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

REPLY BRIEF FOR PLAINTIFF

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

KYLE D. HAWKINS
Solicitor General
Counsel of Record

HEATHER GEBELIN HACKER
Assistant Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
kyle.hawkins@oag.texas.gov
(512) 936-1700

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes:

Miscellaneous:

REPLY BRIEF FOR PLAINTIFF

Texas's motion for review (Mot. 14-31) explains the substantive and procedural errors in the River Master's final determination. Namely, the River Master erred substantively in concluding the Pecos River Compact authorizes charging the evaporated floodwater at issue against Texas's water-delivery rights. And the River Master's final determination doing so flouts the procedures in this Court's amended decree, which sets specific deadlines for accounting and does not allow retroactive amendments without Texas's consent.

In response, New Mexico leads with an appeal to "the equities." Resp. 15-18. That plea is doubly flawed. To start, this Court has no equitable discretion to approve a variation from the Compact's terms. New Mexico does not rebut Texas's showing that the Compact does not authorize the River Master's reduction of Texas's water-delivery rights. *See infra* Part I.A.

In any event, New Mexico gets the equities wrong. New Mexico never explains how it is "penalized" by not getting delivery credit for water that evaporated while it was held in Brantley Reservoir and that no State could have used, and whose storage there by the Bureau of Reclamation did not harm New Mexico. *See infra* Part I.B.

Neither do "the equities" justify the River Master's deviation from the governing procedures in this Court's amended decree. The procedure in place at the relevant times forecloses the River Master's result and is an independent ground for reversal. *See infra* Part II.

ARGUMENT

I. The River Master Misapplied The Compact, And That Error Cannot Be Excused By The Equities, Which Favor Texas.

New Mexico invokes only one provision of the Compact—article XII—as authorizing the River Master's modification determination here. Resp. 33-34. But, as a matter of law, article XII does not apply. The River Master never found that the floodwater stored in Brantley Reservoir was being "consumptive[ly] use[d]" by the federal government incident to its storage "for use in" Texas, as article XII requires. *See infra* Part I.A.1. And the River Master also erred factually in concluding that Texas was solely at fault for the Bureau storing the floodwater. *See infra* Part I.A.2.

New Mexico cannot succeed by appealing to the equities or the Compact's "spirit." The River Master's authority derives from the Compact, which is a contract agreed to by sovereign States and approved by Congress, with the force of a federal statute. *See* 63 Stat. 159 (1949), *reproduced at* App. 1a-9a. Texas's Compact rights cannot be diminished based on a view of the equities. *See infra* Part I.B.1. Regardless, the equities favor Texas, not New Mexico. The original final accounting for water years 2014 and 2015—before the River Master's retroactive modification in 2018—arrived at a result that is both legal and fair: No State gets credits or reductions for the evaporation of water that neither could use. *See infra* Part I.B.2.

A. The Compact does not allow restricting Texas's water-delivery rights based on evaporation of the floodwater held by the Bureau.

Article III(a) of the Pecos River Compact gives Texas a water-delivery right against New Mexico, defined based on historical hydrological conditions. App. 4a. After New Mexico violated that obligation for years, the Court ordered New Mexico's ongoing compliance. *Texas v. New Mexico*, 482 U.S. 124, 127-28, 133 (1987) ("The attached decree enjoins New Mexico to comply with its Article III(a) obligation."); *accord Texas v. New Mexico*, 485 U.S. 388 (1988) (per curiam), *reproduced at* App. 39a-43a. Since applying that article III(a) obligation as defined by the Court "is not entirely mechanical," the Court accepted the Special Master's recommendation to appoint "a River Master to make the required periodic calculations" settling the article III(a) obligation. *Texas*, 482 U.S. at 134.

Because the River Master's authority derives from the Compact, New Mexico does not dispute that his water-delivery decisions must be authorized by the Compact as interpreted by the Court. Thus, New Mexico must point to some Compact provision that authorizes the River Master's decision to count against Texas the floodwater that evaporated while held by the Bureau in Brantley Reservoir. Yet New Mexico fails to do so.

