No. 65, Original

In the Supreme Court of the United States

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO

ON MOTION FOR REVIEW OF THE RIVER MASTER'S 2018 FINAL DETERMINATION

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the River Master clearly erred in calculating New Mexico's delivery credit for evaporation losses under the Pecos River Compact, Act of June 9, 1949 (Compact), ch. 184, 63 Stat. 159.

2. Whether the River Master appropriately entertained New Mexico's request for delivery credit for evaporation losses under the Compact.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the motion for review should be denied.

STATEMENT

A. Legal Background

1. "The Pecos River rises in north-central New Mexico and flows in a southerly direction into Texas until it joins the Rio Grande" River. *Texas* v. *New Mexico*, 462 U.S. 554, 556 (1983); see N.M. Resp. to Mot. App. (N.M. App.) 1 (map). "It is the principal river in eastern New Mexico, draining roughly one-fifth of the State, and it is a major tributary of the Rio Grande." 462 U.S. at 556.

In 1948, New Mexico and Texas signed the Pecos River Compact, Act of June 9, 1949 (Compact), ch. 184, 63 Stat. 159, to "provide[] for the equitable division and

apportionment of the use of the waters of the Pecos River," Art. I, 63 Stat. 160. "Because of the irregular flow of the Pecos River, the Compact did not specify a particular amount of water to be delivered by New Mexico to Texas each year." *Texas* v. *New Mexico*, 482 U.S. 124, 126 (1987). Rather, Article III(a) of the Compact provides that "New Mexico shall not deplete by man's activities the flow of the Pecos River at the New Mexico-Texas state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition." 63 Stat. 161. The "1947 condition is that situation in the Pecos River Basin which produced in New Mexico the man-made depletions resulting from the state of development existing at the beginning of the year 1947." 462 U.S. at 563 (citation omitted); see Art. II(g), 63 Stat. 160.

Article VI of the Compact sets forth various "principles" that "shall govern in regard to the apportionment made by Article III." 63 Stat. 163-164. Article VI(c) of the Compact provides that "the inflow-outflow method" shall be used to determine whether New Mexico is complying with its obligation under Article III(a), at least "until a more feasible method is devised and adopted." *Id.* at 163. "The inflow-outflow method involves the determination of the correlation between an index of the inflow to a basin as measured at certain gaging stations and the outflow from the basin." 462 U.S. at 572 n.19 (citation omitted). That correlation allows engineers to estimate, "for any given inflow," "the amount of water that should flow through and should therefore be available for downstream (in this case Texas') use." *Texas* v. *New Mexico*, 446 U.S. 540, 541 (1980) (Stevens, J., dissenting).

Article III(f) of the Compact specifies an "[e]xcept[ion]" to New Mexico's obligation under Article III(a). 63 Stat. 161. It provides that "[b]eneficial consumptive use of unappropriated flood waters is hereby apportioned fifty per cent (50%) to Texas and fifty per cent (50%) to New Mexico." Art. III(f), 63 Stat. 161. Under the Compact, "'unappropriated flood waters' means water originating in the Pecos River Basin above Red Bluff Dam in Texas, the impoundment of which will not deplete the water usable by the storage and diversion facilities existing in either state under the 1947 condition and which if not impounded will flow past Girvin, Texas." Art. II(i), 63 Stat. 161. Article VI(d) of the Compact provides that, "[i]f unappropriated flood waters apportioned to Texas are stored in facilities constructed in New Mexico, * * * [r]eservoir losses shall be charged to each state in proportion to the quantity of water belonging to that state in storage at the time the losses occur." Art. VI(d)(iii), 63 Stat. 164.

2. In 1974, Texas filed an original action in this Court, alleging that "New Mexico has breached its obligations under Art. III(a) of the Compact." 462 U.S. at 562. After appointing a Special Master, the Court approved the Special Master's reports construing "the 1947 condition" and specifying the inflow-outflow methodology to be used in determining New Mexico's obligation under Article III(a). 482 U.S. at 127. The Court then entered a decree enjoining New Mexico "[t]o comply with [its] Article III(a) obligation * * * by delivering to Texas at [the] state line each year an amount of water calculated in accordance with the inflow-outflow equation" approved by the Court. *Id.* at 135.

