

A Shallow Opinion: The Supreme Court Missed an Opportunity to Provide Guidance on Interstate Water Compacts in *Texas v. New Mexico*

INTRODUCTION

Climate change is making water a scarcer resource.¹ Warming temperatures, urban growth, and agricultural demand are pushing water resources to their limits.² Increasingly, rival states compete over water allocation from limited sources throughout the country, such as the Rio Grande.³ These fights often extend to the courtroom.

Since drafting the Rio Grande Compact in 1939, Texas, New Mexico, and Colorado have been engaged in a series of legal battles over the allocation of water in the Rio Grande.⁴ In 2013, Texas filed a suit in the U.S. Supreme Court, which has original jurisdiction in interstate disputes, to review the allocation of water in the Rio Grande.⁵ In 2018, the Court granted the United States permission to intervene to protect its distinct federal interest, namely its water treaty with Mexico.⁶

In *Texas v. New Mexico*, the Supreme Court held that the United States may intervene in interstate disputes because the following four specific conditions are met.⁷ First, the United States may intervene when the dispute “inextricably” involves the United States’ contract obligations to states.⁸ Second, the United States must have an integral role with the contract at issue.⁹ Third, when

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1. See Jesse Newman, *The Water Wars that Defined the American West are Heading East*, WALL ST. J. (Dec. 2, 2019), <https://www.wsj.com/articles/the-water-wars-that-defined-the-american-west-are-heading-east-11575315318>.

2. *Id.*

3. *Id.*; Laura Paskus, *As NM’s Water Situation Worsens, SCOTUS Battle Over the Rio Grande Intensifies*, NM POL. REP. (Sept. 27, 2018), <https://nmpoliticalreport.com/2018/09/27/as-nms-water-situation-worsens-scotus-battle-over-the-rio-grande-intensifies-en/>.

4. Edella Schlager et al., *The Costs of Compliance with Interstate Agreements Lessons from Water Compacts in the Western United States*, 42 PUBLIUS 494, 499 (2012).

5. U.S. Const. art. III, § 2, cl. 2; 28 U.S.C. § 1251 (1978).

6. *Texas v. New Mexico*, 138 S. Ct. 954, 956 (2018).

7. *Id.* at 959.

8. *Id.*

9. *Id.*

intervening, the United States must honor international treaty obligations.¹⁰ Fourth, the United States must not seek to initiate or expand issues in litigation.¹¹ While the federal government lacks blanket authority to intervene in cases involving interstate compacts, the Court granted an intervention because of the distinct federal interests in this case.¹²

The holding in *Texas v. New Mexico* raises important questions regarding the future of federal government intervention. May the United States intervene to expand existing interstate litigation? May the United States initiate disputes between states? With climate change increasing the number of interstate water disputes, it is likely that the federal government's obligations to states and Mexico will become more complicated, leading to additional requests to intervene and expand litigation between states in the future. The narrow holding in *Texas v. New Mexico* raises these important questions about the United States' opportunities for litigation, which will likely become more common in the future. The answers to these questions may challenge the United States' authority to enforce its obligations under the water treaty with Mexico and the Downstream Contracts. In a narrowly written opinion, *Texas v. New Mexico* correctly held that the United States may intervene in interstate water disputes for distinct federal interests. Nevertheless, *Texas v. New Mexico* failed to set guiding precedent for many contentious legal questions that will likely become more urgent due to climate change.

I. BACKGROUND ON WATER DISPUTES

The Rio Grande is a critical source of water for the arid states of New Mexico and Texas. As the fourth largest river in the United States, the Rio Grande supports some of the most productive agricultural land and fastest growing cities in the nation.¹³ Seventy-five percent of the river's water is diverted for agriculture.¹⁴ Yet, municipal use is expected to increase by 100 percent and industrial use by 40 percent over the next fifty years.¹⁵

10. *Id.*

11. *Id.* at 960.

12. Ryke Longest, *Opinion Analysis Texas' Compact Claims Against New Mexico over the Rio Grande River Leave Room for United States' Claims as Well*, SCOTUSBLOG (Mar. 5, 2018, 6:43 PM), <https://www.scotusblog.com/2018/03/opinion-analysis-texas-compact-claims-new-mexico-rio-grande-river-leave-room-united-states-claims-well/>.

