Supreme Court Original Jurisdiction and Water Pollution

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INTRODUCTION

On August 5, 2015, the United States Environmental Protection Agency (EPA), the Colorado Division of Reclamation, Mining and Safety (DRMS), and EPA's contractor breached the Gold King Mine, releasing over three million gallons of mine wastewater and 880,000 pounds of metals into Cement Creek, a tributary of the Animas River in southwestern Colorado.[1] The contaminated river water flowed through New Mexico, the Navajo Nation, and Utah.[2] As of December 13, 2016, EPA had reimbursed New Mexico more than $1.7 million. This included more than $1 million from CERCLA § 104; $465,000 via Clean Water Act § 106 and § 319, respectively; $108,000 via the Drinking Water State Revolving Fund (under the Safe Drinking Water Act); and $112,093 via one or more multi-purpose grants.[3] On May 23, 2016, New Mexico filed a complaint in the district court of New Mexico against EPA, its contractor Environmental Restoration, and the owners of Sunnyside Mine (Kinross) for claims related to the August 5, 2015 spill.[4]

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[1] Motion for Leave to File Bill of Complaint at 2, New Mexico v. Colorado, (U.S. 2017) (No. 22O147).
[2] *Id.*
[3] EPA, *Frequent Questions Related to Gold King Mine Response*, EPA.gov (Dec. 13, 2016), https://19january2017snapshot.epa.gov/goldkingmine/frequent-questions-related-gold-king-mine-response_.html
[4] Complaint, New Mexico v. Colorado (D.N.M. May 23, 2016) (No. 1:16-cv-00465-KK-LF).

New Mexico's complaint against EPA in district court has not yet been resolved; litigation is ongoing.[5]

Almost a month later, on June 20, 2016, New Mexico motioned the U.S. Supreme Court for leave to file a Bill of Complaint against the State of Colorado.[6] New Mexico's claims against Colorado included: cost recovery under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 107(a), with Colorado liable as both an arranger and an operator; declaratory judgment under CERCLA § 113(g)(2) for New Mexico's unreimbursed response costs; injunctive relief under the Resource Conservation and Recovery Act (RCRA) § 6972(A)(1)(B); public nuisance; negligence; and gross negligence.[7] The first basis of New Mexico's motion for the Supreme Court to exercise its original exclusive jurisdiction is Article III, § 2 of the U.S. Constitution, which states that "[i]n all Cases… in which a State shall be [a] Party, the Supreme Court shall have original jurisdiction."[8]

The second basis of New Mexico's motion is the Judiciary Act of 1789 (codified at 28 U.S.C. § 1251(a)). The Judiciary Act of 1789 was adopted in the first session of the First U.S. Congress and effectively established the federal judiciary. Importantly, it established that no other court may hear an interstate case where the Supreme Court has exclusive jurisdiction.[9] It stated that the Supreme Court shall have original and exclusive jurisdiction of all controversies between two of more states.[10] Section 13 of the Judiciary Act of 1789 provided: "And be it further enacted, That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and, except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive

[5] *Id*.
[6] Motion for Leave to File Bill of Complaint, *supra* note 2.
[7] *Id.* at 39-50.
[8] U.S. CONST. art. III, § 1, cl. 2.
[9] Mississippi v. Louisiana, 506 U.S. 73, 78, n.1 (1992) ("Neither party disputes Congress' authority to make our original jurisdiction exclusive in some cases and concurrent in others. This distinction has existed since the Judiciary Act of 1789, Section 13 . . . and has never been questioned by this Court.").
[10] Judiciary Act of 1789, First Congress, Sess. 1 Ch. 20.

jurisdiction..."[11] These provisions are now codified in the U.S. Code.[12] That begs the question: can the Court decline to accept a case between states? And, if so, what are the factors to be considered in that decision?

The Constitution did not specify that certain types of cases were exclusively the Supreme Court's – that principle, too, was spelled out in the Judiciary Act of 1789.[13] Congress divided original jurisdiction into two types: "original and exclusive," which includes controversies between states, and "original and non-exclusive" (i.e., concurrent), which includes controversies between the United States and a state, actions by a state against citizens of another state (or aliens), and actions to which foreign ambassadors, consuls, and similar persons are parties.[14] The procedure for these original jurisdiction cases is spelled out in Rule 17 of the Supreme Court Rules.[15] Rule 17.2 says that "the form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed."[16] And, "[i]n other respects, those Rules and the Federal Rules of Evidence may be taken as guides."[17] Rule 17.5 ends by saying that the Court "may ... require that other proceedings be conducted."[18] When the Court takes jurisdiction under Rule 17.5, it conducts four types of "other proceedings," using either a special master, a commission, affidavits, or a more traditional jury trial. Pursuant to FRCP 53, the Court may use a special master to conduct fact-finding.[19] The Court may also make a decision based entirely on the parties' affidavits.[20] In some older cases, as in the 1890s boundary dispute between Iowa and Illinois, the Court chose to impanel "a commission with broad powers to resolve factual questions in a controversy."[21] Finally, some of the Court's early

