

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS,)
)
 Plaintiff,)
)
 v.) No. 65, Orig.
)
 STATE OF NEW MEXICO,)
)
 Defendant.)

Pages: 1 through 74
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P R O C E E D I N G S

(11:08 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case Number 65 on our original docket, State of Texas versus the State of New Mexico.

General Hawkins.

ORAL ARGUMENT OF KYLE D. HAWKINS

ON BEHALF OF THE PLAINTIFF

MR. HAWKINS: Thank you, Mr. Chief Justice, and may it please the Court:

The River Master's decision to award evaporative loss delivery credits to New Mexico effectively deprives the farmers and businesses of west Texas of a year's worth of irrigation and threatens incalculable economic harm should New Mexico redeem those credits during a drought year.

That result is unlawful substantively under the Pecos River Compact and procedurally under this Court's 1988 amended decree.

New Mexico and the River Master have offered only two theories justifying these delivery credits, but each violates the plain text of the compact that Congress approved.

1 New Mexico's lead argument is Article
2 XII, but, as the United States correctly points
3 out, Article XII cannot and does not justify the
4 River Master's decision. It applies only to
5 consumptive use of water by the United States,
6 and it was no use here at all. The United
7 States merely re-regulated the water for public
8 safety purposes and released it not when it
9 could be used but when the public emergency
10 expired.

11 The only other substantive provision
12 New Mexico and the River Master have pointed to
13 is C.5 of the River Master Manual. But C.5
14 applies only in two situations, and neither one
15 is presented here.

16 The first is under Article VI(d) when
17 dealing with unappropriated floodwaters. But,
18 here, the River Master determined that these
19 waters are not unappropriated floodwaters, and
20 the parties haven't challenged that. So Article
21 VI(d) doesn't apply.

22 The second is under Article XII,
23 which, as I mentioned a moment ago, is not
24 implicated here, where there's no use at all.
25 The compact sets the rules, and the manual

1 simply turns those rules into math.

2 Here, the compact prohibits charging
3 Texas for these evaporative losses that occurred
4 in New Mexico, and nothing in the manual can
5 supersede that.

6 CHIEF JUSTICE ROBERTS: Counsel,
7 before you --

8 MR. HAWKINS: The River Master --

9 CHIEF JUSTICE ROBERTS: -- before you
10 go any further, I want to clear away some
11 underbrush here. You spend an awful lot of time
12 in your brief talking about forfeiture and
13 waiver and estoppel. You haven't mentioned that
14 here. And you don't really think we would
15 decide a case of this importance between two
16 states on the basis of those doctrines, do you?

17 MR. HAWKINS: Well, Mr. Chief Justice,
18 I think there's two ways to decide this case.
19 One is on the substance, and the other is on
20 procedure.

21 And, indeed, I think there would be a
22 good reason, Mr. Chief Justice, to refuse to
23 entertain what the River Master did here on
24 procedural grounds. This Court's 1988 amended
25 decree specified specific time periods and

1 deadlines for a reason. It's partly to manage
2 this Court's own docket, but it's also, I think,
3 an acknowledgment that the farmers and
4 businesses in west Texas rely on predictability
5 and some level of certainty.

6 They -- this water is central to their
7 livelihoods, and to be in a position where we're
8 arguing about e-mails and waiver that happened
9 six years ago, I think is a disservice to the
10 real-world impact that this has, which I think
11 is what the Court was acknowledging in 1988.

12 CHIEF JUSTICE ROBERTS: You say that
13 the water at issue here can't be considered
14 stored in the Brantley Reservoir for Texas,
15 right?

16 MR. HAWKINS: That's correct,
17 Mr. Chief Justice.

18 CHIEF JUSTICE ROBERTS: But -- but
19 Commissioner Tate, on page 61a of your appendix,
20 specifically asked that New Mexico store Texas's
21 portion of the flows until such time as they can
22 be utilized by Texas. And the -- the e-mail
23 was, in fact, titled Texas Request For Storage.

24 What do you do with that?

25 MR. HAWKINS: Mr. Chief Justice, that

1 e-mail is talking about storing Texas's portion
2 of unappropriated floodwaters, and you don't
3 have to take my word for it. New Mexico's
4 response, Your Honor, at 63a, confirms that New
5 Mexico understood this to be a communication
6 about unappropriated floodwaters.

7 New Mexico is not in charge of
8 Brantley, and, indeed, for two months before
9 that e-mail at 61a, the Bureau had already been
10 re-regulating the water, as page 66a confirms.

11 That e-mail is simply reflecting a
12 mutual mistake between the parties that these
13 were unappropriated floodwaters. And I think
14 it's crucial to note that, Mr. Chief Justice, if
15 that e-mail at 61a had never been sent, nothing
16 would have been different.

17 CHIEF JUSTICE ROBERTS: Well, you draw
18 a sharp distinction between holding the water
19 for storage and holding it for flood control.
20 Can't they be doing both?

21 MR. HAWKINS: Well, two things, Your
22 Honor. Number one, they say that they weren't
23 doing both. The United States says they were
24 only re-regulating the water for flood control.

25 And I think the reason they say they

1 weren't storing the water for use is twofold.
2 Number one, to do that, they would need a Warren
3 Act contract with Texas, and there is no such
4 contract. And, number two, I think the fact
5 that the United States released this water in
6 August of 2015, when the public emergency
7 expired and without any regard at all to whether
8 any state could use the water, confirms that it
9 was not being stored for future beneficial use.

10 CHIEF JUSTICE ROBERTS: Well, whose
11 fault is it that there was no Warren Act
12 contract?

13 MR. HAWKINS: Mr. Chief Justice, I
14 don't think it's a -- a matter of fault. Texas
15 and the Bureau have -- have chosen not to enter
16 into one. And, of course, entering into a
17 Warren Act contract is -- is not as simple as --
18 as buying a new car. It takes months or years,
19 because those contracts are subject to NEPA and
20 environmental reviews.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Justice Thomas?

24 JUSTICE THOMAS: Thank you, Mr. Chief
25 Justice.

1 General, the -- I'm a little bit
2 confused by your argument because, on page 270
3 of the appendix to the motion for review, it
4 seems as though the River Master is deciding
5 that, well, Texas was unable to take the amount
6 of water that it would have been able to take
7 under the 1947 conditions, and, as a result of
8 that, the water has to be held. And so it
9 basically said: Well, we will say that this is
10 Texas's water.

11 I don't understand you to agree with
12 that. Could you tell me exactly why this
13 assessment by the River Master is wrong?

14 MR. HAWKINS: Sure, Justice Thomas. I
15 think it all starts with the compact, which has
16 the status of federal law.

17 The compact at Article VI(c) says that
18 the inflow/outflow method should be used to
19 determine New Mexico's delivery obligation.

20 Now that just means that New Mexico
21 gets credit for water that crosses the state
22 line and doesn't get credit for water that does
23 not cross the state line.

24 Now, here, we're talking about water
25 that didn't cross the state line. It evaporated

1 in New Mexico. And so the question is, what in
2 the compact allowed the River Master to deviate
3 from the inflow/outflow rule in VI(c)?

4 And New Mexico and the United States
5 and the River Master have not pointed to any
6 exception in the compact that allows deviating
7 from this rule.

8 And, indeed, at page 270a of the
9 record, as Your Honor just pointed out, the New
10 Mexico -- the River Master effectively admits
11 that. This is towards the bottom of the page.

12 He admits that if these waters are not
13 unappropriated floodwaters, then we're just
14 going to use the regular inflow/outflow method.
15 And that gives away the game because the
16 inflow/outflow method does not allow the credit
17 for these evaporative losses.

18 But the River Master --

19 JUSTICE THOMAS: Well, actually, I
20 understand your argument there. But his point
21 is that the reason that that couldn't happen is
22 because you couldn't take your -- that the --
23 that the Red Bluff Reservoir was in disrepair
24 and could not accept the volumes that were --
25 that it could have accepted in 1947.

1 MR. HAWKINS: Justice Thomas, that --
2 that's not correct, because Texas began
3 releasing water from the Red Bluff Reservoir in
4 March of 2015 to make room for these anticipated
5 inflows from the Brantley Reservoir.

6 In February of 2015, the United States
7 -- or, rather, in January -- and this is at page
8 137a, the river -- or the United States
9 indicated that it was going to begin releasing
10 waters.

11 In response to that, Texas started
12 clearing out room in the Red Bluff Reservoir,
13 but New Mexico objected to the release of the
14 water at that time because of the ongoing
15 disaster in Eddy County in southeastern New
16 Mexico. That's why the Bureau held off until
17 August. And we see that confirmed at pages 236,
18 137, and 68 of the Texas appendix.

