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Supreme Court hears NM-Texas water dispute

By Michael Coleman

Journal Washington Bureau
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The Rio Grande flows along the border between the United States and Mexico, with Ciudad Juárez on the left and Texas on the right. The U.S. Supreme Court heard arguments Monday in a water dispute between New Mexico and Texas. (Roberto E. Rosales/Albuquerque Journal)

The Rio Grande flows near Alameda in Albuquerque, with the Sandia Mountains in the distance. Water from the river is at the center of a dispute between New Mexico and Texas. (Adolphe Pierre-Louis/Albuquerque Journal)

WASHINGTON - The U.S. Supreme Court heard arguments in a long-running dispute between Texas and New Mexico over Rio Grande water rights Monday, with New Mexico's attorney asserting that the federal government should not be allowed to intervene.

Monday's arguments centered on whether the federal government should be involved in the legal dispute between Texas and New Mexico to help ensure that federal water obligations - including an international agreement with Mexico - are fulfilled.

The nine-member high court on Monday peppered lawyers from New Mexico, Texas, Colorado (another party to the Texas lawsuit) and the federal government's attorney with questions about a nearly 80-year-old water compact that governs the distribution of water among the states. New Mexico had filed a motion to dismiss

Texas' lawsuit, but in July a so-called special master appointed by the Supreme Court to analyze the case recommended the court reject that motion and allow the case to proceed.

Ann O'Connell, assistant to the solicitor general at the U.S. Department of Justice, argued Monday that the special master failed to recognize the federal government's interest under the water compact, especially as it related to U.S. obligations under treaties with Mexico to deliver water.



Texas claims that New Mexico farmers and pecan growers illegally pump groundwater from below Elephant Butte Dam. New Mexico claims that its water obligations to Texas are measured at the dam. (Dean Hanson/Albuquerque Journal)

“What our complaint does ... is set forth what the United States' interests are and then tell the court how we think it can shape injunctive relief against New Mexico to protect those interests,” O'Donnell said during the arguments.

Marcus J. Rael Jr., a private attorney working under contract for the New Mexico Attorney General's Office, represented the state before the court on Monday. Rael told the justices that under his view of the law, the federal government can pursue legal remedies under an earlier treaty but not under the 1939 compact apportioning the water among Texas, New Mexico and Colorado.

“New Mexico is arguing that the United States is a necessary party, but their claims arise under the Reclamation Act of 1902 and not under the compact,” Rael said. “And so the special master was correct in his recommendation that the United States should participate in order to enforce its treaty obligations, but it does so under the treaty, which it can bring in this litigation. So they are a necessary party ... they're just not allowed to bring compact claims, in our opinion.”

The oral arguments Monday morning marked the Supreme Court's first this year, and justices quickly jumped into intricate details of the case.

Justice Steven Breyer was perhaps most direct in signaling his view of the question about federal intervention in the case.

“It seemed to me quite simple,” Breyer told Rael during questioning. “The Constitution foresees that they (the federal government) can intervene where there’s an interest. They have several interests. End of case, unless there is something that I don’t see.”

Justice Elena Kagan also noted that the U.S. government has a significant interest in the case.

“The United States has important interests here. Part of them are international, as with Mexico, and part of them are domestic,” Kagan said.

Texas took its case against New Mexico to the Supreme Court in 2013, asking that the state stop pumping groundwater between Elephant Butte and the southern border so that more of the river could flow south from Elephant Butte Dam near Truth or Consequences to farmers and residents in El Paso. Despite the pumping, New Mexico argues its delivery obligations to Texas are being met.

All sides say the stakes are high, given uncertainty about the sustainability of water supplies throughout the Rio Grande Valley. Farmers, water policy experts, municipal officials and others have been working behind the scenes to build a framework for a possible settlement.

In dry years when there’s not enough water in the river, chile farmers and pecan growers in southern New Mexico are forced to rely on wells to keep their crops and trees alive. Texas officials complain that the New Mexico farmers are tapping the shallow aquifer that would otherwise drain back into the river and flow to Texas.

New Mexico Attorney General Hector Balderas attended the hearing with Sen. Tom Udall, a New Mexico Democrat who served as New Mexico attorney general in the 1990s.

“Attorney General Hector Balderas was pleased the Supreme Court seemed to balance interests throughout the hearing,” said Balderas’ spokesman, James Hallinan. “New Mexico is seeking to protect state sovereignty and prevent the vast expansion of the United States’ power over compacts among sovereign states.”

Texas Attorney General Ken Paxton said afterward that it was a good day in court for Texas.

“New Mexico’s illegal actions in taking Rio Grande Project water intended for use in Texas violates the Rio Grande Compact, depriving our state of the water it is legally entitled,” Paxton said. “The Rio Grande plays an integral part in the water supply for Texas’ border regions and farmers, and the Supreme Court should rule in favor of protecting Texas’ rights.”

Reed Benson, a University of New Mexico professor specializing in water law, said the Supreme Court's task in deciding the U.S. government's role is "very legalistic - very much a technical reading of what is and is not in the compact."

"I actually have thought that New Mexico's chances in front of the nine justices may be a little bit better than some people thought," Benson said. "Some of those justices may be persuaded by the plain text argument - that New Mexico's obligations are measured at Elephant Butte and once New Mexico delivers to Elephant Butte that it has met its obligation and has met its compliance. The argument of Texas and the feds is that New Mexico has obligations beyond that that aren't directly stated in the compact."

Udall said the outcome of the case "will impact the management and division of water use by farmers and communities in all the Rio Grande Compact states in the coming decades."

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