

**No. 141, Original**

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**In the  
SUPREME COURT OF THE UNITED STATES**

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**STATE OF TEXAS,**

**Plaintiff,  
v.**

**STATE OF NEW MEXICO and  
STATE OF COLORADO,**

**Defendants**

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**OFFICE OF THE SPECIAL MASTER**

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**UNITED STATES OF AMERICA’S JANUARY 2019 STATUS REPORT**

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The United States respectfully submits its January 2019 status report to the Special Master pursuant to paragraph 5 of the Case Management Plan dated September 6, 2018 (“CMP”).

**I. The United States’ Production of Documents**

The status of the United States’ production of documents is summarized in the United States’ December 2018 status report, filed with the Special Master on December 7, 2018. Although the United States intends to review potentially discoverable documents and supplement its production of documents as responsive documents are identified and become available for production, it has been impeded in doing so because of the partial federal government shutdown that went into effect at midnight on December 21, 2018 and remains in effect. The effects of the shutdown are discussed below.

**II. Production of Electronically Stored Information (“ESI”)**

The United States has participated in negotiation of the Stipulation for the production of ESI entered into by the parties and filed with the Special Master on November 14, 2018. The parties are currently negotiating agreed upon search terms for their initial sweep of computer, email and electronic systems for ESI. The parties are currently attempting to test and refine the search terms in order to limit the use of terms that result in over-broad collection of tens of thousands of documents irrelevant to the facts and issues of this case. The United States participated in a conference call of counsel on December 20, 2018, to discuss these matters.

**III. Index of Documents**

The Parties are also discussing the creation of an index system for documents produced in this case, as provided in Section 7.2.2 of the CMP. The United States anticipates that the system will also address the handling of ESI.

#### **IV. Further Discovery**

Fact discovery commenced in this case on September 1, 2018. Depositions of fact witnesses have commenced. The United States participated in depositions of fact witnesses in Las Cruces, N.M. on December 12 and 13, 2018. Written discovery has been propounded on New Mexico by Texas, and on Amici by New Mexico. The United States anticipates that additional written discovery will be propounded in the near future.

#### **V. Motions on Pleadings and Motions for Partial Judgment**

The November 21, 2018 Amendment to the Case Management Plan adopted modified deadlines for future proceedings, including a December 24, 2018 deadline for the filing of Motions for Judgment on the Pleadings and Motions for Partial Judgment regarding “law of the case” or matters previously decided. The Special Master subsequently extended the December 24 deadline to December 26, per Notice to Counsel dated December 19, 2018. On December 21, 2018, ahead of the government shutdown, the United States filed its motion for judgment on the pleadings against New Mexico’s counterclaims 2, 3, 5, 6, 7, 8, and 9. On December 26, Texas filed (1) a request for a judicial declaration to confirm the legal issues previously decided and motion in limine to exclude the introduction of evidence thereon, and (2) a motion to strike or for partial judgment regarding New Mexico’s counterclaims and affirmative defenses, under Federal Rules of Civil Procedure 12(c) and 56. On December 26, New Mexico filed a motion for partial judgment on matters previously decided and brief in support. Under the amended case management plan issued by the Special Master on November 21, 2018, responses to these motions are due January 23, 2019, and replies are due February 7, 2019. The Special Master has scheduled an in-person oral argument on these motions for February 19, 2019, in Denver.

## **VI. The Lapse in Federal Appropriations and the Current Partial Government Shutdown**

At the end of the day on December 21, 2018, the appropriations act that had been funding the Department of Justice (“Department”) expired and appropriations to the Department lapsed. The same is true for several other Executive agencies, including the Departments of the Interior, State, and the U.S. Section of the International Boundary and Water Commission. The Department does not know when funding will be restored by Congress. Absent an appropriation, Department of Justice attorneys and employees of the federal agencies referenced above are prohibited from working, even on a voluntary basis, except in very limited circumstances, including “emergencies involving the safety of human life or the protection of property.” 31 U.S.C. § 1342. The government shutdown has impaired the ability of Department of Justice attorneys to review the motions filed on December 26 by Texas and New Mexico, to confer internally and with client agency contacts about those motions, and to prepare responses to the motions presently due on January 23. Accordingly, the United States is preparing a request for an extension of the January 23 and February 7 deadlines, and is contacting counsel for the parties to ascertain whether they concur in such a request. As soon as the United States hears back from counsel, the United States will submit its request under separate cover.

Respectfully submitted this 4th day of January, 2019,

/s/ Stephen M. Macfarlane  
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United States Department of Justice

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**CERTIFICATE OF SERVICE**

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This is to certify that on the 4th day of January, 2019, I caused a true and correct copy of **UNITED STATES OF AMERICA’S JANUARY 2019 STATUS REPORT** to be served upon the Special Master via electronic and U.S. mail, as indicated below:

**Special Master**

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On the 4th day of January, 2019, **UNITED STATES OF AMERICA’S JANUARY 2019 STATUS REPORT** was served via electronic mail and/or U.S. mail as indicated, upon those individuals listed on the Service List, attached hereto.

Respectfully submitted,

/s/ D. Zachary Wall  
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