PRIVATE UPSTREAM OBLIGATIONS AND THEIR DOWNSTREAM IMPACTS: WATER RIGHTS IN COLORADO AND THE WEST

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This Note discusses the intricate landscape of water rights and obligations in the western United States, focusing on recent legal developments and the historical state of the law. It analyzes the applicability of the recent Navajo Nation *Supreme Court decision to older interstate water compacts, as well as how the affirmative action holding in that case affects the system of water rights adjudication. After an examination of the history of water rights, case law, and legislative materials, this Note turns its focus to whether a private right of action exists that would require an upstream water rights holder to take affirmative action to ensure the fulfillment of a downstream right. This Note evaluates the existence of the right through the use of a hypothetical Colorado water rights case, which incorporates a myriad of historical precedents to establish jurisdiction, a cause of action, and a likely outcome of the case. Based on the current state of the law, this Note concludes that a downstream water rights holder would likely be granted an injunction that would promote an upstream user to take affirmative action to fulfill downstream rights.*

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INTRODUCTION

As the U.S. Supreme Court recently observed in *Arizona v. Navajo Nation*: "Water has long been scarce, and the problem is getting worse."[1] The arid conditions in the western United States produced the "driest 23-year period in more than a century" between 2000 and 2022, which was also one of the driest periods the region has experienced in the last 1,200 years.[2] As the western states face water scarcity at an unprecedented level, water rights have been thrust into the legal spotlight. In the 5–4 *Navajo Nation* decision, the U.S. Supreme Court took center stage in the western water rights dilemma by both acknowledging the expanding problem of water scarcity and defining the obligations that parties to a treaty about water rights owe to one another.[3] The case arose from the 1868 Treaty Between the United States of America and the Navajo Tribe of Indians ("1868 Navajo Treaty").[4]

The 1868 Navajo Treaty, in part, reserved the Navajo Nation's ("the Nation") right to use needed water from "various sources—such as groundwater, rivers, streams, lakes, and springs—that arise on, border, cross, underlie, or are encompassed within the reservation."[5] While the federal government had already "secured hundreds of thousands of acre-feet of water and authorized billions of dollars for water infrastructure on the Navajo reservation," the Nation alleged that the water rights established in the 1868 Navajo Treaty required the United States to "take affirmative steps to secure water for the Tribe."[6] These steps included developing a plan to secure the needed water and building the necessary water infrastructure to that end.[7]

Importantly, because these steps would impact the Colorado River—which borders the Navajo reservation—Arizona, Colorado, and Nevada intervened in the suit to protect their residents' interest in the same water from being affected by the Nation's requested relief.[8] The *Navajo Nation* case thus highlighted one of the most serious problems facing states and water rights holders in the West. First, water flows without recognition of political borders. Second, the rights and actions of

1. Arizona v. Navajo Nation, 599 U.S. 555, 561 (2023).
2. *Id.*
3. *Id.* at 566–69.
4. *Id.* at 561.
5. *Id.*
6. *Id.* at 562.
7. *Id.*
8. *Id.*

parties upstream have a direct effect on the claims of everyone downstream, regardless of whether they are located in the same state. This problem in turn poses an important question: what obligations do upstream water rights holders owe to those with downstream claims? More specifically, do private water rights holders in an upstream state owe a duty to take *affirmative action* to ensure downstream rights holders receive their claimed amount of water?

For the purposes of this Note, "affirmative action" means any proactive steps that maintain the expected flow of water downstream, such as fixing leaky pipes, implementing efficient means of irrigation, clearing natural obstructions to the flow of water (e.g., dams, fallen trees), and undertaking measures to combat erosion and flooding, among others. In *Navajo Nation*, the Supreme Court found that the United States did not have an obligation to take affirmative steps to ensure the water rights guaranteed in the 1868 Navajo Treaty.[9] However, the decision does not explicitly extend to private water rights holders, and it is distinguishable from obligations arising out of water rights compacts in the West.[10] "Private water rights holders" in this Note are holders who have acquired their rights from their state of residence.

The primary purpose of this Note is to analyze how the law should handle private water rights in light of the affirmative action ramifications of the *Navajo Nation* decision.[11] Essentially, while the government is not obligated to take affirmative action to guarantee water rights in a treaty, a legal evaluation of *private* water rights holders' affirmative action obligations could lead to a different conclusion.

In the West, the legislatures of all the signatory western states and Congress adopted two major river compacts ("the 1922 Compact" and "the 1948 Compact").[12] Unfortunately, neither compact could have anticipated the massive problem that water scarcity would present in the modern western United States, or just how important every acre-foot[13] of water in the Colorado River would become. Thus, these compacts reveal an issue similar to the federal obligation problem in the *Navajo Nation* case. Unlike that case, the apportioned water rights between states are more specific, and the states are obligated to refrain from actions that would impact the flow of water downstream.

This Note argues that the question between states and their private water rights holders mirrors the *Navajo Nation* question between the federal government and Indigenous peoples. Namely, can a state compel private rights holders to take affirmative action to ensure that the appropriated amounts of water reach the states

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9. *Id.*

10. *See generally id.*

11. *See infra* Part III.

12. COLO. REV. STAT. § 37-62-101 (2024); U.S. DEP'T OF THE INTERIOR, DOCUMENTS ON THE USE AND CONTROL OF THE WATERS OF INTERSTATE AND INTERNATIONAL STREAMS 39 (1956).

13. An acre-foot of water is the amount of water required to cover an acre of land with water to a depth of one foot. Jeffery Jacobs, *The Sustainability of Water Resources in the Colorado River Basin*, *in* 41 THE BRIDGE ON SUSTAINABLE WATER RESOURCES 6, 7 n.1 (Stephen D. Parker ed., 2011). This is equivalent to roughly 326,000 gallons of water. *Id.*

downstream? This question, in turn, anticipates a significant private water rights problem. Every private, individual water right on the Colorado River stems from the apportioned water to each state that has a claim under the 1948 Compact, meaning any individual state's obligations under the agreement could be imputed onto the private water rights holder.[14] Thus, the issue becomes whether an upstream private water rights holder on the Colorado River is obligated to take affirmative action to ensure that the amount of water apportioned to downstream states (and their private water rights holders) is fulfilled under the 1922 and 1948 Compacts. This Note calls this issue the *substantive water rights question*.

Another important aspect of this question is: what forum(s) would have jurisdiction to hear a case seeking to compel a private water rights holder to act? The reason the answer is in doubt is that a private party in a downstream state would have water rights based on its state's allocation, whereas contesting the obligations of an upstream private party would be based on the water rights established under the upstream state's laws.[15] This Note calls this the *procedural water rights question*.

The allocation of specific percentages of water to seven western states under the 1922 and 1948 Compacts indicates the potential obligations of each signatory state to ensure compliance with the Compacts.[16] Part I of this Note investigates those obligations by examining the history of water rights and private party obligations in the United States, with a focus on the American West. Part I also discusses the historical jurisdiction in water rights adjudication and establishes a hypothetical lawsuit for analysis. In Part II, this Note analyzes whether current legal standards and interstate water agreements provide a basis for compelling private water rights holders to take affirmative action to ensure the fulfillment of downstream water rights. In Part III, this Note argues that based on current legal standards and the specific obligations of states in the western United States, and in contrast to the decision in *Navajo Nation*, persons and entities with upstream private water rights should take affirmative action to guarantee the fulfillment of private water rights downstream. Part III furthers this analysis by evaluating the potential legal outcome of the hypothetical lawsuit that is introduced in Part I. A brief conclusion follows.

I. A BRIEF HISTORY OF WESTERN WATER RIGHTS

A. Interstate Waters

To evaluate the obligations of private water rights holders, the distribution of water that travels over state borders (i.e., interstate waters) must first be examined. The most significant agreement in the western United States that governs this distribution is the 1922 Compact.[17] The signatories to this agreement are Arizona,

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14. § 37-62-101.

