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

MOTION FOR REVIEW OF RIVER MASTER'S FINAL DETERMINATION

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QUESTIONS PRESENTED

To resolve disputes about use of the Pecos River, Texas and New Mexico entered into the Pecos River Compact. This Court subsequently entered an amended decree ordering New Mexico to comply with its Compact obligations and appointing a River Master to perform the annual calculations of New Mexico's water-delivery obligations.

The Court's decree specifies exact procedures for objecting to the River Master's annual reports. In particular, a party must seek this Court's review of any final determination of the River Master within 30 days. Likewise, the decree allows modifying the manual governing the River Master's calculations only by specified procedures.

In 2014 and 2015, a federally owned reservoir in New Mexico impounded and held large amounts of flood waters dumped in the Pecos Basin by heavy rains. When the reservoir's authority to hold the water for flood-control purposes expired, the reservoir began to release it. Texas did not use this water, nor could it. The downstream reservoir in Texas was already full from holding flood water, so Texas had to release water, wasted, to make room for the water flowing in from New Mexico.

The River Master timely calculated and reported New Mexico's obligations for 2014 and 2015. Neither report reduced Texas's rights to water delivery based on the evaporation of water stored in the federal reservoir in New Mexico—water that Texas could not use. At the time, New Mexico lodged no objection, and the 30-day review period lapsed. But years later, in mid-2018, New Mexico filed a motion arguing that its delivery obligations should be reduced by the water that evapo-

rated from the flood waters stored in 2014 and 2015, giving New Mexico delivery credits for losses from water that neither State used.

Rather than dismiss that untimely objection, the River Master modified the governing manual over Texas's objection to allow retroactive changes to final reports, gave that modification of the manual retroactive effect, and amended the 2015 report to provide New Mexico credits against its delivery obligations for most of the evaporative loss in 2015.

The questions presented are:

1. Whether the River Master clearly erred in retroactively amending the River Master Manual and his final accounting for 2015 without Texas's consent and contrary to this Court's decree.

2. Whether the River Master clearly erred by charging Texas for evaporative losses without authority under the Compact.

PARTIES TO THE PROCEEDING

The plaintiff in this case is the State of Texas. The defendant in this case is the State of New Mexico.

The appointed River Master is Dr. Neil S. Grigg.

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JURISDICTION

The Court exercised original jurisdiction over this interstate water dispute pursuant to article III, § 2 of the United States Constitution and 28 U.S.C. § 1251. *Texas v. New Mexico*, 462 U.S. 554, 562 (1983). The Court appointed a River Master and retained jurisdiction to enter supplemental orders and review the River Master's final determinations—review that Texas now seeks. *Texas v. New Mexico*, 485 U.S. 388, 393-94 (1988) (per curiam).

STATEMENT

Texas and New Mexico formed the Pecos River Compact to allocate the waters of the Pecos River, and disputes arose over implementation of the Compact. This Court issued an amended decree to govern those disputes and appointed a River Master to calculate and oversee the parties' obligations. Texas now challenges a final determination of the River Master.

A. The Pecos River Compact

1. The Pecos River is famed in the lore of the Wild West.[1] It originates in the Pecos Wilderness in New Mexico and flows south until it joins the Rio Grande in Texas:

[1] The land west of the Pecos was mythologized in Westerns as "the wildest spot in the United States . . . [v]irtually beyond the reach of the authorities." *Judge Roy Bean*, Western Clippings, http://www.westernclippings.com/remember/judgeroybean_doyouremember.shtml [https://perma.cc/6AWM-U2Q4]. "It was said that all civilization and law stopped at the east bank of the Pecos." *Id.*

Brantley Reservoir sits on the Pecos River in New Mexico, about 50 miles north of the Texas border. As part of the federal Brantley Project, it is owned by the United States Bureau of Reclamation. *See* Reclamation Project Authorization Act of 1972, Pub. L. No. 92-514, § 201, 86 Stat. 964, 966 (Oct. 20, 1972); U.S. Dep't of the Interior, Bureau of Reclamation, *Brantley Project: Plan*, https://www.usbr.gov/projects/index.php?id=501 [https://perma.cc/572L-3S6P]; U.S. Dep't of the Interior, Bureau of Reclamation, *Brantley Dam: Details*, https://www.usbr.gov/projects/index.php?id=28 [https://perma.cc/7H9C-8UA2]. The Bureau of Reclamation is a component agency of the United States Department of

the Interior; it builds, oversees, and operates projects throughout the western United States for irrigation, water supply, and hydroelectric power generation. *See* U.S. Dep't of the Interior, Bureau of Reclamation, *About Us: Fact Sheet*, https://www.usbr.gov/main/about/fact.html [https://perma.cc/H8NS-AD7M].

Downstream, over the state line in Texas, is the Red Bluff Reservoir. Built in 1936 to provide water for irrigation and hydroelectric power, its dam is operated by a Texas power and water district. Tex. Water Dev. Bd., *Red Bluff Reservoir (Rio Grande River Basin)*, http://www.twdb.texas.gov/surfacewater/rivers/reservoirs/red_bluff/index.asp [https://perma.cc/K7M7-N7N4]. Red Bluff is the principal water storage space on the Pecos River in Texas. *See* App. 22a, 62a.

2. The Pecos River in its natural state can dry up for weeks over fairly long stretches in New Mexico, and its flow varies dramatically from year to year. *See Texas*, 462 U.S. at 557 n.2. As a result, if development in New Mexico were not restricted, no Pecos River water at all would reach Texas in many years. *Id.* at 557.