Although its decree went "no further," the Court noted the Special Master's recommendation that, "because applying the approved apportionment formula is not entirely mechanical and involves a degree of judgment," a River Master should be appointed "to make the required periodic calculations." 482 U.S. at 134. The Court stated that "[t]he natural propensity of the two States to disagree if an allocation formula leaves room to do so cannot be ignored." *Ibid.* And the Court expressed concern that, "[a]bsent some disinterested authority to make determinations binding on the parties," it would be faced with "a series of original actions to determine the periodic division of the water flowing in the Pecos." *Ibid.* The Court agreed that a River Master "should therefore be appointed to make the calculations provided for in this decree," *ibid.*, while recognizing that the decree itself would need to be amended to make "[p]rovision for a River Master," *id.* at 135. The Court remanded the case to the Special Master to recommend such an amendment. *Ibid.*

3. The Special Master subsequently submitted a report with a proposed amended decree. *Texas* v. *New Mexico*, 485 U.S. 388, 388 (1988) (per curiam). The Court approved the report, appointed a River Master, and issued an amended decree. *Id.* at 388, 394. The amended decree requires the River Master each year to calculate New Mexico's "Article III(a) obligation" as well as "[a]ny shortfall or overage." *Id.* at 391. It further requires the River Master to make those calculations "pursuant to the methodology set forth in the" Pecos River Master's Manual (Manual). *Ibid.*; see Tex. Mot. for Review App. (Tex. App.) 10a-38a.

The Manual—which the amended decree describes as "an integral part of th[e] Decree" itself, 485 U.S. at

389—sets forth the inflow-outflow methodology to be used in determining New Mexico's Article III(a) obligation. See Tex. App. 15a-37a. After specifying the methods for computing the relevant inflows and outflows, see *id.* at 16a-32a, the Manual identifies "several factors which, under terms of the Pecos River Compact, might at times increase or decrease New Mexico's obligation to deliver Pecos River water at the state line," *id.* at 15a. One of those factors is addressed in Section C.5 of the Manual, entitled "Texas water stored in New Mexico reservoirs." *Id.* at 37a (capitalization altered). Section C.5 provides:

> If a quantity of the Texas allocation is stored in facilities constructed in New Mexico at the request of Texas, then to the extent not inconsistent with the conditions imposed pursuant to Article IV(e) of the Compact, this quantity will be reduced by the amount of reservoir losses attributable to its storage, and, when released for delivery to Texas, the quantity released less channel losses is to be delivered by New Mexico at the New Mexico-Texas state line.

Ibid.[1]

The amended decree requires the River Master to make the calculations under the Manual for each calendar year, referred to as a "water year." 485 U.S. at 389; see *id.* at 391. The River Master must "[d]eliver to the parties a Preliminary Report setting forth the tentative results of the calculations" by May 15 of the following

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[1] Article IV(e) of the Compact authorizes the Pecos River Commission—a commission created by the Compact—to "determine the conditions under which Texas may store water in works constructed in and operated by New Mexico." 63 Stat. 161.

year, known as the "accounting year." *Id.* at 391; see *id.* at 389. The amended decree requires the River Master to "[c]onsider any written objections to the Preliminary Report submitted by the parties prior to June 15 of the accounting year." *Id.* at 391. It further requires the River Master to "[d]eliver to the parties a Final Report setting forth the final results of the calculations * * * by July 1 of the accounting year." *Ibid.* Any "Final Determination," including any "Final Report," "shall be effective upon its adoption, and shall be subject to review by this Court only on a showing that the Final Determination is clearly erroneous." *Id.* at 393. The amended decree provides that "[a] party seeking review of a Final Determination must file a motion with the Clerk of this Court within thirty (30) days of its adoption." *Ibid.*

Finally, the amended decree provides that the "Manual may be modified from time to time in accordance with the terms of th[e] Decree." 485 U.S. at 389. The amended decree sets forth two ways of modifying the Manual. *Id.* at 392. First, it provides that "[t]he River Master shall modify the Manual in accordance with any written agreement of the parties. Such written agreement shall state the effective date of the modification and whether it is to be retroactive." *Ibid.* Second, the amended decree provides that "the River Master may modify the Manual" "upon motion by either party and for good cause shown." *Ibid.* The amended decree authorizes the River Master to "adopt, reject, or amend the proposed modification." *Ibid.* And it provides that "[a] modification of the Manual by motion shall be first applicable to the water year in which the modification becomes effective." *Ibid.*

