GROUNDWATER LAW AND *TEXAS V. NEW MEXICO AND COLORADO*

BY

SEAN LYNESS*

In the 2024 Supreme Court decision Texas v. New Mexico and Colorado*, the Court redefined the intersection of groundwater and federal law. The case concerned interstate water compacts for the Rio Grande. In a 5–4 decision, the Court rejected the Special Master's proposed consent decree because it would deny the United States the opportunity to assert its own claims. In sum, the Court is requiring interstate water disputes to give the United States a seat at the table.*

*Though these interstate water disputes are often viewed as hyper-technical and mundane—they are often assigned, as here, to the most junior justice—*Texas v. New Mexico and Colorado *is an important water law case. More specifically,* Texas *is an important groundwater law case.* Texas *cements in Supreme Court jurisprudence the linkage between groundwater and surface water. It also, for the first time, recognizes the federal government's interest in groundwater.*

These holdings have major implications not only for other interstate water disputes (the Colorado River is the greatest example), but also for how the federal government will police state use of groundwater. The case suggests that federal interests significantly undercut state dominion of groundwater. That should incentivize states to modernize their groundwater law, lest the federal government force their hand.

* Assistant Professor of Law, University of Massachusetts School of Law. Professor Lyness teaches Civil Procedure, Property, Water Law, and Legislation & Regulation, among other courses. He spent his practice career at the Rhode Island Office of the Attorney General, focusing on environmental cases, defensive litigation, and open government adjudications. He also clerked for the Presiding Justice of the Rhode Island Superior Court. He earned his JD from Harvard Law School and his BA from Brown University. Many thanks to the superlative team at *Environmental Law* for their thorough edits.

I. INTRODUCTION

The United States Supreme Court has been busy in environmental law. Professors have watched the early summer closing of each recent Court term with trepidation, wondering how much they will have to re-write their syllabus before the fall. Such concern is warranted. In just the past few years the Court has fundamentally narrowed the Clean Water Act,[1] thwarted new regulations under the Clean Air Act,[2] and disposed of the *Chevron* deference regime that so often gave the federal government the ability to act on environmental issues.[3] In blockbuster case after blockbuster case, the Supreme Court has placed itself at the heart of federal environmental policy.[4]

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[1] *See* Sackett v. Env't Prot. Agency, 598 U.S. 651, 671 (2023) (limiting the Clean Water Act to "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic[al] features' that are described in ordinary parlance as 'streams, oceans, rivers, and lakes.'" (alteration in original)).

[2] *See, e.g.*, Amy Howe, *Supreme Court Blocks EPA's 'Good Neighbor' Air Pollution Rule*, SCOTUSBLOG (June 27, 2024, 3:35 PM), https://www.scotusblog.com/2024/06/supreme-court-blocks-epas-good-neighbor-air-pollution-rule [https://perma.cc/JH9D-H3GH] ("The Supreme Court on Thursday temporarily blocked a rule issued by the Environmental Protection Agency to reduce air pollution from power plants and other industrial facilities in 23 states."); *see also* West Virginia v. Env't Prot. Agency, 597 U.S. 697, 735 (2022) ("[I]t is not plausible that Congress gave EPA the authority to adopt on its own [regulations capping carbon dioxide emissions] in Section 111(d) [of the Clean Air Act].").

[3] *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024) (overturning *Chevron* deference).

[4] *See, e.g.*, Akielly Hu & Grist, *New Supreme Court Decisions Jeopardize Efforts to Curb Pollution and Climate Change*, SCI. AM. (July 3, 2024), https://www.scientificamerican.com/article/new-supreme-court-decisions-jeopardize-efforts-to-curb-pollution-and-climate [https://perma.cc/E773-7GR5] (discussing the impacts of recent Supreme Court decisions on pollution and climate change).

It would be easy, then, to miss the smaller cases. Amid the flurry of consequential, late June 2024 opinions,[5] the Supreme Court issued a relatively short opinion in a groundwater dispute among three states. The case—*Texas v. New Mexico and Colorado*[6]—marked the second time the Court had weighed in on the decade-old dispute.[7] In a workmanlike twenty-page opinion, the five-justice majority denied the states' request to enter a consent decree.[8] Initially, the procedural posture of the case and the hyper-technical facts—an interstate water dispute over groundwater pumping—did not engender much media attention.[9] And, like many interstate water disputes, the case was assigned to the most junior justice.[10] Nothing to see here, so it seemed.

But *Texas* is a significant water law case. Perhaps more importantly, *Texas* is a significant *ground*water law case. The case cemented the law's understanding of the hydrological connection between surface water and groundwater.[11] And, for the first time, the Court acknowledged the federal government's interest in groundwater.[12]

Those conclusions provoked a vociferous four-justice dissent.[13] And they fit in the context of increasing interstate groundwater disputes, some of which have likewise made their way to the Supreme Court's door. There is little doubt that *Texas* has significant implications for state groundwater law.

This Article examines *Texas*—its context, the case itself, and its implications. Part II describes the history of interstate water and groundwater disputes that have forced the Court to weigh in. The trend is towards more Court involvement. Part III recounts the case itself, from its 2013 filing to the 2018 Supreme Court decision, to the 2024 Supreme Court decision. Part IV analyzes the implications of *Texas*, both how

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5 The consequential cases have not been solely confined to environmental law. *See, e.g.*, Melissa Quinn, *4 Major Takeaways from the Supreme Court's Most Consequential Term in Years*, CBS NEWS (July 5, 2024, 4:19 PM), https://www.cbsnews.com/news/supreme-court-takeaways-trump-chevron-abortion [https://perma.cc/VQ5P-WV8E] ("It was one of the most momentous Supreme Court terms in decades, resulting in a flurry of blockbuster decisions on guns, abortion, the power of federal regulatory agencies and the prosecution of former President Donald Trump.").

6 Texas v. New Mexico and Colorado, 602 U.S. 943 (2024).

7 The litigation had come before the Court in 2018. *See* Texas v. New Mexico and Colorado, 583 U.S. 407, 409, 415 (2018) (addressing the resolution of water rights in the Rio Grande Compact).

8 *Texas*, 602 U.S. at 965.

9 Neither CNN nor *The New York Times* appear to have published pieces about the decision.

10 *See Texas*, 602 U.S. at 947 (Jackson, J., delivering the opinion of the court); *see also* Jeff Neal & Rachel Reed, *Harvard Law Faculty Dissect Several Recent Supreme Court Decisions*, HARV. L. TODAY (June 28, 2024), https://hls.harvard.edu/today/harvard-law-faculty-dissect-key-decisions-from-the-supreme-court-term ("Interstate river disputes like this one are not considered particularly exciting and, as here, are often assigned to the most junior justice.").

11 *Texas*, 602 U.S. at 948, 968.

12 *Id.* at 960.

13 *Id.* at 966 (Gorsuch, J., dissenting, joined by Thomas, Alito, & Barrett, JJ.).

interstate water disputes are adjudicated and how state groundwater law is implemented. The case suggests that the federal government's interests significantly undercut a state's dominion over groundwater. This should incentivize states to update and modernize their groundwater law, lest the federal government force their hand.

II. THE CONTEXT

Texas exists in a rich context of original jurisdiction disputes. This Part illustrates the long and increasingly common story of interstate water disputes and groundwater disputes that have found their way to the Supreme Court's door. Properly placed in context, *Texas* is no outlier. The Supreme Court has been increasingly forced, perhaps unwillingly, to weigh in on water issues amid climate change.

A. Increasing Interstate Water Disputes and the Supreme Court

The Constitution grants the Supreme Court original jurisdiction in all cases "in which a State shall be Party."[14] The first Congress went further, giving the Supreme Court *exclusive* jurisdiction over suits between two or more states.[15] On its face, that exclusive and original jurisdiction—plus nearly two hundred and fifty years of experience—should make the Supreme Court an expert on interstate disputes.

But, at least initially, the Supreme Court showed little interest in interstate disputes, particularly water-based ones. Case after case, the Court cautioned that its "original jurisdiction should be invoked sparingly,"[16] and "was not contemplated [to] be exercised save when the necessity was absolute and the matter in itself properly justiciable."[17] That attitude perhaps explains the Court's interpretation of its original jurisdiction as discretionary and seldom exercised.[18] As a result, "[o]riginal jurisdiction cases are exceedingly rare";[19] by the early twenty-first century fewer than two hundred had been decided.[20] Most were *not* interstate water disputes.[21]

It is worth considering why the Court was so reluctant to wade into interstate water disputes. One possible reason is that these cases are hard to decide. As scholar Jamison Colburn puts it, these disputes center on "[t]he pliant, often cryptic quality and extent of waters," foreclosing

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[14] U.S. CONST. art. III, § 2, cl. 2.

[15] *See* Judiciary Act of 1789, ch. 20, § 13, 1 Stat. 73, 80.

[16] Utah v. United States, 394 U.S. 89, 95 (1969).

[17] Louisiana v. Texas, 176 U.S. 1, 15 (1900).

[18] Catherine Danley, *Water Wars: Solving Interstate Water Disputes Through Concurrent Federal Jurisdiction*, 47 ENV'T L. REP. NEWS & ANALYSIS 10980, 10982 (2017).

[19] Noah D. Hall & Benjamin L. Cavataro, *Interstate Groundwater Law in the Snake Valley: Equitable Apportionment and a New Model for Transboundary Aquifer Management*, 2013 UTAH L. REV. 1553, 1602 (2013).

[20] *Id.*

[21] *See id.*

clear injuries and easy decisions.[22] Perhaps it is that "[t]erritorial disputes are zero-sum contests where one state's gain is another's loss."[23] The Court could conceivably feel discomfort picking winners and losers among state sovereigns. Or maybe it is a simpler reason: "[i]nterstate river disputes . . . are not considered particularly exciting."[24] For a Court that picks its docket, why select cases that fail to inspire? Whatever the animating impulse, the Court's track record of shying away from exercising its original jurisdiction—particularly in interstate water disputes—is clear.

