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 NEW MEXICO'S RESPONSE TO STATE OF TEXAS'S SECOND EVIDENTIARY OBJECTIONS

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February 22, 2021

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This brief is in response to the *State of Texas's Objections and Reply to the State of New Mexico's Consolidated Statement of Facts and Appendix 1 Filed by New Mexico in Response to Texas's Motion for Partial Summary Judgment* ("Tex. 2d Objections") filed February 5, 2021.

INTRODUCTION

For the reasons set forth below, all of Texas's evidentiary objections in the Texas 2nd Objections are unjustified and serve only to divert the attention of New Mexico—and the Special Master—from the substantive issues in this case. Texas's evidentiary objections should be overruled and its requests for relief denied.[1]

Many of Texas's current objections were previously raised in Texas's Evidentiary Objections and Responses to the State of New Mexico's Facts (Dec. 22, 2020) [Dkt. 431]. New Mexico fully rebuked those prior objections, including Texas's mischaracterization of the admissibility of expert declarations and expert reports, in New Mexico's Response to the State of Texas's Evidentiary Objections (Feb. 5, 2021) [Dkt. 468], and those prior responses are fully incorporated herein.

ARGUMENT

I. TEXAS'S OBJECTION TO THE "CONSOLIDATED STATEMENT OF FACTS" IS BASELESS

A. New Mexico's Consolidated Statement of Material Facts Is Legally Proper and Practical

Texas's request for the Court to strike New Mexico's Consolidated Statement of Material Facts ("CSMF") based on alleged procedural and substantive impropriety is without merit and should be ignored in its entirety. *See* Tex. 2d Objections at 1-2. Texas fails to cite any case law

[1] Concurrent with this response to Texas 2nd Objections, New Mexico has filed a Response to the United States of America's Motion to Strike Declarations. To the extent that the Texas 2nd Objections raises any of the same issues as the United States Motion to Strike, New Mexico incorporates its responses to those United States objections, by reference, herein.

or Supreme Court rule that prohibits a consolidated, separate statement of material facts, and New Mexico is not aware of any such rule. A consolidated statement in no way hinders the Court's ability to evaluate the parties' pending motions, responses, and replies. In fact, it streamlines the Court's ability to sift through and evaluate the evidence by providing a centralized document for ease of reference.

Texas claims that the CSMF creates confusion,[2] but any confusion in the evidentiary record originates from Texas's disregard of standard summary judgment practice. Texas did not discretely enumerate its alleged material facts in its Motion for Partial Summary Judgment, causing New Mexico to expend significant time and resources compiling the evidence sprinkled throughout that motion. *Compare generally* State of Texas's Motion for Partial Summary Judgment (Nov. 5, 2020) at 1-106 *with* State of New Mexico's Response to the State of Texas's Motion for Partial Summary Judgment, Appendix 1 (Dec. 22, 2020) ("Appendix 1") (identifying and enumerating Texas's facts to allow for a proper response).

Federal Rule of Civil Procedure 83 allows federal district courts to promulgate local practice rules, and in many jurisdictions a separate statement of material facts is standard practice. *See Ayala-Gerena v. Bristol Myers-Squibb Co*., 95 F.3d 86, 95 (1st Cir. 1996) (upholding summary judgment for appellees based on failure of appellant to provide a separate statement of disputed facts); *State Auto Prop. & Cas. Ins. Co. v. LaGrotta*, 529 Fed. Appx. 271, 273 (3d Cir. 2013) (addressing defendant's failure to comply with local rule requiring separate statement of material facts to accompany motion); *Eason v. Nolan*, 416 Fed. Appx. 569, 569 (7th Cir. 2011) (affirming

[2] Texas also asserts that the CSMF does not differentiate as to what facts and evidence the individual CSMFs are proffered to support. This is incorrect. The individual CSMFs accurately identify the summary judgment brief and material facts which they support in the brackets at the end of the CSMF.

summary judgment for defendants based on failure of plaintiff to submit a separate statement of additional facts).

Because there is no controlling Supreme Court rule or precedent that disallows a consolidated statement of facts—and because New Mexico's CSMF was submitted out of practical consideration for the Court—Texas's request should be outright denied as baseless and legally unsupported.

B. Response to Texas's "Exhibit A"

Texas's "Exhibit A" is a copy of New Mexico's CSMF with additional columns annotating Texas's evidentiary and substantive objections. *See* Tex. 2d Objections at 2-4. Texas also raises numerous evidentiary objections (see response below to Objections #1-#9), including requests to strike materials and declarations, to which New Mexico must respond to assure the Court that New Mexico's evidence is appropriately submitted for consideration on summary judgment. *See* Tex. 2d Objections at 5-37. These specific Texas's Objections (Objections #1- #9) are addressed below.

Attachment A hereto is a copy of Texas's "Exhibit A" modified to remove irrelevant columns and to provide a column for New Mexico's "Response to Texas Evidentiary Objections" (far right column on table), in which New Mexico responds to Texas's individual evidentiary objections. Texas's current objections are almost entirely redundant of its prior objections, which New Mexico has already addressed. Out of an abundance of caution, however, New Mexico includes Texas's duplicated objections in Exhibit A, notes where New Mexico previously addressed them, and notes where the specific responses to Objections # 1 through #9 below apply.

II. RESPONSE TO TEXAS'S OBJECTIONS TO NEW MEXICO'S APPENDIX 1

Because Texas did not provide enumerated facts in its Motion for Partial Summary Judgment, New Mexico created its Appendix 1 table identifying and responding to all the facts it could identify throughout the Texas brief. *See* § I(A), *supra*. Texas has copied that table and

added its substantive and evidentiary objections as its "Exhibit B." *See* Tex. 2d Objections at 4-5. It is not appropriate for New Mexico to address Texas's substantive objections from Texas's reply filings at this point in the summary judgment process. However, it would be "unfair" to fail to consider evidence that Texas argues is inadmissible in its summary judgment reply brief because New Mexico has had no "meaningful opportunity to be heard on the evidentiary issue." *Smith v. Bray*, 681 F.3d 888, 903 (7th Cir. 2012) (*overruled on other grounds by Ortiz v. Werner Enterprises, Inc.*, 834 F.3d 760 (7th Cir. 2016)).[3]

III. RESPONSE TO TEXAS'S GENERAL OBJECTIONS

Texas proffers twenty-eight pages of objections, most of which Texas previously raised, to New Mexico's summary judgment evidence. *Compare* Tex. 2d Objections at 5-32 *with* Evidentiary Objections and Responses to the State of New Mexico's Facts (Dec. 22, 2020). New Mexico already fully rebuked many of these objections, including Texas's mischaracterization of the admissibility of expert declarations and expert reports. *See* New Mexico's Response to the State of Texas's Evidentiary Objections (Feb. 5, 2021).

