No. 65, Original

In The Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO,

Defendant.

On Review of the River Master's 2018 Final Determination

STATE OF NEW MEXICO'S RESPONSE TO TEXAS'S MOTION FOR REVIEW OF RIVER MASTER'S FINAL DETERMINATION

HECTOR H. BALDERAS
New Mexico
Attorney General
TANIA MAESTAS
Deputy Attorney General
STATE OF NEW MEXICO
P.O. Drawer 1508
Santa Fe, New Mexico 87501
(505) 239-4672

JEFFREY J. WECHSLER*
Special Assistant
Attorney General
MATTHEW A. ZIDOVSKY
MONTGOMERY & ANDREWS, P.A.
325 Paseo de Peralta
Santa Fe, New Mexico 87505
(505) 986-2637
jwechsler@montand.com

DOMINIQUE M. WORK
A. NATHANIEL CHAKERES
Special Assistant
Attorneys General
NM INTERSTATE
STREAM COMMISSION
P.O. Box 25102
Santa Fe, New Mexico 87504
(505) 476-0512

**Counsel of Record*

February 15, 2019

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. This Court, through its Amended Decree, appointed the Pecos River Master to calculate New Mexico's annual delivery shortfall or overage under the Pecos River Compact. Starting in 2014, New Mexico stored unusual storm flows for Texas at Texas's request, which posed novel accounting issues. Did the River Master have discretion, with the concurrence of the states, to adopt procedures to address the novel accounting issues?

2. Given that Texas did not object to the 2015 Final Report, was New Mexico justified in relying on the procedures adopted by the River Master in that Report for resolving the accounting issues?

3. Should this Court affirm the River Master's one-time adjustment given the equities of the dispute, the spirit of the Compact, and the preference for resolving interstate disputes on their merits?

4. Did the River Master clearly err in finding that the storm flows stored at Texas's request were stored for use in Texas, and that the public safety period ended on March 1, 2015?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

STATEMENT

I. The Pecos River Compact

The Pecos River rises in the Sangre de Cristo Mountains east of Santa Fe, New Mexico and flows through the arid and semi-arid landscapes of southeastern New Mexico and west Texas before emptying into the Rio Grande. New Mexico Appendix at 1 ("NM App."). In the 1940s, representatives from Texas, New Mexico, and the United States overcame prior failures to negotiate an interstate compact apportioning the Pecos River's flows between the two states. Senate Document No. 109, 81st Cong., 1st Sess. at 4-6, 13 (1949) ("S.Doc. 109"). The states relied upon data generated by an engineering advisory committee in negotiating a compact. *Id.* at 131. Most importantly, the "1947 condition" became the cornerstone of the agreement. *See* Pecos River Compact, 63 Stat. 159 (1949) ("Compact") at Art. II(g), Art. VI(a).

The Compact provides that New Mexico will "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." Art. III(a). In addition, the Compact provides for the creation of the Pecos River Commission, composed of a commissioner from each state, and a non-voting commissioner representing the United States. Art. V(a).

In drafting the Compact, the states recognized that both the natural and man-made conditions on the river might change in the future, and incorporated

flexibility into the Compact to account for those changes. "Unappropriated flood waters" are defined as "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). The Compact apportions the beneficial consumptive use of unappropriated flood waters, Arts. III(f) & VI, and allows for the future construction of reservoirs to conserve such waters. S.Doc. 109 at xv. Finally, the Compact provides that consumptive use by the United States "incident to the diversion, impounding, or conveyance of water in one state for use in the other state shall be charged to such latter state." Art. XII.

II. Relevant Post-Compact Developments

A. Legal History and Framework for Accounting

In 1974, Texas commenced this original action, which resulted in, among other things, this Court's Amended Decree, *Texas v. New Mexico*, 485 U.S. 388 (1988) ("Amended Decree") (reprinted in the Texas Appendix ("Tex. App.") at 39a-43a). The Amended Decree appointed Dr. Neil S. Grigg, as the Court's River Master. Dr. Grigg continues to serve as River Master today. Among the River Master's duties is to annually calculate New Mexico's delivery obligation, *see id.* at 391, subject to procedures outlined in the Pecos River

Master's Manual ("Manual") (reprinted in Tex. App. 10a-38a (without appendices)). The Manual can be amended pursuant to specified procedures. *Id.* at 41a-42a. Under the Amended Decree, changes to the Manual that are agreed to by the states can be retroactive. *Id.* at 41a. If a state seeks to change the Manual through an opposed motion, however, the change becomes applicable in the water year in which the modification becomes effective. *Id*. at 42a.

The Compact calls for the calculation of New Mexico's delivery obligation using an "inflow-outflow method." Art. VI(c). First, the River Master calculates "index inflows" by calculating and adding together certain flood inflows on various stretches of the river. Tex. App. 16a. To guard against large year-to-year variations in annual flows, the Compact (and Manual) calls for the averaging of the index inflows of the three most recent years. *Id.* at 15a. This number is then entered into a regression equation to arrive at the "index outflow," which is New Mexico's "delivery obligation." *Id.* The difference between the delivery obligation and the three-year average measured outflow at the Texas state line (called the "average historical outflow" in the Manual) is New Mexico's "annual departure." *Id*. at 17a-18a. The annual departure is then subject to additional adjustments and credits to arrive at a "Final Calculated Departure" from New Mexico's delivery obligation. *Id*. at 242a.

One potential adjustment or credit listed in the Manual is for unappropriated flood waters. *Id*. at 37a. The Compact specifies that those quantities shall be

determined on the basis of three-year periods. Art. VI. However, the Manual has no procedures for how to identify and declare unappropriated flood waters, *see* Tex. App. 37a, and there has never been such a declaration.

New Mexico has taken great care to comply with the Compact and the Amended Decree. Since the entry of the Amended Decree, New Mexico has never been out of compliance. Not only has New Mexico never incurred a net water debit since 1988, but New Mexico has delivered, and Texas has received, more than 150,000 acre-feet of water above what Texas is entitled to under the Compact. *Id.* at 242a. In addition, over that same time period, the states' disputes over the annual accounting have been resolved with only minimal Court involvement. On multiple occasions, the states have mutually agreed to amendments to the Manual at the River Master's urging. *Id.* at 38a; *see also id.* at 97a, 269a; NM App. 40.

