

TEXAS v. NEW MEXICO & COLORADO

“U.S. involvement in [this] state dispute over water rights ... rankled the Supreme Court this morning ...”

—Courthouse News

“[S]ome of the justices are concerned about the implications of ... allowing the United States to proceed as a party .”

—SCOTUSblog



INTRODUCTION



- **Fred Yarger**, Colorado Solicitor General
- **Appointed by Cynthia H. Coffman**, Colorado Attorney General
- **Responsibilities:**
 - Supervise Appellate and Selected Trial-Court Litigation, all U.S. Supreme Court Cases
 - Four Supreme Court arguments to date
 - Senior Legal Advisor to AG Coffman
 - Committees and Management Functions

TODAY'S DISCUSSION

Part I: Background

Part II: Oral Argument
and the Opinion

Part III: Lessons

Background: WESTERN WATER

- Scarce; spread over vast distance.
- Interstate water projects—often requiring federal coordination.
- But States, not U.S. , administer western water rights:

The U.S. “must obtain permits and priorities for the use of water from the State [its water] rights can rise no higher.”
Neb. v. Wyo. (1935).



Background: RIO GRANDE COMPACT

- 1890s–1930s: CO, NM, TX, and Mexico debate allocation of Rio Grande.
- 1906: U.S.–Mexico Treaty.
- 1916: U.S. completes Elephant Butte Dam to supply NM, TX, Mexico.
- 1938: Rio Grande Compact Signed.
 - Only CO, NM, and TX are parties with voting rights.
 - CO delivers to the state line.
 - But

Rio Grande Watershed



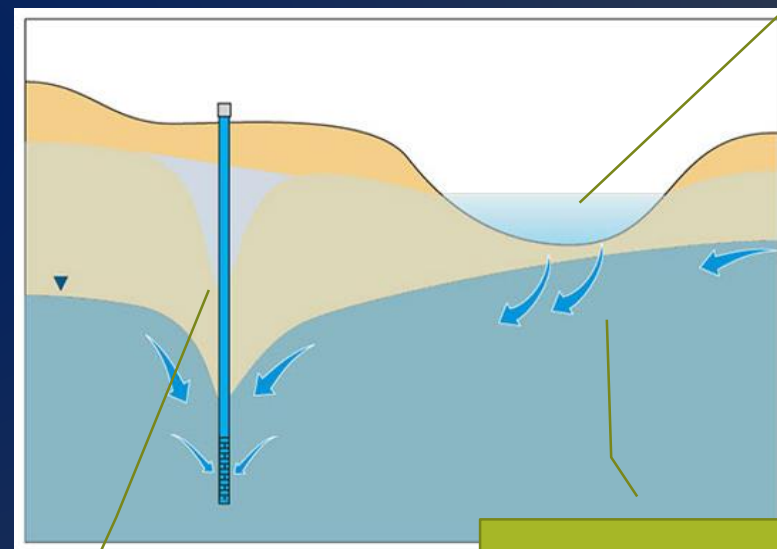
Background: RIO GRANDE COMPACT

- New Mexico's delivery point is not the state line—it's the reservoir, 100 miles north.
- What happens to water below the dam?
 - Can NM administer it?
 - What obligation does NM have to TX?
 - To the U.S.?



Background: THE DISPUTE

- NM allegedly allows too much ground water pumping south of Elephant Butte Dam.
- Allegedly depletes Rio Grande surface water that would otherwise flow to TX and Mexico.



Surface
Water

Well

Hydrologically Connected
Ground Water

Background: THE ORIGINAL JURISDICTION CASE



- TX sues, seeks order preventing NM groundwater pumping.
- U.S. intervenes to protect flows into the dam. It raises claims under the compact, not just the treaty.
- CO's Role: as party to Compact, has a strong interest in its interpretation.

Background: THE QUESTION PRESENTED

- The Special Master denies NM's motion to dismiss; all parties agree case should go forward.
- BUT—the question is, what is the U.S.'s role? Can it sue under the Compact, or only the Treaty?

“For the first time in its history of litigating original actions to apportion interstate streams among States ... the United States here intervened as a party plaintiff, alleging as the basis for its claims ... that it has a right protected by the Compact.”

Oral Argument: BINDING THE U.S.?

GOVERNMENT: U.S. will “not be bound” by a Supreme Court decree unless made a party. “We’re here trying to be helpful ... we are willing to be bound.”

CHIEF JUSTICE ROBERTS: “I don’t understand what you mean when you say that ... you’re not going to be bound.”



Oral Argument: HOW FAR CAN THE U.S. GO?

GOVERNMENT: Believes it can independently maintain suit. But “I don't think the Court needs to reach that, because Texas's complaint is going forward.”

JUSTICE KAGAN: “Well, what's the difference? How could we say, yes, you have the rights to intervene, even though you don't have the rights to bring your own suit initially?”



THE OPINION

- Bottom line: “May the United States assert essentially the same claims Texas already has? We believe it may.”
- But...
 - “Permission should not be confused for license.” The U.S. does not have “blanket authority to intervene.”
 - The Rio Grande Compact is unique: it is “inextricably intertwined with the Rio Grande Project.”
 - U.S. asserted its claim “[1] in an existing action brought by Texas, [2] seeking substantially the same relief and [3] without that State’s objection.”
 - “Nothing in our opinion should be taken to suggest whether a different result would obtain in the absence of any of the[se] considerations.”

LESSONS

- Preserving the primacy of the States in the First-Order Question.
- Comparing *Florida v. Georgia*: again, “we won’t be bound.”
- Be careful the precedent you set: Reclamation; Reserved Rights; Endangered Species; EPA; Corps.