15. *See infra* Section I.E.

16. The full 1948 Compact is available in a Colorado statute. § 37-62-101. The full 1922 Compact is available in a compilation organized by the Department of the Interior. U.S. DEP'T OF THE INTERIOR, *supra* note 12, at 39.

17. U.S. DEP'T OF THE INTERIOR, *supra* note 12, at 39.

California, Colorado, Nevada, New Mexico, Utah, and Wyoming.[18] The purpose of the agreement is to promote the "equitable division and apportionment of the use of the waters of the Colorado River System."[19] The 1922 Compact apportioned 7,500,000 acre-feet of water per year to states in the Upper Basin (Colorado, New Mexico, Utah, Wyoming) and gave the same amount to states in the Lower Basin (Arizona, California, Nevada).[20] Importantly, the 1922 Compact established that states in the Upper Basin could not cause the flow of water that reached the Lower Basin to fall below 75,000,000 acre-feet of water for any period of ten years.[21] The 1922 Compact also required the Upper Basin states to not withhold water, but asserted that the Lower Basin states could not require water delivery unless it was applied to domestic and agricultural uses.[22] Essentially, the 1922 Compact apportioned water between two groups of states, but it did not require either group to take affirmative action to ensure the flow of water.[23] Rather, it required the upstream states to refrain from action that would significantly impact the flow of water downstream.[24] This Note unpacks the legally relevant differences between these two postures.

The Upper Basin states, with the addition of Arizona (which has a very small land area in the Upper Basin[25]), then revised the apportionment of water among the states through the Upper Colorado River Compact of 1948.[26] The 1948 Compact reserved 50,000 acre-feet of water per year for Arizona, and distributed the remaining water, as apportioned by the 1922 Compact, on a percentage basis.[27] However, the 1948 Compact went further than the 1922 Compact with respect to private water rights; it established that *any resident* in any signatory state has a right to acquire rights to the use of the apportioned water and that no state could deny that party such rights in a manner consistent with both the 1922 and 1948 Compacts.[28] Because the water in the compacts was apportioned between the *states* and the

18. *Id.* at 39 art. I.

19. *Id.*

20. *Id.* at 40–41 art. III.

21. *Id.* Essentially, the flow of water could not be reduced below 75,000,000 acre-feet for ten consecutive years. *Id.*

22. *Id.*

23. *See id.*

24. *Id.*

25. The Upper Basin of the Colorado River is defined as the river network that is located upstream of Lee's Ferry, Arizona. Siyu Zhao et al., *Long-Lead Seasonal Prediction of Streamflow over the Upper Colorado River Basin: The Role of the Pacific Sea Surface Temperature and Beyond*, 34 J. CLIMATE 6855, 6855 (2021). A map of the Upper Colorado River Basin reveals that this area extends into Arizona, Colorado, Utah, New Mexico, and Wyoming. Sarah A. Baker et al., *Enhancing Ensemble Seasonal Streamflow Forecasts in the Upper Colorado River Basin Using Multi-Model Climate Forecasts*, 57 J. AM. WATER RES. ASS'N 906, 909 fig.1 (2021).

26. COLO. REV. STAT. § 37-62-101 (2024).

27. Colorado received 51.75% of the remaining apportioned water, New Mexico received 11.25%, Utah received 23%, and Wyoming received 14%. *Id.*

28. The mentioned protected uses of water included the construction and use of diversion works, and the use of "storage reservoirs with appurtenant works, canals and conduits in one state for the purpose of diverting, conveying, storing, regulating and releasing water to satisfy the provisions of the Colorado river compact . . . ." *Id.*

drafters of the compacts left the assignment of private water rights to the states to determine, it is unlikely that a private citizen could bring a suit under either compact.[29] These compacts guarantee the total amount of water that a state is entitled to, and then the states determine how much water each private citizen receives from the original allocation.[30] Thus, the inference is that private citizens have a duty to stay within their water rights assigned by the state, and the state must stay within the boundaries of the compacts when assigning the private water rights.[31]

B. Prior Appropriation

To understand the current allocation of water among the western states, one must first understand the general system of water rights. The prior appropriation doctrine primarily governs the allocation of water in western states,[32] and every state that is a party to the 1948 Compact follows the doctrine of prior appropriation.[33] This doctrine dictates that a person may divert water from a water source, thereby creating a private water right, as long as the diverted water is put to a "beneficial use."[34] A universal, bright-line definition for beneficial use has yet to materialize in common law or state statute. Courts have employed multiple strategies when dealing with the definition of beneficial use. The U.S. Supreme Court held that the language of a water compact is the determining factor in establishing a definition of beneficial use.[35] The Yellowstone River Compact, for example, defined beneficial use as the "use by which the water supply of a drainage basin is depleted when usefully employed by the activities of man."[36] The Court relied on this definition to establish that beneficial use evaluates "not what is actually consumed but what is actually necessary in good faith."[37] Yet, the only definition that the 1948 Compact provided for beneficial use was simply that "[b]eneficial use is the basis, the measure and the limit of the right to use."[38]

Another method federal courts have used to define beneficial use is to look at state court decisions regarding beneficial use.[39] For example, the Tenth Circuit Court of Appeals relied on state court decisions that held out maximum utilization,[40]

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29. The Tenth Circuit specifically held that the 1948 Compact did not establish a private right of action. Three Forks Ranch Corp. v. City of Cheyenne, 96 F. App'x 567, 568 (10th Cir. 2004).

30. § 37-62-101.

31. *See id.*

32. Lisa Greenberg, *Trusting the Public: Reshaping Colorado Water Law in the Face of Changing Public Values*, 40 BOS. COLL. ENV'T AFFS. L. REV. 259, 262 (2013).

33. DAVID H. GETCHES, WATER LAW IN A NUTSHELL 6 (3d ed. 1997).

34. Greenberg, *supra* note 32, at 263.

35. Montana v. Wyoming, 563 U.S. 368, 386 (2011).

36. *Id.*

37. *Id.* at 387.

38. U.S. DEP'T OF THE INTERIOR, *supra* note 12, at 220 art. III.

39. *See, e.g.*, Jicarilla Apache Tribe v. United States, 657 F.2d 1126 (10th Cir. 1981).

40. As the Colorado legislature and judiciary have evaluated maximum utilization, the concept has been solidified to not simply mean the maximum use of the water, but rather maximizing the amount of water that is put to beneficial use. *In re* Rules & Reguls. Governing

prevention of excessive diversion, and the prevention of water waste as the cornerstones of beneficial use.[41] Western states have also taken it upon themselves to statutorily define beneficial use.[42] These definitions have been somewhat broad and ambiguous, such as establishing beneficial use as "the use of the amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made."[43] This definition leaves a vast expanse of pure interpretation, by either the judiciary or the legislature, as to what qualifies as reasonable, appropriate, efficient, and unwasteful. While specific uses of water have been statutorily established as beneficial—such as impoundment for firefighting or storage for wildlife purposes—beneficial use remains poorly defined.[44] The lack of a bright-line definition for beneficial use points towards using a case-specific analysis to establish its meaning. This means that beneficial use could vary from state to state, judicial jurisdiction to judicial jurisdiction, and even from stream to stream. Leaving beneficial use in general terms creates a weakness in water law, as courts will have to evaluate each instance of beneficial use as a separate occurrence.