Yet that trend has shown signs of changing over the past few decades. Scholars of interstate water disputes have chronicled a notable shift in the Court's willingness to entertain these cases.[25] Part of this development is quantity: the Court is starting to voluntarily hear more interstate water disputes.[26] Since roughly 2010, the Court has permitted and decided a significant number of interstate water cases.[27] And part of it is quality: interstate water disputes have grown to include groundwater, and the Court has turned to new remedies for resolving these disputes.[28] A group of practitioners has called this "a new and more robust era of interstate water adjudication."[29]

The natural question, then, is why the greater interest in interstate water cases? Have the cases gotten easier to decide? Has the Court simply shed its reluctance to pick winner states and loser states? Or have the facts themselves gotten more interesting to the justices? Likely the answer to all these questions is "no." What has changed is the climate. In the arid West, climate change is threatening already precarious water supplies.[30] But even in the wetter East, climate change has scrambled the

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[22] Jamison E. Colburn, *Rethinking the Supreme Court's Interstate Waters Jurisprudence*, 33 GEO. ENV'T L. REV. 233, 237 (2021).

[23] *Id.*

[24] Neal & Reed, *supra* note 10.

[25] *See, e.g.*, Colburn *supra* note 22, at 248 ("The Court's docket has turned noticeably in the last three decades to adjudicating the breach of interstate waters compacts.").

[26] *See, e.g.*, John B. Draper et al., *The Evolving Role of the Supreme Court in Interstate Water Disputes*, A.B.A. SEC. ENV'T, ENERGY, & RES.: NAT. RES. & ENV'T, Fall 2016, at 3, 4 ("[T]he Court is demonstrating its new willingness to engage actively in resolving interstate water disputes.").

[27] *See* South Carolina v. North Carolina, 558 U.S. 256 (2010); *see also* Kansas v. Nebraska, 574 U.S. 445 (2015); Montana v. Wyoming, 563 U.S. 368 (2011); Florida v. Georgia, 585 U.S. 803 (2018); Mississippi v. Tennessee, 595 U.S. 15 (2021).

[28] Draper, *supra* note 26, at 3.

[29] *Id.*

[30] *See, e.g.*, Robert Glennon, *Interstate Water Wars are Heating Up Along with the Climate*, TRELLIS (July 24, 2024), https://trellis.net/article/interstate-water-wars-are-heating-along-climate [https://perma.cc/DCR8-VW4L]; *see also* Pamela King, *Climate Change Unleashes Interstate Water Wars*, GREENWIRE (May 6, 2020, 1:13 PM), https://subscriber.politicopro.com/article/eenews/1063047595 [https://perma.cc/6JNX-LHKZ]; *Climate Change Heating Up Water Wars: Clashes Across the US*, O'MELVENY (Feb. 23, 2023), https://www.omm.com/insights/alerts-publications/climate-change-heating-up-water-wars-clashes-across-the-us [https://perma.cc/5CJB-6U5S].

usual rules of water usage.[31] As the United Nations has noted, water is "at the center of the climate crisis."[32] Scarcity begets disputes, disputes beget litigation. With more interstate water litigation vying for the Court's attention, there was bound to be an uptick in decisions.

B. Groundwater and the Supreme Court

Texas also comes at a time of increased attention from the Court to groundwater. At an increasing pace, the Court has issued opinion after opinion in cases involving groundwater. Of the thirty-six Supreme Court cases that mention the word "groundwater," ten were decided in the past decade and nearly two-thirds were decided in the past thirty years.[33] And, more than mere numbers, the groundwater cases have been significant. In just the past four years, the Court has issued several blockbuster groundwater cases that may reshape the law.

First, the Court tackled whether the country's preeminent water statute—the Clean Water Act—covers discharges related to groundwater in *County of Maui v. Hawaii Wildlife Fund*.[34] The majority stressed that "Congress left general groundwater regulatory authority to the States."[35] But what happens when a polluter discharges effluent through a point source to groundwater, and that groundwater flows directly into a navigable water? If the point source were placed into the navigable water, the Act would clearly apply.[36] And if the point source flowed into groundwater that was remote in time and space from a navigable water,

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[31] *See, e.g.*, Adriana Martinez-Smiley, *N.H.'s Coastal Communities are Trying to Protect Drinking Water Access from Climate Change*, WBUR (Aug. 28, 2023), https://www.wbur.org/news/2023/08/28/new-hampshire-seacoast-coastal-climate-change-groundwater [https://perma.cc/4PL8-WVEE]; *see also* Jonathan Fisk et al., *The South's Aging Water Infrastructure is Getting Pounded by Climate Change—Fixing it is also a Struggle*, THE CURRENT (Apr. 13, 2024), https://thecurrentga.org/2024/04/12/the-souths-aging-water-infrastructure-is-getting-pounded-by-climate-change-fixing-it-is-also-a-struggle [https://perma.cc/2HXC-S3YR].

[32] *Water—At the Center of the Climate Crisis*, UNITED NATIONS: CLIMATE ACTION, https://www.un.org/en/climatechange/science/climate-issues/water [https://perma.cc/SAM4-DEY7] (last visited Oct. 2, 2025).

[33] Based on a Westlaw search of United States Supreme Court cases including the word "groundwater." WESTLAW PRECISION, 1.next.westlaw.com [https://perma.cc/2YRW-AWLV] (select "U.S. Supreme Court" as jurisdiction; search "groundwater"; sort by date) (last visited Oct. 2, 2025).

[34] *See* County of Maui v. Haw. Wildlife Fund, 590 U.S. 165, 170, 186 (2020) (holding that "discharge" of a pollutant under § 301 of the Clean Water Act includes some "functional equivalent" discharges which effectively travel through groundwater before reaching waters of the United States).

[35] *Id.* at 177.

[36] *See id.* at 170–71 (quoting the Clean Water Act's definition of "point source" as "any discernible, confined and discrete conveyance . . . from which pollutants are or may be discharged" (alteration in original)).

the Act clearly would *not* apply.[37] For the middle ground cases, what is the outcome?

In a moderating opinion,[38] the *Maui* Court held that the Act *could* cover discharges from a point source to groundwater where the groundwater conveys the discharge in a manner functionally similar to a direct discharge.[39] That is, groundwater *can be included* in the Act's ambit, at least in some cases.[40] For the first time, the Court signaled an understanding of the hydrological connection between groundwater and surface water. While the scope of the opinion was deliberately modest,[41] the Court's foray into groundwater issues was momentous in itself.

Second, just a year later, the Court addressed whether a state could sue for alleged damage to its groundwater.[42] In 2014 the State of Mississippi sued the State of Tennessee for an alleged taking of Mississippi's groundwater.[43] The dispute concerned the Middle Claiborne Aquifer, a groundwater reservoir that underlies eight states and is an important source of drinking water.[44] Mississippi alleged that the City of Memphis was taking billions of gallons of its groundwater through some 160 wells located in Tennessee.[45]

These kinds of disputes—one state taking water that impacts another state—have long been governed by the Court's equitable apportionment doctrine, a method of judicially apportioning water rights

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[37] *See id.* (a point source must have a "discrete conveyance" from which the pollutants were discharged).

[38] *See id.* at 183 ("[W]e conclude that, in light of the statute's language, structure, and purposes, the interpretations offered by the parties, the Government, and the dissents are too extreme.").

[39] *Id.*

[40] *See id.* at 183–84 (the "functional equivalent" of a direct discharge can be through groundwater).

[41] *See id.* at 183 (finding a middle ground between the parties' more extreme arguments); *see also* Georgia D. Reid, *Muddying the Waters: The Need for More Clarity Under the Clean Water Act*, 28 BUFF. ENV'T. L.J. 77, 81 (2021) ("The *Hawaii* decision is not comprehensive enough and does not offer enough guidance to lower courts . . . .").

[42] *See Mississippi*, 595 U.S. 15, 18 (2021) ("Mississippi alleges that Tennessee's pumping has taken hundreds of billions of gallons of water that were once located beneath Mississippi.").

[43] *Id.*

[44] *See id.* at 19 (noting that the Memphis public utility pumps 120 million gallons of groundwater from the aquifer a day for public use).

[45] *Id.* at 19–20. Interestingly, Mississippi based its case on its duties as a trustee of groundwater assets under the state's public trust doctrine. *See* Exceptions to Report of the Special Master by Plaintiff State of Mississippi & Brief in Support of Exceptions at 31, *Mississippi*, 595 U.S. 15 (No. 22O143) ("[A]ll groundwater in Mississippi is held by Mississippi in public trust for the use and benefit of its citizens, and it is Mississippi's duty under the Constitution to protect, preserve, and control its taking for the benefit of its citizens."), 2021 WL 4731360; *see also* Sur-Reply of the State of Mississippi in Support of its Exceptions to Report of the Special Master at 6, *Mississippi*, 595 U.S. 15 (No. 22O143) ("Mississippi seeks . . . to discharge its duties as a trustee under the public trust doctrine . . . ."), 2021 WL 4729982.

that attempts to produce a fair allocation.[46] But the process has always involved surface water of some kind; whether equitable apportionment should apply to *groundwater* aquifers was an open question.[47]

In a terse, unanimous opinion authored by Chief Justice John Roberts, the Court held that interstate groundwater aquifers *were* subject to equitable apportionment.[48] In so doing, the Court emphasized the common characteristics of surface waters and groundwater: both can be transboundary resources, both can flow "naturally between the States,"[49] and both are susceptible to intrastate actions having an interstate impact.[50] However, because Mississippi never requested equitable apportionment, its complaint was dismissed.[51]

Although brief, *Mississippi* seemed poised to open the floodgates to a raft of groundwater litigation.[52] Commentators were quick to note that groundwater litigation was likely to increase.[53] While there has not yet been a rush to the courthouse door for similar state versus state groundwater lawsuits, options remain open for states to do so in the future.

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[46] *See Mississippi*, 595 U.S. at 21 ("Traditionally, equitable apportionment has been the exclusive judicial remedy for interstate water disputes, unless a statute, compact, or prior apportionment controls.").

[47] *See id.* at 24 ("Mississippi correctly observes that we have never considered whether equitable apportionment applies to interstate aquifers.").

[48] *See id.* at 25 ("[T]he speed of the flow . . . does not place the aquifer beyond equitable apportionment.").

[49] *Id.*

[50] *Id.* at 24–26.

[51] *Id.* at 28–29.

[52] *See, e.g.*, Robin Craig, *Court Unanimously Favors Tennessee in Groundwater Dispute with Mississippi*, SCOTUSBLOG (Nov. 22, 2021, 11:10 AM), https://www.scotusblog.com/2021/11/court-unanimously-favors-tennessee-in-groundwater-dispute-with-mississippi [https://perma.cc/MZ52-C8HF] ("During oral argument, some of the justices expressed discomfort with the potential breadth of the equitable apportionment doctrine if they applied it to groundwater, envisioning a proverbial flood of interstate original-jurisdiction litigation about aquifers."); *see also* Brett Walton, *Mississippi's Claim that Tennessee is Stealing Groundwater is a Supreme Court First*, CIRCLE OF BLUE (Oct. 3, 2016), https://www.circleofblue.org/2016/groundwater/states-lag-management-interstate-groundwater [https://perma.cc/CV25-Z4SG] ("Law experts say that the case foreshadows a new field of play for water rights in the United States.").