13. Naveena Sadasivam et al., *In a Warming World, The Fight for Water Can Push Nations Apart—Or Bring Them Together*, TEX. OBSERVER (Aug. 16, 2018), <https://www.texasobserver.org/shallow-waters-introduction/>.

14. INT'L BOUNDARY & WATER COMM'N, *About the Rio Grande*, <https://www.ibwc.gov/CRP/riogrande.htm>.

15. *Id.*

The challenges of relying on this resource are exacerbated in dry years, where the riverbed runs almost completely dry.¹⁶ Drier years present particular challenges for farmers and municipalities. For example, farmers that rely on the Rio Grande for irrigation are unable to make water last throughout the growing season.¹⁷ El Paso, Texas, now uses alternative sources of water because of drought and the dryness of the Rio Grande. El Paso built the world's largest inland desalination plant and will become one of the first cities in the United States to treat sewage water for drinking purposes.¹⁸ Drier conditions not only reduce the amount of water in the Rio Grande but also increase demand from agriculture and municipalities, leading to even more interstate competition over water resources.¹⁹ Less water in the river will increase water disputes between states.²⁰ The decrease in water delivered to Texas has resulted in interstate water disputes in the Bureau of Reclamation and now in the Supreme Court.²¹

The *Texas v. New Mexico* dispute is based on a series of water allocation contracts. In 1906, the United States agreed to deliver 60,000 acre-feet of water annually to Mexico via the Elephant Butte Reservoir (the Reservoir), which lies 105 miles northwest of the Texas state line in New Mexico.²² In 1939, Congress approved the Rio Grande Compact (the Compact), an interstate water compact between Colorado, New Mexico, and Texas.²³ In the Compact, Colorado promised to deliver water to New Mexico annually at the state line, and New Mexico promised to deliver water to Texas at the Elephant Butte Reservoir in New Mexico.²⁴ Additionally, in the Downstream Contracts, the United States agreed to supply water from the Reservoir to downstream water districts with 155,000 irrigable acres in New Mexico and Texas.²⁵ In exchange, the states pay charges in proportion to the percentage of total acres lying in each state, which is about 57 percent for New Mexico and 43 percent for Texas.²⁶

16. See *Earth Matters Climate Change Threatening to Dry Up the Rio Grande River, a Vital Water Supply*, CBS NEWS (Apr. 22, 2019, 8:35 AM), <https://www.cbsnews.com/news/earth-day-2019-climate-change-threatening-to-dry-up-rio-grande-river-vital-water-supply/>.

17. Henry Fountain, *In a Warming West, the Rio Grande is Drying Up*, N.Y. TIMES (May 24, 2018), <https://www.nytimes.com/interactive/2018/05/24/climate/dry-rio-grande.html>.

18. Nadia Kounang, *El Paso to Drink Treated Sewage Water Due to Climate Change Drought*, CNN (Dec. 5, 2018, 2:59 PM), <https://www.cnn.com/2018/11/30/health/water-climate-change-el-paso/index.html>; *Treated Sewage Water to Become Tap Water in El Paso*, AL JAZEERA (Dec. 5, 2018), <https://www.aljazeera.com/news/2018/12/treated-sewage-water-tap-water-el-paso-181205091148665.html>.

19. Brian Clark Howard, *Water Wars Threaten America's Most Endangered Rivers*, NAT'L GEOGRAPHIC (Apr. 12, 2016), <https://www.nationalgeographic.com/news/2016/04/160412-americas-most-endangered-rivers-list-conservation/>.

20. *Id.*

21. Paskus, *supra* note 3.

22. Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, Mex.–U.S., May 21, 1906, 34 Stat. 2953.

23. *Rio Grande Compact*, 53 Stat. 785 (1939).

24. *Id.*

25. *Texas v. New Mexico*, 138 S. Ct. 954, 957 (2018).