19 JUSTICE THOMAS: So your submission is
20 you could have taken the water and it did not
21 cross state lines. It seems they're suggesting
22 you couldn't take it, so that's why they held it
23 for you.

24 MR. HAWKINS: Justice Thomas, we began
25 releasing 30,000 acre feet of water from the Red

1 Bluff Reservoir in March of 2015. And yet the
2 water did not come in from Brantley because the
3 United States was still impounding it because of
4 the disaster in New Mexico. And that's what --

5 JUSTICE THOMAS: But you're saying you
6 could -- you could have taken it?

7 MR. HAWKINS: Yes, Justice Thomas. If
8 the Bureau had began releasing water in March of
9 2015, we had cleared out room in the Red Bluff
10 Reservoir to accept that water.

11 JUSTICE THOMAS: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Breyer?

14 JUSTICE BREYER: Well, I start where
15 Justice Thomas left off. You know, this is very
16 technical stuff here, but, as I understood it,
17 and correct me if I'm wrong, there's some water
18 that belongs to Texas. It hasn't got to Texas
19 yet. And for whatever reason, I thought
20 probably because Texas asked, New Mexico stores
21 it in a reservoir, and then some of that
22 evaporates.

23 So the question is, is Texas given a
24 debit for the amount that had belonged to Texas,
25 the evaporated water, which you can't get

1 because it's in the sky. And the River Master
2 says yes.

3 That seems to make sense. That's why
4 we appoint River Masters, to figure those things
5 out.

6 You say: Oh, no, nothing in the
7 contract allows -- nothing in the -- you know,
8 the basic document here, the agreement, the
9 compact, nothing allows that. Well, the SG
10 says: Go read how they did it. They did it
11 according to the report of the Engineering
12 Advisory Committee, and that's how they decided
13 that evaporation question. That seems right.

14 And then he pointed to VI(c), which
15 says, unless there's a more feasible method, you
16 ought to use the report of the Engineering
17 Advisory Committee. And that's what the --
18 that's what he used.

19 So I understood this very simply. The
20 water's gone. It evaporated. They go to the
21 Advisory Committee's report. They use that and
22 say the evaporated water is Texas's. And they
23 look at, say, VI(c) and say, well, the River
24 Master has the authority to do that, that's the
25 kind of thing we appoint him for, as well as

1 figuring out what all this means.

2 So what's your response?

3 MR. HAWKINS: So, Justice Breyer, I
4 agree with Your Honor that this is
5 straightforward, but I disagree with your
6 conclusion.

7 The starting point is that if the
8 water doesn't get to Texas, then New Mexico
9 doesn't get credited for it, unless there's some
10 exception that specifically provides for it.

11 So the question then is, what
12 exception would be implicated here? Well, we're
13 talking about reservoir losses, water that
14 evaporated.

15 There are only three parts in the
16 compact that speak to reservoir losses. One is
17 VI(d)(3). That can't be implicated here,
18 though, because these are not unappropriated
19 floodwaters, which is all that VI(d)(3) is
20 talking about.

21 The second is Article XII. And that's
22 not implicated here for the reasons that the
23 United States has correctly set out.

24 The other is Section 5(d)(10), which
25 only says that when you're dealing with

1 reservoir losses, look to Article VI to figure
2 out what to do with them.

3 So we're missing something in the
4 compact allowing this deviation from the
5 standard inflow/outflow method. And the core
6 mistake that the United States makes -- the
7 United States gets many things right. They're
8 correct about Article XII. They're correct that
9 everything in the manual has to be tied back to
10 the compact.

11 But they're tying C.5 to the wrong
12 thing. C.5 only applies in the situations that
13 I've set out, and those situations aren't
14 implicated here, so we can never get to C.5 in
15 the first place.

16 JUSTICE BREYER: Thank you. Thank
17 you.

18 CHIEF JUSTICE ROBERTS: Justice Alito.

19 JUSTICE ALITO: Counsel, could you
20 begin by explaining very briefly what as a
21 practical matter is at stake here. What would
22 happen if you win as opposed to what would
23 happen if you lose?

24 MR. HAWKINS: Well, a couple of
25 things, Justice Alito.

1 Number one, if -- if we were to win,
2 we would, of course, wipe away the delivery
3 credit that New Mexico has been awarded, and
4 that's an extraordinary amount of water. It's a
5 year's worth of irrigation that New Mexico would
6 otherwise be entitled to sit on as a credit and
7 cash in potentially during a drought year.

8 But I think the broader implication,
9 Justice Alito, is that I think to rule for Texas
10 here would underscore what this Court said in
11 1983 that only the compact controls.

12 And it doesn't matter --

13 JUSTICE ALITO: Well, actually, my --
14 my question went to the -- to the practical
15 effect as to water. So your -- your answer is
16 that for some period of time New Mexico would --
17 at some point in the future, New Mexico would be
18 entitled to refuse to deliver water that you
19 would otherwise be entitled to and -- and have a
20 need for? Is that right?

21 MR. HAWKINS: Yes, Justice Alito.

22 JUSTICE ALITO: Okay. I find this a
23 very difficult case because it seems to me that
24 everybody, both Texas and New Mexico, and the
25 River Master, proceeded in a very informal

1 manner. Statements and requests were made by a
2 variety of officials and employees on behalf of
3 the states. But, to begin, it wasn't clear to
4 me, who is entitled on both sides to make
5 commitments that are binding on the two states?

6 MR. HAWKINS: Only the state
7 commissioners, Justice Alito.

8 JUSTICE ALITO: Only the state
9 commissioners?

10 MR. HAWKINS: Correct, Your Honor.

11 JUSTICE ALITO: Okay. As to Article
12 XII, is it your position this is not
13 unappropriated floodwater?

14 MR. HAWKINS: The River Master -- yes,
15 Justice, the River Master determined that this
16 is not unappropriated floodwater. And nobody
17 has challenged that determination.

18 Now, if the River Master had
19 determined that it was unappropriated
20 floodwater, then we'd still -- we'd still win
21 because unappropriated floodwaters must be
22 apportioned 50/50 between the states, which, of
23 course, the River Master didn't do here.

24 JUSTICE ALITO: So do you agree with
25 the River Master that, if this water had been

1 released instead of being stored or impounded or
2 whatever -- re-regulated or whatever was done to
3 it, you could have stored the water had you not
4 allowed the storage capacity of your reservoir
5 to be deleted below what existed under the 1947
6 condition?

7 MR. HAWKINS: Well, no, Justice Alito,
8 we -- we don't agree with that conclusion. We
9 were preparing room in the Red Bluff Reservoir
10 to accept this water. But, at the end of the
11 day, Justice Alito, the River Master's findings
12 on that don't actually matter.

13 Your Honor mentioned that this is a
14 difficult, complicated case with a long record.
15 I can try to make it easy for Your Honor just by
16 pointing out that the River Master has awarded a
17 delivery credit that the compact doesn't allow
18 for.

19 And if the Court reaches that
20 conclusion -- and to reach that conclusion, the
21 Court only has to look at the compact and the
22 manual -- everything else drops away. All of
23 these communications, all of these e-mails,
24 these arguments about waiver and forfeiture,
25 they all go by the wayside if this Court holds

1 that, as a substantive matter, the compact does
2 not allow for what the River Master did.

3 JUSTICE ALITO: Thank you.

4 CHIEF JUSTICE ROBERTS: Justice
5 Sotomayor?

6 JUSTICE SOTOMAYOR: Counsel, is there
7 an e-mail of any kind or something in writing
8 where Texas at any point is rescinding
9 Commissioner -- or -- or the Tate --
10 Commissioner Tate's e-mail saying store the
11 water for us? Is there any -- anything in
12 writing by Texas saying release it and release
13 it faster than you are?

14 MR. HAWKINS: Well, Your Honor, that
15 e-mail doesn't exist because New Mexico doesn't
16 control Brantley. The Bureau controls Brantley.
17 And so presenting a request like that to Mex --
18 to New Mexico would like -- would be like me
19 asking Mr. Wechsler if I can borrow
20 Ms. Hansford's car. That --

21 JUSTICE SOTOMAYOR: Counsel, that's
22 the whole point, which is: So why did Mr. --
23 Commissioner Tate send that e-mail to Texas
24 asking him to hold the water? Clearly, it seems
25 to me that the assumption of holding the water

1 was that the Bureau would act on behalf of
2 Texas.

3 MR. HAWKINS: And the Bureau confirmed
4 at 236 and 137 and 68 that it was concerned
5 about flooding in New Mexico, and that's why it
6 was re-regulating the water. And, indeed, New
7 Mexico acknowledges that there were flooding
8 concerns in Eddy County, and that was the source
9 of the Bureau's action. This e-mail that Your
10 Honor refers to at 61a is simply a discussion
11 between the parties about how to account for
12 unappropriated floodwaters.