The prior appropriation doctrine also recognizes seniority of water rights, where the first person to divert water (the senior claimant) is entitled to the entire amount that she can reasonably use, while all other junior water rights claimants are only entitled to the remainder after the senior claim is satisfied.[45] The extent of the senior claimant's right covers the amount of water the senior claimant has historically put to beneficial use.[46] The prior appropriation doctrine does not follow a downstream–upstream dynamic; rather, the guiding principle is being first in time.[47] This fact means that anyone who claims water upstream from a senior claim cannot divert water in a way that would harm the downstream senior claim.[48] Yet, in Colorado (and many prior appropriation states), any water left in the source (i.e., not diverted) is considered "wasted" and could lead to a senior claimant losing the amount of water that was not diverted.[49]

The recognition of the prior appropriation doctrine has traversed state lines, with the U.S. Supreme Court holding that a water rights dispute between or among states should use the prior appropriation doctrine if multiple states recognize and

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Use, Control, & Prot. of Water Rts. for both Surface & Underground Water Located in Rio Grande & Conejos River Basins & their Tributaries, 674 P.2d 914, 933 (Colo. 1983). One method that achieves maximum utilization is requiring a water diverter to establish a reasonable means of effectuating his diversion. *Id.* Simply put, the diverter cannot divert the entire flow of water in order to take only a fraction, but, instead, must create a means of diversion that maximizes the amount of diverted water that can be put to a beneficial use. *Id.*

41. *Jicarilla Apache Tribe*, 657 F.2d at 1133–34.

42. *See, e.g.*, COLO. REV. STAT. § 37-92-103(4) (2024).

43. *Id.*

44. *See* § 37-62-101(4).

45. Greenberg, *supra* note 32, at 263.

46. Lawrence J. MacDonnell, *Prior Appropriation: A Reassessment*, 18 U. DENV. WATER L. REV. 228, 282 (2015).

47. *See* Greenberg, *supra* note 32, at 262.

48. *Id.* at 263.

49. *Id.* at 264–65.

operate under the doctrine.[50] Thus, the senior water rights claimant in litigation between multiple states will be entitled to the full amount of water, and the junior water rights holder will be obligated to ensure that that amount is available.[51]

C. Navigable Waters

While the U.S. Supreme Court has established the prior appropriation doctrine as a guiding principle for deciding water rights disputes between states that both use the doctrine, the case law on rights based on interstate waterways reveals a complicated problem. Namely, what governing body or agreement can actually establish and enforce water rights among multiple states? For the purposes of this Note, "interstate waterways" are sources of water that flow through two or more states. In one of the earliest interstate waterways cases, *Kansas v. Colorado*, the Supreme Court established that the U.S. government can intervene in an interstate water rights case on the basis of navigability, creating jurisdiction over water rights that impact waterway navigation.[52] The Court claimed that the U.S. government had the right to "prevent or remove obstructions in the natural waterways and preserve the navigability of those ways."[53]

In a more recent decision, the Court indicated that the definition of "navigability" covered waters "susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce."[54] Put simply, if exercising a water right impacts the navigability of a waterway, the U.S. government has the ability to override that water right and ensure passage on the body of water. The Court also held that as long as the diversion of water in one state did not destroy the "equitable apportionment of benefits between the two states," then the complaining state did not have a sufficient legal basis for a complaint.[55]

The intersection between states' water rights, private water rights, and the U.S. government's ability to control those water rights resulted in the development of the navigable waters doctrine mentioned in *Kansas v. Colorado*.[56] In 1986, the Fifth Circuit Court of Appeals emphasized the United States' authority to regulate public and private waterways that are useful for interstate commerce.[57] The court found that these waterways fell under the navigable waters definition and held that a privately owned canal was navigable and subject to government regulation.[58] The U.S. Supreme Court followed suit the next year by holding that the Cherokee Nation was subject to the federal government's power to regulate the navigable water on their reservation, and the Cherokee Nation could not circumvent this control by

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50. Wyoming v. Colorado, 286 U.S. 494, 507 (1932).
51. *Id.* at 504–05.
52. 206 U.S. 46, 85–86 (1907).
53. *Id.*
54. Rapanos v. United States, 547 U.S. 715, 731 (2006).
55. *Kansas v. Colorado*, 206 U.S. at 117–18.
56. *Id.* at 85–86.
57. *See* United States v. Lamastus & Assocs., Inc., 785 F.2d 1349, 1352 (5th Cir. 1986).
58. *Id.*

claiming title to the riverbed underneath the waterway.[59] The Court also clarified that the authority of the United States in regard to waterways is not limited to control for navigation, but it expands to any regulation involving commerce on its waters.[60] This includes actions such as flood protection and watershed development because congressional authority is broad when it comes to meeting the needs of commerce.[61] The power to regulate commerce on waterways includes requiring "the removal of obstructions to navigation" in the interest of "furthering navigation or commerce."[62] Even with the expansion of the navigable waters doctrine, the Court has been reluctant to give the federal government carte blanche to supersede private water rights on the basis of navigability. In *Federal Power Commission v. Niagara Mohawk Power Corp.*, the Court held that private water rights established by the states for the distribution or use of water in navigable waterways may be subordinate to the power of Congress to regulate commerce on them.[63] But the Court's opinion recognized the safeguard of the Takings Clause, and the Court held that Congress could not impair state-established rights without just compensation.[64] While this decision does not establish private water rights as superior to the government's right to regulate navigable waters, it provides both a remedy for and a significant check on adverse governmental regulation, namely that the government cannot extinguish private water rights without compensation.[65] The development of the navigable waters doctrine inserts the federal government into the conversation surrounding who controls water rights on interstate water.

D. Equitable Apportionment Doctrine

Another problem that has arisen with interstate waterways in the western United States is identifying which state has the authority to decide and guarantee rights to water that flows through them. The Supreme Court initially established the apportionment of interstate waters as a question of federal common law, which could not be determined by statutes or decisions of any state that was a party to the case.[66] In 1938, the Court compared controversies involving water rights in interstate streams to those concerning state boundaries, which the Court had previously held to be within federal jurisdiction because the cases involved a federal question.[67] The Court then expanded on this body of federal common law almost 50 years later with a decision that solidified "the equitable apportionment doctrine" as the applicable federal common law principle.[68]

The equitable apportionment doctrine departs slightly from the prior appropriation doctrine. Seniority remains a guiding principle, but a variety of other factors are considered to create a just and equitable appropriation of interstate water

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59. United States v. Cherokee Nation of Okla., 480 U.S. 700, 704–05 (1987).
60. Kaiser Aetna v. United States, 444 U.S. 164, 173 (1979).
61. *Id.*
62. *Id.* at 174.
63. 347 U.S. 239, 249 (1954).
64. *Id.* at 255.
65. *See id.*
66. Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 110 (1938).
67. *Id.*
68. Colorado v. New Mexico, 459 U.S. 176, 183 (1982).

between two or more states.[69] The Court held that state law from the litigating states concerning intrastate water rights (i.e., rules for settling water disputes within the state) is a non-controlling factor for consideration in equitable apportionment.[70] Yet the scope of the equitable apportionment doctrine that the federal government can be involved in is limited. For instance, the Tenth Circuit Court of Appeals declined to extend federal common law to disputes among states that did not involve questions of whether and how interstate water should be apportioned among them, which is the only way the equitable apportionment doctrine can be applied.[71] Thus, in order for the federal government to impact private water rights on interstate waterways, it must establish that the waterway is covered under the navigable waters doctrine (use in interstate commerce) or the equitable apportionment doctrine.