26. *Id.*

Even with a water agreement, New Mexico and Texas continue to dispute the current water allocation. In 2013, Texas complained that New Mexico violated the Compact by allowing farmers to drill wells along the Rio Grande in New Mexico below the Reservoir, thus depleting the river's water supply.²⁷ In 2008, Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1, organizations designated to manage the Rio Grande as a water resource for their regions, signed a new agreement with the Bureau of Reclamation to more equitably share water during dry years and prevent further disagreements between Texas and New Mexico.²⁸ However, as water became scarcer, the states no longer saw the allocation of water as favorable. In 2011, New Mexico sued the Bureau of Reclamation, alleging that the plan sent too much water to Texas.²⁹ In 2013, Texas filed suit against New Mexico and Colorado in the Supreme Court, which has original jurisdiction over interstate disputes.³⁰ Texas alleged that it had not received its allotted amount from the Reservoir.³¹ New Mexican farmers allegedly siphoned off water for 90,000 acres of irrigable lands below the Reservoir in New Mexico, preventing Texas from receiving the allotted amount at the border as agreed.³² The Supreme Court heard the United States' motion to intervene in 2018.³³

II. *TEXAS V. NEW MEXICO: A MISSED OPPORTUNITY FOR COURT GUIDANCE*

In *Texas v. New Mexico*, the Supreme Court ruled that the United States may intervene in an interstate dispute because of distinct federal interests.³⁴ The Court built on *Maryland v. Louisiana*, which held that the United States sometimes has the right to intervene in interstate compacts.³⁵ This decision will impact the future of interstate disputes because climate change will likely increase the frequency of such water disputes and the need for the United States to intervene.

A. *Procedural History*

Initiating this dispute, Texas filed suit against New Mexico and Colorado in the Supreme Court in 2013.³⁶ The Supreme Court has original and exclusive

27. Paskus, *supra* note 3.

28. *Id.*; *About*, ELEPHANT BUTTE IRRIGATION DIST., <https://ebid-nm.org/index.php/about-ebid/> (last visited Aug. 18, 2009); *About Us*, EL PASO CTY. WATER IMPROVEMENT DIST. NO. 1, <https://www.epcwidl.org/organization/about-us> (last visited Aug. 18, 2009).

29. Paskus, *supra* note 3.

30. *Texas v. New Mexico*, 138 S. Ct. at 958.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 956.

35. *Id.* at 958; *Maryland v. Louisiana*, 451 U.S. 725, 728 (1981).

36. *Texas v. New Mexico*, 138 S. Ct. at 958.

jurisdiction over all controversies between two or more states.³⁷ The Court assigned a Special Master, an appointed individual who conducts the proceedings much like a judge in a trial court and is commonly used in the Court's original jurisdiction cases.³⁸ The United States moved to intervene in February 2014.³⁹ The United States alleged that because of the water siphoning below the reservoir, it did not have enough water to deliver its water obligation to Mexico as part of their 1906 treaty, similar to Texas's complaint.⁴⁰ The Special Master noted in his report that the United States is not typically a party in interstate disputes and does not even often appear as an amicus but is occasionally allowed to intervene to protect unique sovereign interests.⁴¹ The Court then scheduled oral argument for January 8, 2018 to consider whether the United States may intervene, and the Court ruled on the issue on March 5, 2018.⁴²

B. The Holding

In *Texas v. New Mexico*, the Court held that the United States may intervene because a distinct federal interest existed.⁴³ First, this interest was distinctly federal because of federal involvement in the water contracts.⁴⁴ The Compact only achieved its purpose of equitable water allocation through the Downstream Contracts. Therefore, the United States was an agent of the Compact, and the Compact incorporated the Downstream Contracts by reference.⁴⁵ The federal government thus had a strong interest in the fulfillment of the Compact's terms.⁴⁶ Second, the United States played an integral role in the operation of the Compact.⁴⁷ The United States was responsible for delivery of water as required by the Downstream Contracts.⁴⁸ A state could sue the United States under the Compact for interfering with its operation.⁴⁹ Third, a breach of the Compact could jeopardize the federal government's ability to satisfy its treaty obligations to Mexico.⁵⁰ The United States' ability to deliver water to Mexico was impaired by New Mexico's failure to deliver the specified amount of water to the

37. U.S. Const. art. III, § 2, cl. 2; 28 U.S.C. § 1251 (1978).

38. Longest, *supra* note 12; Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Supreme Court's Original Jurisdiction Cases*, 86 MINN. L. REV. 625, 626–28 (2002).

