

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

STATE OF COLORADO'S RESPONSE TO UNITED STATES' MOTION FOR
JUDGMENT ON THE PLEADINGS AGAINST NEW MEXICO'S
COUNTERCLAIMS 2, 3, 5, 6, 7, 8, AND 9, AND TEXAS' MOTION TO STRIKE
OR FOR PARTIAL JUDGMENT REGARDING NEW MEXICO'S
COUNTERCLAIMS AND AFFIRMATIVE DEFENSES, FEDERAL RULES OF
CIVIL PROCEDURE RULE 12(C) AND RULE 56

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STATEMENT OF THE CASE

Following the Supreme Court's order allowing the United States to proceed with its claims, *Texas v. New Mexico*, 138 S. Ct. 954 (2018) ("March 5th Opinion"), the plaintiffs resubmitted their complaints with the Special Master. He then ordered New Mexico to file any answer and counterclaims by May 22, 2018. Case Management Order No. 16, March 22, 2018. Accordingly, New Mexico filed its answer, along with several counterclaims, with the Special Master. In its answer, New Mexico asserted several equitable affirmative defenses common to both complaints: unclean hands, acceptance, waiver, estoppel, failure to exhaust remedies, and laches. The United States and Texas both filed answers to New Mexico's counterclaims. Texas and New Mexico filed motions for determination of decided legal issues, which Colorado addresses in a companion brief.

This response addresses parts of the remaining motions filed by the United States and Texas seeking to dismiss claims and strike defenses: *United States' Motion for Judgment on the Pleadings Against New Mexico's Counterclaims 2, 3, 5, 6, 7, 8, and 9*, and *Texas' Motion to Strike or for Partial Judgment regarding New Mexico's Counterclaims and Affirmative Defenses, Federal Rules of Civil Procedure Rule 12(c) and Rule 56*. First, the United States argued that it has sovereign immunity shielding it from all of New Mexico's counterclaims. Second, the United States and Texas also seek to dismiss some of New Mexico's counterclaims because

of an asserted lack of interest or injury giving New Mexico standing or for failing to state an actionable claim. The United States seeks to dismiss counterclaims 2, 5, 6, 7, 8, and 9.¹ Texas seeks to dismiss counterclaims 2, 5, and 7. Third, Texas asks to strike New Mexico's equitable affirmative defenses as unavailable as a matter of law in a compact dispute.

SUMMARY OF ARGUMENT

First, the United States has waived sovereign immunity for all compulsory counterclaims. The motions filed by the United States and Texas seeking to dismiss or limit claims or defenses begin with the incorrect presumption that the Rio Grande Compact, ch. 155, 53 Stat. 785 (1939), is not at issue. One of the disputes involves defining the relationship between the Rio Grande Project, including its Elephant Butte Reservoir, and the Rio Grande Compact. To the extent Texas, the United States, or New Mexico pleaded claims asserting actions that affect Rio Grande Project deliveries violate the Rio Grande Compact, they are part of the same

¹ New Mexico's titles its counterclaims as follows: First, Compact violation by Texas caused by unauthorized depletions; Second, Interference with Compact apportionment against the United States; Third, Improper release of Compact credit water by the United States; Fourth, Compact violation and unjust enrichment against Texas; Fifth, Violation of the Water Supply Act by the United States; Sixth, Improper Compact and Project accounting against the United States; Seventh, Violation of the Miscellaneous Proposes Act and the Compact against Texas and the United States; Eighth, Improper Project maintenance against the United States; Ninth, Failure to enforce the 1906 Convention and Compact violation against the United States.

transaction or occurrence. If a counterclaim meets this standard, a party may bring it.

Second, to the extent a signatory State asserts injury because of a violation of a compact, it has standing and has stated a claim. To date the parties have provided the Court and Special Master with contradictory statements regarding the relationship between Rio Grande Project water deliveries and Rio Grande Compact apportionments to the States. As such, the existing record is insufficient to grant the motions.

Third, Texas incorrectly presumes that an equitable defense must impermissibly reform the terms of a compact. The United States Supreme Court has not held that equitable defenses are unavailable in a compact dispute. Instead, it has, on several occasions, considered the merits of equitable defenses. Therefore, as a general matter of law, equitable defenses are available.

