

Scholarly Commons @ UNLV Boyd Law

Scholarly Works

Faculty Scholarship

2023

Fighting for Water Equity in the West: Whose Water Is It Anyway?

Joseph Regalia

Follow this and additional works at: <https://scholars.law.unlv.edu/facpub>



Part of the **Water Law Commons**

This Article is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.

negotiations to resolve this water dispute.⁴ He dispatched Arizona's National Guard to halt the dam's construction. The incursion started as a six-man squadron, but when the soldiers confirmed that construction had begun without Arizona's consent, the state's response grew. On Nov. 10, 1934, Moeur declared martial law and dispatched 100 National Guard troops from the 158th Infantry Regiment. Moeur fired off a telegram to President Franklin Roosevelt:

I [] found it necessary to issue a proclamation establishing martial law on the Arizona side of the river at that point and directing the National Guard to use such means as may be necessary to prevent an invasion of the sovereignty and territory of the State of Arizona.⁵

Arizona's Guard requisitioned ferryboats from the town of Parker so that it could patrol the waters—land-locked Arizona didn't keep a naval fleet on standby. For days, the naval force patrolled the waters.⁶

The Arizona Navy was modest. The fleet consisted of the *Nellie T.* and *Julia B.*, steamboats belonging to Nellie T. Bush and her family. Later, Bush would be named the "Admiral of Arizona's Navy" by Moeur.⁷

The Arizona Fleet put up no fight.⁸ Indeed, the boats soon got tangled in cables from the dam's construction. Luckily, the Arizona Navy was a short commission, and the dispute was settled shortly after in court—in Arizona's favor.⁹ Although, construction resumed in early 1935 after Congress approved the project.

The fights over the Colorado River's waters have continued ever since, albeit without as much showboating. As water resources have dried up, states regularly dispute who should get water—especially from shared sources like the Colorado.¹⁰

4. Bob Silbernagel, "Water War in 1934 Halted Dam on the Colorado River," THE ASSOCIATED PRESS (Mar. 11, 2019),

<https://apnews.com/article/b1f1a8422cb64a7f9858e3c8a76c4a50>

5. *Id.*

6. Nadine Arroyo Rodriguez, "Did You Know: Arizona Navy Deployed In 1934," KJZZ, (Sept. 5, 2014, 2:52 PM), <https://kjzz.org/content/11126/did-you-know-arizona-navy-deployed-1934>.

7. *Id.*

8. REISNER, CADILLAC DESERT: THE AMERICAN WEST AND ITS DISAPPEARING WATER 258 (1993).

9. *Id.*

10. Annie Snider, *Shrinking Colorado River hands Biden his first climate brawl*, POLITICO (Feb. 4, 2023, 7:00 AM),



Arizona state senator Nellie T. Bush, husband Joe Bush, and another man, near Parker, Arizona, 1934. Image from the UCLA Charles E. Young Research Library Department of Special Collections, [CC by 4.0](#).

Something the Arizona-Navy dispute and many other historical water fights have in common are the interests the advocates say they are defending. Back in 1934, Governor Moeur said Arizona was fighting to protect “an invasion of the sovereignty and territory of the State of Arizona.”¹¹ This sounds like the battle cry called by Mississippi in a water dispute the U.S. Supreme Court heard in a recent term—in which Mississippi claimed neighboring Tennessee was invading its sovereignty by draining water from a shared resource.¹²

When states fight over resources other than water, that may be true. States can own things, and if one state were to steal resources owned by another, the victim can press its rights as a sovereign—because the state lost something that it owned *as a state*.

But water is different. What Governor Moeur should have said was that he was protecting “an invasion of his citizens’ rights to water, left in trust with him.” Because unlike most other resources, the rights to water remain in a trust—and always have. Our federal and state constitutions embody important limitations on what governments can do, both express and

<https://www.politico.com/news/2023/02/04/colorado-river-biden-climate-change-water-00080990>.

11. Bob Silbernagel, *Water War in 1934 Halted Dam on the Colorado River*, THE ASSOCIATED PRESS, Mar. 11, 2019,

<https://apnews.com/article/b1f1a8422cb64a7f9858e3c8a76c4a50>.