13 But two years later, when the River
14 Master determines that these are not
15 unappropriated floodwaters, all of these e-mails
16 drop away and become irrelevant.

17 JUSTICE SOTOMAYOR: The -- but is
18 there anywhere that you've told the Bureau,
19 release it faster?

20 MR. HAWKINS: Well, Your Honor, in --

21 JUSTICE SOTOMAYOR: You're saying you
22 should have said it to New Mexico, but why
23 didn't you say it to the government?

24 MR. HAWKINS: Well, Your Honor, we
25 were in regular communications with the federal

1 government, and we see some of these
2 communications in the record reflected in -- in
3 the government's e-mails, like the one at 68a
4 and 236, that reflects the concern is in New
5 Mexico, not in Texas.

6 JUSTICE SOTOMAYOR: Assuming we were
7 interested in the Article XII issue, is there
8 anything in the compact or in any of the
9 amendments to it that would preclude the Court
10 from relying on Article XII when the River
11 Master didn't?

12 MR. HAWKINS: Well, the Court, of
13 course, can apply federal law, Your Honor, which
14 is -- which is what this compact is. The reason
15 not to rely on Article XII is because, by its
16 plain terms, it doesn't apply. There's no
17 consumptive use of water by the United States.

18 And later on in Article XII, it speaks
19 to water in one state for use in the other
20 state. That can't be a hook to bring that
21 provision into this case because the water at
22 issue was not stored for use in Texas. It was
23 re-regulated for flood control.

24 And the best evidence of that, Justice
25 Sotomayor, is that the federal government didn't

1 care whether the water could be used when it
2 released the water from Brantley beginning in
3 August of 2015. It released it without regard
4 to use. And that only confirms what they were
5 saying, that they were re-regulating it not for
6 use but for flood control.

7 JUSTICE SOTOMAYOR: Thank you,
8 counsel.

9 CHIEF JUSTICE ROBERTS: Justice Kagan?

10 JUSTICE KAGAN: General Hawkins, if I
11 could take you back to the procedural aspects of
12 this case, your brief makes it sound as though
13 New Mexico blind-sided you with its motion to
14 account for the evaporation losses.

15 But the way I read the record, really,
16 everyone agreed that the issue would be
17 postponed while the parties negotiated. And
18 then, throughout negotiations, everyone agreed
19 that the River Master was, in the end, going to
20 make a one-time adjustment. So everybody agreed
21 with this process.

22 And then, you know, if you look at the
23 record that way, it's you lost, and all of a
24 sudden you think the process isn't any good
25 because you came out on the short side of the

1 process.

2 But, you know, isn't this a process
3 that you agreed to and went forward with for
4 years?

5 MR. HAWKINS: No, Justice Kagan, I
6 think that the record tells a very different
7 story. We know that the federal government
8 began re-regulating this water as it was falling
9 in September of 2014. From that moment on, the
10 parties start talking about this unprecedented
11 event as though it's unappropriated floodwaters.

12 And for two years, the communications
13 going back and forth are about how to account
14 for unappropriated floodwater. And that's
15 confirmed at 97a of the Texas appendix and New
16 Mexico appendix page 139. We see that that's
17 what the parties have in mind.

18 It is Texas who was blind-sided two
19 years after the rain by New Mexico changing its
20 position, indeed, reversing its position, and
21 saying, well, no, wait, these are not
22 unappropriated floodwaters, we actually think
23 that they should be not split 50/50, as
24 unappropriated floodwaters would be, but,
25 rather, we think they should be charged entirely

1 to Texas.

2 And that's when they made their
3 unilateral motion, at page 44a of our appendix,
4 and that's when we formally objected, saying
5 that the compact and the decree does not allow
6 for this.

7 JUSTICE KAGAN: And when you say that
8 all the e-mails are irrelevant to the
9 determination of the substantive question, I
10 take it that that's because you're saying that
11 the e-mails are only about unappropriated
12 floodwater, is that -- is that correct? So it's
13 the same kind of argument?

14 MR. HAWKINS: Yeah, I think that's
15 basically right, Justice Kagan. Really, the
16 substantive argument doesn't depend on e-mails
17 because the substantive argument depends only on
18 the text of the compact and the manual. And
19 without looking to anything else, we can tell
20 from those documents that what the River Master
21 did is forbidden.

22 JUSTICE KAGAN: Well, the text of the
23 manual is the text of C.5 at least in part,
24 right? So the question is, why isn't -- why
25 wasn't the River Master right -- and, again,

1 this is under a clear error standard under
2 C.5 -- given the text of those e-mails?

3 MR. HAWKINS: Sure. So, Justice
4 Kagan, I think 15a of the Texas appendix helps
5 answer the question. That's Chapter A of the
6 River Master Manual. And we see at A-1 of the
7 River Master Manual an instruction to use the
8 inflow/outflow method, which is tied back to
9 Article VI(c). And there's a lengthy equation
10 for how to do that.

11 Then, at A-2 in the manual, the manual
12 acknowledges that "there are" -- and this is a
13 quote -- "there are factors which, under terms
14 of the Pecos River Compact, might at times
15 increase or decrease that obligation."

16 So we start with inflow/outflow, and
17 then we look whether there's an exception. And
18 under 2(a) through (f) are the six enumerated
19 exceptions that can all be traced back to the
20 compact itself.

21 And so the -- in order to invoke C.5,
22 Your Honor, it has to be traced back to an
23 enumerated exception in the compact itself. And
24 that's what's missing here.

25 The only provisions in the compact

1 that speak to reservoir losses like this are in
2 VI(d)(3) and Article XII, and neither one of
3 those is applicable here. And that means that
4 we're missing an exception, we're missing a
5 departure, and so we have to revert to the core
6 rule of this compact, which is inflow/outflow.

7 JUSTICE KAGAN: Thank you, counsel.

8 CHIEF JUSTICE ROBERTS: Justice
9 Gorsuch.

10 JUSTICE GORSUCH: Counsel, let me pick
11 up where Justice Kagan left off, first off --
12 first of all.

13 You -- you indicate that in order to
14 trigger C.5 of the manual, which speaks about
15 the allocation of evaporative losses, we need,
16 first, to have something in Article VI or
17 Article XII that might allow that application of
18 the manual.

19 But why can't Article III, which
20 indicates who gets what based on 1947 levels --
21 why couldn't the master have reasonably thought
22 that the manual applies in those circumstances
23 too?

24 MR. HAWKINS: Because, Justice
25 Gorsuch, Article III doesn't say anything about

1 what happened here. Here, we've got water
2 that --

3 JUSTICE GORSUCH: Counsel --

4 MR. HAWKINS: -- went --

5 JUSTICE GORSUCH: -- what it does --
6 what it does say is that Texas gets what it had
7 in 1947. And one way to calculate that might be
8 using the manual and -- and its particular more
9 specific direction with respect to evaporative
10 losses.

11 MR. HAWKINS: So Article III, Justice
12 Gorsuch, doesn't speak to evaporative losses.
13 The core rule --

14 JUSTICE GORSUCH: I understand that --
15 I understand that, counsel, but I'm really --
16 I'd be grateful if you kind of got at my
17 question rather than going back to VI or XII.
18 Why couldn't the master have thought that, in
19 calculating what Texas had in 1947, evaporative
20 losses needed to be considered and the manual
21 was a reasonable way to do it?

22 MR. HAWKINS: Well, Justice Gorsuch,
23 the inflow/outflow method has always been the
24 way of calculating the 1947 condition. That's
25 what this Court said in the 1983 decision in

1 this case. This Court said that we cannot come
2 up with new methods --

3 JUSTICE GORSUCH: All right, counsel.

4 MR. HAWKINS: -- beyond in --

5 JUSTICE GORSUCH: Counsel, I got it.

6 Separate question: On the
7 back-and-forth questions about procedure here,
8 you suggest that even if -- that -- that we
9 shouldn't consider New Mexico's arguments
10 because it was just too late and the Master
11 acted after the deadline.

12 But it's not clear to me why, even if
13 you're correct about all that, any of that is
14 jurisdictional. Can you address that question?

15 MR. HAWKINS: Sure, Justice Gorsuch.

16 We think that this Court's amended
17 decree is analogous to something like FRAP 4,
18 which imposes a jurisdictional notice of appeal
19 deadline. We think that this is similar.

20 We've got a federal statute called the
21 Pecos River Compact, and this Court is
22 interpreting it in the amended decree and
23 interpreting it to include certain deadlines for
24 the administration of the compact. And so we
25 think it's fair to say it's jurisdictional.

1 But the Court doesn't have to hold
2 that to rule in my favor. Even if this is not
3 jurisdictional, New Mexico is not entitled to
4 equitable tolling because they haven't provided
5 a reason why they would be entitled to equitable
6 tolling.