Texas's latest evidentiary objections include these same arguments and extend similar arguments upon additional New Mexico declarations and expert reports. Specifically, Texas now also seeks to strike all or portions of the first *and* second Barroll Declaration (NM-EX 001 and NM-EX 006), the first *and* second Lopez Declaration (NM-EX 003 and NM-EX 008), Mr. Lopez's expert reports (NM-EX 107-110), the second Declaration of John D'Antonio, Jr. (NM-EX 007), the first Declaration of Ryan J. Serrano (NM-EX 010), the second Declaration of Rolf I. Schmidt-Petersen (NM-EX 009), and the Declaration of Lee Wilson, PhD (NM-EX 013). These objections

[3] Rather than submit another lengthy table to the Special Master, New Mexico has simply identified Texas's "Exhibit B" objections and New Mexico's responses thereto in the applicable sections, as a footnote, below.

are labeled Objections #1 through #6 in Section III of Texas's brief. Responses to each of the objections are addressed below in the order Texas submitted them.

A. Response to Objection #1: Declarations of Margaret Barroll, Ph.D. [NM Exhibits 001 and 006]

Texas objects to two declarations from Dr. Margaret Barroll, Ph.D. (NM-EX 001 and NM-EX 006). As in its previous December 22, 2020 objections, Texas argues certain paragraphs in the Barroll Declarations are inadmissible evidence to the extent they include statements to which she "has no personal knowledge" and to the extent she opines on "subject matters outside her area of expertise."[4] Tex. 2d Objections at 5-8. Texas specifically claims **paragraphs 15, 16,** and **17** of the first Barroll Declaration (NM-EX 001) and **paragraph 8 and the second sentence of paragraph 9** of the second Barroll Declaration (NM-EX 006) should be stricken as evidence supporting New Mexico's Motions for Partial Summary Judgment (Nov. 5, 2020) ("Motions") and the New Mexico Response to the State of Texas's Motion for Partial Summary Judgment (Dec. 22, 2020).

New Mexico addressed Texas's arguments for paragraphs 15, 16, and 17 of the first Barroll Declaration (NM-EX 001) in New Mexico's previous response. *See* New Mexico's Response to the State of Texas's Evidentiary Objections at 6-12 (Feb. 5, 2021). As explained therein, Texas's arguments to exclude expert declarations due to lack of "personal knowledge" fail because Texas mischaracterizes the admissibility of expert declarations as dependent upon personal knowledge and does not acknowledge the extensive qualifications of the witnesses at issue.

[4] Further, to the extent Texas claims in its Second Evidentiary Objections or its Exhibits A or B that Dr. Barroll asserts impermissible legal conclusions in her Declarations, Texas's arguments fail for the reasons explained in the discussion of Texas's legal conclusion objections to Mr. Lopez's Declarations at pages 13-14, infra.

To begin, Federal Rule of Evidence 702 permits qualified persons to testify as an expert in support of a party and to offer reliable opinions on relevant matters within their expertise. Fed. R. Evid. 702. The qualifications of a proffered expert may be challenged at an appropriate stage in the litigation proceedings. However, the threshold for qualification at summary judgment is low: "Where an expert is not obviously unqualified, questions at the summary judgment stage as to the expert's qualifications should rarely be resolved by exclusion of the evidence." *Cal. Steel & Tube v. Kaiser Steel Corp.*, 650 F.2d 1001, 1003 (9th Cir. 1981). Dr. Barroll is extremely well qualified as demonstrated in her declaration and associated expert reports and easily meets the "not obviously unqualified" standard. Dr. Barroll is qualified by training, knowledge, and experience to offer her challenged expert opinion testimony, and Texas's objections to her materials should be overruled.

Texas ignores additional Federal Rules of Evidence, particularly Rules 703 and 602, that negate their arguments on personal knowledge requirements for experts. Rule 703, entitled *Bases of An Expert's Opinion Testimony*, states that "[a]n expert may base an opinion on facts or data in the case that the *expert has been made aware of or personally observed*. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted." (emphasis added). Moreover, Rule 602, entitled *Need for Personal Knowledge*, states "[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule *does not apply to a witness's expert testimony under Rule 703*." (emphasis added). As illuminated in *Daubert v. Merrell Dow Pharmaceutical, Inc.*, "[u]nlike an ordinary witness, see Rule 701, an expert is permitted wide latitude to offer opinions, including those that are not based

on firsthand knowledge or observation. See Rules 702 and 703. Presumably, this relaxation of the usual requirement of firsthand knowledge . . . is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." 509 U.S. 579, 592 (1993); *see also e.g.*, *Estate of Castleberry v. United States*, 2019 WL 7596275, at *3 (D.N.M. 2019) ("An affidavit that an expert submits need not be based upon personal knowledge, provided that the affidavit complies with rules 702-705 of the Federal Rules of Evidence." (citing *City of Chanute, Kan. v. Williams Natural Gas Co.*, 743 F.Supp. 1437, 1444 (D. Kan. 1990)).

Hence, Texas misapplies Federal Rule of Civil Procedure 56(c)(4) and wrongly claims that expert declarations supporting a motion for partial summary judgment must be made on personal knowledge or otherwise must be stricken. As explained in the Federal Rules of Evidence and applicable case law, the personal knowledge requirement is not applicable to expert declarations, including declarations submitted at the summary judgment stage. An expert "witness need not have observed or participated in the gathering of the data underlying his opinion. Rather, the personal knowledge requirement hinges on whether the expert personally analyzed the data that was 'made known' to him and formed an expert opinion based on his own assessment of the data within his area of expertise." *Huber v. Howard County, Md.*, 1995 WL 325644, at *5 (4th Cir. 1995) (citing *Doe v. Cutter Biological, Inc.*, 971 F.2d 375, 385–86 & n.10 (9th Cir. 1992); *Colgan v. Fisher Scientific Co.*, 935 F.2d 1407, 1423 & n.15 (3d Cir. 1991)); *see also Marine Polymer Technologies, Inc. v. HemCon, Inc.*, 2009 WL 801826 (D.N.H. 2009) ("An expert who provides an affidavit with an opinion formed within his area of expertise and based on his own assessment or analysis of the underlying facts or data satisfies the personal knowledge requirement of Rule 56(e)."). Therefore, all challenges to any statement in the Barroll Declarations on the ground that

Dr. Barroll does not have personal knowledge of the facts and matters underlying such statement must fail.[5]

Texas further contends Dr. Barroll is not qualified to give the testimony contained in paragraphs 15-17 of the first Barroll Declaration (NM-EX 001) and paragraph 8 and the second sentence of paragraph 9 of the second Barroll Declaration (NM-EX 006) because it concerns "subject matters outside her area of expertise." Tex. 2d Objections at 7-8. New Mexico fully addressed this argument as to the first Barroll Declaration in its earlier response. For convenience, New Mexico summarizes that response here.

