No. 65, Original

In the Supreme Court of the United States

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO

ON REVIEW OF THE RIVER MASTER'S 2018 FINAL DETERMINATION

RESPONSE TO THE BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INTRODUCTION

In 2014, Tropical Storm Odile brought historic flooding to the Pecos River basin. Southeastern New Mexico and west Texas were inundated. To prevent disaster, the federal government decided to hold the excess storm water in its Brantley Reservoir until the danger of downstream catastrophes subsided. A few months later, in March 2015, Texas prepared its reservoir to receive inflows from Brantley. But New Mexico asked the federal government to hold off. Eddy County's bridges were not ready for an influx of water.

So the federal government waited until August 2015. By the time southeastern New Mexico finally became ready for the release of water from Brantley, tens of thousands of acre-feet had evaporated. Indeed, most evaporation losses occur in sunny, hot summer months.

Had the water been released in March 2015, when Texas was ready to receive it, the release would have exacerbated catastrophic flooding and destroyed infrastructure in New Mexico. Yet the River Master concluded that *Texas* was responsible for the vast majority of Brantley's evaporation losses—including *all* evaporation loss after March 2015.

Substantively, that result defies the Compact, this Court's amended decree, and common sense. Procedurally, it flouts the rules this Court set in the amended decree. This Court appointed the River Master to serve as a technical expert responsible for complex calculations—not a special master imbued with full equitable powers. The River Master lacks authority to bind States to his own subjective notions of fairness.

In defending the River Master's clearly erroneous decision, the United States misunderstands the facts and the law. Its core error is its assertion that all the

Brantley water lost to evaporation was Texas's water. That claim is impossible to square with the record. The United States also misreads the Compact and this Court's amended decree—neither of which permits the River Master's decision. And the United States aggrandizes the role of the River Master, giving him free-wheeling equitable powers this Court denied long ago. Indeed, the United States' position, if left unchecked, would distort the traditional role of river master and upend various States' settled expectations in other interstate compacts.

The River Master violated the procedures in this Court's decree and issued a clearly erroneous order. The United States did not demonstrate otherwise. The Court should set this matter for oral argument, grant Texas's motion for review, and reverse the River Master's 2018 final determination.

ARGUMENT

I. The River Master's Allocation of Evaporation Losses Was Clearly Erroneous.

The River Master's delivery-credit calculation was not authorized by the Compact and was therefore clearly erroneous. Mot. 27-31. The United States' contrary argument, U.S. Br. 15-18, is premised on an incorrect view that the floodwater at issue belonged to Texas and was stored for Texas. It was not. For that reason, neither article III(a) of the Compact nor section C.5 of the Manual authorized the River Master's action.

A. The United States' cornerstone assertion that all the floodwater was Texas's water is incorrect.

1. The Odile floodwater at issue fell in New Mexico. The federal government decided to impound the water in its own facility in New Mexico to mitigate flooding in

both States. Had the water been released from Brantley, it threatened danger in both States. Yet the United States asserts that all this water was somehow Texas's water, and that Texas should be charged for its evaporation. That argument misreads the Compact and the record.

a. The Compact sets out Texas's allocation—or the amount of water Texas is entitled to. *See* App. 4a (Art. III). It is the amount "equivalent to that available to Texas under the 1947 condition." *Id.* It is *not* whatever amount happens to cross the state line.

The United States misunderstands this definition. It asserts (at 16) that floodwaters that evaporated from Brantley were Texas's because those waters would have eventually reached Texas. But that cannot be squared with article III, which defines Texas's allocation as "the 1947 condition"—not whatever water reaches Texas. App. 4a. The Compact thus defeats the United States' position.

b. Lacking support in the Compact, the United States offers an email from the Texas Compact Commissioner as proof that the evaporated floodwaters were Texas's. U.S. Br. 8 (quoting App. 61a). But that email merely requested that New Mexico store "Texas' *portion* of the flows." App. 61a (emphasis added). It did not assert that Texas owned all the water. And New Mexico's response confirms the parties' understanding that these extraordinary floodwaters would be allocated as "[u]nappropriated [f]lood waters" under the Compact, App. 61a; 63a, and therefore divided 50/50, App. 4a. There is no basis to infer, as the United States does, that the parties understood that all floodwater belonged to Texas.