[53] *See* Walton, *supra* note 52 ("Law experts say that the case foreshadows a new field of play for water rights in the United States. . . . [A ruling for Tennessee would mean] that the water must be shared. . . . [This] would nudge the states to action. [States would be incentivized] to negotiate water-sharing compacts, just as they do for surface waters . . . ."); *see also* Lisa Rosenof, *Interstate Water Wars: Rise of the Litigation*, UNIV. OF CIN. L. REV. BLOG (Apr. 11, 2022), https://uclawreview.org/2022/04/11/interstate-water-wars-rise-of-the-litigation [https://perma.cc/QHV6-KXHP] (commenting on the increase of "water-related lawsuits between states," yet comparing this rise to the foreseeable impact of *Mississippi v. Tennessee*: both the Supreme Court's holding that the aquifer in dispute was subject to "equitable apportionment" and the subsequent "high burden . . . set for proving injury in the case might encourage states to negotiate amongst themselves to share aquifers rather than immediately heading to court for damages").

Third, of course, *Texas* is a case that centers on states' interest in shared groundwater resources.[54] As further discussed *infra*,[55] *Texas* is a groundbreaking groundwater case because it links—for the first time expressly—groundwater and surface water.

These cases—*Maui*, *Mississippi*, and *Texas*—reveal a Supreme Court that increasingly tasks itself with deciding major groundwater disputes. There is, of course, no reason to think that the trend will end with *Texas*; groundwater disputes will continue to engender litigation.

III. THE CASE

A. Conflicts and Compacts

The origins of *Texas* go back decades. As in many western states, parts of Texas, New Mexico, and Colorado have an arid climate where water is highly coveted.[56] Major waterways are thus highly crucial and highly contested.[57]

The Rio Grande is one of the largest rivers in the Southwestern United States and Mexico.[58] From its headwaters in Colorado, the Rio Grande winds its way through New Mexico before forming the border between Texas and Mexico and eventually emptying into the Gulf of Mexico.[59] It is the fourth longest river in the United States, and an essential and vital source of water in an arid part of the country.[60] Water uses are largely agricultural, but the river provides crucial water supply for nearby cities like Albuquerque, New Mexico and El Paso, Texas.[61]

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54 *See* discussion *infra* Part III.

55 *See* discussion *infra* Part III.

56 *See Climate Change Connections: New Mexico (Rio Grande)*, U.S. ENV'T PROT. AGENCY (Feb. 4, 2025), https://www.epa.gov/climateimpacts/climate-change-connections-new-mexico-rio-grande [https://perma.cc/A3V8-595T] (focusing primarily on New Mexico yet generalizing to states dependent on the Rio Grande: "In an already arid region, water conservation has always been important and climate change is motivating further conservation efforts.").

57 *See, e.g.*, John E. Thorson et al., *Dividing Western Waters: A Century of Adjudicating Rivers and Streams*, 8 U. DENV. WATER L. REV. 355, 378–79 (2005) ("After the first wave of settlers acquired prime riparian lands and diversion points, it became apparent that new water laws and institutions would be necessary if remaining arid lands were to support a growing population and economy in the ensuing years.").

58 *Climate Change Connections*, *supra* note 56 (highlighting that the Rio Grande is the "fourth largest river in the United States").

59 *Id.*

60 *Id.*

61 *See id.* (displaying a map with the cities through which the Rio Grande runs); *see also id.* ("[A]round three-quarters of the Rio Grande's water flow is diverted for use in agriculture. Nearly 6 million people . . . rely on the river as one of their primary sources of water."); Diego Mendoza-Moyers, *El Paso is getting less water from the Rio Grande this year. What does that mean for the city's water supply*, EL PASO MATTERS (June 22, 2025), https://elpasomatters.org/2025/06/22/el-paso-water-resources-rio-grande-drought-elephant-butte/ [https://perma.cc/9HRZ-XL5S].

Also, the Rio Grande is life-sustaining for innumerable plants and wildlife along its more than 1,800-mile stretch.[62]

Given the international dimensions of the river, the United States and Mexico entered an agreement in 1906 regarding water rights on the Rio Grande.[63] The treaty followed years of debate and litigation over use of the Rio Grande.[64] In short, the problem then—as now—was too little water and too much demand.[65] The 1906 treaty was simple: the United States promised Mexico a set annual delivery of Rio Grande water.[66]

Yet the treaty said nothing about water delivery *within* the United States. The federal government established an interstate irrigation system in 1910, called the Rio Grande Project, which was designed to foster agriculture.[67] But, like the 1906 treaty, the 1910 project did not address state-by-state allocation.[68]

In the 1920s, Congress tasked the three affected states—Colorado, New Mexico, and Texas—to work together to apportion the Rio Grande's water.[69] The states signed a temporary compact in 1929 that was finalized in 1938.[70] Like the 1906 treaty before it, the 1938 Compact provides for an annual schedule of water delivery.[71] Interestingly, the 1938 compact "apportions water by geographic regions rather than purely political boundaries," focusing on three sections of the Rio Grande: the San Luis Valley in Colorado, the Middle Rio Grande above the San Marcial in New Mexico, and the lower section of the river from the Elephant Butte

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62 *Id.* (highlighting specific species that have adapted to the arid climate's variable participation, like the native cottonwood trees' synced germination with annual flooding or the start of the silvery minnow's spawning season in response to meltwater).

63 *See generally* William A. Paddock, *The Rio Grande Convention of 1906: A Brief History of an International and Interstate Apportionment of the Rio Grande*, 77 DENV. U.L. REV. 287, 303–09 (1999) (describing the catalyst and following informal and formal negotiations with Mexico that resulted in the agreement between the United States and Mexico in 1906, as well as including the agreement itself and author observations).

64 In realizing the proposed international dam in El Paso would not have enough "reliable water supply" if the dam at Elephant Butte were built, the United States had to face "national implications that first had to be addressed," culminating in "the United States [filing] suit against the Rio Grande Company to prevent its construction of a reservoir near Elephant Butte" in May of 1897. *See id.* at 296–98.

65 *See id.* at 294–95 ("Given the nature of the river, seasonal water supply shortages were neither rare nor unexpected. In 1878, the Hatch Report warned that problems over water would grow in the future because the Rio Grande did not always carry enough water to irrigate the El Paso Valley. This statement reflected both the history of recurring droughts and the region's growing population.").

66 *See id.* at 306 ("[T]he United States shall deliver to Mexico a total of 60,000 acre-feet of water annually . . . .").

67 Cathaleen Qiao Chen, *Texas Hoping for Edge Over New Mexico in Battle Over Rio Grande*, TEX. TRIBUNE (Apr. 2, 2014, 6:00 AM), https://www.texastribune.org/2014/04/02/texas-hoping-edge-over-new-mexico-water-battle [https://perma.cc/GB69-AWS5].

68 *Id.*

69 *See id.* (noting Congress' authorization for the three states "to negotiate a temporary deal to determine how much water Texas—the most downstream state—was entitled to").

70 *See, e.g.*, William A. Paddock, *The Rio Grande Compact of 1938*, 5 U. DENV. WATER L. REV. 1, 14, 16 (2001).

71 *See id.* at 44.

Reservoir in southern New Mexico to the river's terminus in the Gulf of Mexico.[72] While this focus may make sense from a hydrological point of view, it lacks jurisdictional precision; nowhere does the 1938 Compact say how much water is allocated to Texas specifically.[73] That foreshadowing is compounded by another omission: the 1938 Compact never differentiates between groundwater and surface water.[74]

B. Texas Files Suit

We jump now to the twenty-first century. In 2013, Texas sued New Mexico (and Colorado, as Colorado was a signatory to the 1938 Compact) for alleged violations of the Compact.[75] According to Texas, New Mexico was diverting surface and groundwater from below the Elephant Butte Reservoir in violation of the Compact.[76] That is, New Mexico was allowing downstream New Mexico users to take water that, per the Compact, was supposed to flow into Texas.[77]

What happened in the intervening seventy-five years? Why did it take so long for Texas to resort to litigation, and what precipitated its filing? While there were likely both political and practical considerations behind Texas's Complaint, the story of the Rio Grande in Texas is common to United States water law in the twenty-first century: increased drought and increased demand. Texas is no stranger to either. Drought has plagued Texas in recent decades, with eighteen drought events between 1980 and 2022 that cost an estimated $1 billion or more in economic impacts.[78] An especially severe drought gripped Texas from 2010 to 2014—during which Texas filed its Complaint.[79] That drought affected 100% of the state for weeks, costing an estimated $73 billion and contributing to the deaths of 271 people.[80] In 2011, just two years before the 2013 Complaint, Texas faced the worst one-year drought in recorded history.[81] The lower Rio Grande in Texas was especially hard hit, with "new records for dryness at nearly every observing location in the Rio

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[72] *Id.* at 2, 44.

[73] *See, e.g.*, Chen, *supra* note 67.

[74] *See id.*

[75] *See id.* Texas did not articulate specific claims against Colorado, seemingly including them only because, as a Compact signatory, they are a necessary and indispensable party.

[76] *See id.*; *see also Texas*, 583 U.S. 407, 411 (2018).

[77] *See Texas*, 583 U.S. at 411.

[78] *See, e.g.*, Jess Donald & Spencer Grubbs, *Drought in Texas: How Rain Scarcity Affects Texans and the Economy*, TEX. COMPTROLLER FISCAL NOTES (Dec. 2022), https://comptroller.texas.gov/economy/fiscal-notes/archive/2022/dec/drought.php [https://perma.cc/6WAS-TMK9].

[79] *Id.*

[80] *See id.*

[81] *See, e.g.*, Kartik Venkataraman et al., *21st Century Drought Outlook for Major Climate Divisions of Texas Based on CMIP5 Multimodel Ensemble: Implications for Water Resource Management*, 534 J. HYDROLOGY 300, 300 (2016).