B. Man-Made Developments on the Pecos River

The two significant man-made developments on the river relevant to this dispute are Brantley Reservoir ("Brantley") and Red Bluff Reservoir ("Red Bluff"). *See* NM App. 1. Brantley was completed in 1987 and sits in Eddy County, New Mexico. *Id.* By agreement, Brantley has a storage capacity for Carlsbad Irrigation District ("CID") water that is equivalent to the 1947 condition. Tex. App. 161a. Additional capacity exists for

waters that might be declared unappropriated flood waters, or for the U.S. Bureau of Reclamation ("Reclamation") to store water for other water users who obtain a contract under the Warren Act, 43 U.S.C. § 523. Tex. App. 68a.

Red Bluff is located fifty miles downstream of Brantley in Texas. S.Doc. 109 at 5; *see also* N.M. App. 1. Its capacity under the 1947 condition was between 270,000 and 310,000 acre-feet of water. Tex. App. 282a. Its current capacity is far less – approximately 140,000 acre-feet, largely due to the fact that its spillway gates can no longer be used to hold back water.[1] *Id.* at 68a, 282a.

III. The Current Dispute

A. New Mexico Agrees to Texas's Request to Store Water in New Mexico

In September of 2014, heavy rains caused by Tropical Storm Odile produced large amounts of precipitation and storm water ("Storm Water") in the Pecos Valley in New Mexico and Texas. Red Bluff rapidly filled to capacity, and the Texas Compact Commissioner wrote to his New Mexico counterpart to "request that New Mexico store Texas' portion of the flows until

[1] *See* Texas Water Development Board, Volumetric Survey of Red Bluff Reservoir: November 2011 Survey, at 1, 10, *available at* https://www.twdb.texas.gov/hydro_survey/RedBluff/2011-11/RedBluff2011_FinalReport.pdf.

such time as they can be utilized in Red Bluff Reservoir." *Id*. at 61a.

New Mexico's Compact Commissioner responded in writing, stating that New Mexico did not object to the temporary storage of the Storm Water at Texas's request, but that New Mexico expected that the Storm Water would be released before the end of March 2015. *Id*. at 63a. New Mexico also conditioned its agreement, stating that "evaporative losses on all water above the Carlsbad Project storage limit should . . . be borne by Texas." *Id*. With New Mexico's concurrence, Reclamation proceeded to store the Storm Water in Brantley. But for Texas's request, the Storm Water would have flowed to Texas in late 2014. *Id*. at 66a. In total, Reclamation stored approximately 51,000 acre-feet in Brantley at Texas's request. NM App. 95. Because the extra impounded water exceeded New Mexico's conservation pool limits at Brantley, New Mexico could not lawfully use the water. Tex. App. 161a.

During a series of conference calls in early 2015, Reclamation indicated that it wanted to release the Storm Water that was stored for Texas. NM App. 83. Some businesses and local governments contacted Reclamation at that time expressing concerns related to the rate of release of the Storm Water in light of bridge repairs that were necessary following the storm. Tex. App. 135a, 137a. Texas informed New Mexico and Reclamation that Red Bluff was essentially still full, and requested that New Mexico and Reclamation hold water in Brantley as long as possible until the deliveries

could be stored in Red Bluff and used in Texas. NM App. 83.

Red Bluff Water Power Control District's members did not begin irrigating until June 15, 2015, and Red Bluff only released 11,361 acre-feet for irrigation in 2015, as compared to historical average releases of approximately 60,000 acre-feet of water per year. *Id.* Anticipating that the 2015 irrigation releases from Red Bluff would not be sufficient to make room for Texas's water stored in Brantley, Texas began releasing water beginning in March 2015. *Id.* at 83-84.

On July 10, 2015, Reclamation sent an email to Texas explaining that Reclamation could not lawfully continue to hold the Storm Water for Texas unless Texas entered into a Warren Act contract for water storage. Tex. App. 68a. Reclamation invited Texas to begin negotiating a Warren Act contract, but Texas never responded to the invitation. *See id.* Accordingly, Reclamation began releasing Texas's water from Brantley on August 5, 2015. *Id*. at 46a. Because Texas's water had been stored in Brantley for nearly a year, significant evaporative losses had occurred. In total, approximately 21,071 acre-feet was lost. *Id.* at 276a. Approximately 6,348 acre-feet of the water evaporated from Brantley before March 1, 2015, and an additional 13,453 acre-feet evaporated after that date. *Id.*

B. The River Master Adopts Procedures to Address the Storm Water

In April 2015, the states jointly contacted the River Master to update him on the storm event and their ongoing discussions. NM App. 38-40. At the time, the states believed that the Storm Water might be unappropriated flood waters as defined in the Compact, but because there had never been a declaration before, and no accounting procedures were in place, the states agreed that their technical representatives would evaluate the issues and develop a work plan and timeline to propose accounting procedures for the Storm Water. Tex. App. 66a-67a; NM App. 38-40. The outstanding technical issues included the methodology for allocating evaporative losses to Texas, timing of storage and release decisions, and the overall issue of accounting for the Storm Water. NM App. 39.

In May 2015, in accordance with the Amended Decree, the River Master issued his Preliminary Accounting Report for Water Year 2014. *Id.* at 2. In the Preliminary Report, the River Master memorialized the communications from the states regarding the Storm Water, and explained the agreed-upon procedure for addressing the accounting issues. *Id*. at 38-40. He wrote: "Given the short time before the due date for the River Master's Preliminary Report, we determined that I would prepare it under the assumption that once the new procedures are in place, we can implement a one-time correction for any Unappropriated Flood Water issues that affected the determination for Water Year 2014." *Id.* at 39-40. He added: "[t]his approach

provides the states with time for careful study of the issues and for the development of mutually acceptable procedures." *Id.* at 40. Texas never objected to the procedures or suggested that a subsequent one-time correction would be untimely. In his Final Determination for Water Year 2014, the River Master noted that the Storm Water issue remained "unresolved," and explained that there were two avenues available to adjust the accounting: the states could reach agreement on the action, or either state could unilaterally initiate a motion to the River Master. *Id.* at 61. The Final Determination did not include a deadline for such a motion. *Id.* Texas did not object to this procedure.

