WATER AND FEDERALISM IN *TEXAS V. NEW MEXICO*

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Drought plagues the western United States.[1] California, Colorado, Arizona, New Mexico, and Texas, among others, rely heavily on the dwindling flow of two major rivers: the Colorado River and the Rio Grande River. These rivers provide millions with drinking water and support hundreds of thousands of acres of agriculture. As the water disappears, states, tribes, and communities are left wondering what the future holds in a dry climate.

Unsurprisingly, scarcity and apprehension generate conflict. Last year, the Supreme Court heard *Arizona v. Navajo Nation*, a case that set the Navajo tribe against western states and the federal government as it tried to gain guaranteed protection of tribal water.[2] The water at-issue flowed within the banks of the Colorado River, a body of water that is no stranger to dispute and litigation.[3] What made this case so interesting was not just its implications for the Colorado River Compact or its impact on tribal resources. The Colorado River spurred litigation that gave great insight into federal power as it relates to the ability of other governments to control, use, and preserve their natural resources.

And this past spring, another river made its way to the Supreme Court—the Rio Grande.

This note discusses the implications of the Court's recent decision in *Texas v. New Mexico and Colorado*, a case that concerns a state-state agreement related to water apportionment and groundwater pumping along the Rio Grande. The Court's recent decision undermines the historical function of the states to define and protect water rights, and it weakens the interstate compact as a tool for future state-to-state negotiation and innovation. The majority's holding creates three obstacles: 1) it limits future cooperation of states when faced with federal intervention in water disputes, 2) it undermines the "cooperative federalism" in interstate water law, and 3) it restrains the ability of states to adapt to unique hydrogeological realities. Even for those uninterested in water law, the currents swirling underneath this opinion speak to the current, and future, balance of federal and state power in the management of this country's natural resources.

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[1] The Department of the Interior has named the current period of water scarcity "the drought crisis." U.S. DEP'T OF THE INTERIOR, ADDRESSING THE DROUGHT CRISIS, https://www.doi.gov/priorities/addressing-the-drought-crisis [https://perma.cc/J8Y7-F96N].

[2] 599 U.S. 555 (2023).

[3] A 1922 compact—the Colorado River Compact—addresses the complicated allocation of water from the river among various western states and tribes.

I. HISTORY AND PREVIOUS LITIGATION

This case concerns the Rio Grande Compact, an interstate agreement between Colorado, New Mexico, and Texas that apportions the Rio Grande's waters among the states.[4]

In 1906, the United States and Mexico entered into a treaty wherein the U.S. promised to keep available 60,000 acre-feet of water in the Rio Grande.[5] To comply with this obligation, the Bureau of Reclamation constructed the Elephant Butte Reservoir in New Mexico, about 100 miles north of Texas's eastern border. The federal government split the remaining reserved water between New Mexico and Texas and entered separate contracts with each state—the "Downstream Contracts." For New Mexico, the Bureau agreed to supply the Elephant Butte Irrigation District with enough water for 88,000 irrigable acres. For Texas, the Bureau agreed to supply the El Paso County Water Improvement District with enough water for 67,000 irrigable acres.[6]

The remainder of the Rio Grande's water—water not captured and reserved by the Bureau of Reclamation's Rio Grande Project—was apportioned by the states themselves. In 1938, the states entered into the Rio Grande River Compact.[7] Essentially, the Compact determined how much water each state delivered to the next.[8] Colorado must deliver a certain amount of water to New Mexico. New Mexico, in turn, must deliver water to the Elephant Butte Reservoir, which would feed the portion of the Rio Grande that flowed into Texas.[9] The Compact also realized the role of the Bureau and USGS in monitoring water delivery, especially between the Elephant Butte Reservoir and Texas's water district. Congress approved the Compact, and it became binding law.