Grande Valley."[82] The drought's severity was exacerbated, at least in part, by increased water demands in the state. Texas's population nearly tripled from 1950 to 2000, and from 2000 to 2010 its population grew more than that of any other state.[83] For many communities in the lower Rio Grande, the river is the main source of water.[84]

This context—scarcity in the face of heightened need—informs Texas's turn to litigation. And with groundwater withdrawals not expressly accounted for in the 1938 Compact, there was a plausible argument that New Mexico's groundwater extractions were prohibited.[85] From Texas's perspective, why not try to use the legal system?

Texas filed a brief sixteen-page Complaint in the United States Supreme Court in January of 2013, invoking the Court's original jurisdiction.[86] The allegations were terse and to the point: "New Mexico . . . has increasingly allowed the diversion of surface water, and has allowed and authorized the extraction of water from beneath the ground, downstream of Elephant Butte Dam."[87] Texas sought declaratory relief upholding Texas's rights under the 1938 Compact as well as injunctive relief commanding New Mexico to deliver water from the Rio Grande in accordance with the Compact.[88] Interestingly, the state hired outside counsel from a midsized California firm that specializes in water resource disputes, perhaps indicating that the state was interested in winning through subject matter expertise and was not filing the suit as a publicity ploy.[89]

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[82] *Rio Grande Valley Hit with Double Whammy: Hot, Dry September Locks up Record Dry Water Year (October 2010 to Sept. 2011)*, NAT'L WEATHER SERV., https://www.weather.gov/bro/2011event_wateryearandseptember [https://perma.cc/4F9G-ATZ6] (last visited Oct. 4, 2025).

[83] *See, e.g.*, *"What's the Problem?"*, TEX. THE STATE OF WATER, http://www.texasthestateofwater.org/screening/html/overview_background.htm [https://perma.cc/BLN5-GCTV] (last visited Oct. 4, 2025); *see also* TEX. WATER DEV. BD., WATER FOR TEXAS 2012 STATE WATER PLAN 129 (2010), https://www.edwardsaquifer.org/wp-content/uploads/2019/02/2010_TWDB_PopulationWaterProjections.pdf (on file with the Environmental Law Review).

[84] *See, e.g.*, Press Release, Lower Rio Grande Valley Dev. Council, Water Resources (Sep. 5, 2024), https://www.lrgvdc.org/water.html [https://perma.cc/Z4W8-UW5X]. *See generally* Berenice Garcia, *As the Rio Grande Runs Dry, South Texas Cities Look to Alternatives for Water*, TEX. TRIBUNE (July 18, 2024, 12:00 PM), https://www.texastribune.org/2024/07/18/rio-grande-river-drought [https://perma.cc/9GBV-A85P] ("Cities [in the Rio Grande Valley] are set up to depend on irrigation districts . . . to deliver water that will eventually go to residents.").

[85] *See, e.g.*, Julián Aguilar, *Vast Rio Grande a Source of Numerous Legal Battles*, TEX. TRIBUNE (Dec. 15, 2013, 6:00 AM), https://www.texastribune.org/2013/12/15/rio-grande-faces-unique-challenges-border-river [https://perma.cc/97RT-JFNG].

[86] *See* Texas's Complaint at 1, *Texas*, 583 U.S. 407 (2018) (No. 22O141).

[87] *Id.* at 8.

[88] *See id.* at 14–15.

[89] *See generally id.* (showing Somach Simmons & Dunn as Texas's counsel of record); *Water Resources*, SOMACH SIMMONS & DUNN, https://somachlaw.com/practices/water-resources [https://perma.cc/5LBP-ES9D] (last visited Oct. 4, 2025) (listing "State of Texas" as a client).

Because the Supreme Court's jurisdiction is discretionary, Texas's Complaint was filed as a Motion for Leave to File a Bill of Complaint.[90] The Court signaled early interest, inviting the Solicitor General to file a brief expressing the views of the United States.[91] The Solicitor General did so, urging the Court to exercise its original jurisdiction.[92] The Court agreed, allowing Texas to file its Complaint in a January 2014 Order.[93]

One month after the Complaint was filed, the United States moved to intervene as a plaintiff;[94] such a move is understandable given the federal government's obligations under the 1906 treaty with Mexico.[95] Texas filed a brief in support of the federal government's intervention, and the Supreme Court agreed within a few weeks of the United States' filing.[96]

The litigation intensified quickly. New Mexico filed a motion to dismiss Texas's Complaint in April 2014.[97] Texas and the United States filed briefs in opposition.[98] Several parties filed amicus briefs, mostly local governments and water districts in New Mexico and Texas.[99] A routine lodging request was filed by New Mexico and opposed by Texas.[100] The case was snowballing.

Perhaps in response to this flurry of litigative activity, the Court assigned a special master to *Texas*, as it does in many other interstate water disputes.[101] Despite its original jurisdiction of these cases, the Supreme Court is not a trial court. The Court routinely appoints a special master to "take evidence, summon witnesses, issue subpoenas, 'fix the time and conditions for the filing of additional pleadings,' 'direct subsequent proceedings,' and entertain motions to intervene or dismiss."[102] In this case, the Court appointed A. Gregory Grimsal, a private commercial litigator based in Louisiana, as the first special master.[103]

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[90] *See* Docket, *Texas*, 583 U.S. 407 (No. 22O141).

[91] *See id.*

[92] *See* Brief for the United States as Amicus Curiae at 10, *Texas*, 583 U.S. 407 (No. 22O141).

[93] *See* Docket, *Texas*, 583 U.S. 407 (No. 22O141).

[94] *See id.*

[95] *See* Paddock, *supra* note 63.

[96] *See* Docket, *Texas*, 583 U.S. 407 (No. 22O141) (granting Motion for Leave to Intervene filed by United States).

[97] *See id.*

[98] *See id.*

[99] *See id.*

[100] *See id.*

[101] *See id.* (showing order of appointment of Special Master A. Gregory Grimsal, Esq., issued November 3, 2014).

[102] L. Elizabeth Sarine, Note, *The Supreme Court's Problematic Deference to Special Masters in Interstate Water Disputes*, 39 ECOLOGY L.Q. 535, 551 (2012) (quoting Anne-Marie C. Carstens, *Lurking in the Shadows of Judicial Process: Special Masters in the Court's Original Jurisdiction Cases*, 86 MINN. L. REV. 625, 654–55 (2002)).

[103] *See, e.g.*, Richard S. Deitchman, *United States Supreme Court Names Special Master in Rio Grande Compact Litigation*, SOMACH SIMMONS & DUNN (Nov. 10, 2014), https://

Over the next three years, the Special Master oversaw a growing docket. New Mexico moved to dismiss both Texas's Complaint and the United States' Complaint in Intervention.[104] Two putative parties attempted to intervene: the Elephant Butte Irrigation District and the El Paso County Water Improvement District No. 1.[105] After holding hearings on these motions, the Special Master filed his First Interim Report in February of 2017.[106] The document is over 350 pages, including appendices.[107] In it, the Special Master recommended denying New Mexico's motion to dismiss Texas's Complaint and denying both motions to intervene.[108] But the Special Master further recommended that the Court grant a portion of New Mexico's motion to dismiss the United States' Complaint.[109] Essentially, the Special Master recommended that the Supreme Court hold that the 1938 Compact "does not confer on the United States the power to enforce its terms."[110] In short order, the United States filed an exception to this recommendation.[111] Several other parties likewise filed exceptions to the First Interim Report.[112]

The Supreme Court accepted most of the Special Master's recommendations, denying New Mexico's Motion to Dismiss Texas's Complaint and denying the two motions to intervene.[113] But the Court decided to take up some issues itself. In an October 2017 order, the Court held that the United States' exceptions and one of Colorado's exceptions were set for oral argument.[114] As the Court described it, both exceptions concerned "the scope of the claims the United States can assert in the original action." The Court explained that "[t]he United States says it may pursue claims for violations of the Compact itself; Colorado says the United States should be permitted to pursue claims only to the extent they arise under the 1906 treaty with Mexico."[115] And, of course, the Special Master determined that neither was correct.[116] Which state was correct would be decided by the Supreme Court in 2018.

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somachlaw.com/policy-alert/united-states-supreme-court-names-special-master-in-rio-grande-compact-litigation [https://perma.cc/U6DK-ENYN].

104 *Compare* Docket, *Texas*, 583 U.S. 407 (No. 22O141) (showing New Mexico's motions to dismiss Texas's and the United States' complaints filed April 30, 2014), *with* Transcript of Oral Argument, *Texas*, 583 U.S. 407 (No. 22O141) (transcribing the oral argument for New Mexico's August 19, 2015, motion to dismiss).

105 Docket, *Texas*, 583 U.S. 407 (No. 22O141) (documenting intervention filings dated December 3, 2014, and April 22, 2015, respectively).

106 *Id.*

107 *See generally* First Interim Report of the Special Master, *Texas*, 583 U.S. 407 (No. 22O141).

108 *See id.* at 217, 267, 277.

109 *See id.* at 237.

110 *Texas*, 583 U.S. at 411.

111 *See* Docket, Texas, 583 U.S. 407 (No. 22O141) (documenting the United States' exception filed June 9, 2017).

112 *See id.*

113 *See id.* (noting denials filed October 10, 2017).

114 *See id.* (documenting the Court's October 10, 2017, order setting oral argument).

115 *Texas*, 583 U.S. at 411–12.

116 *See* First Interim Report of the Special Master, *Texas*, 583 U.S. 407 (No. 22O141).

C. The 2018 Supreme Court Decision

As soon as the Supreme Court took up the case in late 2017, things picked up. A case that had meandered through status conferences and briefings for three years suddenly moved quickly. In mid-November, the Court announced that oral argument was set for January 2018.[117] After an hour of oral argument, the Court submitted the case for consideration.[118] Just two months later, the Court handed down a unanimous opinion by Justice Neil Gorsuch.[119]

As for the substance of the opinion, it was concededly a narrow question. The only issue before the Court was the nature of the claims the United States could pursue in the litigation, not whether the United States had a right to be there at all.[120] It took Justice Gorsuch just six pages to answer the question.[121]

Four considerations guided the Court's decision. First, this case had an unusual intertwining of federal and state interests. Not all interstate compacts necessitate federal intervention, though they almost invariably touch on federal concerns.[122] Yet the Rio Grande is different because the federal government continues to manage water use throughout the river basin.[123] The federally managed Rio Grande Project is responsible for providing water for downstream use.[124] To that end, the federal government has entered into a number of contracts—"Downstream Contracts"—to supply that water.[125] The 1938 Compact, then, "could be thought implicitly to incorporate the Downstream Contracts by reference."[126] Second, all parties agreed that the United States "plays an integral role in the Compact's operation."[127] In other words, even though the United States was not a party to the 1938 Compact, its presence is essential for the compact's operation. Third, the 1906 Treaty with Mexico loomed large over this case.[128] The United States has certain obligations under the Treaty to deliver water to Mexico.[129] As Justice Gorsuch concluded, "[p]ermitting the United States to proceed here will allow it to ensure that those obligations are, in fact, honored."[130] And fourth, the procedural posture—wherein Texas had already filed the litigation—

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117 *See* Docket, *Texas*, 583 U.S. 407 (No. 22O141) (documenting the Court's November 17, 2017, order to set oral argument for January 8, 2018).