Paragraphs 15-17 of the first Barroll Declaration (NM-EX 001) concern the Rio Grande Compact ("Compact") definitions of the terms "Project Supply," "normal release," and "Project Storage." Texas claims Dr. Barroll is not qualified to give testimony on the Compact because she stated in deposition that she is not an expert on the Compact. Tex. 2d Objections at 6-7. This argument mischaracterizes Dr. Barroll's Declaration testimony and the scope of her expertise. Dr. Barroll's Declaration recites her extensive prior experience with the processes and procedures applicable to water accounting in the Rio Grande Basin, including those used by the Rio Grande Project ("Project"). *See* NM-EX 001, Barroll Decl., ¶¶ 6-10.

From 1991 to 2017, Dr. Barroll worked for the New Mexico Office of the State Engineer ("OSE"). During her career at the OSE, Dr. Barroll was a staff member of the Hydrology Bureau where she developed groundwater models, including models that simulated the operations of surface-water irrigation systems. As a staff member of the Hydrology Bureau, Dr. Barroll also evaluated water right applications and provided support to the adjudication branch of the OSE and

[5] This authority relating to qualifications and personal knowledge applies equally to Texas's meritless objections to Gregory Sullivan, which Texas has not briefed but has buried within its "Exhibit A," and New Mexico notes those instances in Attachment A hereto.

to the New Mexico Interstate Steam Commission ("ISC"). Id. at ¶ 6. Dr. Barroll's professional involvement with Lower Rio Grande ("LRG") issues within New Mexico and Texas started around 2000. Over the last 20 years, her work with LRG issues has involved, among other things, an in-depth review of Project records relating to Project allocation, accounting, operations and history; quantitative analysis of Project allocation and accounting; numerous field visits to the Project to identify and inspect infrastructure, and to observe farm management practices; numerous meetings and discussions with the personnel who manage the allocation, accounting and distribution of Project water; review and analysis of data and studies related to LRG surface water hydrology; groundwater modeling of the LRG aquifer system in New Mexico, including the hydrologic effects of the operations of the Project; analysis of groundwater level data both spatially and temporally; and conducting trend analyses of groundwater pumping meter data. *Id.* at ¶ 9.

This experience, knowledge, and training qualifies her to give testimony concerning the meaning of terms used in water accounting within the Project, including "Project Supply," "normal release," and "Project Storage." Texas has not challenged Dr. Barroll's expertise as to the Project or Project operations, nor could they since she is the foremost expert in the field. Additionally, the text of the Compact is the kind of fact an expert in Dr. Barroll's field of expertise "would reasonably rely on … in forming an opinion." Fed. R. Evid. 703. Texas's objection to paragraphs 15-17 in the first Barroll Declaration should be overruled.

Dr. Barroll describes in paragraph 8 of her second Declaration (NM-EX 006) the definition of Project Storage and Usable Water. This is the same definition previously stated in paragraph 17 of her first Declaration, and therefore the same arguments from above apply. Moreover, Dr. Barroll simply recites Compact definitions as foundation for other declaration statements, and such Compact definitions are not in dispute. In the second sentence of paragraph 9, Dr. Barroll mentions

that the Compact has limits and constraints on upstream storage. This is a well-known and general statement about storage upstream from Elephant Butte Reservoir in New Mexico. Dr. Barroll worked for the State Engineer's office for 26 years and developed an understanding of storage operations within the state. This statement is well within Dr. Barroll's knowledge and expertise based on her experience.[6]

B. Response to Objection #2: Declarations and Expert Reports of Estevan R. Lopez, P.E. [NM Exhibit 003, NM Exhibit 008, and NM Exhibits 107-110]

Texas objects to two declarations of Estevan R. Lopez, P.E. (NM-EX 003 and NM-EX 008) and Mr. Lopez's expert reports (NM-EX 107 through NM-EX 110). Texas contends Mr. Lopez is not qualified to give the testimony contained in his declaration and similar opinions contained in his expert reports because they contain "legal conclusions, historical information, and statements regarding the operation of the Rio Grande Project" to which Texas claims Mr. Lopez has no personal knowledge and which fall outside his "area of expertise." Tex. 2d Objections at 8-12. Based on these claims, Texas requests that the following specific paragraphs from the Lopez Declarations be stricken: **paragraphs 4, 7, 12-15, 17, and 19-28** of the first Lopez Declaration (NM-EX 003) and **paragraphs 5-6, 8-12, 15, 17-26, 28, 30-31, 33-36, 38, and 40-41** of the second Lopez Declaration (NM-EX 008). Texas further requests that all references to "objectionable subject matter" contained within the Lopez expert reports also be stricken. Texas, however, does not identify the specific sections of Mr. Lopez's expert reports that contain "objectionable subject matter."

Texas already raised these arguments, and New Mexico explained in its earlier response that each of them were unsupportable. Because Texas expands these arguments to include the

[6] New Mexico's response herein applies to Texas's "Exhibit B" numbers 15, 88, 89, 93, 109, 121, 131, 133, 161, 164, 173, 174, and 194.

second Lopez Declaration, New Mexico summarizes its prior responses herein and addresses the new requests to strike portions of Mr. Lopez's second Declaration. As before, Texas's arguments fail because Texas misconstrues Mr. Lopez's deposition testimony and ignores Mr. Lopez's extensive experience and qualifications.

Mr. Lopez has extensive experience working for the New Mexico State Engineer's office, as well as working for the Bureau of Reclamation. *See* NM-EX 003, Lopez Decl., ¶¶ 3-10; *see also* NM-EX 107, Lopez Rep. at § 2.2 (describing Mr. Lopez's background in detail). Mr. Lopez served as the Commissioner for the Bureau of Reclamation from 2014 to 2017 where he directed all aspects of Reclamation business, managing water throughout seventeen (17) western states and almost 200 water projects. NM-EX 003, Lopez Decl. ¶ ¶ 4-5. Mr. Lopez also served for over ten years as the Director of the ISC, with the responsibility of directing New Mexico's rights and obligations for eight interstate stream compacts Compact. *Id.* at ¶ 7. Mr. Lopez also served as the Engineer Advisor to the New Mexico Rio Grande Compact Commissioner during this time. *Id.* at ¶ 8. By virtue of this extensive experience and knowledge, Mr. Lopez is uniquely qualified to testify concerning the administration of interstate stream compacts, the administration of the Compact, and his experience related to the Project. In light of this experience, Texas's objections are unavailing.

Additionally, for all of the reasons set out above for Dr. Barroll, the objection to any statement in the Lopez Declaration on the basis that Mr. Lopez does not have personal knowledge of the facts underlying such statement are entirely without merit. Under Federal Rule of Evidence 703, Mr. Lopez is entitled to "base an opinion on facts or data … [he] has been made aware of or personally observed." "Unlike an ordinary witness … an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation." *Daubert*, 509

U.S. at 592 (citing Fed. R. Evid. 702, 703). Therefore, all challenges to any statement in the Lopez Declaration on the ground that Mr. Lopez does not have personal knowledge of the facts and matters underlying such statement fails.