New Mexico does not and cannot claim that article III(a) itself authorizes that result. As the River Master acknowledged, that "accounting considers all hydrologic issues *except* evaporation losses that occur while water is stored." App. 270a-71a (emphasis added).

Nor does New Mexico claim that article VI(d)(iii) allows charging Texas for the evaporation here. That article allows charging reservoir losses to Texas when wa-

ters defined as "unappropriated flood waters" are apportioned to Texas and stored in New Mexico. App. 7a. But the River Master determined, and New Mexico does not now disagree, that the waters at issue did not fall within that provision. App. 52a-56a, 270a; *see* Mot. 27 (noting that New Mexico has forfeited any contrary argument).

The only other Compact provision allowing an evaporation-based reduction of Texas's water-delivery rights is article XII. *See* App. 8a. And that is the only Compact provision that New Mexico cites as authorizing the River Master's evaporation-based credit here. *See* Resp. 33-34.

But article XII does not apply even on the River Master's findings, and the River Master did not purport to rely on article XII. *See infra* Part I.A.1. Moreover, the River Master's factual findings cannot stand; the floodwater at issue was not being stored for Texas's use, but rather for public safety. *See infra* Part I.B. Because no Compact provision authorizes the River Master to charge the evaporation against Texas, his decision doing so must be reversed.

1. Even on the River Master's findings, article XII does not apply.

Article XII allows for charging water against a State in limited circumstances:

> 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 use in the other state shall be charged to such latter state.*

App. 8a (emphases added). That article's final clause allows charging Texas for certain uses of water impounded in New Mexico, but only if (1) the water was put to "consumptive use" by the United States or its instrumentalities, and (2) the federal government's consumptive use was incident to the water's impoundment "for use in" Texas. App. 8a. Both requirements must be true for the final clause of article XII to apply.

The River Master, however, made neither of those findings. His modification determination does not even cite article XII. *See* App. 268a-77a. Instead, the River Master engaged in a legally irrelevant inquiry, examining each State's responsibility for the concerns animating the Bureau's decision. App. 271a.

Thus, the River Master faulted Texas for causing certain public-safety concerns, stating that the "condition of the Red Bluff Reservoir spillway, and river conveyance downstream of Red Bluff reservoir[,]" are "the responsibility of that state [i.e., Texas]." App. 271a. Likewise, the River Master reasoned that Texas could not rely on the Bureau's decision to protect a downstream bridge by impounding the floodwater, because a New Mexico bridge is not Texas's "responsibility." App. 273a. Continuing that misguided analysis of causal fault, the River Master also found it significant that Texas's concerns were not just public safety but also waste of water that Texas could not store if released while Red Bluff was at capacity. App. 272a. Based on that analysis, the River Master picked a "fair date" to shift responsibility for evaporation from a "50-50" split to a 100 percent assignment to Texas. App. 273a (picking March 1, 2015).

That line of reasoning applies a legally erroneous standard. Article XII does not turn on allocating responsibility for public-safety concerns that led to the flood-water storage. Rather, article XII as relevant here requires two findings, neither of which the River Master made. *See* App 8a. First, for any water stored in New Mexico to be charged to Texas under article XII, that water must have been put to "consumptive use" "by the United States" or one of its instrumentalities. App. 8a. Again, the River Master never made a finding of "consumptive use" of the flood water, much less of its consumptive use by the federal government. App. 270a-73a; *see* Mot. 30. On that basis alone, the Court can reject New Mexico's argument that article XII authorizes the River Master's modification determination.