That water is of vital importance to Texas citizens who rely on the Pecos River for their livelihood. Texans require water from the Pecos to irrigate farmland and grow crops such as cotton, alfalfa, grain sorghums, vegetables, and fruits. Delmar J. Hayter, Tex. State Historical Ass'n, *Pecos River*, https://tshaonline.org/handbook/online/articles/rnp02 [https://perma.cc/QK3L-JB65]. Moreover, the Pecos River is a principal tributary of the lower Rio Grande. *Id.*; Albert El-Hage & Dan W. Moulton, *Ecologically Significant River & Stream Segments of Region J (Plateau), Regional Water Planning Area* at 42 (2001), https://tpwd.texas.gov/publica

tions/pwdpubs/pwd_rp_t3200_1059d/ (click "Pecos River").

2. To allocate the waters of the Pecos River, Texas and New Mexico formed, and Congress approved, the Pecos River Compact. *See* 63 Stat. 159 (1949), *reproduced at* App. 1a-9a. Because of the Pecos River's irregular flow, the Compact does not specify an exact amount of water that New Mexico must deliver to Texas each year. Instead, the Compact provides:

> 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.

App. 4a (Compact art. III(a)). Various aspects of the Compact are administered by the Pecos River Commission, which has a representative from each State. App. 5a-6a.

3. The Pecos Basin is prone to occasional flooding. The Pecos River Compact provides that the States split the right to use flood waters. App. 4a (Compact art. III(f)). Those excess waters, termed "unappropriated flood waters," include waters impounded in New Mexico that would otherwise, if released, spill over the Red Bluff Dam in Texas and flow past Girvin, Texas, unused. App. 3a (Compact art. II(i)). The Compact directs that evaporative loss of unappropriated flood waters held in a New Mexico reservoir is apportioned between the States: "If 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." App. 7a (Compact art. VI(d)(iii)).

The Compact's only other basis for charging evaporative loss to a State applies when water is not considered "unappropriated flood water" but is held by the United States for one State's use: "consumptive use of water by the United States ... incident to the ... impounding ... of water in one state for use in the other state shall be charged to such latter state." App. 8a (Compact art. XII). Thus, for article XII to apply to evaporative loss of water held in New Mexico, the United States must be storing the water "for use in" Texas, as opposed to another purpose.

B. Prior litigation

Exactly how to calculate the quantity of water owed to Texas has been the subject of protracted litigation in this Court. For years, Texas considered New Mexico to be deficient in its water-delivery obligations, and Texas ultimately filed suit in 1974. *Texas*, 462 U.S. at 562. In 1987, this Court ruled that New Mexico failed to deliver hundreds of thousands of acre-feet of water owed to Texas. *Texas v. New Mexico*, 482 U.S. 124, 127-28 (1987). As prospective relief, the Court issued a decree enjoining New Mexico to comply with its Compact obligation as calculated using a method defined by the Special Master and approved by the Court. *Id.* at 127, 135.

As a further enforcement mechanism, the Court directed the appointment of a River Master to make annual calculations of New Mexico's obligation and direct New Mexico's compliance. *Id.* at 134-35. In 1988, the Court appointed Dr. Neil Grigg, an engineering professor, as River Master and entered an amended decree defining his duties and the consequences and procedures for review of his determinations. *Texas*, 485 U.S. at 388-94, *reproduced at* App. 39a-43a.

The amended decree directs an annual process of calculation and accounting. After a calendar year ends, the River Master is to calculate both New Mexico's water-delivery obligation for that prior year—deemed the "water year" under review—and New Mexico's delivery shortfall for that water year after subtracting any over-delivery credits accumulated since 1987. *Id.* at 389, 391. The year in which those calculations are performed for the prior year is called the "accounting year." *Id.* at 389. During the accounting year, the River Master must set forth his calculations in a preliminary report; consider the parties' objections to be filed within a specified time; and then issue both a final report with final calculations and an "approved plan" for verifiable action by New Mexico to make up the water-year shortfall by March 31 of the year after the accounting year. *Id.* at 389-91.

All of those calculations are to be performed using the River Master Manual, *id.* at 390-91, which is "an integral part" of the amended decree, *id.* at 389. The manual, in turn, may be modified in one of two specified ways. First, the manual can be modified pursuant to a written agreement of the parties, which must specify whether the modification is to be retroactive. *Id.* at 392. Second, one party may move the River Master to modify the manual for good cause. *Id.* Any such unconsented modification requires the River Master to issue a written modification determination after entertaining objections. *Id.* Such an unconsented modification cannot apply to a water year before the year in which the modification determination is adopted. *Id.* In short, neither procedure allows a retroactive modification of the manual without both parties' written consent.

Any final report, approved plan, or modification determination of the River Master (collectively, a "final determination," *id.* at 393) is subject to this Court's review under a clear error standard. *Id.* Review is by motion to the Court within 30 days of such a final determination. *Id.*

C. The current dispute

1. In fall 2014, Tropical Storm Odile caused heavy and widespread rainfall in both New Mexico and Texas. App. 44a, 116a. During the flooding, Red Bluff Reservoir in Texas went from around half full to over capacity—and thus began spilling. App. 79a-80a. Responding to safety concerns, the Bureau of Reclamation began impounding floodwater in Brantley Reservoir in New Mexico, in accordance with its flood-control authority. App. 68a.

On November 20, 2014, Texas's representative to the Pecos River Commission requested that New Mexico continue to store waters that would otherwise be released downstream, "until such time as they can be utilized in Red Bluff Reservoir." App. 61a. New Mexico agreed not to object on January 26, 2015. App. 62a-64a. But, ultimately, the water could not be stored until Texas could use it. The Bureau kept floodwater impounded in Brantley Reservoir for flood control through the rest of 2014 and much of 2015. App. 68a, 116a. While the flood water was impounded in Brantley Reservoir, around 21,000 acre-feet of water evaporated from the reservoir's floodwater pool. App. 215a.