B. The Current Dispute

1. In September 2014, Tropical Storm Odile caused heavy rainfall in the Pecos River Basin. Tex. App. 279a. Those rains increased the flow of the Pecos River into Brantley Reservoir in southeastern New Mexico, north of the border with Texas. N.M. App. 92. Brantley Reservoir is one of four reservoirs on the Pecos River owned and operated by the United States as part of the Carlsbad Project (Project), a federal Bureau of Reclamation (Reclamation) project that supplies water for irrigation and other purposes. See Reclamation, *Carlsbad Project*, https://www.usbr.gov/projects/index.php?id=485. Reclamation may store up to 42,057 acre-feet of water in Brantley Reservoir for the Project. N.M. App. 92. Reclamation is also authorized to hold water in Brantley Reservoir for flood-control, recreational, and fish-and-wildlife purposes. Reclamation Project Authorization Act of 1972, Pub. L. No. 92-514, Tit. II, § 201, 86 Stat. 966. Reclamation, however, may not hold water in the reservoir merely for the purpose of storing it for a State, unless the State enters into a storage contract with Reclamation under the Warren Act, 43 U.S.C. 523 *et seq.*

By October 2014, the storm had filled Brantley Reservoir with 36,419 acre-feet of water above the Project limit. N.M. App. 92. The storm had likewise caused Red Bluff Reservoir—Texas's main reservoir on the Pecos River, just south of the border with New Mexico—to go from half full to full. *Ibid.* To prevent downstream damage and flooding in both New Mexico and Texas, Reclamation decided to exercise its flood-control authority to hold back, or "re-regulate," the excess water

in Brantley Reservoir, rather than release that water downstream. Tex. App. 68a; see N.M. App. 92.

2. In November 2014, the Pecos River Compact Commissioner for Texas sent an email to his New Mexico counterpart. Tex. App. 61a. The subject line of the email read, "Re: Texas request for storage." *Ibid.*

The body of the email stated:

> Due to the recent flood events in the Pecos River basin, the large amounts of flows generated, and the resulting conditions in the Pecos River, it is my request that New Mexico store Texas' portion of the flows until such time as they can be utilized in Red Bluff Reservoir. It is my understanding that the losses due to storage will be allocated in accordance with the Pecos River Master Manual.

Ibid.

In January 2015, New Mexico agreed to Texas's request. Tex. App. 66a. In a letter to Texas, New Mexico stated that while its "concurrence with temporary storage of water in Brantley Reservoir was initially based on public safety (flooding) concerns," its "continued concurrence has evolved to being primarily a matter of comity between New Mexico and Texas." *Id.* at 63a. New Mexico stated that, "[b]ut for Texas' request, New Mexico would have released to the Texas state line all water above the Carlsbad Project storage limit." *Ibid.* New Mexico therefore took the position that "all" of the water above the Project limit "belong[ed] to Texas" and that "[e]vaporative losses on [that] water * * * should thus be borne by Texas." *Ibid.* New Mexico also expressed the view that the water in question "likely" qualified as "Unappropriated Flood Waters," as defined under the Compact. *Ibid.*

Reclamation subsequently informed the States that it would "likely" begin releasing water above the Project limit from Brantley Reservoir in March 2015. Tex. App. 137a. Reclamation explained that, once flood-control concerns ended, it would no longer be able to hold the water without a Warren Act contract, and so it would have to release the water "even if Red Bluff Reservoir was full and would have to pass flows downstream." *Id.* at 139a; see N.M. App. 92.

3. In April 2015, New Mexico and Texas contacted the River Master to discuss how the water held in Brantley Reservoir above the Project limit would be accounted for under the Manual. N.M. App. 38-39. During a subsequent conference call, New Mexico's and Texas's technical advisors agreed that they "would jointly evaluate the issues and develop a work plan and timeline to propose accounting procedures that are agreeable to both states." *Id.* at 39. They also agreed that, "[g]iven the short time before the due date for the River Master's Preliminary Report" for water year 2014, the River Master would prepare that report "under the assumption that once the new procedures are in place," they could "implement a one-time correction for any Unappropriated Flood Water issues that affected the determination for Water Year 2014." *Id.* at 39-40.