Through this Response, Colorado does not take a position whether New Mexico has adequately drafted its claims or defenses or followed necessary procedures. Nor does Colorado weigh in on the merits of the claims or defenses themselves. Colorado's Response does, however, operate to help assure that the Special Master is fully advised of important aspects of the law and the posture of

the case, and does not base a ruling on inaccurate or incomplete arguments regarding the Rio Grande Compact.

ARGUMENT

- I. **The United States does not have sovereign immunity from compulsory counterclaims alleging Rio Grande Compact violations.**
 - a. **The United States has waived sovereign immunity for compulsory counterclaims.**

The United States waived sovereign immunity for counterclaims based on the Rio Grande Compact. The United States intervened in this case to bring a claim against New Mexico under on the Compact. In so doing, the United States implicated the Compact in this litigation. To the extent that New Mexico asserts counterclaims for Rio Grande Compact violations, its claims arise out of the same transaction and occurrence as the United States' claims, and the United States has, therefore, waived sovereign immunity.

A compulsory counterclaim is based on the same transaction or occurrence as alleged in the complaint. *United States v. Iron Mountain Mines, Inc.*, 812 F. Supp, 1528, 1551 (E.D. Cal. 1992). The United States filed a complaint alleging actions by New Mexico below Elephant Butte Reservoir violated the Rio Grande Compact. United States Complaint in Intervention at pp. 4-5. Thus, the United States put at issue the role of the Compact below Elephant Butte Reservoir and the nature of the Compact apportionment to New Mexico and Texas. The Court identified the Project

as inextricably intertwined with the Compact. *Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018). Because the nature of the relationship between the Project and the Compact is intertwined, but not yet defined, the Special Master should allow further proceedings to determine the nature of that relationship.

Further, in its answer, the United States admitted that the Supreme Court has jurisdiction over it's the Compact dispute. United States Answer at p. 2. Also, "The United States has agreed to submit to this Court's jurisdiction and participate in this suit as a party, and in so doing it has agreed to be bound by the Court's interpretation of the Compact." United States Sur-Reply to Exceptions at p. 14. And further, "The United States has intervened and subjected itself to his Court's jurisdiction to permit a full resolution of the dispute among all parties over the interpretation of the Compact." United States Reply to Exceptions at p. 19. Therefore, the United States cannot now assert sovereign immunity in response to Compact counterclaims.

In another line of argument, the United States stresses the difference between recoupment and set off. The law on compulsory counterclaims renders this argument obsolete. First, the United States' analysis is based on superseded legal theories. Recoupment has been described as relating to the same transaction or occurrence as a plaintiff's claim. Setoffs were described as unrelated to the plaintiff's claim. In modern parlance, these concepts have been converted by the

Federal Rules of Civil Procedure into compulsory (recoupment) and permissive (setoff) counterclaims, respectively. *Iron Mountain Mines, Inc.*, 812 F. Supp. at 1551. Second, the United States has waived its sovereign immunity for compulsory counter claims. “When the United States institutes an action, the defendant may assert only compulsory counterclaims.” *Iron Mountain Mines, Inc.*, 812 F. Supp. at 1551, quoting *Spawr v. United States*, 796 F.2d 279, 281 (9th Cir. 1986).

Courts liberally interpret the requirement that compulsory counterclaims arise from the same transaction or occurrence as the initial claim. F.R.C.P. 13; *Iron Mountain Mines, Inc.*, 812 F. Supp. at 1552. Conversely, the United States’ narrow interpretation limiting the nature of relief sought in a counterclaim has been rejected by courts in more recent times. The United States relies on *Frederick v. United States*, 386 F.2d 481 (5th Cir. 1967), which held that affirmative relief could not be allowed because it was different than the nature of relief sought by the United States. However, that narrow view has been rejected by more recent cases interpreting how the F.R.C.P. treats compulsory counterclaims. See, *Iron Mountain Mines, Inc.*, 812 F. Supp. at 1551; *Livera v. First Nat’l State Bank of New Jersey*, 879 F.2d 1186, 1195 (3rd Cir. 1989), cert. den. sub nom. *Livera v. United States Small Business Admin.*, 493 U.S. 937 (1989)(holding recoupment available against the United States when it initiated contract claim).

b. Statutory waiver of sovereign immunity is not needed for compulsory counterclaims.