E. Jurisdiction

The final piece of the history of water rights in the western United States involves what court (or courts) has jurisdiction to actually decide disputed interstate water rights cases. In cases between two states, the Supreme Court has original jurisdiction as required by the U.S. Constitution.[72] However, for the purposes of this Note, the hypothetical lawsuit would not involve states, but instead private citizens. Federal courts have jurisdiction in civil suits between two citizens of different states if the amount in controversy exceeds $75,000.[73] However, as the focus of this Note is affirmative action, the hypothetical civil suit between the citizens would ask for a permanent injunction, in lieu of damages.[74] Yet, federal courts have still evaluated the amount in controversy when the plaintiff is only seeking injunctive or declaratory relief.[75] The amount in controversy in those cases is the "monetary value of the object of the litigation from the plaintiff's perspective."[76] Another federal court defined the value of the requested injunctive relief as the "monetary value of the benefit that would flow to the plaintiff if the injunction were granted."[77]

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69. Factors that the Court mentioned included: physical and climatic conditions, the consumptive use of water in several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, and the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former. Nebraska v. Wyoming, 325 U.S. 589, 618 (1945).

70. *Colorado v. New Mexico*, 459 U.S. at 183–84.

71. United States v. City of Las Cruces, 289 F.3d 1170, 1186 (2002).

72. U.S. CONST. art. III, § 2, cl. 2.

73. 28 U.S.C. § 1332.

74. The standard for a permanent injunction requires a plaintiff to demonstrate "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

75. Federated Mut. Ins. Co. v. McKinnon Motors, LLC, 329 F.3d 805, 807–09 (11th Cir. 2003); Martin v. Hauser, Inc., No. 1:20-cv-04223, 2020 WL 6305555, at *2 (N.D. Ga. Oct. 28, 2020).

76. *Federated Mut. Ins. Co.*, 329 F.3d at 807.

77. *Martin*, 2020 WL 6305555, at *2 (quoting Morrison v. Allstate Indem. Co., 228 F.3d 1255, 1268 (11th Cir. 2000)).

The specific form of injunction that "orders a responsible party to take action" is known as a mandatory injunction.[78] Mandatory injunctions require a showing that "extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation of damages."[79] A good example of how courts have viewed this standard comes from a Texas appellate court, which held that a mandatory injunction requires a "clear and compelling presentation . . . that the injunction is necessary to prevent irreparable injury or extreme hardship."[80] This goes to the first and second factors in a permanent injunction evaluation and indicates that the standard of those factors is raised in mandatory injunction scenarios.

In *Empire Lodge Homeowners' Ass'n v. Moyer*, the Colorado Supreme Court upheld the legality of injunctions in a water rights case, but the injunction in *Empire Lodge* instructed a party to cease acting instead of requiring them to act affirmatively.[81] Further, the Colorado Supreme Court has indicated that mandatory injunctions can be used to compel the "removal of encroaching structures."[82] Yet, when a "defendant's encroachment is unintentional and slight," the damage to the plaintiff is small and compensable, and the cost of removal is great enough to cause hardship, a "mandatory injunction may be properly denied and plaintiff relegated to compensation in damages."[83] Thus, while Colorado courts have paved a pathway for mandatory injunctive relief, it appears that establishing a mandatory injunction as the most equitable form of relief will be a high bar to clear.

In addition to the Colorado Supreme Court's original jurisdiction over interstate water rights, federal courts may also have the power to hear water rights cases under federal question jurisdiction. Federal district courts have original jurisdiction over "all civil actions arising under the Constitution, laws, or treaties of the United States."[84] No state can enter into any agreement or compact with another state without the consent of Congress.[85] Congressional consent to an interstate compact can transform that compact into a law of the United States, presenting a federal question whenever a dispute arises.[86] Congressional consent transforms interstate agreements into federal law when "Congress has authorized the States to enter into a cooperative agreement, and where the subject matter of that agreement is an appropriate subject for congressional legislation."[87] However, congressional consent is not required for agreements outside the scope of the Compact Clause, occurring when an agreement is not "directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or

78. Marlyn Nutraceuticals, Inc. v. Mucus Pharma GmbH & Co., 571 F.3d 873, 879 (9th Cir. 2009) (quoting Meghrig v. KFC W., Inc., 516 U.S. 479, 484 (1996)).

79. *Id.*

80. Tex. Health Huguley, Inc. v. Jones, 637 S.W.3d 202, 215 (Tex. App. 2021).

81. 39 P.3d 1139, 1159–60 (Colo. 2001) (upholding a Water Court injunction that instructed Empire Lodge to stop storing water until it received court approval).

82. Golden Press, Inc. v. Rylands, 124 Colo. 122, 125 (1951).

83. *Id.* at 126.

84. 28 U.S.C. § 1331.

85. Cuyler v. Adams, 449 U.S. 433, 438 (1981).

86. *Id.*

87. *Id.* at 440.

interfere with the just supremacy of the United States."[88] While congressional consent to the 1922 and 1948 Compacts may elevate those compacts to federal law, a private citizen cannot bring suit under those compacts, which eliminates this form of federal jurisdiction.[89]

The adjudication of water rights has traditionally fallen "within the ambit of state court expertise," as the states have specialized resources and experience in water rights litigation.[90] Western states established specific systems of water rights within their borders without "material aid from the United States Government," prompting Congress to defer to state water law when legislation has created water reclamation projects.[91] However, deference to state water law often does not translate into deference to state court jurisdiction.

The U.S. Supreme Court has held federal district courts are the appropriate venues to litigate issues involving federal water rights.[92] But federal and state jurisdiction can be concurrent under the McCarran Amendment,[93] allowing the United States to join a suit for the adjudication or administration of water rights when it appears that the United States is the owner of the water right by appropriation under state law.[94] The Supreme Court went on to establish state courts as potential alternative venues, allowing federal courts to decline exercising jurisdiction when concurrent state jurisdiction involves comprehensive state systems for the adjudication of water rights.[95] In *Colorado River Water Conservation District v. United States*, the Court held that the Colorado Water Rights Determination and Administration Act established a sufficient system for "the adjudication and management of rights to the use of the State's waters."[96] This indicates that the Colorado water rights adjudication system is an appropriate alternative venue for water rights disputes that could be litigated in federal court. In its final remarks, the Court emphasized the heavy obligation it had to exercise jurisdiction, and it declined to address whether federal courts would be obligated to exercise jurisdiction if the involvement of states' water rights were less extensive, or if state proceedings were inadequate to resolve federal claims.[97] Essentially, state court systems with sufficient means for adjudicating water rights would be the preferable jurisdictional arena, even if there was a concurrent federal interest in the case.

Federal courts have also acknowledged the "deference to state and local law regarding water rights" that is present in some federal statutes, such as the

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88. *Id.*
89. *See* Three Forks Ranch Corp. v. City of Cheyenne, 96 F. App'x 567 (10th Cir. 2004).
90. United States v. City of Las Cruces, 289 F.3d 1170, 1190 (2002).
91. *Id.*
92. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 808 (1976).
93. 43 U.S.C. § 666.
94. *Colo. River Water Conservation Dist.*, 424 U.S. at 810.
95. *Id.* at 819.
96. *Id.*
97. *Id.* at 820.

Mining Act of July 26, 1866 ("Mining Act").[98] The Mining Act protected private water rights that involved "mining, agricultural, manufacturing, or other purposes" and were established "by the local customs, laws, and the decisions of courts."[99] Thus, "whether a private water right existed on federal lands under the 1866 Act was determined by state and local law and custom."[100] However, federal courts have also upheld their own jurisdiction in cases involving the equitable apportionment doctrine and navigable waters issues, given that both scenarios present a federal question.[101] At best, jurisdiction over interstate waterways is case-dependent and cloudy, with a variety of different factors potentially impacting what court has jurisdiction.