In February and March 2015, the Bureau stated that it could not hold the water in Brantley Reservoir once public-safety concerns expired, as Texas did not have a contract with the Bureau for water storage under the Warren Act, 42 U.S.C. § 523. App. 68a-69a, 137a,

139a. In response, from March 2015 through December 2015, Red Bluff Reservoir released water because its reservoir was still at capacity yet would be receiving the Brantley Reservoir releases. App. 80a, 117a, 132a. In July 2015, the Bureau notified New Mexico and Texas that its flood-control authority was expiring and that it would begin releasing water in August, even though Red Bluff Reservoir would have to pass flows downstream, but that it would do so at a sufficiently low rate to protect the bridges in New Mexico that were still not repaired from the flood. App. 68a, 236a; *see also* 135a, 137a. The over 40,000 acre-feet of water that Texas had to release from Red Bluff Reservoir went wasted and unused. App. 117a.

2. In 2015, pursuant to the amended decree, the River Master issued a final report for water year 2014. Likewise, in 2016, the River Master issued a final report for water year 2015. In neither final report did the River Master count against Texas (as by a credit against New Mexico's delivery obligation) any of the evaporation of flood water stored in Brantley Reservoir, which Texas could not have used even if released downstream rather than stored. *See* Pecos River Master's Final Report for Accounting Year 2016, *Texas v. New Mexico*, No. 65, Original (U.S. June 28, 2016); Pecos River Master's Final Report for Accounting Year 2015, *Texas v. New Mexico*, No. 65, Original (U.S. July 7, 2015).

Before the deadline to object to the River Master's final reports for water years 2014 and 2015, New Mexico asserted in conversations with Texas officials and the River Master that evaporative losses from the impounded floodwater should be accounted for and counted against Texas's water-delivery rights. App. 63a, 66a, 139a-140a. But New Mexico did not file objections to the

River Master's preliminary report for water year 2014 or 2015 regarding this issue. Nor did New Mexico seek this Court's review of the final report for either water year. New Mexico had no fewer than four formal opportunities to challenge the River Master's determinations that New Mexico would not receive delivery credits for evaporative losses in water years 2014 and 2015. Yet New Mexico did nothing.

Nevertheless, for the sake of comity, Texas permitted technical and legal advisors to attempt a resolution of the dispute by agreement even though New Mexico no longer had recourse under the amended decree's review procedures. But an agreement could not be reached.

New Mexico retained outside counsel in late 2017. After a failed attempt at resolving the dispute by mediation in May 2018, New Mexico received an unopposed extension from the Clerk of this Court for the River Master to submit the final report for water year 2017. Joint Motion for an Extension of Time for the Pecos River Master to File His Final Report for Accounting Year 2018, *Texas v. New Mexico*, No. 65, Original (U.S. June 26, 2018); Order Granting Joint Motion for Extension, *Texas v. New Mexico*, No. 65, Original (U.S. June 28, 2018) (extending the deadline from July 1 to September 10, 2018). In July 2018, New Mexico submitted to the River Master a motion to modify the River Master Manual to allow amendment of the reports for water years 2014 and 2015 and credit New Mexico for evaporative losses that occurred in those years. App. 44a-114a. Alternatively, New Mexico asked the River Master to adjust his calculations for water year 2017 "in recognition of" evaporative losses in 2014 and 2015. App. 47a.

Texas argued that the amended decree did not allow retroactive modifications of the manual without the written agreement of both parties—absent here—and that New Mexico's request in 2018 to adjust its delivery obligation based on evaporation in water years 2014 and 2015 was untimely under the amended decree. App. 119a-123a. New Mexico argued that the River Master has authority to revise final determinations up to three years after their issuance or that equitable tolling excuses New Mexico's failure to timely object to the preliminary and final reports for water years 2014 and 2015. App. 47a-52a.

As to the merits of its claim for credits, New Mexico argued that the storm's floodwaters had been stored in Brantley Reservoir only for Texas's use and that article XII of the Compact applied because evaporative losses at the reservoir were "consumptive use of water by the United States . . . incident to the . . . impounding . . . of water in one state for use in the other state," App. 9a (Compact art. XII); *see also* App. 58a, 199a (New Mexico's motion and reply). Texas argued that the floodwater was not stored "for use" in Texas but rather to prevent flooding, as shown by the Bureau's express statements and its release of the water without regard to and despite Texas's inability to use the water. App. 123a-124a (Texas's argument). Texas further argued that, if the waters at issue were "unappropriated flood waters" under the Compact, evaporative loss should be apportioned pursuant to article VI(d)(iii) and that all unappropriated flood water must be accounted for under the Compact, all of which New Mexico's position failed to do. App. 126a-127a.

3. The River Master provided a proposed ruling granting New Mexico's motion and stating new calcula-

tions for water year 2015. App. 208a-221a. The States provided their objections, App. 222a-236a, and the River Master then issued his final determination for water year 2017 by the extended deadline, App. 237a-286a.

In that final determination, the River Master revised his water year 2015 final accounting, retroactively assigning to Texas most of the evaporative losses of flood water stored in Brantley Reservoir during the flooding. *See* App. 255a, 261a, 276a.