7 JUSTICE GORSUCH: Thank you, counsel.

8 CHIEF JUSTICE ROBERTS: Justice
9 Kavanaugh?

10 JUSTICE KAVANAUGH: Thank you, Chief
11 Justice.

12 And good morning, General Hawkins.

13 The -- it's been argued that the
14 appropriate standard of review of the River
15 Master is clear error, a deferential standard.
16 Can you respond to that?

17 MR. HAWKINS: We agree, Justice
18 Kavanaugh, that that's the standard. That's
19 what this Court said in the amended decree. And
20 we easily satisfy that here because the River
21 Master has violated federal law. And it is
22 always clear error to violate the law.

23 JUSTICE KAVANAUGH: Okay. On the
24 federal law point, I think your primary
25 submission seems to be that it's not rooted in

1 the compact, what happened here.

2 But I just want you to respond to the
3 -- the idea that Article VI(c) of the compact
4 and Article III(a) refer to the inflow/outflow
5 method. Then the amended decree points out that
6 you should look to the manual. And the manual,
7 in turn, talks about factors that may increase
8 or decrease New Mexico's obligation. And C.5
9 then seems to refer to precisely this kind of
10 situation, where there have been losses
11 attributable to its storage in New Mexico.

12 So which parts of that -- you may take
13 issue with several parts of that chain of
14 reasoning. Have at it.

15 MR. HAWKINS: Justice Kavanaugh, I
16 agree with everything you said, except for the
17 last part, tying C.5 into this dispute.

18 I agree that we have to start with the
19 compact itself. The compact says use
20 inflow/outflow unless there's a departure.

21 Now we go to the River Master manual
22 and we see -- and this is page 15a of the Texas
23 appendix -- we see A-1 saying this is the
24 equation for calculating inflow/outflow.

25 And then, at A-2, it says that there

1 are these departures under the terms of the
2 Pecos River Compact. And what that means,
3 Justice Kavanaugh, is that, to invoke one of
4 these departures, we have to be able to tie it
5 back to the compact.

6 And I think, Justice Kavanaugh, an
7 analogy might be helpful. Regarding the
8 Delaware River, C.6 of the River Master manual
9 gives the math for dealing with the Delaware
10 River. That's cross-referenced in A-2(f).

11 And we see that tied clearly back to
12 the compact itself in Article III(b), which
13 describes the Delaware River water as one of
14 these departures from inflow/outflow.

15 The same thing goes for C.5. We're
16 talking about reservoir losses, which are spoken
17 to in two places in the compact, and neither one
18 is applicable here. And so we can't ever get to
19 C.5.

20 And, indeed, Justice Kavanaugh, even
21 if you're not with me on that, C.5 on its face
22 does not apply. It's talking about the Texas
23 allocation, but it doesn't tell us what that is.
24 It's talking about water stored. This water
25 wasn't stored. It was re-regulated.

1 This water wasn't -- and, of course,
2 none of that was at the request of Texas.
3 Indeed, it was New Mexico that initially wanted
4 this water re-regulated.

5 So, even on its face, C.5 isn't
6 applicable. But it cannot be tied back to an
7 exception in the compact that would allow the
8 deviation from inflow/outflow that the River
9 Master performed.

10 JUSTICE KAVANAUGH: Thank you.

11 CHIEF JUSTICE ROBERTS: General
12 Hawkins, why don't you take a minute for
13 rebuttal -- or for wrapping up.

14 MR. HAWKINS: Thank you, Mr. Chief
15 Justice.

16 I just want to emphasize that this
17 case presents to the Court a narrow pure
18 question of law. That question is whether the
19 compact that Congress approved allows for the
20 awarding of evaporative loss credits.

21 Now my friends on the other side have
22 failed in their briefing to point to anything in
23 the Compact that allows this. We've got this
24 general rule, inflow/outflow, and that prohibits
25 awarding credits for water that doesn't cross

1 the state line unless there's an exception in
2 the compact.

3 And that's the end of this case
4 because there is no exception in the compact,
5 and it's always clear error to violate federal
6 law, as the River Master did here.

7 Setting all that aside, if this Court
8 wants to look to the equities, New Mexico has
9 the equities all wrong. New Mexico is asking
10 this Court to give it something for nothing. It
11 wants credit for water that it never delivered
12 to Texas, that neither state could have used,
13 and that would have caused environmental
14 catastrophe in New Mexico had it been released
15 by the federal government.

16 On the other side of that ledger is
17 the fact that Texas began releasing water from
18 Red Bluff, wasted and unused, in March of 2015
19 to make room for the anticipated releases from
20 Brantley. But, because of what was happening in
21 New Mexico, the federal government kept that
22 water re-regulated until August of 2015 to allow
23 Eddy County, New Mexico, to recover.

24 Between March and August of 2015,
25 Texas released over 30,000 acre feet from Red

1 Bluff to make room for the Brantley inflow, and
2 that water never came because of what was
3 happening in New Mexico until the fall.

4 Under these circumstances, it would be
5 extraordinarily inequitable to deprive the
6 farmers and businesses of west Texas of a year's
7 worth of irrigation water. Thank you, Your
8 Honor.

9 CHIEF JUSTICE ROBERTS: Thank you,
10 counsel.

11 Mr. Wechsler.

12 ORAL ARGUMENT OF JEFFREY J. WECHSLER

13 ON BEHALF OF THE DEFENDANT

14 MR. WECHSLER: Mr. Chief Justice, and
15 may it please the Court:

16 In this case, the Court must determine
17 whether Texas should be charged for evaporation
18 of water that was stored in New Mexico at
19 Texas's request and for Texas's benefit.

20 The River Master appointed by this
21 Court determined that New Mexico was entitled to
22 a one-time credit. The Court should reject
23 Texas's motion challenging the River Master's
24 determination for two reasons.

25 First, Texas should be responsible for

1 evaporation loss from waters stored at its
2 request. The River Master found that, but for
3 Texas's request, New Mexico would have released
4 all water above its storage limit, and that
5 water would have flowed across the state line
6 into Texas, satisfying the supported -- but not
7 clearly erroneous.

8 It is fair to charge Texas for the
9 evaporation because the water is not evaporated.
10 It would create certain satisfaction of New
11 Mexico's overwhelming fee obligation under the
12 Pecos River Compact. The River Master used
13 existing accounting procedures required by the
14 courts -- and specifically paragraph A-5 of the
15 River Master manual to credit New Mexico for the
16 evaporation and put New Mexico back in the
17 position it would have been but for Texas's
18 request.

19 Second, Texas argued that the
20 accounting adjustment was untimely. But New
21 Mexico was justified in relying on the
22 procedures adopted by the River Master for
23 resolving the novel and complex accounting
24 issues.

25 As the River Master found, the states

1 knew from the time of the storm that a one-time
2 credit would be retroactively applied in favor
3 of New Mexico. With concurrence from the
4 states, the River Master notified the Court of
5 the unresolved accounting and established a
6 procedure for deciding the issue.

7 Neither state objected, and New Mexico
8 was entitled to rely on the River Master's
9 procedure. Although the states were in regular
10 contact on the issue, Texas did not question the
11 timeliness of the River Master's procedure until
12 three-and-one-half years after the water had
13 been stored.

14 The Court should deny Texas's motion.

15 CHIEF JUSTICE ROBERTS: Counsel, your
16 friend on the other side says that the water
17 could not have been stored at Brantley for Texas
18 in the absence of a Warren Act contract. I'd
19 like your answer to that.

20 MR. WECHSLER: Yes, Your Honor. At --
21 at page 68 of the Texas appendix, you can see an
22 e-mail from Reclamation in which they're
23 indicating to -- to Texas two things: number
24 one, that the water -- Reclamation understood
25 that at that point, in July of 2015, the water

1 was being stored for Texas; and, second,
2 Reclamation could no longer store the water on
3 Texas's behalf unless Texas began to negotiate a
4 Warren Act contract.

5 We understood and understand that
6 Texas always had the option of beginning to
7 negotiate that contract, and, if they had, then
8 Reclamation would have continued to store the
9 water.

10 CHIEF JUSTICE ROBERTS: You emphasized
11 throughout your brief the clearly erroneous
12 standard for reviewing the River Master's
13 determinations. And it looks to me like we did
14 say that in the 1988 decree. Is that right?

15 MR. WECHSLER: It is, Your Honor.

16 CHIEF JUSTICE ROBERTS: But I thought,
17 in an original action, that we don't review
18 findings under a clearly erroneous standard
19 because the River Master is not in the position
20 of a district court but is acting in our stead.

21 And -- and I certainly think there are
22 cases that say that. How do you reconcile that?

23 MR. WECHSLER: You're correct, Your
24 Honor. In an original jurisdiction case,
25 ultimately, the Court is responsible for all

1 determinations.