12. See Noah D. Hall & Joseph Regalia, *Interstate Groundwater Law Revisited: Mississippi v. Tennessee*, 34 VA. ENVTL. L.J. 152, 166 (2016).

implied.¹³ And one of these rights is in water, commonly expressed as the public trust doctrine.¹⁴

And this *trust* nature matters. Because the true owner—the beneficiary—has powerful rights to what’s in a trust.¹⁵ The trustee (here, the state) is limited in how it uses what’s in the trust—always governed by the need to serve the beneficiary.¹⁶

Now, disputes over the Colorado River are once again making front-page news in the West (although, hopefully no navies will be involved). Seven Western states, which include some of the fastest-growing in the nation,¹⁷ get some of their water from the Colorado River today. How that water gets used is governed by a complex network of laws that has been evolving for 100 years, known as the Law of the River—an international treaty, two interstate compacts, U.S. Supreme Court decisions, state court rulings, and federal statutes and regulations.¹⁸ Recently, the states in this group missed two federal deadlines to come up with an agreement about how to handle the river’s declining capacity in the critical Colorado River Compact.¹⁹

13. See *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 452–54 (1892) (a foundational Supreme Court case establishing the public trust doctrine and how that doctrine may prevent a legislature from relinquishing its water rights); see also U.S. CONST. art. I, § 9; U.S. CONST. amend. I-X, XIV; NV CONST. art. I, IV; see generally, W. F. Dodd, *Implied Powers and Implied Limitations in Constitutional Law*, 29 YALE L. J. 137 (1919) (detailing the inherent powers and limitations contained within the constitution and how those restrict legislatures from passing certain laws); Jessica Bulman-Pozen & Miriam Seifter, *The Democracy Principle in State Constitutions*, 119 MICH. L. REV. 859 (2021) (detailing, among other things, the structure and limitations of state constitutions and how that affects democracy).

14. See *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 452–54 (1892) (a foundational Supreme Court case establishing the public trust doctrine and how that doctrine may prevent a legislature from relinquishing its water rights).

15. *Id.* see also Kacy Manahan, *The Constitutional Public Trust Doctrine*, 49 ENVTL. L. 263, 264–65 267–70 (2019);

16. See e.g., *Pennsylvania Env’t Def. Found. v. Commonwealth*, 161 A.3d 911, 931–32 (Pa. 2017)

17. Census, *Percent Change in State Population: July 1, 2021 to July 1, 2022* (Dec. 22, 2022), [census.gov/library/visualizations/2022/comm/percent-change-state-population.html](https://www.census.gov/library/visualizations/2022/comm/percent-change-state-population.html)

18. See NORRIS HUNDLEY, JR., *WATER AND THE WEST: THE COLORADO RIVER COMPACT AND THE POLITICS OF WATER IN THE AMERICAN WEST* (2d ed. 2009).

19. Alvin Powell, *Lesson Emerge as 7 Thirsty States War over Colorado River Water*, THE HARVARD GAZETTE: NATIONAL & WORLD AFFAIRS (Feb 14, 2023),

The story of how states have handled the Colorado River since the Arizona-Navy incident isn't all a bad one.

By and large[] what we've seen in the Colorado River Basin over the past twenty years is a good deal of collaboration—a collaborative culture among policymakers—and, as offshoots, a series of incremental measures aimed at adapting the Colorado River Compact and broader Law of the River to the reality of climate change.²⁰

That sounds great, but even this comment highlights the focus on the *states*—the “policymakers”—rather than the people within those states.²¹ What happens when that collaboration falls apart? And what happens when some of those states press interests or rights on their own behalf, rather than on behalf of the citizens?

II. The Public Trust Doctrine Over Water

The public trust doctrine extends through early America, English common law, 13th century Spain, 11th century France, and back to early Roman law.²² The thrust is that water is so fundamental to “all mankind”²³ that everyone should freely enjoy it, like air.²⁴ We would consider it laughable for a state to sell off our rights to air, and the same goes for water. Water, in other words, is a property of the “commons” that no sovereign can take for their own.²⁵

<https://news.harvard.edu/gazette/story/2023/02/colorado-river-crisis-explained/>.

