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

NEW MEXICO'S RESPONSE TO THE UNITED STATES OF AMERICA'S MOTION TO STRIKE DECLARATIONS

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This brief is in response to the United States of America's Motion to Strike Declarations ("U.S. Motion" or "U.S. Mot.") filed on February 5, 2021 [Dkt. 475].[1]

INTRODUCTION

The United States moves to strike certain sentences, and paragraphs, in numerous expert and fact witness declarations, filed by New Mexico in support of The State of New Mexico's Response to the United States of America's Motion for Partial Summary Judgment ("New Mexico's Response to the U.S. Summary Judgment Motion" and "New Mexico's Response" ("N.M. Resp. U.S.")), filed on December 22, 2020 [Dkt. 437]. These declarations are the second Declaration of Margaret Barroll, Ph.D. ("Barroll Declaration (2d)"), the second Declaration of Estevan R. Lopez, P.E. ("Lopez Declaration (2d)"), the Declaration of Lee Wilson, PhD ("Lee Wilson Declaration"), the second Declaration of Jennifer Stevens, PhD ("Stevens Declaration (2d)"), the second Declaration of John D'Antonio ("D'Antonio Declaration (2d)"), and the Declaration of Ryan J. Serrano ("Serrano Declaration") (collectively, "New Mexico's Declarations"). The United States also moves the Court to "disregard" or strike all statements made in New Mexico's Response that rely on these various sentences and paragraphs.

The primary basis for the U.S. Motion is that these declarants, allegedly, do not have personal knowledge of the facts and matters stated in the various sentences and paragraphs of their Declarations identified by the United States, and, therefore, these statements are inadmissible hearsay. The United States also objects to a more limited number of sentences and paragraphs, based on additional allegations that the particular declarant does not possess the expertise required

[1] Concurrent with this response brief, New Mexico has filed a Response to the State of Texas's Second Evidentiary Objections. To the extent that the U.S. Motion raises any of the same issues as Texas's Second Evidentiary Objections, New Mexico incorporates its responses to those Texas objections, by reference, herein. *See also* U.S. Mot, 2 (U.S. referencing same "Tex. Evidentiary objections & Resp. to N.M. Facts.").

to opine on certain matters; that they comprise "legal conclusions" or "legal arguments"; or they comprise improper opinion testimony. For all of the reasons set out below, these allegations lack merit, and the U.S. Motion should be dismissed in its entirety. Most particularly, as the United States acknowledges in its Motion, each of Margaret Barroll, Ph.D. ("Dr. Barroll"), Estevan R. Lopez, P.E. ("Mr. Lopez"), Lee Wilson, Ph.D. ("Dr. Wilson"), and Jennifer Stevens, Ph.D. ("Dr. Stevens"), are experts in this case. As such, these experts are competent to testify and offer opinions on the facts and matters stated in their declarations. This is entirely permissible under the Federal Rules of Evidence, and is fatal to the vast majority of the United States' objections in its Motion.

BACKGROUND

The United States challenges the following statements, and paragraphs, in New Mexico's Declarations on the ground that the declarants allegedly lack personal knowledge of the facts underlying them—and, therefore, they are, allegedly, "inadmissible hearsay." U.S. Mot, 1-4, 6-14. Relatedly, and on the same basis, the United States requests that the Court disregard/strike the below-identified paragraphs of New Mexico's Response. *Id.* at 4, 6-7, 9-10, 12-13:

New Mexico Declaration:	**Paragraphs in Declaration Challenged:**	**Paragraphs in New Mexico's Response Challenged:**
Barroll Declaration (2d) (NM-EX-006)	13-21, 23-24, 27, 28, 29 (sentences 1-4, 6-7), 33, 37 (sentence 2), 38 (sentence 2), 39 (sentence 7), 43, 50 (sentences 3-6, 8), 53, 54 (sentences 3-4), 55-57, 62 (sentences 2-3), 65, 67, 72, and 75-79	1-8, 10, 14-15, 24-26, 28-29, 43-48, 51, 54-55, 62-63
Lopez Declaration (2d) (NM-EX-008)	4-37, 38 (sentences 1-5), and 39-41	2-4, 7-8, 10-11, 35, 38, 39
Stevens Declaration (2d) (NM-EX-011)	3-32	3-5, 13, 20, 22-23