118 *See* Transcript of Oral Argument at 3, 66, *Texas*, 583 U.S. 407 (No. 22O141) (recording a 10:06 AM argument commencement and 11:04 AM submission), 2018 WL 1368599.

119 *Texas*, 583 U.S. 407.

120 *Id.* at 411–12.

121 *See id.* at 409–15.

122 *See id.* at 413.

123 *See id.* at 413–14.

124 *See id.*

125 *See id.* at 410.

126 *Id.* at 413.

127 *Id.* at 414.

128 *See id.*

129 *Id.*

130 *Id.* at 415.

made it unnecessary a determination of "whether the United States could initiate litigation to force a State to perform its obligations under the Compact."[131]

These four considerations meant that the United States could pursue claims under the Compact itself.[132] With that, the Court remanded the case to the Special Master.[133]

The 2018 *Texas* decision was quite muted. For one, the case very intentionally avoided breaking new ground. The Court did not decide any broad issues of law, instead opting to simply permit the United States to bring claims. The Court did so while expressly declining to opine on what *could* happen in other circumstances.[134] The decision more or less amounts to a permissive shrug, allowing the case to move forward at an early phase with no changes. This lack of consequence is probably responsible, at least in part, for the unanimous opinion.

For another, Justice Gorsuch made clear that the Court's conclusion was based on the particular facts before it. The history of the Rio Grande—and of the federal government's involvement in it—is so idiosyncratic that *Texas* is an unlikely model for any future dispute. The citation of *Texas* in future cases confirms this narrow conclusion; nearly seven years after it was decided, only four cases have cited *Texas*, and one of those was the 2024 Supreme Court second *Texas* decision.[135] In other words, the 2018 *Texas* decision amounts to very little precedential significance. The real battle of the merits was still ahead.

D. Years of Litigation

It would be another six years before the case returned to the Supreme Court. A lot of litigating happened during that period. First, the Court discharged the Special Master and appointed Judge Michael J. Melloy from the Eighth Circuit Court of Appeals.[136] New Mexico answered both Texas's and the United States' complaints, and filed nine counterclaims against both.[137] Interestingly, the counterclaims insisted that Texas, not

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131 *Id.*

132 *See id.* at 415.

133 *See id.*

134 *Id.* at 413–15.

135 Based on an August 2025 Westlaw search of citing references to *Texas*. WESTLAW PRECISION, 1.next.westlaw.com [https://perma.cc/3WFL-CC5K] (search "602 U.S. 943"; sort by Citing References, Cases) (last visited Oct. 4, 2025).

136 *See* Docket, *Texas*, 602 U.S. 943 (2024) (No. 22O141) (transitioning the appointment of Special Master from Gregory Grimsal of Louisiana to Michael J. Melloy of Iowa).

137 *See* State of New Mexico's Answer to the State of Texas's Complaint, *Texas*, 602 U.S. 943 (No. 22O141); State of New Mexico's Answer to the United States' Complaint in Intervention, *Texas*, 602 U.S. 943 (No. 22O141); State of New Mexico's Counterclaims, *Texas*, 602 U.S. 943 (No. 22O141).

New Mexico, was the party that had allowed unauthorized surface and groundwater depletions that affected the Rio Grande.[138]

Next, nearly a year was spent responding to yet another purported intervenor. These so-called "Pre-Federal Claimants" maintained that they held water rights that pre-dated the United States' involvement with the Rio Grande.[139] Another round of briefing commenced, resulting in a Second Interim Report of the Special Master recommending that the Supreme Court deny the motion to intervene.[140] On January 13, 2020, the Court agreed and denied the motion.[141]

With the case back before the Special Master, the trial court nature of the litigation proceeded apace. The Special Master ruled on three pending motions, dismissing a handful of New Mexico's counterclaims.[142] Then, discovery commenced.[143] By this time, however, the COVID-19 crisis was at its height, resulting in a complicated remote version of discovery.[144]

Texas, the United States, and New Mexico all moved for partial summary judgment in early November 2020.[145] By May 2021, the Special Master rendered a hefty fifty-four-page opinion, granting in part and denying in part the various motions.[146] Many of the contentions were factual issues, such as the scope of the apportionments and the duties of the involved states, and thus were inappropriate for summary judgment.[147] But some factual issues were uncontroverted, including—importantly—that New Mexico's groundwater withdrawals negatively impacted the Rio Grande's surface waters.[148] The Special Master accordingly agreed that "[s]urface and groundwater in the Rio Grande basin below Elephant Butte Reservoir are interconnected."[149] As the case headed toward trial, the parties did not diverge on groundwater's central role in the dispute.

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138 *See* State of New Mexico's Counterclaims at 17–19, *Texas*, 602 U.S. 943 (No. 22O141) (making this assertion under "First Claim for Relief").

139 *See* Second Interim Report of the Special Master at 3, *Texas*, 602 U.S. 943 (No. 22O141), ("Pre-Federal Claimants" refer to an estate and a group of individuals who asserted contested rights to water and physical infrastructure).

140 *Id.* at 4.

141 *See* Docket, *Texas*, 602 U.S. 943 (No. 22O141) (documenting the date the Court denied the motion for leave to intervene).

142 Order of the Special Master at 42, *Texas*, 602 U.S. 943 (No. 22O141).

143 *See, e.g.*, Third Interim Report of the Special Master at 31, *Texas*, 602 U.S. 943 (No. 22O141), 2023 WL 4394544.

144 *Id.*

145 State of Texas's Motion for Partial Summary Judgment, *Texas*, 602 U.S. 943 (No. 22O141); United States of America's Motion for Partial Summary Judgment, *Texas*, 602 U.S. 943 (No. 22O141); State of New Mexico's Motion for Partial Summary Judgment on Compact Apportionment, *Texas*, 602 U.S. 943 (No. 22O141).

146 Order of the Special Master at 46–54, *Texas*, 602 U.S. 943 (No. 22O141).

147 *See id.* at 47 ("The Compact is ambiguous as to the detailed scope of the apportionments and the New Mexican duty.").

148 *See id.* at 49–50.

149 *See id.* at 49.

When trial came, the Special Master bifurcated it into liability and damages phases, and then further bifurcated the liability phase into fact and expert witnesses.[150] The first liability phase—percipient fact witnesses—ended by November 2021.[151] Perhaps sensing some common ground, the Special Master took pains to get the parties to settle.[152] The second liability phase trial date was pushed back several times to permit the parties to conduct mediation, once even over Texas's objection.[153] By the fall of 2022 the United States represented to the Special Master that settlement was expected by September.[154] Yet, in a September status conference, the parties announced an impasse, suggesting the trial would proceed.[155]

Then, as if out of nowhere, the states filed a motion to enter into a Consent Decree.[156] Texas, New Mexico, and Colorado had finally agreed on a way to end the litigation.[157] The substance of the Consent Decree was temperate and compromising.[158] It imposed a duty on New Mexico to manage in-state waters to assure a set amount of water reached Texas.[159] And it clarified what the Texas apportionment would be.[160] More than just thresholds, the Consent Decree also contained mechanisms for future fixes, allowing (and sometimes requiring) adjustments to water deliveries on "a forward-looking basis."[161] Interestingly, the way the Consent Decree assessed New Mexico's compliance was based not on the water levels present during the 1938 Compact, but instead the water levels from 1951 to 1978.[162] The nearly ten-year litigation seemed almost over.

That was, however, until the United States substantively objected to the Consent Decree.[163] This objection triggered another round of briefing, oral argument, and—finally—decision by the Special Master through a Third Interim Report.[164] Published in July 2023, the Third Interim Report of the Special Master is over one-hundred pages of carefully detailed analysis.[165] In the report, the Special Master upheld the Consent Decree as "adequate, reasonable, and substantively and procedurally fair" over

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150 *See, e.g.*, Third Interim Report of the Special Master at 34–35, *Texas*, 602 U.S. 943 (No.22O141), 2023 WL 4394544.

151 *See id.*

152 *See id.*

153 *See id.* at 35–36.

154 *See id.*

155 *See id.* at 36.

156 *See id.* at 36–37.

157 *See id.*

158 *See id.* at 38.

159 *See id.*

160 *See id.*

161 *Id.* at 38.

162 *See, e.g.*, *Texas*, 602 U.S. at 962–63.

163 *See, e.g.*, Third Interim Report of the Special Master at 34–35, *Texas*, 602 U.S. 943 (No.22O141), 2023 WL 4394544.

164 *See id.* at 37–38.

165 *Id.* at 108.

the United States' objections.[166] The United States subsequently filed its exceptions to the report before the Supreme Court.[167] The Supreme Court ultimately considered those exceptions in its January 2024 conference and scheduled the case for oral argument in March 2024.[168] A decision followed in late June 2024.[169] After years of litigation, the case has finally found its way back to the Supreme Court.

But that result was not inevitable; just a year and half earlier, in the fall of 2022, the United States represented to the Special Master its understanding that the entire case would settle.[170] But later, in January 2024, the United States expressed its problems with the proposed Consent Decree.[171]

The United States details their concerns in its Exception to the Special Master's Third Interim Report.[172] At first blush, the ninety-six-page brief reads like standard contract law; the United States argues that the proposed Consent Decree would dispose of the United States' claims and impose obligations on the United States without the States' consent.[173] The United States' impression is that the three states—Texas, New Mexico, and Colorado—are purporting to consent behind the United States' back. But why wouldn't the United States join in and agree? If the state that started the litigation—Texas—could manage to agree, why couldn't the United States?