But the situation soon became turbulent. Within twenty years of the Compact's passage, drought began affecting the southwestern states. As a result, irrigators in New Mexico south of the Elephant Butte Reservoir began pumping groundwater, which decreased the amount of water that actually flowed across the New Mexico-Texas border.[10]

Decades later, in 2013, Texas sued New Mexico in the Supreme Court of the United States for declaratory and injunctive relief (*Texas v. New Mexico,* or *Texas I*). Texas wanted to prevent New Mexico from interfering with the passage of water through the Rio Grande Project; New Mexico water users needed to stop groundwater pumping south of the Reservoir. In 2014, the U.S. sought to intervene in the suit.[11]

The Supreme Court ruled in its favor, rejecting the recommendation of the Special Master that the U.S.'s claims be dismissed.[12] But the majority opinion, authored by Justice Gorsuch, noted that simply because Congress plays a role in approving interstate compacts, it does not necessarily follow that the federal government automatically receives "blanket authority to intervene in

[4] H. R. 4997, Public Act No. 96, May 31, 1939.
[5] Texas v. New Mexico, 602 U.S. ___, 2–3 (2024).
[6] *Id.* at 3.
[7] H. R. 4997, *supra* note 4.
[8] *Id.*
[9] *Texas*, 602 U.S. at 4.
[10] *Id.* at 4–5.
[11] Texas v. New Mexico, 583 U.S. 407 (2018).
[12] *Id.*

cases concerning the construction of those agreements."[13] The opinion set out four justifications for the U.S. to intervene: 1) the Rio Grande Compact was "inextricably intertwined" with the Downstream Contracts; 2) New Mexico conceded that the U.S. "plays an integral role in the Compact's operation"; 3) New Mexico's breach of the compact jeopardized the US's delivery of water to Mexico; and 4) the U.S. sought substantially the same relief as Texas, a signatory state.[14]

Notably, the opinion stated that "This case does not present the question whether the United States could initiate litigation to force a State to perform its obligations under the Compact or expand the scope of an existing controversy between States."[15] The Court explicitly reserved judgment on whether the U.S., on its own, could bring suit against a Compact state.

After the U.S. intervened, litigation continued for almost ten years. Until, finally, the states made a breakthrough—Texas and New Mexico negotiated a consent decree that complied with the Compact and settled the dispute between the states. Specifically, the decree updated the method used to calculate the amount of water New Mexico had to deliver downstream to the Texas border. This new method permitted New Mexico users to pump at slightly elevated rates[16] and modified the amount of water New Mexico had to store in the Elephant Butte Reservoir. Texas received sufficient water from the Reservoir, and New Mexico water users kept pumping.

But despite the states' agreement, the U.S. objected, and claimed the consent decree would dispose of its Compact claims without its consent. The Special Master disagreed, and the U.S. filed an exception.

II. THE CURRENT CASE

The U.S. claimed that New Mexico's groundwater pumping violated the terms of the Compact—similar to the claim brought by Texas in the prior litigation (*Texas I*). Specifically, the U.S. argued New Mexico must comply with incredibly low groundwater pumping rates.[17] Although Texas *had* sought the same relief in *Texas I*, it no longer asserted that claim. Therefore, the Court faced the question it previously avoided: Can the federal government continue litigation and force a state to perform its Compact obligations, even when no other signatory state maintained those claims?[18]

The majority determined that it could. The federal government had "its own, uniquely federal claims under the Compact," and the consent decree would dispose of those claims.[19] Because the federal government had to deliver water to New Mexico and Texas under the Downstream Contracts, as well as Mexico under the 1906 treaty, the U.S. could intervene and styme the consent decree. Besides, the majority concluded, the Court had already given the U.S. permission to intervene in *Texas I*.[20]

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[13] *Id.* at 413.

[14] *Id.* at 413–15.

[15] *Id.* at 415.

[16] Groundwater pumping was rare in 1938, when the Compact was written. The consent decree allowed pumping to occur at the 1951-1978 rate—"the D2 period"—a period when groundwater pumping was more common.

[17] Specifically, the 1938 groundwater pumping rates—not the higher 1951-1978 rate identified in the consent decree.

[18] Texas v. New Mexico, 602 U.S. ___, 6–8 (2024).

[19] *Id.* at 12, 16.

[20] *Id.* at 9–12.

Ironically, Justice Gorsuch, the author of *Texas I*, wrote a passionate dissent. He made several points that undermined the majority's decision:

1. The consent decree is not inconsistent with the Compact or other congressional decree.[21]
2. The government's claims expands the scope of the original dispute between Texas and New Mexico.[22]
3. This action undermines historical reliance on state water law and cooperative federalism.[23]

Not only did the majority mischaracterize *Texas I*, but it also disregarded the deference historically accorded states to navigate water disputes between themselves. The U.S. did not have the power to "assert essentially any Compact-related claims" on its own. [24] The Court confused narrow permission to intervene with an ongoing license to intervene in Compact cases.[25]

At the end of his dissent, Gorsuch wrote three brief statements—two questions, and one warning. Each of these sentences, transcribed below, connect to three obstacles created by the majority's decision: 1) it limits future cooperation of states when faced with federal intervention in water disputes, 2) it undermines the cooperative federalism in interstate water law, and 3) it restrains the ability of states to adapt to unique hydrogeological realities. In a broader context, these obstacles suggest a growing imbalance in state and federal power.