[11] *Id.* at § 13.
[12] 28 U.S.C. § 1251 (2015).
[13] Judiciary Act of 1789.
[14] *Id.* at § 13.
[15] SUP. CT. R. 17.
[16] *Id.* at R. 17.2.
[17] *Id.*
[18] *Id.* at R. 17.5.
[19] FED. R. CIV. P. 53.
[20] *See* Georgia v. Tenn. Copper Company, 206 U.S. 230, 236 (1907).
[21] Texas v. New Mexico 462 U.S. 554, 566 n.11 (1983).

decisions (none later than 1797) were based upon the fact-finding of a jury seated in the Court itself.[22]

I. THE COURT AND ORIGINAL JURISDICTION

Nearly all of the initial exercises of original exclusive jurisdiction involved disputes over boundaries.[23] For example, in *New Jersey v. New York*, an 1830 dispute over New York Harbor saw forcible seizures and nearly violent conflict over the rights of steamboat owners.[24] As in *Gibbons v. Ogden*, another famous steamboat case, if the Court did not "interpose [its] friendly hand, [there would be] civil war."[25] In *Missouri v. Iowa*, an 1849 boundary dispute between the two states led Missouri to call out 1,500 troops and Iowa 1,100; the dispute was particularly serious because the 2,000 square miles would become additional slave territory if Missouri prevailed.[26] In *Alabama v. Georgia*, the two states argued a boundary dispute over the Chattahoochee River.[27] Such seemingly ancient controversies between states over boundaries still arise relatively often.[28] In the 1994 case *New York v. New Jersey*, the Supreme Court granted New Jersey leave to file a complaint over the filled-in portion of Ellis Island and appointed a special master (retired law professor Paul Verkuil) to resolve the boundary dispute.[29] The special master held a trial from July 10 to August 15, 1996, and submitted his report in June of 1997.[30] The

[22] *E.g.,* Georgia v. Brailsford, 3 U.S. (1 Dall.) 1 (1794) (empaneling a "special jury" of experienced merchants to make findings of fact as to mercantile customs).
[23] *See* New York v. Connecticut, 4 U.S. (4 Dall.) 3 (1799); New Jersey v. New York, 30 U.S. (5 Pet.) 284 (1831); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838); Rhode Island v. Massachusetts, 38 U.S. (13 Pet.) 23 (1839); Rhode Island v. Massachusetts, 45 U.S. (4 How.) 591 (1846); Missouri v. Iowa, 48 U.S. (7 How.) 660 (1849); Missouri v. Iowa, 51 U.S. (10 How.) 1 (1850); Alabama v. Georgia, 64 U.S. (23 How.) 505 (1860).
[24] New Jersey v. New York, 30 U.S. (5 Pet.) 284 (1831).
[25] Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 185 (1824).
[26] Missouri v. Iowa, 48 U.S. (7 How.) 660 (1849).
[27] Alabama v. Georgia, 64 U.S. (23 How.) 505 (1860).
[28] *See* California v. Nevada, 447 U.S. 125 (1980); Arkansas v. Mississippi, 471 U.S. 377 (1985); Georgia v. South Carolina, 497 U.S. 376 (1990); Illinois v. Kentucky, 500 U.S. 380 (1991); Mississippi v. Louisiana, 506 U.S. 73 (1992); New Jersey v. New York, 523 U.S. 767 (1998); New Hampshire v. Maine, 532 U.S. 742 (2001).
[29] New Jersey v. New York, 513 U.S. 924 (1994).
[30] New Jersey v. New York, 520 U.S. 1273 (1997).

Court then decided in New Jersey's favor in 1998 (Justice Souter wrote for a 6-justice majority, holding that New Jersey owned the filled-in portion of Ellis Island).[31] Other interstate cases potentially relevant to New Mexico's current claims involved interference with waterway navigation,[32] discriminatory interstate quarantine,[33] and disputes involving state taxes.[34]

There have also been several examples of Supreme Court cases invoking original exclusive jurisdiction in state disputes over water apportionment.[35] These cases are obviously important for the resolution of New Mexico's claim. One particularly interesting case, *Mississippi v. Tennessee*, involves a dispute over an immense aquifer (70,000 square miles), which underlies eight states (MS, TN, LA, AL, AR, MO, KY, IL).[36] Mississippi claims that the city of Memphis is pumping so intensively from the Sparta-Memphis Sand Aquifer, which extends across state lines, that a depression in the water table has formed beneath the city's wells and is altering the direction water flows underground.[37] Mississippi had previously sued over use of this aquifer, claiming nuisance, unjust enrichment, and trespass in an action against Memphis in U.S. District Court for Northern District of Mississippi.[38] The district court held that Tennessee was a necessary party and then dismissed the case – joining Tennessee would trigger the Supreme Court's original exclusive jurisdiction, making the district court unable to hear it