The quotes Texas cherry picks from Mr. Lopez's deposition specify that his experience related to the Compact is based primarily on his time at the ISC, that Mr. Lopez has not physically operated a Reclamation project, and that while he was the Commissioner of Reclamation he did not work specifically on Project issues (because he recused himself due to his prior extensive experience with the Project while the Director of the ISC; *see* NM-EX 107, Lopez Rep., at 3). Texas also includes a quote where Mr. Lopez confirms to Texas's counsel that he is not an attorney and is not an expert historian. Presumably Texas believes these selected quotes should limit Mr. Lopez's extensive knowledge and experience related to the Compact.

Yet, Mr. Lopez does not need to be a lawyer, or an historian, or to have physically diverted water at a canal heading to have an understanding of Compact administration. Mr. Lopez's understanding is based on his expertise in this area and his familiarity with the documents and materials relating to Compact administration he bases his opinions on. *See Monks v. Gen. Elec. Co.*, 919 F.2d 1189, 1192 (6th Cir. 1990) (explaining that an expert, in contrast to a lay witness, gains "personal knowledge" for purposes of Rule 56(c)(4) by familiarizing himself with the record and other relevant materials). It is also based on his personal knowledge of the activities and concerns of the agencies he has led. *See In re Kaypro,* 218 F.3d 1070, 1075 (9th Cir. 2000) ("Personal knowledge may be inferred from a declarant's position.") (citation omitted); *see also Barthelemy v. Air Lines Pilots Ass'n,* 897 F.2d 999, 1018 (9th Cir. 1990) (concluding a CEO's personal knowledge of various corporate activities could be presumed); *Stonefire Grill, Inc. v. FGF Brands, Inc*., 987 F. Supp. 2d 1023, 1035 (C.D. Cal. 2013) (stating that witnesses' position

in corporation afforded presumption of personal knowledge of corporation's present and past activities); *Los Angeles Times Commc'ns, LLC v. Dep't of Army,* 442 F.Supp.2d 880, 886 (C.D. Cal. 2006) ("[D]eclarant can testify about practices or procedures in place before the witness was employed with the organization about which he is relating information.").

Texas is also incorrect that Mr. Lopez's Declaration statements include impermissible legal conclusions. Under Federal Rule of Evidence 702, an expert witness "may testify in the form of an opinion or otherwise if [] the expert's … knowledge will help the trier of fact to understand the evidence or determine a fact in issue." An expert is even permitted to offer an opinion on an "ultimate issue," "as long as the expert's testimony assists, rather than supplants, the jury's judgment." *United States v. Dazey*, 403 F.3d 1147, 1172 (10th Cir. 2005); *see also United States v. Bedford*, 536 F.3d 1148, 1158 (10th Cir. 2008) (citation omitted) (an expert can "testify in the form of an opinion or inference even if that opinion or inference embraces an ultimate issue to be determined by the trier of fact."); Fed. R. Evid. 704(a) (an opinion rendered by an expert "is not objectionable just because it embraces an ultimate issue.").

Additionally, an expert may assist the factfinder in understanding factual issues "even though reference to those facts is couched in legal terms." *Smith v. Ingersoll-Rand Co.*, 214 F.3d 1235, 1246 (10th Cir. 2000). Indeed, courts acknowledge that "it is sometimes impossible for an expert to render his or her opinion on a subject without resorting to language that recurs in the applicable legal standard," *see United States v. Diaz*, 876 F.3d 1194, 1198-1199 (9th Cir. 2017), and if terms used by the expert "do not have a specialized meaning in law and do not represent an attempt to instruct the jury on the law or how to apply the law to the facts of the case, the testimony is not an impermissible legal conclusion," *id.*; *see also Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 100–101 (1st Cir. 1997) ("[T]he definition of what is law and what is application or practice

may be difficult to ascertain."); Mueller & Kirkpatrick, 3 Federal Evidence § 7:12 (4th ed. 2020) ("In some suits, complicated legal standards overlap with complicated technical standards in such ways that expert testimony seems almost indispensable, and inevitably such testimony tends to suggest both legal and factual conclusions."); *United States v. Richter*, 796 F.3d 1173, 1197 (10th Cir. 2015) ("Witnesses are permitted to testify about how the law applies to a certain set of facts, so long as they provide adequate explanations for their conclusions.") (citation omitted).

To the extent Texas claims Mr. Lopez's opinions are impermissible legal conclusions and must be struck, Texas fails to recognize that Mr. Lopez's opinions capture Mr. Lopez's extensive personal knowledge of practices relating to Compact administration. Although these practices are inherently associated with certain legal issues posed in this litigation, they are far from bald and generalized legal conclusions unhelpful to the Court as factfinder. Rather, the specific paragraphs Texas challenges are related, instead, to matters derived from Mr. Lopez's professional water administration experience and his time as New Mexico's Engineer Adviser to the Rio Grande Compact Commission (Lopez 1st Decl. ¶¶ 4, 7, 12-15, 17; Lopez 2d Decl. ¶¶ 5-6, 8-12, 15, 30-31); historical or technical issues relating to the Compact that Mr. Lopez extensively researched as an expert in this case (Lopez 2d Decl. ¶¶ 33-36, 38, 40-41; or both (Lopez 1st Decl. ¶¶ 19-28, Lopez 2d Decl. ¶¶ 17-26, 28). Mr. Lopez offers these statements based on his understanding and perspective as a former water administrator, who required knowledge of New Mexico's rights and obligations under the Compact to fulfill his duties.

Notably, Texas fails to make specific objections to each of the above paragraphs. Instead, Texas makes general complaints about legal opinions and assertions that the paragraphs are opinions beyond Mr. Lopez's areas of expertise. It is not sufficient to provide vague arguments as to the basis of exclusion for nearly every paragraph of a declaration. Even more ambiguous,

Texas asserts that any "objectionable subject matter" contained within the Lopez reports should also be stricken.

It appears Texas simply wants to eliminate Mr. Lopez as one of New Mexico's witnesses. This likely is because Texas has not designated any expert witnesses with Compact administration expertise. Unfortunately for Texas, Mr. Lopez is highly qualified and has valuable testimony for the Court. None of Mr. Lopez's Declaration paragraphs or his expert reports should be stricken.[7]

C. Response to Objection #3: Second Declaration of John D'Antonio, Jr. [NM Exhibit 007]

Texas argues the second D'Antonio Declaration is inadmissible evidence to the extent Mr. D'Antonio opines on subject matter "outside his personal knowledge and/or expertise" including "legal conclusions and historical circumstances surrounding the negotiation of the 1938 Rio Grande Compact."[8] Tex. 2d Objections at 10-12. Texas requests **paragraphs 8-21, 49, 52, and 58** (NM-EX 007) in the second D'Antonio Declaration be stricken. This request should be denied.

As one example of Texas's challenges to Mr. D'Antonio, Texas asserts Mr. D'Antonio testified at his deposition that statements on the Compact are outside his personal knowledge and area of expertise. Mr. D'Antonio made no such statement at his deposition, and Texas's own quoted deposition text confirms this. In Texas's objections, Texas points to one line of questioning at Mr. D'Antonio's deposition where he was asked who he would say is the person in New Mexico with the "most knowledge" about New Mexico's obligations under the Compact. Mr. D'Antonio provided two names in response. Texas turns this line of questioning on its head and claims that

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[7] New Mexico's response herein applies to Texas's "Exhibit B" numbers 16, 17, 18, 19, 21, 23, 25, 30, 31, 32, 33, 38, 39, 40, 44, 45, 47, 48, 50, 67, 68, 69, 71, 75, 76, 77, 78, 79, 80, 81, 82, 83, 93, 94, 132, 167, 169, 170, 173, and 174.

