No. 141, Original

In the

SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

OFFICE OF THE SPECIAL MASTER

THE STATE OF TEXAS'S REPLY BRIEF IN SUPPORT OF REQUEST FOR A JUDICIAL DECLARATION TO CONFIRM THE LEGAL ISSUES PREVIOUSLY DECIDED AND MOTION IN LIMINE TO EXCLUDE THE INTRODUCTION OF EVIDENCE THEREON

Hearing: April 2, 2019; 9:00 a.m.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Court Rules

Other Authorities

I. INTRODUCTION

The State of Texas (Texas) respectfully submits the following reply (Texas Reply Brief) in support of its Request for a Judicial Declaration to Confirm the Legal Issues Previously Decided and Motion in Limine to Exclude the Introduction of Evidence Thereon (Texas Motion). The Texas Reply Brief responds to the following:

(1) The State of New Mexico's (New Mexico) Response to the Texas Motion (New Mexico Response or N.M. Response);

(2) The State of Colorado's (Colorado) Response to the Texas Motion and New Mexico's Motion for Partial Judgment on Matters Previously Decided (Colorado Response);

(3) The United States of America's Response to Legal Motions of Texas and New Mexico Regarding Issues Decided in this Action (United States or U.S. Response); and

(4) Pertinent portions of the various *amicus curiae* briefs filed in this matter on February 28, 2019.

For the reasons set forth in the Texas Motion, and herein below, the Texas Motion should be granted in its entirety.[1]

II. ARGUMENT

A. New Mexico Confuses the Standard of Review for Law of the Case in an Original Action

Texas and New Mexico each filed separate motions on December 26, 2018 to identify, from the perspective of each party, issues that have been previously decided and should therefore constitute the law of the case. In those December 26, 2018 briefs, Texas and New Mexico both cite to original jurisdiction cases *Arizona v. California*, 460 U.S.

[1] The State of Texas's Response to the State of New Mexico's Motion for Partial Judgment on Matters Previously Decided and Brief in Support (Texas's Response to New Mexico Motion), filed on February 28, 2019, is incorporated herein by reference.

605, 618 (1983), and *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), as the controlling authority on the doctrine of law of the case. *See* State of New Mexico's Motion for Partial Judgment on Matters Previously Decided and Brief in Support (N.M. Motion), at 11; Texas Motion, at 16, 21-22.

Now, New Mexico argues that Texas misconstrues *Arizona v. California* as well as *Wyoming v. Oklahoma* and that those cases should not be relied upon to "disturb the bedrock principles that the Court retains ultimate responsibility for all findings in original actions[] . . . ." N.M. Response, at 5-7. New Mexico admits that these are the only two original jurisdiction cases that "consider at length the application of law of the case . . . ." N.M. Response, at 5. Nonetheless, New Mexico downplays the Court's reasoning in those original actions as the Court's reasoning is applied to this case, and instead, argues that the critical factor is whether a matter was "directly discussed and decided by the Supreme Court," as set forth in a variety of lower federal Court decisions, but not applied by the Court in any original jurisdiction case. N.M. Response, at 1-2. New Mexico launches this argument, and its retreat from the Court's reasoning in *Arizona v. California* and *Wyoming v. Oklahoma* in an attempt to bolster its argument that the Special Master's reasoning should be disregarded. *Id.* According to New Mexico, the Special Master's reasoning was not "adopted" by the Court because it was not "directly discussed and decided by the Supreme Court." *Id.*

The applicable rule, as discussed in *Wyoming v. Oklahoma* is as follows:

> Although we have been reluctant to import wholesale law-of-the-case principles into original actions, *Arizona v. California*, 460 U.S. 605, 618-619 [citation omitted] (1983), prior rulings in such cases *'should be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated.' Id.*[] at 619. Here, Oklahoma in no way suggests any change of circumstance, whether of fact or law. *In each brief submitted on the issue, Oklahoma has recited the same facts, cited the same cases, and constructed the same arguments.* Of course, we surely have the power to accede to Oklahoma's request at this late date, and if convinced, which we are not, that we were clearly

> wrong in accepting jurisdiction of this case, we would not hesitate to depart from our prior rulings.

Wyoming v. Oklahoma, 502 U.S. 437, 446 (1992) (emphasis added) (citing *Arizona v. California*, 460 U.S. at 618-19.)

Texas urges the Special Master to rely on the principles of finality and repose articulated by the Court in *Wyoming v. Oklahoma*, 502 U.S. at 446, and *Arizona v. California*, 460 U.S. at 618-19. In original actions, the Court relies upon the "fundamental precept of common-law adjudication . . . that an issue once determined by a competent court is conclusive." *Arizona v. California*, 460 U.S. at 619, (citing *Montana v. United States*, 440 U.S. 147, 153 (1979).) In *Arizona v. California*, the Court declined to reopen a previously decided issue regarding statutory allocations of water, and emphasized that the conclusive determination of rights "is particularly important with respect to water rights in the Western United States." *Id*. at 620.[2]

Here, as in *Wyoming v. Oklahoma*, 502 U.S. at 446, "[New Mexico] in no way suggests any change of circumstance, whether of fact or law. In each brief submitted on the issue, [New Mexico] has recited the same facts, cited the same cases, and constructed the same arguments." [3] New Mexico has repeatedly placed various legal questions at issue before the Special Master and the Court, resulting in the First Report,[4] a 278-page analysis by the Special Master addressing each of the legal questions posed by New

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[2] *See also Nevada v. United States*, 463 U.S. 110, 129 n.10 (1983) (discussing that principles of finality are at their ". . . zenith in cases concerning real property, land and water.").

[3] *See* New Mexico's Opposition to Texas's Motion for Leave to File Complaint (March 11, 2013); New Mexico's Motion to Dismiss Texas' Complaint and the United States' Complaint in Intervention (April 30, 2014) (N.M. Motion to Dismiss); State of New Mexico's Exceptions to the First Interim Report of the Special Master and Brief in Support (June 19, 2017) (N.M. Exceptions).

[4] The First Interim Report of the Special Master on New Mexico's Motion to Dismiss Texas's Complaint and the United States' Complaint in Intervention and Motions of Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 for Leave to Intervene (Feb. 9, 2017) (First Report).