Second, the River Master never found that the floodwater impounded in Brantley Reservoir was stored "for the use" of Texas. App. 271a-73a. The River Master did observe that Texas would have liked to use that water if Red Bluff Reservoir could later store it. *See* App. 273a. But Texas's unprotected desire to use water is not the same as the Bureau in fact storing that water "for the use" of Texas. App. 8a. *Cf., e.g., Davis v. United States*, 495 U.S. 472, 485 (1990) (holding that "a gift or contribution is 'for the use of' a qualified organization when it is held in a legally enforceable trust for the qualified organization or in a similar legal arrangement"). It is undisputed that Texas did not have a Warren Act contract for water storage. And, as the River Master admitted, the Bureau "indicated it would have to release the water once the public safety concerns were over unless a Warren Act Contract had been executed." App. 271a (footnote omitted). That is exactly what occurred.

Hence, the River Master did not and could not find that the Bureau was storing the impounded floodwater "for the use" of Texas. App. 8a. The Bureau was aware of Texas's desire to use the water eventually. But the Bureau was never bound to and never did protect that desire. Instead, the Bureau undisputedly released the water downstream even though Texas could not use it because Red Bluff Reservoir was still full—leading to the water being wasted. App. 68a-69a, 117a, 132a.

In sum, the River Master made none of the findings required for article XII of the Compact to apply here. And, again, that is the only Compact provision that New Mexico claims authorizes the River Master's decision to reduce Texas's rights based on the evaporation at issue. Resp. 33-34.

New Mexico also argues, as the River Master did, that the delivery credits for evaporative loss were appropriate under section C.5 of the River Master Manual. Resp. 34; App. 285a-86a. That section reads:

> Texas Water Stored in New Mexico Reservoirs
>
> If a quantity of the Texas allocation is stored in facilities constructed in New Mexico at the request of Texas, then to the extent not inconsistent with the conditions imposed pursuant to Article IV(e) of the Compact, this quantity will be reduced by the amount of reservoir losses attributable to its storage ....

App. 37a. That argument fails for two reasons.

First, the cited provision does not apply on its own terms. It expressly concerns "Texas Water" and "the Texas allocation" of water. App. 37a. But the dispute here is over the antecedent question of what water Tex-

as is entitled to in the first place—whether article XII applies to reduce Texas's article III(a) rights.

Second, more fundamentally, the River Master Manual cannot change Texas's rights under the Compact, which is a contract ratified by Congress with the force of federal law. New Mexico points to only one Compact provision as authorizing the River Master's challenged decision here. Resp. 33-34 (article XII). That provision does not apply even on the River Master's own findings, as explained above. A provision of the River Master Manual cannot create new federal law.

2. The River Master's factual conclusions are also erroneous.

The River Master's modification determination is also infected by factual error, even accepting his mistaken view of the relevant legal standard. The River Master concluded that the floodwater held by the Bureau "would not have been in the reservoir at all except for [Texas's] request for storage," App. 286a, at least past March 1, 2015, *see* App. 273a.

But the water was being held by the Bureau of Reclamation for public safety in *both* States. The Bureau stated that it held the water in Brantley both because of safety concerns in Texas *and* "because of safety concerns related to Pecos River crossings in Eddy County, New Mexico." App. 68a. That bridge crossing was "washed out in the 2014 flood" and there were "delays in getting it replaced," leading to a "temporary bridge" that "may not stand a large release from Brantley." App. 135a; *accord* App. 137a. The fact that a private party needed to use that bridge (App. 271a-72a) does not somehow negate the public-safety benefit. New Mexico does not claim that it was indifferent to the lack of safe river crossings in Eddy County.

Initially, the water was also being held to prevent further damage to the spillway at Red Bluff. App. 68a. But Red Bluff was ready in December 2014 to undertake efforts to prepare to receive water. App. 132a; *see also* App. 137a (discussing release of water in March 2015, but mentioning only Eddy County's concerns). After that, the Bureau delayed release to benefit New Mexico. App. 135a, 137a.