Neither does the email support the United States' contention (at 16) that New Mexico stored the floodwa-

ter for Texas's use. First, the water was not "stored"; it was impounded in Brantley for flood control. App. 68a. In water law, to "store" water means to hold it *long-term* for beneficial use in the future. *See, e.g.*, Anthony Dan Tarlock & Jason Anthony Robison, Law of Water Rights and Resources § 5:39 (July 2019) ("Storage itself is not a beneficial use; storage is a means to apply water to a beneficial use.") Here, the Bureau *temporarily* held water for flood control, not for future use. No water was "stored" because it was released as soon as flood-control needs abated when no State could use it. App. 68a.

Regardless, no water was stored "*for Texas*." The Bureau impounded the water to control flooding in *both* States. App. 68a. And the Bureau released that water when the flood danger in *both* States ceased. App. 68a. The record thus contradicts the United States' claim that the water would have been released absent Texas's request, and it provides no support for the United States' contention that all water was Texas's.

Finally, *New Mexico* did not hold the water. The Bureau held it in Brantley. Mot. 2-3. The Bureau—not the States—decided when to impound it. And the Bureau—not the States—decided when to release it. The federal government's unilateral actions do not make the floodwater Texas's.

2. At minimum, it was clear error to assign all evaporation losses that occurred after March 2015 to Texas. Indeed, no evidence supports such an apportionment. Brantley experienced significant evaporation losses in the hot months between March 2015 and August 2015, and the River Master assigned them all to Texas. *See* App. 273a. But it was *New Mexico*—not Texas—that asked the Bureau to continue holding water after March 2015. In March 2015, New Mexico was

concerned that its still-temporary bridge crossings would not withstand a release from Brantley. App. 68a, 135a, 137a. As late as July 2015, projects to rebuild bridges over the Pecos in Eddy County still needed permits. App. 135a, 137a. So New Mexico asked the Bureau to delay its release—and the Bureau obliged. App. 68a, 135a, 137a.

By contrast, Texas was ready to accept new water months earlier. *See* App. 132a. In March 2015, Texas started releasing water from its Red Bluff Reservoir—all of which went unused—to make room for the upcoming releases from Brantley. App. 80a, 117a, 137a. Yet the Bureau did nothing until August 2015, in keeping with New Mexico's request. Against that backdrop, the River Master clearly erred in charging Texas for all evaporation losses after March 2015.

B. Article III(a) does not support the River Master's decision, which is presumably why he did not invoke that provision.

Not only does the United States misunderstand the ownership of the evaporated water, but it also misconstrues how the Compact requires such losses to be handled. The United States contends that article III(a) of the Compact authorized the River Master to charge the evaporation losses at issue against Texas as part of the required inflow-outflow calculation. U.S. Br. 16-17. But article III(a) allows no such thing—which is why the River Master did not rely on it.

As set out in Texas's motion (at 27-31), the Compact allows apportionment of evaporation losses in only two instances: (1) under article VI, when water is "unappropriated flood waters[,]" App. 7a; and (2) under article XII, for consumptive use by the federal government when storing water "for use in" Texas, App. 8a. The

United States agrees that neither applies here. *See* U.S. Br. 17-18. And because neither applies to assign evaporation losses to Texas, New Mexico—as the upstream State—bears such losses. After all, through its own use, New Mexico reduces how much water crosses the state line, which is why New Mexico is generally accountable for evaporation losses unless otherwise specifically indicated. *See, e.g.*, Final Report for Accounting Year 2001 at Tables 3, 6, 10, *Texas v. New Mexico*, Orig. 65 (U.S. Jul. 2, 2001) (allocating evaporation loss other than Brantley).

