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## **Case Preview: In newest chapter in long-running water dispute, court will hear first-ever challenge to ruling by interstate river master**

**By Reed Benson**

The SCOTUS Blog  
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*Texas v. New Mexico* is a new dispute in an old Supreme Court proceeding, first filed in 1974 but, until recently, dormant since the early 1990s. The litigation involves the Pecos River, the waters of which are apportioned between New Mexico and Texas under the Pecos River Compact, approved by Congress in 1949. Earlier decisions in this case established key principles for litigation of interstate water disputes, helping define the court's approach to interpreting and enforcing water allocation compacts.

This latest installment — which will be argued on Oct. 5, the first day of the court's 2020-21 term — figures to be far less consequential. It is an accounting dispute over a one-time event that took place from 2014 to 2015, involving temporary storage of floodwaters in a federal reservoir. As a challenge to a decision by the court-appointed river master, the case is a procedural oddity, seemingly a first in the history of interstate water lawsuits that fall within the court's "original jurisdiction." The unique nature of the dispute makes it unlikely to set important precedent beyond the Pecos Basin.

### **The history of *Texas v. New Mexico***

The dispute was very different in 1974, when Texas alleged that upstream New Mexico was chronically overusing the Pecos River and delivering too little water at the state line. The compact requires that New Mexico "not deplete by man's activities the flow of the Pecos River at the state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition." It soon became evident that the hydrologic model the compact relied on to represent the "1947 condition" was clearly flawed, but the states disagreed on how to fix it. The compact established a Pecos River Commission to administer its terms, but because the commission had only two voting members — one from each state — there was no way to break the deadlock. Texas then sued in the Supreme Court.

*Texas v. New Mexico* was the bellwether case for interstate compact enforcement, as landmark decisions in [1983](#) and [1987](#) addressed fundamental questions about the court's role and approach in these disputes. The court held that it had authority to decide compact disputes on its own, and not simply to review decisions of the commission. But that power did not extend to adding a third, tiebreaking vote to the commission – that would contravene the compact, which the court recognized as an act of Congress. Instead, once it determined that New Mexico had indeed violated the compact by delivering too little water, the court declared that it had the power to order a remedy for past noncompliance (payable in water or money), as well as to require compliance going forward.

The court ordered New Mexico to comply with its compact duties, which would require delivery to Texas of an additional 10,000 acre-feet of water per year on average. (An acre-foot is a measure of water volume, slightly under one-third of a million gallons.) It also established a new formula for determining New Mexico's obligations, noting that the formula could change if the commission could agree on a better one. The court recognized, however, that applying that formula would involve some judgment calls, and that the states might continue to disagree on the proper methodology. "Absent some disinterested authority to make determinations binding on the parties," the justices wrote, "we could anticipate a series of original actions" whereby the court would have to decide if Texas had received its due in any given year. To avoid this problem, the court held that it would appoint a river master to make the "calculations" needed in applying the decreed formula, and to report those annual calculations to the states.

The case culminated in a 1988 amended decree, which largely defined the duties of the river master. It identified an existing Pecos River Master's Manual, calling it "an integral part of this Decree," but also prescribed how the manual could be modified. The amended decree laid out procedures for river master decisions, and provided that such a decision "shall be subject to review by this Court only on a showing that the Final Determination is clearly erroneous."

The Pecos River master, then, has a very different assignment than the more familiar special master in state v. state water cases that fall exclusively within the court's original jurisdiction. In such cases, the court appoints a special master to address legal and factual issues, develop the record and issue reports to the court. The court weighs the special master's recommendations, and the litigants' responses to them, in deciding the case. Thus, the special master assists the court in reaching its decision; by contrast, the river master in this case oversees compliance with the amended decree. And whereas the court regularly appoints a special master for each interstate water case, it has only twice provided for a river master. (The other instance was to oversee a 1954 Delaware River decree.)

The Pecos River master must decide whether New Mexico has delivered enough water to Texas each year, and also quantify any lesser or greater amount to reach the state line. The amended decree requires New Mexico to take prompt action to remedy any shortfall, increasing flows at the state line. If New Mexico exceeds its required annual delivery, the "overage" carries forward, and repeated overages can accumulate to New Mexico's benefit. This "accumulated overage" began to trend

upward in the early 2000s, and in recent years has exceeded 100,000 acre-feet, providing New Mexico a substantial cushion against future shortfalls. Under this system, every acre-foot counts, even in wet years.

### **The current Pecos River dispute**

The river master decision at issue here was precipitated by the remnants of Tropical Storm Odile, which dumped heavy rains on the Pecos Basin in September 2014. The U.S. Bureau of Reclamation held back some of the resulting water in Brantley Reservoir, located on the Pecos River above Carlsbad, New Mexico. Brantley primarily stores irrigation water for the bureau's Carlsbad Project, but flood control is also an authorized purpose. The storm also filled a downstream irrigation reservoir on the Pecos in Texas, called Red Bluff.