Lee Wilson Declaration (NM-EX-013)	4 (sentences 3-6), 6(a) (sentence 3), 6(b) (part of sentence 2, sentences 3-4), 6(e), 6(g) (sentences 1, part of sentence 2, sentences 3-4), 6(h), and 9	6, 10, 52
D'Antonio Declaration (2d) (NM-EX-007)	2, 4, 8 (sentences 2-7), 9, 9 n.3&4, 10, 11 (sentence 2), 12-13, 14, 14 n.5, 15 (sentence 1), 17 (part of sentence 1), 18, 18 n.6, 19 (part of sentence 1, sentence 2), 20, 21 n.8, 22 (sentence 3), 22 n.9, 23 (sentence 2), 24 (sentence 2), 25 (sentence 4), 26 (sentences 2-3), 28, 37(a) (sentence 3 and the bullets in their entirety), 37(a) n.11, 37(b) (sentence 2), 37(b) n.12 (sentences 1, 5), 37(c) (bullet 1 in its entirety, part of sentence 1 on bullet 2), 37(c) n.13, 37(c) n.14 (sentence 1), 40 n.15, 44 (sentence 5), 47, 49 (sentence 3-4, part of sentence 5), 51-52, 53 (sentence 7), 54 n.20, 55, 56 (part of sentence 1), and 57 (sentence 3)	1-2, 5-11, 31, 53-57
Serrano Declaration (NM-EX-010)	8, 13(f) (sentence 3), 14(g) (sentences 2-3), 15, 19 (sentence 2), 26 (sentence 1), 29, 31 n.6 (sentence 2), 32 (sentence 7), 35-36, and 37 (sentence 2)	1, 5-7, 9-10, 17, 52, 56

The United States also makes 11 additional objections to various of the above-identified paragraphs—New Mexico will respond to these additional objections, as they relate to each declarant, below. The United States objects to:

1. Paragraph 13 (sentence 4) of the Barroll Declaration (2d) on the ground that Dr. Barroll allegedly lacks the personal knowledge required to rely on the deposition testimony she cites to in this paragraph. U.S. Mot. 13.

2. Paragraphs 23 (sentence 7), 28 (sentence 1), 29 (sentence 1-4, 6), 37 (sentence 2), 39 (sentence 7), 43 (sentence 3), 56 (sentence 1), 65 (sentence 1), 75, 77, and 78 of the Barroll Declaration (2d) on the ground that Dr. Barroll allegedly lacks the personal knowledge required to rely on the declaration or expert report of another person, that she cites to in these

sentences/paragraphs. U.S. Mot. 14.

3. Paragraphs 35 n.7, and 39 (sentence 2) of the Lopez Declaration (2d) on the ground that Mr. Lopez allegedly lacks the personal knowledge required to rely on the deposition testimony he cites to in these statements/paragraphs. U.S. Mot. 13.

4. Paragraphs 18 (sentence 5), 19 (sentence 4), 22 (sentence 4), 23 (sentences 3-4), 33 (sentence 3), 35, 37 (sentence 2) and 39 (sentence 1) of the Lopez Declaration (2d) on the ground that Mr. Lopez allegedly lacks the personal knowledge required to rely on the declaration or expert report of another person, that he cites to in these sentences/paragraphs. U.S. Mot. 14.

5. Paragraphs 3, 18-20, and 22-24 of the Lopez Declaration (2d) on the ground that these allegedly contain "legal arguments" and "legal conclusions." U.S. Mot. 8.

6. Paragraph 9 of the Lee Wilson Declaration on the ground that this paragraph allegedly contains "legal conclusions, which [Dr. Wilson] is not qualified to assert." U.S. Mot., 13.

7. Paragraphs 22 (sentence 3), 23 (sentence 2), 26 (sentence 2-3), 37 n.11, 40 n.15, and 53 (sentence 6) of the D'Antonio Declaration (2d) on the ground that Mr. D'Antonio allegedly lacks the personal knowledge required to rely on the deposition testimony he cites to in these statements/paragraphs. U.S. Mot. 13.

8. Paragraphs 12 (sentences 1, 6), 13 (sentence 5), 14 n.5, 18 (sentence 2), 20, 47 (sentence 3), and 49 (sentence 4) of the D'Antonio Declaration (2d) on the ground that Mr. D'Antonio allegedly lacks the personal knowledge required to rely on the declaration or expert report of another person, that he cites to in these sentences/paragraphs. U.S. Mot. 14.

9. Paragraphs 10, 14 (g) (sentences 2-3), and 15 of the Serrano Declaration on the ground that Mr. Serrano allegedly lacks the personal knowledge required to rely on the deposition

testimony he cites to in these statements/paragraphs. U.S. Mot. 14.

10. Paragraph 8 of the Serrano Declaration—and paragraph 52 of New Mexico's Response to the U.S. Summary Judgment Motion—on the ground that Mr. Serrano is a fact witness and so cannot offer opinion testimony on the matters stated in these paragraphs. U.S. Mot. 12.

11. Paragraph 37 of the Serrano Declaration on the ground that Mr. Serrano allegedly lacks the personal knowledge required to rely on the declaration or expert report of another person, that he cites to in these sentences/paragraphs. U.S. Mot. 14.