In May 2015, the River Master delivered a preliminary report for water year 2014, attaching a summary of his conference call with the States and reiterating that the States were still "evaluating" the issue of how to account for the water held in Brantley Reservoir above the Project limit. N.M. App. 38; see *id.* at 39-40. The River Master explained that because the States' "recommendation about how to proceed" "may arrive

after the Final Report has been sent," "it may be necessary to modify the Report to recognize the Unappropriated Flood Flows." *Id.* at 38. Neither New Mexico nor Texas objected to that part of the preliminary report. See *id.* at 59-61.

In June 2015, the River Master delivered a final report for water year 2014, which identified two "pending issues," N.M. App. 61 (capitalization and emphasis omitted), that "remain unresolved," *ibid.* One of those issues was "how to handle potential Unappropriated Flood Flows that occurred during Water Year 2014." *Ibid.* The final report explained that the amended decree did not provide the River Master with "unilateral authority to modify the Final Determination" for water year 2014. *Ibid.* But the final report stated that, under the amended decree, the States could resolve the pending issues either by "reach[ing] agreement" on a modification or by "initiat[ing] a motion to be considered by the River Master." *Ibid.* Neither New Mexico nor Texas sought this Court's review of the final report.

4. In July 2015, Reclamation sent an email to Texas about "[s]torage of Texas' water in Brantley." Tex. App. 68a. Reclamation noted that "the water has remained in Brantley for about 9 months." *Ibid.* And Reclamation explained that, while "[t]he floodwater currently in Brantley has been re-regulated" under its flood-control authority, the situation was "moving from re-regulation to storage." *Ibid.* Reclamation therefore stated that, "without a contract, [it] d[id] not have the authority to hold this water in Brantley any longer," and "ask[ed] that Texas begin moving this water out of Brantley in the first week of August." *Id.* at 69a.

In August and September 2015, Reclamation released about 30,000 acre-feet of water from Brantley

Reservoir to the New Mexico-Texas line. N.M. App. 93; see Tex. App. 74a, 236a. In the year since the September 2014 storm, another 21,071 acre-feet of water above the Project limit had evaporated while being held in Brantley Reservoir. Tex. App. 74a. To make room for the releases from Brantley Reservoir, Texas released over 40,000 acre-feet of water from Red Bluff Reservoir between March and October 2015. N.M. App. 83-84.

5. In February 2016, the River Master met with representatives from both States to discuss the still-unresolved accounting issues. Tex. App. 70a-72a. Afterward, New Mexico circulated meeting notes stating that "the decision was made not to declare an [unappropriated flood waters] event," but rather "to account for the 2014/2015 storage in Brantley as water stored for Texas," with "[t]otal evaporation of that stored water charged to [Texas]." *Id.* at 71a; see *id.* at 67a. The River Master responded that those notes "captured the main points well." N.M. App. 74.

In May 2016, New Mexico sent Texas a draft joint motion, stating that the States had made "[t]he collective decision" that "the stored water was not Unappropriated Flood Waters, but instead was Texas water stored at its request in a New Mexico facility," and that "the volume evaporated from Texas' water while it was held in Brantley Reservoir would be added as delivery to Texas by New Mexico." Tex. App. 74a. Texas's technical advisor responded that the draft joint motion "look[ed] good," but noted that they "still ha[d] a couple of things to clear up," including whether to include the "evaporation" as a one-time adjustment "in the year it occurred," or to "go with" "averaging" the adjustment over multiple water years. *Id.* at 76a.

The River Master subsequently delivered his preliminary report for water year 2015. Texas lodged a "general[]" objection, noting that "[o]utstanding issues exist with the accounting for [water year] 2014 related to the unusual flood flows occurring during that period," and that "Texas will contact New Mexico to resolve any issues related to [water year] 2014 for presentation to the River Master." N.M. App. 64.

In January 2017, Texas sent a letter to New Mexico, disagreeing with New Mexico's draft joint motion. Tex. App. 78a. In its letter, Texas took the position that all of the water that had been held in Brantley Reservoir above the Project limit should be treated as "unappropriated flood water," with 50% allocated to Texas. *Id.* at 81a. Texas further argued that it should be charged for evaporation losses only on that allocation. *Id.* at 82a.