Mexico with finality and repose. Based on the law of the case standard of review for an original jurisdiction case, the Texas Motion must prevail.[5]

B. New Mexico Misstates the Standard for the Court to Adopt a Special Master's Recommendations

New Mexico declares, "an *affirmative act* by the Court is necessary to render the Special Master's recommendations operative" and concludes, "the Court has not taken such an affirmative act in this case." N.M. Response, at 3 (emphasis added). New Mexico makes this assertion without citing to any legal authority whatsoever, and fails to define what constitutes "an affirmative act." The Special Master should disregard New Mexico's misstatement of law.

New Mexico also references Texas's Reply to Exceptions to the First Interim Report of Special Master (July 28, 2017) (Texas Reply to Exceptions) for the proposition that Texas previously recognized certain functions of the Special Master and "conceded" that the Special Master's role was "advisory only." N.M. Response, at 3. New Mexico attributes Texas's quote to *United States v. Raddatz,* 447 U.S. 667 at 683 n.11 (1980), but takes the quote out of context, by highlighting only what it deems useful to its conclusion. As stated by Texas in its Reply to Exceptions:

> In considering exceptions to the Special Master's recommendations, the Supreme Court affords "respect and a tacit presumption of correctness" to the Special Master's findings while assuming the ultimate responsibility for deciding all matters. *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984). 'In original cases . . . the master's recommendations are advisory only, yet this Court regularly acts on the basis of the master's report and exceptions thereto.' *United States v. Raddatz*, 447 U.S. at 683 n.11.

Texas Reply to Exceptions, at 9.

While *Raddatz* does support the premise that a Special Master's recommendations are advisory, that phrase cannot be considered out of context. The Court also expressly

[5] As discussed in the Texas Response to the New Mexico Motion at pages 7-8, the application of New Mexico's "discussed and decided" standard also supports granting the Texas Motion and denying the New Mexico Motion.

acknowledged that it "regularly acts" on a Special Master's report after considering exceptions and, in fact, the Court found that the delegation of duties to a magistrate (*i.e.* Special Master) is appropriate "so long as the ultimate decision is made by the district court." [6] *Raddatz,* 447 U.S. at 683 n.11. Moreover, New Mexico fails to acknowledge the standard dictated by the Supreme Court in the original action of *Colorado v. New Mexico* which affords "respect and a tacit presumption of correctness" to a Special Master's findings, even though the Court has "the ultimate responsibility for deciding . . . ." *Colorado v. New Mexico,* 467 U.S. 310, 317 (1984).

Here, the Supreme Court articulated that the Special Master was "appointed to consider the case, received briefing, heard argument, and eventually issued an interim report recommending that [the Supreme Court] deny New Mexico's motion to dismiss Texas's complaint." *Texas v. New Mexico,* 138 S. Ct. 954, 958 (2018). Based on the Supreme Court's review of the First Report and the Parties exceptions, the Court accepted the Special Master's recommendation, without any qualifications, consistent with the standards articulated in both *Colorado v. New Mexico,* 467 U.S. at 317 and *Raddatz,* 447 U.S. at 683 n.11.

[6] In *Raddatz,* the Supreme Court reviewed a District Court's acceptance of a magistrate's recommendation to deny a motion to suppress. The District Court stated it had "considered the transcript of the Magistrate's hearing, the parties' proposed findings of fact, conclusions of law, and supporting memoranda, the Magistrate's recommendation, and oral argument of counsel." *Raddatz*, 447 U.S. at 669. The appellate court reversed, holding "that respondent had been deprived of due process by the failure of the District Court personally to hear the controverted testimony." *Id.* at 672. The Supreme Court reviewed the Federal Magistrates Act of 1968, 28 U.S.C. § 636 (b)(1)(B) to determine the powers of a District Court and magistrate. (Note the Supreme Court was not reviewing its own powers to accept a Special Master's recommendation.) The Court found that "a delegation does not violate Art. III so long as the ultimate decision is made by the district court." *Id.* at 683. Thus, the Supreme Court overruled the appellate court and upheld the District Court's reliance on the magistrate's efforts.

C. The Court Accepted the Special Master's Analysis Supporting the Recommendation to Deny the Motion to Dismiss

New Mexico rejects, as law of the case, all of the legal issues resolved by the Special Master in support of the recommendations set forth in the First Report, asserting that the Court did not adopt the reasoning set forth in the report. N.M. Response, at 8. In support, New Mexico reviews examples of language used in other cases to adopt Special Master recommendations, and concludes that because the Court did not employ the precise language used by the Court in prior matters, the Court did not intend to adopt the analysis in support of the recommendations in the First Report. *Id.* at 9. Thus, it declares that the Court did not agree to the First Report "wholesale," or to the "rationale for specific conclusions," but limited its agreement to *only* the denial of the motion itself. *Id.*

The Special Master's role, among other things, is to provide the basis and reasoning for a decision recommended to the Court. The Brief *Amicus Curiae* City of El Paso, Texas Response to Motions for Partial Judgment on the Pleadings (El Paso Brief) filed on February 29, 2019, recites correctly that New Mexico opened the door for deciding specific legal issues when it raised three explicit grounds to dismiss Texas's Complaint. "These are the issues New Mexico considered dispositive – legal issues of compact construction, not fact issues or issues upon which evidence was required." El Paso Brief, at 2. The Special Master "considered those arguments in detail, rejected them, and recommended denial of New Mexico's motion." *Id.* Indeed, the Special Master did everything New Mexico argues should be done, including completion of the "primary function" to create a robust record for the Court so it could rely upon that record. N.M. Response, at 2.