The River Master explained his reasoning in his modification determination. App. 268a-286a. As to his authority to entertain New Mexico's request, the River Master decided that, because the States had attempted to negotiate the issue, the amended decree's timeline for objecting to a preliminary report during an accounting year should be equitably tolled. App. 269a-270a. The River Master thought that requiring New Mexico to file objections within the period specified by this Court in the amended decree would put "an unnecessary time limit" on resolution of issues and discourage cooperation. App. 269a. The River Master further reasoned that retroactive adjustment of a final determination is not "explicitly" prohibited by the Compact or the amended decree. App. 270a.

As to the merits of New Mexico's claim for credits, the River Master concluded that the floodwaters at issue were not "unappropriated flood waters" under the Compact. App. 270a. Instead, the River Master determined, without citing any authority, that New Mexico's delivery obligation for 2015 should be reduced by half of the evaporative loss that occurred while flood water was stored for public safety. App. 270a-273a. The River Master believed that the Bureau's public-safety-based storage ended in March 2015. App. 273a.

After that date, the River Master reasoned, Brantley Reservoir impounded the water exclusively for Texas's use because of Red Bluff's inability to store the water, and the River Master concluded that the full evaporative losses after that date should count against Texas under article XII of the Compact. App. 270a-273a. The River Master based that timing conclusion on his review of communications in January 2015, when the Bureau appears to have believed that its flood-control authority would expire in March 2015. App. 273a. The River Master did not address the Bureau's July 2015 communication to the parties stating that its flood-control authority would expire in August 2015.

Finally, recognizing that neither the Compact nor the River Master Manual provided for retroactive adjustments to previous accounting years' final calculations, the River Master granted New Mexico's request to amend the manual to include a provision allowing this retroactive adjustment, as well as others in the future. App. 277a.

4. The Clerk of the Court extended the deadline for Texas to file a motion for review of the River Master's final determination to December 17, 2018. *See* Order Granting Extension of Time, *Texas v. New Mexico*, No. 65, Original (U.S. Oct. 9, 2018); Order Granting Extension of Time, *Texas v. New Mexico*, No. 65, Original (U.S. Nov. 28, 2018). Texas now timely moves for that review.

SUMMARY OF ARGUMENT

I. The River Master's retroactive assignment of water-delivery credits to New Mexico for water year 2015 was clearly erroneous. New Mexico forfeited its right to object, before the River Master or this Court, to the water year 2015 calculations by failing to follow

the amended decree's deadlines for such objections. *See Texas*, 485 U.S. at 391, 393. Equitable tolling of those deadlines is both unavailable and, in any event, unwarranted. And neither the amended decree nor the River Master Manual contemplates retroactive modifications of past years' reports without the consent of both parties. The River Master's retroactive amendment of the manual, despite Texas's objection, exceeded his authority and was clear error.

II. Even if the River Master had authority under the amended decree to amend the River Master Manual in 2018 and assign new delivery credits to New Mexico for evaporative loss in 2015, absent both parties' consent, that decision is clearly erroneous.

First, it is contrary to the Compact. Only two Compact provisions allow apportionment of evaporative losses occurring in New Mexico: article VI, concerning evaporative losses from "unappropriated flood waters" stored in New Mexico, and article XII, concerning losses from consumptive use by the federal government in storing water "for use in" Texas. New Mexico did not rely on the first provision, forfeiting that theory. The second provision does not apply, as the Bureau was not authorized to and was not in fact storing water for use in Texas; instead, for public-safety reasons, it was impounding flood water that Texas could not use.

The River Master had no authority to depart from this Court's approved formula and the then-effective River Master Manual, by counting against Texas the evaporation of water stored in New Mexico that Texas could not use even if it were released. That decision exceeded the River Master's authority and was clearly erroneous.

ARGUMENT

I. The River Master's Decision To Retroactively Award Delivery Credits To New Mexico Is Clearly Erroneous.

New Mexico has forfeited any objection to the River Master's 2016 determinations about water year 2015. In pressing its objections, New Mexico flouts this Court's decree proscribing a 30-day period to object to preliminary reports and a 30-day period to challenge final reports. No authority permits the River Master to retroactively modify past final reports over a party's objection. And no authority authorizes the equitable tolling the River Master applied to consider New Mexico's time-barred objections.

A. New Mexico forfeited its objections to the water year 2015 report.

The River Master clearly erred by considering New Mexico's untimely motion to reconcile and account for the floodwater stored in Brantley Reservoir because of the 2014 flooding. Under the amended decree, there are two mechanisms for the States to challenge the River Master's allocation of delivery credits. The first is by submitting written objections within 30 days of the River Master's issuance of his preliminary report. *Texas*, 485 U.S. at 391. The second is by seeking this Court's review of the final report within 30 days of its adoption. *Id.* at 393. For water years 2014 and 2015, New Mexico did neither, even though the preliminary and final determinations for both years did not include any credit to New Mexico for evaporation of the flood water impounded in Brantley Reservoir. *See* Pecos River Master's Final Report for Accounting Year 2016, *supra*; Pe-

cos River Master's Final Report for Accounting Year 2015, *supra*.

Instead, New Mexico waited until July 13, 2018 to seek review of these reports with the River Master, App. 44a-114a, even though the amended decree expressly limits opportunities to challenge the River Master's final determinations by imposing the deadlines recited above. Indeed, the amended decree clearly states that a final determination "shall be effective upon its adoption." *Texas*, 485 U.S. at 393. The River Master Manual, an integral part of the amended decree, also contains no provision authorizing retroactive assignment of delivery credits. *See* App. 10a-38a; *see also* App. 277a (amending manual to allow retroactive modification on motion by one State).