[8] Further, to the extent Texas claims in its Second Evidentiary Objections or its Exhibit B that Mr. D'Antonio asserts impermissible legal conclusions in his second Declaration, Texas's arguments fail for the reasons explained in the discussion of Texas's legal conclusion objections to Mr. Lopez's Declarations at pages 13-14, supra.

because Mr. D'Antonio named two people other than himself as the "most" knowledgeable then by default he has "no personal knowledge" on the Compact, and his opinions on the Compact are "outside of Mr. D'Antonio's expertise." Texas's arguments are absurd. Based on this faulty assertion, Texas requests that **paragraphs 8-21, 49, 52, and 58** (NM-EX 007) in the second D'Antonio Declaration be stricken.

Contrary to Texas's argument, Mr. D'Antonio is a highly qualified witness with extensive experience in water administration. First, Mr. D'Antonio is a professional registered engineer and the current New Mexico State Engineer. See NM-EX 002, D'Antonio 1st Decl., ¶¶ 2-8. Mr. D'Antonio has been in his current position since March 2019 and was previously the New Mexico State Engineer from January 2003 through November 2011. *Id*. Between 2011 and 2019, Mr. D'Antonio worked as the Deputy District Engineer for Programs for the United States Army Corps of Engineers ("USACE"). *Id*. From April 1998 to August 2002, Mr. D'Antonio was Supervisor and then a Director in the Water Resource Allocation Program of the OSE. *Id*. In those positions, he managed and directed the Water Rights Division and District offices, the Hydrology Bureau, the Dam Safety Bureau, and the Water Use and Conservation Bureau. *Id*. He was further responsible for all technical and administrative activities concerning water rights administration. *Id*.

As Mr. D'Antonio states in his first Declaration, "[a]s the State Engineer, I am statutorily charged with supervising the state's water resources through the measurement, appropriation, and distribution of all ground and surface water in New Mexico, including streams and rivers that cross state boundaries." *Id.*, ¶ 2. The OSE is the executive agency charged with the management and administration of all waters in the state, with a current staff of over 300 authorized personnel. NM-EX 002, ¶ 2. As State Engineer, Mr. D'Antonio holds personal knowledge of the activities and

concerns of his office. *See In re Kaypro,* 218 F.3d 1070, 1075 (9th Cir. 2000) ("Personal knowledge may be inferred from a declarant's position.") (citation omitted); *see also Barthelemy v. Air Lines Pilots Ass'n,* 897 F.2d 999, 1018 (9th Cir. 1990) (concluding that a CEO's personal knowledge of various corporate activities could be presumed); *Los Angeles Times Commc'ns, LLC v. Dep't of Army,* 442 F.Supp.2d 880, 886 (C.D. Cal. 2006) ("[D]eclarant can testify about practices or procedures in place before the witness was employed with the organization about which he is relating information.").

Texas's objections to paragraphs 8-21, 49, 52, and 58 in Mr. D'Antonio's second Declaration, which all describe New Mexico's rigorous water administration and specific administrative background for the Project area, fail because Texas has not and cannot refute the extensive evidence of State Engineer D'Antonio's experience in and knowledge of these issues. As the State Engineer, Mr. D'Antonio is the single person most responsible for water administration in New Mexico. Further, Mr. D'Antonio's water administration duties in New Mexico include compact compliance, as he describes in detail in his Declaration. NM-EX 002, D'Antonio Decl. ¶ 3. Texas's claim that these declaration paragraphs are outside his "personal knowledge and/or expertise" is without any credible support.[9]

D. Response to Objection #4: First Declaration of Ryan J. Serrano [NM Exhibit 010]

Texas objects to the first Declaration of Ryan J. Serrano (NM-EX 010). Texas claims the declaration at **paragraph 8** is inadmissible evidence to the extent Mr. Serrano opines on subject

[9] New Mexico's response herein applies to Texas's "Exhibit B" numbers 53, 166, 171, 176, 177, 178, 173, 174, 179, and 193.

matter outside his personal knowledge and expertise.[10] The paragraph Texas finds offensive is as follows:

> The LRG's agricultural importance to New Mexico is significant. Pecan production in New Mexico is the second highest in the nation and is the State's number one cash crop with a value of $162.3 million in 2018. New Mexico is also ranked 2nd in the nation for chile production, most of that coming from the LRG. New Mexico is ranked 5th in the nation for onion production, and the LRG accounts for the majority of the onion cash crop.

NM-EX 540, 2018 WM Report at 1. Texas claims Mr. Serrano has no personal knowledge as to pecan, chile, and onion production or its value in New Mexico. This assertion is patently false.

Mr. Serrano works for the OSE and is the current Water Master for the Lower Rio Grande Water Master District (LRG Water Master). NM-EX 010, Serrano Decl. ¶ 2. Prior to becoming the LRG Water Master, Mr. Serrano was the Assistant LRG Water Master from 2009 to 2012. *Id*. Mr. Serrano's LRG Water Master District include the entire New Mexico Project area. *See id*. The LRG Water Master ensures compliance on the local level—with the farmers in the LRG. *Id*. ¶ 4. Part of Mr. Serrano's duties includes working directly with water right owners, driving farm roads, monitoring meters, and attending the local irrigation district meetings. *Id*. ¶¶ 5-7. Mr. Serrano also prepares an annual LRG Water Master Report where he reports on the counties and crops within his district, the local water usage, and a summary of enforcement actions. As set out above, a declaration or "affidavit can adequately support a motion for summary judgment when the affiant's personal knowledge is based on a review of h[is] employer's business records and the affiant's position with the employer renders h[im] competent to testify on the particular issue which the affidavit concerns." *Carson v. Perry*, 1996 U.S. App. LEXIS 44382 at *2 (5th Cir. 1996); *In*

[10] Further, to the extent Texas claims in its Second Evidentiary Objections or its Exhibit B that Mr. Serrano asserts impermissible legal conclusions in his second Declaration, Texas's arguments fail for the reasons explained in the discussion of Texas's legal conclusion objections to Mr. Lopez's Declarations at pages 13-14, supra.

re Kaypro, 218 F.3d 1070, 1075 (9th Cir.2000) ("Personal knowledge may be inferred from a declarant's position.").