[31] New Jersey v. New York, 523 U.S. 767 (1998).
[32] South Carolina v. Georgia, 93 U.S. 4 (1876).
[33] Louisiana v. Texas, 176 U.S. 1 (1900).
[34] *See* Arizona v. New Mexico, 425 U.S. 794 (1976); Maryland v. Louisiana, 451 U.S. 725 (1981); Wyoming v. Oklahoma, 488 U.S. 921 (1988); Wyoming v. Oklahoma, 502 U.S. 437 (1992).
[35] *See* Kansas v. Colorado, 185 U.S. 125 (1902); Kansas v. Colorado, 206 U.S. 46 (1907); Wyoming v. Colorado, 259 U.S. 419 (1922); Connecticut v. Massachusetts, 282 U.S. 660 (1931); New Jersey v. New York, 283 U.S. 336 (1931); Wyoming v. Colorado, 298 U.S. 573 (1936); Nebraska v. Wyoming and Colorado, 325 U.S. 589 (1945); Texas v. New Mexico, 342 U.S. 874 (1951); Texas v. Colorado, 389 U.S. 1000 (1967); Wisconsin v. Illinois, 449 U.S. 48 (1980); Texas v. New Mexico 462 U.S. 554 (1983); Idaho v. Oregon & Washington, 462 U.S. 1017 (1983); Colorado v. New Mexico, 467 U.S. 310 (1984); Virginia v. Maryland, 540 U.S. 56 (2003); Montana v. Wyoming, 555 U.S. 968 (2008); South Carolina v. North Carolina, 558 U.S. 256 (2010); Kansas v. Nebraska, 562 U.S. 820 (2010); Texas v. New Mexico, 134 S. Ct. 1050 (2014); Florida v. Georgia, 135 S. Ct. 471 (2014); Mississippi v. Tennessee, 135 S. Ct. 2916 (2015).
[36] Mississippi v. Tennessee, 135 S. Ct. 2916 (2015).
[37] Mississippi v. Memphis, 570 F.3d 625 (5th Cir. 2009).
[38] *Id*.

under the Judiciary Act and the Constitution.[39] The Fifth Circuit upheld the district court decision,[40] and the Supreme Court subsequently accepted the interstate case via original jurisdiction.[41] As of 2017, the proceeding was still before the Court's appointed special master.[42] Commentators have stated that the Court's decision in this case could potentially upend established U.S. water law given the novelty and size of the claim.[43]

Since the 1970's, the Supreme Court has increasingly refused to hear cases where it had original non-exclusive jurisdiction.[44] Soon after that sea change, the Court began declining to hear more of the cases brought under its original exclusive jurisdiction.[45] In 1976's *Arizona v. New Mexico*, Arizona complained of a New Mexico utility tax that fell primarily on Arizona residents.[46] The Court rejected the case, pointing out that there was an alternative forum for the underlying dispute, as there was ongoing litigation in New Mexico state court.[47] In *California v. West Virginia*, California sued West Virginia, claiming that West Virginia University (WVU) had breached a 1974 contract for a home-and-home football series between the WVU Mountaineers and the San Jose State University (SJSU) Spartans.[48] WVU's athletic director had cancelled the games, saying the travel was too expensive. SJSU sued WVU, seeking $250,000 in damages. The Court voted 8-1 to deny California's attempt in 1981 to invoke the Court's jurisdiction to hear the case, but provided no explanation for the decision.[49] Justice Stevens dissented, saying

[39] *Id*. at 628.
[40] *Id*. at 627.
[41] Mississippi v. Tennessee, 135 S. Ct. 2916 (2015).
[42] SCOTUSblog, Mississippi v. Tennessee (July 26, 2017, 3:14 PM) http://www.scotusblog.com/case-files/cases/mississippi-v-tennessee/.
[43] Circle of Blue, *Mississippi's Claim That Tennessee Is Stealing Groundwater Is A Supreme Court First* (August 3, 2017, 3:45 PM) http://www.circleofblue.org/2016/groundwater/states-lag-management-interstate-groundwater/.
[44] *See* Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971); Illinois v. City of Milwaukee, 406 U.S. 91 (1972); Washington v. General Motors Corp., 406 U.S. 109 (1972); United States v. Nevada and California, 412 U.S. 534 (1973).
[45] *See* Arizona v. New Mexico, 425 U.S. 794 (1976); California v. Texas, 437 U.S. 601 (1978); California v. West Virginia, 454 U.S. 1027 (1981); Mississippi v. Louisiana, 488 U.S. 990 (1988); Wyoming v. Oklahoma, 502 U.S. 437, 474 (1992); Arkansas v. Oklahoma, 546 U.S. 1166, 126 S. Ct. 1428 (2006); Nebraska v. Colorado, 135 S. Ct. 1034 (2016).
[46] Arizona v. New Mexico, 425 U.S. 794 (1976).
[47] *Id*. at 797.
[48] California v. West Virginia, 454 U.S. 1027 (1981).
[49] *Id*.

