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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 2019 FINAL
DETERMINATION*

**UNOPPOSED CONDITIONAL MOTION FOR REVIEW
OF RIVER MASTER'S 2019 FINAL DETERMINATION**

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QUESTION PRESENTED

If the Court finds that the River Master's retroactive delivery credit to New Mexico in the 2018 final determination was erroneous, whether the Court should also grant review of the 2019 final determination and order the River Master to eliminate the disputed delivery credit in those calculations.

PARTIES TO THE PROCEEDING

The plaintiff is the State of Texas. The defendant is the State of New Mexico.

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

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JURISDICTION

The Court exercised original jurisdiction over this interstate water dispute pursuant to article III, section 2 of the Constitution and 28 United States Code section 1251. *Texas v. New Mexico*, 462 U.S. 554, 562 (1983). The Court appointed a River Master and retained jurisdiction to enter supplemental orders and review the River Master's final determinations. *Texas v. New Mexico*, 485 U.S. 388, 393-94 (1988) (per curiam). On July 8, 2019, the River Master filed his 2019 final determination. See App. 59a-78a; Docket, *Texas*, No. 65, Original (U.S. Jul. 8, 2019). A party must seek this Court's review of a final determination within 30 days. *Texas*, 485 U.S. at 393. Texas received a 30-day extension, until September 6, 2019, to file a motion for review of this determination. Docket, No. 65, Original (U.S. Jul. 31, 2019).

INTRODUCTION

Texas's opposed motion challenging the retroactive delivery credit to New Mexico for 16,600 acre-feet of water in the River Master's 2018 final determination is currently pending before the Court. If the Court grants the relief requested in that motion and reverses the disputed credit, it should order a corresponding correction to the 2019 final determination as well. Texas files this motion to ensure consistent treatment of the 2018 and 2019 final determinations. New Mexico does not oppose the conditional relief that Texas is seeking.

STATEMENT

1. The Pecos River originates in the Pecos Wilderness in New Mexico and flows southward until it joins the Rio Grande in Texas. To resolve disputes about use of the river, Texas and New Mexico entered into the Pecos River Compact. See 63 Stat. 159 (1949) (*repro-*

*duced at 2018 Mot. App. 1a-9a).*¹ This Court later entered an amended decree ordering New Mexico to comply with its Compact obligations and appointing a River Master to perform the annual calculations of New Mexico's water-delivery obligations. *Texas*, 485 U.S. 388 (*reproduced at 2018 Mot. App. 39a-43a*).

Each year, the River Master issues a report, or final determination, that summarizes these calculations and accounting for the previous calendar year (the "water year") and files it with the Court. *See Texas*, 485 U.S. at 392 (*reproduced at 2018 Mot. App. 41a*). The 2019 final determination, for instance, contains the River Master's accounting for New Mexico's water-delivery obligations for water year 2018, accounting year 2019. *See App. 59a*. A party must seek this Court's review of a final determination within 30 days. *Texas*, 485 U.S. at 393.

2. In late 2014, a tropical storm caused historic flooding in the Pecos River Basin. *See 2018 Mot. App. 44a, 116a.*² Bridges over the Pecos River in Southeast-

¹ The 2018 Motion Appendix was filed with Texas's Motion for Review of the River Master's 2018 Final Determination on December 17, 2018. An appendix with the relevant 2019 documents is filed with this Conditional Motion.

² The background facts of the dispute are briefly summarized here for the Court's convenience. A more complete statement of these facts from each State is included with Texas's Motion for Review of the 2018 Final Determination at 1-12, *Texas*, No. 65 Original (U.S. Dec. 17, 2018), and New Mexico's Response at 1-14, *Texas*, No. 65, Original (U.S. Feb. 15, 2019).

