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## Westerners Hung Out to Dry: A Review of the Prior Appropriation Doctrine Amidst a Drying Climate and a Patchwork of Water Claims

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WESTERNERS HUNG OUT TO DRY: A REVIEW OF THE  
PRIOR APPROPRIATION DOCTRINE AMIDST A DRYING  
CLIMATE AND A PATCHWORK OF WATER CLAIMS

I. A NOT-SO WATERED-DOWN REGION: AN INTRODUCTION TO THE  
CLIMATE AND WATER RESOURCES OF THE WESTERN UNITED STATES

The western United States has struggled with maintaining an adequate water supply since its early settlement.<sup>1</sup> In recent years, however, climate change and population growth have become additional components of the challenge, increasing the imminence of its water scarcity predicament.<sup>2</sup> In 2021, the western half of the United States experienced a severe drought that forced states to cut back on water allocation, pushed farmers to suspend crop operations, and increased the severity of wildfires across the region.<sup>3</sup> Scientists argue this drought might have been a moderate drought in a world without climate change.<sup>4</sup>

In addition to the West's shrinking water supply, as the population increases, demand for water grows.<sup>5</sup> This population growth is mostly due to the popularity of living in the western United States.<sup>6</sup>

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1. See D. CRAIG BELL & NORMAN K. JOHNSON, *State Water Laws and Federal Water Uses: The History of Conflict, the Prospects for Accommodation*, 21 ENVTL. L. 1, 4 (1991) (describing concerns of western water law). For the purposes of this Comment, the western United States consists of the nineteen western-most states. 1 WELLS A. HUTCHINS, *WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES* 13 (1971) (listing states included in specific study).

2. See Julia Jacobo, *How Will the West Solve a Water Crisis If Climate Change Continues to Get Worse?*, ABC NEWS (July 12, 2021, 5:17 AM), <https://abcnews.go.com/US/west-solve-water-crisis-climate-change-continues-worse/story?id=78566068> (adding climate change as factor of water crisis in West); Michael Elizabeth Sakas, *Population Is Booming in the West – But There's Not Enough Water to Keep Up With It*, NAT'L PUB. RADIO (June 26, 2021, 8:01 AM), <https://www.npr.org/2021/06/26/1010521100/population-is-booming-in-the-west-but-theres-not-enough-water-to-keep-up-with-it> (exhibiting demand for water in West due to population growth).

3. Henry Fountain, *The Western Drought Is Bad. Here's What You Should Know About It.*, N.Y. TIMES (Oct. 21, 2021), <https://www.nytimes.com/article/drought-california-western-united-states.html> (reporting on drought in western United States); see also *U.S. West Hit With Extreme Heat, Drought and Unrelenting Wildfires in July*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Aug. 9, 2021), <https://www.noaa.gov/news/us-west-hit-with-extreme-heat-drought-and-unrelenting-wildfires-in-july> (tracking status of western drought); Shelby Vittek, *Western Drought Forces Farmers to Make Tough Decisions*, MODERN FARMER (June 7, 2021), <https://modernfarmer.com/2021/06/western-drought-forces-farmers-to-make-tough-decisions/> (publicizing difficulties of farmers during drought).

4. Fountain, *supra* note 3 (blaming drought on climate change).

5. *Id.* (analyzing demand for water in western United States).

6. See Ben Kessler, *Drought Is Here to Stay in the Western U.S. How Will States Adapt?*, NBC NEWS (June 11, 2021, 6:53 AM), <https://www.nbcnews.com/news/>

Against the backdrop of water scarcity, however, is the harsh reality that Earth's water supply is permanently limited.<sup>7</sup>

This Comment examines the background and current state of water rights in the western United States, the different administrative frameworks for allocating water among states, and the impact of current decentralized systems on allocation and preservation of the West's limited water supply.<sup>8</sup> This Comment ultimately recommends the federal government intervene to centralize all water rights and administration systems.<sup>9</sup> Part II of the Comment will explore the history and current administration of the prior appropriation doctrine.<sup>10</sup> Part III will examine the administration of the water appropriation doctrine and state judiciaries' roles in determining and adjudicating water rights.<sup>11</sup> Part IV will evaluate the federal government's lack of oversight of the prior appropriation doctrine.<sup>12</sup> Part V introduces various states' current attempts to remedy the prior appropriation practice's shortcomings.<sup>13</sup> Finally,

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weather/drought-here-stay-western-u-s-how-will-states-adapt-n1270248 (mentioning booming population in western United States); *see also* America Counts Staff, *Arizona's Population More Than 7 Million in 2020, Up 11.9% Since 2010*, U.S. CENSUS BUREAU (Aug. 25, 2021), <https://www.census.gov/library/stories/state-by-state/arizona-population-change-between-census-decade.html> (reviewing Arizona's population growth); America Counts Staff, *Colorado Among Fastest-Growing States Last Decade*, U.S. CENSUS BUREAU (Aug. 25, 2021), <https://www.census.gov/library/stories/state-by-state/colorado-population-change-between-census-decade.html> (counting growth of Colorado); Adam Forgie, *Where Are Americans Moving? Reports Shows Migration to Western, Southern States*, 2KUTV (Jan. 18, 2021), <https://kutv.com/news/nation-world/where-are-americans-moving-report-shows-migration-to-western-southern-states> (hypothesizing why population in western United States is growing).

7. David S. Brookshire, H. Stuart Burness, Janie M. Chermak & Kate Krause, *Western Urban Water Demand*, 42 NAT. RES. J. 873, 874 n.1 (2002) (stating water supply is limited regardless of sustainability efforts); *see also* *Water Scarcity*, WORLD WILDLIFE FUND, <https://www.worldwildlife.org/threats/water-scarcity> (last visited Feb. 9, 2022) (describing water scarcity). The World Wildlife Fund predicts that by 2025, two-thirds of people globally could face water shortages which may permanently alter ecosystems across the globe. *Id.* (anticipating vast water shortage within next decade).

8. For a discussion of appropriative water rights regimes in the western United States, see *infra* notes 15-76 and accompanying text.

9. For a discussion of the recommended adjustments to decentralization of the water allocation system, see *infra* notes 177-90 and accompanying text.

10. For a discussion of the prior appropriation doctrine's development, see *infra* notes 15-43 and accompanying text.

11. For a discussion of the administration of and the judiciary's current role in the prior appropriation doctrine, see *infra* notes 48-98 and accompanying text.

12. For a discussion of the federal government's limited role in water allocation, see *infra* notes 99-135 and accompanying text.

13. For a discussion of states' attempts to amend the shortcomings of the prior appropriation doctrine, see *infra* notes 146-63 and accompanying text.

Part VI concludes by recommending federal oversight of western water rights.<sup>14</sup>

## II. FLOWING INTO THE ISSUES: BACKGROUND OF THE PRIOR APPROPRIATION DOCTRINE

In the United States, there are two major water rights doctrines: riparian and appropriative.<sup>15</sup> Eastern states with more precipitation have always ascribed to the riparian doctrine, which allocates water to those who own the land along the water's natural path.<sup>16</sup> Alternatively, the arid climate in the western United States forced its early settlers to develop a different system of water allocation, leading to the prior appropriation doctrine.<sup>17</sup>

In the 1840s, miners in the West adopted the practice of prior appropriation when using surface waters.<sup>18</sup> The miners' practice embodied the principle "first in time, first in right" through which a water right belonged to the claimant who had the earliest provable date of use.<sup>19</sup> The practice quickly evolved into a custom for obtaining water rights from a particular source in areas where water

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14. For a discussion of recommended federal legislation to aid in the West's water crisis, see *infra* notes 164-90 and accompanying text.

15. See David N. Cassuto & Romulo S. R. Sampaio, *Water Law in the United States and Brazil — Climate Change & Two Approaches to Emerging Water Poverty*, 35 WM. & MARY ENVTL. L. & POL'Y REV. 371, 378, 382 (2011) (explaining riparian and appropriative water regimes).