2 In this case, the liability has
3 already been determined as between the two
4 states. The Court entered its amended decree
5 and it assigned the River Master the duties of
6 administering that decree. And so we're not
7 looking at liability in the first instance.

8 I would also say that there is
9 agreement amongst the states that the clearly
10 erroneous standard was applied if you review the
11 record. In fact, the states proposed the decree
12 in the current form.

13 And, finally, we understand that the
14 rationale for adopting the erroneous -- clearly
15 erroneous standard was, in part, to ensure that
16 that a series of original actions were not
17 elevated to the Court to -- to be decided.

18 Instead, that the Court --

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Thomas? Justice Thomas?

22 JUSTICE THOMAS: Thank you, Mr. Chief
23 Justice.

24 Counsel, the State of Texas argues
25 that if it doesn't -- basically, if it doesn't

1 cross state line, it can't be counted. And the
2 -- on page 270 of the Joint Appendix, the -- the
3 River Master suggests, well, we could -- it
4 couldn't cross state line because Texas was not
5 prepared to receive it. That's a suggestion.
6 I'm not going to read all of the provisions.

7 How do you react to that? Texas says
8 we could have taken it, and it didn't come
9 across; therefore, it can't be counted.

10 MR. WECHSLER: Well --

11 JUSTICE THOMAS: What --

12 MR. WECHSLER: -- two things, Your
13 Honor -- two things, Justice Thomas.

14 The first is the inflow/outflow method
15 determines the obligation of New Mexico based on
16 the amount of water that falls within New
17 Mexico. And so, here, the flows from Tropical
18 Storm Odile formed part of the water that New
19 Mexico was obligated to deliver to Texas. And
20 the record is very clear that, but for Texas's
21 request, New Mexico would have delivered that
22 water to the state line.

23 And the way in which Texas views that
24 provision, it would completely read out and make
25 meaningless the provision of paragraph C.5 and,

1 for that matter, Article XII of the compact, in
2 that that only -- those -- those provisions only
3 make sense to the extent that part of the
4 allocation of Texas can be stored in -- in New
5 Mexico.

6 As to your question as to whether or
7 not the -- the water could have been stored in
8 Texas, I think the River Master's finding on the
9 -- 1947 is quite clear, and that is the amount
10 of water that each state is entitled to is
11 defined by the 1947 condition at the existing
12 facilities in 1947.

13 And because Texas allowed Red Bluff
14 Reservoir to go into disrepair, it no longer had
15 the ability to store the water. But, in 1947,
16 which is what the compact keys to, it would have
17 been able to store that water.

18 JUSTICE THOMAS: Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Breyer?

22 JUSTICE BREYER: No, you may go ahead
23 to the next. Go -- go ahead. I'm not -- I
24 don't have a question.

25 CHIEF JUSTICE ROBERTS: Justice Alito?

1 JUSTICE ALITO: Counsel, would you
2 agree that so long as the water was being
3 re-regulated or held, or whatever the term is,
4 in the Brantley Reservoir by the Bureau of Land
5 Reclamation for flood control purposes, then any
6 evaporation should not be charged against Texas?

7 MR. WECHSLER: No, we would not agree
8 to that, Justice Alito. The authority under
9 which Reclamation stores water is not the same
10 question as to whether Texas's store -- the
11 water is stored for Texas's benefit and it
12 should be charged with the evaporation. Rather,
13 paragraph C.5 used by the River Master keys to
14 whether there is a request for Texas -- from
15 Texas.

16 Here, there's no dispute that one of
17 the reasons that there was a significant amount
18 of water had to do with the -- the -- the
19 tropical storm, which created flooding issues.

20 JUSTICE ALITO: Well, I don't
21 understand that.

22 MR. WECHSLER: But that --

23 JUSTICE ALITO: I don't -- counsel, I
24 don't understand that answer.

25 If -- if Reclamation is holding the

1 water for flood control purposes, then how can
2 the water be stored at Texas's request? It --
3 it can't be both, can it? It's either being
4 held for -- for flood control purposes, or it's
5 being held at Texas's -- stored at Texas's
6 request?

7 MR. WECHSLER: No, I don't think that
8 that's right, Your Honor. The -- the authority
9 under which Reclamation was operating was the
10 flood control authority. Its authority to do so
11 is relatively broad.

12 I think that the -- the record makes
13 clear that -- and -- and the River Master found
14 that in March of 2015, March 1, Reclamation
15 would have released that water but for Texas's
16 request. It continued to -- to hold that water
17 under its flood control authority, but that has
18 no bearing on whether or not paragraph C.5
19 applies.

20 And so what the Court should be
21 looking at is what is the reason that ultimately
22 that -- that water was stored. And, again,
23 there's no dispute Texas made the request, and
24 -- and there's no dispute that at least from New
25 Mexico's perspective, that water would have been

1 delivered to the state line but for that
2 request.

3 JUSTICE ALITO: Well, I'm still --

4 MR. WECHSLER: And where you're --

5 JUSTICE ALITO: -- I'm still puzzled
6 by your answer, but I guess my time has expired.

7 CHIEF JUSTICE ROBERTS: You can take
8 some of Justice Breyer's time, Justice Alito.

9 JUSTICE ALITO: Well, all right. Let
10 me move on to a different point then.

11 The -- the decree provides dates by
12 which certain things have to be done. A final
13 report has to be filed by July 1.

14 Does the River Master have the
15 authority by amending the manual to say, well, I
16 really don't have to file a final report by July
17 1; I can file some other type of report and then
18 make changes to it retroactively?

19 MR. WECHSLER: Well, Your Honor, the
20 -- the one-time credit that was made to the
21 previous year's accounting was not made by
22 virtue of a -- an amendment to the River Master
23 Manual.

24 The change to the River Master Manual
25 at C.7 was only a prospective change to provide

1 guidance. And I think that what happened
2 here --

3 JUSTICE ALITO: Yeah, well,
4 prospectively, does -- prospectively, does the
5 River Master have that authority?

6 MR. WECHSLER: Certainly not, Justice
7 Alito. The -- the master does not have the
8 authority to change the amended decree. And we
9 don't think that that's what happened here.

10 Here, he did submit a final report.
11 If you look to the 2015 final report, in
12 particular, at page 61a, there, he identified
13 the procedure that the -- the states had agreed
14 upon, the procedure to resolve what -- what had
15 been determined was an unresolved issue.

16 And -- and that procedure said either
17 the states would resolve that by agreement or,
18 absent that, would -- one of the states could
19 file a motion. But looking at each, they're --

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel. Thank you, counsel.

22 Justice Sotomayor.

23 JUSTICE SOTOMAYOR: Counsel, I'm a bit
24 confused by what the Special Master did and --
25 and, frankly, the fact that you haven't

1 objected, if you were holding the water for
2 Texas, he made you pay or took away from you
3 half of the credits for the evaporation from
4 September through March.

5 First of all, I don't know how you
6 could have been holding that water for Texas in
7 September and October when they didn't ask you
8 to.

9 But, if they asked you to, why aren't
10 you entitled to the full evaporation credits?

11 MR. WECHSLER: I think, Justice
12 Sotomayor, that a strict reading of the River
13 Master Manual, you are correct, that prior to
14 November 20, when Texas requested the water, New
15 Mexico would be charged for the evaporation
16 under the normal operation of the inflow/outflow
17 method. After November 20, all of those
18 evaporative losses would go to Texas.

19 In this particular case, New Mexico
20 did not challenge the -- the split from November
21 until March, in part out of a spirit of
22 cooperation and -- and comity that was --

23 JUSTICE SOTOMAYOR: All right. So let
24 me stop you there. What would entitle him to
25 have given -- you're saying a spirit of

1 cooperation. But, if the water was being held
2 both for your benefit and for Texas's benefit,
3 which is how I read his order, how do -- what
4 does that mean under the normal terms of the
5 compact? If you couldn't release the water,
6 shouldn't you be paying for the evaporation?

7 MR. WECHSLER: Well, I think that that
8 is exactly right. Prior to November 20, New
9 Mexico would be charged with all of the
10 evaporation. And then, if you look to paragraph
11 C.5, once the request was made -- and -- and I
12 think that that's when the water would have been
13 released -- you can see that at 234a, as well as
14 62 and 63a -- then, after November, all of that
15 water should have been charged to Texas.

16 Here, what the master said was, during
17 that public safety period, both parties
18 benefitted, and, therefore, he split the
19 evaporative losses.

20 You -- you could make a reasonable
21 argument that that was allowed by the River
22 Master Manual in that, because Texas benefits,
23 it was for its use, pursuant to Article XII or
24 paragraph C.5, and -- and then, certainly, New
25 Mexico would normally be charged for that water,

1 which -- which we think is fair because normally
2 water stored in Brantley is used for the benefit
3 of -- of New Mexico residents.