The United States next argues that it cannot be sued because the Rio Grande Compact does not create a statutory waiver of immunity. This argument should be rejected for two reasons. First, a statutory waiver for compact-based counterclaims in this case is not necessary because the United States waived its sovereign immunity when it intervened as a plaintiff. *Frederick*, 386 F.2d at 489 (holding statutory waiver of sovereign immunity not needed when United States filed suit and counterclaims are from the same transaction or occurrence). This argument is addressed above.

Second, the issue raised by the United States, and to some degree by Texas, is that the counterclaims raised by New Mexico may also implicate Rio Grande Project operations. Both Texas' and the United States' complaints describe use of the Rio Grande below Elephant Butte Reservoir. Specifically, they allege that New Mexico has violated the Rio Grande Compact "by allowing downstream New Mexico users to siphon off water below the Reservoir . . ." *Texas v. New Mexico*, 138 S. Ct. at 958. The Court further noted that the Compact is inextricably intertwined with the Rio Grande Project. *Id.* at 959. The United States has legal responsibility to deliver water from the Rio Grande Project to Texas and part of New Mexico through contracts. *Id.* Claims describing how terms for Compact apportionments through delivery of Project water involve the same disputed issues already raised by Texas

and the United States. Therefore, the unresolved question is the nature of the relationship between the Rio Grande Compact and the Rio Grande Project. The Court recognized that the two were intertwined, but did not elaborate on the legal nature of what that means for the Compact. *See*, Colorado's Response to the State of Texas' Request for a Judicial Declaration to Confirm the Legal Issues Previously Decided and Motion in Limine to Exclude the Introduction of Evidence Thereon and State of New Mexico's Motion for Partial Judgment on Matters Previously Decided.

Moreover, the United States' own claims do not make a clear distinction between the Rio Grande Project and the Rio Grande Compact. New Mexico's counterclaims numbered 2, 3, 6, 7, and 9 all allege violations of the Compact. New Mexico has alleged some claims as stand-alone Compact violations, but for others it alleges violations of both the Compact and other statutes. The United States "did not draw a distinction between claims based on the Compact and claims based upon other laws." United States Sur-Reply to Exceptions p. 10. Therefore, the United States has not alleged in its complaint a distinction between claims based on the Compact and claims based on Project operations. It now asserts an insurmountable distinction between the two in an effort to dismiss counterclaims based on the Compact. It would be incongruous to allow the United States to deliberately not draw distinctions among the laws on which it based its claims, while not allowing a State to do the same. This makes it difficult to determine whether counterclaims

based on the same factual transaction or occurrence are based on a violation of the Compact or some other federal laws. Given that the United States filed its complaint alleging interference with Project water deliveries under both the Compact and other laws, a counterclaim would fall under the same transaction or occurrence by making allegations that a method of making Project water deliveries violated the Compact. Should the Special Master determine that New Mexico's counterclaims raise Compact claims, the United States has waived sovereign immunity with regard to them.

II. The United States and Texas have made conflicting assertions regarding the relationship between the Rio Grande Compact and the Rio Grande Project, undermining their arguments that a State lacks standing to bring Compact counterclaims.

The Rio Grande Compact "effects an equitable apportionment of the waters of the Rio Grande, above Fort Quitman, Texas, among the States of Colorado, New Mexico, and Texas." Compact, preamble. The motions to strike or dismiss by the United States and Texas are based, in part, on presumptions that New Mexico's counterclaims are not based on the Compact. The Special Master must sort out the conflicting positions of the parties to determine whether the case is about Compact apportionment among the States or about the contractual deliveries of water from the Rio Grande Project independent of Compact apportionment. This is important because if the Project operates independently from the Compact, claims and counterclaims based on the Project are not Compact claims. Conversely, a

determination that the Compact apportions water among the States below Elephant Butte Reservoir drives an investigation into terms the Compact uses to effect that apportionment. Thus far, parties have made assertions on both sides, depending on the issue briefed. This highlights both the need to determine how the Compact and the Project interact, and that the Court has not yet made those conclusions. *See*, Colorado's Response to the State of Texas' Request for a Judicial Declaration to Confirm the Legal Issues Previously Decided and Motion in Limine to Exclude the Introduction of Evidence Thereon and State of New Mexico's Motion for Partial Judgment on Matters Previously Decided.