The answer to these questions lies in the lynchpin of this whole dispute: groundwater. The United States' position throughout the litigation was, like Texas, that New Mexico was over-pumping groundwater.[174] And while Texas was apparently fine with a Consent Decree that assessed New Mexico's compliance based on a base period from 1951 to 1978, the United States was not.[175] In other words, the United States asserted that the Consent Decree would foreclose its position that New Mexico's groundwater pumping violated the 1938

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166 *Id.*

167 *See* Docket, *Texas*, 602 U.S. 943 (No. 22O141) (filing the exception and supporting brief on Oct. 6, 2023).

168 *See id.*

169 *See id.*

170 *See* Third Interim Report of the Special Master at 35–37, *Texas*, 602 U.S. 943 (No.22O141), 2023 WL 4394544.

171 *Compare* Joint Notice of No Exceptions to the Third Interim Report of the Special Master at 1, *Texas*, 602 U.S. 943 (No. 22O141), *with* Exception of the United States and Brief for the United States in Support of Exception, *Texas*, 602 U.S. 943 (No. 22O141), 2023 WL 6627385.

172 *See* Exception of the United States and Brief for the United States in Support of Exception at 17–46, *Texas*, 602 U.S. 943 (No. 22O141) (addressing why the consent decree should be rejected), 2023 WL 6627385.

173 *See id.* at 17–40.

174 *See Texas*, 602 U.S. at 962–63 ("The United States maintains that New Mexico's pumping breaches that State's alleged duty under the Compact not to interfere with the Project.").

175 *See id.*

Compact.[176] This exception underscored a point evident from Texas's filing of the Complaint in 2013 through to 2024: groundwater, and more particularly *groundwater overuse*, was at the heart of this case.

E. The 2024 Supreme Court Decision

Much like in 2018, the timeline from the Supreme Court's acceptance of the case to oral argument was brief.[177] The Court gave less than two months from the scheduling of oral argument to the argument itself.[178] The oral argument featured an active bench.[179] Off the bat, Justice Gorsuch—the author of the 2018 decision—teased the United States' advocate, Frederick Liu, remarking, "I've got to say you're making me regret that decision."[180] Several times the justices spoke over one another, indicating some intense interest from the bench.[181] In particular, Justices Neil Gorsuch, Sonia Sotomayor, and Ketanji Brown Jackson asked the advocates a number of questions.[182] Perhaps unsurprisingly, Justices Jackson and Gorsuch authored the majority opinion and dissent, respectively.[183]

The Court issued its opinion just three months after oral argument.[184] The opinion was a markedly different affair than the short 2018 decision; it totaled forty-three pages, with eighteen for the majority and twenty-four for the dissent.[185] Rather than a unanimous court, the 2024 *Texas* decision was split 5–4, with Justices Jackson, Kagan, Sotomayor, and Kavanaugh and Chief Justice Roberts in the majority, and Justices Gorsuch, Thomas, Alito, and Barrett in the dissent.[186] And unlike the measured and temperate 2018 decision, the 2024 opinion was full of barbs, with the majority accusing the States and the dissent of "mischaracteriz[ing]" the United States' claims and the dissent firing back that the majority "defies 100 years of this Court's water law jurisprudence," representing a "serious assault on the power of States to govern [water rights]."[187] The following discussion analyzes the majority

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176 *Id.* at 963 ("[T]he consent decree would settle that question by deeming New Mexico compliant with the Compact, even as it allows pumping at the D2 levels [from 1951–1978].").

177 *See* Docket, *Texas*, 602 U.S. 943 (No. 22O141) (noting that the Supreme Court of the United States, on January 29, 2024, set oral argument for March 20, 2024, less than two months later).

178 *See, e.g.*, *id.*

179 *See* Transcript of Oral Argument at 1, *Texas*, 602 U.S. 943 (No. 22O141) (transcribing the March 20, 2024, oral argument).

180 *Id.* at 9.

181 *See id.* at 68 (noting an interruption of Chief Justice Roberts by Justice Sotomayor).

182 *See, e.g.*, *id.* at 10–11, 19–23.

183 *Texas*, 602 U.S. at 947, 966.

184 Docket, *Texas*, 602 U.S. 943 (No. 22O141) (delivering the opinion on June 21, 2024, just three months after oral argument on March 20, 2024).

185 *See Texas*, 602 U.S. at 947–65 (majority opinion); *id.* at 966–90 (dissenting opinion).

186 *Texas*, 602 U.S. at 945.

187 *Id.* at 964; *id.* at 966–67 (Gorsuch, J., dissenting).

and dissenting opinions separately, concluding with an analysis of the Court's disagreement.

1. The Majority Opinion

Justice Jackson, the most junior member of the Court, authored the 2024 *Texas* majority opinion.[188] The majority she wrote for was an interesting amalgam, with fellow liberal Justices Kagan and Sotomayor as well as conservatives Justice Kavanaugh and Chief Justice Roberts.[189] Perhaps these strange bedfellows make more sense in the context of Justice Kavanaugh's and Chief Justice Roberts's past affiliation with the federal government (and their votes in favor of the federal government here).[190]

Whatever the motive behind the five votes, Justice Jackson made clear from the opinion's outset that the case was about permitting the United States to pursue its claims, specifically those related to groundwater: "Through the consent decree, the States would settle all parties' Compact claims and, in the process, cut off the United States' requested relief as to New Mexican groundwater pumping."[191] Indeed, even the routine fact recitation highlighted how central groundwater is to this dispute, focusing on "New Mexico's ramped-up groundwater pumping" and how that action impacts the federal government.[192]

Justice Jackson framed the analysis around two central questions: "whether the United States ha[d] valid Compact claims and whether the proposed consent decree would dispose of those claims."[193] As to the first question, the 2018 *Texas* case is dispositive.[194] In *Texas*, the unanimous Court found that the United States had "distinctively federal interests" under the 1938 Compact, premised on the federal government's obligations under the 1906 Treaty with Mexico.[195] As Justice Jackson pithily put it, "[i]f it did not, one might wonder why we permitted the Federal Government to intervene in the first place."[196] While these claims "may or may not ultimately prevail at trial," that is a separate question from whether the claims themselves are valid.[197]

As to the second analysis, there is little doubt that the proposed Consent Decree would dispose of the United States' claims.[198] In fact, even

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188 *See id.* at 947.

189 *Id.* at 945.

190 *Current Members*, SUP. CT. OF THE U.S., https://www.supremecourt.gov/about/biographies.aspx [https://perma.cc/5B8D-MWY6] (last visited Oct. 4, 2025). This is not the first time Chief Justice Roberts and Justice Kavanaugh have joined their liberal colleagues to form a five-vote block. *See, e.g.*, Salinas v. U.S. R.R. Ret. Bd., 592 U.S. 188 (2021).

191 *Texas*, 602 U.S at 948.

192 *Id.* at 951.

193 *Id.* at 954.

194 *See id.* at 956–57.

195 *Id.*

196 *Id.* at 957.

197 *Id.* at 963.

198 *See id.* at 961–62.

"the States have conceded as much."[199] As Justice Jackson noted, "[w]ere the consent decree adopted, the United States would be precluded from claiming what it argues now—that New Mexico's present degree of groundwater pumping violates the Compact."[200] After all, that is the point of consent decrees: to dispose of claims and end litigation.

With these analyses done, Justice Jackson concluded that the Court would not enter a "'consent' judgment without the actual consent of the Government."[201] But before ending the opinion, Justice Jackson tacked on one additional section to respond to the dissent.[202] There, Justice Jackson asserted that the dissent and the States are "mischaracteriz[ing]" the United States' position.[203] The United States' claims, so said Justice Jackson, were not a simple "'*intrastate* dispute between the United States and New Mexico' that is better left to existing litigation in other courts."[204] Instead, the United States' claims were that "the Compact itself bars New Mexico's allegedly excessive groundwater pumping," which would be impossible to litigate elsewhere if disposed of here.[205] With that, Justice Jackson ended the opinion.

2. The Dissent

Just six years after writing the 2018 *Texas* opinion for a unanimous court, Justice Gorsuch wrote the dissent for the same case, this time for four justices.[206] Court observers were quick to point out that Justice Gorsuch did not pull any punches, calling the dissent "vigorous"[207] and "passionate."[208] Reading the dissent, it is easy to see why. Justice Gorsuch starts by framing the debate very differently. This was not a case about entering a consent decree over the objection of a party. This was a case about an obstinate party—the federal government—who sought "to advance a theory about how water should be distributed between Texas and New Mexico so aggressive that New Mexico fears it could devastate its economy."[209] This was despite the fact that the states had already agreed to "fairly apportion water" and "leave federal reclamation operations in the area running the way they have run for decades."[210] The Special Master himself concluded that it is "difficult to envision a

199 *Id.* at 962.
200 *Id.* at 963.
201 *Id.*
202 *Id.* at 964–65; *id.* at 965 n.5.
203 *Id.* at 964.
204 *Id.* (quoting Joint Reply to the Exception of the United States at 43, *Texas*, 602 U.S. 943 (No. 22O141)).
205 *Id.* at 965.
206 *See id.* at 966 (Gorsuch, J., dissenting, joined by Thomas, Alito, & Barrett, JJ.).
207 Neal & Reed, *supra* note 10.
208 Frances Williamson, *Water and Federalism in* Texas v. New Mexico, HARV. J.L. & PUB. POL'Y: PER CURIAM, Summer 2024, at 1, 4.
209 *Texas*, 602 U.S. at 966 (Gorsuch, J., dissenting).
210 *Id.*

resolution to this matter that might be superior."[211] To permit the United States to upend this process, prolonging the litigation, was in "defiance [of] 100 years of this Court's water law jurisprudence. And it represents a serious assault on the power of States to govern, as they always have, the water rights of users in their jurisdictions."[212] This diatribe came in just the introduction to the dissent.

The rest of the dissent maintained this sentiment. While the facts recounted by the dissent are mostly the same as the majority's recitation, Justice Gorsuch differed in his retelling of why the United States disagreed with the proposed consent decree.[213] He called the United States' litigating position "an unexpected and still-unexplained move."[214] In his version,

> the United States abandoned its position, held for over 40 years, that its own D2 Period [1951–1978] data supply the correct method for measuring the amount of water it must deliver to Texas and New Mexico water districts. Instead, the federal government began advocating for something similar to what Texas had once urged—the 'broad elimination of New Mexican [groundwater] pumping through a return to a 1938' baseline.[215]

Yet again, Justice Gorsuch laid the blame squarely at the feet of a difficult federal government.