By failing to timely object to the preliminary reports for water years 2014 and 2015 or seek review of the final reports for those years in this Court—or to request an extension of the applicable deadlines, to allow for negotiation between the States—New Mexico forfeited its right to challenge those determinations before the River Master or this Court. The River Master clearly erred in entertaining New Mexico's time-barred objections.

B. Neither the Compact, the amended decree, nor the River Master Manual permits the retroactive modification of past reports without the consent of both States.

1. New Mexico argued that the River Master could still provide the requested relief, even though the time had expired for seeking review. *See* App. 47a-52a, 195a-198a. It characterized the River Master's ability to retroactively calculate and assign credits for the 2014 flood

event as merely "equitable adjustments to the accounting," App. 195a, even though the relief that New Mexico requested was not a mere adjustment based on an agreed mistake in previous accounting. New Mexico argued that the amended decree did not limit the River Master's ability to make such adjustments and that New Mexico was consequently not required to have formally objected to the River Master's preliminary or final reports. App. 47a-50a, 196a-197a.

But neither the Compact nor the amended decree allows for *sua sponte*, retroactive "equitable adjustments to the accounting." *See* App. 1a-9a, 39a-43a. And as New Mexico and the River Master both acknowledged, neither does the River Master Manual. App. 49a, 277a. Recognizing the lack of authority in any of those documents, New Mexico argued that the River Master could simply change the River Master Manual retroactively to create the needed authority. *See* App. 49a. The River Master agreed and did just that. *See* App. 277a.

But such a modification is foreclosed by the amended decree. If mistakes need to be corrected retroactively, the contemplated mechanism is through an agreement by the parties. Under the amended decree, modifications that are agreed to by the parties can have retroactive application if the parties also so agree in writing: The "written agreement [of the parties] shall state the effective date of the modification and whether it is to be retroactive." *Texas*, 485 U.S. at 392.

The only other method for amending the manual, "absent written agreement of the parties," is "upon motion by either party and for good cause shown." *Id.* But the amended decree expressly provides that a modification by motion "shall be first applicable to the water year in which the modification becomes effective." *Id.*

That stands in stark contrast to modifications by consent, the only type that the decree allows to be made retroactive (by written agreement).

Thus, an unconsented modification cannot be used to amend the River Master Manual with retroactive effect. Here, Texas did not agree to the modification of the River Master Manual, much less agree in writing to make such a modification retroactive. Yet that is exactly what the River Master's modification does. App. 277a. New Mexico's suggestion that this is not a retroactive modification because the Compact calls for certain aspects of the accounting be averaged over a three-year period, App. 49a, is a fig leaf. That interpretation nullifies the deadlines in the amended decree. The Court was aware of the three-year averaging feature of the Compact when it issued the amended decree. If it intended to allow States to be able to request modifications of prior years' determinations for three years, it could have reflected that in its prescribed deadlines. It did not. The River Master's retroactive modification of the manual was clearly erroneous under the terms of this Court's amended decree.

C. The River Master clearly erred in finding that the doctrine of equitable tolling would permit New Mexico's untimely request.

New Mexico further argued that, even if its requested relief was untimely under the deadlines in the amended decree, the River Master could apply the doctrine of equitable tolling to permit consideration of New Mexico's tardy request for relief. App. 50a-52a, 197a-198a. The River Master agreed, finding that requiring New Mexico to file objections within the period specified by this Court in the amended decree would put "an unnecessary time limit" on the resolution of those is-

sues and discourage cooperation. App. 269a. The River Master stated that retroactive adjustment of a final determination is not "explicitly" prohibited by the Compact or the amended decree. App. 270a.

That willfulness is clear error. The River Master had no authority to override this Court's judgment and circumvent its prescribed deadlines. In any event, even were the doctrine available, its application here would be clear error.

1. The River Master lacks the authority to apply equitable tolling or act outside the explicit terms of the Compact, River Master Manual, or amended decree.

In the first place, the River Master's decision to act outside the procedures of the amended decree, allowing a party to bypass the deadlines set by this Court, exceeds his authority. In appointing a River Master rather than a Special Master to resolve ongoing issues between the parties in the amended decree, the Court viewed the issues within his authority to resolve as technical, rather than legal.

It is indisputably within the River Master's considerable expertise as an engineer to perform the technical calculations necessary to identify New Mexico's article III(a) obligations under the Compact. *See Texas*, 485 U.S. at 391. Conversely, the River Master is not a lawyer. It is beyond his mandate and his expertise to second-guess this Court's determination on the process for resolving legal disputes between the parties or to exercise discretion in applying legal doctrines to excuse noncompliance with the amended decree.

The Court has chosen to appoint a River Master only under "rare" circumstances, *Vermont v. New York*,

417 U.S. 270, 275 (1974) (per curiam), and only in instances where ongoing disputes are limited to technical issues, *Kansas v. Colorado*, 543 U.S. 86, 92 (2004). In declining to appoint a River Master in another water dispute between States, the Court described the River Master's limited responsibilities in this case:

> For one thing, further disputes in this case, while technical, may well require discretionary, policy-oriented decisionmaking directly and importantly related to the underlying legal issues. In this respect, potential disputes in this case differ at least in degree from those that we have asked River Masters to resolve. Implementation of the Pecos River Decree, for example, involved application of a largely noncontroversial mathematical curve . . . . Lingering disputes between Texas and New Mexico, we thought, would involve not the curve's shape but whether officials had properly measured the flows. Although these disputes might call for a "degree of judgment," they would often prove capable of mechanical resolution and would usually involve marginal calculation adjustments.

Id. at 92-93 (citations omitted).