As late as July 2015, the Bureau stated that it was still holding the water for public safety, explaining that "[f]lood control is an authorized purpose of the Brantley Project." App. 68a. The Bureau noted that, even as of July 2015, it "would consider [the water] to [ ] be stored for the State of Texas" only "if this water *were to remain* in Brantley" going forward into August 2015. App. 68a-69a (emphasis added). Surely the Bureau, as the party that actually held the water, is best situated to say why it did so. And, as just explained, its contemporaneous statements show that the Bureau was not storing the water for Texas. App. 68a (stating "we are not authorized to store this floodwater" absent a Warren Act contract).

The River Master thus clearly erred in concluding that public-safety concerns in New Mexico vanished in March 2015 and that the Bureau would not have held the floodwater in Brantley but for Texas. That finding cannot be squared with the Bureau's release of the water when its flood-control authority expired in August 2015, notwithstanding Texas's inability to store and use the water. *See* App. 68a-69a, 117a, 132a.

B. New Mexico's appeal to equity does not excuse the River Master's unauthorized reduction of Texas's water-delivery rights.

Texas's water-delivery rights under article III(a) are qualified only by other Compact provisions. Thus, the River Master's unauthorized reduction of Texas's water-delivery rights cannot be cured by New Mexico's appeal to the equities. *See infra* Part I.B.1. Regardless, the equities here favor Texas. There is no equitable basis for New Mexico to benefit from the evaporation of the floodwater that the Bureau stored in its own reservoir, without any detriment to New Mexico, for which New Mexico received accounting credit for delivering, and that Texas never got to use. *See infra* Part I.B.2.

1. Interstate water disputes must be resolved in accordance with the governing compact.

Texas agrees with New Mexico (Resp. 15) that the Court has "inherent authority, as part of the Constitution's grant of original jurisdiction, to equitably apportion interstate streams between States." *Kansas v. Nebraska*, 135 S. Ct. 1042, 1052 (2015). But that authority is tethered to the terms of an applicable interstate Compact. The Court made that clear in the portion of the *Kansas* opinion that New Mexico fails to reproduce. *Compare id.* ("We may invoke equitable principles, *so long as consistent with the compact itself*, to devise 'fair ... solution[s] to the state-parties' disputes and provide effective relief for their violations.") (emphasis added) (quoting *Texas*, 482 U.S. at 134), *with* Resp. 16 ("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." (alteration in original) (quoting *Texas*, 482 U.S. at 134)).

The question is not what outcome an arbiter may find equitable. Because the Pecos River Compact governs here, the question is whether the River Master's modification determination complies with the Compact:

> [A]n interstate compact is not just a contract; it is a federal statute enacted by Congress. If courts were authorized to add a fairness requirement to the implementation of federal statutes, judges would be potent lawmakers indeed.

Alabama v. North Carolina, 560 U.S. 330, 351-52 (2010). As the Court explained earlier in this same original action, "courts have no power to substitute their own notions of an equitable apportionment for the apportionment chosen by Congress." *Texas v. New Mexico*, 462 U.S. 554, 568 (1983) (quotation marks omitted). So, "[i]f there is a compact, it is a law of the United States, and [the Court's] first and last order of business is interpreting the compact." *Id.* at 567-68 (citation omitted).

2. The equities favor Texas, not New Mexico.

Yet even if the equities did factor into whether the Court should enforce the Pecos River Compact as written, the equities here favor Texas, not New Mexico.

a. New Mexico argues that unless the River Master's retroactive award of water-delivery credits is upheld, New Mexico will be "penalized for cooperating with Texas." Resp. 18. But New Mexico never explains how it is "penalized" by not receiving credit for water that was not delivered, that Texas could not have used, and whose storage in Brantley Reservoir by the Bureau did not prejudice New Mexico.

New Mexico does not offer any such explanation because it cannot. The Bureau, which owns and operates Brantley, used its own capacity and legal authority to store the unanticipated floodwater for public-safety purposes. App. 68a. That capacity is in addition to the conservation pool at Brantley—that is, the capacity that the Bureau reserves exclusively to store water for New Mexico under an existing agreement. App. 61a, 169a.