New Mexico further argues that Texas relies "on a single line in the 2018 decision," wherein the Court held that "[t]he United States's exception is sustained, all other exceptions are overruled, and the case is remanded to the Special Master for further proceedings consistent with this opinion." N.M. Response, at 8 (quoting *Texas v. New*

Mexico, 138 S. Ct. at 860.) Texas does rely upon the quoted language. It would indeed be odd to ignore the specific mandate contained in that sentence since it is not at all ambiguous and it contains the mandate of the Special Master on remand. In any event, to suggest that Texas *only* relies upon that language is incorrect. Texas Response, at 5, Exhibit A,[7] at 2. The Special Master carefully articulated answers to the legal questions posed by New Mexico in its motion to dismiss, supported by a detailed analysis. New Mexico and Colorado filed exceptions, asking the Court *not* to adopt the detailed analysis (without challenging the recommendation to deny the motion itself), and the Court denied those exceptions. The fact that the Court did not ask for oral argument and issue a written decision after considering the argument, as it did with respect to exceptions on the motion to dismiss the United States' Complaint in Intervention, does not infer that the Court did not rely upon the analysis, agree with the analysis or adopt the analysis. To the contrary, the Court's satisfaction with the Special Master's analysis and recommendation to deny the motion to dismiss the Texas Complaint is underscored by the fact that the Court did *not* request oral argument. It is more than reasonable to conclude that the Court accepted the Special Master's recommendation and the analysis upon which it was based.

D. <u>Five Legal Determinations Constitute the Law of the Case</u>

It should be noted that in the United States' response, it posits that the five legal determinations outlined in Texas's Motion as the Special Master's reasoning and interpretation of the 1938 Rio Grande Compact, Act of May 31, 1939, Pub. L. No. 76-96, ch. 155, 53 Stat. 785 (1938 Compact or Compact) should be accorded finality as the law of the case. United States Response, at 12. Texas agrees, and reiterates that when the Special Master recommended denial of New Mexico's Motion to Dismiss Texas's

[7] Exhibit A in Support of the State of Texas's Response to the State of New Mexico's Motion for Partial Judgment on Matters Previously Decided and Brief in Support. (Texas Response, Exhibit A.)

Complaint, the Special Master found that Texas stated a claim under the unambiguous text and structure of the 1938 Compact. First Report, at 194; Texas Motion, at 7. The Special Master used contract interpretation standards to support his recommendation, and he relied solely upon the "plain text and structure" (*id*.) to guide the five legal determinations.

Texas responds to New Mexico's comments regarding each specific legal determination below.

1. *Determination 1*: The Rio Grande Project was fully integrated into the 1938 Compact

New Mexico "agrees that the Court determined that the Compact incorporates the [Project]."[8] N.M. Response, at 11. New Mexico does not agree that the Compact incorporated the Project "wholly and completely," and urges the Court to recognize "New Mexico's Proposed Principle Nos. 5-7," as articulated in the New Mexico Motion. N.M. Response, at 11.[9] As set forth in Texas Response, Exhibit A, Texas disputes that New Mexico's items 5-7 should be the law of the case, and also disputes the way New Mexico characterizes each item.

Additionally, and contrary to New Mexico's assertion, the Special Master found that the Project "is wholly incorporated throughout the 1938 Compact, which imposes

[8] Rio Grande Project (Project).

[9] In Texas's response to the New Mexico Motion, Texas prepared and attached Exhibit A, also attached hereto for ease of reference. Exhibit A is a summary of Texas's position regarding each of New Mexico's eleven items, which New Mexico refers to as "proposed principles." (N.M. Response, at 11). As set forth in the Texas Response to the New Mexico Motion, at footnotes 2 and 12, Texas believes it important to distinguish what is law of the case from those items that may be undisputed and, in that context, decided for other reasons. Exhibit A carefully articulates Texas's analysis of New Mexico's eleven items, explains why all but one of those items cannot constitute law of the case, and also identifies those items that are not law of the case but that Texas nonetheless does not contest.

rights and duties on each of the signatory States in that context." First Report, at 195.

Thus, Determination 1 should be declared the law of the case.

2. *Determination 2*: The text of the 1938 Compact requires New Mexico to relinquish control and dominion over the water it deposits into Elephant Butte Reservoir

The Special Master expressly concluded that the "plain text of Article IV of the 1938 Compact requires New Mexico to relinquish control and dominion over the water it deposits in Elephant Butte Reservoir." First Report, at 197. The Special Master carefully articulated the basis for the legal conclusion, including his finding that the common and straightforward meanings of "*deliver*" and "*obligation*" are determinative. First Report, at 197 (emphasis in original). New Mexico states that it does not "share a common understanding" with the Special Master's conclusions and, as such, argues that this determination should be disregarded as "ambiguous." N.M. Response, at 11-12. The fact that New Mexico does not "share a common understanding" with the Special Master's findings is irrelevant. New Mexico fully briefed its position in the context of its Motion to Dismiss, and the Special Master addressed each of the legal questions posed by New Mexico with finality and repose.

Thus, Determination 2 should be declared the law of the case.

3. *Determination 3*: New Mexico through its agents or subdivisions may not divert or intercept water it is required to deliver to Elephant Butte Reservoir pursuant to the 1938 Compact after the water is released from Elephant Butte Reservoir

Texas's Determination 3 reflects the express findings of the Special Master in the First Report. Texas Motion, at 9; First Report, at 200-02. New Mexico's Response argues that Texas's Determination 3, based upon the Special Master's legal findings, "represents a fundamental misunderstanding of water use and administration." N.M. Response, at 12. Again, New Mexico has already fully briefed its position in the

context of its Motion to Dismiss, and the Special Master rejected the position with finality and repose.

Thus, Determination 3 should be declared the law of the case.

4. *Determination 4*: New Mexico must refrain from post-1938 depletions of water (i.e., depletions that are greater than what occurred in 1938) below Elephant Butte Reservoir

The Special Master determined that New Mexico also has a duty to "refrain from post-Compact depletions of water below Elephant Butte," and that the duty does not arise from any implied covenant or implied term, but from the very meaning of the text of the Compact.[10] First Report, at 197-98; *see* Texas Motion, at 10-11.