When the Court appointed the River Master in this case, it envisioned a limited role reserved to making the calculations necessary to determine New Mexico's yearly article III(a) delivery requirements. *See Texas*, 485 U.S. at 391. It evidently did not envision the River Master receiving what amount to legal briefs and engaging in interpretation of a judicial decree and application of legal doctrines. *See* App. 44a-203a.

If New Mexico required relief that would exceed the River Master's authority under the amended decree or

the River Master Manual, the proper step was to file a motion with this Court—such as a motion to extend the deadlines in the amended decree. By including time limits for review, and also by disallowing retroactive modifications to the River Master Manual without the agreement of both parties, *Texas*, 485 U.S. at 392-93, this Court made plain that it intended to resolve any conflicts arising from the River Master's final determinations soon after finalization of the determination at issue. New Mexico failed to follow the procedures to request relief from the River Master's final reports for water years 2014 and 2015. It was clear error for the River Master to entertain equitable doctrines to allow New Mexico to avoid the Court's specified deadlines.

2. The River Master clearly erred in applying equitable tolling to the deadlines in the amended decree and permitting New Mexico's untimely request for relief.

Apart from the River Master's lack of authority to toll this Court's deadlines, equitable tolling is not available here for two additional reasons. First, the time limit that this Court imposed on the review period is jurisdictional. Jurisdictional deadlines are not subject to equitable tolling. Second, even if equitable tolling were theoretically available, and even if the River Master had the authority to override this Court's time limits, the facts do not meet the strict requirements necessary to demonstrate a right to equitable tolling.

a. The River Master clearly erred in applying equitable tolling because the time limitations set out in this Court's amended decree are jurisdictional. Equitable tolling is available only as to non-jurisdictional statutes of limitation, *see United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1631 (2015), and only in limited circum-

stances, *see Menominee Indian Tribe of Wis. v. United States*, 136 S. Ct. 750, 755 (2016). By contrast, equitable tolling is not available for deadlines that protect not only the interests of potential defendants but also those of adjudicatory bodies. *See, e.g.*, *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) ("the taking of an appeal within the prescribed time is mandatory and jurisdictional"). This Court in *Budinich* described the "very real interests" in finality—"not merely those of the immediate parties, but, more particularly, those that pertain to the smooth functioning of our judicial system." *Id.* at 201 (quoting *Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 69 (1948)). That is why, for example, the time limit for filing of a notice of appeal "is mandatory and jurisdictional." *United States v. Robinson*, 361 U.S. 220, 224 (1960).

This Court's reasoning in *Robinson* and *Budinich* applies here, too. This Court's interest in "the smooth functioning of our judicial system," *see Budinich*, 486 U.S. at 201, forecloses the River Master's power to equitably toll this Court's deadlines. That "system-related goal[]" goes beyond "a defendant's case-specific interest in timeliness." *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-34 (2008). The 30-day deadline is thus not amenable to tolling.

Moreover, if this Court had wanted to provide exceptions to its carefully crafted time limitations, it could have done so easily. *See Bowles v. Russell*, 551 U.S. 205, 214 (2007) (recognizing Congress's ability to create exceptions to deadlines). But it did not. And the River Master may not wield a power that this Court declined to exercise. *See id.* (stating that where there is "no authority to create equitable exceptions to jurisdictional requirements," doing so is "illegitimate").

New Mexico easily could have preserved its right to request review while allowing time to seek settlement of the dispute; the proper step was to file a motion for extension. Indeed, New Mexico did just that in this very case as to later years' deadlines. *See* Joint Motion for Extension of Time for the Pecos River Master to File His Final Report for Accounting Year 2018, *Texas v. New Mexico*, No. 65, Original (U.S. June 26, 2018)). New Mexico's failure to do so for the water year 2014 and 2015 final reports does not create a right to toll this Court's deadlines.

b. Even were the Court inclined to consider equitably tolling New Mexico's deadline to seek review, it is clear that this case does not meet the stringent requirements for doing so. "[A] litigant is entitled to equitable tolling of a statute of limitations only if the litigant establishes two elements: '(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way and prevented timely filing.'" *Menominee Indian Tribe*, 136 S. Ct. at 755 (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)). A litigant fails to establish diligence if there is unjustified delay in asserting its rights. *See Pace v. DiGuglielmo*, 544 U.S. 408, 419 (2005). "[T]he second prong of the equitable tolling test is met only where the circumstances that caused a litigant's delay are both extraordinary and beyond its control." *Menominee Indian Tribe*, 136 S. Ct. at 756.

i. Despite being aware of the lack of accounting for evaporative losses to floodwater impounded in Brantley Reservoir in 2014-2015, New Mexico failed to seek formal relief from the River Master until July 2018, App. 44a-114a, and never requested that this Court review the water year 2015 final accounting. New Mexico ar-

gued that because the States were negotiating about the allocation of the floodwater evaporation losses, it was not required to formalize its objections or challenge the water years 2014 and 2015 final reports; New Mexico argues that it relied on a belief that the States would be able to resolve the disagreement. App. 50a-52a, 197a-198a. But attempting to negotiate a resolution did not prevent New Mexico from preserving its right to review, by filing a motion for extension; New Mexico's delay is unjustified. A court would not excuse the failure of a party to appeal a judgment within the time limit specified by Federal Rule of Appellate Procedure 4 based on the excuse that the party thought the case could be settled and was trying to negotiate a resolution.

ii. Even assuming *arguendo* that New Mexico's participation in negotiations with Texas could be considered diligent assertion of its rights, New Mexico cannot satisfy the remaining element, as there were no "extraordinary" circumstances preventing it from seeking timely review or merely preserving its right to do so, nor was the delay "beyond its control." *Menominee Indian Tribe*, 136 S. Ct. at 756. New Mexico argued that Texas negotiated in "bad faith" and "robb[ed] New Mexico of its opportunity to timely appeal." App. 52a. But the River Master did not agree with this unfounded accusation, App. 269a-270a, and neither should this Court.