16. Christine A. Klein, *The Constitutional Mythology of Western Water Law*, 14 VA. ENVTL. L. J. 343, 345 (1995) (summarizing riparian water rights doctrine). Alabama, Arkansas, Connecticut, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Virginia, West Virginia, and Wisconsin all ascribe to the riparian doctrine. Cassuto & Sampaio, *supra* note 15, at 378 n.30 (listing states that follow riparian doctrine); see also Peter N. Davis, *Law and Fact Patterns in Common Law Water Pollution Cases*, 1 MO. ENVTL. L. & POL'Y REV. 3, 4 n.20 (1993) (enumerating states that follow riparian water rights doctrine). Riparianism has developed into a more regulated version of itself: "regulated riparianism," which follows a comprehensive permitting system the state administers. See Cassuto & Sampaio, *supra* note 15, at 380 (tracking development of riparian rights doctrine).

17. Bell & Johnson, *supra* note 1, at 4 (distinguishing water needs in different regions of United States).

18. John E. Thorson, Ramsey L. Kropf, Andrea K. Gerlak & Dar Crammond, *Dividing Western Waters: A Century of Adjudicating Rivers and Streams*, 8 U. DENV. WATER L. REV. 355, 379 (2005) (introducing appropriation water practice). The prior appropriation doctrine only applies to surface waters — all water not found underground — and not to well waters. See *id.* at 379 (applying prior appropriation doctrine to surface waters); see also *Surface Water*, PHYSICAL OCEANOGRAPHY DISTRIBUTED ACTIVE ARCHIVE CTR., <https://podaac.jpl.nasa.gov/SurfaceWater> (last visited Oct. 20, 2022) (defining surface water).

19. *Id.* (summarizing custom).

was scarce.<sup>20</sup> The rights accompanying a water claim included the ability to use the amount of water initially used at its original place of diversion and a right to transfer the property right to another claimant.<sup>21</sup>

Unlike the riparian doctrine, the water appropriation custom treats property rights and water rights as separate.<sup>22</sup> The core tenet of this custom is that a claimant could “divert” water from its origin to use it in a different location.<sup>23</sup> By limiting the amount of water to the exact needs of the claimant, diversion serves a dual purpose of notifying others of the claimant’s intent and preventing waste.<sup>24</sup>

In 1855 — with the western population widely using the prior appropriation custom without an endorsement by any governmental entity — the California Supreme Court adjudicated a dispute between two miners over competing claims to water.<sup>25</sup> At the time, there were few private land owners in California and the federal government or the state owned the majority of the state’s land.<sup>26</sup> Consequently, the court could not use the riparian doctrine to resolve the controversy because neither claimant owned the land on which the water originated.<sup>27</sup> The court, therefore, judicially acknowledged the prior appropriation custom by holding that the first miner to use the water in a beneficial manner obtained the property right.<sup>28</sup> Shortly after California, other western state legislatures and state courts adopted the prior appropriation custom as law.<sup>29</sup> Now, the seventeen western-most states of the United States

20. See Klein, *supra* note 16, at 347 (narrating how westerners adopted custom).

21. Thorson et al., *supra* note 18, at 379 (listing property rights water claimant obtains with right). Priority rights are particularly important when the amount of water available is scarce. See *id.* at 389 (noting prevalence of conflicts when water is scarce). In those circumstances, claimants with senior priority over an appropriative water right will receive water and can exclude junior claimants. Bell & Johnson, *supra* note 1, at 5 (describing benefits of senior water claimants).

22. Bell & Johnson, *supra* note 1, at 6 (asserting prior appropriation law as different from riparian law).

23. Klein, *supra* note 16, at 348 (explaining diversion requirement). Diversion is the process of removing the water from the body in which it is located and utilizing it in a different location. *Id.* at 345 n.4 (defining diversion).

24. *Id.* at 352 (rationalizing diversion aspect of prior appropriation).

25. *Irwin v. Phillips*, 5 Cal. 140, 145 (1855) (settling dispute between water claimants).

26. *Id.* at 145-46 (taking land ownership into consideration).

27. *Id.* (repudiating riparian doctrine claims).

28. *Id.* at 147 (holding for first user of water).

29. See Bell & Johnson, *supra* note 1, at 23 (recounting codification of custom and subsequent conflict of law); see also *Coffin v. Lefthand Ditch Co.*, 6 Colo. 443, 451 (1882) (adopting prior appropriation custom).

— either through statute or through constitution — have laws that subject natural waters to appropriation priority.<sup>30</sup>

The initial prior appropriation practice granted water rights in “pure property” form.<sup>31</sup> A water right in pure property form places only a few limitations on an individual’s water right.<sup>32</sup> First, all claimants must comply with the beneficial use doctrine: a claimant only has a preemptive priority water right over the amount of water that the claimant needs for beneficial uses.<sup>33</sup> This limitation stems from the historic scarcity of water in the region and the intuitive practice to avoid waste of a limited resource.<sup>34</sup> While states purport to enforce this limitation, administrators consider beneficial use to be essentially “any productive use, including domestic, municipal, agricultural, and industrial . . .” or even recreational purposes.<sup>35</sup> The use simply must not be wasteful.<sup>36</sup> Courts have held that practices such as using stream flow to wash debris downstream, drowning gophers to protect crops, and irrigating through natural overflow are wasteful.<sup>37</sup> Yet, there is no bright-line test to define wasteful practices.<sup>38</sup> Because of the arbitrary limitation, there is no meaningful limit on the use of beneficial water.<sup>39</sup>

Another limitation the appropriation doctrine places on water rights is forfeiture by nonuse or abandonment: a “use-it-or-lose-it” principle.<sup>40</sup> This limitation minimizes speculative claims and ensures the doctrine furthers public interest when dealing with water rights claims.<sup>41</sup> Forfeiture may give new or lower priority appropri-

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30. HUTCHINS, *supra* note 1, at 13 (listing codification of prior appropriation in state laws).

31. Bell & Johnson, *supra* note 1, at 4 (recounting initial prior appropriation practice).

32. *Id.* (noting limitations of water rights).

33. *See, e.g., id.* at 5 (describing beneficial use limitation); *see also* Klein, *supra* note 16, at 348-49 (explaining intention against excessive use of water); COLO. CONST. art. XVI, § 6 (adding only beneficial use to water right).

34. *See* Klein, *supra* note 16, at 349-50 (rationalizing beneficial use limitation).

35. *Id.* at 348-49 (expanding definition of beneficial use); Cassuto & Sampaio, *supra* note 15, at 384 (listing what courts consider beneficial uses).

36. Cassuto & Sampaio, *supra* note 15, at 384 (summarizing beneficial use rule).

37. *See generally* Klein, *supra* note 16, at 350 (listing judicially acknowledged wasteful uses of water).

38. *See* Caleb Hall, *Land and Water Use in the United States: Water, Water, Nowhere: Adapting Water Rights for a Changing Climate*, 16 SUSTAINABLE DEV. L. & POL’Y 25, 27 (2015) (noting legal uncertainties in beneficial use doctrine).

39. *See id.* (highlighting beneficial use limitation flexibility); Cassuto & Sampaio, *supra* note 15, at 384 (observing variability of beneficial use limitation).

40. *See* Bell & Johnson, *supra* note 1, at 5 (placing forfeiture principle on water rights).