Justice Gorsuch's application of the law continued in a similar vein. Rather than stressing the "consent" part of consent decrees as the majority does, he emphasized that water law is a matter of state sovereignty, one that requires "'mutual accommodation and agreement' rather than . . . litigation."[216] The Court's role, then, is twofold: (1) to confirm that proposed consent decrees are consistent with existing compacts; and (2) to verify that "a proposed settlement does not improperly impose duties or obligations on those third parties without their consent or dispose of the valid claims they enjoy."[217]

As to the first duty, Justice Gorsuch had little trouble concluding that the proposed consent decree was consistent with the 1938 Compact.[218] After all, the Compact promised "Texas some minimum amount of Rio Grande water each year," and the proposed consent decree delivers on that promise.[219] To be sure, the calculations for that delivery have changed, but it is based on a period of time that the states have been relying on "for decades."[220]

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211 *Id.*
212 *Id.* at 966–67.
213 *See id.* at 972–73.
214 *Id.* at 972.
215 *Id.* at 972–73 (second alteration in original).
216 *Id.* at 974 (quoting Florida v. Georgia, 585 U.S. 803, 809 (2018)).
217 *Id.* at 976–77.
218 *See id.* at 977 ("*First*, the decree is consistent with the Compact.").
219 *Id.*
220 *Id.* at 968–69, 977.

As to the second duty, Justice Gorsuch maintained that the proposed "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."[221] This, of course, is the main point of disagreement with the majority. Justice Gorsuch noted that the proposed consent decree would further protect the water delivery the United States is required to make to Mexico.[222] And as for the claims that the United States may wish to make concerning New Mexico's groundwater pumping, this is not the proper forum for those claims.[223] The Special Master recommended dismissing those claims without prejudice, allowing the United States "to pursue any valid independent claims it may have in the ordinary course in lower courts."[224] To Justice Gorsuch, that result is "'an entirely appropriate'—and long preferred—'means of resolving whatever questions remain' after the resolution of an interstate dispute."[225]

The remaining substantive section of the dissent was a response to the majority.[226] The dissent made two main counterpoints: first, that the United States does *not* have claims that the proposed consent decree extinguishes, and second, that the 2018 *Texas* decision does not compel the Court's conclusion here.[227] Here, Justice Gorsuch excoriated the majority for "omit[ing]" the fact that the Special Master expressly allowed the United States to pursue its claims in "other fora."[228] And, to Justice Gorsuch, the United States' position is its own fault: "[T]he government did not allege—and still has not alleged—in its complaint that the Compact mandates a 1938 baseline."[229] In other words, the majority goes out of its way to assure the federal government a right to assert a claim it never alleged.[230] Doing so "conspicuously avoids the lessons of our water law jurisprudence."[231]

Next, Justice Gorsuch took pains to argue that the 2018 *Texas* case does not compel this outcome. This argument, of course, carries an interesting color given that Justice Gorsuch authored that opinion.[232] In his telling, the 2018 *Texas* case said *nothing* about "the federal government's current assertion that it has a right to pursue a claim that the Compact requires the use of a 1938 baseline."[233] Allowing this case to

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221 *Id.* at 977 (emphasis added).
222 *Id.* at 978.
223 *See id.* at 978–79.
224 *Id.* at 979.
225 *Id.* (quoting California v. Nevada, 447 U.S. 125, 133 (1980)).
226 *See id.* at 980–88.
227 *Id.* at 981.
228 *Id.*
229 *Id.* at 984.
230 *See id.* at 983–84.
231 *Id.* at 983.
232 *Texas*, 583 U.S. 407, 409 (2018).
233 *Texas*, 602 U.S. at 985 (Gorsuch, J., dissenting).

continue is to "ignore all this and the many caveats that accompanied our decision."[234]

The dissent ends with a pithy lament: "After 10 years and tens of millions of dollars in lawyers' fees, [the State's] agreement disappears with only the promise of more litigation to follow. All because the government won't accept a settlement providing it with everything it once sought . . . ."[235] Justice Gorsuch then closes by foreshadowing the case's potential impact on future interstate water disputes, noting that "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?"[236]

3. Making Heads or Tails of Texas

What should we make of *Texas*? Two important conclusions follow. First, and importantly, both the dissent and majority recognize the hydrological connection between groundwater and surface water. Justice Jackson notes that "groundwater pumping" is responsible for "drawing water away from the river."[237] This, of course, is only possible if groundwater and surface water are connected. The dissent is even more explicit, explaining that "[g]roundwater and surface water (like the Rio Grande) are often connected, drawing from and feeding back into one another."[238]

The Supreme Court has hinted at this connection before.[239] But *Texas* is the first time the Supreme Court made express what scientists have known for decades: groundwater and surface water are interrelated, not distinct.[240]

This acknowledgment is important because the law has treated groundwater differently since the 1800s.[241] Termed "groundwater exceptionalism," scholar Christine Klein has argued that this legal distinction has produced "the over-propertization and under-regulation of groundwater."[242] With the Supreme Court's confirmation of the hydrological interconnectedness, there is finally some evidence that the legal system is aligning with the science. In short, *Texas* is a big step forward for scientific integrity in water law.

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234 *Id.* at 988 (referring to *Texas*, 583 U.S. 407 (2018)).

235 *Id.* at 989.

236 *Id.*

237 *Id.* at 951 (majority opinion).

238 *Id.* at 968 (Gorsuch, J., dissenting).

239 *See, e.g.*, *Mississippi*, 595 U.S. 15, 24 (2021) (treating groundwater like surface water for purposes of equitable apportionment).

240 *See, e.g.*, Christine A. Klein, *Groundwater Exceptionalism: The Disconnect Between Law and Science*, 71 EMORY L.J. 487, 489 (2022) ("[T]he law seems to delight in crafting fine distinctions between groundwater and surface water in defiance of scientists' understanding of the water cycle.").

241 *See id.* at 494–96.

242 *Id.* at 491.

Second, the majority expressly disclaimed any impact on state water law. In a footnote, Justice Jackson made clear that, "notwithstanding the dissent's suggestions to the contrary, 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."[243] This is a curious attempt at a limiting principle. Taken literally, the footnote appears to repudiate *any* future impacts of this decision, as if the case has no precedential effect whatsoever. But, of course, there surely are *some* consequences from this decision on the Court's water law jurisprudence, just as there are when the Court issues an opinion on any topic. As detailed *infra*, the optics of the case alone—the Court's sanctioning of the federal government's claims against intrastate groundwater pumping in New Mexico—portend changes for how states should think about groundwater use.[244] To suggest, as the majority does, that the case will have no life beyond the immediate parties underestimates the case's import.

One final post-script is necessary. While this Article's treatment of *Texas* ended here with the 2024 Supreme Court decision, the case itself is not yet over. Indeed, the 2024 ruling ensured that the litigation continued, perhaps for years more. Just a few weeks after issuing its opinion, the Supreme Court discharged the Special Master and appointed a new one.[245] In the ensuing months, the new Special Master has conducted mediation and status conferences.[246] The litigation remains pending.[247]

IV. THE IMPLICATIONS

Academics are not fortune-tellers, and it would be folly to prognosticate what any future court will do. But *Texas* does offer meaningful insight about the status of interstate water disputes and groundwater law. With the careful caveat that implications are not inevitabilities, this Part details what *Texas* means for both future interstate water disputes and state groundwater law.

A. Implications for Interstate Water Disputes

Following any Supreme Court case, there is a rush of post-decision analysis. Here, observers of *Texas* were quick to note that the 2024 ruling

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243 *Texas*, 602 U.S. at 961 n.4 (citation omitted).

244 *See* discussion *infra* Section IV.B. Implications for State Groundwater Law

245 Docket, *Texas*, 602 U.S. 943 (2024) (No. 22O141) (appointing Michael J. Melloy of Iowa).

246 *See* Order Scheduling Status Conference, *Texas*, 602 U.S. 943 (2024) (No. 22O141) (granting a status conference with the Special Master after a three-day mediation).

247 *See* Docket, *Texas*, 602 U.S. 943 (2024) (No. 22O141).

had implications for other Western water disputes.[248] In particular, commentators speculated that *Texas* would impact the long-running Colorado River dispute.[249] The parallels are easy to see. Like the Rio Grande, the Colorado River spans multiple states (including New Mexico and Colorado) and Mexico.[250] Like the Rio Grande, the Colorado River has been apportioned by compact.[251] And like the Rio Grande, the Colorado River has faced prolonged drought and the threat of interstate litigation.[252] It is easy to see how Colorado River states could read *Texas* with some alarm, knowing that the Supreme Court would permit the federal government's claims, even intrastate ones, that threaten interstate agreements where federal interests are involved.[253] The timing is particularly important, as existing management agreements for the Colorado River expire in 2026.[254] As Colorado's former top water official put it, "[t]he [*Texas*] opinion carries outsized implications on the Colorado River where the federal interests include not only the largest reservoirs on the nation but also 30 sovereign tribes to which the federal government owes a trust responsibility."[255] In short, *Texas* assures the federal government a commanding position in the Colorado River discussions, backed up by the threat of Court-sanctioned federal claims.

But *Texas* is not just limited to Western rivers. The optics of the case will hang over any interstate disputes, even those that do not have international dimensions. To be sure, the *Texas* majority conditioned its decision, in part, on the United States' obligations to deliver water to

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248 *See, e.g.*, Tim Hearden, *SCOTUS Ruling Could Impact Colo. River Dispute*, FARM PROGRESS (June 25, 2024), https://www.farmprogress.com/farm-policy/scotus-ruling-could-impact-colo-river-dispute [https://perma.cc/HWE9-X77F] ("The U.S. Supreme Court's recent decision to nix a settlement between Texas and New Mexico over the management of the Rio Grande River could have a sweeping impact on other interstate water disputes in the West . . . ."); *see also* Jennifer Yachnin, *Supreme Court Rio Grande Ruling Could Ripple Through Other Water Cases*, E&E NEWS (June 21, 2024, 1:39 PM), https://www.eenews.net/articles/supreme-court-rio-grande-ruling-could-ripple-through-other-water-cases [https://perma.cc/3MJT-G726] ("Before Friday's ruling, legal observers had suggested that a decision granting the federal government new power to control the flow of water in drought-stricken regions would be of particular note, given ongoing negotiations over the long-term operating plan for the Colorado River.").

249 *See, e.g.*, Hearden, *supra* note 248 (stating that the Supreme Court's *Texas* ruling "could have a sweeping impact on" disputes involving the Colorado River); Yachnin, *supra* note 248.

