LITIGATION
Texas v. New Mexico

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On June 21, the U.S. Supreme Court, in a 5-4 opinion, denied approval of a settlement in *Texas v. New Mexico and Colorado* (#22O141) (WSW #2545). The United States, intervenor to the case, opposed the settlement and took exception to the Special Master's recommendation to approve it (WSW #2579). The Court sustained the United States' exception and denied the motion to enter the decree.

In the order, the majority wrote that the decision depended on two considerations: (1) Whether the United States has valid Compact claims? and (2) Whether the proposed consent decree would dispose of those claims? The Court referenced its holding in 2018 that the federal government had its own distinct interests in holding New Mexico to its obligations under the Rio Grande Compact, as the Compact is "inextricably intertwined" with the United States' operation of the Rio Grande Project.

The Court noted that, although the consent decree would have resolved the States' claims, the proposed settlement failed to prohibit New Mexico from interfering with the United States' delivery of water to Texas water districts. It also failed to enjoin New Mexico from allowing excessive groundwater pumping downstream of Elephant Butte Reservoir. The Court further argued that, by requiring theuse of project data for a period from 1951 to 1978 (baseline index D2), the settlement would impose new metrics for measuring compliance that would take New Mexico's pumping during that period for granted (WSW #2563). These provisions would preclude the United States from arguing that the Compact itself forecloses New Mexico's current rates of groundwater pumping.

The Court acknowledged that the United States could litigate the meaning of the Compact in another forum. However, the United States would have to depend on another source of law other than the Compact that independently bars current levels of New Mexican groundwater pumping. The consent decree would settle the pumping question as far as the Compact is concerned, eliminating the United States' claim that New Mexico is breaching a duty under the Compact. The Court also responded to the dissenting opinion that the Court's decision "…defies 100 years of [the] Court's water law jurisprudence," saying: "Nothing in today's decision affects either this Court's state water law jurisprudence or the Federal Government's general obligation to comply with state water law."

Justice Neil Gorsuch wrote the dissenting opinion and addressed two different questions: (1) Whether the decree was consistent with the Compact itself? and (2) Whether the decree purported to bind third parties that the States have no authority to represent? Gorsuch argued that although the proposed settlement does compel Reclamation to use the D2 baseline index and determine where it would measure (El Paso), the longstanding practice of calculating flows based on the D2 period has gone undisputed for many years. Gorsuch argued this long-standing practice is "highly significant evidence of everyone's understanding of the Compact's terms." Gorsuch said the El Paso "gauge" is consistent with the Compact, as the Compact expressly authorized representatives from each compacting State to choose "gauge" locations. And the federal government has "long maintained the El Paso gauging station."

In addition, Gorsuch argued that the majority did not sufficiently explain why the federal government could not press whatever independent Compact claims it may have in another forum. He argued that Texas and New Mexico are entitled to decide what water rights their governmental water districts are due, and the federal government's reclamation project is bound to honor what the States mandate (WSW #2587). He wrote: "As we have seen, under longstanding federal law, a consent decree between the States will necessarily bind the Reclamation Bureau because all of its acts…. in operating the Project so as to impound and release waters of the river are subject to the States' authority.... 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.... And here, no one, the majority included, has identified any congressional directive, much less a clear one, inconsistent with the consent decree before us" (internal quotes and citations omitted).

Texas Attorney General Ken Paxton said: "I am disappointed that a narrow majority of the Supreme Court has unfortunately and incorrectly granted the federal government even more power over the States. Every State in this case and even the special master appointed by the Supreme Court itself supported the consent decree that would put an end to more than a decade of litigation and ensure Texas farmers have access to vital water supplies. However, the Biden

Administration objected, claiming that they can unilaterally block the States' resolution of a dispute between the States themselves. We will continue to work to ensure that the rights of Texas farmers are protected during the next steps of the process."

New Mexico Attorney General Raúl Torrez said: "We are profoundly disappointed by the Supreme Court's decision to reject a comprehensive settlement that would have safeguarded the rights of water users throughout southern New Mexico. But we are even more disappointed that the federal government would stand in the way of an equitable resolution of a decades-long case that neither Texas nor New Mexico wish to continue. This decision will result in millions more spent on legal fees and more uncertainty for New Mexico's water users, all because the Interior Department feels the need to dictate how New Mexico meets its obligations to the State of Texas. It's a sad day when two western states are able to resolve a generational dispute over water only to have that deal undermined by lawyers and bureaucrats in Washington D.C."

Colorado Attorney General Phil Weiser said: "After more than a decade of litigation and mediation, the states found a way to resolve their dispute under the Compact. The court has now ruled, under the very specific circumstances presented by this case and under this Compact, that it cannot enter the states' proposed consent decree because it would have resolved claims that the court had earlier allowed the United States to assert under the Compact as an intervenor in this litigation… While I disagree with that finding and the court's holding, it cannot change the fact that three states have already resolved their dispute under the Compact and are interested in ending this litigation. To that end, I remain committed to working with Texas and New Mexico to develop a path forward that ends this dispute as expeditiously as possible."