ARGUMENT

I. United States Motion to Strike is Wrongheaded

As an initial matter, the U.S. Motion is wrongheaded for the following reasons:

A. The United States Motion to the Extent It Seeks to Strike Statements Made in New Mexico's Response is Improper

First, while the U.S. Motion is styled as a Motion to Strike Declarations, throughout the Motion, the United States repeatedly requests that the Court strike not only certain sentences and paragraphs in the New Mexico Declarations, but also statements made in New Mexico's Response to the U.S. Summary Judgment Motion which cite to these sentences and paragraphs. The United States moves to strike these sentences, paragraphs and statements "based on Rules 12(f), 56(c) & (e) of the Federal Rules of Civil Procedure, [and] Rule 17 of the Rules of the Supreme Court." U.S. Mot., 1; Fed. R. Civ. P. 12(f), 56(c), (e); Supreme Ct. R., 17. The U.S. Motion as it relates to New Mexico's Response is wrongheaded—New Mexico's Response is a summary judgment brief, and as such it is not the proper subject of a motion to strike.

Rule 17 of the Supreme Court Rules provides, among other things, that the form of "motions prescribed by the Federal Rules of Civil Procedure" should be followed, and that those "Rules and the Federal Rules of Evidence may be taken as guides." Supreme Ct. R., 17. Federal

Rule of Civil Procedure 12(f) empowers the Court to "strike from a *pleading* an insufficient defense or any *redundant, immaterial, impertinent, or scandalous matter*." Fed. R. Civ. P. 12(f) (emphasis added). The term "pleading" is defined in Rule 7(a) as a complaint, an answer, and a reply to an answer. Fed. R. Civ. P. 7(a). By its express language, Rule 12(f) only applies to material contained in a "pleading." Fed. R. Civ. P. 12(f), 7(a). "Motions, briefs or memoranda, objections, or affidavits may *not* be attacked by the motion to strike." Moore's Federal Practice § 12.37[2] (2021) (emphasis added);[2] *see also e.g.*, *Sum of $66,839.59 v. IRS*, 119 F. Supp. 2d 1358, 1359 n.1 (N.D. Ga. 2000) ("a motion to strike is only appropriate with regard to a pleading"). There is no basis in Rule 12(f) to strike a motion, or a memorandum in support of that motion. *See e.g.*, *EEOC v. Admiral Maint. Serv*., L.P., 174 F.R.D. 643, 646 (N.D. Ill. 1997) ("motions for summary judgments are not pleadings"); *Board of Educ. v. Admiral Heating & Ventilation, Inc*., 94 F.R.D. 300, 304 (N.D. Ill. 1982) (refusing to strike a footnote in a memorandum on the ground that a "footnote [] in a memorandum, [is] not a pleading.").

Rule 56 relates to summary judgment. Fed. R. Civ. P. 56. Rule 56(c) and (e) concern, among other things, the proper support for assertions as to whether "a fact cannot be or is genuinely disputed," including by reference to "documents … affidavits or declarations … or other materials," and reliance on affidavits or declarations "to support or oppose a motion" for summary

[2] The U.S. references *Judicial Watch, Inc. v. U.S. Dept. of Commerce*, 224 F.R.D. 261 (2004). That case is inapposite to the issues presented in the U.S. Motion. In that case, the court found that "materiality and pertinence defects" in "affidavits and declarations filed in support of technical pleadings" could be stricken under Rule 12(f), because "Rule 12(f) is the only viable method" for doing so. *Id.* at 263 n.1. As to objections to declarations under Rule 56(e), the court there struck certain sentences in a declaration by a Department of Commerce Freedom of Information Act Director on the ground that they comprised "unsubstantiated opinion for which [the declarant] lack[ed] first-hand knowledge and personal experience necessary to render her competent to attest to … [the] facts underlying her statements." *Id.* at 265. Here, for the reasons explained, all of the New Mexico declarants have the required foundational knowledge, and expertise, to testify as to the facts and matters stated.

judgment. Fed. R. Civ. P. 56 (c), (e). Rule 56(c) and (e) do not empower the Court to strike statements made in summary judgment briefs.

B. There is No Basis to Strike Under Rule 12(f) or Rule 56

The United States' reliance on Rule 12(f) as regards New Mexico's Declarations is also misplaced. Rule 12(f) empowers the Court to "[s]trike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). "[T]here is no basis" in Rule 12(f) "to strike an affidavit or portions thereof." *Lombard v. MCI Telcoms. Corp*., 13 F. Supp. 2d 621, 625 (N.D. Ohio 1998)) (internal quotations and citations omitted). In any event, the United States does not allege that any of New Mexico's Declarations contain "redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f).