4 And embodied in the compact is the
5 principle that whichever party benefits from the
6 storage should be charged with the evaporation.

7 JUSTICE SOTOMAYOR: Thank you.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Justice Kagan.

11 JUSTICE KAGAN: Mr. Wechsler, when you
12 were talking to Justice Alito, you referred to
13 this -- the Reclamation e-mail to the states
14 where the Bureau says, we expect to start
15 releasing this water on March 1. And you said
16 it would have been released but for Texas's
17 request.

18 Now how about if -- if I read the
19 record differently, how about if I read the
20 record as showing that, at that point, what was
21 holding up the release was New Mexico's concern
22 about flooding?

23 Then -- if that were the case, then
24 you wouldn't have a leg to stand on, would you?

25 MR. WECHSLER: No, that would be a

1 different case, Justice Kagan. But the record
2 does not support Texas's assertion for a number
3 of reasons.

4 First, New Mexico never requested that
5 the water be stored and never expressed any
6 concerns about the water being released or being
7 held for safety reasons. Quite the contrary,
8 New Mexico made clear that but for the request
9 from Texas, it would have released that water to
10 the state line.

11 Now Texas cites e-mails at page 137
12 and 135, but those e-mails from a New Mexico
13 entity, not the state, raise issues about not
14 whether the water should be released but the
15 rate at which it should be released. And,
16 specifically, their concern was that the water
17 be released at a rate below 1200 cubic feet per
18 second to protect the bridges.

19 Now the -- you can see that
20 Reclamation considered that issue and said that,
21 well, we're going to release the water at a rate
22 that's consistent with that. And you can see at
23 page 236 that when the water was released in
24 August, in fact, Reclamation did release it at
25 that rate, and so there was no reason related to

1 New Mexico that the water was stored after March
2 1.

3 So why was the water stored? Well,
4 you can see that Texas admits that the water is
5 stored for their benefit, at both pages 80a of
6 the Texas appendix and page 108 of the New
7 Mexico appendix, which is a letter from 2017 and
8 a position paper to the River Master in which
9 they acknowledge, yes, this water was stored
10 after March for our benefit and based on our
11 request.

12 And you can see at page 68 of the --
13 the Texas appendix that Reclamation agreed it
14 was holding that water for -- for Texas and
15 indicated, as I -- as I said earlier, that if
16 Texas had started to negotiate a Warren Act
17 contract, that water would have continued to be
18 held.

19 So that's why the River Master
20 rejected Texas's position. And we also think
21 it's noteworthy that even though the states had
22 been in regular contact for three-and-a-half
23 years after the flood working through this
24 issue, Texas never raised this position until
25 May of 2018, as I said, three-and-a-half years

1 after the flood.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Gorsuch.

5 JUSTICE GORSUCH: I have no questions.
6 Thank you, Chief.

7 CHIEF JUSTICE ROBERTS: Justice
8 Kavanaugh.

9 JUSTICE KAVANAUGH: Thank you, Mr.
10 Chief Justice.

11 And good morning, Mr. Wechsler.

12 First, a contextual issue about the
13 real-world impacts of this dispute. General
14 Hawkins said that ruling for you would threaten
15 the farmers and ranchers of west Texas.

16 And I guess I have two questions off
17 that comment. Do you -- first, do you
18 acknowledge that? And, second, if you do
19 acknowledge that, would ruling against you -- or
20 how would ruling against you likewise harm the
21 people of New Mexico? If you could just zero in
22 on the real-world impacts of this dispute?

23 MR. WECHSLER: Well, I certainly agree
24 with General Hawkins that this is a significant
25 amount of water in a very dry part of the

1 country, and, yes, whichever state is
2 unsuccessful here, it could have real-life
3 implications to the lives and livelihoods of the
4 -- the farmers.

5 I also want to focus on two other
6 consequences that I think if -- if you sustained
7 Texas's motion, and that is it would discourage
8 cooperation from -- between the two states in
9 administering the compact in that, here, New
10 Mexico attempted to do what this Court has often
11 indicated it would like states to do, and that
12 is work with its neighbor. And yet New Mexico
13 would be -- would be unfairly punished for that.

14 And, second, we think that ruling
15 against New Mexico and in favor of Texas would
16 have the effect of elevating more of these
17 issues to the Court because it would deprive the
18 River Master from -- of the ability to be
19 resolving these issues as part of his duties
20 under the amended decree.

21 JUSTICE KAVANAUGH: Thank you.

22 CHIEF JUSTICE ROBERTS: Counsel, do
23 you want to take a minute to wrap up?

24 MR. WECHSLER: Thank you, Mr. Chief
25 Justice.

1 Under paragraph C.5 of the River
2 Master Manual, the master is tasked with
3 charging Texas with evaporation when the water
4 is stored "at the request of Texas."

5 There is no dispute that Texas
6 requested that the stormwater be stored for its
7 benefit, and there is no dispute that New Mexico
8 conditioned its consent on the agreement that
9 all of the evaporation would be charged to
10 Texas.

11 Nor is there any purchase to Texas's
12 argument that the credit to New Mexico was
13 untimely. Both states knew from the time of the
14 flood that a retroactive adjustment to the
15 accounting would be made.

16 With the agreement of the states, the
17 River Master alerted the Court to the unresolved
18 issue and established a procedure for resolving
19 it. New Mexico was justified in following the
20 procedure identified by the River Master.

21 Granting New Mexico a credit for the
22 Texas water is both consistent with the plain
23 language of the compact and the River Master
24 Manual and the equitable outcome. Thank you.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Ms. Hansford.

3 ORAL ARGUMENT OF MASHA G. HANSFORD

4 FOR THE UNITED STATES, AS AMICUS CURIAE,

5 SUPPORTING THE DEFENDANT

6 MS. HANSFORD: Mr. Chief Justice, and

7 may it please the Court:

8 Texas has not identified any error in

9 the River Master's determination.

10 First, the River Master was correct to

11 apply C.5 of the manual, which addresses water

12 stored in New Mexico at the request of Texas,

13 because Texas made an express request for

14 storage.

15 Second, there was no procedural

16 obstacle. The 2014 Water Year Report

17 specifically left open the relevant accounting

18 and stated that the River Master would resolve

19 the issue on a motion by a single state. Texas

20 did not object.

21 The determination reaches a result

22 that is both technically accurate and entirely

23 fair. The River Master found that but for

24 Texas's request, New Mexico would have delivered

25 the water before the evaporation occurred,

1 meaning that it would have gotten credit for the
2 full pre-evaporation amount.

3 CHIEF JUSTICE ROBERTS: Ms. Hansford,
4 I know that you don't think that Article XII of
5 the compact applies, unlike New Mexico, but what
6 would the position of the government be under
7 Article XII, assuming it --

8 MS. HANSFORD: We --

9 CHIEF JUSTICE ROBERTS: -- assuming it
10 -- assuming it did apply as New Mexico argues?

11 MS. HANSFORD: Assuming that this is a
12 consumptive use by the United States, which is
13 the part where we agree with Texas, we don't
14 believe it is, but assuming this is a
15 consumptive use for the United States, we do
16 think that the provider clause of Article XII is
17 triggered, because the water was stored for use
18 by Texas, even though Texas ultimately didn't
19 end up using as much water as it expected and
20 had to waste other water to make use for it.

21 But then what the party that received
22 this ultimately does does not address the
23 question whether it was stored for use. So we
24 do think the second clause would apply if -- if
25 you found that the article applies.

1 CHIEF JUSTICE ROBERTS: And what do
2 you think of the argument by Texas that the
3 River Master erred in adding a provision to the
4 manual without the consent of both states?

5 MS. HANSFORD: We don't believe that
6 that is at issue here because that's not the
7 procedure on which the River Master relied to
8 make this adjustment. To make this adjudgment
9 -- adjustment, the River Master relied on the
10 procedures he set out in the 2014 Water Year
11 Report, which were suggested by the parties to
12 which Texas did not object.

13 And if Texas had objected, New Mexico
14 could have taken steps to protect its rights,
15 like seeking an extension from this Court or
16 moving for a manual provision prospective, which
17 it could have done on motion at that time.

18 CHIEF JUSTICE ROBERTS: What was the
19 authority of the Reclamation Bureau to hold --
20 to store the water at Brantley for Texas in the
21 absence of a Warren Act contract?