III. RAMIFICATIONS

A. Limiting federal intervention

"But in light of the veto power the Court seemingly awards the government over the settlement of an original action, what State in its right mind wouldn't object to the government's intervention in future water rights cases?"[26]

Rivers pay no heed to jurisdiction, some spanning as many as seven states in their journey from headwaters to delta.[27] The way one state treats an interstate water source inherently affects the uses of its neighbors. For example, if farmers in Arkansas diverted all the water from the Mississippi River, riparian crops in Louisiana would not receive any of its beneficial flows. Interstate water requires interstate management.

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[21] *Texas,* 602 U.S. at 19 (Gorsuch, J., dissenting) ("Few rules in water law are more settled than that federal reclamation projects must comply with any Compact, state water law, or consent decree term 'not inconsistent with clear congressional directives respecting the project.'" (quoting California v. United States, 438 U. S. 645, 672 (1978))).

[22] *Id.* at 21. The U.S. did not previously request a return to the 1938 groundwater pumping baseline, so the consent decree satisfied the interests the U.S. asserted in the original case. *Id.* at 22, 24.

[23] *Id*. at 24–25.

[24] *Id.* at 24.

[25] *Id.*

[26] *Id.* at 25.

[27] Noah D. Hall, *Interstate Water Compacts and Climate Change Adaptation*, 5 ENV'T & ENERGY L. & POL'Y J. 237, 255 (2010); *see also* Lynn A. Mandarano, Jeffrey P. Featherstone & Kurt Paulsen, *Institutions for Interstate Water Resources Management*, 44 J. OF THE AM. WATER RESOURCES ASS. 136, 136 (2008).

Compacts became a way to mitigate the harms states impose through excessive pumping, irrigation, and various other forms of diversions. State delegates met and determined the proper allocation of river water among the relevant states. The states then signed the contract and submitted it for Congress's approval.[28] Today, over 20 different compacts (in various iterations) exist.[29] The terms of each compact differ greatly—some simply allocate volumes of water to individual states, and others set minimum guidelines for shared water management.[30]

Even the judiciary recognized the superiority of compacts as a tool for state to resolve water disputes. The Supreme Court wrote that issues with interstate water management are "more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted."[31] The Court plays a role in enforcing Compact terms through original jurisdiction.[32] Since 2015, the Supreme Court has resolved disputes involving the Republican River Compact,[33] the Yellowstone River Compact,[34] and other attempts to equitably apportion aquifers and basins.[35] Compacts remain an important tool for conflict resolution between states, and the Court plays a role in maintaining their efficacy.[36]

The Court's decision in *Texas v. New Mexico* risks undermining this reliable mechanism for resolving interstate water disputes by showing states the risk of federal intervention. States will hesitate, if not balk, when faced with federal interference in a compact dispute. Rather than acknowledge federal interests, western states may disregard them in an attempt to obscure the need for federal intervention.

Admittedly, it is important that the U.S. retain the right to intervene in compact disputes. The federal government holds reserved water rights for dozens of American Indian tribes, as well as endangered species living in interstate waters. And states are often accused of devaluing—or totally ignoring—these rights.[37] If the federal government does not intervene on their behalf, those water rights may disappear.

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[28] The Compact Clause in the U.S. Constitution states that "No State shall, without the consent of Congress, . . . enter into any agreement or compact with another State, or with a foreign power." U.S. CONST. art. I, § 10, cl. 3.

[29] Hall, *supra* note 27, at 260–61.

[30] *Id.* at 255.

[31] New York v. New Jersey, 256 U.S. 296, 313 (1921); *see id.* at 257; *see also,* Amelia I.P. Frenkel, *Interstate Water Rights: Take No Drop for Granted*, 40 HARV. ENV'TL L. REV. 253, 260 (2016) ("[W]ater compacts have, in modern times, proven to be the favored method of division.").

[32] The Constitution vests the Supreme Court with original jurisdiction to adjudicate interstate disputes over the meaning of compact terms. *See* Texas v. New Mexico, 602 U.S. ___, 11 (2024) (Gorsuch, J., dissenting).