New Mexico had already missed the deadline to appeal the water year 2014 final report by the time the parties began negotiations in February 2016. During the February 2016 meeting between the River Master and the States' technical advisors, Texas's technical advisor believed that the States had agreed that the flood

waters met the definition of "unappropriated flood waters" under the Compact, but could not agree on a mechanism for accounting. App. 139a-140a. New Mexico did not send Texas a proposal regarding the impounded floodwater until May 6, 2016. App. 140a. The River Master circulated his preliminary report on May 9, 2016, which did not include an accounting for the impounded floodwater. App. 118a. The States filed their objections on June 14, 2016, but New Mexico did not include an objection related to the lack of accounting for the impounded floodwater. App. 118a. The water year 2015 final report was docketed on June 28, 2016. Pecos River Master's Final Report for Accounting Year 2016, *supra*.

The deadline for requesting this Court's review of the water year 2015 final report would have been at the end of July 2016. *See Texas,* 485 U.S. at 393. New Mexico did not seek review or even request an extension, even though the parties did not have an agreement. Instead, New Mexico sent a draft agreed motion to amend the water years 2014 and 2015 accounting to Texas on August 22, 2016. App. 144a.

The communications between the parties between February 2016 and January 2017 show that Texas's technical advisor repeatedly expressed concerns in good faith about New Mexico's proposals and attempted to collect more information. App. 77a, 139a-145a. No reasonable interpretation of these communications would suggest that the parties had formalized any agreement, or that Texas intentionally misled New Mexico. Nor can Texas's continued good faith efforts to resolve the issue in the spirit of cooperation, even though New Mexico had forfeited its right to appeal, be construed as misleading.

By January 2017, when Texas's legal counsel made clear that it did not agree with New Mexico's proposal, App. 78a-83a, there could be no doubt that the parties were not close to reaching an agreement. Yet after the River Master sent his water year 2016 preliminary report to the States on May 8, 2017, App. 119a, which again did not include an accounting of evaporative losses from the floodwater, New Mexico again did not file objections on that basis. And New Mexico again did not seek review in this Court after the River Master filed his final report for water year 2016 on July 21, 2017. Pecos River Master's Final Report for Accounting Year 2017, *Texas v. New* Mexico, No. 65, Original (U.S. July 21, 2017).

New Mexico's choice not to preserve its rights, even though there was no agreement as to the terms of an agreed motion, was its own to make. And equitable tolling does not apply to deadlines missed by a party due to its own misunderstanding, simple neglect, or strategy choice. *Menominee Indian Tribe*, 136 S. Ct. at 757. Trust and hope that settlement discussions will bear fruit, while valuable and something that Texas fosters as well, does not "override the clear language" of deadlines. *Id.*

iii. Even the River Master did not rely on this argument in deciding to apply equitable tolling. Instead, he simply decided to overlook the deadlines in the amended decree because of his view that the overall purpose of the Compact documents was to encourage cooperation:

> The unified management philosophy of the Compact, the Pecos River Commission, and the Amended Decree is to seek agreement among the states. Preventing such agreement or fair

> resolution of issues by imposing an unnecessary time limit, absent agreement of the states, seems to the River Master to be contrary to the spirit of the quest for cooperation in managing shared water resources. As far as he can tell, there is no explicit rule in the Compact documents about curtailing negotiations or their resolution through the motion process on the basis of a time limit.
>
> Because equitable sharing and taking a cooperative approach are core purposes of the Pecos River Compact and the Amended Decree, the River Master finds no reason that New Mexico's Motion cannot be considered and resolved.

App. 269a.

That reasoning is flawed. Negotiation does not have to be curtailed if a party merely acts to preserve its right of review by requesting an extension, and there *is* an "explicit statement" in the amended decree regarding deadlines for seeking review. *Texas*, 485 U.S. at 391, 393. In appeals, for example, is it routine for parties to move to suspend briefing deadlines because the parties are negotiating a possible settlement. Given the River Master's lack of a legal background, he may not have been aware that parties are expected to act to preserve their rights under the law even while negotiating. But New Mexico, who is represented by counsel, has no similar excuse. The River Master's decision to equitably toll the amended decree's deadlines is clearly erroneous.

II. The River Master's Decision To Apportion Evaporative Losses Violates The Compact And Is Clearly Erroneous Because The Bureau Of Reclamation Was Not Storing Water For Texas's Use.

Even if the River Master's consideration of New Mexico's untimely request to apportion evaporation losses from stored flood water was not clearly erroneous, his apportionment of those losses exceeds his authority under the Compact and is clearly erroneous.

The Compact allows apportionment of evaporative losses in only two instances: (1) under article VI, when water is "unappropriated flood waters," App. 7a, or (2) under article XII, for consumptive use by the federal government when storing water "for use in" Texas, App. 8a.

The River Master determined that the floodwater did not meet the definition of "unappropriated flood waters" under the Compact, and therefore declined to apportion the losses under article VI. App. 270a. Indeed, New Mexico argued that the waters at issue did not meet that definition, App. 52a-56a, and has therefore forfeited any such basis for evaporative-loss allocation here.

But the possible remaining basis for apportionment of evaporative loss, article XII, is inapplicable. The decision to modify the water year 2015 final accounting to charge Texas for evaporative losses on water that was not stored for its use thus has no footing in authority and violates Texas's water-delivery rights under the Compact.