The Bureau's storage of the floodwater in a reservoir not owned or operated by New Mexico did not create any burden for New Mexico, nor did it lessen the reservoir's capacity to store water for New Mexico. New Mexico does not contend otherwise. Thus, New Mexico entirely fails to articulate how the Bureau's storage of the floodwater at issue harmed or was unfair to New Mexico. *See* Resp. 17-18 (noting that the impounded water did not benefit New Mexico, but never explaining how New Mexico was allegedly harmed). By contrast, permitting the award of the evaporation credit to New Mexico would practically operate to allow New Mexico to deliver less water to Texas than it normally would in a future year, most likely a drought year, without running afoul of the Compact. Those credits could therefore harm Texas in a dry year.

b. Not only was New Mexico unharmed by the Bureau storing the water, New Mexico actually benefitted. Had the water not been held in Brantley, it would have caused further flooding in southeastern New Mexico and would likely have washed out the one remaining bridge over the Pecos River in that part of the State. *See* App. 135a; *see also* App. 68a. Aside from public-safety concerns, losing that crossing would have impaired operations at Southwest Salt, a desalinization plant and salt manufacturer in Eddy County. App. 135a.

That would harm area residents and the local economy. *See* App. 135a. And those operations also benefit New Mexico because the plant desalinizes the Pecos River. *See About Us*, Southwest Salt Company, LLC, https://www.swsalt.com/about-us/ [https://perma.cc/96UB-VMLF].

c. New Mexico asserts that but for Texas's request to store the water, it would have been released in late 2014. Resp. 6, 35. That does not demonstrate that New Mexico was harmed by the Bureau holding the floodwater in Brantley. And that assertion is also incorrect. App. 68a. If Brantley did not hold the floodwater, not only would southeastern New Mexico have suffered from further flooding, but the released water would likely have led to a catastrophic failure of the dam at Red Bluff Reservoir, endangering public safety. As it was, Red Bluff already sustained damage to the service spillway from the flood, and the dam was spilling. App. 68a, 79a-80a. Even months after the flood, Red Bluff was still at capacity, and Eddy County's bridges had not been secured. App. 68a, 80a, 117a, 132a. New Mexico ignores the reality of the situation in asserting that, if Texas had not requested the Bureau to hold the floodwater, the Bureau would have simply let it all flow downstream. Moreover, New Mexico fails to cite any evidence to show that the floodwater was being held by the Bureau *solely* at Texas's request. It admits that "[s]ome businesses and local governments" contacted the Bureau about holding the water, though it fails to acknowledge those entities—Eddy County and Southwest Salt—are in New Mexico. Resp. 6 (citing App. 135a, 137a).

New Mexico claims that its Compact Commissioner only agreed that the water should be held until March

2015 and that, after that point, the water was stored only for Texas's benefit. Resp. 6, 18. That still does not show how New Mexico was prejudiced. It also overlooks that the Bureau continued to hold the water until August 2015 to give Eddy County in New Mexico additional time to secure its river crossings, App. 68a-69a—a job delayed until June or July 2015 due to the county's inability to obtain necessary permits, App. 135a, 137a. It further overlooks that, in December 2014, Red Bluff was ready to start releasing water to make room for releases from Brantley. App. 132a.

Further, Texas cannot be equitably faulted for Red Bluff lacking the capacity to receive the unexpected, overwhelming amount of floodwater. Tropical Storm Odile led to unprecedented, historic flooding in the Pecos River Basin. App. 44a, 48a, 116a. It was the first time in Compact history that Red Bluff spilled. *See* App. 48a. Even if New Mexico is right (Resp. 5) that Red Bluff has less capacity now than it had decades ago, Red Bluff was still meeting normal water-storage needs before this unanticipated, catastrophic event.

d. New Mexico wrongly implies that Texas misled it during discussions after the 2014 flood. Resp. 17. New Mexico is aware that the technical advisors have no authority to bind the States. Under the Compact, only a Commissioner has such authority. App. 1a, 2a, 9a. Texas permitted its technical advisor to engage in discussions with New Mexico about resolving the dispute, in the interest of comity and cooperation. But even if Texas's technical advisor fully agreed with New Mexico's proposal—and she did not, *see* App. 76a, 139a-140a—everyone involved knew that such an agreement was neither binding nor final.

