor. Yet, while substatutory alternatives such as MOUs or rules and regulations may be immediate pragmatic necessities, sovereign parity's ultimate realization requires affording Native nations opportunities for direct representation alongside their cosovereigns on commissions.

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425. *See* Interview with Douglas S. Kenney, *supra* note 402; Interview with John E. Thorson, *supra* note 385.

426. *See supra* Section III.B.1.

427. *See* Robison, *supra* note 23, at 661-62.

428. *See supra* note 274 and accompanying text.

429. *See* Interview with Barbara Cosens, *supra* note 388; Interview with Burke Griggs, *supra* note 387; Interview with Douglas S. Kenney, *supra* note 402.

430. Interview with Barbara Cosens, *supra* note 388.

431. *See* Udasin, *supra* note 393 (discussing advocacy for "parity of sovereignty" between states and tribes in the Colorado River Basin).

CONCLUSION

A clever, biting vignette from visionaries Vine Deloria, Jr. and Clifford M. Lytle in *The Nations Within: The Past and Future of American Indian Sovereignty* offers a fitting conclusion:

> It must be a bit disconcerting when the average American on vacation out west suddenly encounters a sign that boldly proclaims that the highway is entering an Indian 'nation.' . . . [W]hen the idea of Indian tribes as nations is voiced, many Americans laugh at the pretension, convinced that Indians have some primitive delusion of grandeur that has certainly been erased by history.[432]

The binary conception of cosovereignty, as embedded in water-apportionment compacts, perpetuates such misperceptions of "pretension," "primitive delusion of grandeur," and erasure. It runs contrary to the structural principle of tripartite cosovereignty—to the truth that "[t]here are three branches of sovereignty within the American constitutional system: the United States, the states . . . and the Indian tribes."[433]

Frankfurter and Landis's advocacy in *The Compact Clause of the Constitution* failed to grasp this truth. These scholars remained unattuned to the invigorating "potentialities . . . left largely unexplored" for cooperation among states, tribes, and the federal government and to realize "the possibilities of the compact idea."[434] The next six decades of the twentieth century saw Native nations and their water rights placed at the periphery of compacts apportioning the very essence of life. The "political and legal pluralism that has always existed in North America"[435] was confined to a conception of cosovereignty that "concentrat[ed] its gaze on the Euro-American political community" and "treated Tribal nations largely as obstacles to that entity's self-realization."[436]

Yet, as expressed by Herbert C. Hoover at the Colorado River Compact negotiations in 1922, "[N]othing lasts forever."[437] Let us hope so. Let us hope for far more equitable and honorable cosovereign relations over transboundary waters as the twenty-first century progresses. That is the vision this Article seeks to advance—a vision of tripartite water cosovereignty manifest in indigenized

432. VINE DELORIA, JR. & CLIFFORD M. LYTLE, THE NATIONS WITHIN: THE PAST AND FUTURE OF AMERICAN INDIAN SOVEREIGNTY 1 (2d ed. 1998).

433. WILKINSON, *supra* note 14, at 249.

434. Frankfurter & Landis, *supra* note 3, at 688, 702.

435. WILKINS, *supra* note 12, at 55.

436. *Id.* at 53.

437. Muys et al., *supra* note 285, at 33.

compact commissions. To this end, the Article has argued that within compacted basins containing tribal lands and areas in and adjacent to the West, Native nations should be afforded opportunities for direct representation beside their state and federal cosovereigns on updated or newly formed commissions, in accordance with a "one sovereign, one representative" default rule. The federal trustee should provide tribes with the resources necessary to build water-management capacity for meaningful participation on these commissions, and the indigenizing legal instrument (and associated process) should be tailored to realize the principle of sovereign parity.

What is at stake in this advocacy is not just the promise of better cosovereign relations over North America's arterial rivers but the prospect of an actual democracy in the United States, one that respects and supports Native nations and their resilient, time-honored ways.[438] What is at stake is Deloria and Lytle's road sign—the sovereignty echoing from time immemorial, the sovereignty emanating still, yet the sovereignty too often unseen.

438. WILKINS, *supra* note 12, at 55.