II. CURRENT LEGAL STANDARDS IMPLICATING AFFIRMATIVE ACTION

A. Separating Navajo Nation *from Interstate Water Compacts*

As established by the 1922 and 1948 Compacts, the apportionment of the interstate waters of the Colorado River was based on the assent of each signatory state and Congress.[102] The U.S. Supreme Court held that congressional consent can transform an interstate compact into a law of the United States.[103] However, *Navajo Nation* involved a treaty established directly between the governments of the United States and the Navajo Nation.[104] While Congress consented to the two compacts, the United States was not a party to either.[105] Furthermore, the treaty at issue in *Navajo Nation* simply reserved the right of the Nation to the water on the reservation, while the western compacts specifically allocated water to certain states and defined what duties states owed to each other.[106] Thus, the reasoning in the *Navajo Nation* decision, which absolved the United States from taking affirmative action to ensure water rights that were given to the Nation,[107] cannot be automatically extended to the parties involved in the two compacts.

B. Beneficial Use and Private Water Rights

As noted earlier,[108] the definition of beneficial use remains underdeveloped. The U.S. Supreme Court has deferred to definitions in compacts; federal appellate courts have deferred to state case law; and states have enacted their

98. Baker Ranches, Inc. v. Zinke, 625 F. Supp. 3d 1080, 1099–1100 (D. Nev. 2022) (quoting Western Watersheds Project v. Matejko, 468 F.3d 1099 (9th Cir. 2006)).

99. *Id.*

100. *Id.* at 1100.

101. *See generally* Colorado v. New Mexico, 459 U.S. 176 (1982); United States v. City of Las Cruces, 289 F.3d 1170 (10th Cir. 2002).

102. *See* U.S. DEP'T OF THE INTERIOR, *supra* note 12.

103. New Jersey v. New York, 523 U.S. 767, 811 (1998).

104. *See* Arizona v. Navajo Nation, 599 U.S. 555, 558 (2023).

105. *See* COLO. REV. STAT. § 37-62-101 (2024); U.S. DEP'T OF THE INTERIOR, *supra* note 12, at 39.

106. *Navajo Nation*, 599 U.S. at 561; § 37-62-101.

107. *See Navajo Nation*, 599 U.S. at 569–70.

108. *See supra* Section I.B.

own statutory definitions of "beneficial use."[109] This variety of approaches indicates both the deference of the federal courts to more localized definitions and the power of the states, in the absence of a definition in a compact, to define beneficial use in their statutes. The 1948 Compact does not define beneficial use.[110] Thus, in a hypothetical case involving a suit against a private water rights holder in Colorado by a private water rights holder in another state that is a party to the 1948 Compact, the Colorado definition of beneficial use will likely control, regardless of the legal forum. This assumption comes from federal court deference to statutory definitions, as well as the Supreme Court's assertion that Colorado's Water Rights Determination and Administration Act established a sufficient system for "the adjudication and management of rights to the use of the State's waters."[111] It is not a stretch to assume that in a suit against a Colorado water rights holder, the Colorado definition of beneficial use would be the basis for evaluation.

The Colorado legislature defines "beneficial use" as "the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made."[112] While this definition's scope is broad, state courts have qualified it further in several decisions. The Colorado Supreme Court established that the "reasonableness, efficiency, and avoidance of waste" guide the limitations to the scope of a "beneficial use."[113] The Court also held that exceeding the "total volume of water reasonably needed for a given use" when irrigating would fall outside the boundaries of a "beneficial use."[114]

Colorado case law points to measurable standards for beneficial use that give substance to the abstract concept of reasonableness. Specifically, "efficiency," "avoidance of waste," and "total volume of water needed for a given use" provide more specific criteria for the "beneficial use" standard.[115] Emphasizing the obligation a private holder has to use appropriated water efficiently opens the door to adding an affirmative action obligation to the beneficial use standard. While the Colorado Supreme Court has indicated that the beneficial use standard implies a limitation on diversions so they do not exceed an amount of water that can be used beneficially, the overall goals of western and Colorado water law reveal the potential for guiding private rights holders to take action to prevent their diversions from affecting downstream users.[116] The Colorado Supreme Court explained that the purpose of the limitations based on "beneficial use" was meant to "advance the fundamental principles of Colorado and western water law that favor optimum use,

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109. *See* Montana v. Wyoming, 563 U.S. 368, 386 (2011); Jicarilla Apache Tribe v. United States, 657 F.2d 1126, 1136 (10th Cir. 1981); COLO. REV. STAT. § 37-92-103(4) (2024).

110. U.S. DEP'T OF THE INTERIOR, *supra* note 12, at 40–41.

111. *Jicarilla Apache Tribe*, 657 F.2d at 1133; Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 819 (1976).

112. § 37-92-103(4).

113. St. Jude's Co. v. Roaring Fork Club, L.L.C., 351 P.3d 442, 450 (Colo. 2015).

114. *Id.* at 450–51.

115. *Id.* at 451.

116. Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson, 990 P.2d 46, 54 (Colo. 1999).

efficient water management, priority administration, and disfavor speculation and waste."[117] These principles provide the hypothetical window for lawsuits seeking affirmative action. If Colorado courts can base beneficial use limitations on optimum use, efficient water management, and avoidance of waste, then it follows that the courts could compel water users to take action to ensure those same principles.

The nuances of defining beneficial use are informative in understanding what actions taken by private water rights users fit within the Colorado courts' definition of beneficial use. For example, the Colorado Supreme Court has held that storing water, by itself, is not considered a beneficial use.[118] However, the Court has also held "the capture and storage of flood water" to constitute a "beneficial use."[119] This distinction indicates a subtle but significant demarcation of water uses that qualify as beneficial use. Anyone who simply stores water (e.g., diversion of water into tanks that serve no additional purpose) does not meet the Colorado standard for beneficial use. Yet, the highest Court in the state carved out an exception for removing water due to flooding. This implies that Colorado case law promotes affirmative actions by those water rights holders dealing with flooding, laying the groundwork for legal obligations requiring affirmative action from private water rights holders. While the Court did not address the legality of refusing to take action regarding floodwaters, the creation of a legal exception for affirmative action relating to floodwater storage indicates the possibility that the Colorado courts place legal value in private water rights users' affirmative actions. Whether this rises to the level of an obligation remains to be determined.

C. Conveyance and Right-of-Way

Federal courts acknowledge a well-established principle that "the right to convey water is distinguishable from the right to use water."[120] This right of conveyance means a private water rights holder is guaranteed to "have the water flow in the stream to the point of diversion."[121] Under the prior appropriation system, the fact that a state line intersects the stream in question does not impinge upon the right to conveyance.[122] In fact, "one who has acquired a right to the water of a stream," in accordance with the laws of the state where the rights were established, is protected from infringement on her water rights by a holder operating under another state's law.[123] This means that two private water rights holders in different states operating under the prior appropriation system are subject to seniority obligations.[124] Also, a private holder in one state is entitled to have water flow to her point of diversion, at the potential expense of a junior water rights holder in another

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117. *Id.*

118. Burlington Ditch Reservoir & Land Co. v. Metro Wastewater Reclamation Dist., 256 P.3d 645, 663 (Colo. 2011).

119. Vance v. Wolfe, 205 P.3d 1165, 1171 (Colo. 2009).

120. Baker Ranches, Inc. v. Zinke, 625 F. Supp. 3d 1080, 1100 (D. Nev. 2022).

121. *Id.* at 1102.

122. *Id.*

123. *Id.*

124. *See id.*

state.[125] This exemplifies that certain legal standards regarding water rights extend beyond state boundaries, even if the cause of action is in state court.