22 MS. HANSFORD: The authority was, in
23 fact, the flood control authority, but I'd like
24 to clarify because the flood control authority,
25 we do think, is entirely consistent with the

1 River Master's findings in this case.

2 Texas sees it as an on/off switch that
3 either must be exercised or can't be exercised,
4 but Reclamation has a lot of discretion, and the
5 record reflects that it takes the views of the
6 stakeholders very seriously. And as Justice
7 Sotomayor --

8 CHIEF JUSTICE ROBERTS: Thank you.
9 Thank you, counsel.

10 Justice Thomas?

11 JUSTICE THOMAS: Briefly.

12 Counsel, the -- I'm a bit confused as
13 to which approach to take. Texas says that
14 Texas allocation refers to what it should have
15 gotten under the 1947 -- under 1947 conditions.
16 You seem to suggest that it's what would have
17 crossed state line.

18 Could you give us a basis or give me
19 the best argument for choosing one over the
20 other approach?

21 MS. HANSFORD: Yes, Justice Thomas. I
22 think that Texas's position is inconsistent with
23 the amended decree because it sets the Article
24 III obligation as both a floor and a ceiling.
25 An amended decree makes clear that New Mexico is

1 entitled to a credit for any overage.

2 And so all the calculations the River
3 Master does determines the full amount. And the
4 procedures do not change in the years where New
5 Mexico is going to fall short or fall over. The
6 point is that New Mexico would have gotten a
7 credit for the full amount if it had been
8 delivered earlier, as it did, I would note, for
9 the 30,000 feet of water that didn't evaporate.

10 And so that shows that everything
11 counts, not just up until New Mexico hit that
12 bare minimum it's required to deliver in a
13 particular year.

14 JUSTICE THOMAS: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Breyer.

17 JUSTICE BREYER: Well, I just want to
18 be sure I got your argument. Is this -- one
19 argument: Look, look at VI(c)(5) and it says go
20 use the engineering report if you want to
21 measure water which could be measured by the
22 inflow/outflow method. Okay.

23 So now we look at the engineering
24 report and the engineering report says: When a
25 Texas allocation is stored in New Mexico, any of

1 the losses after that, called channel losses,
2 are -- are -- are charged up to Texas.

3 Now is that how you're interpreting
4 this or not?

5 MS. HANSFORD: A -- a -- a couple of
6 amendments to that, Justice Breyer.

7 JUSTICE BREYER: Yeah.

8 MS. HANSFORD: First, I think this is
9 the -- the manual, not the engineering report.
10 But, under the manual, we think that the piece
11 that matters isn't the channel losses but the --
12 the phrase that says this quantity will be
13 reduced -- when a quantity of the Texas
14 allocation is stored, consistent with --

15 JUSTICE BREYER: Oh, reservoir losses,
16 I see, I see, reservoir losses.

17 MS. HANSFORD: Will be reduced by the
18 amount of reservoir losses, exactly.

19 JUSTICE BREYER: All right. All
20 right. Now he said, I think by -- mostly by
21 Kavanaugh, and -- and what do you think of what
22 their view is on what I just said, and what
23 apparently you came close -- close enough, I'm
24 close enough to. I want to give you a chance to
25 answer their argument.

1 MS. HANSFORD: Well, we -- we think
2 that C.5 plainly applies by its terms. Page 61
3 of the appendix is a formal request from one
4 commissioner to the other saying it is my
5 request that New Mexico store Texas's portion of
6 the flows.

7 And so this is just squarely within
8 C.5, and the River Master treated it
9 accordingly. I think it's a -- it's a really
10 straightforward application of C.5.

11 And I -- I would note that now Texas
12 for the first time is raising questions about
13 the derivation of C.5, but C.5 was incorporated
14 in this Court's amended decree as an integral
15 part of the decree. It was in the manual, the
16 original manual that the Court adopted at that
17 time. And so it seems a little late to be
18 doubting the River Master's power to apply that
19 provision.

20 JUSTICE BREYER: Thank you.

21 CHIEF JUSTICE ROBERTS: Thank you,
22 counsel.

23 Justice Alito.

24 JUSTICE ALITO: At a certain point,
25 did the Bureau of Land Reclamation hold this

1 water at Brantley for other than flood control
2 purposes?

3 MS. HANSFORD: Justice Alito, it was
4 always under the flood control authority, but
5 the reason for the flood control authority
6 changed over time.

7 In the first weeks after the storm,
8 there were urgent public safety concerns, and
9 there really wasn't any question Reclamation
10 would exercise its flood control authority.

11 But, subsequently, as Texas's request
12 makes -- and New Mexico's response to it makes
13 clear, things shifted somewhat. And there are
14 exchanges between Reclamation and Texas that
15 indicate that Reclamation understood that it was
16 really Texas's concern that was driving it.

17 There continued to be --

18 JUSTICE ALITO: So I will add --

19 MS. HANSFORD: -- flood control --

20 JUSTICE ALITO: I mean, your answer
21 seems to be yes, the flood control justification
22 ended and Reclamation continued to hold the
23 water because Texas had requested it. Is that
24 right?

25 MS. HANSFORD: No, Justice Alito. The

1 flood control authority did not end because Red
2 Bluff was full. So, in that sense, it would
3 cause a flood. But the natural solution to that
4 was that Texas can make room in Red Bluff, and
5 it was pushing back on that.

6 As it indicates in its own filing at
7 page 80, Red Bluff was asking Reclamation to
8 hold as long as possible the water to give us
9 the best chance to --

10 JUSTICE ALITO: Well --

11 MS. HANSFORD: -- use --

12 JUSTICE ALITO: -- and perhaps my --
13 my grasp of this case is simplistic, but it does
14 seem to me that the water must either be held
15 for flood control purposes or for some other
16 purpose. And for the period when it was being
17 held by the Bureau of Reclamation for flood
18 control purposes, it cannot have been held at
19 Texas's request, which would have required a
20 contract, which didn't exist.

21 MS. HANSFORD: Justice Alito, we
22 disagree with either/or. But even if you think
23 that's the case, we think there's some inherent
24 wind-down authority once Reclamation has slowed
25 down the water, and it really has to work out

1 with the parties, it's hard to know how it would
2 force Texas to empty the water.

3 But it has to have some amount of
4 discretion to release that water on -- and the
5 parties -- New Mexico was concurring in Texas's
6 request, Reclamation was trying to accommodate
7 everybody's interests to the extent it could
8 until it felt it really no longer could. It
9 became clear Texas wasn't willing to enter a
10 Warren Act compact under which it would pay for
11 the storage, and then Reclamation felt like it
12 --

13 JUSTICE ALITO: Did Texas --

14 MS. HANSFORD: -- had to respond.

15 JUSTICE ALITO: -- ever -- did Texas
16 ever suggest it wanted a Warren Act contract?
17 Yes or no. My time has expired. Could you just
18 answer that --

19 MS. HANSFORD: No.

20 JUSTICE ALITO: -- yes or no? No,
21 thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Sotomayor?

24 JUSTICE SOTOMAYOR: Counsel, I know
25 you don't think Article XII applies because you

1 didn't use the water. But I looked at the
2 glossary from the Bureau of Reclamation and it
3 says: Any use which lessens the amount of water
4 available for another use.

5 So, for example, irrigation is a
6 consumptive use because it depletes the
7 available water supply, but it does it through
8 absorption and even evaporation as well.

9 And there you would say it was
10 consumptive use. So if I -- assuming I
11 disagreed with you, what would that do with
12 respect to our decision-making? Can we use
13 Article XII to explain the River Master's
14 decision even though he didn't apply that
15 provision, or do we have only the power to
16 review the River Master's findings?

17 MS. HANSFORD: Justice Sotomayor, let
18 me take those questions in order.

19 First, our argument on why this isn't
20 a consumptive use by the United States isn't
21 that evaporation isn't a consumptive use; it's
22 that the United States didn't have an
23 appropriated water right in this water. It only
24 had an appropriated water right for the water
25 below 42,000 feet. And we don't think a

1 consumptive use includes evaporation that is not
2 incident to an appropriate water right.

3 JUSTICE SOTOMAYOR: You don't think --

4 MS. HANSFORD: I think that's --

5 JUSTICE SOTOMAYOR: -- your right --
6 you don't think your right to control flooding
7 is a consumptive use?

8 MS. HANSFORD: No, because, under that
9 authority, Reclamation simply slows down the
10 water. It doesn't change the ownership or -- or
11 other aspects of the water.

12 But, as to your second question, if
13 you disagree with us on that, you can resolve
14 this under Article XII. You certainly have the
15 power to do that.

16 We would just submit that because the
17 River Master physically relied on C.5 and
18 because application to C.5 is so straightforward
19 in this context, that would be the -- the better
20 way to resolve it, even if you disagree with us
21 about the application of Article XII.

22 JUSTICE SOTOMAYOR: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice Kagan.

24 JUSTICE KAGAN: Ms. Hansford, what in
25 Article XII requires that the United States have

1 an appropriated water right in order for this
2 provision to apply?

3 MS. HANSFORD: That's how we interpret
4 consumptive use by the United States, Justice
5 Kagan.

6 JUSTICE KAGAN: I know, but I'm asking
7 why? Why -- why -- why does that language
8 suggest an appropriated water right?