the mere fact that this case had the potential to "add to [the Court's] burdens" did not justify the majority's decision to refuse to exercise exclusive jurisdiction.[50]

The majority's decision in *California v. West Virginia* (interpreted as deeming the case too insubstantial to be worthy of the Court's attention) elicited some criticism. For example, one commentator (now Georgetown Law Professor Anne-Marie Carstens) wrote that under a theory of strict construction, the Supreme Court cannot refuse to entertain cases falling within its original jurisdiction if no other forum is available.[51] Carstens' argument was supported by language in several 19th century opinions.[52] In the 1821 case of *Cohens v. Virginia*, Chief Justice Marshall wrote: "The Court must take jurisdiction if it should… We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution."[53] In the 1831 case of *Fisher v. Cockerell*, the court wrote: "As this court has never grasped at ungranted jurisdiction, so will it never ... shrink from the exercise of that which is conferred upon it."[54] In 1861, "the Court could not ... refuse to exercise a power with which it was clothed by the Constitution..."[55] Despite this criticism, in the 1992 case *Wyoming v. Oklahoma*, Justice Thomas (joined by Justice Scalia and Chief Justice Rehnquist) dissented from a case where the Court accepted jurisdiction, stating that his minority would have declined jurisdiction based on the test for discretionary original jurisdiction.[56] He did, however, note Justice Stevens' dissent in *California v. West Virginia* with some approval, perhaps indicating that his position was evolving.[57]

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[50] *Id*. at 1028 (Stevens, J., dissenting).
[51] Anne-Marie C. Carstens, Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction, 86 Minn. L. Rev. 625, 640 (2002).
[52] *E.g*., Cohens v. Virginia, 19 U.S. (6 Wheaton) 264 (1821); Fisher v. Cockerell, 30 U.S. (5 Pet.) 248 (1831); The St. Lawrence, 66 U.S. 522 (1861).
[53] Cohens, 19 U.S. at 387.
[54] Fisher, 30 U.S. at 259.
[55] The St. Lawrence, 66 U.S. at 526
[56] Wyoming v. Oklahoma, 502 U.S. 437, 473-74 (1992) (Thomas, J., Scalia, J., and Rehnquist, C.J., dissenting).
[57] *Id*. at n.50.

Though the position of the Court as a whole has not changed, Justice Thomas reconsidered his position in 2016 for *Nebraska & Oklahoma v. Colorado*.[58] Colorado began allowing recreational use of marijuana in 2014, and in December 2014, two states filed a motion for leave to file a bill of complaint against Colorado.[59] Concerned that the flow of illegal marijuana into their states was increasing as a result of Colorado's law, the two states argued that Colorado's marijuana law was pre-empted by federal law (the Controlled Substances Act).[60] Colorado filed in opposition, asking the Court not to exercise its original jurisdiction because 1) the two states lacked standing, 2) no cause of action existed to enforce any federal preemption, and 3) the U.S. was an indispensable party.[61] The U.S. filed its amicus brief on December 16, 2015, largely siding with Colorado: 1) the case wasn't sufficiently serious, given that Nebraska and Oklahoma retain full authority to prohibit marijuana within their borders; and 2) Colorado wasn't directly injuring the two other states, and without a 'direct' injury, there is no actual 'controversy' between states.[62] In 2016, the Court declined to exercise jurisdiction.[63] Justice Thomas dissented and explicitly stated that he had changed his position on the issue of exclusive jurisdiction.[64] He now believes that federal law does not give the Court discretion to decline inter-state controversies.[65] This view is based on a textual reading of the Judiciary Act of 1789 and arguments made by commentators after *Wyoming v. Oklahoma* in 1992.[66]

Despite Justice Thomas' change of opinion, jurisdiction is still evaluated under discretionary factors from the 1992 case *Mississippi v. Louisiana*.[67] This case was significant because it was the first obvious wavering of the Court in original exclusive jurisdiction cases. Over time, the Mississippi River's thalweg (the deepest part of a river

[58] Nebraska v. Colorado, 136 S. Ct. 1034 (2016).
[59] *Id.* at 1035.
[60] *Id.* at 1036.
[61] Brief of Respondent Colorado in Opposition, Nebraska v. Colorado, (U.S. 2016) (No. 220144).
[62] Brief for the United States as Amicus Curiae, Nebraska v. Colorado, (U.S. 2016) (No. 220144).
[63] Nebraska v. Colorado, 136 S. Ct. 1034.
[64] *Id*. (Thomas, J., dissenting).
[65] *Id*.
[66] *Id*. at 1035.
[67] Mississippi v. Louisiana, 506 U.S. 73 (1992).