In his 2018 Water Master Report, Mr. Serrano reported local statistics from the New Mexico Department of Agriculture's Agricultural Statistics Bulletin for the counties within his district and stated as follows:

> The counties within the district consistently maintain top three state rankings for yield and cash value of crops sold. Examples include: Pecans (State Rank #1 with 67,630,000 lbs produced valued at over $162.3 million). Dona Ana County in particular accounted for 22.7% of the nation's total pecan production in 2017 and the state of New Mexico was the number 2 ranked state in the nation for production of pecans behind only Georgia. Chile is also a major cash crop within the district (State Rank #2 with 14,900 tons produced in 2017 valued at $27 million). New Mexico is ranked number 2 in the nation for Chile production behind only California. A third crop worth mentioning is Onion. New Mexico ranks fifth in the nation for onion production with a 2017 crop value of $220 million, Sierra & Dona Ana County account for a large portion of this production. All of the above referenced statistics according to the New Mexico Department of Agriculture's 2017 Agricultural Statistics Bulletin.

NM-EX 540, Lower Rio Grande Water Master Annual Report 2018 Accounting Year at 1 (2018). Texas's claim that Mr. Serrano's paragraph 8 in his declaration should be stricken because Mr. Serrano is without personal knowledge and/or expertise is unsupported. Clearly, paragraph 8 was derived directly from Mr. Serrano's Water Master Report, which is prepared annually as part of Mr. Serrano's normal job duties. Mr. Serrano has direct personal knowledge of the local crops and relies upon the agricultural statistics as part of his professional work. For all of these reasons, Mr. Serrano has personal knowledge of all of the facts and matters stated in paragraph 8.

E. Response to Objection #5: Second Declaration of Rolf I. Schmidt-Petersen [NM Exhibit 009]

Texas objects to the second Declaration of Rolf I. Schmidt-Petersen (NM-EX 009). Texas argues the Schmidt-Petersen Declaration should be stricken in its entirety because "Mr. Schmidt-Petersen does not respond to facts raised by the Texas Motion and provides narrative regarding

subject matter of New Mexico's dismissed counterclaims" and therefore the subject matter is not relevant.[11] Tex. 2d Objections at 13-15. As Texas acknowledges, "[e]vidence is relevant if it 'has any tendency to make a fact more or less probable than it would be without the evidence,' and if 'the fact is of consequence in determining the action.'" Fed. R. Evid. 401.

The relevancy requirement in Rule 401 is frequently referred to as a "low bar." *E.g., Novick v. Shopcom Wireless, Inc.*, 946 F.3d 735, 741 (5th Cir. 2020) (evidence of job-description information relevant to employment dispute); *accord United States v. Acevedo-Hernandez*, 898 F.3d 150, 168 (1st Cir. 2018). Evidence clears this low bar not only when it is directly relevant to the main issue in a case, but also when it is relevant to issues bearing on the main dispute. In *United States v. Oldrock*, for example, the court affirmed the district court's admission of evidence about a forensic interview process over the defendant's objection that this evidence was not relevant to "the main issue at trial—his guilt" because it helped the jury "understand the process of the forensic interview and explain[ed] how the investigation proceeded." 867 F.3d 934, 940 (8th Cir. 2017).

Texas argues Mr. Schmidt-Petersen's Second Declaration is not relevant because it "provides no additional specificity regarding which of Texas's stated material facts that it is in response to and the declaration is merely Mr. Schmidt-Petersen's summary of the scope of the New Mexico Interstate Stream Commission's ("ISC") responsibilities." Tex. 2d Objections at 15. Texas further argues Mr. Schmidt-Petersen's Second Declaration is irrelevant because it "seeks to

[11] The Special Master has specifically noted that evidence pertaining to New Mexico's dismissed counterclaims may well be relevant to New Mexico's remaining counterclaims and defenses. *See* Special Master Order at 41 (Mar. 31, 2020). Further, to the extent Texas claims in its Second Evidentiary Objections or its Exhibit B that Mr. Schmidt-Petersen asserts impermissible legal conclusions in his second Declaration, Texas's arguments fail for the reasons explained in the discussion of Texas's legal conclusion objections to Mr. Lopez's Declarations at pages 13-14, supra.

address subjects pertaining to New Mexico's [dismissed] counterclaims," specifically New Mexico's counterclaim relating to the United States' unlawful, unilateral reduction in New Mexico's Accrued Credits in 2011. *Id*.

Texas and the United States made numerous factually incorrect claims and arguments regarding New Mexico's administration of water rights and compacts in their motions for partial summary judgment. *E.g.,* Tex. Mot. at 21 ("New Mexico has taken no action to establish a system for administration as required to meet downstream interstate delivery entitlements."), 94-106 (asserting arguments regarding how New Mexico must administer water rights to comply with the Compact and identifying alleged deficiencies in said administration); U.S. Mot. at 15-20 (asserting numerous facts regarding New Mexico administration of water in the LRG, many of which are incorrect or incomplete).

New Mexico provided Mr. Schmidt-Petersen's Second Declaration to rebut these misstatements and inform the Court and Special Master how New Mexico administers the compacts to which it is a party, including the Compact. Evidence of New Mexico's system for administering compacts and water rights is clearly relevant to this dispute, particularly in light of Texas's and the United States' challenges to the adequacy of New Mexico's administration. *Cf. Oldrock*, 867 F.3d at 940. In any event, New Mexico provided numerous citations to Mr. Schmidt-Petersen's Second Declaration in its responsive briefs and its Consolidated Statement of Material Facts (CSMF), providing Texas ample specificity. *E.g.,* NM-CSMF ¶¶ 290-92, 312-20 (citing NM-EX 009, Schmidt-Petersen 2d Decl.); NM Resp. U.S. Mot. 2, 54 (citing NM-EX 009, Schmidt-Petersen 2d Decl.); NM Resp. Tex. Mot. 33 (citing NM-EX 009, Schmidt-Petersen 2d Decl. & NM-CSMF ¶¶ 303-320), 34-35 (citing NM-CSMF ¶ 290).

Texas's challenge to Mr. Schmidt-Petersen's statements concerning credit water as relevant only to New Mexico's dismissed counterclaim completely misrepresents Mr. Schmidt-Petersen's Second Declaration. Mr. Schmidt-Petersen states:

> The ISC's work described in ¶¶ 13, 14, and 15, above, contributed to New Mexico being able to build a large volume of Accrued Credit (Compact Article VI) in Elephant Butte Reservoir over the last few decades. That then allowed New Mexico to relinquish approximately 380,000 AF of its Accrued Credit for use by the Project, increasing the Project's Usable Water in storage available for release by that amount.

NM-EX 009, Schmidt-Petersen 2d Decl., ¶ 16. Nowhere in this statement does Mr. Schmidt-Petersen mention the illegal release of credit water in 2011 or any other facts that formed the basis for New Mexico's Third Counterclaim against the United States. Instead, Mr. Schmidt-Petersen discusses how the New Mexico ISC's administration of water rights and the Compact has resulted in large volumes of Accrued Credits in Project storage, which New Mexico has relinquished to provide additional Usable Water for the Project. This statement illustrates one way New Mexico administration works to benefit the Project, and therefore Texas and the United States, and tends to rebut the presumption in their arguments that New Mexico either ignores its Compact responsibilities or willfully disregards them. *See* Tex. Mot. 94-106; U.S. PSJ 34-40. It is, thus, clearly relevant to the issues that remain in this case. For the foregoing reasons, Texas's motion to strike Mr. Schmidt-Petersen's Second Declaration in whole, and Paragraph 16 in particular, should be denied.