9 MS. HANSFORD: Because the United
10 States --

11 JUSTICE KAGAN: Why isn't it just the
12 U.S. is holding the water and it's evaporating
13 and evaporation is a consumptive use?

14 MS. HANSFORD: Sure, because it wasn't
15 incident to any consumptive use by the United
16 States. The United States only had a right to
17 consumptively use the first 42,000 acre feet.

18 And so, because this was just incident
19 to slowing it down, we think it's more
20 accurately described as a reservoir loss, which
21 the compact uses elsewhere. We think that's the
22 more appropriate term in this circumstance.

23 JUSTICE KAGAN: Okay. If I could go
24 back to Justice Alito's questions, when -- when
25 -- when you said initially the Bureau thought

1 that there was -- there was -- there were flood
2 problems, but then those concerns dissipated and
3 -- and -- and -- and Texas's desire for the
4 Bureau to hang on to the water started driving
5 the Bureau's decision-making, but isn't -- is
6 that -- did that have anything to do with --
7 with flood control?

8 MS. HANSFORD: The -- the reason it
9 still continued to relate to flood control was
10 because there would be a flood until Texas
11 released water from Red Bluff. So, really, the
12 discussion was over how hard to push Texas to
13 take a step that would avoid the flood concern.
14 And that's why I say this was kind of in a
15 discretionary gray area.

16 If New Mexico were resisting or if
17 Texas weren't making this request, the analysis
18 may have come out differently. And, you -- you
19 know, we think the record supports the River
20 Master's finding that it would have come out
21 differently.

22 But we do think there was a flood
23 concern purpose. It's just that there were
24 other options, and it was Texas that was driving
25 it. And I think that it really wouldn't make

1 sense for Texas to make the request that it did
2 if it was irrelevant to the Reclamation flood
3 control authority. So I think that that offers
4 a lot of support for this interpretation.

5 JUSTICE KAGAN: Thank you,
6 Ms. Hansford.

7 CHIEF JUSTICE ROBERTS: Justice
8 Gorsuch.

9 JUSTICE GORSUCH: Counsel, I'd
10 appreciate your thoughts on the timeliness
11 question of whether Texas is correct that we
12 lack jurisdiction to entertain this argument at
13 all from New Mexico.

14 MS. HANSFORD: Justice Gorsuch, we
15 very much disagree there's a jurisdictional
16 problem here. There -- normally, you would
17 think of a jurisdictional time limit coming from
18 a statute because Congress had the ability to
19 limit lower court jurisdiction.

20 Here, there's no statute, and, in
21 fact, Article III sets out this Court's
22 jurisdiction. So we think it's -- that the
23 concept of a jurisdictional time limit really
24 doesn't make sense in this context. But even if
25 you think it does, this is worded like a classic

1 claims processing rule, limiting a claimant's
2 time to take a certain action and not at all in
3 terms of the Court's power or even willingness
4 to exercise jurisdiction.

5 JUSTICE GORSUCH: Do you believe Texas
6 waived or forfeited any complaint about
7 timeliness given its conduct in this case?

8 MS. HANSFORD: We believe that Texas
9 forfeited any argument that the 2014 process set
10 out by the River Master is somehow improper.
11 And we don't take a position on equitable
12 estoppel or judicial estoppel if you disagree
13 with us on that part.

14 But we do think Texas's course of
15 conduct is indicative of the parties'
16 interpretation of the compact and the amended
17 decree to allow this type of procedure, at least
18 when agreed by the parties, kind of as a fairly
19 included in the River Master's authority to
20 issue an accurate final report.

21 JUSTICE GORSUCH: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice
23 Kavanaugh.

24 JUSTICE KAVANAUGH: Thank you,
25 Mr. Chief Justice.

1 Good morning, Ms. Hansford. Earlier
2 in the argument, the Chief Justice asked a
3 question about the clearly erroneous standard,
4 and I wanted to give you an opportunity to
5 provide any thoughts you had on that.
6 Obviously, it was in the 1988 amended decree,
7 but any further thoughts you have about the
8 appropriateness of that standard.

9 MS. HANSFORD: That's right, Justice
10 Kavanaugh. At -- at the outset, I would note
11 that it hasn't been challenged here, and it was
12 reflected in the Court's earlier judgment.

13 We think that it is probably
14 appropriate because the parties did not object
15 to it after the Special Master proposed it, so
16 this is analogous to a consent. And so I would
17 say it's analogous to Rule 53, where a special
18 master is allowed to have a clear error standard
19 of review, just for factual determinations, when
20 the parties consent to it.

21 And so we think that's appropriate
22 here for the factual determination, but we don't
23 think anything turns on the standard of review.
24 We think the River Master is correct under any
25 standard and that because he was close to the

1 parties and all the representations that went
2 on, as well as the technical issues, his views
3 on the facts should get a lot of persuasive
4 weight, even if you don't want to think of it as
5 a clear error standard.

6 JUSTICE KAVANAUGH: Do you think of
7 the primary dispute here as factual?

8 MS. HANSFORD: I think the application
9 of C.5 is straightforward, and I don't think
10 Texas has put a dent in it. So I do think the
11 primary dispute is factual.

12 JUSTICE KAVANAUGH: Thank you.

13 CHIEF JUSTICE ROBERTS: A minute to
14 wrap up, Ms. Hansford.

15 MS. HANSFORD: Thank you.

16 As the discussion today indicates, the
17 River Master's determination is the correct
18 result under a straightforward application of
19 the manual's language.

20 Texas's approach, by contrast, would
21 saddle New Mexico with the full evaporative loss
22 for water that would have evaporated on the
23 Texas side of the state line. The River
24 Master's determination was not erroneous, and we
25 would ask this Court to deny the motion for

1 review.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 General Hawkins, three minutes for
5 rebuttal.

6 REBUTTAL ARGUMENT OF KYLE D. HAWKINS
7 ON BEHALF OF THE PLAINTIFF

8 MR. HAWKINS: Thank you, Mr. Chief
9 Justice.

10 The arguments on the other side
11 confirm that the best approach here is to do
12 what this Court said in 1983 and follow the
13 compact and disallow anything inconsistent with
14 it.

15 I didn't hear Mr. Wechsler tie C.5
16 back to anything in the compact, and neither did
17 the River Master. Indeed, the River Master
18 admitted -- and this is at page 286a of the
19 Texas appendix -- that he wasn't following the
20 compact, that he was doing equity to New Mexico
21 and he was using C.5 as a free-floating
22 provision to do what he subjectively thinks is
23 fair.

24 The United States also doesn't tie
25 this back to the compact, except to invoke

1 Article III and the 1947 condition. But that
2 misunderstands Article III. Article III has
3 always applied inflow/outflow to figure out the
4 1947 condition, and you don't have to take my
5 word for it. That's what this Court said in
6 1983. Inflow/outflow underpins the compact, and
7 the Court cannot depart from that in the name of
8 convenience.

9 I didn't hear my friends on the other
10 side acknowledge A-2 of the manual at all. A-2
11 of the manual says that C.5 is a departure from
12 inflow/outflow and explicitly ties it back to
13 the compact.

14 The United States thinks that C.5 is
15 some free-floating equitable adjustment that can
16 be deployed independent of the compact. And
17 that's contrary to A-2 and the 1983 decision.

18 My friends on the other side accused
19 us of writing C.5 out of the manual. And I just
20 want to underscore that is not true. We think
21 that C.5 fully applies when we're dealing with
22 unappropriated floodwaters or with the situation
23 that Article XII contemplates. But, since
24 neither one is implicated here, we can't look to
25 C.5.

1 One final point. Mr. Wechsler
2 suggested that ruling for Texas will open the
3 door to more of these motions. The opposite is
4 true. The best way to keep this case out of
5 this Court is to reaffirm that the compact
6 controls and apply it strictly and deny the
7 River Master free-floating equitable powers.

8 And the history backs me up on that.
9 During the 1980s, there was a special master in
10 this case rather than a River Master, and under
11 that special master, this case -- this case
12 reached this Court something like a half dozen
13 times in the 1980s alone.

14 But, in 1987, the Court eliminated the
15 special master and appointed the River Master
16 and imbued him with very limited technical
17 powers to perform technical calculations and
18 nothing more.

19 And since that time, things have gone
20 great. This compact has been relatively
21 amicable and litigation-free up until now, when
22 the River Master stepped away from the compact
23 to apply his subjective sense of equity instead
24 of what Congress determined.

25 That was clear error, and the motion

1 should be granted.

2 Unless the Court has further
3 questions.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 General Hawkins. The case is submitted.

6 (Whereupon, at 12:23 p.m., the case
7 was submitted.)

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