State courts have similarly upheld the principle of the right to conveyance. In *Ennor v. Raine*, the Supreme Court of Nevada established that a senior claimant is entitled to a right-of-way to convey his water along its natural channel, upholding the legality of a farmer entering his neighbor's property to clear obstructions that were impacting his water rights.[126] Colorado law also established that persons shall have a right-of-way across private lands "for the construction of ditches, canals and flumes" for domestic water use purposes such as irrigation, "upon payment of just compensation."[127] The Colorado Supreme Court went on to establish that disputes involving rights-of-way and water rights can be settled by a declaratory judgment allowing the servient estate[128] to make ditch alterations that provide downstream rights holders their water without an increase in cost to them.[129] This solution was meant to discourage "self-help" remedies, where a water rights owner takes self-appointed action that alters the adjudicated water rights of other holders.[130]

The ramifications of these decisions are far-reaching. They show that state courts have emphasized that the right to conveyance provides a private water rights holder with the right to act on private property, even if that property is not their own. In allowing a farmer to clear obstructions on his neighbor's land, the Supreme Court of Nevada delineated the importance of protecting the arrival of water at the diversion point, regardless of the private property interests of the upstream owner.[131] By establishing right-of-way rights to protect conveyance, Colorado has similarly emphasized the obligation that an upstream water rights holder has to convey the appropriated amount of water to their downstream counterparts.[132] Colorado specifically sought to discourage self-help remedies; instead, it promoted actions by the upstream neighbor that would ensure the conveyance of water to the downstream diversion point.[133] Essentially, in order to avoid downstream neighbors taking matters into their own hands, the upstream owner should adjust the conveyance on their own. Colorado's requirement of a declaratory judgment in lieu of a right-of-way also indicates that private water rights owners can take affirmative action that does not disrupt the conveyance of water downstream.[134] Both examples stop short of requiring the upstream owner to take action to ensure conveyance, but they strongly promote the idea that affirmative action can be required on the basis of the right to conveyance. The *Navajo Nation* case asserted that the U.S. government is

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125. *Id.*
126. Ennor v. Raine, 74 P. 1, 2 (Nev. 1903).
127. Archuleta v. Gomez, 200 P.3d 333, 341 (Colo. 2009).
128. A servient estate is a piece of land that is subject to an easement and the easement benefits another parcel of land. Legal Information Institute, *Servient Estate*, CORNELL L. SCH., https://www.law.cornell.edu/wex/servient_estate [https://perma.cc/VM3X-CR3R] (last visited April 22, 2024).
129. *Archuleta*, 200 P.3d at 342.
130. *Id.*
131. *See Ennor*, 74 P. at 2.
132. *See Archuleta*, 200 P.3d at 341.
133. *Id.* at 341–42.
134. *Id.* at 342.

not obligated to ensure water rights are fulfilled.[135] Court decisions have not yet declared that private water rights holders similarly owe no obligation.

Furthermore, federal courts have recognized that state law can provide a right-of-way to ensure the conveyance of water on the private property of another, but they have declined to acknowledge that right-of-way on federal land.[136] The U.S. Supreme Court held that a junior claimant under the prior appropriation system had a duty to adjust the crossings of his diversion ditches, so as to not interfere with the full use and enjoyment of the senior claimant's water rights.[137] This decision goes further in terms of affirmative action. By requiring a junior claimant to adjust his diversion ditches, the Court opened the door to creating an affirmative action obligation in terms of conveyance, where junior claimants must take action to avoid impacting senior claimants' rights.

D. Historical Usage and Out-of-Priority Diversions

The Colorado Supreme Court has held that when an appropriator takes affirmative action to change her water right, she "runs a real risk of a re-quantification of the water right based on actual historical consumptive use."[138] However, until such affirmative action is taken, the amount of water that has been declared in the water right controls how much water a private rights holder is entitled to, "despite the likelihood that the water user may never actually divert that amount."[139] This is different from beneficial use, as beneficial use dictates whether the diverted water has been used appropriately, while historical use dictates the amount of water that a holder is entitled to divert.[140] Under Colorado case law, even if a rights holder has not diverted the full historical use amount she is entitled to, she does not lose the right to that water unless she takes action to change her water rights.[141] For example, diverting water from "undecreed points of diversion" is an action that could lead to changes in water rights.[142] Essentially, a water rights holder who changes how their water right is fulfilled—either through diversion changes, new irrigation construction, or other alterations—is subject to an evaluation of their historical use.

As water resources have become more strained, state courts have also had to wrestle with how to adjudicate "out-of-priority" diversions—diversions that a junior claimant makes in contrast to the rights of a senior claimant. The Colorado Supreme Court acknowledged that when a water commissioner is aware of out-of-priority diversions, the diversions can be considered to establish the historical usage amount of the water right, even though they are not in line with the seniority of

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135. Arizona v. Navajo Nation, 599 U.S. 555, 569–70 (2023).

136. Baker Ranches, Inc. v. Zinke, 625 F. Supp. 3d 1080, 1112–13 (D. Nev. 2022).

137. Jennison v. Kirk, 98 U.S. 453, 455–56 (1878).

138. Pueblo W. Metro. Dist. v. Se. Colo. Water Conservancy Dist., 717 P.2d 955, 959 (Colo. 1986).

139. *Id.*

140. *See id.*

141. *Id.*

142. *See id.* An undecreed water right is a point of diversion that has not been previously revealed in the water right. *Id.*

appropriation.[143] For example, if a junior water rights holder diverted water out of priority and the water commissioner is aware of the diversions but does not rectify them, the historical usage amount of the water right is now defined by the amount that was involved in those diversions. However, the water commissioner is tasked with evaluating "each diversion by a junior appropriator on a case-by-case basis to determine whether the diversion is causing material injury to senior appropriators" before discontinuing a diversion on the basis of out-of-priority diversions.[144] Thus, when the diversion necessarily injures senior water rights holders, the adjustment of the historical use amount to what a private water rights holder is entitled can actually be lowered to reflect both actual historical use and the damage to senior water rights holders.[145]

The historical use amount adjustment needs to reflect an amount that no longer damages the senior water rights. Out-of-priority diversions highlight another avenue for obligating affirmative action from private water rights holders. In adjudicating water rights, the state courts in Colorado have the ability to lessen a holder's historical use entitlement when the holder has taken affirmative action to alter her right. Similarly, the courts can require holders to lessen their water use if they relied on an out-of-priority diversion that was either unrecognized or harmful to senior holders. This indicates that state courts can require holders to take action to reduce their water usage, although the means through which the holders are supposed to do this remain ambiguous. In the vein of efficiency, under this line of case law, it appears that a court could require a junior claimant to lessen her water consumption to an adjudicated actual historical usage amount by improving the efficiency of diversion. In the complex world of water diversion, the answer cannot simply be to take less water; rather, it must be to utilize your water more efficiently.

E. State Court Adjudication

State courts have solidified their own role in the settlement of water disputes. The Colorado Supreme Court aligned itself with the state legislature's goal of "reinforcing the adjudication and administration of decreed water rights in order of priority."[146] The Court also recognized the state's goal of maximizing water use for as many decreed users as possible—consistent with "the state's interstate delivery obligations under United States Supreme Court equitable apportionment decrees and congressionally approved interstate compacts."[147] Under Colorado law, in order to have "standing to challenge another's water use on the basis of an alleged injury to one's water right, the challenger must both possess a water right and obtain a decree for it."[148] In Colorado, water rights are generally incapable of being enforced unless there has been an adjudication that legally vests the holder with a certain amount of water based on an established priority date (a decreed right),

143. *Id.*
144. *Id.*
145. *Id.* at 960.
146. Empire Lodge Homeowners' Ass'n v. Moyer, 39 P.3d 1139, 1150 (Colo. 2001).
147. *Id.*
148. *Id.* at 1156.

which is subject only to the rights of senior appropriators.[149] Decreed prior appropriators are also entitled to the "maintenance of the condition of the stream existing at the time of the respective appropriation."[150] This seemingly indicates that the holder's right must have previously been adjudicated and established as a decreed water right for a water rights holder to seek judicial enforcement of a water right. This provides an interesting wrinkle in potential litigation between private holders in separate states. If the case were adjudicated in a Colorado state court, it is unclear whether both parties would have to have decreed water rights pursuant to a Colorado state decision to seek enforcement of a water right. However, an argument can be made that under the 1948 Compact, Colorado is a party to at least some amount of water that has been decreed to other states.[151] Thus, if the *Colorado* private water rights holder has a decreed right, it would follow that the state courts could not look past the grant of water rights to other states, regardless of whether those rights are expressed through a private party.