channel) had shifted as a result of deposition of sediment.[68] Thus, uncertainty arose as to the boundary between Mississippi and Louisiana and whether certain property was located in Mississippi or Louisiana.[69] Private plaintiffs brought suit against private defendants in Mississippi federal district court to quiet title to certain riparian property.[70] Louisiana intervened and eventually sought leave to file suit in the U.S. Supreme Court.[71] The Supreme Court originally denied Louisiana leave to file.[72] Justices White, Scalia, and Stevens dissented from the denial, arguing that the Court should hear the case because no other court could hear it.[73] In the Mississippi district case that followed the Court's denial, the district court ruled that the disputed property was located in Mississippi; the Fifth Circuit reversed, holding that it was located in Louisiana.[74] The Supreme Court only then granted certiorari, accepting the case through its appellate jurisdiction where it had denied original jurisdiction.[75] Chief Justice Rehnquist, in a unanimous and highly formalistic opinion, held that the district court didn't have jurisdiction to decide state boundary disputes; such jurisdiction was exclusive to the Supreme Court.[76] In the Court's decision, Chief Justice Rehnquist identified the two discretionary factors the Court considers when deciding whether to exercise its original jurisdiction: the availability of an alternative forum in which the issue tendered can be resolved and "the nature of the interest of the complaining State," focusing on the "seriousness and dignity of the claim."[77] Rehnquist emphasized that the Court's "original jurisdiction should be exercised only sparingly..." in "case-by-case judgments."[78] The exercise of this original

[68] *Id*. at 75.
[69] *Id*.
[70] *Id*. at 74.
[71] *Id*.
[72] *Id*. at 75.
[73] *Id*. (citing Louisiana v. Mississippi, 488 U.S. 990 (1988) (White, J., dissenting))
[74] Houston v. Thomas, 937 F.2d 247 (5th Cir. 1991).
[75] Mississippi v. Louisiana, 506 U.S. 73 (1992).
[76] *Id.* at 77.
[77] *Id*.
[78] *Id*. at 76.

jurisdiction is thus "obligatory only in appropriate cases," a rather murky statement of the law.[79] The Court then addressed the merits and held in Mississippi's favor.[80]

The case law around these factors remains ambiguous. Regarding the first factor, alternative forum, there have been cases in which the Supreme Court has found that a federal district court could address the issue underlying the dispute between the two states, even though the lower court couldn't hear the substantive interstate dispute.[81] For example, in *Arizona v. New Mexico*, the state court proceedings as to the constitutionality of a disputed tax were considered a more appropriate forum.[82] However, there have been other cases where the Supreme Court granted certiorari even though there were arguably separate forums available.[83] The second factor raises the question of how "serious" and "dignified" a claim must be before the Court will exercise its original jurisdiction where the jurisdiction is exclusive (where denial would result in the state having no forum to pursue its claim). The model case for invocation of the Court's original jurisdiction is a dispute between states of such seriousness that it would amount to casus belli ("an act that causes war") if the states were fully sovereign.[84] The Constitution does not allow one state to go to war against another.[85] The states are "bound hand and foot"; their only resort to resolve controversies is the Supreme Court. The Supreme Court should have power over interstate cases "which involve the peace of the confederacy," and "all those [cases] in which the state tribunals cannot be supposed to be impartial and unbiased."[86] The Supreme Court has no "local attachments" and is therefore "likely to be impartial between the different States."[87]

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[79] *Id*.
[80] Louisiana v. Mississippi, 516 U.S. 22 (1995).
[81] *E.g*., Arizona v. New Mexico, 425 U.S. 794 (1976).
[82] *Id*. at 797.
[83] *E.g*., South Carolina v. North Carolina, 558 U.S. 256 (2010). In a dispute over apportionment of Catawba River, the Supreme Court took the case via original jurisdiction even though there was arguably a separate forum available (a FERC proceeding to apportion the river flow).
[84] Texas v. New Mexico, 462 U.S. 554, 571 n.18 (1983)
[85] U.S. CONST. art. I, § 10, cl. 3.
[86] The Federalist No. 80 (Alexander Hamilton).
[87] *Id.*

In *Missouri v. Illinois*, a water pollution case, Justice Oliver Wendell Holmes considered whether a claim of water pollution might amount to a *casus belli*.[88] He stated that the "health and comfort of the large communities" who would be severely harmed if the pollution brought the injuries and diseases alleged by Missouri, and that such substantial harms would theoretically be resolved by either negotiation or force.[89] The Court permitted Missouri's suit to proceed.[90] Holmes cited his *Missouri v. Illinois* opinion a year later, in *Georgia v. Tennessee Copper Company*.[91] In *Georgia v. Tennessee Copper Company*, Holmes explained that the sovereign states had given up their right to go to war against each other when they joined the Union.[92] The states retained the right, however, to make reasonable demands on the basis of their remaining quasi-sovereign interests via the Supreme Court.[93] Holmes wrote that the state could sue "in its capacity as quasi-sovereign . . . the state has an interest . . . in all the earth and air within its domain."[94] Holmes also cited *Missouri v. Illinois* for the proposition that the Court should be more inclined to decline jurisdiction when a state brings claims analogous to torts.[95]