New Mexico argues that this cannot be the law of the case because New Mexico did not "feature" this issue in its exceptions. N.M. Response, at 13. This argument is baseless. Whether New Mexico "featured" this issue in its exceptions is irrelevant because New Mexico expressly challenged, and asked the Court to disregard, *all* of the

[10] Albuquerque Bernalillo County Water Utility Authority (ABCWU), in its *Amicus Curiae* Brief in Response to Dispositive Motions Filed by The State of Texas and The United States (ABCWU Response) argues against the idea that what Texas and New Mexico were apportioned was based upon a 1938 baseline, but do not explain what the alternative might be. ABCWU Response, at 9-12. Texas and New Mexico must have been apportioned something in 1938. The 1938 condition, which will be factually developed as part of the trial in this case, assumes the level of development that occurred at the time of the Compact because, among other things, the Rio Grande was fully appropriated in 1938. Limiting development to 1938 conditions was mutual. That is, it did not only limit development in New Mexico, but also in Texas. This stabilization also facilitated development in New Mexico locations where water diversions were junior to Project rights, including the Middle Rio Grande. If development in New Mexico was to be facilitated beyond the 1938 condition, it would need to be done through release of water for this purpose from the Middle Rio Grande and not by taking water otherwise apportioned to Texas. It is odd that ABCWU would argue a position that is hostile to its own interests. ABCWU also continues to propagate the misconception that Texas seeks a state-line delivery where none is provided for in the Compact. Texas does not seek a state line delivery. Water apportioned to it, as recognized by the Supreme Court, is at Elephant Butte Reservoir. *Texas v. New Mexico*, 138 S. Ct. 954, at 957. It is because this delivery is made so far north of the state-line that Texas seeks here to stop New Mexico from intercepting and using in New Mexico water apportioned to Texas.

Special Master's reasoning articulated in the First Report. *See, e.g.*, N.M. Exceptions, at 13. As such, New Mexico *did* challenge this aspect of the Special Master's reasoning in its exceptions, which were expressly overruled. *Texas v. New Mexico*, 138 S. Ct. at 960.

Additionally, while in general the United States agrees with Texas and its analysis of the law of the case issues presented in the Texas Motion and the New Mexico Motion, clarification of one point regarding Determination 4 is important. The United States voices concern that the phrase "'post-1938 depletions' as used by Texas could be given a broader meaning beyond the interference with Project water deliveries." *See* United States Response, at 9. New Mexico makes a similar argument. New Mexico Response, at 13-14.

The United States, by use of example, articulates its concern. United States Response, at 10. The United States notes that the First Report does not address the impacts of changes in irrigation efficiency or cropping patterns on depletions of Project deliveries. Further, the United States says it does not believe that there would be any requirement that New Mexico administer its law to "restrain landowners otherwise authorized to receive Project water from growing certain crops or making improvements to their farms simply to preserve depletions at 1938 levels." *Id*. As a consequence, the United States does not agree that "post-Compact depletions," as the phrase is used in the First Report, encompasses changes in irrigation efficiency or cropping patterns, and Determination 4 should not apply to such depletions." *Id.* Texas takes issue with this limiting interpretation of "post-Compact depletions."

From Texas's perspective, all depletions in excess of what occurred in 1938 reduce the amount of water that Texas was apportioned under the 1938 Compact. "Depletions" are nothing more than the amount of water either consumed in New Mexico or lost as a natural part of irrigation deliveries. Water not consumed or lost returns to the river as "return flows," should be added to direct flow earmarked for Texas upon release

from Elephant Butte Reservoir. This water then constitutes what was apportioned to Texas. Stated another way, what is left over after accounting for consumption and losses is what Texas gets. Thus, total depletions cannot exceed what occurred in 1938 or it reduces what the Compact intended be apportioned to Texas. As the Special Master states in the First Report, ". . . post-Compact depletions of water below Elephant Butte do not arise from any implied covenant or implied term, but from the very meaning of the text of the Compact." First Report, at 197-98.

While water salvaged from Project lands in New Mexico through increased efficiency, as suggested by the United States, can be made available for consumption through greater efficiency on those lands, and consumed on Project lands in New Mexico (instead of being lost) – the total depletion cannot increase over what occurred in 1938 or it deprives Texas of its entitlement under the Compact. The hypothetical result of 100 percent efficiency, for example, would mean Texas received no return flows to its clear detriment.

Project lands within New Mexico could likewise increase consumptive use by, as it has done, changing crops or cropping patterns. There is nothing wrong with this if doing so does not increase total depletions over those total depletions occurring in 1938. Thus, one could plant more water intensive crops than those that existed in 1938 or undertake double cropping, but the total depletions from these changed practices cannot exceed what existed in 1938. The choice to plant fewer acres to facilitate growing higher value crops is a choice Project landowners in New Mexico can make without interference with Texas. However, increasing depletions over what existed in 1938 is not permissible because it reduces the amount of water that Texas will receive and to which it is entitled.

While there may be the need for fact development of the application of the Determination, Determination 4 should be declared the law of the case.

5. *Determination 5*: New Mexico state law plays no role in an interstate dispute

As stated in the Texas Motion, the 1938 Compact represents the negotiation and agreement between Colorado, New Mexico and Texas "for the purpose of effecting an equitable apportionment." Texas Motion, at 11 (quoting First Report, at Appendix A at A-1 (preamble of 1938 Compact).) To achieve this equitable apportionment, "the 1938 Compact commits the water New Mexico delivers to Elephant Butte Reservoir to the Rio Grande Project" and the water "is not subject to appropriation or distribution under New Mexico state law." First Report, at 211. "That water has been committed by compact to the Rio Grande Project for delivery to Texas, Mexico, and lower New Mexico, and that dedication takes priority over all other appropriations granted by New Mexico." First Report, at 213.

New Mexico's argument in response to Determination 5 has already been considered, and rejected. New Mexico has already fully briefed its position in the context of its Motion to Dismiss, and exceptions to the Special Master's First Report. New Mexico's position was rejected with finality and repose. N.M. Motion to Dismiss, at 52-58; N.M. Exceptions, at 25-48; Texas Reply to Exceptions, at 22-25; *Texas v. New Mexico*, 138 S. Ct. at 960.[11]

Thus, Determination 5 should be declared the law of the case.