III. A CONCRETE RESOLUTION TO A FLUID PROBLEM: ANALYZING WHETHER AFFIRMATIVE ACTION IS VIABLE

As is common in the water law realm, the analysis of case law, statutes, and literature thus far has not pointed to a solidified standard for determining the affirmative action obligations of private water rights holders in different states. This final Part seeks to produce such a standard utilizing the aforementioned hypothetical case between a junior private water rights holder in Colorado and a senior private water rights holder in a downstream state that is a party to the 1948 Compact.

A. Venue

The first challenge in litigating this case is determining the appropriate venue. Assuming the case is filed in Colorado state court, could either party remove the matter to federal court? While federal courts would have jurisdiction in a suit between private citizens of two different states if the amount in controversy exceeded $75,000, this suit involves a request for an injunction—only appropriate when monetary damages are inadequate to compensate for the injury.[152] Yet, federal courts have found that a case seeking only declaratory or injunctive relief can be evaluated for the amount in controversy, but it is assessed from the value of the injunctive relief to the plaintiff and requires a high burden of proof to establish the amount.[153] In the hypothetical case, the evaluation of the amount in controversy would center around the value of the injunction to the downstream user and would require showing that the injunction sought is worth over $75,000 to the plaintiff. Historically speaking, states and the federal government have struggled to put a definitive dollar amount on the value of an acre-foot of water, likely due to the

149. *Id.*
150. *Id.* at 1157.
151. COLO. REV. STAT. § 37-62-101 (2024).
152. 28 U.S.C. § 1332; eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).
153. Federated Mut. Ins. Co. v. McKinnon Motors LLC, 329 F.3d 805, 807 (11th Cir. 2003); Martin v. Hauser, Inc., No. 1:20-cv-04223, 2020 WL 6305555, at *2 (N.D. Ga. Oct. 28, 2020).

multitudes of uses that an acre-foot can be put to.[154] Given the high burden of proof required for establishing the amount in controversy, it appears unlikely that a court could definitively determine a dollar amount for the value of the injunctive relief. Injunctive relief only ensures the upstream user will take action to ensure the flow of water to the downstream user, not that the entirety of the downstream user's rights will be fulfilled. When the amount in controversy is not readily observable, federal courts have declined to exercise jurisdiction.[155]

However, the federal courts would also have jurisdiction over matters that arise under "the Constitution, laws, or treaties of the United States."[156] An injunction, seeking to compel a private water rights user to take affirmative action to ensure water flows downstream to the diversion point of a senior rights holder, would invoke federal jurisdiction if the action (or lack thereof) impacted the "navigability" of the stream or the obligations under either the 1922 or 1948 Compacts.[157] The stronger of the two arguments is under navigability, as inaction that deprived a downstream user of her full water right could potentially impact the navigability of the waterway. It is unlikely that the diversion would be so extreme as to undermine the amount of water that states downstream of Colorado are entitled to under the 1948 Compact. Similarly, a private citizen does not have the ability to bring a private action under the 1948 Compact.[158] Thus, removal to federal court turns on the question of navigability.

The navigable waters doctrine gives Congress the ability to regulate commerce on waterways by removing obstructions to navigation in the interest of furthering navigation or commerce.[159] While the navigable waters doctrine is rooted in a federal question, a suit to compel affirmative action by a private water rights holder could invoke the congressional power to regulate commerce if the water in question impacts the navigability of the stream. However, even if a federal court has jurisdiction, federal case law has shown that in cases where the United States could be joined as a party, the federal court can defer to state courts if the state has a comprehensive water rights adjudication system.[160] The U.S. Supreme Court has

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154. Different users on the Colorado River were guaranteed reimbursement from the federal government for conservation of water in amounts ranging from $400 per acre-foot to $776 per acre-foot. Alastair Bland, *Colorado River deal: What does it mean for California?*, CAL MATTERS (May 22, 2023), https://calmatters.org/environment/water/2023/05/colorado-river-states-agreement/ [https://perma.cc/TQK4-HT2Y]; Alex Hager, *The Colorado River's biggest user will conserve some water in exchange for federal dollars*, KUNC (Dec. 5, 2023), https://www.kunc.org/news/2023-12-05/the-colorado-rivers-biggest-user-will-conserve-some-water-in-exchange-for-federal-dollars [https://perma.cc/XK64-C8JY].

155. *Federated Mut. Ins. Co.*, 329 F.3d at 807; *Martin*, 2020 WL 6305555, at *2.

156. 28 U.S.C. § 1331.

157. COLO. REV. STAT. § 37-62-101 (2024); U.S. DEP'T OF THE INTERIOR, *supra* note 12, at 39; *see* United States v. Lamastus & Assocs., Inc., 785 F.2d 1349, 1352 (5th Cir. 1986).

158. *See* Three Forks Ranch Corp. v. City of Cheyenne, 96 F. App'x 567, 568 (10th Cir. 2004).

159. *See* Rapanos v. United States, 547 U.S. 715, 731 (2006).

160. Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 819 (1976).

held that Colorado's system for water rights adjudication is sufficient for the adjudication of state water rights.[161] Thus, while a federal court might have concurrent jurisdiction, case law indicates that it would defer to the Colorado courts to evaluate the case at hand. Similarly, the U.S. Supreme Court has found that there was no basis for a legal complaint in federal court when a diversion in one state did not interfere with the equitable apportionment of water between states.[162] For the sake of the hypothetical case, the assumption is that the contested diversion is not so significant as to impact the equitable apportionment between the states. With neither basis for federal jurisdiction bearing fruit, the remaining evaluation turns its focus to how a Colorado court would adjudicate the dispute.

B. Legal Argument and Standards

With the case in a Colorado[163] court, the first legal standard to evaluate is whether the Colorado definition of beneficial use provides an avenue for the creation of an affirmative action obligation. The scope of beneficial use has been guided by "reasonableness, efficiency, and avoidance of waste."[164] However, this beneficial use doctrine implies a limitation on diversions, meaning a private water user needs to *refrain* from taking certain actions but not necessarily to act affirmatively.[165] The purpose of the limitations on beneficial use was to advance principles that "favor optimum use, efficient water management, and priority administration, and disfavor speculation and waste."[166] The same purpose would extend to requiring affirmative action. Creating an obligation for private water users to fix leaky irrigation, implement flood protection, remove natural obstructions, or take other affirmative actions optimizes use, incentivizes efficiency, helps satisfy priority administration, and cuts back on waste. The Colorado courts have already incentivized affirmative action by protecting uses (e.g., floodwater storage) that generally fall outside the bounds of beneficial use (e.g., general storage).[167] Thus, under the same doctrine that has established limitations on beneficial use, the most viable argument to present to a Colorado court is that an affirmative action obligation based on beneficial use fits within the principles of Colorado water law and aligns with the previous state court decisions.

Another legal theory where an affirmative action obligation could arise is under the right of conveyance. The Colorado court could take guidance from federal court decisions regarding the right of conveyance. One court held that a person who has acquired a water right in accordance with the laws of the state is protected from

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161. *Id.* The Colorado System was established by the Colorado Water Rights Determination and Administration Act and creates a "single continuous proceeding for water rights adjudication," which is overseen by Colorado's water courts and the State Engineer. *Id.* at 819–20.

162. Kansas v. Colorado, 206 U.S. 46, 117–18 (1907).

163. Colorado has been selected as it has already been deemed a jurisdiction that has a sufficient adjudication process for water rights claims that could potentially be tried in a federal court. *Colo. River Water Conservation Dist.*, 424 U.S. at 819.