41. *Id.* (tying forfeiture limitation to beneficial use doctrine).

ators access to water that they would not have otherwise.<sup>42</sup> Lastly, because water rights qualify as property rights, the federal government may impose limitations on them by exercising eminent domain under the Fifth Amendment of the Constitution.<sup>43</sup>

### III. KEEPING FROM POISONING THE WELL: THE CURRENT ADMINISTRATIVE SYSTEM AND STATE JUDICIARY DOMINANCE

The procedure for acquiring a water right has developed since legislatures stepped in to oversee the practice.<sup>44</sup> As water supply decreases, executive administration and litigation in state courts have become the principal mechanisms for resolving these disputes.<sup>45</sup> Further, because the federal government has deferred to state law in determining water rights for nearly two hundred years, current disputes over antiquated and unrecorded water rights are inevitable and common.<sup>46</sup> This combination of a decentralized adjudicatory system and a dwindling water supply causes new issues in determining the availability of water for new uses.<sup>47</sup>

#### A. Current Administration of the Prior Appropriation Doctrine

All appropriative water jurisdictions have adopted rules or statutes requiring water rights claimants to file the water claim with the appropriate state administrative agency.<sup>48</sup> Prior to state regulation

42. Steven J. Shupe, Gary D. Weatherford & Elizabeth Checchio, *Western Water Rights: The Era of Reallocation*, 29 NAT. RES. J. 413, 415 (1989) (stating positive aspects of forfeiture limitation).

43. *Id.* (listing eminent domain as limitation); see also *In re Powder River Drainage Area*, 216 Mont. 361, 376 (Mont. 1985) (accepting state power of eminent domain can modify water rights).

44. HUTCHINS, *supra* note 1, at 283 (viewing new process for water right appropriation).

45. Thorson et al., *supra* note 18, at 358-59 (explaining that state courts determine disputed water rights); see also Joseph M. Feller, *Water Law and Policy Conference: The Adjudication That Ate Arizona Water Law*, 49 ARIZ. L. REV. 405, 432 (2007) (discussing unavoidable nature of water rights litigation).

46. See Thorson et al., *supra* note 18, at 358-59 (describing breadth of water rights adjudications); see also Michelle Bryan, *At the End of the Day: Are the West's General Stream Adjudications Relevant to Modern Rights Administration?*, 15 WYO. L. REV. 461, 463 (2015) (detailing history of water right adjudications).

47. Bryan, *supra* note 46, at 463 (emphasizing importance of understanding how much water is available for new uses).

48. See, e.g., CAL. WATER CODE § 123 (1957) (designating authority to adjudicate water disputes to state court and State Water Resources Control Board); COLO. REV. STAT. §§ 37-80-102 (b) (2017) (creating Office of State Engineer to adjudicate water disputes). While the federal government defers to state governments when adjudicating most water rights, interstates and international waterways like the Colorado River fall under federal jurisdiction. Bryan, *supra* note 46, at 469 (removing Colorado River adjudication from evaluation).

of the appropriation process, a person could rightfully appropriate water as long as there was water available to appropriate.<sup>49</sup> Now, while states continue to determine priority based on the filing date with the administrative agency, agencies often review the totality of circumstances when granting a new water right.<sup>50</sup> Several states now require water rights administrators to consider multiple factors within the totality of circumstances when approving or denying proposed water rights.<sup>51</sup> Consequently, with added administrative considerations, what courts previously treated as a right with respect to water appropriations has evolved into a privilege.<sup>52</sup>

There are similarities and differences between each state's appropriation administration system.<sup>53</sup> For example, in Arizona, the legislature codified the pure water appropriation statute with a few caveats.<sup>54</sup> The relevant statute requires that holders of water rights document their appropriation with permits and certificates from the Arizona Department of Water Resources (ADWR).<sup>55</sup> The director of the ADWR is to approve applications unless "the proposed use conflicts with a vested water right, is a menace to public safety, or is against the interests and welfare of the public."<sup>56</sup>

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49. HUTCHINS, *supra* note 1, at 283 (evaluating administrative changes to granting of water rights).

50. *See id.* (explaining new water right process).

51. Bell & Johnson, *supra* note 1, at 7 (adding public interest consideration requirement to water right approval process). States that adhere to the totality of circumstances review of water claims include Alaska, Arizona, California, Hawaii, Idaho, Texas, Montana, Nevada, North Dakota, Oregon, and New Mexico. *Id.* at 7 n.12 (noting states with statutory provisions requiring administrators to review public interest when granting new water rights).

52. HUTCHINS, *supra* note 1, at 283 (assessing changes in water rights).

53. Compare ARIZ. DEP'T OF WATER RES., <https://new.azwater.gov/> (last visited Jan. 18, 2022) (managing water resources in Arizona) [hereinafter *ADWR*], with OFFICE OF THE STATE ENGINEER, <https://www.ose.state.nm.us/> (last visited Jan. 18, 2022) (administering water rights in New Mexico). The Arizona Department of Water Resources manages water rights applications by investigating and permitting claims and preliminarily adjudicating disputes. Bryan, *supra* note 46, at 466 (describing ADWR's role in water rights adjudications). Meanwhile, the New Mexico Office of the State Engineer grants water rights after determining water is available for a new claimant, yet solely serves as the first stop for mediation when there are water rights disputes. *State Engineer Hearing Unit*, OFFICE OF THE STATE ENGINEER, <https://www.ose.state.nm.us/HU/index.php> (last visited Oct. 22, 2022) (publicizing purpose of State Engineer Hearing Unit). If the mediation the OSE offers does not solve the dispute, a district court judge oversees and rules on the dispute. Bryan, *supra* note 46, at 488 (reviewing role of state district court in New Mexico water rights adjudications).

54. ARIZ. REV. STAT. § 45-153 (2019) (codifying criteria for water right appropriation approval or rejection).

55. *Id.* (explaining Arizona water administrative process); *see also ADWR, supra* note 53 (administering water resources in Arizona).

56. ARIZ. REV. STAT. § 45-153(A) (limiting water right appropriations).



Arizona has varied in its water rights recording process, leading to a diaspora of water rights records.<sup>57</sup> Historically, the state did not always mandate that claimants apply for a certificate of water rights.<sup>58</sup> Consequently, some appropriations may be complete but lack certification, leaving no way to determine from the ADWR's records whether the water right is valid.<sup>59</sup> Further, where the executive branch has recorded a valid water right, petitioners may challenge it in subsequent judicial adjudications after appealing an ADWR final decision to a state administrative law judge.<sup>60</sup> The ADWR keeps records of applications, permits, and statements of claims; yet, the law does not discuss when and how the ADWR updates the registry when the appropriate administrative body issues a final decree.<sup>61</sup>

Arizona law creates a "water superintendent" position in each water district to protect and administer water rights properly.<sup>62</sup> While the ADWR has seven divisions to aid in water administration, the agency has not appointed any "water superintendents" since the legislature created the position through statute.<sup>63</sup> Arizona's robust statutory scheme creates a framework for granting and adjudicating rights; however, the state's administration — or lack thereof — of

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57. Bryan, *supra* note 46, at 465 (examining Arizona's water administration system). This variance is primarily due to Arizona's heavy reliance on the Colorado River. *Id.* (attributing less efficient system to Colorado River).

58. See Feller, *supra* note 45, at 416 (blaming lack of organization on poor record keeping); see also Bryan, *supra* note 46, at 465 (recounting complexities of Arizona water law system).

59. See Feller, *supra* note 45, at 416 (evaluating inconsistencies in Arizona recording system).

60. See Bryan, *supra* note 46, at 468-69 (reviewing process for challenging water right). The Arizona Code Provision that controls water rights adjudications provides:

One or more water users on a river system and source, the water rights of which have not been previously adjudicated . . . and administered by the director of water resources, or this state . . . may file a petition to have determined in a general adjudication the nature, extent, and relative priority of the water rights of all persons in the river system and source.

ARIZ. REV. STAT. ANN. § 45-252(A) (2021) (directing claimants of water rights to correct administrator). For further discussion on the state judiciary's role in water adjudications, see *infra* notes 77-99 and accompanying text.

61. See Bryan, *supra* note 46, at 468-69 (questioning records keeping system).

62. *Id.* at 469 (observing statutory creation of superintendent); see also ARIZ. REV. STAT. ANN. § 45-109 (1980) (establishing water superintendent position).