In December 2017, after failing to reach agreement, New Mexico and Texas sent the River Master a joint letter. N.M. App. 92-93. The letter stated that, "in accordance with the decrees of [this Court] in 1987 and 1988," the States were "seek[ing] [his] resolution of the final accounting for [water years] 2014-15." *Id.* at 93. The States subsequently submitted position papers, proposing revisions to the accounting tables for water years 2014 and 2015. See *id.* at 94-117. The States then agreed to further briefing, *id.* at 157, and New Mexico filed a motion asking the River Master to "modify the Manual to [e]ffect a one-time adjustment of the Pecos River accounting, resulting in a 21,071 acre-foot credit to New Mexico" for all of the evaporation losses, Tex. App. 59a. Texas responded, arguing that New Mexico's motion was untimely, *id.* at 116a, and that Texas should not "be charged for water that it couldn't use," *id.* at 128a.

6. In September 2018, the River Master issued a final determination. Tex. App. 268a-286a. The River Master rejected Texas's contention that New Mexico's motion was untimely. *Id.* at 269a-270a, 283a-284a. The River Master observed that "discussions about the flood and accounting for it equitably were continuous from the time the flood occurred until the present," and that it was not until May 2018, during a "meeting in Fort Collins," that Texas raised "the issue of time limits" for "[t]he first time." *Id.* at 269a. The River Master found "no explicit rule in the Compact documents about curtailing negotiations or their resolution through the motion process on the basis of a time limit." *Ibid.* The River Master likewise determined that neither the Compact nor the amended decree prohibited the "retroactive adjustment of a Final Determination." *Id.* at 269a-270a.

On the merits, the River Master determined that "the flood event of September 2014 did not comprise [unappropriated flood waters]" under the Compact. Tex. App. 270a; see *id.* at 37a (authorizing the River Master to make such a determination). That determination rested on the River Master's finding that "the flood waters could have been stored or diverted under the 1947 condition," given the greater capacity of Red Bluff Reservoir in 1947. *Id.* at 270a (footnote omitted); see *id.* at 279-282a, 284a-285a. The River Master then explained that because "the flooding does not comprise [unappropriated flood waters]," "the flood waters are part of ongoing inflow-outflow computations," "to be accounted for under the [Manual]." *Id.* at 270a. In other words, the River Master stated, "if they pass the state line, they are part of New Mexico's delivery credit." *Ibid.*

Turning to the Manual, the River Master found Section C.5 applicable here. Tex. App. 285a-286a. The River Master read Texas's November 2014 email to New Mexico "to indicate clearly that [Texas] understood the water stored in [New Mexico] to be [Texas] water." *Id.* at 285a. And the River Master understood Section C.5 to charge evaporation losses to Texas in that situation. *Id.* at 267a, 273a, 285a-286a. The River Master determined, however, that before March 1, 2015, "the evaporation charge" should be split "50-50" between the States because, in his view, there were public-safety concerns in both States about releasing the water until that date. *Id.* at 273a. The River Master "shift[ed] all responsibility for evaporation" after that date "to Texas." *Ibid.* The River Master therefore awarded New Mexico a 16,627 acre-foot credit toward its delivery obligation under Article III(a) of the Compact. *Id.* at 276a. He did so by adding that credit to the accounting table for water year 2015. *Id.* at 261a, 264a.

Finally, the River Master determined that the Manual "needed" a provision to give the River Master and the States "guidance about handling future changes." Tex. App. 286a. He thus amended the Manual to authorize the River Master to make "an adjustment to an annual Final Report" upon a motion by one or both States and a showing of "good cause." *Id.* at 277a.

DISCUSSION

Under this Court's amended decree, any final determination of the River Master "shall be subject to review by this Court only on a showing that the Final Determination is clearly erroneous." *Texas* v. *New Mexico*, 485 U.S. 388, 393 (1988). Texas has not made that show-

ing here. The River Master did not clearly err in calculating New Mexico's delivery credit for evaporation losses under the Compact, and he appropriately entertained New Mexico's request for such a credit. Texas's motion for review therefore should be denied.

A. The River Master Did Not Clearly Err In Calculating New Mexico's Delivery Credit For Evaporation Losses

For a year following Tropical Storm Odile, Brantley Reservoir held flood waters that otherwise would have been released to the New Mexico-Texas line. Tex. App. 276a. Over the course of that year, some of those flood waters evaporated. N.M. App. 92. Applying Section C.5 of the Manual, the River Master determined that most of the evaporated water should be credited to New Mexico, as if it had been delivered to Texas. Tex. App. 267a, 276a, 285a-286a. That determination was not clearly erroneous.