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[11] *Amicus curiae* Las Cruces asserts an argument based upon New Mexico state law that was previously raised and rejected when the Supreme Court provided leave for Texas to file its Complaint and also in the denial of the New Mexico Motion to Dismiss. This argument falls outside of the amicus standards in Supreme Court Rule 37, which states, in part, such a brief should cover a "relevant matter" not dealt with by the parties. Also, as noted in the Texas Motion, the Texas apportionment cannot be governed by New Mexico state law, rather it is governed by the Compact which commits water delivered to Elephant Butte Reservoir to the Project. First Report, at 211; Texas Motion at 11. The interpretation of the Compact can only be made by the Supreme Court in an original action. The New Mexico adjudication courts' pronouncements may have relevance when New Mexico seeks to remediate the harm that it has caused, but has no relevance as against the Texas claims.

6. The Supreme Court's March 5, 2018 ruling

The Texas Motion reviews the details of the various exceptions filed to the First Report, the procedural history that led to the Court requesting oral argument on certain exceptions related to the United States' Complaint in Intervention, and the Court's March 5, 2018 ruling after oral argument. Texas Motion, at 3-4, 12-16. In that context, Texas explains "principal decisions" reached by the Court in the March 5, 2018 ruling, including its decision that "[t]he United States's exception is sustained, *all other exceptions are overruled, and the case is remanded to the Special Master for further proceedings consistent with this opinion*." *Texas v. New Mexico*, 138 S. Ct. 954, at 960 (emphasis added).

However, Texas does not argue, as suggested by New Mexico, that these decisions included within the Court's March 5, 2018 Ruling should constitute the law of the case. Texas Motion, at 12-16; N.M. Response, at 15-20. The only determinations that Texas asks the Special Master to declare as the law of the case are the five legal determinations articulated above.

Texas recognizes that many of the eleven items New Mexico proposes to be "the law of the case" in its Motion are loosely based upon the decisions in the Court's March 5, 2018 ruling. Texas Response, at 1; N.M. Motion, at 2-3. However, New Mexico misinterprets Texas's mere *mention* of these items in the Texas Motion to be an endorsement that each of the items should properly be considered *legal determinations* constituting the law of the case, and then proceeds to evaluate each decision as "Texas's Principal Decision No. 1 through No. 9." N.M. Response, at 15-20. These are not "Texas's Principal Decisions." They are decisions included within a ruling articulated by the Supreme Court and carry the force, effect, and authority as determined by basic principles of jurisprudence. Texas has not made an assertion that each of these decisions should be the law of the case. Indeed, many of the items are purely factual and, for that reason alone, are not the law of the case. At any rate, Texas responded to each of the

items proposed in the New Mexico Motion and summarized its response to each item, reflected in Exhibit A. *See* supra, p. 8 n.9. Exhibit A carefully articulates Texas's analysis of New Mexico's eleven items, explains why all but one of those items cannot constitute law of the case, and also identifies those items that are not law of the case but that Texas nonetheless does not contest.

E. Texas's Response to Colorado

For the most part Colorado's substantive arguments are addressed directly in Texas's response to New Mexico's Response above, however, it is necessary to point out two points unique to Colorado's Response.

First, Colorado ignores that fact that it was New Mexico and Colorado that filed the rejected exceptions to the Special Master's First Report. Texas filed no exceptions. Consequently, when the Court denied all exceptions except for those of the United States, it was Colorado and New Mexico's exceptions that were rejected, not anything that Texas argued. Indeed, Texas argued that the Colorado and New Mexico exceptions should be rejected. Colorado seeks to ignore the consequences of its action in filing exceptions, because it does not like the Court's resolution of the issues that both Colorado and New Mexico squarely put before the Court.

Second, Colorado, at some point, needs to decide if it is in or out of this litigation. At page 5 of Colorado's Response, it states that it has a concrete interest in the law of the case issue raised in the Texas and New Mexico Motions. Colorado argues that its interest arises because the Supreme Court ruling on how the Compact affects Elephant Butte Reservoir may impact Colorado's ability to store water, irrigate during droughts, and achieve its Compact delivery obligations. However, Colorado nowhere states what any of that means, nor is there any record that Colorado must protect these interests in this case. Colorado has not answered any Complaint and has not sought to explain its bare allegations. Before Colorado's concerns can or should be addressed, if at all, it should be

required to explain itself and not rest on bare allegations that do not appear in any relevant pleadings.

Further, Colorado has clearly asserted positions here as if it had filed claims in this action, in an effort to protect its own articulated interests. Colorado Response, at 5. As noted above, the positions asserted by Colorado are clearly averse to those of Texas and the United States. This is not in itself inappropriate, but raises the question of whether Colorado's position has changed to one in which it is now a full traditional participant in this action. If so, the Special Master may want to consider if Colorado should be treated as such, including requiring it to file an answer, and to pay a full share of the costs otherwise borne by Texas, New Mexico and the United States.

F. Texas's Motion in Limine to Exclude Evidence on Previously Decided Legal Issues Should be Granted

Texas properly asks the Special Master to grant an order, *in limine*, to exclude the introduction of evidence on all legal issues that it determines have been previously decided and constitute the law of the case. The requested order, if granted, serves to promote judicial efficiency, as well as reduce the burden and expense of litigation for all Parties.

New Mexico objects to Texas's request based upon three stated reasons. N.M. Response, at 23. First, New Mexico argues that if the Special Master does not declare, as law of the case, the previously decided legal issues identified by Texas, then the motion *in limine* to exclude evidence should be denied. N.M. Response, at 24. Texas agrees. Indeed, Texas premises its motion *in limine* upon the Special Master first issuing a declaration on the law of the case principles. Texas Motion, at 27-29.

New Mexico further argues that Texas fails to identify the evidence at issue, rendering the Motion "vague and overly broad." N.M. Response, at 23. Contrary to New Mexico's assertion, Texas provides a specific list at page 29 of the Texas Motion identifying the topics upon which to exclude evidence. Texas is not required to identify

the specific elements of the evidence to be excluded (*i.e.*, proposing to exclude a document with a specific Bates number). Rather, a party may raise an *in limine* motion in anticipation of evidentiary issues, including before trial or even during trial, and the motion has the same effect as an objection to evidence offered during trial. *Luce v. United States*, 469 U.S. 38 (1984) at 40 n.2 (citing *Black's Law Dictionary* 708 (5th ed. 1979)); *see also Fed. Deposit Ins. Corp. v. Clark*, 768 F. Supp. 1402, 1413 (D. Colo. 1989).) The United States agrees. U.S. Response, at 21.