250 *See, e.g.*, Act of Aug. 19, 1921, ch. 72, 42 Stat. 171 (permitting a compact between Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming respecting the disposition and apportionment of the waters of the Colorado River).

251 *See id.* at 172.

252 *See, e.g.*, Shannon Mullane, *40 Million People Share the Shrinking Colorado River. Here's How that Water Gets Divvied Up.*, COLO. SUN (Sep. 1, 2023, 10:12 AM), https://coloradosun.com/2023/08/14/colorado-river-explained [https://perma.cc/KE33-CBTH] (discussing the current drought in the Colorado River Basin and corresponding interstate negotiations around rules for water storage and releases).

253 *See, e.g.*, Yachnin, *supra* note 248 (discussing the impact of the *Texas* decision on interstate negotiations around the management of the Colorado River).

254 *See id.*

255 *Id.*

Mexico.[256] But, as the dissent makes clear, it was undisputed "that the consent decree would protect water due Mexico under this country's treaty with that nation."[257] In fact, per the dissent, "the government does not argue anything of the sort here, never suggesting, for example, that the proposed decree would risk its obligations under its treaty with Mexico."[258]

The upshot is twofold. First, *all* interstate water disputes are now clouded by the potential for federal government intervention. This is not to suggest that *Texas* grants the United States carte blanche authority to meddle in any interstate water dispute it chooses. But it is to say that states would be foolish to not consider the prospect of federal government involvement. So long as the federal government can articulate some "distinctively federal interests," it seems that a majority of the Court is inclined to let them litigate over them.[259] That consideration will certainly shape states' behavior in interstate water disputes going forward.

Second, in cases where the federal government is already a party to interstate water negotiations—where, for example, there are international dimensions to the waterbody or where the federal government has existing water infrastructure—the tenor of negotiations will change. The Colorado River is perhaps the largest example, but it is not the only one.[260] After *Texas*, the federal government can come into these discussions with more leverage, and thus more say in the outcome. *Texas* does not grant the federal government a trump card, but it does give them a stronger hand to play.

In sum, *Texas* impacts interstate water disputes by making the federal government—or the threat of the federal government—part of the calculus for states. Justice Gorsuch's intimation in the dissent that States will have a harder time negotiating interstate water agreements is true, regardless of whether the federal government is already a party.[261]

B. Implications for State Groundwater Law

Less obviously, but perhaps more consequentially, *Texas* portends a critical shift for state groundwater law. Remember that the crux of the

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256 *See Texas*, 602 U.S. 943, 956 (2024) ("[T]he United States' ability to deliver water to Mexico depends on New Mexico's compliance with 'its Compact obligations,' and 'a breach of the Compact could jeopardize the federal government's ability to satisfy its treaty obligations.'" (quoting *Texas*, 583 U.S. 407, 414 (2018)).

257 *Id.* at 972 (Gorsuch, J., dissenting).

258 *Id.* at 978.

259 *Id.* at 957.

260 The federal Bureau of Reclamation operates water projects in seventeen states. *Land & Realty Program*, BUREAU OF RECLAMATION (Sep. 13, 2022), https://www.usbr.gov/lands/index.html [https://perma.cc/X9AA-JERZ] (describing the Bureau of Reclamation projects that permit public application for use of Reclamation waterbodies in various states).

261 *See Texas*, 602 U.S. at 990 (Gorsuch, J., dissenting) ("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.").

United States' claim by the time the 2024 dispute happened was that the proposed consent decree did not adequately inhibit New Mexico's groundwater pumping.[262] That is, the United States asserted legal claims against intrastate New Mexico activities related to groundwater.[263] The Supreme Court's sanctioning of those claims signals the new viability of federal oversight of state groundwater law.

Groundwater law, like other water law, is traditionally the sole dominion of the state.[264] Many states, in fact, claim exclusive ownership of intrastate groundwater, with some even extending their public trust doctrine to the resource.[265] Just a few years ago in *Mississippi v. Tennessee* the Supreme Court even appeared to acknowledge that groundwater can properly be a public trust asset owned by the state.[266]

But *Texas* undercuts that logic. Intrastate groundwater pumping in New Mexico that, under the facts of the case, did *not* impact the federal government's international treaty obligations was fair game for the federal government to challenge.[267] The only way to interpret this outcome is to acknowledge that the federal government too has an interest in groundwater, even wholly intrastate groundwater. That conclusion, in itself, is a major change in groundwater law. The result in *Texas* further suggests that the federal government has a larger role in policing not just the resource but also a state's *use* of the resource than previously recognized.

For States, *Texas* is a significant case as it highlights the potential of future federal oversight of state groundwater. In many states, substantial groundwater pumping threatens the long-term viability of aquifers. News

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262 *See id.* (majority opinion) ("The United States maintains that New Mexico's pumping breaches that State's alleged duty under the Compact not to interfere with the Project."); *see also id.* at 963 ("[T]he consent decree would settle that question by deeming New Mexico compliant with the Compact, even as it allows pumping at the D2 levels [from 1951–1978].").

263 *Id.*

264 *See, e.g.*, Klein, *supra* note 240, at 502 ("Each state has developed a body of 'water rights' law to allocate the right to use water among competing claimants.").

265 *See* Sean Lyness, *Entrusting Groundwater*, WIS. L. REV. 1823, 1857–64 (2024) (explaining that eight states have expressly included groundwater as a public trust asset).

266 *See id.* at 1871 ("[T]he [Mississippi v. Tennessee] Court did nothing to counter Mississippi's recognition of groundwater as a public trust asset. . . . This seems to condone affirmative state actions for protecting public trust assets—including groundwater—at least within a state's borders. There is thus some tacit acknowledgment from the Court that groundwater *can* be a proper public trust asset." (emphasis in original)).

267 *See Texas*, 602 U.S. 957, 978.

stories abound in states as diverse as California,[268] Arizona,[269] Kansas,[270] Oklahoma,[271] Texas,[272] Pennsylvania,[273] and Florida,[274] among others, about groundwater withdrawals depleting aquifers at tremendous rates; New Mexico is not the only state overusing its groundwater. Any of these states could now face federal oversight of their groundwater.

Forward-thinking states should see *Texas* for what it is: not a guarantee that all groundwater will be federalized, but a possibility that the federal government will have *some* say in how a state uses and protects its groundwater. And yet, few states are taking proactive steps to address their growing groundwater problems.[275] States should be incentivized to update and modernize their groundwater law, lest the federal government force their hand.

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[268] *See, e.g.*, Rachel Becker, *California Farmers Depleted Groundwater in this County. Now a State Crackdown Could Rein Them In*, CAL MATTERS (Apr. 15, 2024), https://calmatters.org/environment/water/2024/04/california-farmers-groundwater-probation-kings-county [https://perma.cc/2AJW-8UM7].

[269] *See, e.g.*, Stacey Barchenger, *Arizona Attorney General Sues Fondomonte, Says Groundwater Pumping is an Illegal Nuisance*, AZ CENT. (Dec. 11, 2024, 5:54 PM), https://www.azcentral.com/story/news/local/arizona/2024/12/11/kris-mayes-sues-saudi-company-fondomonte-over-groundwater-pumping/76901623007 [https://perma.cc/W3GU-SGJF].

[270] *See, e.g.*, Kevin Hardy & Allison Kite, *'Time for a Reckoning.' Kansas Farmers Brace for Water Cuts to Save Ogallala Aquifer*, STATELINE (June 13, 2024, 5:00 AM), https://stateline.org/2024/06/13/time-for-a-reckoning-kansas-farmers-brace-for-water-cuts-to-save-ogallala-aquifer [https://perma.cc/PVV9-R2BC].

[271] *See, e.g.*, Graycen Wheeler, *As Aquifer Levels Decline in the Great Plains, States Like Oklahoma Weigh the Need to Meter Irrigation Wells*, KOSU (Oct. 10, 2023, 5:15 AM), https://www.kosu.org/energy-environment/2023-10-10/as-aquifer-levels-decline-in-the-great-plains-states-like-oklahoma-weigh-the-need-to-meter-irrigation-wells [https://perma.cc/B583-7CUM].

[272] *See, e.g.*, Megan Kimble, *Thirsty New Subdivisions Have Made the Texas Groundwater Crisis Plain to See*, TEX. MONTHLY (Aug. 2024), https://www.texasmonthly.com/news-politics/groundwater-crisis-katy-subsidence-rule-of-capture [https://perma.cc/BR7V-8N3U].

[273] *See, e.g.*, Emily Kress, *Wells Drying Up Amid Moderate Drought Conditions*, WNEP (Nov. 8, 2024, 4:13 PM), https://www.wnep.com/article/news/local/monroe-county/wells-drying-up-amid-drought-conditions-pennsylvania-poconos/523-e064d775-0caf-4f54-b5d5-06884500a177 [https://perma.cc/SGY8-5FV5].

[274] *See, e.g.* Jon Heggie, *The Floridan Aquifer: Why One of our Rainiest States is Worried About Water*, NAT'L GEOGRAPHIC (July 28, 2020), https://www.nationalgeographic.com/science/article/partner-content-worried-about-water-floridan-aquifer [https://perma.cc/9SVT-MLL3] ("Across the state, wells have been drilled to tap into this seemingly endless water supply. But serious challenges to the Floridan aquifer are forcing residents to realize their water supply may be limited.").

[275] *See, e.g.*, Mira Rojanasakul et al., *America Is Using Up Its Groundwater Like There's No Tomorrow*, N.Y. TIMES (Aug. 28, 2023), https://www.nytimes.com/interactive/2023/08/28/climate/groundwater-drying-climate-change.html [https://perma.cc/RBR2-AQK5] ("One of the biggest obstacles is that the depletion of this unseen yet essential natural resource is barely regulated. The federal government plays almost no role, and individual states have implemented a dizzying array of often weak rules.").

V. CONCLUSION

The Supreme Court's decision in *Texas v. New Mexico and Colorado* marks a critical moment in the evolving legal landscape of groundwater governance. *Texas* cements the legal significance of the hydrological connection between surface water and groundwater and signals a growing federal interest in overseeing groundwater resources. *Texas* also challenges traditional notions of state control over groundwater. With climate change and increasing water scarcity driving more disputes, states would be wise to proactively modernize their groundwater laws. Otherwise, they risk ceding greater control to federal oversight or being forced into reactive legal battles with uncertain outcomes. *Texas* is not just another technical ruling in water law—it is a signal of a legal regime where groundwater management is no longer solely a matter of state prerogative but also of federal concern.