Texas offers an argument based on a distinction using the terms "allocation" and "apportionment" to attempt to create a divide between the Project and the Compact. Texas' Motion to Strike or for Partial Judgment regarding New Mexico's Counterclaims and Affirmative Defenses at p. 17. Texas also argues that Rio Grande Project allocations on a per-acre basis are not part of the Compact. *Id.*

However, Texas has made conflicting assertions of its own that contradict this argument. It has alleged that water released from Elephant Butte Reservoir is water apportioned among the States by the Compact. "Therefore, the doctrine of equitable apportionment, not Reclamation Law, governs the Project's delivery of apportioned water to Texas and New Mexico (i.e., the distribution of water below Elephant Butte Reservoir.)" Texas Reply to Exceptions at p. 40-41. "[T]he Compact

utilizes the Rio Grande Project, operated by the United States, 'as the single vehicle by which to apportion' Rio Grande water to Texas and New Mexico." Texas Reply to Exceptions at p. 40. "Therefore, the Project water leaving Elephant Butte belongs to either New Mexico or Texas *by Compact*, or to Mexico by the Convention of 1906." Texas Sur-Reply to Exceptions at p. 2, quoting Report at p. 212-213 (emphasis original). "In short, the 1938 Compact uses the Project to deliver compact water." Texas Sur-Reply to Exceptions at p. 2. These statements indicate Texas' position that the water from the Project is apportioned among the States by the Compact.

Conversely, Texas has made assertions that delivery of water from the Rio Grande Project is separate from the Compact. "Once delivered to Elephant Butte Reservoir, that water is allocated and belongs to Rio Grande Project beneficiaries in southern New Mexico and in Texas, based upon allocations derived from the Rio Grande Project authorization and relevant contractual arrangements." Texas Complaint at p. 2. "The Rio Grande Compact did not specifically identify quantitative allocations of water below Elephant Butte Dam as between southern New Mexico and Texas; nor did it articulate a specific state-line delivery allocation." Texas Complaint at p. 4-5. These statements indicate that the water leaving Elephant Butte Reservoir is not an apportionment among the States governed by the Compact.

The United States asserts that New Mexico lacks standing to bring claims that involve Rio Grande Project deliveries because those deliveries are controlled by reclamation law, not by the Compact. United States' Motion for Judgment on the Pleadings Against New Mexico's Counterclaims 2, 3, 5, 6, 7, 8, and 9 at p. 22. Similarly, the United States has varied its representation of what law governs the waters released from Elephant Butte Reservoir. While it now argues that New Mexico cannot bring counterclaims regarding deliveries of water from the reservoir because it is purely a contractual matter, it has in the past emphasized the Compact as controlling legal authority. "In short, the United States has an interest in ensuring that the Compact is interpreted to require New Mexico to curtail diversions of surface water and hydrologically connected groundwater in New Mexico below Elephant Butte Reservoir to the extent those diversion interfere with Project deliveries that fulfill the United States' treaty obligations to Mexico and complete the Compact's apportionment to Texas and lower New Mexico." United States Sur-Reply to Exceptions at p.3-4. "To effectuate an equitable apportionment of the waters of the Rio Grande, the compacting States incorporated and relied upon an existing federal reclamation project 'as the vehicle to guarantee delivery of Texas's and part of New Mexico's equitable apportionment of the stream.'" United States Reply to Exceptions at p 18.

That both Texas and the United States now assert that Project deliveries are not part of this dispute, but had previously asserted that Project deliveries effected the equitable apportionment under the Compact, highlights the undefined relationship between the Project and the Compact. There are disputed issues regarding how and whether the Compact's apportionment to the States utilizes the Rio Grande Project. Texas has stated that the Compact does not set forth a quantity of water apportioned to Texas. Texas Complaint at pp. 4-5. In that absence, Texas refers to adverse impacts to the amounts and locations of Rio Grande Project delivery of water to Project beneficiaries. See, Texas Complaint at p. 2. Yet it would be difficult, if not impossible, to determine how a Compact violation may occur based on impacts to Project deliveries without also knowing how the Compact's terms govern Project deliveries, including the amount of deliveries subject to the Compact apportionment and where they must occur. Thus, the Special Master should not accept the assertions in the motions at this time that claims to describe what is or is not a part of the Compact's terms for apportionment to the States. If a State asserts a claim based on the apportionments below Elephant Butte Reservoir made to it by the Compact, that claim is within the scope of the current disputed issues. The compacting States have standing to bring claims for violation of the Compact. Conversely, if delivery of water from Elephant Butte Reservoir for certain amounts and certain locations is governed solely by the reclamation law, then it appears the