20. Jason Anthony Robison, *Confluence: The Colorado River Compact's Centennial*, 22 Wyo. L. Rev. 11, 18 (2022).

21. *Id.*

22. *See, e.g.*, Gail Osherenko, *New Discourses on Ocean Governance: Understanding Property Rights and the Public Trust*, 21 J. ENV. L. & LITIG. 317, 350 (2006); J. Inst. Protemium, 2.1.1 (T. Sandars trans. 4th ed. 1867); KING JOHN OF ENGLAND, MAGNA CARTA clause 33 (Eng. 1215); SIR MATTHEW HALE, A TREATISE DE JURE MARIS ET BRACHIORUM EJUSDEM (1670); FRANCIS HARGRAVE, A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 1 (T. Wright, 1st ed.1787).

23. J. Inst. Protemium, 2.1.1 (T. Sandars trans. 4th ed. 1867).

24. *See Juliana v. United States*, 217 F. Supp. 3d 1224, 1252 (D. Or. 2016) *motion to certify appeal denied*, No. 6:15-CV-01517-TC, 2017 WL 2483705 (D. Or. June 8, 2017) (discussing the trust theory of the doctrine).

25. *See Hale, supra* note 17; *see also In re Water Use Permit Applications*, 9 P.3d 409 (Haw. 2000) (applying public trust obligations to state agency).

That's where the trust part comes in. At its core, the trust stems from the public having a fundamental interest and accompanying right to water resources that preexists the U.S. Constitution *or any state's constitution*.²⁶ Even the U.S. Supreme Court has supported the force of this fundamental limitation on governments' relationship with water, explaining that "[t]he control of the state for the purposes of the trust can never be lost," except when "promoting the interests of the public," or when privatizing the water will not inflict "any substantial impairment of the public interest in the lands and waters remaining."²⁷

Like any fundamental right held by the People, it's not infringed any time a state impinges on it. Small transgressions aren't always actionable under this trust theory. Instead, it's when governments take steps that threaten important continuing interests in water that affect the *public's* trust interests in a substantial way.²⁸

And like any beneficiary, the public can't sue the trustee when that trustee is doing a good job maintaining the trust. And perhaps that's how we should view much of the Compact's 100-year history: good-faith efforts by the trustees. It's only when a trustee, here a state, has violated its duties substantially that we can enforce our fundamental rights.²⁹ These public

26. See Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 475–78 (1970). ; A. DAN TARLOCK, *LAW OF WATER RIGHTS AND RESOURCES* § 8:4 (2005).

27. See *Ill. Cent. R.R. Co.*, 146 U.S. at 453 (applying limitations on state power).

28. Multiple states have created tests to determine meaningful violations of the public trust doctrine. See *e.g.*, *Kootenai Env't All., Inc. v. Panhandle Yacht Club, Inc.* 671 P.2d 1085, 1092 (Idaho 1983) (adopting a five-part test, from the Supreme Court of Wisconsin, to determine whether the public trust doctrine has been violated in a specific case.). For further case illustrations compare *Arizona Ctr. For L. in Pub. Int. v. Hassell*, 837 P.2d 158, 167 (Ct. App. 1991) (the court using the test established in *Kootenai* held that an Arizona Law that relinquished the state's equal footing interest in all watercourses other than the Colorado violated the Public Trust Doctrine); *with Kelly v. 1250 Oceanside Partners*, 140 P.3d 985, 989–91, 1006–08, 1014 (Haw. 2006) (holding that the County of Hawai'i did not violate its public trust duty when it failed to supervise the construction of a resort that caused runoff pollution in the Kealahakua Bay); *and Kramer v. City of Lake Oswego*, 446 P.3d 1, 19-20 (Or. 2019) (holding that a city's prohibition of non-city residents from swimming in a lake did not violate the public trust doctrine in the Oregon Constitution).

29. *Geer v. Connecticut*, 161 U.S. 519, 534 (1896), *overruled by Hughes v. Oklahoma*, 441 U.S. 322 (1979) ("[I]t is the duty of the legislature to enact such laws as will best preserve the subject of the trust, and secure its beneficial use



Ferry *Nellie*, protecting Colorado River from construction of Parker Dam, near Parker, Arizona, 1934. Image from the UCLA Charles E. Young Research Library Department of Special Collections, [CC by 4.0](#).

fundamental rights to water are baked into any ownership theory states or private parties have. This is much like the principle that rights that come with owning land are qualified by the competing rights of others, like the right to be free from nuisances.³⁰

Some have suggested that rights like those protected by the public trust doctrine are reserved to the states, not the people. These folks have suggested that the public trust doctrine was intended to protect narrow interests that don't extend to a general interest in continued access to water now and in the future—and even if other interests used to be protected, states can curb those protections at will.³¹

in the future to the people of the state.”); *In re Water Use Permit Applications*, 9 P.3d at 453 (“Under the public trust, the state has both the authority and duty to preserve the rights of present and future generations in the waters of the state.”).