63. Bryan, *supra* note 46, at 469 (noting lack of appointment to position); see also *Contact Us*, ARIZ. DEP'T OF WATER RES., <https://new.azwater.gov/adwr/contact-us> (last visited May 6, 2022) (omitting water superintendents from list of offices within Department of Water Resources).

the framework contributes to confusion and disordered water rights.<sup>64</sup>

In 1907, the New Mexico state legislature “assigned [state] courts the task of adjudicating New Mexico’s water rights” and created the Office of the State Engineer (OSE), which has “general supervision over the measurement, appropriation and distribution of New Mexico’s water.”<sup>65</sup> The delegating statute requires an applicant to state the amount of water in the appropriation and any other data necessary to show the practicability of the water use.<sup>66</sup> The state engineer then carries out the allocation according to the statutory authorization.<sup>67</sup> Like Arizona’s administration, there is no provision in New Mexico’s water statute that mandates the OSE to record and update final decrees.<sup>68</sup> In contrast to Arizona, however, the OSE Water Resource Allocation Program (WRAP) actively enforces and oversees conditions or restrictions on water rights.<sup>69</sup> While the OSE has strong internal practices and positions, its office has insufficient resources to carry out all responsibilities of the office effectively.<sup>70</sup> This has led to a significant backlog of water rights applications.<sup>71</sup>

Other western states have similar roles and approaches to the administration and adjudication of water rights.<sup>72</sup> These commonalities make room for overlapping issues among states.<sup>73</sup> The disconnect between adjudication and agency administration of water rights can cause confusion about evidentiary requirements and who

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64. See generally Feller, *supra* note 45, at 440 (critiquing Arizona’s surface water rights administration); Bryan, *supra* note 46, at 462 n.4 (reviewing confusion of former method of record keeping).

65. Bryan, *supra* note 46, at 487 (quoting *Brief History of the Office of the State Engineer*, OFF. OF THE STATE ENG’R, <https://www.ose.state.nm.us/ProgramSupport/seHistory.php> (last visited Aug. 15, 2022)) (reviewing history of New Mexico administration system). Due to New Mexico’s reliance on interstate waterways, the State Engineer is also the Secretary of the Interstate Stream Commission, which negotiates with other states to settle interstate stream disputes. *Interstate Stream Commission*, OFF. OF THE STATE ENG’R, <https://www.ose.state.nm.us/ISC/index.php> (last visited Jan. 18, 2022) (delegating power to Interstate Stream Commission).

66. N.M. STAT. ANN. § 72-5-1 (2020) (administrating water appropriation).

67. *Id.* (laying out process for acquiring water appropriation permit).

68. Bryan, *supra* note 46, at 490 (noting lack of recording guidance).

69. *Water Resource Allocation Program (WRAP)*, OFF. OF THE STATE ENG’R, <https://www.ose.state.nm.us/WR/> (last visited Jan. 19, 2022) (outlining duties of Water Resource Allocation Program).

70. Bryan, *supra* note 46, at 489 (critiquing state funding of OSE).

71. *Id.* at 489 (attributing backlog to lack of funding).

72. See *id.* at 507 (condensing common themes of state water administrations).

73. See *id.* (assessing functionality of current appropriation system).

ultimately makes decisions about water rights.<sup>74</sup> Further, the strict adherence to antiquated water statutes shields legislators and administrators from dealing with a changing climate and shrinking water supply.<sup>75</sup> Most importantly, given the decentralized nature of the adjudications and agencies — even in resolving interstate disputes — it is difficult to evaluate the amount of water left in the region for allocation and the amount of water the doctrine wastes.<sup>76</sup>

#### B. Water Adjudications and the State Judiciary's Control Over Water Rights

Each western state — whether through statute, custom, or constitution — has developed an adjudicatory system for allocating water rights.<sup>77</sup> Despite the federal government's power to take control of water adjudication, Congress allows states to adjudicate water rights even when the United States is a party to the adjudication.<sup>78</sup> This section will examine where the adjudicatory power lies in different states and the various aspects of state water adjudication as they relate to branches of government.<sup>79</sup> The different adjudicatory frameworks function on a continuum, with the power distributed between the judicial and executive branches.<sup>80</sup> Further, this section will review the federal government's increasingly narrow role in all aspects of western water.<sup>81</sup>

A major policy dispute around water claims involved whether adjudication should lie in the hands of the judiciary or the execu-

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74. *See id.* at 509 (predicting inconsistency among water administration and adjudications). For further discussion on the role of decision-making in water rights adjudications, see *infra* notes 77-99 and accompanying text.

75. *See* Cassuto & Sampaio, *supra* note 15, at 386 (facing static water appropriation doctrine issues).

76. *Accord id.* at 385-86 (positing that majority of water in West was appropriated long ago); Bryan, *supra* note 46, at 509 (examining inconsistencies in administration across jurisdictions); Bell & Johnson, *supra* note 1, at 6 (reiterating criticisms of prior appropriation doctrine).

77. 2 WELLS A. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 444-45 (1974) (listing adoption of specialized adjudicatory system).

78. *Compare* U.S. CONST. art. VI, § 2, cl. 2 (establishing federal government's authority to make supreme laws of land), *and* U.S. CONST. art. IV, § 3 (giving Congress power to make laws concerning property rights), *with* McCarran Amendment, 43 U.S.C. § 666 (1952) (allowing United States to be enjoined in state water right adjudications).

79. For a discussion of the state judiciary's role in water adjudications, see *infra* notes 80-103 and accompanying text.

80. *See* Thorson et al., *supra* note 18, at 408 (naming most frequent parties in water adjudication).

81. For a discussion on the federal government's respect for the prior appropriation doctrine, see *infra* notes 104-45 and accompanying text.

tive.<sup>82</sup> States have adopted different mechanisms to adjudicate water rights.<sup>83</sup> Some states place the adjudication system entirely within the judiciary or the executive.<sup>84</sup> Most states, however, distribute power between the two branches with a preference toward a more powerful administrative authority.<sup>85</sup> Each framework serves as an attempt by state legislatures to remedy deficiencies that the decentralization of water rights adjudication caused.<sup>86</sup>

In 1890, Wyoming chose to have a fully administratively run allocation system subject to limited judicial review.<sup>87</sup> At the time of the system's adoption, many citizens saw the scheme as unconstitutionally aggrandizing executive branch power.<sup>88</sup> Despite protests, the Wyoming Supreme Court upheld the scheme by viewing the adjudication aspect of water administration as a small part of the larger system of water management, which belonged in the executive branch.<sup>89</sup> One commentator has called this opinion "nonsense" because the determination of factual disputes, such as property ownership, is historically a judicial function.<sup>90</sup> Today, Wyoming continues this statutory scheme with the State Board of Control (BOC), a quasi-judicial body which adjudicates water rights, oversees water distribution, and reviews water rights changes.<sup>91</sup> Once the BOC speaks on the owner of a water right, the executive action bypasses judicial review and the order is "conclusive as to all prior appropriations, and the rights of all existing claimants upon the stream or other body of water lawfully embraced in the adjudication . . . ." <sup>92</sup>

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82. See Thorson et al., *supra* note 18, at 408 (naming most frequent parties in water adjudication).

83. *Id.* (illustrating different water adjudication frameworks).

84. *Id.* (acknowledging extreme spectrum of state water adjudication systems).

85. *Id.* (summarizing different water adjudication frameworks).

86. A. Dan Tarlock, *The Illusion of Finality in General Water Rights Adjudications*, 25 IDAHO L. REV. 271, 281 (1988) (understanding origins of adjudication systems).

87. *Id.* at 277 (examining Wyoming's adjudication system). The principal administrative office in Wyoming is the State Engineer's Office (SEO). Bryan, *supra* note 46, at 503 (naming relevant office).

88. See Tarlock, *supra* note 86, at 277 (invoking separation of powers argument against statutory scheme).

89. See *generally id.* (citing decision to uphold administrative system).

90. See *id.* at 278 (calling Wyoming Supreme Court's reasoning nonsense).

91. WYO. STAT. ANN. (1977) § 41-4-201 (creating State BOC); *Board of Control*, WYO. STATE ENG'R OFF., <https://sites.google.com/a/wyo.gov/seo/agency-divisions/board-of-control> (last visited Feb. 2, 2022) (detailing State BOC's role). For a discussion on other state adjudication and administration systems, see *supra* notes 48-72 and accompanying text.