What is more, even Texas's Commissioner cannot agree to an arrangement that violates the Compact approved by Congress, as New Mexico's proposal did. Initially, all parties thought that the floodwater would be considered "unappropriated flood waters" under article II(i) of the Compact. App. 63a. Indeed, New Mexico's Commissioner made that assumption in the letter agreeing to hold the water, while conceding that whether the floodwater qualified as "unappropriated flood waters" would later be determined by the River Master. App. 63a. If the waters were "unappropriated flood waters," the Compact would require equal apportionment of evaporation losses due to storage based on the proportion of water belonging to each State, App. 4a (art. III(f)), and would equally divide entitlement to the water between the States, App. 4a (art. III(f)), 7a (art. VI(d)(iii)). But the parties had difficulty determining how to implement such an accounting. App. 139a-40a.

New Mexico then changed positions and proposed working around that difficulty by instead giving New Mexico a one-time delivery credit for all evaporative losses of water stored above the conservation pool in Brantley. App. 140a. But that proposal would not result in a complete accounting of the floodwater. For example, it would not account for downstream floodwaters, as Texas's technical advisor pointed out. App. 140a. More importantly, that proposed accounting was inconsistent with the Compact, which contemplated apportionment of evaporative losses due to storage in only two scenarios: under article VI(d)(iii), in the event of water determined to be "unappropriated flood waters" as defined by article II, App. 3a, 7a; or under article XII, in the event of consumptive use by the federal government incident to storing water in one State for use

in another State, App. 8a. Even if Texas's technical advisor had agreed to that proposal, that agreement would be invalid because it conflicted with the Compact, as the Texas Commissioner's legal counsel pointed out. App. 82a, 127a. And even the Texas Commissioner cannot agree to something that conflicts with the Compact. If New Mexico relied on those discussions to show an agreement, it was unjustified in doing so.

New Mexico also relies on the New Mexico Commissioner's letter as proof of its claim that it only agreed to hold the floodwater if evaporative losses were assigned to Texas. Resp. 6, 16. But, as the New Mexico Commissioner's letter shows, those statements were premised on the assumption that the River Master would later determine that the water qualified as "unappropriated flood water" under the Compact. App. 63a ("Summary[:] Presuming that the River Master will designate the water at issue as Unappropriated Flood Waters, New Mexico does not object to storage of Texas's water in Brantley Reservoir until it can be utilized."). New Mexico later reversed course on that position. App. 52a-56a. Notably, it was *Texas's position* that would have allowed for some evaporation credit for New Mexico, if accepted by the River Master. App. 78a. But New Mexico rejected that approach. App. 52a-56a. And ultimately, the River Master declined to designate the water as "unappropriated flood water." App. 270a.

In sum, New Mexico fails to explain how it was harmed by the Bureau temporarily holding the floodwaters in Brantley Reservoir. Even if this Court could disregard the Compact terms and simply dictate an equitable result, the equities here strongly favor Texas. But the Compact binds the Court and alone provides a complete basis for reversal. *See supra* Part I.A.

II. The River Master's Modification Determination Flouts The Amended Decree's Procedures.

The River Master's decision to credit New Mexico with delivering water that evaporated while stored by the Bureau in 2015 not only contravenes Texas's water-delivery rights under the Compact, it also violates the procedures in this Court's amended decree. That is an independently sufficient basis for reversing the River Master's determination.