The United States nevertheless argues that article III provides a path to assign evaporation losses to Texas. Articles III and VI require the River Master to perform "inflow-outflow" calculations in order to ensure that Texas receives its entitlement under "the 1947 condition." App. 4a, 7a. According to the United States, the "inflow-outflow" accounting is a flexible vehicle to assign any evaporation losses. U.S. Br. 15-16.

But nothing on the face of article III speaks to evaporation losses. And no authority of which Texas is aware supports the notion that article III grants the River Master free-ranging license to apportion evaporation losses in Brantley. Indeed, the River Master himself did not rely on article III. He correctly made the inflow-outflow calculation in the Final Report for Accounting Year 2015, which did not include evaporation losses for the floodwater impounded in Brantley. App. 270a-271a. And he acknowledged that floodwater is *already* accounted for by the inflow-outflow method. *Id.* That "accounting considers all hydrologic issues *except evaporation losses* that occur while water is stored." *Id.* (emphasis added); *cf.* U.S. Br. 15.

The River Master thus confirmed that his 2018 revisions to his 2015 calculations were not adjustments to

the inflow-outflow analysis, as the United States suggests. Instead, the River Master made a freestanding adjustment to the overall accounting to assign evaporation losses to Texas. The River Master did not invoke article III or any other provision of the Compact. He simply invented an unprecedented methodology to accomplish what he considered "fair." App. 271a-273a.

The Compact does not authorize the River Master to make ad hoc equitable apportionments, and the United States is wrong to suggest that such power is implicit in article III.

C. Section C.5 of the Manual likewise does not apply here.

Contrary to the United States' assertions (at 16-18), section C.5 of the Manual did not authorize the River Master's allocation of evaporation loss, either. That section expressly applies only to "a quantity of the Texas *allocation* [that] is *stored* in facilities constructed in New Mexico at the request of Texas[.]" App. 37a (emphasis added). As already explained, the floodwater at issue was not all Texas's "allocation," and it was not "stored" "at the request of Texas." *Id.*; *see supra* Part I.A.

II. The River Master Wrongly Amended the 2014 Calculations Years After This Court's Deadline.

Texas's motion demonstrated that the River Master flouted the procedures required by the Compact and the amended decree. Mot. 15-16, 27-31. The motion further explained that New Mexico's objections to the River Master's report are untimely. *Id.* at 14-15, 17-26. In response, the United State aggrandizes the role of the River Master beyond what the amended decree contemplates, and it wrongly accuses Texas of forfeiting its contentions.

A. The United States improperly aggrandizes the River Master's authority granted by this Court.

The United States erroneously expands the River Master's authority in its effort to excuse New Mexico's forfeiture. The United States identifies no provision in the Compact, the amended decree, or the Manual that allows the River Master to retroactively adjust his Final Report without agreement from the States. It instead argues that nothing *disallows* the adjustment. U.S. Br. 19. That argument misunderstands the role and authority of a River Master. If accepted, it would alter the dynamics of any multistate compact involving a River Master.

1. This Court appointed a River Master in this case to address only limited, technical, non-legal issues. *See Kansas v. Colorado*, 543 U.S. 86, 92-93 (2004). Previously, there was a Special Master. *See* App. 39a. When considering alternatives to the Special Master, the Court noted possible appointment of a River Master "solely to perform ministerial tasks." *Texas v. New Mexico*, 462 U.S. 554, 566 n.11 (1983). The Court appointed the River Master for "technical" expertise. *Kansas*, 543 U.S. at 92-93; *see* Mot. 19.

The authority that the United States attributes to the River Master is more like the authority the Court gave a *special* master in another interstate compact case. In *Alabama v. North Carolina*, the Court appointed a special master with "discretion to 'direct subsequent proceedings.'" 560 U.S. 330, 353 (2010) (quoting *Alabama v. North Carolina*, 540 U.S. 1014 (2003)). That gave him "case management" authority, allowing him to "defer[] filing any report[.]" *Id.* at 353-54.