C. Texas Confirms Its Agreement to Be Charged for the Water Stored for Texas

On February 11, 2016, technical representatives from both states met together with the River Master to agree on how to account for the Storm Water. In advance of that meeting, the River Master shared notes explaining his initial thoughts about the accounting. *Id.* at 139-47.

At the February 11, 2016 meeting, the technical representatives for both states reached a conceptual agreement with the River Master on how to account for the Storm Water. Tex. App. 71a. They agreed that the Storm Water would be treated as water stored for Texas, and not unappropriated flood waters. *Id.* They further agreed that New Mexico would receive a credit for the evaporative losses. *Id.* The only significant

issues remaining were (1) where in the accounting spreadsheet to place the credit to New Mexico, and (2) finalizing the actual evaporative loss amount. *Id.* This agreement was memorialized in a set of notes from the meeting, which according to the River Master, "captured the main points well." NM App. 74. The states agreed to work together to resolve the outstanding issues and present the proposal through a joint motion. Tex. App. 67a, 71a, 205a.

D. Continued Efforts to Agree on an Accounting Methodology

On May 5, 2016, Texas sent New Mexico a proposed accounting spreadsheet giving New Mexico the full evaporation credit, and explaining that there were multiple places in the spreadsheet where the credit could go. NM App. 75-80. The next day, New Mexico sent a proposed joint motion to Texas that handled the evaporation credit in the manner suggested by Texas. Tex. App. 73a-76a. Texas did not immediately respond to the proposed joint motion.

Also in May 2016, the River Master issued his Preliminary Report for Water Year 2015 in accordance with the timeline in the Amended Decree. The Preliminary Report did not mention the Storm Water issue, which is unsurprising given that the states had just agreed to handle the issue through a joint motion. *Id.* at 67a, 71a, 205a. In its objections to the Preliminary Report, Texas included a "general" objection to the exclusion of the Storm Water, stating only that

"[o]utstanding issues exist with the accounting for WY 2014 related to the unusual flood flows during that period," and committing to "contact New Mexico to resolve any issues related to WY 2014 for presentation to the River Master." NM App. 64.

In August 2016, New Mexico contacted Texas for an update on the status of the joint motion. Tex. App. 144a. On September 7, 2016, and again on September 30, 2016, Texas informed New Mexico that it was still reviewing the proposed joint motion. *Id.* at 142a-43a.

In October 2016, the states first reported that Texas had concerns with portions of New Mexico's proposal, and that Texas hoped to provide a counter-proposal "in the next few weeks." NM App. 125. The correspondence also stated that Texas was planning to meet with New Mexico in an attempt to find agreement, and that "both states are committed to finding an equitable solution to this unprecedented situation on the Pecos River." *Id.*

E. Texas Reverses Its Position

In January 2017, Texas finally provided New Mexico with its proposal: it was a full-scale rejection of the conceptual framework that had been agreed upon the previous February. *Id.* at 81-91. For the first time, Texas stated that it "*now* believes that the equitable apportionment of water in WY 2014 and WY 2015 requires the treatment of certain flows as unappropriated flood water." Tex. App. 78a (emphasis added). Texas proposed that both evaporative losses and spills from

Red Bluff be divided evenly between the states. NM App. 84-87.

In April 2017, New Mexico rejected Texas's proposal and suggested that the states meet with the River Master. Tex. App. 89a-94a. In July 2017, the River Master wrote to the states to inquire about the status of the outstanding Storm Water issue. *See* NM App. 92. Still hoping to resolve the issue without filing opposed motions, the states responded by proposing an informal briefing process, to be followed by a meeting with the River Master. *Id.* at 93.

The parties submitted their position papers in December 2017, and their responses in January 2018. *Id.* at 94, 106, 118, 117. Both states requested retroactive accounting adjustments in their favor. *Id.* at 94, 112. The states then met with the River Master in May 2018, but were unable to resolve the issue. Thereafter, the states jointly proposed a formal briefing process. *Id.* at 157-58.

New Mexico's requested relief was an accounting credit for evaporative losses for the water stored for Texas. Tex. App. 57a-59a. New Mexico argued that, under Article XII of the Compact, it was entitled to a credit for the full amount of the evaporative losses on water stored for Texas's use. In the spirit of comity, however, New Mexico agreed to absorb 50% of the evaporative losses that occurred during the public safety period. *Id*. at 59a. Texas did not file a motion, but responded to New Mexico, arguing that New Mexico's motion was untimely and that the Storm Water

was unappropriated flood waters. *Id.* at 115a-29a. Texas did not argue at that time that the Storm Water was stored exclusively for public safety purposes. *See id.*

On September 6, 2018, the River Master ruled largely in New Mexico's favor. *Id*. at 268a-86a. He rejected Texas's argument that the motion was untimely, explaining that "the discussions about the flood and accounting for it equitably were continuous from the time the flood occurred until the present." *Id.* at 269a. He noted that Texas had never raised the issue of timeliness until May 2018, and that time limits in the Amended Decree had never been an issue in deciding previous motions. *Id.* He pointed out that "[t]he unified management philosophy of the Compact, the Pecos River Commission, and the Amended Decree is to seek agreement among the states," and that putting unnecessary time limits on the resolution of disputes would hinder their amicable resolution and be "contrary to the spirit of the quest for cooperation in managing shared water resources." *Id.* At bottom, "the states knew from the time of the flood that [a retroactive] adjustment would be required." *Id.* at 270a.

The River Master also held that the Storm Water was water stored for Texas, and not unappropriated flood waters as defined in the Compact. *Id*. He based his decision on the fact that, under the 1947 condition, Red Bluff had more than enough capacity to store the Storm Water. *Id*. The River Master concluded, "[t]he apparent reason that Texas could not store the flood water is diminished capacity in Red Bluff Reservoir. It

is not New Mexico's responsibility that Texas was unable to store these waters." *Id*. at 282a.