claims by all the parties may fail to identify a controversy governed by the terms of the Compact.

III. As a general matter of law, equitable defenses are available in compact disputes.

As a general matter, the affirmative defenses of unclean hands, acceptance, waiver, estoppel, and laches are not legally precluded solely because this is a compact action. In its motion to dismiss these defenses, Texas starts with the presumption that an equitable defense equates to reformation of a compact. It then analyzes law regarding reformation. Such arguments, however, miss the mark. Defenses do not create new terms in a compact, they inform whether a plaintiff is entitled to the relief it seeks. Compacts are construed by first turning to their express terms. *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 628 (2013). Past customary practice may inform the intent of compacting States in the absence of express terms. *Id.* at 633. A party's course of performance under a compact is highly significant evidence of the compact's terms. *Id.* at 636. Thus, a State's past conduct may be relevant to determine whether a breach of a compact has occurred.

This does not prevent a court from examining equitable defenses. Modern courts no longer base their jurisdiction on distinctions between law and equity. See, *Granite State Ins. Co. v. Smart Modular Technologies, Inc.*, 76 F.3d 1023, 1027 (9th Cir. 1996), citing 5 James W. Moore, *Moore's Federal Practice* ¶38.4[6] (2nd ed.

1995). See also, *Omaha Work Herald Co. v. Neasi-Weber Int'l*, 205 F.3d 1347 (8th Cir. 2000); *Home Guarantee Ins. Corp. v. Third Financial Serv. Inc.*, 694 F. Supp. 438 (M.D. Tenn. 1988). “Equitable estoppel and waiver may be asserted as affirmative defenses in a contract action.” *Norfolk Southern Railway Co. v. GWSI, Inc.*, 2018 WL 4466008 *6, citing *Belnick, Inc. v. TBB Global Logistics, Inc.*, 106 F. Supp. 3d 551, 566-567 (M.D. Pa. 2019)(citations omitted). Moreover, the Supreme Court has allowed equitable defenses when determining whether relief is available. See, e.g., *New Jersey v. New York*, 523 U.S. 767, 786-787 (1998); *Kansas v. Colorado*, 514 U.S. 673, 687 (1995). Accordingly, the Special Master should not hold that affirmative defenses are unavailable as a matter of law solely because this is a compact dispute.

The affirmative defense of unclean hands has not been precluded by the Court for use in a compact case. Texas misconstrues the cases it cites when it claims they support precluding unclean hand as a defense in a compact case. They do not. Instead, they discuss reformation of compacts or decrees.

Texas cites *Nebraska v. Wyoming*, 507 U.S. 584, 592 (1993) for the proposition that unclean hands is not an available defense in a compact case. The *Nebraska* Court actually considered the difference between a claim to enforce a decree and one to modify a decree. The decision did not involve whether a defendant could assert an affirmative defense of unclean hands.

Texas also refers to *Texas v. New Mexico*, 462 U.S. 554 (1983). That opinion about the Pecos River Compact, however, did not consider affirmative defenses. Instead it rejected the Special Master's recommendation to create a right to vote for the United States and the use of an accounting method different from the one accepted by the compact's commission. The case is consistent with the prohibition of court reformation of a compact, but offers no guidance on the use of equitable defenses.