30. See Robin Kundis Craig, *Public Trust and Public Necessity Defenses to Takings Liability for Sea Level Rise Responses on the Gulf Coast*, 26 J. LAND USE & ENVTL. L. 395, 407 (2011).

31. See, e.g., Maureen E. Brady, *Defining “Navigability”: Balancing State-Court Flexibility and Private Rights in Waterways*, 36 CARDOZO L. REV. 1415 (2015); see also *Northern Transp. Co. v. City of Chicago*, 99 U.S. 635, 25 L. Ed. 336, 1878 WL 18229 (1878); *Daniels v. Carney*, 148 Ala. 81, 42 So. 452 (1906); *Colberg, Inc. v. State ex rel. Dept. of Public Works*, 67 Cal. 2d 408, 62 Cal. Rptr. 401, 432 P.2d 3 (1967); *Town of Orange v. Resnick*, 94 Conn. 573, 109 A. 864, 10 A.L.R. 1046 (1920); *State ex rel. Wilcox v. T. O. L., Inc.*, 206 So. 2d 69 (Fla. 4th DCA 1968);

But in ratifying the U.S. Constitution, it was the People, not the states, who had the power to reserve rights. After all, to ratify the U.S. Constitution, it is not state legislatures that acted, but people—through ratifying conventions.³² So if you believe that the People held a fundamental right to water, the states only inherited it if the People handed it over (and even then, it's questionable whether the People of any generation can hand over the rights that future citizens hold).

In any event, the historical context surrounding water interests, then and since, confirms that the People reserved water rights to states solely in a trust. History illustrates that the underpinnings of the public trust doctrine derive from the public's transfer of its interests and rights to flowing water, not some subset of a state's rights or a narrow list of interests (that the states get to define).³³ There has always been a set of retained rights held by the People, and that includes public trust rights to water.

Some courts have suggested the public trust comes from owning land underneath water—particularly in early America.³⁴ That storyline has consistently eroded over the last century.³⁵ The public trust doctrine does not rely on states owning certain land.³⁶ Even the U.S. Supreme Court disconnected the public trust from ownership as far back as the late 1800s.³⁷

There are also other historical hints that the public trust protects a wide-ranging public interest in water. In the 1600s, a pivotal text in the evolution

Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n, 57 Fla. 399, 48 So. 643 (1909); Parsons v. E.I. Du Pont De Nemours Powder Co., 198 Mich. 409, 164 N.W. 413 (1917); Macrum v. Hawkins, 261 N.Y. 193, 184 N.E. 817 (1933); Gaither v. Albemarle Hospital, 235 N.C. 431, 70 S.E.2d 680 (1952); Anderson v. Columbia Contract Co., 94 Or. 171, 185 P. 231 (1919).

32. U.S. CONST. art. VII.

33. See J. INST. 2.1.1-4 (discussing the public's right to flowing water). See, e.g., *Nat'l Audubon Soc'y*, 658 P.2d at 709; *Juliana*, 217 F. Supp. 3d at 1224. See, e.g., SAMUEL C. WIEL, *WATER RIGHTS IN THE WESTERN STATES* 10-13 (3d ed. 1911).

34. See, e.g., *Martin v. Waddell's Lessee*, 41 U.S. 367, 410 (1842) (stating that states "hold the absolute right to all their navigable waters and the soils under them").

35. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378-79 (1977) (recognizing that public trust is not necessarily connected to title).