Lastly, New Mexico argues that granting the motion *in limine* would "break with the tradition of previous Special Masters, who have taken a cautious and farsighted approach to limiting issues and evidence." N.M. Response, at 24. New Mexico thereafter cites to a series of cases that discuss a Special Master's role to compile a record to support fact finding and decision making based upon evidentiary considerations. N.M. Response, at 25. However, Texas is not asking the Special Master to exclude any evidence that may be pertinent to the Court's ultimate decision on factual issues in the future. Texas's motion *in limine* is limited to the exclusion of evidence that would otherwise have been introduced on matters that have been previously decided and are determined to be the law of the case. Introduction of any evidence on an issue that has already been decided and is not subject to a future fact finding effort or decision by the Special Master or Court is a waste of judicial resources, overly burdensome, and inefficient, as such evidence is irrelevant.

The Special Master should grant Texas's *in limine* motion as set forth in the Texas Motion.

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III. CONCLUSION

Based on the foregoing, Texas respectfully requests the Special Master grant Texas's Request for a Judicial Declaration to Confirm the Legal Issues Previously Decided and Motion in Limine to Exclude the Introduction of Evidence Thereon.

Dated: March 15, 2019

Respectfully submitted,

s/ Stuart L. Somach

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EXHIBIT A IN SUPPORT OF

THE STATE OF TEXAS'S RESPONSE TO THE STATE OF

NEW MEXICO'S MOTION FOR PARTIAL JUDGMENT ON MATTERS

PREVIOUSLY DECIDED AND BRIEF IN SUPPORT

New Mexico's Eleven Items	**Texas's Position Regarding Whether Each Item Should Constitute the Law of the Case, and Supporting Supreme Court/Special Master Authority**
1. "Assuming for purposes of the Motion to Dismiss that the well-pled factual allegations in the complaint are true, both Texas and the United States have pled valid claims arising under the Compact. *See Texas v. New Mexico*, 138 S. Ct. 349 (mem.)(2017)." N.M. Motion, at 2.	**1. Disputed as being law of the case, but undisputed for other reasons.** The phrase "[a]ssuming for purposes of the Motion to Dismiss that the well-pled factual allegations in the complaint are true," is a statement reflecting one facet of the standard of review in the context of a motion to dismiss. It is not a previously decided legal principle. As such, it does not constitute the law of the case. Texas does not dispute that the Special Master and Court came to the legal conclusion that both Texas and the United States pled valid claims arising under the 1938 Compact. Supporting Authority: "For the foregoing reasons, I recommend that the Supreme Court deny New Mexico's motion to dismiss the Complaint filed by Texas, as Texas has stated plausible claims for New Mexico's violation of the 1938 Compact." The First Interim Report of the Special Master on New Mexico's Motion to Dismiss Texas's Complaint and the United States' Complaint in Intervention and Motions of Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 for Leave to Intervene (First Report), at 217. "Motion of New Mexico to dismiss Texas's complaint is denied." *Texas v. New Mexico*, 138 S. Ct. 349 (2017). "A Special Master we appointed to consider the case received briefing, heard argument, and eventually issued an interim report recommending that we deny New Mexico's motion to dismiss Texas's complaint. *We accepted that recommendation*." *Texas v. New Mexico*, 138 S. Ct. 954, 958 (2018) (emphasis added).

New Mexico's Eleven Items	**Texas's Position Regarding Whether Each Item Should Constitute the Law of the Case, and Supporting Supreme Court/Special Master Authority**
	"Taken together, we are persuaded these factors favor allowing the United States to pursue the Compact claims it has pleaded in this original action." *Texas v. New Mexico*, 138 S. Ct. 954, 960 (2018). "The United States's exception is sustained, all other exceptions are overruled, and the case is remanded to the Special Master for further proceedings consistent with this opinion." *Texas v. New Mexico*, 138 S. Ct. 954, 960 (2018).
2. "The Compact applies below Elephant Butte. *See Texas v. New Mexico*, 138 S. Ct. 954 (2018)." N.M. Motion, at 2.	**2. Disputed as being law of the case, and also disputed because of the way New Mexico characterizes the item.** This item, as phrased by New Mexico, cannot constitute the law of the case. Texas does not dispute that the Special Master and Court came to the legal conclusion that the Compact is intended to equitably apportion the waters of the Rio Grande above Fort Quitman (which geographically includes an area below Elephant Butte) (*see* authority below), and Texas agrees with this conclusion. However, the way New Mexico phrases this item does not accurately reflect any legal determination made by the Special Master and Court. It also improperly conflates the concepts of apportionment of the waters of the Rio Grande, and allocation of Project water. As such, it does not constitute the law of the case. Supporting Authority: "The preamble to the 1938 Compact unambiguously declares that, through the 1938 Compact, the signatory States intended to apportion equitably all of the waters of the Rio Grande above Fort Quitman among the three States. *See* 1938 Compact, 53 Stat. 785." First Report, at 194. "[T]he Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts. The Compact indicates that its purpose is to 'effec[t] an equitable apportionment' of 'the waters of the Rio Grande' between the affected States. 53 Stat. 785. Yet it can achieve that purpose only because, by the time the Compact was executed and enacted, the United States had negotiated and approved the Downstream Contracts, in which it assumed a legal responsibility to deliver a certain amount of water to Texas." *Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018).

