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 2020 FINAL DETERMINATION

UNOPPOSED CONDITIONAL MOTION FOR REVIEW OF RIVER MASTER'S 2020 FINAL DETERMINATION

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

RYAN L. BANGERT
Deputy First Assistant Attorney General

KYLE D. HAWKINS
Solicitor General
Counsel of Record

BILL DAVIS
Deputy Solicitor General

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

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 2020 final determination and order the River Master to eliminate the disputed delivery credit in those calculations, as it did last year with respect to the 2019 final determination.

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.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

JURISDICTION

The Court exercised original jurisdiction over this interstate water dispute pursuant to article III, section 2 of the Constitution and 28 U.S.C. § 1251. *Texas v. New Mexico*, 462 U.S. 554, 562 (1983). The Court appointed a River Master and retained jurisdiction to enter supplemental orders and review the River Master's final determinations. *Texas v. New Mexico*, 485 U.S. 388, 393-94 (1988) (per curiam). On July 29, 2020, the River Master filed his 2020 final determination. *See* App. 41a-59a; Docket, *Texas v. New Mexico*, No. 65, Original (U.S. Jul. 29, 2020). A party must seek this Court's review of a final determination within 30 days. *Texas*, 485 U.S. at 393. This motion is therefore timely.

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 set for argument on October 5, 2020. But the River Master's accounting for 2019 and 2020 also includes the disputed credit. To preserve its right to have that accounting corrected if the Court determines the River Master granted it in error, Texas filed a conditional motion for review of the River Master's 2019 final determination. For the same reason, Texas now files this conditional motion for review of the 2020 final determination. Just as it granted the 2019 conditional motion, the Court should grant this motion to ensure consistent treatment of the 2018, 2019, and 2020 final determinations. New Mexico does not oppose the conditional relief that Texas seeks.

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) (*reproduced 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 and files with the Court a report (a final determination) summarizing these calculations for the previous calendar year. *See Texas*, 485 U.S. at 391-92 (*reproduced at* 2018 Mot. App. 41a-42a). The 2020 final determination, for instance, contains the River Master's accounting for New Mexico's water-delivery obligations for water year 2019, which corresponds to accounting year 2020. *See* App. 41a. 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 southeastern

---

[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 2020 documents accompanies this Conditional Motion.

[2] The background facts of the dispute are briefly summarized here for the Court's convenience. A more complete statement of the 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,

New Mexico were washed out, and Texas's downstream reservoir, Red Bluff, started to spill. 2018 Mot. App. 68a, 79a-80a, 135a. To prevent flooding in both States, the Bureau of Reclamation temporarily impounded the flood water in Brantley Reservoir, a federally owned reservoir in New Mexico upstream of Red Bluff. 2018 Mot. App. 68a; *see also* 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]. Texas was ready to accept the impounded water in March of 2015, after releasing water from the already-flooded Red Bluff Reservoir. 2018 Mot. App. 80a, 117a, 132a. This water went downstream, wasted and unused. 2018 Mot. App. 80a, 117a, 132a. The Bureau delayed releasing the flood water until August of 2015, avoiding further damage to New Mexico's bridges. 2018 Mot. App. 68a-69a, 135a, 137a, 236a.

When the River Master calculated and reported New Mexico's Compact obligations for water years 2014 and 2015, he did not change either State's water rights 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). That was proper

---

2018), and New Mexico's Response at 1-14, *Texas*, No. 65, Original (U.S. Feb. 15, 2019).

under the Compact. *See* 2018 Mot. 27-31; Resp. to Br. of United States 5-7.

In mid-2018, however, New Mexico filed a motion asking the River Master to reduce its delivery obligations to account for the flood water that evaporated while it was impounded in Brantley in 2014 and 2015. 2018 Mot. App. 44a-114a. The River Master modified the governing manual over Texas's objection to allow retroactive changes to final reports and amended his 2015 report to credit New Mexico for 16,600 acre-feet of water, corresponding to most of the evaporative loss in 2015, reducing New Mexico's delivery obligations to Texas. 2018 Mot. App. 255a, 261a, 264a, 276-77a.

3. In December 2018, Texas filed a motion for review of the 2018 final determination in this Court pursuant to the Amended Decree. Docket, *Texas*, No. 65, Original (U.S. Dec. 17, 2018). That motion was fully briefed by the parties.

4. In June 2019, the Court called for the views of the Solicitor General. Docket, *Texas*, No. 65, Original (U.S. June 3, 2019). Six months later, the Solicitor General filed a brief for the United States as amicus curiae. Docket, *Texas*, No. 65, Original (U.S. Dec. 9, 2019). Texas filed a brief in response. Docket, *Texas*, No. 65, Original (U.S. Dec. 23, 2019).

5. On July 8, 2019, the River Master filed his 2019 final determination, which included the disputed credit. Docket, *Texas*, No. 65, Original (U.S. July 8, 2019); 2019 Mot. App. 63a, 77a.[3] Thus, after receiving a 30-day

---

[3] The 2019 Motion Appendix was filed with Texas's Unopposed Conditional Motion for Review of the River Master's 2019 Final Determination on September 3, 2019.

extension, Texas filed an unopposed conditional motion for review of the 2019 final determination to preserve its right to have subsequent accounting that included the disputed credit corrected if the Court concludes that the credit was erroneously granted. Docket, *Texas*, No. 65, Original (U.S. Sept. 3, 2019). The Court granted Texas's 2019 conditional motion. Docket, *Texas*, No. 65, Original (U.S. Oct. 21, 2019).

6. On January 27, 2020, the Court set the 2018 motion for oral argument in due course. Docket, *Texas*, No. 65, Original (U.S. Jan. 27, 2020). The Court scheduled oral argument for October 5, 2020. Docket, *Texas*, No. 65, Original (U.S. July 13, 2020).

7. On July 29, 2019, the River Master filed his 2020 final determination. *See* App. 41-59a; Docket, *Texas*, No. 65, Original (U.S. July 29, 2020).

ARGUMENT

The 2020 final determination calculates an Accumulated Overage or Shortfall value that carries forward the River Master's 2018 credit to reduce New Mexico's delivery obligation by 16,600 acre-feet. *See* App. 45a, 59a. The annual overage amount for water year 2017, and therefore the accumulated overage amounts for water years 2017, 2018, and 2019, include this disputed credit. App. 59a; *see also* 2018 Mot. App. 261a, 262a, 264a; 2019 Mot. App. 63a, 77a.

Both New Mexico and Texas noted this issue in their objections to the River Master's 2020 preliminary report. *See* App. 29a, 35a; *see also* App. 1a-27a (2020 preliminary report). The River Master stated that "no changes in this Final Report are required to respond to this issue at this time." App. 59a.

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 2020 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 reverse the disputed evaporation credit, the Court need not review the 2020 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 2020 final determination and order the River Master to correct the calculations to remove the disputed credit to New Mexico.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

JEFFREY C. MATEER
First Assistant Attorney General

RYAN L. BANGERT
Deputy First Assistant Attorney General

KYLE D. HAWKINS
Solicitor General
Counsel of Record

BILL DAVIS
Deputy Solicitor General

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

AUGUST 2020