39. Longest, *supra* note 12.

40. *Texas v. New Mexico*, 138 S. Ct. at 959–60.

41. Longest, *supra* note 12.

42. *Id.*

43. *Texas v. New Mexico*, 138 S. Ct. at 958.

44. *Id.* at 959.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

Reservoir.⁵¹ Therefore, the United States had a strong federal interest in this dispute.

Finally, the Court held that the United States' intervention was proper because it was not initiating or seeking to expand the scope of the litigation.⁵² The United States' claim was essentially the same as Texas's. It alleged that New Mexico was allowing its farmers to siphon off water below the reservoir, preventing the proper allocation of water to be delivered to Texas and Mexico.⁵³

C. Maryland v. Louisiana

Likewise, the Court allowed the United States to intervene in *Maryland v. Louisiana*.⁵⁴ In *Maryland v. Louisiana*, the United States, the Federal Energy Regulatory Commission, several states, and a number of pipeline companies challenged the constitutionality of Louisiana's first-use tax.⁵⁵ This taxed natural gas produced on the Outer Continental Shelf, brought into the state, and sold to out-of-state customers.⁵⁶ Louisiana filed a motion to dismiss, challenging the Court's use of exclusive jurisdiction.⁵⁷ However, the Court held that it was an appropriate use of exclusive jurisdiction for two reasons.⁵⁸ Under 28 U.S.C. § 1251(a), the Court had original jurisdiction because the tax implicated important federalism concerns, namely that it taxed gas extracted from public areas that belong to the people at large to the relative detriment of the other states.⁵⁹ Under § 1251(b)(2), the Court had original jurisdiction because the United States had interests in administering the Outer Continental Shelf area and regulating the production of natural gas on public land.⁶⁰ Therefore, the Court permitted the federal government to participate in compact disputes to defend "distinctively federal interests."⁶¹

D. The Holding's Federalism Implications

The United States' intervention in the *Texas v. New Mexico* dispute raises novel issues of federalism. For example, the United States is now a party to a dispute over a contract to which it was not an original party.⁶² The United States does not own any water rights under the Compact or through the Reservoir.⁶³

51. *Id.*; Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, Mex.-U.S., May 21, 1906, 34 Stat. 2953.

52. *Texas v. New Mexico*, 138 S. Ct. at 960.

53. *Id.*

54. *Maryland v. Louisiana*, 451 U.S. 725, 744 (1981).

55. *Id.* at 728-35.

56. *Id.*

57. *Id.* at 744-45.

58. *Id.*

59. *Id.* at 743.

60. *Id.*; 28 U.S.C. § 1251.

61. *Maryland v. Louisiana*, 451 U.S. at 745 n.21.

62. Transcript of Oral Argument at 34, *Texas v. New Mexico*, 138 S. Ct. 954, 956 (2018).

63. *Id.*

Moreover, New Mexico argued that the United States had already weighed in on the Compact via congressional approval.⁶⁴ However, the Court did not address these issues.

The Court's holding is narrow. The opinion raises no suggestions as to the result in a case with an "absence of any of the considerations" or in the presence of "additional, countervailing consideration,"⁶⁵ meaning cases where the United States raises new issues in its complaint—unlike this case, where its complaint was similar to Texas's complaint. Therefore, the holding raises further questions that will likely arise in similar contexts in the future. It does not address whether the federal government can initiate litigation to compel a state to honor its duties under the Compact, a contract to which the United States is not party. Also, it is unclear if the United States may intervene and expand the scope of the litigation. These unanswered questions are likely to be raised in future litigation as climate change will likely make disputes between states in interstate water compacts more common. The United States' obligations to Mexico will likely be implicated again due to a decrease in water availability. The United States must be able to protect those federal obligations and prevent a misallocation of water along the Rio Grande and similar rivers.