New Mexico's response (Resp. 18-33) boils down to an assertion that this Court's deadlines in the amended decree can be suspended at will. Although the Court can amend its decrees as necessary, the River Master has no such power. He is bound by the amended decree just as the parties are. *See infra* Part II.A. Under that decree's deadlines, New Mexico's motion for relief was untimely, *see infra* Part II.B, which cannot be excused by equitable tolling, *see infra* Part II.C. And the River Master's retroactive modification of the River Master Manual also contravenes the amended decree's procedures. *See infra* Part II.D.

A. The River Master lacks authority to ignore deadlines in the amended decree.

The amended decree provides two ways for a State to challenge the River Master's allocation of delivery credits for a given water year. The first is written objection within one month of the River Master's issuance of his preliminary report. App. 41a. The second is seeking this Court's review of a final report within 30 days. App. 42a. New Mexico did neither, and it offers no compelling reason to set aside those deadlines.

1. First, New Mexico argues that the deadlines did not give the States and the River Master enough time

to figure out the flood-water issue, so the River Master was free to ignore them and use his own judgment. Resp. 20-25. But either party or the River Master himself could have sought an extension of time from this Court, as has been done before. *See* Mot. 22. That would not require this Court to "referee an endless series of disputes." Resp. 22. It would actually reduce the number of future disputes by ensuring respect for the rules. In contrast, future disputes would be guaranteed by allowing a court order to be ignored when a party bound by it finds another course to be the better "judgment." Resp. 23.

2. New Mexico next argues that the River Master invented a procedure for dealing with these issues that Texas never objected to and that New Mexico was entitled to rely on. Resp. 24-25. That claim is misleading.

The first document to which New Mexico points (Resp. 24) is an exhibit to the River Master's 2015 final determination, which addresses resolution of objections. The River Master stated: "The Amended Decree provides two avenues for the States to agree on how [pending] issues should be handled once they are clarified: 1. The States can reach agreement on the action; or 2. Either State can initiate a motion to be considered by the River Master." N.M. App. 61. As shown in the full quote, the River Master was referring to the amended decree's procedures, not purporting to invent new ones.

Furthermore, the River Master was describing the procedures for modifying the River Master Manual, not for modifying past final reports—a step not allowed by the decree. App. 41a. Of course, by mentioning the second option, the River Master may have been misreading the amended decree as allowing a retroactive modification on a single party's unconsented motion. Regard-

less, the River Master acknowledged that the amended decree's procedures constrained his actions, so there was no reason for Texas to object. *See* N.M. App. 61 ("The Amended Decree does not provide the River Master with unilateral authority to modify the Final Determination.").

New Mexico also points to a briefing schedule proposed by the parties in 2018, claiming that it ratified the second option mentioned by the River Master. Resp. 24-25. But the agreed questions to be addressed by the parties belie the notion that Texas agreed to some alternate procedure for retroactive modifications to reports. The first question listed to be briefed is whether the River Master even had authority to modify past years' reports. N.M. App. 157. There was no consent to such authority.

3. New Mexico repeatedly argues that the River Master should be permitted to apply his judgment to create procedures addressing objections to his accounting. Resp. 22-25. But New Mexico points to no authority allowing him to do so. The River Master was required to follow the amended decree just as the parties were. If compliance with a court order is deemed impracticable, the solution is to ask the issuing court to approve a different procedure. This Court confirmed as much in the amended decree. *See* App. 42a ("[I]f the Commissioners reach agreement on any matter, the parties shall advise the Court and seek an appropriate amendment to this Decree.").

Texas's ongoing negotiations with New Mexico to arrive at an agreed solution in the spirit of comity does not create authority to depart from the decree. If the States had agreed on an outcome, of course, they could have filed a joint motion to modify the decree or a joint

motion to retroactively modify the River Master Manual. But the States ultimately could not agree. New Mexico cannot tarnish Texas as acting in bad faith for respecting the governing decree procedures.