164. St. Jude's Co. v. Roaring Fork Club L.L.C., 351 P.3d 442, 450 (Colo. 2015).

165. Santa Fe Trail Ranches Prop. Owners Ass'n v. Simpson, 990 P.2d 46, 54 (Colo. 1999).

166. *Id.*

167. Vance v. Wolfe, 205 P.3d 1165, 1171 (Colo. 2009).

infringement on her water rights by a holder operating under another state's law.[168] Thus, a private water rights holder in a downstream state would be protected from infringement by a Colorado water rights holder. The U.S. Supreme Court has also placed a duty on a junior water rights holder to adjust his diversion ditches so that they would not interfere with the full use and enjoyment of a senior claimant's water rights.[169] Similarly, Colorado courts have specifically discouraged self-help remedies and upheld the legality of diversion alterations that provide downstream rights holders with their water.[170] By discouraging parties from taking matters into their own hands and promoting affirmative action that guarantees downstream rights, Colorado case law points towards requiring affirmative action.[171] With federal guidance, Colorado courts requiring affirmative action to rectify or supersede downstream injury aligns with the previous discouragement of self-help, as well as the federal duty a junior claimant owes a senior claimant.[172] If the senior water rights holder is downstream, the creation of an obligation for private actions that ensure downstream conveyance in Colorado would not likely be undermined by the fact that the senior user is in another state. To hold as such would undermine both the dedication to the right of conveyance as well as the honored foundation of Colorado water law—priority of appropriation.

Finally, the third legal theory, which an obligation to take affirmative action could rest, involves Colorado's adjudication on historical use and out-of-priority diversions. Under Colorado case law, the amount of water that a private rights holder is entitled to is based on the amount she has been entitled to historically (historical use) and cannot be changed unless a user takes affirmative action to change her water rights.[173] However, when the action taken constitutes an out-of-priority diversion, the water rights holder can have her historical use amount adjusted to a lower amount to reflect any damage to senior rights holders.[174] This indicates that a person who made an out-of-priority diversion that impacted a senior water rights claimant could be instructed to take action to reduce the amount of water diverted. While it is unclear what action is required, it is not unreasonable to argue that the Colorado courts could mandate an affirmative action that adjusts the diversion point to reduce the flow of water in line with the newly established historical use. How does this fit into the analysis of the hypothetical case? Colorado courts' establishment of affirmative action as the defining point for reevaluating historical use places the evaluation of affirmative action within the judicial arena.[175] A court has to evaluate how the action impacted both the actual amount of water used by the actor and whether that action damaged the rights of senior claimants.[176] Because a water right can be reduced in volume to reflect the action's impact on

168. Baker Ranches, Inc. v. Zinke, 625 F. Supp. 3d 1080, 1102 (D. Nev. 2022).
169. Jennison v. Kirk, 98 U.S. 453, 455–56 (1878).
170. Archuleta v. Gomez, 200 P.3d 333, 342 (Colo. 2009).
171. *See id.*
172. *See id.*
173. Pueblo W. Metro. Dist. v. Se. Colo. Water Conservancy Dist., 717 P.2d 955, 959 (Colo. 1986).
174. *Id.* at 960.
175. *See id.* at 959.
176. *Id.*

senior water claimants, it follows that the court could order the party at fault to take affirmative action to ensure that its method of diversion does not damage senior claimants. While this is the weakest of the three legal arguments, it still aligns with the basic principles that the Colorado courts have upheld time and time again.[177]

C. Appropriate Relief

As the hypothetical case involves a request for an injunction, the evaluation must now turn to whether the case at hand meets the standard for a mandatory injunction. The factors relevant for determining whether an injunction is appropriate are (1) whether the plaintiff has suffered irreparable injury; (2) whether the remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) whether a remedy in equity is warranted after considering the balance of hardships between the plaintiff and defendant, and (4) that the public interest would not be disserved by a permanent injunction.[178] Mandatory injunctions go even further by requiring a showing that "extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages."[179] The irreparable injury in this case is the lost flow of water. Nature tells us that time (and water) will not flow backwards. So, the injury suffered by damage to a senior claimant's water right is necessarily irreparable. The most difficult factor to evaluate is whether monetary damages are inadequate to compensate for the injury. Water rights have been given a monetary value in the past.[180] However, the value of water rights as a whole does not give rise to a straightforward monetary damages assessment in the case of a senior water rights holder who has seen her flow diminished as the result of a lack of action by a junior water rights holder. To place a monetary value on the harm suffered as a result of a lack of action taken by an upstream party would include the monumental task of determining how much of the flow reduction was a result of the inaction, the value of water in two different states (for two potentially different uses), and how much of the flow reduction at the point of diversion for the senior rights holder was attributable to the inaction of the junior holder. This evaluation is obviously complicated further by the sheer size of the flow in an interstate stream, such as the 75,000,000 acre-feet of water guaranteed in the 1922 Compact.[181] Determining the exact amount of water that a junior water rights holder has deprived the senior claimant of through inaction would likely be impossible. Thus, there are no available remedies at law, outside of requiring the junior holder to take action.

Balancing the hardships between the plaintiff and defendant need not go further than looking to the purpose of prior appropriation. Prior appropriation is largely based on the idea that the first person to divert the water is entitled to the entire amount she can beneficially use, and junior claimants are only entitled to

177. *See generally id.*

178. eBay Inc. v. MercExchange L.L.C., 547 U.S. 388, 391 (2006).

179. Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 879 (9th Cir. 2009) (quoting Anderson v. United States, 612 F.2d 1112, 1115 (9th Cir. 1979)).

180. Indian Mountain Corp. v. Indian Mountain Metro. Dist., 412 P.3d 881, 886 (Colo. App. 2016).

181. U.S. DEP'T OF THE INTERIOR, *supra* note 12, at 40–41 art. III.

anything remaining after the senior claim is satisfied.[182] The hardship suffered by a senior claimant—namely the undermining of her right to water that has been well established—pales in comparison to the hardship faced by a junior claimant in taking action to ensure that her obligations under prior appropriation are fulfilled. Requiring a junior claimant to uphold the system of prior appropriation is unlikely to qualify as a significant hardship.

In a similar sense, a mandatory injunction requiring affirmative action to be taken to ensure a senior claimant's right is fulfilled goes to the overall public goals. The allocation of water in western states primarily falls under the doctrine of prior appropriation.[183] An injunction, which requires fulfillment of the prior appropriation obligations, directly aligns with the public interest. With the vast expanse of prior appropriation in the West, an order that sought to uphold the integrity of that system would not disserve the public interest. Thus, all four factors that must be evaluated when considering whether an injunction is appropriate are satisfied in this hypothetical.

CONCLUSION

Based on jurisdiction, multiple legal theories, and the appropriate form of relief, a Colorado court could establish an obligation for a junior private water rights holder to take affirmative action to ensure the water that a senior claimant is entitled to makes it to the senior claimant's point of diversion. While this partially contrasts with the decision in *Navajo Nation*, the hypothetical involved in this Note would likely be one of first impression in any court. It is beyond the scope of this Note to speculate on the ramifications that this will have for tribes, such as the Navajo Nation. However, by creating a duty to take affirmative action to ensure water rights, it would logically follow that the window could be reopened for litigation that results in the fulfillment of the water rights in the 1868 Navajo Treaty. It is possible that the newly created duty of private citizens could make up for the lack of any affirmative action obligation of the federal government. Even though the federal government has no duty to take affirmative action to guarantee water rights, a private party's obligations to their downstream counterparts cannot just flow like water under the bridge; instead, they must be solidified by a judicial decision following the guidance above.

182. Greenberg, *supra* note 32, at 263.
183. *Id.* at 262.