36. *Id.*

37. See *Geer*, 161 U.S. at 519.

of water rights was published, the *Commonwealth of Oceana*.³⁸ This text explains that the public has a far-ranging, fundamental interest in water—and that this is the government’s source of authority over this resource.³⁹ Early Spanish and French law agree.⁴⁰

Public trust principles over water were even incorporated in Article III of the 1783 Peace Treaty between Britain and the United States at the end of the Revolution, when the parties “agreed that the People of the United States shall continue to enjoy unmolested the Right” to access water “on the Coasts, Bays & Creeks of all other of his Britannic Majesty’s Dominions in America”⁴¹

Since the earliest mentions of the public trust doctrine, courts in the U.S. have emphasized the public’s fundamental right to water.⁴² *Illinois Central* is among the most influential public trust case, and in striking down a state’s attempt to impair an important waterway, the Court framed the issue as one of “substantial impairment of the *interest of the public* in the waters.”⁴³ Indeed, the majority uses some form of the phrase “public interest” 16 times.⁴⁴

Some of the confusion around what rights are protected and when states can be held accountable is a matter of evolving threats to water resources. During America’s history, when threats to important current and future water resources were not threatened, the public trust has served a narrow role. After all, the public trust in water isn’t in any particular drop; it’s an interest in the ability to access water resources now and in the future. In Eastern states, for example, there has been little need for the public trust on any grand scale, and the trust has focused mostly on needs like the public’s ability to use water for navigation or fishing.⁴⁵ Although some Western states faced water shortages, we were not facing the continuous and calamitous water resource crisis that climate change has brought on in recent decades.

38. JAMES HARRINGTON, *THE COMMONWEALTH OF OCEANA* 171 (J.G.A. Pocock, 1992).

39. *Id.*

40. See M. MEYER, *WATER IN THE HISPANIC SOUTHWEST* 117-19 (1984); M. BLOCH, *FRENCH RURAL HISTORY* 183 (1966).

41. Definitive Treaty of Peace Between the United States of America and His Britannic Majesty, Gr. Brit.-U.S., art. III, Sept. 30, 1783, 8 Stat. 80.

42. See, e.g., *Ill. Cent. R.R. Co.*, 146 U.S. at 435 (referring to the right at issue the “interest of the public in waters”).

43. *Id.* (emphasis added).

44. *Id.*

45. See *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 446 (1827) (noting the importance of navigation to early America).

That isn't to say some commentators and courts (and states) have rejected the theory that the public has a fundamental right to water.⁴⁶ But the weight of authority and historical evidence supports the public's fundamental right to water.⁴⁷ "The Social Contract theory, which heavily influenced Thomas Jefferson and other Founding Fathers, provides that people possess certain inalienable rights and that governments were established by consent of the governed for the purpose of securing those rights."⁴⁸ Given that the historical record is clear that the state's interests in water came from the public trust originally, and that the weight of authority since has confirmed that source, we should continue to view the state's relationship with water as a limited one akin to protecting other fundamental rights.

Also critical to the trust theory—and another reason to see the states' relationship with water as about more than what a legislature decides to decree—is that a minority group's interests cannot give way to another's interests just because it constitutes a bigger share. A trustee is trustee for all beneficiaries.⁴⁹

The court in *Robinson Twp. v. Commonwealth* sums all this up nicely:⁵⁰ "The concept that certain rights are inherent to mankind, and thus secured rather than bestowed by the Constitution . . . has a long pedigree . . . that goes back at least to the founding of the Republic."⁵¹

With this public trust interest in hand: That we are entering an era when the public's fundamental rights to water are being threatened is almost

46. See, e.g., Henry P. Monaghan, *Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 27–29 (1975); Brady, *supra* note 25 (criticizing the contention that the public trust comes from any constitutional principles).

47. See Michael Bloom & Rachel D. Guthrie, *Internalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxon Vision*, 45 U.C.D. L. Rev 741, 799 (2012).

48. *Juliana v. United States*, 217 F. Supp. 3d 1224, 1260–61 (D. Or. 2016).

49. See Noah Webster, *A Citizen of America* (Oct. 17, 1787), available at <https://teachingamericanhistory.org/document/a-citizen-of-america-an-examination-into-the-leading-principles-of-america/>; Letter from James Madison to George Washington (Oct. 18, 1787), available at <https://founders.archives.gov/documents/Madison/01-09-02-0208> (suggesting that granting monopolies would be a breach of trust and outside Congress' enumerated powers).

50. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 946-50 (Pa. 2013) (plurality opinion).

51. *Id.*

undeniable. Water supplies are dwindling.⁵² As climate change⁵³ and growth puts more strain on resources in the West,⁵⁴ including especially key waterbodies like the Colorado, the public's interests are in play on a grander scale than ever before.