92. WYO. STAT. ANN. § 41-4-326 (2014) (ordering BOC decisions conclusive of water rights).

On the other end of the spectrum, Colorado created a special statutory judicial procedure in which courts determine *all* water rights.<sup>93</sup> This authority extends not only to determining existing water rights, but also to “new water rights and changes of use.”<sup>94</sup> The judiciary’s control continues today with nominal input from the State Engineer, the state’s administrative agency.<sup>95</sup> The State Engineer, however, mainly provides the adjudicating court with reports and facts regarding the water right application and issues preliminary water rights determinations.<sup>96</sup> Yet, the State Engineer leaves final decision-making to the courts.<sup>97</sup>

Most state water adjudication systems have fallen somewhere in the middle of these two extremes with a preference towards a more powerful administrative authority.<sup>98</sup> Through the years, many users have objected to administrative aspects of adjudications as violations of due process.<sup>99</sup> States have responded to these objections by amending adjudicatory statutes to comply with separation of powers and due process.<sup>100</sup>

As states have worked to perfect and amend each adjudicatory process, adjudication is simply one aspect of a water claim.<sup>101</sup> The judicial and executive branches within each state work together to maintain the appropriative system while respecting separation of powers.<sup>102</sup> Further, the gaps in recordkeeping and communication between different state water rights and federal water rights complicate the water rights conversation.<sup>103</sup>

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93. See Tarlock, *supra* note 86, at 276 (creating special statutory judicial procedure for determining water rights).

94. See Bryan, *supra* note 46, at 472-73 (identifying all areas of water adjudications Colorado judiciary has control over).

95. *Id.* at 473-74 (noting minimal input from State Engineer).

96. *Id.* (identifying where State Engineer defers to court).

97. *Id.* (describing State Engineer’s role).

98. See Tarlock, *supra* note 86, at 278 (observing stratification among states’ adjudicatory systems).

99. See *id.* (citing challenges to extreme adjudicatory power in determining water rights).

100. See, e.g., *id.* (noting new adjudication statutes); IDAHO CODE ANN. §§ 42-1404 to -1428 (1986) (creating specialized adjudication).

101. Tarlock, *supra* note 86, at 271 (remembering different aspects of adjudication system).

102. See Bryan, *supra* note 46, at 507-08 (insinuating difficult relationship between judiciary and administrative branch).

103. See Tarlock, *supra* note 86, at 286 (adding federal jurisdiction into equation).

#### IV. THE FEDERAL GOVERNMENT'S ROLE IN WESTERN WATER RIGHTS

The federal government responded to states' codification of the appropriation custom deferentially through the Desert Land Act of 1877 (Act).<sup>104</sup> The Act effectively severed land and water estates in the public domain: "[T]he right to the use of [western states'] waters by the person so conducting the same . . . shall depend upon a bona fide prior appropriation . . ." <sup>105</sup> Prior to the Desert Land Act, the United States Supreme Court recognized the miners' customs as a common law system.<sup>106</sup> After the Act's passage, the Court declared that in passing the Act, Congress intended to empower state governments to administer water rights if the state had chosen not to follow the riparian water right doctrine.<sup>107</sup>

The Supreme Court has subsequently elucidated Congress's reasoning for deferral to state law as due to the "legal confusion that would arise if federal water and state water law reigned side by side in the same locality."<sup>108</sup> To add to the states' supremacy, Congress ceded any right to sovereign immunity or federal jurisdiction when the United States is a party in a water rights suit.<sup>109</sup> Consequently, state courts reign supreme when adjudicating water disputes.<sup>110</sup> Further, in nearly all national water acts, Congress has made clear its deference to state water law by including "savings clauses" in most federally legislated water actions that limit an act from interfering with appropriative laws.<sup>111</sup>

Despite the federal government's widely deferential stance on the prior appropriation doctrine, there are aspects of western water

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104. Desert Land Act of 1877, 43 U.S.C. § 321 (1877) (codifying prior appropriation custom).

105. *Id.* (prioritizing first appropriator as rightful property owner). The Act only applied to desert lands. *Id.* (stipulating application to desert lands).

106. *Jennison v. Kirk*, 98 U.S. 453, 461 (1878) (holding owner of water has first right to enjoyment of right).

107. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 162 (1935) (recognizing will of Congress).

108. *California v. United States*, 438 U.S. 645, 668-69 (1978) (predicting confusion between state and federal laws).

109. For a discussion of the McCarran Amendment and its effect on states' adjudicatory power of water rights, see *infra* notes 130-138 and accompanying text.

110. *California*, 438 U.S. at 668-69 (empowering states to decide water adjudications).

111. *Bell & Johnson*, *supra* note 1, at 25 (expounding on savings clause). In the Reclamation Act of 1902, for example, the relevant saving clause reads: "Nothing in this Act shall be construed as affecting . . . the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder . . ." 43 U.S.C. § 383 (1988) (preserving states' rights to assign water rights).

allocation that interfere with substantial federal interests and laws.<sup>112</sup> For these reasons, aspects of western water allocation are subject to federal intervention.<sup>113</sup> Today, the federal government manages over 245 million acres of land in the United States.<sup>114</sup> Based on its location, a large percentage of this land obtains water rights pursuant to the prior appropriation doctrine.<sup>115</sup> Because states developed the prior appropriation doctrine without regard to federally owned land in the region, the federal government's use of and various claims to water have caused controversy.<sup>116</sup>

The Supreme Court first addressed this controversy in *Winters v. United States*.<sup>117</sup> In this case, the United States sued numerous settlers on behalf of the Fort Belknap Indian Reservation.<sup>118</sup> While the treaty that created the reservation retained the land for tribal members, it did not speak to the ownership of water in or around the land.<sup>119</sup> As a result, when settlers arrived on the land surrounding the reservation, many usurped the water that members of the reservation relied on.<sup>120</sup> The Court held: "The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. That the Government did reserve them we have decided, and for a use which would be necessarily continued through years."<sup>121</sup> This holding

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112. Bell & Johnson, *supra* note 1, at 26 (recognizing effect of federal or state water law).

113. Sharon Megdal, Joanna Nadeau & Tiffany Tom, *The Forgotten Sector: Arizona Water Law and the Environment*, 1 ARIZ. J. ENVTL. L. & POL'Y. 243, 252 (2011) (prioritizing order of deference to federal or state water law).

114. *What We Manage*, BUREAU LAND MGMT., <https://www.blm.gov/about/what-we-manage/national> (last visited Feb. 9, 2022) (noting number of acres Bureau of Land Management oversees).

115. *See, e.g., BLM Arizona*, BUREAU LAND MGMT., <https://www.blm.gov/arizona> (last visited Feb. 9, 2022) (discussing management in Arizona); *BLM Colorado*, BUREAU LAND MGMT., <https://www.blm.gov/colorado> (last visited Feb. 9, 2022) (promoting land management in Colorado); *BLM Oregon/Washington*, BUREAU LAND MGMT., <https://www.blm.gov/oregon-washington> (last visited Feb. 9, 2022) (reviewing land management in Oregon and Washington); *see also* HUTCHINS, *supra* note 1, at 13 (listing states that follow water appropriation doctrine).

116. Harold A. Ranquist, *The Winters Doctrine and How it Grew: Federal Reservation of Rights to the Use of Water*, 1975 BYU L. REV. 639, 646 (1975) (evaluating conflict between federally owned land and state jurisdiction).

117. 207 U.S. 564, 574 (1908) (deciding federal supremacy over water rights).

118. *See Winters v. United States*, 143 F. 740, 745 (9th Cir. 1906) (discussing usurpation of reserved water by settlers).