Texas's reliance on a memorandum in *Kansas v. Nebraska*, No. 126 Orig., Memorandum of Decision No. 3 (Oct. 19, 2001) is also misplaced. Texas references a memorandum, wherein the Special Master did not allow unclean hands. However, the Special Master did not find the defense legally unavailable because it was a compact dispute. Instead, because Kansas and Nebraska were both upstream and downstream states to each other, the unclean hands defense merely duplicated Nebraska's existing claim of overuse against Kansas. Rather than use the defenses to defeat claims of Nebraska's own over use, the Special Master desired each party to fully prove up its claims by tallying each State's total use. He did not rule that unclean hands was unavailable as an affirmative defense as a matter of law. See Memorandum of Decision No. 3 at pp. 8-10. Moreover, the parties did not file exceptions on that decision, so the Supreme Court did not make a final determination on the issue. Texas refers to these cases under the premise that an

unclean hands defense amounts to creating new terms in the Compact. The defense does no such thing. Instead it goes to consideration of whether a plaintiff is entitled to the claimed relief under the alleged violations of compact terms.

Finally, Texas has asserted the affirmative defense of unclean hands in its own answer. Texas Answer to the Counterclaims of the State of New Mexico at p. 16. Texas would be estopped from successfully using this defense itself and then arguing it is unavailable to another party. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)(holding state is barred by judicial estoppel from successfully maintaining a position and thereafter assuming a contrary position). Texas has not yet prevailed on its unclean hands defense; however, it would be inconsistent to allow Texas to assert equitable defenses while also allowing Texas to argue that equitable defenses are not legally available in this action. Given the Supreme Court has not rejected the defense, the Special Master should not preclude the defense of unclean hands as a matter of law.

The Supreme Court has allowed another group of related affirmative defenses, acceptance, waiver, and estoppel, in prior compact disputes. These defenses all deal with past conduct of the parties not taking action or ratifying actions relating to a compact. In *New Jersey v. New York*, 523 U.S. 767, 786-787 (1998), the Court allowed consideration of prescriptive acquiescence for ownership of Ellis Island. Although New York did not prevail in that defense against New Jersey's claim of

ownership, the Court did consider such defenses even though the Island had already been divided. In *Kansas v. Colorado*, 1994 WL 16189353, 78 (1994) the Special Master allowed evidence of waiver in the compact dispute by Colorado. These cases demonstrate that these defenses are not precluded under the theory that they modify compact terms. Instead, the defenses may demonstrate what the States believe are actions consistent with the terms of a compact.

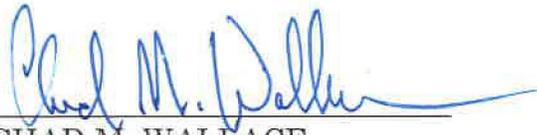
Likewise, laches is not precluded solely because this is a compact dispute. Texas misapplies *Texas v. New Mexico*, 482 U.S. 124 (1987) for its proposition that laches is not available. As described above, that opinion rejected adding terms to the Pecos River Compact to give the United States voting rights and changing the accounting methods. It had nothing to do with application of laches as a defense. Instead, the Special Master may refer to *Kansas v. Colorado*, 514 U.S. 673, 687 (1995) and *New Jersey v. New York*, 523 U.S. 767, 806-807 (1998), which both allowed a laches defense.

CONCLUSION

Because these claims have not been tested by discovery or the adversarial process, the Special Master should deny the United States' request to dismiss compulsory compact counterclaims, deny the motion by the United States and Texas to dismiss counterclaims based on the Compact for lack of standing or failure

to state a claim, and deny Texas' motion to strike the equitable defenses of unclean hands, acceptance, waiver, estoppel, and laches.

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OFFICE OF THE SPECIAL MASTER

STATE OF COLORADO'S CERTIFICATE OF SERVICE

This is to certify that on the 28th day of February, 2019, I caused a true and correct copy of the **State of Colorado's Response to United States' Motion for Judgment on the Pleadings Against New Mexico's Counterclaims 2, 3, 5, 6, 7, 8, and 9, and Texas' Motion to Strike or for Partial Judgment regarding New Mexico's Counterclaims and Affirmative Defenses, Federal Rules of Civil Procedure Rule 12(c) and Rule 56** to be served by e-mail upon all counsel of record and counsel for interested parties and mail courier upon the Special Master and Clerk of the 8th Circuit Michael Gans.

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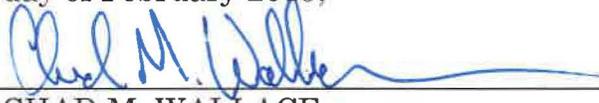
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