The River Master accepted New Mexico's concession that it would absorb half the evaporative losses during the public safety period. After reviewing the record, the River Master found that public safety concerns ended on March 1, 2015. *Id*. at 271a-73a. The River Master therefore evenly divided the evaporative losses prior to that date, giving New Mexico a net credit (after also accounting for conveyance losses) of 16,600 acre-feet. *Id*. at 276a. The River Master also amended the Manual to provide clarification for future accounting adjustments. *Id*. at 277a.

ARGUMENT

I. Standard of Review

The Amended Decree provides that River Master determinations are reviewed under a clearly erroneous standard. *Texas v. New Mexico*, 485 U.S. at 393. The clearly erroneous standard is more deferential than the normal standard of review for reports by special masters in original jurisdiction cases, which require an independent review. *See, e.g.*, *Florida v. Georgia*, ___ U.S. ___, 138 S. Ct. 2502, 2517-18 (2018); *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984). Under the clearly erroneous standard, this Court does not "reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." *Anderson v. City of Bessemer City*, 470 U.S. 564,

573 (1985). Instead, reversal is appropriate only when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948). The reviewing court "cannot substitute its interpretation of the evidence for that of the [factfinder] simply because the reviewing court might give the facts another construction [or] resolve the ambiguities differently." *Inwood Labs, Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 857-58 (1982).

Deference is appropriate with respect to all factual findings. *Anderson*, 470 U.S. at 574-75. "If the [factfinder's] account of the evidence is plausible in light of the record viewed in its entirety, the [reviewing court] may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. When there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* at 573-74.

II. The Equities Weigh Heavily in New Mexico's Favor

The Court's role in a compact enforcement action "is . . . to declare rights under the Compact and enforce its terms." *Kansas v. Nebraska*, ___ U.S. ___, 135 S. Ct. 1042, 1052 (2015). Within these bounds, the Court has the ability "to provide the remedies necessary to prevent abuse." *Id*. The Court's "remedial authority gains still greater force because the Compact, having

received Congress's blessing, counts as federal law." *Id*. at 1053. The Court's "equitable authority to grant remedies is at its apex" in a compact enforcement suit such as this. *Id.* at 1062. Put simply, as the Court considers the River Master's determination, it should "invoke equitable principles . . . to devise 'fair solutions' to the state-parties' disputes." *Id*. at 1052 (quoting *Texas v. New Mexico*, 482 U.S. 124, 134 (1987)); *see also Texas v. New Mexico*, 482 U.S. at 130-31.

In this case, the equities weigh heavily in New Mexico's favor for three reasons. *First*, the water stored in Brantley between September 19, 2014, and September 8, 2015, was stored at Texas's request and on Texas's behalf ("Water Stored for Texas"). *See* Tex. App. 286a (River Master finding that "the TX water would not have been in the reservoir at all except for TX request for storage"). Initially, the Storm Water was stored in Brantley to protect public safety. After the public safety concerns subsided, however, the Pecos River Commissioner for Texas requested that the Storm Water continue to be stored in New Mexico. As part of its request, Texas represented that it would be responsible for the "losses due to storage" in accordance with the Manual. *Id.* at 61a.

New Mexico agreed to this request as a matter of comity and cooperation, but with the condition that "Texas will assume responsibility for all evaporative losses on water stored in Brantley Reservoir above the Carlsbad Project storage limitation." *Id.* at 63a. Texas acquiesced to this condition. *Id.* at 66a, ¶¶ 8-11 (based on numerous communications, it was "generally

understood" that "Texas would assume all evaporative losses"), 205a, ¶¶ 5-7 (same). But for Texas's request, and New Mexico's conditional concurrence, the Storm Water would have been released to the Texas state line as soon as public safety would have allowed, and those flows would have contributed to New Mexico's delivery to Texas. *Id.* at 63a, 270a.

Second, for over two years after the 2014 storm event, Texas agreed that it would bear the evaporative losses for the Water Stored for Texas. During this extended storage period in Brantley, there was no disagreement that Texas would be charged with the associated evaporation. *Id.* at 66a, ¶¶ 8-11, 205a, ¶¶ 5-7. Although the states held several conference calls to discuss coordination of the water storage, Texas never raised any concerns with this arrangement. On February 11, 2016, over 17 months after the 2014 storm event, the states met with the River Master to discuss the accounting for the Storm Water. At that meeting, the states' technical representatives and the River Master decided that the water would be treated as Water Stored for Texas, and that Texas would be charged for the "[t]otal evaporation." *Id.* at 71a; *see also* NM App. 73-74 (River Master stating that the notes contained in Tex. App. 71a "captured the main points [of the February 11, 2016 meeting] well"). It was not until January 2017, some 27 months after the storm event, that Texas articulated a different position.

Third, New Mexico should not be penalized for its good faith efforts to assist Texas. The Water Stored for Texas did not benefit New Mexico under the Compact

or otherwise. Nor was it stored for the benefit of any New Mexico water user. It was water stored at the request of, and on behalf of, Texas alone. Unless New Mexico is credited for the evaporative losses associated with those waters, New Mexico will be penalized for cooperating with Texas.

III. The One-Time Credit to Account for Evaporative Losses Associated with the Water Stored for Texas Is Timely

Texas devotes the bulk of its brief to its argument that New Mexico "has forfeited any objection to the River Master's 2016 determinations about water year 2015." Tex. Br. 14. If Texas's technical procedural argument were accepted, New Mexico would be unfairly charged for the evaporation resulting from the Water Stored for Texas. As discussed below, the Court should reject Texas's request for five related reasons.

A. The River Master Established the Procedure for Deciding the Accounting Issue in 2015

Contrary to Texas's argument, New Mexico was justified in relying on the procedure established by the River Master for evaluating and resolving the novel accounting issues presented by the 2014 storm event.

1. The Court Has Inherent Authority to Manage Its Amended Decree

Texas's argument that New Mexico forfeited its right to object to the accounting for Water Years 2014 and 2015, Tex. Br. 14-15, incorrectly assumes that this Court lacks inherent authority to manage the Amended Decree.