119. *Winters*, 207 U.S. at 575-76 (observing lack of discussion of water rights in treaty).

120. *Winters*, 143 F. 740 at 745 (noting settlement near reservation and increasing use of water).

121. *Winters*, 207 U.S. at 577 (citations omitted) (holding in favor of federal government's priority).

recognized that when the United States reserved land for any purpose, it implicitly reserved enough water — originating from the inside or outside of the reservation — to fulfill the purposes of that land.<sup>122</sup> Consequently, the United States appropriated a water right by reserving the land.<sup>123</sup>

While *Winters* dealt with the federal government's reservation of tribal lands, the Court extended the principle to any land the federal government reserves for a particular federal purpose, such as a national forest, park, or other federal enclaves.<sup>124</sup> Congress's power to reserve these waters stems from the Commerce Clause of the United States Constitution, which permits federal regulation of navigable streams, and from the Property Clause, which allows federal regulation of federally-owned lands and waters.<sup>125</sup> Despite ample case law reaffirming the federal government's right to reserve water rights, there is no statute on the books preserving this right.<sup>126</sup>

The federal government has, however, relinquished a large portion of the privileges that come with the constitutional clauses and *Winters* doctrine.<sup>127</sup> For example, the judiciary must determine how much water the federal government needs to fulfill the purposes of its land.<sup>128</sup> Originally, federal and state courts had concurrent jurisdiction over water rights disputes in which the United States was a party.<sup>129</sup> In 1952, Congress passed the McCarran Amendment, which in relevant part provides:

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122. Ranquist, *supra* note 116, at 648 (reiterating *Winters* doctrine as applied to non-tribal federal lands). The *Winters* doctrine is the term courts and scholars use to explain the federal government's reservation of water rights. *Id.* at 641 (defining *Winters* doctrine).

123. *Winters*, 207 U.S. at 577 (reserving water right for federal government).

124. *Arizona v. California*, 373 U.S. 546, 601 (1963) (holding federal government has water rights); *see also* *Cappaert v. United States*, 426 U.S. 128, 141 (1976) (affirming federal government right to regulate waters on federal lands).

125. *Cappaert*, 426 U.S. at 138 (identifying source of federal power to regulate water rights); *see also* U.S. CONST. art. I, § 8, cl. 3 (allowing federal government to regulate interstate commerce); U.S. CONST. art. IV, § 3, cl. 2 (protecting Congress's right to make regulations regarding territory belonging to federal government).

126. Ranquist, *supra* note 116, at 649-52 (noticing lack of congressional action).

127. *See* 43 U.S.C. § 666 (allowing parties to join federal government as party in state court water disputes).

128. *See* Ranquist, *supra* note 116, at 695 (observing lack of legal standards or prior determinations for amount of water reserved by federal government).

129. 28 U.S.C. § 1345 (providing federal jurisdiction over state water claims); *see also* *Colo. River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 809 (1976) (allowing concurrent federal and state jurisdiction over water rights).



Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law . . . .<sup>130</sup>

With this legislation, among other things, Congress intended to allow courts to determine federal and state rights contemporaneously.<sup>131</sup> Congress remained cognizant of the dangers of having the federal government determine its own water rights.<sup>132</sup> Accounting for Congress's intent, the Supreme Court in *Colorado River Water Conservation District v. United States*<sup>133</sup> observed that the McCarran Amendment did not diminish federal jurisdiction over federal water rights uses.<sup>134</sup> The Court decided to honor Congress's concerns about having separate fora for water rights determinations and justified barring removal of these claims to federal court.<sup>135</sup> While the federal government has the power to amend the terms of the McCarran Amendment, it has taken no action to override *Colorado River's* holding in the forty-six years since the decision.<sup>136</sup> This inaction potentially affirms the Supreme Court's interpretation of Congress's intent in passing the McCarran Amendment.<sup>137</sup> Consequently, the large tracts of federally owned lands that would otherwise be under federal jurisdiction — and thus subject to potentially centralized federal regulations — are now at the mercy of various state courts.<sup>138</sup>

Finally, when discussing the federal government's abdication of control over water rights, it is important to note that states have

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130. 43 U.S.C. § 666 (waiving sovereign immunity over water rights suits).

131. See *Colo. River Water Conservation Dist.*, 424 U.S. at 808 (reporting on legislative intent of McCarran Amendment).

132. Thomas H. Pacheco, *How Big Is Big? The Scope of Water Rights Suits Under the McCarran Amendment*, 15 *ECOLOGY L.Q.* 627, 632 (1988) (reviewing legislative history on jurisdictional aspects of McCarran Amendment).

133. 424 U.S. 800, 803 (1976) (deciding jurisdictional question following McCarran Amendment).

134. *Id.* at 809 (maintaining federal jurisdiction over federal water rights suits).

135. *Id.* at 818-19 (dismissing to avoid piecemeal of adjudicated water rights).

136. See Matthew R. Christiansen & William N. Eskridge, Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 *TEX. L. REV.* 1317, 1317 (2014) (confirming Congress's authority to override Supreme Court statutory interpretation).

137. See *id.* at 1322 (explaining effect of congressional override).

138. See Pacheco, *supra* note 132, at 633 (recounting jurisdictional shift due to McCarran Amendment).

negotiated agreements among themselves to divide the use of water in interstate waterways.<sup>139</sup> This interstate waterway management would generally be a federal function.<sup>140</sup> States negotiated most of the agreements without the help of the federal government, then turned to Congress to ratify the documents.<sup>141</sup> This is another federal interest to which the federal government has deferred to state's decisions.<sup>142</sup>

Not only has the federal government deferred to the states in water rights administration, but it has effectively ceded any adjudicatory power over federal water claims in the West.<sup>143</sup> While the Supreme Court has rationalized this as avoiding "piecemeal adjudications," it fails to consider the piecemeal that already exists among and between different states.<sup>144</sup> It seems that the Supreme Court's concern about legal confusion has already occurred without any attention from state or federal regulatory authorities.<sup>145</sup>

#### V. MORE THAN JUST A MUDDLED CONCEPT: COLLABORATION BETWEEN STATES TO AMEND THE SHORTCOMINGS OF THE PRIOR APPROPRIATION DOCTRINE

The prior appropriation doctrine itself is far from perfect.<sup>146</sup> While states have developed and regulated the venerable doctrine, there are aspects of the practice that have failed to change along-

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139. See, e.g., Canadian River Compact, Pub. L. No. 82-345, 66 Stat. 74 (1952) (providing New Mexico with unrestricted use of waters above Conchas Dam); Snake River Compact, Pub. L. No. 81-464, 64 Stat. 29 (1950) (agreeing to apportionment of river between Idaho and Wyoming); Rio Grande Compact, Pub. L. No. 76-96, 53 Stat. 785 (1939) (consenting to apportionment of Rio Grande).

140. See, e.g., Yellowstone River Compact, Pub. L. No. 82-231, 65 Stat. 663 (1951) (consenting to apportionment of Yellowstone River); see also U.S. CONST. art. I, § 8, cl. 3 (enumerating interstate commerce as under oversight of federal government).

141. See, e.g., Sabine River Compact, Pub. L. No. 83-578, 68 Stat. 690 (1954) (amended 1962) (ratifying agreement between Louisiana and Texas).

142. See Bell & Johnson, *supra* note 1, at 26-29 (reviewing state actions that implicate federal interests).

143. See, e.g., Ranquist, *supra* note 116, at 697 (concluding that United States must submit to jurisdiction of state courts for adjudication of its water rights); *Colo. River Water Conservation Dist.*, 424 U.S. at 820 (giving nearly all jurisdiction to state courts).