New Mexico's Eleven Items	**Texas's Position Regarding Whether Each Item Should Constitute the Law of the Case, and Supporting Supreme Court/Special Master Authority**
	"But the purposes identified in Article I's definition of "Usable Water" and in Article VIII indicate that the 1938 Compact also protects the water that is released from Elephant Butte in order for it to reach its intended destination." First Report, at 200. "The text and structure of the 1938 Compact do not simply require New Mexico to make water deliveries to Elephant Butte Reservoir, as New Mexico asserts. Rather, the 1938 Compact is a comprehensive agreement, the text and structure of which equitably apportion water to Texas, as well as to Colorado and New Mexico, and provides a detailed system of accountability to ensure that each State continues to receive its equitable share. New Mexico's obligations under the 1938 Compact do not end discretely at Article IV, but are woven throughout the 1938 Compact to effect the overall purpose of the Compact." First Report, at 201.
3. "The United States agreed by treaty to deliver 60,000 acre-feet of water annually to Mexico upon completion of the new reservoir. *Id.* at 957." N.M. Motion, at 2.	**3. Disputed as being law of the case, but not otherwise disputed.** This item is a statement of fact, not a previously decided legal principle. As such, it does not constitute the law of the case. Texas agrees, however, with the factual statement.
4. "The Project was designed to serve 155,000 irrigable acres of land in New Mexico and Texas. EBID and EPCWID agreed to pay charges in proportion to the amount of land in each district, and in turn 57% of the water was allocated to New Mexico and 43% of the water was allocated to Texas. *Id.*" N.M. Motion, at 2.	**4. Disputed as being law of the case, and also disputed as being a mischaracterization by New Mexico of what was actually stated by the Court.** This item is a statement of fact, not a previously decided legal principle. As such, it does not constitute the law of the case. Texas does not dispute that, in its 2018 opinion, the Court referenced an agreement by the United States to supply water from the Reservoir to downstream water districts with 155,000 irrigable acres in New Mexico and Texas, and that the districts agreed to pay charges in proportion to the percentage of acres lying in each State. *See* authority below. Texas agrees with these facts, as expressed by the Court. *Texas v. New Mexico*, 138 S. Ct. 954, 957 (2018). Texas disagrees, however, with New Mexico's misinterpretation of the Court's factual statement.

New Mexico's Eleven Items	**Texas's Position Regarding Whether Each Item Should Constitute the Law of the Case, and Supporting Supreme Court/Special Master Authority**
	Supporting Authority: "In the first set of agreements, the federal government promised to supply water from the Reservoir to downstream water districts with 155,000 irrigable acres in New Mexico and Texas. In turn, the water districts agreed to pay charges in proportion to the percentage of the total acres lying in each State—roughly 57% for New Mexico and 43% for Texas. We will call those agreements the 'Downstream Contracts.'" *Texas v. New Mexico*, 138 S. Ct. 954, 957 (2018).
5. "The Compact incorporates the 'Downstream Contracts' and the Project to the extent not inconsistent with the express language of the Compact. *Id.* at 957-59." N.M. Motion, at 2.	**5. Disputed as being law of the case, and also disputed because of the way New Mexico characterizes the item.** This item is a mixed statement of law and fact, not a previously decided legal principle. Although Texas does not dispute that the Court stated that the "Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts" (*Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018)), and agrees with that statement, the identification of the contracts in question, the scope and application of the contracts, and whether the contracts are consistent with the Compact, are questions of fact. As such, this item does not constitute the law of the case.
6. "The Compact and Downstream Contracts effect an equitable apportionment of the surface waters of the Rio Grande from Elephant Butte (Reservoir) to Fort Quitman (Texas). *Id*. at 959." N.M. Motion, at 2.	**6. Disputed as being law of the case, and also disputed because of the way New Mexico characterizes the item.** This item, as phrased by New Mexico, cannot constitute the law of the case. Texas does not dispute that the Special Master and Court came to the legal conclusion that the Compact is intended to equitably apportion the waters of the Rio Grande above Fort Quitman (which geographically includes an area below Elephant Butte) (*see* authority below). Texas agrees with this legal conclusion, as expressed by the Court. *Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018). However, the way New Mexico phrases this item does not accurately reflect any legal determination made by the Special Master and Court. It also improperly conflates the concepts of apportionment of the waters of the Rio Grande, and allocation of Project water. As such, it does not constitute the law of the case.

New Mexico's Eleven Items	**Texas's Position Regarding Whether Each Item Should Constitute the Law of the Case, and Supporting Supreme Court/Special Master Authority**
	Supporting Authority: "The preamble to the 1938 Compact unambiguously declares that, through the 1938 Compact, the signatory States intended to apportion equitably all of the waters of the Rio Grande above Fort Quitman among the three States. *See* 1938 Compact, 53 Stat. 785." First Report, at 194. "[T]he Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts. The Compact indicates that its purpose is to 'effec[t] an equitable apportionment' of 'the waters of the Rio Grande' between the affected States. 53 Stat. 785. Yet it can achieve that purpose only because, by the time the Compact was executed and enacted, the United States had negotiated and approved the Downstream Contracts, in which it assumed a legal responsibility to deliver a certain amount of water to Texas. *Texas v. New Mexico,* 138 S. Ct. 954, 959 (2018).
7. "The apportionment is based on Downstream Contracts and the operation of the Project. *Id*. at 957-59." N.M. Motion, at 2.	**7. Disputed as being law of the case, and also disputed because of the way New Mexico characterizes the item.** This item, as phrased by New Mexico, cannot constitute the law of the case. The way New Mexico phrases this item does not accurately reflect any legal determination made by the Special Master and Court. It also improperly conflates the concepts of apportionment of the waters of the Rio Grande, and allocation of Project water. As such, it does not constitute the law of the case.
8. "The United States has obligations that arise under the Compact. Those obligations include the duty to deliver a certain amount of water through the Project to assure that the Compact's equitable apportionment to Texas and part of New Mexico is made. *Id*. at 959." N.M. Motion, at 2-3.	**8. Disputed as being law of the case, and also disputed because of the way New Mexico characterizes the item.** This item, as phrased by New Mexico, cannot constitute the law of the case. Texas does not dispute that the Court found that the United States has a role in the Compact's operation (*see* authority below). Texas agrees with this finding, as expressed by the Court. *Texas v. New Mexico,* 138 S. Ct. 954, 959 (2018). However, the way New Mexico phrases this item does not accurately reflect any legal determination made by the Special Master and Court. It also improperly conflates obligations that may arise under the Compact versus under the Project and/or the Downstream Contracts. As such, it does not constitute the law of the case.

