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

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

under the Judiciary Act and the Constitution.<sup>39</sup> The Fifth Circuit upheld the district court decision,<sup>40</sup> and the Supreme Court subsequently accepted the interstate case via original

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

The majority's decision in *California v. West Virginia* (interpreted as deeming the case too insubstantial to be worthy of the Court's attention) elicited some criticism. For example, one commentator (now Georgetown Law Professor Anne-Marie Carstens) wrote that under a theory of strict construction, the Supreme Court cannot refuse to entertain cases falling within its original jurisdiction if no other forum is available. The Carstens' argument was supported by language in several 19th century opinions. In the 1821 case of *Cohens v. Virginia*, Chief Justice Marshall wrote: "The Court must take jurisdiction if it should... We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given. The one or the other would be treason to the Constitution." In the 1831 case of *Fisher v. Cockerell*, the court wrote: "As this in 1900 0.24 1 in 1900 0.24 1 at 1900 0.24 1 at 1900 0.25 1

Though the position of the Court as a whole has not changed, Justice Thomas reconsidered his position in 2016 for *Nebraska & Oklahoma v. Colorado*. <sup>58</sup> Colorado began allowing recreational use of marijuana in 2014, and in December 2014, two states filed a motion for leave to file a bill of complaint against Colorado. 59 Concerned that the flow of illegal marijuana into their states was increasing as a result of Colorado's law, the two states argued that Colorado's marijuana law was pre-empted by federal law (the Controlled Substances Act). 60 Colorado filed in opposition, asking the Court not to exercise its original jurisdiction because 1) the two states lacked standing, 2) no cause of action existed to enforce any federal preemption, and 3) the U.S. was an indispensable party. 61 The U.S. filed its amicus brief on December 16, 2015, largely siding with Colorado: 1) the case wasn't sufficiently serious, given that Nebraska and Oklahoma retain full authority to prohibit marijuana within their borders; and 2) Colorado wasn't directly injuring the two other states, and without a 'direct' injury, there is no actual 'controversy' between states. 62 In 2016, the Court declined to exercise jurisdiction. 63 Justice Thomas dissented and explicitly stated that he had changed his position on the issue of exclusive jurisdiction.<sup>64</sup> He now believes that federal law does not give the Court discretion to decline inter-state controversies. 65 This view is based on a textual reading of the Judiciary Act of 1789 and arguments made by commentators after Wyoming v. Oklahoma in 1992.66

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

<sup>58</sup> Nebraska v. Colorado, 136 S. Ct. 1034 (2016).

<sup>&</sup>lt;sup>59</sup> *Id.* at 1035.

<sup>&</sup>lt;sup>60</sup> *Id.* at 1036.

<sup>&</sup>lt;sup>61</sup> Brief of Respondent Colorado in Opposition, Nebraska v. Colorado, (U.S. 2016) (No. 220144).

<sup>&</sup>lt;sup>62</sup> Brief for the United States as Amicus Curiae, Nebraska v. Colorado, (U.S. 2016) (No. 220144).

<sup>&</sup>lt;sup>63</sup> Nebraska v. Colorado, 136 S. Ct. 1034.

<sup>&</sup>lt;sup>64</sup> *Id.* (Thomas, J., dissenting).

<sup>&</sup>lt;sup>66</sup> Id. at 1035 0 41 0 0 Tm /TT1 1 .0054 Tc 41q 0. 767.76r54 Tc 41q 0. 767.76r54 Tc 41q 0. 767.76r0 0 0 scq 0.24 0 0 0.24 107.

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

<sup>68</sup> *Id*. at 75.

<sup>&</sup>lt;sup>69</sup> *Id*.

<sup>&</sup>lt;sup>70</sup> *Id*. at 74.

<sup>&</sup>lt;sup>71</sup> *Id*.

<sup>&</sup>lt;sup>72</sup> *Id*. at 75.

<sup>&</sup>lt;sup>73</sup> Id. (citing Louisiana v. Mississippi, 488 U.S. 990 (1988) (White, J., dissenting))

<sup>&</sup>lt;sup>74</sup> Houston v. Thomas, 937 F.2d 247 (5th Cir. 1991).

<sup>&</sup>lt;sup>75</sup> Mississippi v. Louisiana, 506 U.S. 73 (1992).

<sup>&</sup>lt;sup>76</sup> *Id.* at 77.

<sup>77</sup> *Id.* 

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

The case law around these factors remains 2017r

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

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

<sup>&</sup>lt;sup>88</sup> Missouri v. Illinois, 200 U.S. 496 (1906).

<sup>&</sup>lt;sup>89</sup> *Id.* at 344.

<sup>&</sup>lt;sup>90</sup> *Id.* at 249.

<sup>&</sup>lt;sup>91</sup> Georgia v. Tennessee Copper Company, 206 U.S. 230 (1907).

 $<sup>^{92}</sup>$  Id. at 237 ("...the states by their union made the forcible abatement of outside nuisances impossible to each...").

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liable as an operator or arranger under CERCLA, a RCRA imminent and substantial endangerment claim is barred by both RCRA and CERCLA as a challenge to an ongoing response action, and New Mexico's federal common law tort claims have been displaced by passage of the CWA, RCRA, and CERCLA. <sup>106</sup> Third, Colorado contends that the litigation in the district court provides New Mexico with an alternative forum in which it can seek appropriate relief. <sup>107</sup>

If the Supreme Court did exercise its original exclusive jurisdiction, the United States asked the Supreme Court to consider resolving certain legal issues itself (e.g., Colorado's claim that CERCLA 113(h) precludes subject matter jurisdiction for New Mexico's claims) before, or in lieu of, referring the case to a Special Master. In other words, the Court could set a schedule for motions on certain issues before any decision on the merits. The motions to dismiss would then be decided by either the Court or an appointed Special Master. Alternatively, the Court was asked to stay its proceedings and await the resolution of the district court litigation. Granted, for the most part, Colorado's liability cannot be resolved in the district court (unless EPA is held liable and EPA sought contribution from Colorado – in that scenario, the district court could resolve Colorado's CERCLA liability, but not its common law liability). But there is substantial overlap between New Mexico's two complaints, and even New Mexico acknowledges that its

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

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