144. See Pacheco, *supra* note 132, at 635 (viewing state adjudications skeptically).

145. See *California*, 438 U.S. at 668 (separating federal and state administration of appropriative water rights).

146. See generally Klein, *supra* note 16, at 351 (rebuking strict adherence to aspects of prior appropriation doctrine); Megdal et al., *supra* note 113, at 246 (explaining Arizona's administration does not consider needs of environment).

side regional developments.<sup>147</sup> Over-appropriation and its aftereffects account for the biggest risks associated with the doctrine.<sup>148</sup> Further, current ecological phenomena, such as climate change and population growth, worsen the threats that over-appropriation creates.<sup>149</sup> Because of the localized function of the prior appropriation doctrine, states must fend off and deal with these increasing threats on their own, without substantial aid or organization from the federal government.<sup>150</sup>

States recognize their common goals and have collaborated to work towards achieving them.<sup>151</sup> The Western States Water Council (WSWC) assists states in coordinating with one another to respond to the limited water resources and challenges federal regulations pose to effective allocation.<sup>152</sup> The WSWC's mission is "[t]o ensure that the West has an adequate, secure, and sustainable supply of water of suitable quality to meet its diverse economic and environmental needs now and in the future."<sup>153</sup> While working towards collaboration among western states, the WSWC articulates a preference for state governance over federal regulations assisting in water management.<sup>154</sup>

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147. See Hall, *supra* note 38, at 31 (recognizing need for change to coincide with changing environment). But see Norman K. Johnson & Charles T. DuMars, *A Survey of the Evolution of Western Water Law in Response to Changing Economic and Public Interest Demands*, 29 NAT. RES. J. 347, 387 (1989) (heralding developments of prior appropriation doctrine).

148. See Lawrence J. MacDonnell, *Out-of-Priority Water Use: Adding Flexibility to the Water Appropriation System*, 83 NEB. L. REV. 485, 486 (2004) (assessing lack of unappropriated water); see also Klein, *supra* note 16, at 348 (explaining diversion requirement).

149. See generally Lawrence J. MacDonnell, *Prior Appropriation: A Reassessment*, 18 U. DENV. WATER L. REV. 228, 233-34 (2015) (recounting loss of water due to population growth); Cassuto & Sampaio, *supra* note 15, at 386 (predicting issues with prior appropriation doctrine as climate change worsens).

150. See, e.g., Western States Water Council, *WaDE*, W. DATA EXCH. PROGRAM, <https://westernstateswater.org/wade/> (last visited Feb. 15, 2022) [hereinafter *WaDE*] (introducing Water Data Exchange Program); WSWC Rules of Organization, *What is the Western States Water Council?*, W. STATES WATER COUNCIL (July 10, 2015), <https://westernstateswater.org/about> [hereinafter *Western States Water Council*] (discussing hardships of individual state water administration without cooperation of other states).

151. See *Western States Water Council*, *supra* note 150 (defining WSWC).

152. See *id.* (promulgating goals of WSWC). Eighteen western states are members of the Western States Water Council. *Council Members*, W. STATES WATER COUNCIL, <https://westernstateswater.org/members/> (last visited Feb. 15, 2022) (listing member states).

153. Western States Water Council, *A Vision on Water*, W. STATES WATER COUNCIL, [https://westernstateswater.org/wp-content/uploads/2019/01/Vision-on-Water\\_2018Oct26.pdf](https://westernstateswater.org/wp-content/uploads/2019/01/Vision-on-Water_2018Oct26.pdf) (last visited Feb. 23, 2022) (publishing mission statement).

154. See *Western States Water Council*, *supra* note 150 (criticizing federal encroachment on water planning and policy).

The federal government has responded to the WSWC by creating the Western States Federal Agency Support Team (WestFAST) to help facilitate collaborative partnerships between state and federal agencies relating to water management responsibilities in the West.<sup>155</sup> WestFAST has assisted state agencies by sharing information among federal agencies and highlighting and publicizing agencies' water activities.<sup>156</sup> Most importantly, WestFAST works with the WSWC to improve resolutions of federal water rights disputes and supports WSWC in meeting its priorities.<sup>157</sup>

One of the most innovative projects the WSWC has taken on is the creation of the Water Data Exchange Program (WaDE).<sup>158</sup> The need for greater access to information from state water agencies prompted a study to estimate the amount of water left available for appropriation.<sup>159</sup> The results of the study revealed difficulties in measuring and adjusting different state metrics of available water data and translating them to a common metric.<sup>160</sup> In response, the WSWC initiated WaDE to standardize water data among states and allow universal access to the data.<sup>161</sup> The WSWC reviewed the data in WaDE to determine how to use it to create a more collaborative water system and allow comparable, regional analyses of water availability and use across state boundaries.<sup>162</sup> As the WSWC foreshadowed, untracked consumptive use and return flows created several data gaps among and between states.<sup>163</sup> WaDE's results led the WSWC to publish several recommendations to facilitate better communication between states.<sup>164</sup> These recommendations include ex-

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155. *Western States Federal Agency Support Team: What We Do*, W. STATES WATER COUNCIL, <https://westernstateswater.org/westfast/> (last visited Feb. 22, 2022) [hereinafter *WestFAST*] (advising WSWC on best way to work with federal agencies on water resources issues).

156. *WestFAST, Western States Federal Agency Support 2019-2021 Work Plan*, W. STATES WATER COUNCIL, <https://westernstateswater.org/wp-content/uploads/2019/10/MASTER-WestFAST-Workplan-2019-2021.pdf> (last visited Feb. 22, 2022) (enumerating tasks for WestFAST to aid WSWC).

157. *Id.* (mirroring WSWC's goals).

158. *See* WaDe, *supra* note 150 (introducing Water Data Exchange Program).

159. *About WaDe*, W. DATA EXCH. PROGRAM, <https://www.wade.westernstateswater.org/about-wade/> (last visited Feb. 15, 2022) (relaying impetus for WaDE); *Western States Water Council, supra* note 150 (asking questions about how much water is left).

160. *Id.* (discussing study results).

161. *Id.* (explaining reasons for centralizing data).

162. *A Survey of State Programs*, W. STATES WATER COUNCIL, <https://www.wade.westernstateswater.org/wade-data/> (last visited July 7, 2022) (sharing preliminary findings of WaDE data).

163. *Id.* (displaying survey results).

164. *Id.* (publishing suggestions).

panding water withdrawal and water use reporting programs to include areas of the state that have not been assessed yet, facilitating state-by-state communication regarding water resource management legal processes, and inviting states to review WaDE data for possible inclusion in program efforts.<sup>165</sup>

## VI. REFILLING AND REFRESHING THE PRIOR APPROPRIATION DOCTRINE

One of the original purposes of the prior appropriation doctrine was to ensure that landowners had access to enough water to make use of their otherwise arid and unusable land.<sup>166</sup> As climate change progresses and the population grows, the doctrine has not fulfilled its principal purpose.<sup>167</sup> It is time to amend the prior appropriation doctrine so that it works to preserve water and ensure that all usable resources are put to the best purpose.<sup>168</sup> Because of the variation in administrative practice, metrics in measurement, and communication among states, the federal government is best suited to lead the states in amending the doctrine and overseeing updates to the practices.<sup>169</sup>

### A. Federal Government's Authority to Regulate State Water Rights

It is likely that both the Commerce Clause and the Supremacy Clause of the U.S. Constitution permit federal regulation of non-federal private water rights.<sup>170</sup> Congress's inclusion of savings clauses in all statutory provisions implicating water rights reinforces the presumption — at least by Congress — that the federal govern-

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165. *Id.* (listing recommendations).

166. Johnson & DuMars, *supra* note 147, at 354 (explaining reason for prior appropriation doctrine).

167. *See id.* at 387 (acknowledging changes in prior appropriation doctrine as needs in West have changed); Hall, *supra* note 38, at 26 (arguing current western water law is not sustainable for future and current droughts); Shupe et al., *supra* note 42, at 414 (anticipating limited water supply for expanding municipalities and development in west).

168. For a discussion of recommended updates to the prior appropriation practice, see *infra* notes 170-90 and accompanying text.

169. For a discussion of suggested actions that the federal government can take to revamp the prior appropriation doctrine, see *infra* notes 170-90 and accompanying text.