New Mexico's Eleven Items	**Texas's Position Regarding Whether Each Item Should Constitute the Law of the Case, and Supporting Supreme Court/Special Master Authority**
	Supporting Authority: "[T]he Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts. The Compact indicates that its purpose is to 'effec[t] an equitable apportionment' of 'the waters of the Rio Grande' between the affected States. 53 Stat. 785. Yet it can achieve that purpose only because, by the time the Compact was executed and enacted, the United States had negotiated and approved the Downstream Contracts, in which it assumed a legal responsibility to deliver a certain amount of water to Texas." *Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018). "In this way, the United States might be said to serve, through the Downstream Contracts, as a sort of 'agent of the Compact, charged with assuring that the Compact's equitable apportionment' to Texas and part of New Mexico 'is, in fact, made.' Texas's Reply to Exceptions to the First Interim Report of the Special Master 40." *Texas v. New Mexico*, 138 S. Ct., 954 959 (2018). "However described, it is clear enough that the federal government has an interest in seeing that water is deposited in the Reservoir consistent with the Compact's terms. That is what allows the United States to meet its duties under the Downstream Contracts, which are themselves, essential to the fulfillment of the Compact's expressly stated purpose." *Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018).
9. "New Mexico is obligated by the Compact to deliver a specified amount of water to Elephant Butte Reservoir. *Id*." N.M. Motion, at 3.	**9. Undisputed.** Supporting Authority: Article IV of the 1938 Compact requires New Mexico to "deliver" Project water at Elephant Butte Reservoir. First Report, at 196, including FN 51. Article IV of the 1938 Compact also identifies that the delivery of water by New Mexico is an "obligation." First Report, at 196. "But then, instead of similarly requiring New Mexico to deliver a specified amount of water annually to the Texas state line, the Compact directed New Mexico to deliver water to the Reservoir. *Id.*, at 788. In isolation, this might have seemed a curious choice, for a promise to

New Mexico's Eleven Items	**Texas's Position Regarding Whether Each Item Should Constitute the Law of the Case, and Supporting Supreme Court/Special Master Authority**
	deliver water to a reservoir more than 100 miles inside New Mexico would seemingly secure nothing for Texas. But the choice made all the sense in the world in light of the simultaneously negotiated Downstream Contracts that promised Texas water districts a certain amount of water every year from the Reservoir's resources." *Texas v. New Mexico*, 138 S. Ct. 954, 957 (2018). "And to fill that Reservoir the Compact obliges New Mexico to deliver a specified amount of water to the facility." *Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018).
10. "A breach of the Compact, if proven, could jeopardize the federal government's ability to satisfy its treaty obligation to Mexico. *Id.*" N.M. Motion, at 3.	**10. Disputed as being the law of the case, but not disputed for other reasons.** This item represents one of the several factors that the Court relied upon in granting the United States' motion to intervene and pursue Compact claims in this action (*see* authority below). Texas agrees with the analysis, as expressed by the Court. *Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018). However, the item represents a hypothetical scenario that New Mexico admits would require "proof." The Court also premised its ruling on the consideration of various factors that "[t]aken together," supported its decision. As such, the item does not represent a legal conclusion that is properly the law of the case moving forward. Supporting Authority: "*Third*, a breach of the Compact could jeopardize the federal government's ability to satisfy its treaty obligations. …Our treaty with Mexico requires the federal government to deliver 60,000 acre-feet of water annually from the Elephant Butte Reservoir. And to fill that Reservoir the Compact obliges New Mexico to deliver a specified amount of water to the facility. So a failure by New Mexico to meet its Compact obligations could directly impair the federal government's ability to perform its obligations under the treaty." *Texas v. New Mexico*, 138 S. Ct. 954, 960 (2018). "Taken together, we are persuaded these factors favor allowing the United States to pursue the Compact claims it has pleaded in this original action." *Texas v. New Mexico*, 138 S. Ct. 954, 960 (2018).

New Mexico's Eleven Items	**Texas's Position Regarding Whether Each Item Should Constitute the Law of the Case, and Supporting Supreme Court/Special Master Authority**
11. "The claims asserted by the United States do not and may not expand the scope of this litigation beyond what was alleged in Texas's Complaint. *Id.* at 960." N.M. Motion, at 3.	**11. Disputed as being the law of the case, but not disputed for other reasons.** This item, in part, represents one of the several factors that the Court relied upon in granting the United States' motion to intervene and pursue Compact claims in this action and, in part, goes beyond the language utilized by the Court (*see* authority below). The Court also premised its ruling on the consideration of various factors that "[t]aken together." supported its decision. Although Texas agrees with the analysis, as expressed by the Court *Texas v. New Mexico,* 138 S. Ct. 954, 960 (2018), and agrees with the premise that a party may not assert claims that expand the scope of this litigation (without leave of the Court), the item does not represent a legal conclusion that is properly the law of the case moving forward. Supporting Authority: *"Fourth*, the United States has asserted its Compact claims in an existing action brought by Texas, seeking substantially the same relief and without that State's objection. This case does not present the question whether the United States could initiate litigation to force a State to perform its obligations under the Compact or expand the scope of an existing controversy between States." *Texas v. New Mexico,* 138 S. Ct. 954, 960 (2018) "Taken together, we are persuaded these factors favor allowing the United States to pursue the Compact claims it has pleaded in this original action." *Texas v. New Mexico,* 138 S. Ct. 954, 960 (2018).

No. 141, Original

In the

SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

OFFICE OF THE SPECIAL MASTER

CERTIFICATE OF SERVICE

This is to certify that on the 15th day of March 2019, I caused a true and correct copy of **THE STATE OF TEXAS'S REPLY BRIEF IN SUPPORT OF REQUEST FOR A JUDICIAL DECLARATION TO CONFIRM THE LEGAL ISSUES PREVIOUSLY DECIDED AND MOTION IN LIMINE TO EXCLUDE THE INTRODUCTION OF EVIDENCE THEREON** to be served upon all counsel for all parties to this action and amici, via electronic mail, as indicated in the Service List attached hereto.

Respectfully submitted,

Dated: March 15, 2019

Yolanda De La Cruz

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(Service via E-Mail and US Mail)

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