[33] Kansas v. Nebraska, No. 126, Orig, 574 U.S. 445 (2015).

[34] Montana v. Wyoming, No. 137, Orig, 538 U.S. 142 (2018).

[35] *See* Brief of Water Law Professors as Amici Curiae Supporting Respondents, Texas v. New Mexico, 602 U.S. ___(2023) (No. 141).

[36] "The result of the Court's approach, when it is successful in securing compliance with pre-existing apportionments, is to preserve, insofar as possible, states' settled expectations with regard to the availability of water." Frenkel, *supra* note 31, at 256.

[37] For example, *Arizona v. Navajo Nation* was a recent case highlighting state water interests in conflict with tribal water interests. 599 U.S. 555 (2023). Ultimately, the federal government was not forced to maintain responsibility for the Navajo's water rights—a result desired by the states involved in the litigation.

But, as the dissent notes, even if the Court rejected the government's individual claim, the U.S. had access to the lower federal courts.[38] Rather than intervene in an original jurisdiction compact dispute, the federal government would bring a separate suit disputing the compact's effect on federal reserved water rights. For example, in this case, the federal government could initiate action against New Mexico for impeding its ability to honor its 1906 treaty with Mexico. Similarly, the federal government can sue in lower federal court if a compact allocated too much water to a state and impeded the water rights of a federally-recognized tribe.[39] The drastic result that the majority envisioned did not come from necessity; the federal government had other legal avenues to protect federal water rights.

Justice Gorsuch exposes this concern and identifies the existential threat *Texas v. New Mexico* creates for the future of interstate water compacts. The Court gives the federal government license to undo signatory state efforts to resolve water disputes, simply because the U.S. is interested in the disputed water.[40] Even if the federal government chooses not to exercise the full extent of this intervening power, states that would prefer negotiation to litigation may be hesitant to pursue such a path. Why expend resources settling out of court when the federal government will block you later?[41] States will resist attempts by the U.S. to intervene on behalf of reserved water rights. The government should celebrate negotiations between compact signatory states as efficient and effective means of water dispute resolution. Instead, the majority's decision clouds negotiations with doubt.

B. Undermining cooperative federalism

> *"If, as happened here, even heavily caveated permission to intervene may end up federalizing an interstate dispute, what State (or Court) would ever want to risk letting the nose make it under the tent?"*[42]

The majority granted the federal government the power to intervene in a compact dispute between signatory states. Specifically, it let the government disturb a complex negotiation process, claw back the authority and autonomy of the states, and upset the delicate balance built by a compact. In this way, *Texas v. New Mexico* contradicts the practice of cooperative federalism in water law jurisprudence.

Cooperative federalism involves federal deference to state water law and federal adherence to state water compacts.[43] This concept dates back to 1902, when Congress passed the

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[38] Here, a dismissal of the government's claims without prejudice, as recommended by the Special Master, would allow the government "to pursue any valid independent claims it may have in the ordinary course in lower courts." Texas v. New Mexico, 602 U.S. ___, 15 (2024) (Gorsuch, J., dissenting). And if the government prevailed, it may return to the Supreme Court for modification of the consent decree.

[39] For example, the litigation that culminated in *Arizona v. Navajo Nation*—litigation that implicated the Colorado River Compact—began in a federal district court and moved to the Ninth Circuit before receiving a grant of cert. 599 U.S. 555 (2023).

[40] Here, the consent decree did not "impose any new improper duty or obligation on the federal government or deny it the ability to pursue any valid claim it may have." *Texas*, 602 U.S. at 13 (Gorsuch, J., dissenting). Instead, it merely required the Bureau of Reclamation measure distributed water with the metric it already used—the 1951–1978 numbers. *Id.*

[41] The dissent notes that, in this case, Texas and New Mexico spent "tens of millions of dollars in lawyers' fees" over a period of ten years to craft the consent decree. *Texas*, 602 U.S. at 25 (Gorsuch, J., dissenting).

[42] *Id*.

[43] *Id.* at 10–11.

Reclamation Act. The Act authorized the Department of the Interior to construct irrigation infrastructure in areas designated by the Secretary of the Interior in the western states. But the grant of authority to a federal department did not diminish the role of the states in water management. The Act stated:

> "Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with 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, and the Secretary of the Interior . . . shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof."[44]

Congress ensured the Reclamation Act did not eviscerate state water law. The federal government was bound, in this context, by state law.