170. *See* U.S. CONST. art. I, § 8, cl. 3 (stating federal government has power to regulate navigable waters in United States); U.S. CONST. art. VI, cl. 2 (preempting state law with federal law when federal government chooses to do so); *see also* Stoddard v. W. Carolina Reg'l Sewer Auth., 784 F.2d 1200, 1207 (4th Cir. 1986) (invoking power to preempt state laws and constitutions).

ment has the power to regulate non-federally owned waters.<sup>171</sup> The Supreme Court has also insinuated in dicta that Congress has the power to override state water laws with its own law when it explicitly intends to do so.<sup>172</sup> The federal government giving consent to state-to-state agreements regarding water apportionment is further evidence of Congress's jurisdiction over water apportionment.<sup>173</sup>

It is important to note, however, that because the federal government has statutorily recognized the states' role in water appropriation for nearly one hundred and fifty years, Congress would have to repeal a large amount of federal legislation when passing preemptory legislation.<sup>174</sup> Congress could do this by simply stating that the forthcoming legislation preempts all pertinent federal code provisions.<sup>175</sup> The Supremacy Clause of the Constitution allows Congress to take this action so long as the legislation includes a preemption clause.<sup>176</sup>

#### B. Recommended Improvements to Water Rights Administration

State-led efforts to collaborate on water preservation and share information between agencies, such as WaDE, are on the right track.<sup>177</sup> The WaDE portal presents the perfect opportunity for the federal government to preempt, guide, and oversee state collaboration on water appropriation through its already existing

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171. *See generally* Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376, 1251(g) (1982) (saving state allocation ability); Federal Power Act, 16 U.S.C. §§ 791-828, 821 (1982) (preserving state right to administer water).

172. *See, e.g., Stoddard*, 784 F.2d at 1207 (acknowledging Congress's preemption power); *California v. United States*, 438 U.S. 645, 668 n. 21 (1978) (noting Congress overrode state law by implementing exact same method of water use as followed by state); *Ga. Power Co. v. Baker*, 830 F.2d 163, 166 (11th Cir. 1987) (referring to federal government's power to abolish state law riparian rights).

173. *See, e.g., Canadian River Compact*, ch. 306, 66 Stat. 74 (1952) (consenting to compact between party states); *Snake River Compact*, ch. 73, 64 Stat. 29 (1950) (agreeing to apportionment of river between Idaho and Wyoming); *Rio Grande Compact*, ch. 155, 53 Stat. 785 (1939) (consenting to apportionment of Rio Grande).

174. *See, e.g.,* 43 U.S.C. § 321 (1877) (severing land and water rights in prior appropriation states); 43 U.S.C. § 666 (1953) (giving states power to enjoin federal government in water rights suits).

175. *See, e.g.,* 47 U.S.C. § 151 (repealing portions of Radio Act of 1927); *Bamberger Broad Serv. v. Orloff*, 44 F. Supp. 904, 907 (S.D.N.Y. 1942) (holding that provisions of disputed Radio Act of 1927 were repealed by subsequent legislation).

176. U.S. CONST. art. VI, cl. 2 (giving federal government power to override state law through legislation).

177. *See WaDe, supra* note 150 (introducing interstate collaboration for access to water information).

frameworks.<sup>178</sup> As many states' water rights recording systems are inconsistent — even internally — the creation of a federal database will allow states to take stock and re-evaluate the water rights that administrators have allocated.<sup>179</sup> Because current state collaboration efforts are purportedly attempting to work with federal agencies, further cooperation with and oversight by the federal government would be feasible.<sup>180</sup>

The federal government's role in western water oversight should go a step further than simply providing a uniform recording system.<sup>181</sup> Congress should repeal the McCarran Amendment and grant federal courts jurisdiction over state water rights adjudications.<sup>182</sup> As compared to state courts or administrators with an interest in the adjudicatory outcomes, granting federal courts jurisdiction over state water rights allows uniformity among water rights decisions, redeems federal interests in water rights, and provides a more objective court to adjudicate.<sup>183</sup> While federal courts are courts of limited jurisdiction, a uniform federal statute would give state plaintiffs a cause of action enabling them to bring suit in federal court.<sup>184</sup>

As the federal government does sometimes have an interest in water rights adjudications, it will be important for the government to insulate adjudications from the federal employee litigating the

178. See *WestFAST*, *supra* note 155 (providing state governments with guidance on navigating federal water legislation).

179. See Bryan, *supra* note 46, at 465 (acknowledging variation of water rights recording systems in Arizona).

180. See *WestFAST*, *supra* note 155 (explaining tools already in place for federal oversight of state water administration).

181. See *generally id.* (acknowledging suggestion that decision-making should move into federal government's purview); Bryan, *supra* note 46, at 465-503 (reviewing different states' water rights systems).

182. See *generally* 43 U.S.C. § 666 (1953) (waiving sovereign immunity over water rights suits); see also 28 U.S.C. § 1331 (empowering federal courts to hear suits arising under federal law); Scott B. McElroy & Jeff J. Davis, *Revisiting Colorado River Water Conservation District v. United States — There Must Be a Better Way*, 27 ARIZ. ST. L.J. 597, 648 (1995) (arguing McCarran Amendment has not been as beneficial as was anticipated).

183. For a discussion of the federal government's current role in water rights adjudications, see *supra* notes 104-142 and accompanying text. See, e.g., N. William Hines, *History of the 1972 Clean Water Act: The Story Behind How the 1972 Act Became the Capstone on a Decade of Extraordinary Environmental Reform*, 4 GEO. WASH. J. ENERGY & ENVTL. L. 80, 96 (2013) (heralding benefits of national jurisdiction over Clean Water Act); Reed D. Benson, *The Greenback, the Humpback, and the Silverback: How a Third Wave of Federal Water Policy Could Benefit the West*, 93 OR. L. REV. 685, 690 (2015) (valuing federal intervention in western water management).

184. See 28 U.S.C. § 1331 (giving federal courts jurisdiction over all civil actions arising under laws of United States); Benson, *supra* note 183, at 714 (listing problems that can only be solved with federal legislation).

federal government's water rights.<sup>185</sup> The adjudication and party litigation will ostensibly take place within the U.S. Department of the Interior.<sup>186</sup> To ensure that there are no conflicting interests, the Bureau of Land Management can carry out adjudication, while litigation on behalf of the parties would depend on the party involved.<sup>187</sup>

Given the West's dwindling water supply, the United States must know the future amount of available water and the states must work together to determine how to conserve water and ensure its equitable apportionment.<sup>188</sup> To do this, proactive collaboration across state governments is crucial.<sup>189</sup> Using the federal government as a watchdog and tool to help gauge and standardize the measurements across state administrations will help achieve this goal with time to spare.<sup>190</sup>

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185. See generally *FTC v. Cement Institute*, 333 U.S. 683, 726-27 (1948) (holding administrative agency's combination of functions constitutional so long as there is no prejudice).

186. See Reclamation Act of 1902, Pub. L. No. 66-212, ch. 191, § 2, 41 Stat. 605 (1902) (delegating exchanges of federal lands to Secretary of Interior).

187. Compare Federal Land Policy and Management Act of 1976, § 206(a)-(c), Pub. L. No. 94-579, 90 Stat. 2743 (1976) (concerning Secretary of Interior with exchanges of lands and interests), with National Wildlife Refuge System Improvement Act, Pub. L. No. 105-57, 111 Stat. 1252 (1997) (instructing Fish and Wildlife Service to administer national wildlife refuges), and 25 U.S.C. § 2 (1946) (giving Commissioner of Indian Affairs power to manage all matters arising out of Indian relations).

188. See Brookshire et al., *supra* note 7, at 874 (publicizing water scarcity).

189. For a discussion of the need for state collaboration regarding water allocation, see *supra* notes 146-52 and accompanying text.

190. For a discussion of how the federal government can aid in oversight of interstate collaboration on water allocation, see *supra* notes 177-89 and accompanying text.

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