With those reservoirs still full and flows still high in November 2014, the Pecos River Compact commissioner for Texas emailed his New Mexico counterpart, stating his "request that New Mexico store Texas' portion of the flows until such time as they can be utilized in Red Bluff Reservoir." The New Mexico commissioner agreed in January 2015, stating that New Mexico accepted retaining the water in Brantley "initially based on public safety (flooding) concerns," but that "continued concurrence has evolved to being primarily a matter of comity" between the two states. But for Texas' request, he continued, New Mexico would have released all the excess water in Brantley to the state line. He stated New Mexico's position that all the excess water "belonged to Texas," and while it remained in storage at Brantley, all losses of that water due to evaporation "should thus be borne by Texas."

Texas hoped to have the water released when it could be stored in Red Bluff for irrigation use, but that reservoir remained basically full into the summer. In July 2015, the Bureau of Reclamation emailed Texas to inform the state that the water had been sitting in Brantley for about nine months and would soon need to be released unless Texas entered into a contract for continued storage. Soon thereafter, the bureau released about 30,000 acre-feet of water down the Pecos, which Texas was unable to store and use. Before it was released, the excess water held in Brantley had lost over 21,000 acre-feet to evaporation.

Which state should bear those evaporation losses? Neither the compact, the amended decree nor the river master manual clearly answers that question. The river master noted it as an unresolved issue in his final accounting report for 2015, but it appeared then that the two states would agree on a formula. At one point they did seem to reach agreement, but it was never made official, and eventually they hit an impasse on the accounting question. In December 2017, the states jointly requested that the river master resolve the issue, and later each state filed briefs.

The river master decided that Texas should be charged with most of the evaporation losses, because he deemed the water held in Brantley to have been stored there at Texas' request, and the river master manual provides that Texas is responsible for evaporation losses on such water. He imposed a 50/50 split for losses occurring prior to March 1, 2015, because until then water was being withheld partly due to safety concerns in both states. Thus, he determined that New Mexico should receive credit

for 16,627 acre-feet of water, essentially finding that this amount of water would have reached the state line had it not been retained for the benefit of Texas.

Texas then moved for Supreme Court review of that decision, something neither state had done since 1991 (when the court denied without argument a motion from New Mexico). New Mexico urged the court to deny Texas' motion, as did the solicitor general after the court requested the views of the United States. The court then scheduled oral argument in the case, agreeing for the first time to hear a challenge to a decision by its appointed river master.

### **The competing arguments**

Although the states argue about the equities of this dispute, their basic disagreement is about the governing law and the river master's authority. For its part, the United States as *amicus curiae* essentially agrees with New Mexico. The federal government's position is notable because in the other ongoing [\*Texas v. New Mexico\*](#) litigation in the Supreme Court – a dispute over compliance with the Rio Grande Compact – the United States is closely aligned with Texas.

Texas essentially argues for a strict construction of the Pecos River Compact and the court's amended decree, and a narrow view of the river master's authority and discretion. In its view, the compact allows for apportionment of evaporation losses in only two circumstances, neither of which applies here. The amended decree provides specific procedures and deadlines for annual accounting decisions, and those procedures, Texas argues, prohibit the river master from crediting New Mexico retroactively, even though earlier reports noted the issue as unresolved. Finally, Texas views the river master as having a purely technical role in determining compliance with the compact and decree, with no mandate or expertise to address legal questions; such decisions can be made only by the court itself.

New Mexico, in contrast, focuses more on the facts and the equities of this dispute, including Texas' initial request to store the water and New Mexico's response that Texas should bear the resulting evaporation losses. In its view, these facts support the river master's decision to charge Texas with these losses based on a provision of the manual, which is part of the amended decree. The timelines and procedures for accounting decisions were met because the annual reports for 2015 and 2016 noted that this issue remained unresolved, and neither party objected. And New Mexico contends that the river master has enough authority and discretion to determine novel accounting issues like the one here, thus avoiding the need for the court to decide them.

### **The competing arguments**

The stakes in this round of *Texas v. New Mexico* are relatively low even for the two states involved. While the merits of the case may seem unworthy of review by the Supreme Court, there is simply no other forum for review of a decision by a river master appointed by the court itself. The case is remarkable for being the first of its kind to reach the court, but its uniqueness makes it unlikely to set major precedent beyond the Pecos, which has one of only two river masters in the nation.

The court's decision may have some meaning for other cases involving interstate water compacts. There are over two dozen such compacts in the United States, most of which involve rivers in the West, and several of these compacts have been interpreted by the Supreme Court. This latest litigation on the Pecos may offer meaningful clues on the justices' willingness to adjust the legal and technical arrangements for assessing compact compliance, following the 2015 decision on that issue by a divided court in *Kansas v. Nebraska*.

Perhaps the entity with the most at stake in this case, however, is the Supreme Court itself. If it holds that the river master has no authority to decide any quasi-legal issue involving compact compliance on the Pecos, it will invite more cases like this one.