B. New Mexico's motion for relief was untimely.

New Mexico now argues that its motion for modification of the 2016 final determination was actually timely because of the Compact's provision for averaging water flows over a three-year period for certain aspects of accounting. Resp. 26-27. Specifically, article VI(b) provides that "[u]nless otherwise determined by the Commission, depletions by man's activities, state-line flows, quantities of water salvaged, and quantities of unappropriated flood waters shall be determined on the basis of three-year periods reckoned in continuing progressive series." App. 6a-7a.

But if the Court intended to allow the three-year averaging feature to affect the deadlines for seeking review of a final determination, it would have said so. Distorting the three-year averaging feature into a silent reversal of the stated deadlines makes no sense. It would effectively nullify the specific procedure set forth by the Court, allowing review of all prior years' final reports even when the stated review deadlines have long passed.

Plus, the accounting facets subject to three-year averaging basis are not even implicated by New Mexico's request for relief here. First, article VI(b)'s reference to "unappropriated flood water" does not apply here, as New Mexico and the River Master agreed that the floodwater does not fall in that category. App. 52a-56a. Second, New Mexico does not explain how the adjustment that it sought pertains to any other article VI(b) amount (i.e., depletions by man's activities, state-line

flows, or quantities of water salvaged). App. 49a. New Mexico cannot simply gesture towards a provision with no explanation and expect to win by the resulting confusion.

C. New Mexico's tardiness is not excused by equitable tolling.

As discussed in Texas's motion, the River Master had no authority to apply the doctrine of equitable tolling. Mot. 18-20. The fact that the determinations are reviewed for clear error, App. 42a, only confirms that the Court was delegating to the River Master responsibility only for technical determinations related to accounting for water delivery, as opposed to equitable judgments related to legal doctrines. But even assuming the doctrine of equitable tolling could apply under the amended decree, *contra* Mot. 20-22, New Mexico fails to meet its elements.

That doctrine requires the party invoking it to show "(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*, 136 S. Ct. 750, 755 (2016). New Mexico does not even argue that it diligently pursued its rights by choosing to disregard the decree's deadlines. Resp. 29-32. Instead, New Mexico focuses on its baseless accusation that Texas misled New Mexico or engaged in bad faith—an accusation already dispelled. *See supra* Parts I.B.2.d, II.A.2.

New Mexico also fails to explain how its own views about whether the decree's deadlines controlled were "extraordinary" and "beyond its control," *Menominee Indian Tribe*, 136 S. Ct. at 756. New Mexico is represented by sophisticated counsel; it is capable of reading and understanding the amended decree. *Cf. Lawrence*

v. Florida, 549 U.S. 327, 336-37 (2007) (declining to find extraordinary circumstances for equitable tolling based on an attorney's miscalculation). New Mexico's choice not to move for a deadline extension was either a misguided strategy or a simple mistake. Neither is an extraordinary circumstance justifying equitable tolling. *See Menominee Indian Tribe*, 136 S. Ct. at 757.

D. The River Master made a prohibited retroactive modification of the River Master Manual.

The River Master's 2018 final determination on review here explicitly amended the River Master Manual to allow retroactive modifications of prior years' final reports on an unconsented, single-party motion. App. 277a. That power of retroactive adjustment is what New Mexico explicitly asked for. App. 52a.

But that power violates this Court's governing decree. The decree allows retroactive modifications to the Manual only if *both* parties consent. App. 41a-42a. And there is no difference between the River Master making a Manual modification retroactive (which is prohibited absent mutual consent) and New Mexico's conceit that the River Master here simply modified the Manual prospectively but created a "one-time credit" for events in the past. Resp. 32. That is the same thing. Either way, New Mexico is getting a credit for evaporation in 2014 and 2015 that the then-governing Manual did not allow. That flouts the amended decree's requirement that retroactive Manual modifications require both parties' consent.

CONCLUSION

For the foregoing reasons and those stated in the motion for review, the Court should reverse the River Master's 2018 final determination.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

KYLE D. HAWKINS
Solicitor General
Counsel of Record

HEATHER GEBELIN HACKER
Assistant Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
kyle.hawkins@oag.texas.gov
(512) 936-1700

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