E. Compact Complications Because of Climate Change

The Court's lack of guidance is troubling because climate change will make interstate water disputes even more fraught in the future. Climate change will decrease the amount of water flowing in the Rio Grande.⁶⁶ The mountains that feed the Rio Grande will experience less snow, warmer springs, and higher rates of evaporation.⁶⁷ In the last few decades, the snowpacks in New Mexico and Colorado that feed the Rio Grande have decreased by 25 percent as a result of climate change, thus reducing the water in the Rio Grande.⁶⁸ Climate scientists predict a temperature rise of 5.5 to 9.5 degrees Fahrenheit by 2070 to 2099 in the Southwest.⁶⁹ Longer and warmer agricultural growing seasons will also require more water from the rivers.⁷⁰ All of these factors will reduce water levels in the Rio Grande. Finally, the Rio Grande historically alternates between dry and wet years.⁷¹ As the Rio Grande's dry years become more frequent and intense, the water level in the Reservoir will continue to decrease, as it has since the 1980s.⁷²

64. *Id.*

65. *Texas v. New Mexico*, 138 S. Ct. 954, 960 (2018).

66. Fountain, *supra* note 17.

67. *Id.*

68. Sadasivam, *supra* note 13.

69. Hilda Blanco et al., *Southwest, National Climate Assessment (2014)*, U.S. GLOBAL CHANGE RES. PROGRAM (2014), <https://nca2014.globalchange.gov/report/regions/southwest>.

70. Sadasivam, *supra* note 13.

71. Fountain, *supra* note 17.

72. *Vital Statistics, Rio Grande at Elephant Butte Lake*, NAT'L WEATHER SERV. (Dec. 30, 2019), <https://water.weather.gov/ahps2/hydrograph.php?wfo=epz&gage=ebdn5>; Tex. Water Dev. Bd., *Elephant*

Less water in the Rio Grande means less water feeding into the Elephant Butte Reservoir.⁷³ Therefore, the United States has less water to deliver to Mexico to uphold its obligations under the treaty with Mexico. The United States has compelling reasons to ensure the delivery of the appropriate amount of water along the Rio Grande to fulfill these obligations.⁷⁴ Mexico is an important trade partner, neighbor, and ally for the United States. Therefore, as climate change makes water in the Rio Grande scarcer, the United States will continue to have distinct federal interests that could warrant federal intervention into state disputes, as in *Texas v. New Mexico*.⁷⁵

Texas v. New Mexico answers a narrow question, yet these same federal interests are likely to be at stake in future litigation as climate change exacerbates the lack of water in the Rio Grande and there is no guidance on how litigation may progress in the future.⁷⁶ Initiating a dispute or expanding litigation would provide the United States a powerful legal tool. The United States should not be forced to wait to intervene in existing litigation between states to enforce its federal obligations. To meet its burden of water delivery, the United States must be able to compel the states to honor their own burdens of water delivery. Suing the states or expanding the scope of existing litigation would provide crucial opportunities for the United States to protect its federal interests in the Downstream Contracts and the treaty with Mexico.

Texas v. New Mexico established that the United States can intervene for distinct federal interests, but it remains unclear if the United States can intervene and expand the scope of the litigation or even initiate a dispute.⁷⁷ Therefore, it remains unclear what options the United States will have to compel the states in the Compact to meet their water allocations and not interfere with federal treaty obligations. This narrow holding leaves more questions than it answers for the future of interstate water disputes.

CONCLUSION

Texas v. New Mexico will potentially expand federal opportunities to sue states to protect federal interests because the United States was allowed to intervene in an interstate dispute where it held distinct federal interests. As climate change makes water in the Rio Grande scarce, interstate water disputes are likely to increase. The United States' interests may require repeated

Butte Lake, WATER DATA TEX. (Dec. 30, 2019), <https://waterdatafortexas.org/reservoirs/individual/elephant-butte>.

73. Laura Paskus, *NM's Reservoirs Weathered This Year. But What will Happen Next Year?*, NM POL. REP. (Sept. 21, 2018), <http://nmpoliticalreport.com/2018/09/21/nms-reservoirs-weathered-this-year-but-what-will-happen-next-year-en/>.

74. Bureau of W. Hemisphere Affs., *U.S. Relations with Mexico*, U.S. DEP. OF STATE, <https://www.state.gov/u-s-relations-with-mexico/> (last updated Apr. 1, 2019).

75. *Texas v. New Mexico*, 138 S. Ct. 954, 959–60 (2018).

76. *Id.* at 960.

77. *Id.*

intervention and suit initiation to honor its treaty with Mexico. Therefore, the United States must be able to initiate disputes or expand existing litigation between states to protect its federal treaty obligations.

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