III. The Colorado River and the Law of the River

The Colorado River remains immensely important both within the Colorado River Basin and beyond. Its waters sustain life and development and everything in between.⁵⁵ The Colorado River is a defining feature of the Southwest, providing lifeblood for eleven national parks, sustaining diverse American Indian tribes and farming communities, and enabling the growth of major metropolitan areas.⁵⁶

Central to the Law of the River is the Colorado River Compact.⁵⁷ The seven states in the Colorado River basin (and the members of the Compact) are Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming.⁵⁸ In the early 1900s, these states struggled to work out how to equitably use the Colorado's resources. So Congress authorized negotiations for the Compact in 1922, citing the region's arid nature and the desire to avoid water disputes between the states. Six states ratified the Compact by 1925, and Arizona joined in 1944. The Compact has been enacted by each of the seven members into their respective state laws.

52. Thomas R. Karl et al., *Global Climate Change Impacts in the United States* 41 (2009) *available at* <https://www.nrc.gov/docs/ML1006/ML100601201.pdf>.

53. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *CLIMATE CHANGE 2007: SYNTHESIS REPORT: SUMMARY FOR POLICYMAKERS* 7-10 (Nov. 2007).

54. Amir Agha Kouchak et al., Comment, *Water and Climate: Recognize Anthropogenic Drought*, 524 *NATURE* 409, 409 (2015).

55. See Bureau of Reclamation, *Colorado River Basin Water Supply and Demand Study*, Interim Report No. 1, at SR-2, SR-10 (2011) (detailing how important the Colorado River Basin to the surrounding basin states).

56. See Southwick Assocs., *Economic Contributions of Outdoor Recreation on the Colorado River and Its Tributaries* 2 (2012).

57. Colorado River Compact, ch. 189, 1923 Colo. Sess. Laws 684 (1923).

58. COLO. RIVER COMPACT, art. II (1922).

Critically, the Compact emphasizes *equity* in regulating the Colorado's waters. Article I in the Compact states that its "primary purpose" is for "equitable division" of the Colorado River's waters.⁵⁹ The federal law that authorized creating the Compact says something similar, stating that Congress empowered the states to enter a compact to "provide[] for an equitable division . . . of the water supply of the Colorado River."⁶⁰



Colorado River Compact signing in 1922. Courtesy of the Bureau of Reclamation.

Also reflecting this equity principle are the opening remarks of then-Secretary of Commerce Herbert Hoover during the law's passing. Hoover served as chair of the interstate commission that negotiated the Compact. He noted that the commission had been established "to consider and if possible to agree upon a compact between the seven states of the Colorado River Basin, providing for an *equitable division* of the water supply of the Colorado River and its tributaries."⁶¹

What that text doesn't explain is: What does *equitable division* mean? Equitable division for the states? Or equitable division for the people in those states? We normally think of the states and their respective citizens as one in the same—after all, the states act through representatives elected by the people. But there are important differences. States may balance many interests, and ultimately, acts through a majority via lawmakers. That is different from representing the interests of *all* citizens in a trust relationship, where a minority group's interest must be given consideration, too.

The difference isn't only academic. And it doesn't require diving into the nuances of democracy and representation. The question is: Do individuals have any rights to enforce some fundamental rights to water resources in the

59. Colo. Rev. Stat. Ann. § 37-61-101.

60. Act of Aug. 19, 1921, Pub. L. No. 67-56, 42 Stat. 171, 172.

61. COLO. RIVER COMM'N, MINUTES AND RECORD OF THE FIRST EIGHTEEN SESSIONS OF THE COLORADO RIVER COMMISSION NEGOTIATING THE COLORADO RIVER COMPACT OF 1922 at 2 (1922), *available at*

<http://www.riversimulator.org/Resources/LawOfTheRiver/MinutesColoradoRiverCompact.pdf>

Colorado River outside the states and their participation in the Compact and the other laws that make up the Law of the River? The history of the public trust we've already waded through suggests that is so.