As a general rule, "a . . . court possesses inherent powers that are 'governed . . . by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.'" *Dietz v. Bouldin*, ___ U.S. ___, 136 S. Ct. 1885, 1891 (2016) (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 630-31 (1962)). This power is at its apex in original jurisdiction cases, *Kansas v. Nebraska*, 135 S. Ct. at 1063, where the Court is not bound by normal procedural rules "but will deviate from them where the purposes of justice require it, or the ends of justice can be more conveniently attained." *Florida v. Georgia*, 58 U.S. 478, 493 (1854); *see also Kansas v. Colorado*, 556 U.S. 98, 110 (2009) (Roberts, C.J., concurring) ("it is accordingly our responsibility to determine matters related to our original jurisdiction"); *Texas v. New Mexico*, 482 U.S. at 132 n.8 (in original jurisdiction cases the Court is "not bound" by the rules applicable to district courts).

An interstate dispute is "too important in its character, and the interests concerned too great, to be decided upon . . . mere technical principles . . . ." *Rhode Island v. Massachusetts*, 39 U.S. 201, 257 (1840). For

that reason, the Court, "in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development" of the record and arguments. *United States v. Texas*, 339 U.S. 707, 715 (1950) (citing cases). It does so "in order to enable both parties to present their respective claims in their full strength." *Rhode Island*, 39 U.S. at 257; *see also Virginia v. West Virginia*, 234 U.S. 117, 121 (1914) (original actions require procedures that allow "no room for the slightest inference that the more restricted rules applicable to individuals have been applied to a great public controversy, or that anything but the largest justice, after the amplest opportunity to be heard, has in any degree entered into the disposition of the case").

In short, the Court possesses inherent authority to adopt a reasonable procedure to manage this case to allow both states "to present their respective claims in their full strength" and achieve a fair and accurate accounting. *Rhode Island*, 39 U.S. at 257.

2. The River Master Exercised His Discretion to Adopt a Procedure for Resolving the Accounting Issue

As indicated in the Amended Decree, the River Master's primary duty is to calculate New Mexico's delivery obligation. *See Texas v. New Mexico*, 485 U.S. at 391. Nonetheless, in Texas's view, the River Master lacks authority to manage the accounting process. Tex.

Br. 18-20. But the River Master's authority is grounded in, and derived directly from, this Court. New Mexico recognizes there are limits on the River Master's authority, but he is certainly empowered to take those actions that are necessary for him to fulfill his duties. *Cf. Texas v. New Mexico*, 502 U.S. 903 (1991) (granting authority for the River Master to issue subpoenas "he deems necessary or desirable" and the authority to retain "competent legal advice deemed by him to be necessary").[2] This includes the authority to adjust deadlines and adopt procedures for addressing novel accounting issues.

It is only in the "rare case" that the Court appoints a River Master. *Vermont v. New York*, 417 U.S. 270, 275 (1974). Here, this Court appointed the River Master because the "natural propensity of these two States to disagree if an allocation formula leaves room to do so cannot be ignored." *Texas v. New Mexico*, 482 U.S. at 134. Therefore, a "disinterested authority" was necessary to exercise "judgment" and "make determinations binding on the parties" to avoid "a series of original actions to determine the periodic division of the water flowing in the Pecos." *Id*. As such, the rationale for appointing the River Master in this case is directly related to the duties articulated in the Amended Decree. *See Texas v. New Mexico*, 485 U.S. at 391 (providing

[2] The 1991 order disposes of Texas's suggestion that the River Master is not authorized to address any topic that involves legal issues. Tex. Br. 18.

that the River Master must calculate New Mexico's annual delivery obligation and shortfall or overage).

Under Texas's interpretation, the River Master's function is limited to making technical calculations, and he cannot adopt procedures or deadlines. *See* Tex. Br. 19. This argument fails on multiple levels. First, as the River Master noted when he initially addressed the appropriate procedures, the Storm Water posed novel accounting issues, and there was insufficient time within existing deadlines to make accurate adjustments in the calculations to account for those novel issues. *See* NM App. 39-40. The River Master wanted to afford the states a reasonable opportunity to evaluate and discuss the accounting. Logically, the River Master, having been appointed to make a fair and accurate annual accounting, has the authority to adopt procedures to accomplish that goal.

If the opposite were true, it would be antithetical to the very purposes for which the River Master was appointed. His express role is to avoid having this Court referee an endless series of disputes. *Texas v. New Mexico*, 482 U.S. at 134. If he were powerless to adopt procedures and deadlines when new and complex accounting issues present themselves, he might issue incomplete accounting or inaccurate determinations, and the states would be forced to file motions to this Court to resolve those novel technical issues in the first instance. *See, e.g.*, *Ohio v. Wyandotte Chems. Corp.*, 401 U.S. 493, 498 (1971) ("This Court is . . . ill-equipped for the task of factfinding"). Such a process would be wasteful of the Court's and states' resources, and

would prevent the River Master from doing the work he was appointed to do: applying his judgment to perform an accurate accounting of New Mexico's annual delivery obligation, shortfall or overage under the Compact.

Similarly, an express purpose of the Compact is "to promote interstate comity. . . ." Art. I. The procedure adopted by the River Master was designed to serve this purpose, to allow the collaborative accounting discussions that "were continuous from the time the flood occurred" to reach a conclusion, and to ensure a fair and accurate calculation of the impact of the Storm Water. Tex. App. 269a. This is consistent with guidance provided by this Court under similar circumstances. *See Texas v. New Mexico*, 462 U.S. 554, 575 (1983) (advising states "that their dispute is one more likely to be wisely solved by co-operative study and by conference and mutual concession" (internal quotation omitted)); *Arizona v. California*, 373 U.S. 546, 564 (1963) (recognizing the Court's "often expressed preference that, where possible, States settle their controversies by mutual accommodation and agreement").