1. As an initial matter, neither State challenges the River Master's determination that the waters held in Brantley Reservoir above the Project limit were not "unappropriated flood waters." Tex. App. 270a. Under the Compact, that term refers to certain waters that would not have been "usable" under "the 1947 condition." Art. II(i), 63 Stat. 161. If the River Master had designated the waters at issue as "unappropriated flood waters," they would have been accounted for separately under Articles III(f) and VI(d) of the Compact. See p. 3, *supra*. But because the River Master determined that the waters at issue were not "unappropriated flood waters," those waters are appropriately accounted for under Article III(a), as "part of ongoing inflow-outflow computations." Tex. App. 270a.

Article VI(c) of the Compact requires use of an "inflow-outflow method" in calculating New Mexico's delivery obligation—as well as any shortfall or overage—under Article III(a). 63 Stat. 163. The amended decree, in turn, requires use of the particular inflow-outflow "methodology set forth in the Manual." 485 U.S at 391. And Section C.5 of the Manual provides that, "[i]f a quantity of the Texas allocation is stored in facilities constructed in New Mexico at the request of Texas, then * * * this quantity will be reduced by the amount of reservoir losses attributable to its storage." Tex. App. 37a.

That provision applies here. To begin, the waters held in Brantley Reservoir above the Project limit were part of "the Texas allocation." Tex. App. 37a. There is no dispute that, if those waters had not been held, they would have flowed across the state line into Texas. *Id.* at 276a-277a, 284a, 286a. The waters at issue were therefore Texas's—as Texas itself recognized in an email to New Mexico in November 2014 "request[ing] that New Mexico store Texas' portion of the flows." *Id.* at 61a. That same email also fairly establishes that the Texas allocation was "stored in facilities constructed in New Mexico"—namely, Brantley Reservoir—"at the request of Texas," *id.* at 37a, for the email was sent by Texas, with the subject line: "Texas request for storage." *Id.* at 61a.

Section C.5 of the Manual therefore requires that the "quantity" of the Texas allocation "be reduced by the amount of reservoir losses attributable to its storage"—in other words, that Texas be charged with losses due to evaporation while the waters were being held in Brantley Reservoir. Tex. App. 37a. That makes sense, because if the water had not evaporated, it eventually

would have been delivered to Texas—and thus been counted toward satisfaction of New Mexico's Article III(a) obligation. *Id.* at 276a-277a, 284a, 286a. The only reason the water was not delivered before it evaporated was because it was being held in Brantley Reservoir. *Id.* at 276a-277a. And if the water was being held there at Texas's request, it is fair that any evaporation losses should be borne by Texas.[2]

2. Texas's challenges to the River Master's determination lack merit. Texas contends (Mot. 27) that if the waters at issue are not "unappropriated flood waters," Article XII is the only "possible remaining basis for apportionment of evaporative loss" under the Compact, and Article XII "is inapplicable." Texas is correct that Article XII is inapplicable here. That Article applies to the "consumptive use of water by the United States," and the United States did not engage in any "consumptive use" of the waters at issue here, Art. XII 63 Stat. 165; it merely held the waters for flood-control purposes, Tex. App. 68a. Texas errs, however, in contending (Mot. 27) that Article XII is the only "possible remaining basis for apportionment of evaporative loss" under the Compact. As explained above, Article VI(c) of the Compact requires that New Mexico's Article III(a) obligation be calculated using an inflow-outflow method, and the amended decree requires that the River Master use the particular method set forth in the Manual. See p. 16, *supra*. The River Master's authority

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[2] The River Master charged to Texas only half of the evaporation losses prior to March 1, 2015, while there were still public-safety concerns about releasing the water. Tex. App. 277a. New Mexico does not seek review of that aspect of the River Master's determination.

to charge the evaporative losses to Texas under Section C.5 can therefore be traced from the Manual, through the amended decree, to the Compact itself.

Texas also contends (Mot. 30) that if the water at issue were Texas's water, Reclamation was acting illegally because Texas had no Warren Act contract for storage of Texas's water. A Warren Act contract, however, is only one basis for holding water in Brantley Reservoir above the Project limit. Reclamation may also lawfully hold water pursuant to its flood-control authority, 86 Stat. 966, as it did here, Tex. App. 68a. The fact that Reclamation was acting pursuant to its flood-control authority does not change the fact that the water was being "stored" in a facility constructed in New Mexico within the ordinary meaning of that term. *Id.* at 37a. Nor does it change the fact that the water was part of "the Texas allocation," which otherwise would have flowed across the state line. *Ibid.* Thus, the fact that Reclamation was acting pursuant to its flood-control authority does not undermine the application of Section C.5 here.