ern New Mexico were washed out, and Texas's downstream reservoir, Red Bluff, started to spill. 2018 Mot. App. 68a, 79a-80a, 135a. Brantley Reservoir, a federally owned reservoir in New Mexico upstream from Red Bluff, impounded flood water. 2018 Mot. App. 68a. Brantley is operated by the U.S. Bureau of Reclamation. *See* Reclamation Project Authorization Act of 1972, Pub. L. No. 92-514, § 201, 86 Stat. 964, 966 (Oct. 20, 1972); U.S. Dep't of the Interior, Bureau of Reclamation, *Brantley Project: Plan*, <https://www.usbr.gov/projects/index.php?id=501> [<https://perma.cc/572L-3S6P>]; U.S. Dep't of the Interior, Bureau of Reclamation, *Brantley Dam: Details*, <https://www.usbr.gov/projects/index.php?id=28> [<https://perma.cc/7H9C-8UA2>]. The Bureau released the flood water in August 2015. 2018 Mot. App. 68a-69a. The water was ultimately wasted because Red Bluff Reservoir, which was still full due to the flooding, could not hold it. 2018 Mot. App. 117a. Texas had to release the water downstream. 2018 Mot. App. 80a, 117a, 132a.

When the River Master calculated and reported New Mexico's Compact obligations for water years 2014 and 2015, he did not reduce Texas's rights to water delivery based on the evaporation of the flood water impounded in the federal reservoir in New Mexico. *See* Pecos River Master's Final Report for Accounting Year 2016, *Texas*, No. 65, Original (U.S. June 28, 2016); Pecos River Master's Final Report for Accounting Year 2015, *Texas*, No. 65, Original (U.S. July 7, 2015).

In mid-2018, New Mexico filed a motion with the River Master arguing that its delivery obligations should be reduced by the water that evaporated from the flood waters stored in 2014 and 2015. 2018 Mot. App. 44a-114a. The River Master modified the govern-

ing manual over Texas's objection to allow retroactive changes to final reports and amended the 2015 report to provide New Mexico credit for 16,600 acre-feet of water against its delivery obligations for most of the evaporative loss in 2015. 2018 Mot. App. 255a, 261a, 264a, 276-77a.

In December 2018, Texas filed a motion for review of the 2018 final determination in this Court pursuant to the Amended Decree. That motion is fully briefed before this Court. On June 3, 2019, the Court called for the views of the Solicitor General. Docket, No. 65, Original (U.S. June 3, 2018).

3. On July 8, 2019, the River Master filed his 2019 final determination. *See* App. 59a-78a; Docket, No. 65, Original (U.S. Jul. 8, 2019). Texas received a 30-day extension, until September 6, 2019, to file a motion for review of this determination. Docket, No. 65, Original (U.S. Jul. 31, 2019).

ARGUMENT

The River Master's credit of 16,600 acre-feet of water to New Mexico's delivery obligation under the Compact was factored into the calculation of Annual and Accumulated Overage or Shortfall, which is included with the 2019 final determination. *See* App. 63a, 77a. The annual overage amount for water year 2017, and therefore the accumulated overage amounts for water years 2017 and 2018, include this disputed credit. App. 77a; *see also* 2018 Mot. App. 261a, 262a, 264a.

Both New Mexico and Texas raised this issue in their objections to the River Master's 2019 preliminary report. *See* App. 31a, 37a; *see also* App. 1a-30a (2019 preliminary report). The River Master stated that "[n]o changes in the Preliminary Report are required to respond to this issue at this time." App. 63a.

Because the newest final determination includes the disputed credit in the accounting, the Court should hold this motion in abeyance while it considers Texas's motion for review of the 2018 final determination.

If the Court grants review of the 2018 final determination and reverses the River Master's evaporation credit to New Mexico, it should also grant this motion to review the 2019 final determination and order the River Master to revise the calculations of annual and accumulated overage or shortfall to exclude the disputed credit. New Mexico does not oppose this relief.

Conversely, if the Court does not grant review of the 2018 final determination or does not reverse the disputed evaporation credit, there is no need for the Court to review the 2019 final determination, and this motion should be dismissed.

CONCLUSION

If the Court grants the pending motion for review and reverses the River Master's 2018 final determination, it should also grant review of the 2019 final determination and order the River Master to correct the calculations to remove the disputed credit to New Mexico.

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Respectfully submitted.

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