Texas's argument ignores this Court's rationale for appointing the River Master: "because applying the approved apportionment formula is not entirely mechanical and involves a degree of judgment, an additional enforcement mechanism [must] be supplied[.]" *Texas v. New Mexico*, 482 U.S. at 134. The "degree of judgment" afforded to the River Master must be employed when, as here, a generational storm event creates accounting issues that have never existed before.

The River Master did not exceed his authority in adopting a procedure to address the Water Stored for Texas. As early as April 2015, the River Master understood that the collaborative development of proper accounting procedures for the Storm Water was technically complex and would take time to evaluate. NM App. 39-40. He therefore decided that the accounting for the Water Stored for Texas would be entered after the proper accounting adjustment had been determined. *Id.* He also adopted a procedure for determining both the accounting mechanism and the amount of any adjustment. Specifically, the River Master provided in his 2015 Final Report that the adjustment would be determined at a later date by compromise or motions practice through two possible procedures:

> 1. The States can reach agreement on the action; or
>
> 2. Either State can initiate a motion to be considered by the River Master.

Id. at 61. Texas did not object to the River Master's procedure in 2015. *See id.* at 39-40, 61. In fact, Texas raised no objections to this procedure until the states met with the River Master on May 31, 2018. Tex. App. 269a.

Pursuant to this process, the states attempted to cooperatively resolve the accounting details until May 2018. When a settlement could not be reached, the states jointly proposed a briefing schedule to the River Master consistent with the second procedural option. NM App. 157-58. New Mexico timely filed its motion in

accordance with that schedule. Tex. App. 60a. Thus, the issue of the accounting adjustment was properly before the River Master.

3. New Mexico Was Justified in Relying on the Procedure Adopted by the River Master

New Mexico was entitled to follow the guidance of the River Master. As discussed, acting jointly, the states timely sought, and obtained, guidance from the River Master as to the procedure to make the proper accounting adjustments for the 2014 storm event. NM App. 38-40. In the spring and summer of 2015, the River Master adopted an appropriate procedure and indicated that he would entertain future motions for accounting adjustments, if necessary. *See id.* at 39-40, 61. New Mexico was justified in relying upon that procedure. *See, e.g.*, *Berkovitz v. Home Box Office, Inc.*, 89 F.3d 24, 30 (1st Cir. 1996) ("When a court charts a procedural route, lawyers and litigants are entitled to rely on it.").

Nor can Texas complain of prejudice from the procedure adopted by the River Master. Like New Mexico, Texas was on notice since 2015 about the procedures for adjusting the reports to account for the Water Stored for Texas, and it has an avenue for challenging the substantive conclusions of the River Master in this Motion. *See* NM App. 40. Rather than prejudice, the River Master's procedure "operate[d] no injustice to the opposing state, since it but afford[ed] opportunity

to guard against the possibility of error, and thus reach the result most consonant with the honor and dignity of both parties to the controversy." *Virginia*, 234 U.S. at 121.

B. The One-Time Credit Is Properly Before the Court Because this Is the Last Year of the Three-Year Accounting Period Contemplated by the Compact

Texas argues that New Mexico "forfeited any objection to the River Master's 2016 determinations about water year 2015." Tex. Br. 14-15. Since May 31, 2018, Texas has claimed that New Mexico was required to raise the one-time adjustment in 2015 or 2016 because the Final Reports for those years did not account for the Water Stored for Texas. *Id*. But Texas's argument ignores the plain language of the Compact, which contemplates adjustments within a three-year accounting period.

The Compact itself establishes the significance of the three-year period, stating that the accounting "shall be determined on the basis of three-year periods reckoned in continuing progressive series. . . ." Art. VI(b). The methodology used to determine New Mexico's delivery obligation under the Manual requires that the River Master calculate the three-year average of "annual flood inflows," which is then termed the "index inflow" and entered into a formula in order to determine the "index outflow" which is New Mexico's

"delivery obligation." *See* Tex. App. 15a & the discussion in Section II(A), *supra*.

The 2017 Water Year accounting, which is contained in the Final Report at issue here, is the last year of the three-year accounting period that includes the water associated with the Water Stored for Texas. The River Master elected to credit New Mexico by placing a one-time adjustment in Water Year 2015, but he could have achieved the equivalent result by "changing the relevant tables in the accounting and spreading the changes over three years by averaging." Tex. App. 277a. Either way, how the storm flows are accounted for in Water Year 2015 affect the cumulative credit in Water Year 2017. *See id.* at 263a-65a. New Mexico's motion was timely with respect to Water Year 2017, and Texas does not argue otherwise. Thus, contrary to Texas's argument, because the Compact identifies a three-year accounting period, New Mexico's motion, and the River Master's modification, were timely.

C. Equitable Principles Justify Granting the One-Time Credit at this Time

1. Texas Agreed to the Procedure for Resolving the Accounting Issue

To protect the integrity of relations between states, this Court has discouraged parties to interstate agreements from taking inconsistent positions according to the exigencies of the moment: "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position he may not

thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (citation omitted); *see also id.* at 751-55 (holding that New Hampshire was judicially estopped from giving a different meaning to the term "Middle of the River," which it defined in one manner in settling the initial dispute, and in another manner in a subsequent proceeding); *Yniguez v. Arizona*, 939 F.2d 727, 738 (9th Cir. 1991) (judicial estoppel, also known as "preclusion of inconsistent positions," prohibits a litigant from asserting inconsistent positions in the same litigation). Likewise, equitable estoppel is invoked in order to avoid injustice where one party has relied on its adversary's conduct to change its position to its detriment. *See, e.g.*, *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 59 (1984). The principles underlying these doctrines apply to Texas's Motion.

In April 2015, the states jointly requested a telephonic meeting with the River Master to discuss the accounting for the 2014 storm event. NM App. 39. At that telephonic meeting, the states and River Master discussed the "process going forward" to "evaluate the issues and develop a work plan and timeline to propose accounting procedures that are agreeable to both states." *Id*. To accomplish that, the states "determined" that the River Master would identify the procedure to "implement a one-time correction" to account for the Water Stored for Texas. The states and River

Master discussed that such a process would be fair because the states would have "the opportunity to object to any of the findings" once "the numbers [were] evident." *Id.* at 40. The communication reflecting that agreement was reproduced as part of the 2015 Preliminary Report, and neither state objected.