States themselves often confirm that the public has an overarching and fundamental right to water that can be enforced regardless of how states feel on the matter. Some, for example, have refused citizen-suits seeking to enforce their public trust rights to water.⁶²

The low water mark for states on the public trust right to water is Colorado, which is one of the few states that has not embodied a public trust right to water in its constitution.⁶³ Although the state says that the public has rights to water, its constitution expressly says that those public rights are "subject to" any private or state interests in water.⁶⁴

Colorado has effectively said that even if every drop of water is drained from its waterways—leaving no water for current and future generations—no public interest in water has been infringed. This despite a Colorado that faces increasing water resources threats.⁶⁵ This is also despite state ballot initiatives that have sought to amend the Colorado Constitution to require the state to "adopt and defend a strong public trust doctrine."

But most states, including those in the Colorado Basin, have embodied public trust principles into their constitutions or statutes (although, whether and how those states enforce these interests is another matter).

California makes clear by statute and constitution that the public has powerful, fundamental trust-rights in water: "[C]onservation of [] waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare."⁶⁶ And California has confirmed these broad public trust rights to water in the courts.⁶⁷

62. See Joseph Regalia, *The Public Trust Doctrine and the Climate Crisis: Panacea or Platitude?*, 11 Mich. J. Env'tl. & Admin. L. 1, 15 (2021) (reviewing a large sample of litigation data from cases asserting the public trust doctrine and concluding that "most cases either barely mentioned the [public] doctrine or held that it did not apply to protect the water in dispute").

63. Colo. Art. XVI, § 5.

64. *Id.*

65. JEFF LUKAS ET AL., COLO. WATER CONSERVATION BD., CLIMATE CHANGE IN COLORADO: A SYNTHESIS TO SUPPORT WATER RESOURCES MANAGEMENT AND ADAPTATION 26 (2d ed. Aug. 2014),

https://www.colorado.edu/sites/default/files/2021-09/IWCS_2008_Nov_feature.pdf [<https://perma.cc/56FK-2UAE>].

66. CAL. WATER CODE § 102 (2018).

67. *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971).

Arizona also expressly recognizes “public trust purposes” and “public trust values.”⁶⁸ New Mexico is even broader: “All natural waters flowing in streams and watercourses, whether such be perennial, or torrential, within the limits of the state of New Mexico, belong to the public. . . .”⁶⁹ Utah as well.⁷⁰

Nevada leaves no doubt: “Water belongs to public. . . . The water of all sources of water supply within the boundaries of the State whether above or beneath the surface of the ground, belongs to the public.”⁷¹

IV. Water Equity for All: Regardless of a Compact, a Statute, or What the States Say on the Matter

The water is running out. And nothing in the Compact’s requirements of equity has stopped states from using more water than bodies like the Colorado can maintain.⁷²

If states are neglecting to adequately value the public’s interest in water, particularly the generation-spanning interests in maintaining water resources in the face of climate change and increasing draught threats—when does the public trust step in to demand more?

Even if states like Colorado were right that its citizens have signed over their rights to water long ago, that is not true in neighboring states. The state-interest theory breaks down where it starts: Citizens in California never signed away their rights to water resources, and Colorado can’t retroactively take those rights now.

We are all beneficiaries of the public trust to water. We never gave the U.S. government more than that at the founding, or any time since. So while some states may wish they had those rights, they cannot manufacture them now.

68. Ariz. Rev. Stat. § 37-1101(9). Although note that like many states in the West, Arizona purports to limit those public trust principles to certain uses and waters.

69. N.M. Stat. Ann. § 72-1-1 (2021).

70. Utah Code Ann. § 73-1-1 (West 2010).

71. Nev. Rev. Stat. Ann. § 533.025 (1919)

72. For example, California’s Imperial Valley gets more water from the Colorado River for its agriculture than Arizona and Nevada combined. BUREAU OF RECLAMATION, Lower Colorado Basin Region CY 2023 at 5 (Mar. 10, 2023, 3:10 PM), <https://www.usbr.gov/lc/region/g4000/hourly/forecast.pdf>; see also Dan Charles, *Meet the California Farmers Awash in Colorado River Water, Even in a Drought*, NPR (Oct. 4, 2022, 5:00 PM),

<https://www.npr.org/2022/10/04/1126240060/meet-the-california-farmers-awash-in-colorado-river-water-even-in-a-drought>

Perhaps the threats to water have not often been substantial enough to warrant drastic action to defend the public's trust interests in water. But that is no longer the case.