F. Response to Objection #6: Declaration of Lee Wilson, Ph.D. [NM Exhibit 013]

Texas objects to the declaration of Lee Wilson, Ph.D. (NM-EX 013). Specifically, Texas claims **paragraphs 8 and 9** of the Wilson Declaration are inadmissible evidence to the extent Dr. Wilson asserts improper legal opinions and that his declaration statements are speculative, lack foundation, and make irrelevant statements that do not address Texas's stated material facts.

As described in Dr. Wilson's Declaration, Dr. Wilson is a Certified Professional Hydrogeologist, with 50 years of experience of the Rio Grande. He is familiar with surface and groundwater hydrology, water rights, and water use in the LRG and with the Project in both New Mexico and Texas. NM-EX 013, Wilson Decl., ¶ 2. Dr. Wilson has also been a water consultant to the City of Las Cruces for over 40 years. *Id*.

Paragraph 8 of Dr. Wilson's Declaration states as follows:

> Referring to the City of Las Cruces, at p. 22-23 the Texas Motion for Summary Judgment acknowledges a fact set forth in my June 15, 2020 disclosure, that the City of Las Cruces owns EBID acres. I understand this to be a recognition that the City has a right to use water released from Elephant Butte Reservoir.

Paragraph 9 of Dr. Wilson's Declaration states as follows:

> The Texas claim that non-Project water uses were frozen by adoption of the 1938 Rio Grande Compact is not consistent with the U.S. rebuttal report by their expert J. Phillip King who stated as fact that adoption of the D-2 curve established 1951-1978 as the baseline for allocation of water to Texas. To this day D-2 remains the basis for calculating the amount of water delivered to Texas, whereas deliveries in New Mexico are governed by the new D-3 curve. I consider Dr. King's report to correctly dispute the Texas claim.

NM-EX 013, Wilson Decl., ¶¶ 8-9. Texas's arguments concerning Dr. Wilson's Declaration are unfounded and should be denied.

Texas objects to paragraphs 8 and 9 in the Lee Wilson Declaration on the grounds that statements in these paragraphs allegedly "constitute[] improper legal opinion[s]." Tex. 2d Objections at 16. First, to the extent Texas intends to levy this same objection to any other statement in Dr. Wilson's Declaration, Texas has failed to identify and particularize such objection; therefore, any additional such objections should be dismissed.

These paragraphs contain no legal conclusions. In paragraph 8, Dr. Wilson explicitly states he is expressing his understanding regarding a Texas statement of fact. This is not a legal

conclusion, and New Mexico trusts the Special Master and Court are able to afford this statement the proper weight when considering the evidence submitted on these dispositive motions.

In paragraph 9, Dr. Wilson notes Texas's claim that non-Project water uses were frozen at 1938 levels by adoption of the Compact "is not consistent with the U.S. rebuttal report by their expert J. Phillip King who stated as fact that adoption of the D-2 curve established 1951-1978 as the baseline for allocation of water to Texas." Dr. Wilson further points out the fact that "[t]o this day D-2 remains the basis for calculating the amount of water delivered to Texas, whereas deliveries in New Mexico are governed by the new D-3 curve." *Id.* Dr. Wilson then expresses his expert opinion that he "consider[s] Dr. King's report to correctly dispute the Texas claim." *Id.* For these reasons, and the reasons explained in the discussion of Texas's challenge to Mr. Lopez at pages 13-14, *supra*, Dr. Wilson offers no improper legal opinions in paragraph 9. Texas's objection to this paragraph, on that ground, should therefore be dismissed.

Texas further argues Paragraphs 8 and 9 in the Wilson Declaration should be struck as "not relevant" to "Texas stated material facts" or "the issues presented." Tex. 2d Objections at 17. This is clearly incorrect. Dr. Wilson's statements in both of the challenged paragraphs are relevant to the contested issue of the amount of water use the Compact allows in the LRG. These statements easily clear the "low bar" for relevancy set by Federal Rule 401. *See Novick*, 946 F.3d at 741.

Texas's citation to Federal Rule of Evidence 402, which provides that "[r]elevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court," provides no support for its argument. Texas fails to identify any statute, rule, or constitutional provision that mandates exclusion of this otherwise relevant evidence. Texas's arguments on the relevancy of this material fail.

Texas asserts several other arguments in a conclusory fashion, namely that paragraph 8 of Dr. Wilson's Declaration lacks foundation and is speculative and that paragraph 9 "does not materially dispute Texas's stated material facts relating to the 1938 Condition." Texas also cites to Rule 704 to support its arguments without explaining the relevance of this rule or the particular nature of its objections.

Texas's foundation argument fails because Texas does not give any basis for its objection. *Jerden v. Amstutz*, 430 F.3d 1231, 1237 (9th Cir. 2005) ("[A]n objection to admission of evidence on foundational grounds must give the basis for objection in a timely way to permit the possibility of cure."). Texas also ignores the extensive foundation Dr. Wilson laid for his expert opinions, including his extensive professional experience and knowledge. NM-EX 013, Wilson Decl. ¶¶ 2-3; *see also* NM-EX 604, Resume of Lee Wilson; NM-EX 605, Expert Testimony of Lee Wilson.

Texas similarly fails to explain how Dr. Wilson's statements in paragraph 8 are speculative. Dr. Wilson is not "speculating" when he acknowledges Texas's statement and, in effect, agrees with it.

Finally, Texas's citation to Federal Rule of Evidence 704 is also unavailing. Rule 704 provides in subsection (a) that "an opinion is not objectionable just because it embraces an ultimate issue" and provides a limited, irrelevant exception to this rule. Texas provides no explanation for why it believes Rule 704 mandates exclusion of paragraphs 8 and 9 of Dr. Wilson's Declaration. The simple explanation is that Rule 704 does not require exclusion of these opinions, but instead supports their admission. For the foregoing reasons, the Court should deny Texas's motion to strike paragraphs 8 and 9 of Dr. Wilson's Declaration.[12]

[12] New Mexico's response herein applies to Texas's "Exhibit B" numbers 91 and 92.

G. New Mexico's Expert Reports are Permissible as Summary Judgment Evidence.

Texas's Objection #7 (§ III(G)) is a global objection to the authenticity of the expert reports and portions of reports submitted by New Mexico in support of its summary judgment briefing. This objection is redundant of Texas's earlier objection on the topic and New Mexico fully addressed this objection in its previous response. *See* New Mexico's Response to the State of Texas's Evidentiary Objections at §§ I, II, II(A) & II(B) (Feb. 5, 2021) [Dkt. 468]. New Mexico incorporates those responses herein and no further response is necessary.[13]

H. Texas Applied an Incorrect Standard as to the Authentication of Documents Submitted in Support of New Mexico's Summary Judgment Briefing.