There have also been instances where the Supreme Court found interstate water pollution claims to be of a sufficiently serious nature to exercise jurisdiction.[96] In *Vermont v. New York*, Vermont filed a bill of complaint claiming that New York and International Paper Co. were responsible for a bed of sludge in Lake Champlain and Ticonderoga Creek that polluted the water, impeded navigation, and constituted a public nuisance.[97] The Court decided to exercise its original exclusive jurisdiction, granting Vermont's motion to file its complaint.[98] The Court appointed a special master (retired

[88] Missouri v. Illinois, 200 U.S. 496 (1906).
[89] *Id.* at 344.
[90] *Id.* at 249.
[91] Georgia v. Tennessee Copper Company, 206 U.S. 230 (1907).
[92] *Id.* at 237 ("...the states by their union made the forcible abatement of outside nuisances impossible to each...").
[93] *Id.*
[94] *Id.*
[95] *Id*.
[96] State of Missouri v. State of Illinois, 180 U.S. 208, 248 (1901); New York v. New Jersey, 256 U.S. 296 (1921); Vermont v. New York, 406 U.S. 186 (1972).
[97] Vermont v. New York, 406 U.S. 186 (1972)
[98] *Id*.

Massachusetts state Supreme Court Justice Ammi Cutter) to hear the case.[99] On April 24, 1974, the special master submitted his report to the Court, recommending approval of a negotiated consent decree that included appointment of a special lake master.[100] The proposed lake master would police the implementation of the settlement; if there were any contested issues in the future, the master would propose a resolution that would be submitted to the Supreme Court for its approval.[101] In a per curiam order, the Court denied the proposed consent decree, holding that it would be improper for the Court to supervise the execution of the consent decree and to act more in an arbitral manner rather than a judicial manner.[102] The process envisioned by the decree, the Court said, would materially change the Court's function in these interstate disputes.[103] The Court said that its jurisdiction extends to adjudications of controversies between States according to principles of law under Article III of the Constitution; however, the proposed consent decree was more similar to "mere settlements by the parties" "acting under compulsions and motives that have no relation" to the performance of the Court's Article III functions.[104] The Court's refusal to approve a settlement even after assuming jurisdiction demonstrates how carefully it navigates the bounds of its authority in this area of the law.

II. NEW MEXICO V. COLORADO

In the present case, Colorado argues that the Supreme Court should not invoke original exclusive jurisdiction for a few reasons. First, Colorado says the Supreme Court does not have original jurisdiction over New Mexico's RCRA and CERCLA claim because those statutes give exclusive jurisdiction to federal district courts.[105] Second, it argues that New Mexico's claims against Colorado lack merit because Colorado is not

[99] Vermont v. New York, 408 U.S. 917 (1972).
[100] Vermont v. New York, 417 U.S. 270, 271 (1974).
[101] *Id*.
[102] *Id*. at 277.
[103] *Id*.
[104] *Id*.
[105] Colorado's Brief in Opposition to Motion for Leave to File Complaint at 13, New Mexico v. Colorado, No. 220147 (U.S. Oct. 21, 2016).

liable as an operator or arranger under CERCLA, a RCRA imminent and substantial endangerment claim is barred by both RCRA and CERCLA as a challenge to an ongoing response action, and New Mexico's federal common law tort claims have been displaced by passage of the CWA, RCRA, and CERCLA.[106] Third, Colorado contends that the litigation in the district court provides New Mexico with an alternative forum in which it can seek appropriate relief.[107] On November 28, 2016, the Supreme Court invited the Acting Solicitor General to file an amicus brief expressing the views of the United States.[108] On May 23, 2017, the United States filed its brief.[109] The United States made the same arguments as Colorado, except on the issue of common law displacement.[110] The Attorney General argued that the CWA and RCRA displaced New Mexico's common law claims.[111] The Attorney General also argued that New Mexico did not state a cognizable claim under CERCLA or RCRA.[112] Relevant case law suggests that although New Mexico's nuisance claims are displaced by the CWA,[113] its negligence claims likely have not been displaced by the relevant statutes.[114] The complexity of this area of the law and the apparently conflicting circuit case law would seem to weigh in favor of the Court settling the questions of displacement.