Consistent with that agreement, the River Master adopted a procedure for implementing the "one-time correction" in the Final Report for Accounting Year 2015 that is discussed above. *Id.* at 61. Texas did not challenge the procedure. Moreover, until May 31, 2018, Texas recognized the process for adopting a retroactive modification, and, in fact, actively sought its own retroactive modification. *Id.* at 39-40, 61; Tex. App. 67a, 73a-77a, 81a-83a, 142a, 204a-07a, 269a. Because Texas agreed to the procedure adopted by the River Master, and because New Mexico and the River Master relied upon Texas's position, Texas should not now be allowed to claim that New Mexico "forfeited" its ability to utilize the approved procedure to seek a fair accounting.

2. The River Master Correctly Applied the Doctrine of Equitable Tolling

Texas argues that it was clear error for the River Master to apply the doctrine of equitable tolling. Tex. Br. 17-26. A litigant is entitled to equitable tolling of a limitations period if he can establish 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 of Wis. v. United States, ___ U.S. ___, 136 S. Ct. 750, 755 (2016) (quoting *Holland v. Florida*, 560 U.S. 631, 649 (2010)). Extraordinary circumstances "include conduct by a defendant that caused the plaintiff to refrain from filing an action during the applicable period." *Robert v. Barreras*, 484 F.3d 1236, 1241 (10th Cir. 2007) (internal quotation marks and citation omitted).

As an initial matter, New Mexico does not agree with Texas's underlying premise that it missed an applicable deadline. Rather, as discussed above, it followed the clear order of the River Master, which was set out in the 2015 Final Report. NM App. 61. But even assuming, *arguendo*, that New Mexico was obligated to ignore the direction of the River Master and file an objection to an accounting that had not yet been completed by the River Master,[3] Texas's argument still fails.

The crux of Texas's argument is that the 30-day period to review a final report is jurisdictional in nature and, therefore, not subject to equitable tolling. Tex. Br. 20-22. This Court has held, however, that there is a "rebuttable presumption [that] equitable tolling should apply to suits brought against [governmental entities]," and that the presumption is only rebutted if the litigant can "show that Congress made the time bar at issue jurisdictional" thereby "depriv[ing] a court

[3] Had New Mexico filed an objection to this Court in July 2015, Texas would have responded that the objection was premature because the River Master had not yet determined the accounting for the storm event.

of all authority to hear a case." *United States v. Wong*, ___ U.S. ___, 135 S. Ct. 1625, 1631 (2015) (footnotes, internal quotation marks, and citation omitted). In addition, procedural rules, "including time bars, cabin a court's power only if Congress has 'clearly stated' as much." *Id.* at 1632 (alteration omitted) (quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 154 (2013)).

The Amended Decree is not a statute or a rule of civil procedure, and Congress has not "clearly stated" that the 30-day review periods outlined in the Amended Decree are jurisdictional. *Wong*, 135 S. Ct. at 1631-32. To the contrary, as noted by the River Master, "a possible time limit" has never been an issue "[w]hen considering previous motions [for modifications] under the Amended Decree." Tex. App. 269a.

Texas understates the reasons that New Mexico did not challenge the 2015 or 2016 final reports. As discussed at length above, the Water Stored for Texas was stored at Texas's request, Texas agreed that it would be charged with the evaporative losses, the River Master adopted a specific procedure for resolving the accounting for the Water Stored for Texas, and the states worked together up until May 31, 2018 to attempt to reach a resolution of the issue. This is the exact circumstance – where one party relies on the conduct of another – that justifies the application of equitable tolling. *See Glus v. Brooklyn E. Dist. Terminal*, 359 U.S. 231, 234-35 (1959) (equitable tolling applies where the adversary's misrepresentation caused the plaintiff to miss a deadline); *Holmberg v. Ambrecht*, 327 U.S. 392, 397 (1946) (equitable tolling applies where the plaintiff

is unaware of the defendant's fraudulent conduct); *Robert*, 484 F.3d at 1241 (circumstances justifying equitable tolling "include conduct by a defendant that caused the plaintiff to refrain from filing an action during the applicable period").

D. The River Master Did Not Enact a Retroactive Modification of the Manual

Texas argues that the modification made by the River Master was accomplished through a "retroactive" "change to the River Master Manual" in violation of Section III(C)(2) of the Amended Decree. Tex. Br. 15-16. While it is accurate that retroactive changes *to the Manual* can only be accomplished by agreement of the states, Tex. App. 41a-42a, the modification does not make retroactive changes to the Manual. In fact, the action to credit New Mexico for the Water Stored for Texas was not a change to the Manual or existing accounting procedures at all. Instead, it was a "one-time credit" to New Mexico for the evaporative losses from the Water Stored for Texas. *Id.* at 277a. The only change to the Manual was to address subsequent accounting adjustments to clarify the process for future disputes. *See* NM App. 61.

E. If Necessary, the Court Has Inherent Authority to Adjust the River Master's Determination to Accomplish a Fair Result

Finally, New Mexico maintains that the Court should deny Texas's Motion and allow the River

Master's determination to stand. If it prefers, however, the Court has inherent authority to adjust the River Master's determination to accomplish a fair result. As recognized by the River Master, "an adjustment to allocate the evaporation losses . . . can be accounted either as a one-time credit or by changing the relevant tables in the accounting and spreading the changes over three years by averaging." Tex. App. 277a. The mechanism chosen by the River Master was a "one-time credit." *Id*. This credit represents a stand-alone modification that can be inserted in any one of the three years included in the 2018 Final Report. While it is true that the location that the River Master selected for the credit was a 2015 table, *id.* at 261a, 264a, that one-time adjustment could be made in any one of the three years to the same effect. If the Court prefers, it could simply place the credit in the 2017 accounting as part of its resolution of Texas's Motion. *See Kansas v. Nebraska*, 135 S. Ct. at 1061 (one role of the Court is to "promote accuracy in apportioning waters under a compact").