But in this case, the Court *withheld* such power from the River Master. The Court has emphasized—both within and without this litigation—the narrowness of his authority. *See Kansas*, 543 U.S. at 92-93. The United States turns that context on its head by presuming that the River Master has authority unless the Court says otherwise. *See* U.S. Br. 19. That presumption overlooks the Court's detailed list of the River Master's technical duties. App. 41a-42a. And it intrudes on state sovereignty by imbuing a non-lawyer with broad equitable powers to force his subjective views of fairness. *See* App. 271a-273a.

The River Master stepped beyond his bounds in this dispute by making legal determinations. *See* N.M. App. 157; App. 208a. He attempted to invoke and apply equitable doctrines. *See* Reply 10-16; 21-22. He amended the Manual prospectively to formalize the expansion of his authority, apparently on his own motion. *See* App. 232a. The United States ignores these problems. The Court should repudiate the United States' position to prevent harm to other interstate compacts, especially those involving River Masters. *E.g., New Jersey v. New York*, 347 U.S. 995, 1002-04 (1954).

2. If the River Master should have allocated evaporation losses in the 2015 report, he failed to meet his obligation to submit a "Final Report" under the amended decree. App. 41a. A final report with a one-time adjustment in the indefinite future is not final at all. And incomplete final reports make no sense when viewed alongside the deadlines in the amended decree. *See* App. 40a-41a.

If issues from Odile were unresolved (for example, the floodwater at issue was still in Brantley when the 2015 Final Report was filed), the proper course was for the River Master to request an extension from this

Court. *See, e.g.,* Order Granting Joint Motion for Extension of Time for the Pecos River Master to File His Final Report for Accounting Year 2018, *Texas v. New Mexico*, Orig. 65 (U.S. June 28, 2018). But he did not. Instead, he determined that a non-final report satisfied his obligation. N.M. App. 61. That determination contradicts the amended decree. App. 41a.

The United States strains to conclude otherwise. It acknowledges that the amended decree "sets a deadline … for objections[,]" then retreats to argue that the amended decree does not explicitly prohibit leaving open issues in a final report to be resolved later. U.S. Br. 19. But the Court intentionally limited the River Master's authority. If nothing in the Compact, amended decree, or Manual permits a given action by the River Master, the action exceeds his authority.

The River Master himself acknowledged that the amended decree constrained his authority to modify the 2015 Final Report, N.M. App. 61, and implicitly acknowledged that the Manual did not permit his action by adopting a new provision in the Manual allowing for it, App. 277a. The United States' position would expand the River Master's authority far beyond what this Court permitted.

B. Texas did not forfeit its objection to the River Master's error.

Finally, the United States argues that Texas forfeited its right to object to the River Master's post-hoc adjustments. That is wrong for multiple reasons.

1. As an initial matter, the deadlines in this Court's amended decree are jurisdictional. *See* Mot. 20-22. Parties cannot forfeit jurisdictional requirements.

2. In any event, Texas objected to the River Master's improper procedure as soon as he flouted the

amended decree. The River Master advised the States that they could retroactively apportion evaporation losses *only by agreement*—exactly as the amended decree provides. As he put it:

> The Amended Decree provides two avenues *for the States to agree* on how these issues should be handled once they are clarified:
>
> 1. The States can reach agreement on the action; or
>
> 2. Either State can initiate a motion to be considered by the River Master.
>
> The Amended Decree does not provide the River Master with unilateral authority to modify the Final Determination for Accounting Year 2015 unless *the States* initiate a request under one of these avenues.

N.M. App. 61 (emphases added).

That procedure contemplates agreement, so there was no basis to object to it. The amended decree allows only *agreed* retroactive action, App. 41a-42a, and the River Master acknowledged as much, N.M. App. 61. It would make little sense for Texas to object to a statement by the River Master that he would follow the amended decree.

Texas had no reason to object until the River Master contradicted his own insistence that agreement was necessary for retroactive adjustments. New Mexico moved unilaterally for evaporation credits without Texas's consent. App. 44a. By the River Master's own telling, he should have rejected that unilateral request. *See* N.M. App. 61. Instead, he granted it—and that led to this timely Motion for Review.

CONCLUSION

The Court should set this case for oral argument, grant the pending motion for review, and reverse the River Master's 2018 final determination.

Respectfully submitted.

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