A. Article XII does not apply because the Bureau of Reclamation was impounding flood water only for flood control, not for use in Texas.

The Bureau of Reclamation's authority to impound water is limited. While the Bureau may use excess capacity in Brantley Reservoir to impound water for flood control, it may not impound water for use without a contract.

The Reclamation Project Authorization Act of 1972 authorized the Secretary of the Interior to construct, operate, and maintain the Brantley Project for the purposes of irrigation, flood control, and recreation, and to replace McMillan Dam, which was failing. Reclamation Project Authorization Act, § 201, 86 Stat. at 966. Pursuant to a Pecos River Compact Commission resolution and a New Mexico state-court consent decree, the Bureau may store no more than 42,000 acre-feet of water for entities in New Mexico, except when it is necessary to impound water for flood control or when storing "unappropriated flood waters" as that term is defined in the Compact. App. 161a, 171a. Water may not be stored in Brantley Reservoir without a contract. App. 68a, 139a.

In a July 2015 email to the parties, the Bureau acknowledged its limited authority to store water. App. 68a. It noted that its flood-control authority would soon expire and that, because Texas did not have a contract to store water, it would begin to release floodwater in the first week of August 2015. App. 68a-69a.

Earlier, in January 2015, the Bureau indicated that it had decided to continue to impound the floodwater until March 2015 at the request of Eddy County, New Mexico, due to concerns related to washed-out bridges.

App. 137a; *see also* App. 68a-69a. Beginning in March 2015, Red Bluff Reservoir in Texas began releasing water downstream, unused and wasted, to accommodate the expected releases from Brantley Reservoir, as Red Bluff did not otherwise have the capacity to accept the release. App. 80a, 117a, 132a. After coordinating with parties in both New Mexico and Texas, the Bureau began releasing floodwater in August 2015. App. 68a-69a. That timing confirms that the Bureau was not holding the water for Texas's use, but instead was storing the water for flood control.

B. Article XII cannot form the basis for awarding credit for evaporative losses to New Mexico.

The River Master assigned most of the evaporative losses from the floodwater pool to Texas, assigning half of the losses from September 2014 to February 2015 and all the losses from February 2015 to August 2015 to Texas. App. 276a. Despite the absence of any authority in the Compact to reduce New Mexico's delivery obligation for evaporative losses associated with flood control, the River Master apportioned losses between the States. App. 270a-273a. That was clear error.

The River Master concluded that, after March 1, 2015, the Bureau was impounding the flood water solely for the use of Texas, which was therefore subject to article XII of the Compact. App. 270a-273a. That conclusion is both legally and factually erroneous.

Article XII allows for charging against a State the consumptive use of water by the United States for a federal project in that State:

> The consumptive use of water by the United States or any of its agencies, instrumentalities or

> wards shall be charged as a use by the state in which the use is made; provided, that such consumptive use incident to the diversion, impounding, or conveyance of water in one state for the use in the other state should be charged to such latter state.

App. 8a (Compact art. XII). There were no such projects at the time of the 2014 flooding. Article XII could conceivably provide for charging to Texas evaporative losses related to water that the Bureau stores for Texas under a Warren Act contract, *see* 43 U.S.C. § 523. But Texas has no such contracts related to Brantley Reservoir. *See* App. 68a. Indeed, that was precisely why the Bureau released the water when its public-safety authority expired: it had no other legal authority to impound the water. App. 68a.

The River Master based his contrary conclusion on two January 2015 letters. App. 273a. In one, the New Mexico Pecos River Commissioner stated that he believed that public-safety concerns would have subsided by March 2015 and that he expected the floodwater would be released then. App. 63a. In the other, the Bureau stated that it expected to begin releasing water in March 2015. App. 137a. Given those communications, the River Master concluded that the only reason that the Bureau was impounding the water after March 2015 was for Texas's use. App. 270a-273a. The River Master modified the water year 2015 final accounting to charge Texas for 16,627 acre-feet of evaporative loss of the flood water between February and August 2015. App. 276a.

The River Master's decision is tantamount to a declaration that the Bureau acted illegally. The Bureau was not legally authorized to store water for Texas. The

Bureau did not have a contract with Texas to do so. The Bureau's only authority to impound the flood water was to protect public safety by flood control, under its authorizing statute, *see* Reclamation Project Authorization Act, § 201, 86 Stat. at 966; under the Pecos River Compact Resolution, App. 161a; and under the final decree in *New Mexico ex rel. Office of the State Engineer v. Lewis,* App. 171a.

The River Master failed to consider the Bureau's July 2015 email stating that its flood-control authority had continued through July, but would expire in August. App. 68a-69a. The River Master also failed to consider that Texas was actively managing Red Bluff Reservoir to accept releases of floodwater from Brantley Reservoir during this time. App. 80a, 117a, 132a. Texas would not have wasted that water if the Bureau was storing the floodwater in Brantley Reservoir for Texas's later use, which it clearly was not. The Bureau repeatedly stated that it was holding the water under its flood-control authority and would release it—whether Texas could use it or not—when that authority expired. App. 68a, 139a.

That is exactly what happened. The Bureau released the water when Texas could not use it. App. 68a-69a, 117a, 132a. Because the flood water was not being stored for Texas's use, and could not have been according to the law, article XII cannot form a basis for awarding credit for evaporative losses to New Mexico. The River Master's contrary conclusion is clearly erroneous.

CONCLUSION

The Court should grant the motion for review, set the case for oral argument, and ultimately reverse the River Master's September 10, 2018 final determination.

Respectfully submitted.

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DECEMBER 2018