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[106] *Id*. at 16-27.
[107] *Id*. at 27-29.
[108] Invitation for the Acting Solicitor General to File Brief as Amicus Curiae, New Mexico v. Colorado, No. 220147 (U.S. Nov. 28, 2016); *see also* SCOTUS Blog, New Mexico v. Colorado, http://www.scotusblog.com/case-files/cases/new-mexico-v-colorado/ (last visited Oct. 16, 2017) (listing the November 28, 2016 invitation to Solicitor General under "Proceedings and Orders" of the case).
[109] Brief for the United States as Amicus Curiae, New Mexico v. Colorado, No. 220147 (U.S. May 23, 2017).
[110] *Id.*
[111] *Id*. at 13-15.
[112] *Id*. at 15-20.
[113] *See* City of Milwaukee v. Illinois and Michigan, 451 U.S. 304 (1981) (holding that a nuisance suit for an equitable remedy was displaced by the CWA); *see also* Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1, 21-22 (1981) (holding, effectively, that all nuisance claims in water pollution cases were displaced).
[114] *See* Exxon Shipping Co. v. Baker, 554 U.S. 471, 489 (2008) (holding that the CWA did not displace "the entire field of pollution remedies" and awarding punitive damages under federal maritime common law); *see* Cropwell Leasing Co. v. NMS, Inc., 5 F.3d 899 (5th Cir. 1993); *see also* PMC, Inc. v. Sherwin-Williams Co., 151 F.3d 610, 617-618 (7th Cir. 1998) (Posner, J.) (holding that CERCLA's savings clause prevented it from displacing federal common law remedies). *But see* New Mexico v. General Electric Co., 467 F.3d 1223, 1246-48 (10th Cir. 2006) (holding that CERCLA NRD remedies displaced state's "unrestricted damage" claims for natural resources damage.

If the Supreme Court did exercise its original exclusive jurisdiction, the United States asked the Supreme Court to consider resolving certain legal issues itself (e.g., Colorado's claim that CERCLA 113(h) precludes subject matter jurisdiction for New Mexico's claims) before, or in lieu of, referring the case to a Special Master.[115] In other words, the Court could set a schedule for motions on certain issues before any decision on the merits. The motions to dismiss would then be decided by either the Court or an appointed Special Master. Alternatively, the Court was asked to stay its proceedings and await the resolution of the district court litigation. Granted, for the most part, Colorado's liability cannot be resolved in the district court (unless EPA is held liable and EPA sought contribution from Colorado – in that scenario, the district court could resolve Colorado's CERCLA liability, but not its common law liability). But there is substantial overlap between New Mexico's two complaints, and even New Mexico acknowledges that its claims against Colorado in the Supreme Court are "intertwined" with its claims against the U.S. and others in the district court. In its reply brief, New Mexico subsequently said that it may obtain additional evidence about Colorado's liability if it is able to engage in discovery in the district court litigation, suggesting that even New Mexico sees the value of district court proceedings over arcane original jurisdiction proceedings.[116]

On June 6, 2017, New Mexico filed a reply to the United States' amicus brief. New Mexico argued that the Court should exercise its original exclusive jurisdiction because this case is similar to interstate disputes over boundaries, the use of interstate rivers, and interstate pollution (citing *Missouri v. Illinois* and *New York v. New Jersey*).[117] New Mexico cited the amicus brief that the U.S. filed in 2010 in *Michigan v. Illinois*, which said that the Supreme Court generally doesn't require a motion at this stage to

[115] Brief for the United States as Amicus Curiae at 21-22.
[116] State of New Mexico's Response to the United States' Brief as Amicus Curiae at 19 n.47, New Mexico v. Colorado, No. 22O147 (U.S. Jun. 6, 2017) ("If the District Court denies EPA's or its contractor, Environmental Restoration's, motions to dismiss, and New Mexico obtains discovery, Colorado's status as "operator" and "arranger" may become even clearer.)
[117] State of New Mexico's Response to the United States' Brief as Amicus Curiae, New Mexico v. Colorado, No. 220147 (U.S. Jun. 6, 2017).

satisfy the FRCP 12(b)(6) standard.[118] New Mexico also cited the amicus brief that the U.S. had filed in December 2015 in *Nebraska and Oklahoma v. Colorado* that said that it is "entirely proper and necessary" for the Court to exercise its jurisdiction in an interstate pollution case.[119] New Mexico then further used its reply brief to supplement its argument that its claims were cognizable and deserved a forum, New Mexico that the CWA had not completely displaced its common law claims.[120]