B. The River Master Appropriately Entertained New Mexico's Request For Delivery Credit

Texas contends (Mot. 14-26) that the River Master should not have even reached the merits of whether New Mexico was entitled to a delivery credit for evaporation losses. In Texas's view (*ibid.*), the River Master should have rejected New Mexico's request for such a credit as procedurally improper. The River Master, however, appropriately entertained New Mexico's request, for two reasons. First, the procedure the River Master followed did not violate the amended decree.

Second, Texas has forfeited any contention that the procedure the River Master followed was improper.

1. In awarding New Mexico a delivery credit for evaporation losses, the River Master followed a procedure set forth in his final report for water year 2014. In that final report, the River Master noted the existence of two "unresolved" issues that his preliminary report for the same year had identified—one of them involving the waters at issue here. N.M. App. 61. The River Master then explained how those issues could be resolved: either (1) by agreement or (2) upon a motion by one of the States. *Ibid.* When the States failed to reach agreement on how to resolve the accounting issue here, New Mexico pursued the second option. Tex. App. 44a. Although New Mexico's motion asked that a delivery credit be granted through modification of the "Manual," *ibid.*, the River Master granted the credit simply by adjusting the accounting table for water year 2015, *id.* at 261a, 264a, 267a.

Texas contends (Mot. 14-15) that the amended decree prohibits the procedure the River Master followed. But although the amended decree sets a deadline of June 15 of the accounting year for objections to the River Master's preliminary report for a given water year, and a 30-day limit for seeking review by this Court of the River Master's final report for the water year, see 485 U.S. at 391, 393, the amended decree nowhere prohibits the River Master from identifying unresolved issues in one year's preliminary and final reports, to be resolved in a future year.

In addition, the amended decree contains various provisions governing modification of the Manual. 485 U.S. at 392. In awarding New Mexico a delivery credit for evaporation losses, however, the River Master did

not modify the Manual. Rather, the River Master made a one-time adjustment to the accounting table for water year 2015. Tex. App. 261a, 264a, 267a. The provisions governing modification of the Manual do not apply to such one-time adjustments to the accounting table, which leave the Manual unaltered. And although the River Master did modify the Manual to include a new provision setting forth the procedures for making such one-time adjustments, that modification applies only prospectively, to "future" disputes. *Id.* at 286a. It therefore does not violate the rule that "[a] modification of the Manual by motion shall be first applicable to the water year in which the modification becomes effective." 485 U.S. at 392.

2. In any event, Texas forfeited any contention that the procedure the River Master followed was improper. When the River Master described the "process going forward" in his preliminary report for water year 2014, Texas did not object. N.M. App. 39. When the River Master likewise described that process in his final report for that same year, Texas did not seek this Court's review. *Id.* at 61. And two years later, when the States still had not resolved the accounting issue here, Texas joined a letter with New Mexico affirmatively "seek[ing] [the River Master's] resolution" of the issue, "in accordance with" the amended decree. *Id.* at 93. Texas then submitted a position paper to the River Master, seeking its own retroactive adjustments to the accounting tables for water years 2014 and 2015. *Id.* at 106. By May 2018, when Texas first questioned whether such an adjustment would be timely, Tex. App. 269a, it was too late; Texas had forfeited any objection to the procedure that had been adopted in a final report of

which Texas did not seek review and that had been in place for three years.

Texas contends (Mot. 20) that "the time limitations set out in this Court's amended decree are jurisdictional." If so, they would not be subject to forfeiture. But in setting forth those time limitations, the text of the amended decree "does not speak in jurisdictional terms." *United States* v. *Kwai Fun Wong*, 135 S. Ct. 1625, 1633 (2015) (citation omitted). Rather, it speaks in the language of a claim-processing rule, prescribing when "[t]he River Master shall perform [certain] duties." 485 U.S. at 391. By contrast, when the amended decree does speak about "jurisdiction," it does so explicitly—stating that "[t]he Court retains jurisdiction" for certain purposes. *Id.* at 394. Thus, even if the procedure the River Master followed violated the time limitations set forth in the amended decree, Texas forfeited any such violation by waiting several years to object.

CONCLUSION

The motion for review should be denied.

Respectfully submitted.

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