Texas's Objection #8 (§ III(H)) is a global objection to the authenticity of deposition transcripts, hearing transcripts, pleadings, and other documents submitted by New Mexico in support of its summary judgment briefing. This objection is redundant of Texas's earlier objection on the topic, and New Mexico fully addressed these objections in its earlier response. *See* New Mexico's Response to the State of Texas's Evidentiary Objections at §§ I, II, II(C), II(D) & II(E) (Feb. 5, 2021) [Dkt. 468]. New Mexico incorporates those responses herein and no further response is necessary.

IV. RESPONSE TO TEXAS "SHAM DECLARATION" ARGUMENTS

Texas further objects to certain New Mexico declarations, falsely claiming they are "sham affidavits." Tex. 2d Objections at 22. Texas greatly overstates the breadth of the "sham affidavit" rule as well as its application. Generally, "the inconsistency between a party's testimony and subsequent affidavit must be *clear and unambiguous* to justify striking the affidavit." *Van Asdale v. Int'l Game Tech.*, 577 F.3d 989, 998-99 (9th Cir, 2009) (emphasis added); *accord Castro v.*

[13] New Mexico's response herein applies to Texas's "Exhibit B" numbers 93, 98, 99, 106, 109, 121, 125, 128, 130, 134, 135, 136, 163, 168, and 172.

DeVry Univ., Inc., 786 F.3d 572 (7th Cir. 2015) (affidavit should be excluded as a sham "only where the witness has given clear answers to unambiguous questions which negate the existence of any genuine issue of material fact." (internal quotations omitted)).

Courts generally are cautioned to apply the sham affidavit rule "sparingly because of the harsh effect it may have on a party's case." *Furcron v. Mail Centers Plus, LLC*, 843 F.3d 1295, 1307 (11th Cir. 2016) (internal quotation omitted). *Castro* ably explains why:

> [The sham affidavit rule] must be applied with great care, though, because summary judgment is not a tool for deciding questions of credibility. Few honest witnesses testify at any length without at least occasional lapses of memory or needs for correction or clarification. Disregarding as a sham every correction of a memory failure or variation in a witness's testimony requires far too much from lay witnesses and would usurp the trier of fact's role in determining which portion of the testimony was most accurate and reliable.

786 F.3d at 571-72 (internal quotations and citations omitted). Therefore, the sham affidavit rule should be invoked to exclude an affidavit only where "the only reasonable inference" is that the declaration is a sham. *Id*. at 571. Or as *Furcron* reasoned:

> [T]he rule only operates in a limited manner to exclude unexplained discrepancies and inconsistencies, as opposed to those which create an issue of credibility or go to the weight of the evidence. Put differently, an opposing party's affidavit should be considered although it differs from or varies from his evidence as given by deposition or another affidavit and the two in conjunction may disclose as issue of credibility.

843 F.3d at 1305-07 (internal quotations and citations omitted).

In addition, courts recognize a number of exceptions to the sham affidavit rule. For example, a party "is not precluded from elaborating upon, explaining or clarifying prior testimony elicited by opposing counsel on deposition and minor inconsistencies that result from an honest discrepancy, a mistake, or newly discovered evidence afford no basis for excluding an opposition affidavit." *Van Asdale*, 577 F.3d at 999 (quotation omitted); *accord Button v. Dakota, Minnesota & Eastern Ry. Corp.*, 963 F.3d 824, 830 (8th Cir. 2020). Similarly, "[w]here there is independent

evidence in the record to bolster an otherwise questionable affidavit, courts generally have refused to disregard the affidavit." *Jiminez v. All American Rathskeller, Inc.*, 503 F.3d 247, 254 (3d Cir. 2007). Finally, the sham affidavit rule allows a court to disregard an affidavit submitted in opposition to a motion for summary judgment only "when the affidavit contradicts the *affiant's* prior deposition testimony, not another witness's prior deposition testimony. *Quest Integrity USA, LLC v. Cokebusters USA, Inc.*, 924 F.3d 1220, 1232-33 (Fed. Cir. 2019) (emphasis added) (internal quotation omitted).

Texas requests that the Court apply the sham affidavit rule far more broadly than is warranted, seeking to exclude large swaths of evidence submitted by New Mexico on the basis of alleged discrepancies between New Mexico's declarants and their prior deposition testimony that crumble under even casual scrutiny. As demonstrated in the **attached table**, **Attachment B,** none of the alleged inconsistencies Texas identifies amount to an actual conflict between the challenged declarations and the deposition testimony of the affiants, let alone "clear and unambiguous" inconsistencies, that justifies striking any of the challenged declaration statements as sham affidavits. *Van Asdale*, 577 F.3d at 998.

In general, Texas seeks to exclude a number of statements in State Engineer John D'Antonio's second Declaration, NM-EX 007, largely on the grounds that Mr. D'Antonio's discussion of administrative actions New Mexico has taken in the LRG conflicts with Texas's simplistic and false narrative that New Mexico has not conducted any administration in that area. However, Texas does not identify any actual dispute between Mr. D'Antonio's deposition testimony and the facts in his declaration.

Similarly, Texas misrepresents Dr. Barroll's deposition testimony in an attempt to exclude portions of her second Declaration, NM-EX 006. In addition to attempting to exclude information

Dr. Barroll presents about New Mexico's efforts to reduce groundwater withdrawals in the LRG, Texas seeks to exclude statements Dr. Barroll makes about the impacts of groundwater withdrawals on the flimsy basis that they "imply" conclusions Texas believes are unfavorable to its case. Again, Texas cannot identify any actual disputes between Dr. Barroll's testimony and her declarations, and its arguments should be disregarded.

Finally, Texas seeks to exclude one paragraph from Dr. Jennifer Stevens' second Declaration, NM-EX 011, on the basis that it conflicts with her deposition testimony. Again, Texas does not identify an actual conflict. Dr. Stevens's testimony concerning the number of wells in the LRG at the time the Compact was executed was limited to wells within EBID, whereas her second Declaration includes wells outside of EBID, including municipal wells. As with Mr. D'Antonio and Dr. Barroll, Texas's attempt to demonstrate that part of Dr. Stevens' second Declaration is a "sham" fails and Texas's request to strike these portions of the referenced declarations should be denied.[14]

CONCLUSION

Texas objected to virtually all the evidence submitted with the New Mexico motions for partial summary judgment and New Mexico's response to Texas's motion for partial summary judgment. The entirety of *State of Texas's Objections and Reply to the State of New Mexico's Consolidated Statement of Facts and Appendix 1 Filed by New Mexico in Response to Texas's Motion for Partial Summary Judgment* filed February 5, 2021 [Dkt. 460] should be denied because each of the objections lack support.

[14] New Mexico's response herein applies to Texas's "Exhibit B" numbers 124, 162, 165, 166, 172, 178, 179, 188, 189, 192, and 193.

Respectfully submitted,

/s/ *Jeffrey J. Wechsler*

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ATTACHMENT A

ATTACHMENT B