Cooperative federalism recognizes the role that states and the federal government play in water management. The majority's decision undermines this historic balance and allows the federal government to demolish a state-state agreement. As Justice Gorsuch writes, the agreement between Texas and New Mexico disappeared because the federal government would not "accept a settlement providing it with everything it once sought, and now seeks to promote the use of an alternative 1938 baseline that no party seeks and New Mexico represents could cost it tens of thousands of jobs and a large segment of the State's economy."[45] The consent decree did not violate the Rio Grande Compact, nor did it practically impair the Bureau of Reclamation's functions. In fact, the consent decree promised to end a ten-year dispute without further controversy. But the majority permitted the U.S. to transform a state-state negotiation into federal litigation. The decision undermined the autonomy of the states to make state-to-state water allocation decisions, and it threatened the framework of water law jurisprudence established at the turn of the century.

C. Restraining state adaptation

> *"In that way, too, I fear the majority's shortsighted decision will only make it harder to secure the kind of cooperation between federal and state authorities reclamation law envisions and many river systems require."*[46]

Finally, and potentially most concerning, the majority's opinion threatens to restrain attempts by the state to adapt to drought conditions. In an amicus brief, a group of water law professors wrote that "the Consent Decree account[ed] for the most serious hydrological threat to the Basin since the groundwater revolution: aridification caused by climate change."[47] The consent decree employed an "aridity adjustment" that required an annual adjustment to the measuring index.[48] Texas and New Mexico could account for increased rates of evaporation, and insufficient

[44] 43 U.S.C. § 383.
[45] *Texas*, 602 U.S. at 25 (Gorsuch, J., dissenting).
[46] *Id*.
[47] Brief of Water Law Professors, *supra* note 35, at 12.
[48] *Id.*

replenishment, in this manner.[49] The consent decree represented state innovation in the face of drought.

For example, the consent decree made the forward-thinking shift to integrate groundwater and surface water.[50] Not all western states treat surface water and groundwater as connected, and many states apply different laws of ownership to each.[51] But the integration of both systems allows lawmakers to account for the hydrological reality that groundwater and surface water *are* connected. Laws in integrated systems regulate water rights in ways that match the natural world. The consent decree, once again, exemplified state adaptation to changing ecological circumstances.

The consent decree helped the signatory states adapt to drought and decreased rainfall, and the Court allowed the federal government to stifle it. Will states feel the same incentive to experiment and innovate if they fear federal intervention? Does the lack of federal cooperation in *Texas v. New Mexico* discourage states hoping to bring their compacts into alignment with a changing western landscape? The Court's decision chills the willingness of states to adjust interstate compacts in accord with an era of drought. The principles adopted in *Texas v. New Mexico* will impact how western states handle water-management challenges in the future, maybe for the worse.

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This case speaks to more than groundwater pumping in New Mexico. It addresses the future of this nation's natural resources management, and it potentially undermines the role of the states in that vital endeavor. States protect the water rights of their citizens, and interstate compacts became a successful avenue for dispute resolution. The Court's recent decision destabilizes that historical function and weakens the interstate compact as a tool for state-to-state negotiation and innovation. The federal government's new license to intervene may limit the cooperation of states when faced with federal intervention in water disputes. And the reasoning of the majority's opinion undermines the historic "cooperative federalism" principle of interstate water law. Finally, the decision restrains the ability of the states to adapt to unique hydrogeological realities, as any state-led experimentation may be vetoed by the federal government. The balance of federal and state power shapes the future of water in the West. *Texas v. New Mexico* strains that balance.

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[49] *Id.*

[50] *Id.*

[51] New Mexico, for example, applies a prior appropriation framework to both groundwater *and* surface water rights; the surface water and groundwater legal frameworks of the State are fully integrated. STANFORD: WATER IN THE WEST, "New Mexico," https://groundwater.stanford.edu/dashboard/region.html [https://perma.cc/E8EW-67RL] (last visited May 27, 2024). In Arizona, however, groundwater and surface water are governed by different legal frameworks—they are not integrated. While surface water is public property subject to prior appropriation laws, percolating groundwater is subject to the reasonable use doctrine. STANFORD: WATER IN THE WEST, "Arizona," https://groundwater.stanford.edu/dashboard/region.html [https://perma.cc/E8EW-67RL] (last visited May 27, 2024).