It is unclear why the Supreme Court rejected New Mexico's petition by a 7-2 vote, because there was no opinion by the majority – only a brief order of denial.[121] The most obvious reason for declining the case is perhaps that there is an alternative forum, the first prong of the *Mississippi v. Louisiana* test.[122] Under this theory, New Mexico's lawsuit in federal district court may resolve its issues with the spill through liability imposed on EPA or the mine's owners. The second prong of the test, examining the nature of the state's claim and its seriousness, may not have been satisfied given the remedies already afforded to New Mexico and the nebulous nature of claims like negligence based upon another state's environmental policy.[123] The Court may also have taken notice of the relative severity of the spill and EPA's ongoing (largely successful) response efforts – these would weigh against the claim's seriousness.[124] Beyond the *Mississippi v. Louisiana* factors, there are more ordinary reasons for the Court to have declined to hear the case. The Court may have believed Colorado's assertion that New Mexico's federal common law claims were displaced by statute, an analysis supplemented by Justice Holmes' caution against taking jurisdiction of tort-like claims

[118] *Id.* at 5 n.4 ("The Solicitor General's Office has previously acknowledged that this Court 'generally does not require a motion for leave to file to satisfy the standard for stating a claim under Rule 12(b)(6) of the FEDERAL RULES OF CIVIL PROCEDURE.' Instead, in cases where the threshold legal viability of the plaintiff's claims is in question, the Court invites the defendants to file a motion to dismiss and either rules on that motion itself or refers it to a special master.")
[119] *Id*. at 6.
[120] *Id.* at 6, 14.
[121] Order Denying Motion for Leave to File a Bill of Complaint, New Mexico v. Colorado, No. 22O147 ORG (U.S. June 26, 2017).
[122] Mississippi v. Louisiana, 516 U.S. 122 (1995).
[123] *Id*.
[124] Brief for the United States as Amicus Curiae, New Mexico v. Colorado, No. 220147 (U.S. May 23, 2017).

brought by state, articulated in *Georgia v. Tennessee Copper Co*.[125] The denial may also have been influenced by internal court politics or a belief that the case was an inappropriate vehicle for the complicated legal issues involved in suing a state for negligence based on its environmental regulatory efforts. Regardless, Justice Thomas, joined by Justice Alito, maintained his recent view that the Court did not have discretion to decline the case, whatever its reasons.[126] Thomas's dissent in the 2016 Colorado marijuana case was cited in their *New Mexico v. Colorado* dissent.[127] In that prior dissent, Justice Thomas had written that there is no law that gives the Supreme Court discretion to reject a petition for an inter-state controversy.[128]

Until New Mexico's federal district lawsuit is resolved, there is substantial room for speculation – New Mexico's claims could eventually reach the Supreme Court through its appellate jurisdiction. The district court could also agree with the owners of Sunnyside Mine that Colorado is an indispensable party and, as a result, dismiss New Mexico's suit.[129] In that case, New Mexico may be able to successfully re-file in the Supreme Court, which could wade through the issues on appeal at that time. Given the role Colorado's environmental policies may play in the role of the negligence claims in particular, the case is well worth following as it proceeds through lower court litigation.

V. CONCLUSION

As water issues become more contentious, is the Supreme Court obligated to take these cases, or will *New Mexico v. Colorado* have a "chilling effect" on interstate litigation in the United States? Whatever the courts decide, water issues are not going away. By 2025, two-thirds of the world's population may face water shortages: water

[125] Georgia v. Tennessee Copper Company, 206 U.S. 230 (1907).
[126] Dissent of Justice Thomas, New Mexico v. Colorado, No. 22O147 ORG (U.S. June 26, 2017).
[127] *Id.*
[128] *Id.*
[129] InsideEPA.com, *High Court Rejection of Gold King Case Creates Doubts Over District Suit* (August 3, 2017, 11:05 AM) https://insideepa.com/daily-news/high-court-rejection-gold-king-case-creates-doubts-over-district-suit.

issues are reaching a boiling point.[130] In the United States, Governor Jerry Brown lifted California's state of emergency in the spring of 2017, but the state's three-year water shortage imposed a new outlook on water usage throughout the state – "conservation must remain a way of life" when "the next drought could be around the corner," the governor said.[131] A 2014 study of the drought concluded that it was likely the worst in 1200 years.[132] The researchers involved in the study and a climate scientist contacted for comment urged attention to the problem, saying that increasing temperatures and changing weather patterns will soon cause droughts like California's across the American West.[133] As these states attempt to control their decreasing water resources, the Supreme Court's historic role as an arbiter of interstate water disputes may rise to the forefront of its jurisprudence.

[130] WWF, *Threats: Water Scarcity* (August 5, 2017, 11:05 PM) https://www.worldwildlife.org/threats/water-scarcity.
[131] Bettina Boxall, *Gov. Brown declares California drought emergency is over*, LA Times (April 7, 2017) (August 5, 2017, 11:11 PM) http://www.latimes.com/local/lanow/la-me-brown-drought-20170407-story.html.
[132] Thomas Sumner*, California drought worst in at least 1,200 years*, Science News (December 6, 2014) (August 5, 2017, 11:14 PM) https://www.sciencenews.org/article/california-drought-worst-least-1200-years.
[133] *Id.*