IV. The Court Should Uphold the River Master's Determination

A. The Plain Language of the Compact, Amended Decree, and Manual Require that Texas Be Charged for the Water Stored for Texas in Brantley

An interstate compact is "a legal document that must be construed and applied in accordance with its terms." *Texas v. New Mexico*, 482 U.S. at 128. Article

XII of the Compact provides that "[t]he consumptive use of water by the United States or any of its agencies . . . incident to the diversion, impounding, or conveyance of water in one state for use in the other state shall be charged to such latter state." Thus, if the water was stored "for use" in Texas, Texas is charged with its consumptive use.

The Amended Decree similarly provides that New Mexico's delivery obligation, shortfall or overage is to be determined "pursuant to the methodology set forth in the Manual." Tex. App. 41a. The Manual, in turn, provides that if water is stored "in facilities constructed in New Mexico at the request of Texas" then Texas is charged for "the amount of reservoir losses attributable to its storage," i.e., for the evaporative losses. *Id.* at 37a. The River Master explained that "[t]his provision seems to govern the situation under consideration here." *Id.* at 286a.

The River Master further found that, indeed, the water at issue was water stored for Texas. *See, e.g.*, *id.* at 285a-86a. As Texas acknowledges, it necessarily follows from this finding that the evaporative loss of water incident to its impoundment in Brantley is to be charged to Texas according to the plain terms of the Compact, Amended Decree, and Manual. Tex. Br. 27.

B. The River Master's Determination Is Supported by the Record

To overcome the plain language of the Compact, Texas challenges two factual findings from the River

Master: (1) that the water was stored for Texas; and (2) that the public safety concerns had subsided by March 1, 2015. Both findings have ample support in the record, and neither is clearly erroneous.

In making its argument regarding the purpose of the water, Texas ignores its original request. Texas explicitly requested that the Storm Water be stored in New Mexico until it could be "utilized" in Texas. Tex. App. 61a. In its response to Texas's request, New Mexico made clear that "New Mexico's concurrence with temporary storage . . . was initially based on public safety (flooding) concerns," but that by January of 2015 "the basis for continued concurrence . . . evolved to being primarily a matter of comity." *Id.* at 63a. The purpose of the storage was clear at that time. New Mexico never had the legal right, Tex. Br. 28, or the intention to use the water, and would have released it but for Texas's request. Tex. App. 63a. In the words of the River Master, "the [Texas] water would not have been in the reservoir at all except for [Texas's] request for storage." *Id.* at 286a. Based on his review of the record, the River Master concluded that Texas "understood the water stored in [Brantley] to be [Texas's] water." *Id.* at 285a.

On the matter of public safety, Texas contradicts the River Master's factual findings. The River Master found that public safety concerns had abated by March 1, 2015.[4] *Id.* at 273a. This factual finding had ample

[4] Some concerns raised in early 2015 to Reclamation were shown to be manageable through controlling the rate of release. *See* Tex. App. 236a.

evidentiary support, and is not clearly erroneous. *Id.* at 270a-73a, 285a-86a. Nor does the record contain the requisite evidence of public safety concerns after March 1, 2015, to support Texas's argument.

Instead, Texas suggests that the River Master "failed to consider" a July 2015 email from Reclamation, even though the River Master cites it directly. *Id.* at 271a, n.6. Texas then mischaracterizes the email as an admission by Reclamation that its flood control authority had continued through July. Tex. Br. 31. A review of the email reveals that this is inaccurate – Reclamation explained it could not continue to store the water for Texas without a Warren Act contract, and indicated that Texas must begin contract negotiations or Reclamation would begin releasing the water in early August. Tex. App. 68a. The email does not state, or even suggest, that public safety concerns continued until July. *See id.*

More importantly, Texas is arguing for a different interpretation of the email than was adopted by the River Master. But Texas "cannot substitute its interpretation of the evidence for that of the [factfinder] simply because [it] might give the facts another construction." *Inwood Labs.*, 456 U.S. at 857-58.

Texas also argues that the River Master's finding that public safety concerns abated by March 1, 2015 is "tantamount to a declaration that [Reclamation] acted illegally" by holding the Water Stored for Texas past that time. Tex. Br. 30. But Reclamation held the water because Texas requested that it do so until such time

as Texas could utilize it in Red Bluff. Tex. App. 62a, 80a. Reclamation reacted reasonably by seeking to work with Texas, even offering to hold the water while a Warren Act contract was negotiated. *Id.* at 68a. Rather than an indication of illegal behavior, holding the water during the four-month period before the July 10th email, represents a restrained and pragmatic approach to managing the reservoir. Texas was ultimately unable to put its water to beneficial use because (1) it has not maintained the 1947 storage capacity in Red Bluff, and (2) it took no steps to enter into a Warren Act contract. As the River Master recognized "[i]t is not New Mexico's responsibility that Texas was unable to store these waters." *Id.* at 282a.

Finally, in making its record arguments, Texas suggests that the River Master "based his . . . conclusion on two January 2015 letters." Tex. Br. 30. That is incorrect. The River Master included a list of six "main documents and declarations about public safety" that he relied upon, and another list of 28 documents that he considered. Tex. App. 272a, 278a. In short, the River Master's findings should not be disturbed because they are "plausible in light of the record viewed in its entirety." *Anderson*, 470 U.S. at 574-75.

CONCLUSION

Texas's Motion should be denied.

Respectfully submitted,

HECTOR H. BALDERAS
New Mexico
Attorney General
TANIA MAESTAS
Deputy Attorney General
STATE OF NEW MEXICO
P.O. Drawer 1508
Santa Fe, New Mexico 87501
(505) 239-4672

JEFFREY J. WECHSLER*
Special Assistant
Attorney General
MATTHEW A. ZIDOVSKY
MONTGOMERY & ANDREWS, P.A.
325 Paseo de Peralta
Santa Fe, New Mexico 87505
(505) 986-2637
jwechsler@montand.com

DOMINIQUE M. WORK
A. NATHANIEL CHAKERES
Special Assistant
Attorneys General
NM INTERSTATE
STREAM COMMISSION
P.O. Box 25102
Santa Fe, New Mexico 87504
(505) 476-0512

**Counsel of Record*