Further, while Rule 56 provides that on summary judgment, "[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence," Fed. R. Civ. P. 56(c)(2); and a "declaration used to support or oppose a motion [for summary judgment] must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated," Fed. R. Civ. P. 56(c)(4)—Rule 56(e) also provides that "[i]f a party fails to properly support an assertion of fact … the court may," among other things, afford that party "an opportunity to properly support or address the fact," or "issue any other appropriate order." Fed. R. Civ. P. 56(e). Further, in the summary judgment context, "the proper method for challenging the admissibility of evidence in an affidavit [or declaration] is to file a notice of objection to the challenged testimony." *Sum of $66,839.59*, 119 F. Supp. 2d 1359 n.1. The Court should then "evaluate the evidence presented," and generally, objections should "go to the weight to be given to [that] testimony rather than its admissibility." *Id.*; *see also Lombard*, 13 F. Supp. 2d at 625 (the proper

approach is to "disregard inadmissible evidence, not strike that evidence from the record.") (internal quotations and citations omitted).

C. The United States Motion is Overbroad and Lacks Reasonable Specificity

Third, the United States' objection to the identified sentences and paragraphs in New Mexico's Declarations, and to statements in New Mexico's Response to the U.S. Summary Judgment Motion is overbroad, and lacks reasonable specificity. The United States objects to, and seeks to strike, at a minimum, one sentence in each of 33 paragraphs in the Barroll Declaration (2d); 37 paragraphs in the Lopez Declaration (2d); 29 paragraphs in the Stevens Declaration (2d); 33 paragraphs in the D'Antonio Declaration (2d); and 12 paragraphs in the Serrano Declaration. Similarly, the United States blanket objects to 41 pages in New Mexico's Response, and leaves it to the Court to determine which portions on these pages exclusively rely on allegedly objectionable statements in New Mexico's Declarations such that they should—according to the United States—be stricken or disregarded.

Making these tasks even more burdensome and unreasonable, when the sentences and paragraphs the United States has identified in New Mexico's Declarations are compared with the pages the United States identifies in New Mexico's Response, there is limited overlap—meaning that the United States has objected to a significant number of sentences and paragraphs in New Mexico's Declarations that New Mexico does not cite to, or rely on in New Mexico's Response.[3]

[3] When the 33 objected to paragraphs in the Barroll Declaration (2d) are matched with the 26 objected to pages in New Mexico's Response identified by the U.S., there are citations to 29 of these paragraphs on these Response pages (13-21, 23-24, 27-29, 33, 43, 50, 53-57, 62, 65, 67, 72, 75-79), but there is no reference to the remaining nine of these paragraphs (16, 19-20, 27, 43, 53-54, 75, 79).

When the 37 objected to paragraphs in the Lopez Declaration (2d) are matched with the 10 objected to pages in New Mexico's Response identified by the U.S., there are citations to eight of these paragraphs (23-24, 30, 35, 37-39, and 41), but there is no reference to the remaining 29 of these paragraphs (4-22, 25-29, 31-34, 36, or 40).

The United States does not explain why—during summary judgment briefing—it is objecting to all of these additional sentences and paragraphs in New Mexico's Declarations. In any event, the U.S. Motion is overbroad, and unduly burdensome, and its lack of specificity is unreasonable. For these reasons alone—and particularly, if the intent of the U.S. Motion is, to any extent, to detract New Mexico from the issues in the case, and to require New Mexico to incur unnecessary and unreasonable litigation costs—New Mexico respectfully submits that the Court should review the United States' objections with a critical eye.

D. The United States Acknowledges that Dr. Barroll, Mr. Lopez, Dr. Wilson and Dr. Stevens Are Experts in This Case[4]

The United States acknowledges that Dr. Barroll, Mr. Lopez, Dr. Wilson, and Dr. Stevens are experts in this case (U.S. Mot., 1-2, 4-5, 7 and 12), and objects to certain statements in the Barroll Declaration (2d), the Lopez Declaration (2d), and the Lee Wilson Declaration on the ground that Dr. Barroll, Mr. Lopez, and Dr. Wilson allegedly lack the necessary expertise to opine

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When the 29 objected to paragraphs in the Stevens Declaration (2d) are matched with the 12 objected to pages in New Mexico's Response identified by the U.S., there are citations to 13 of these paragraphs (4, 12, 23, 25, 29-32), but there is no reference to the remaining 16 of these paragraphs (3, 5-11, 13-22, 24, 26-28).

When the three objected to paragraphs in the Lee Wilson Declaration are matched with the three objected to pages in New Mexico's Response identified by the U.S., there are citations to only two of these paragraphs (4 and 6)—there is no reference to paragraph 9.

When the 16 objected-to paragraphs in the D'Antonio Declaration (2d) are matched with the 15 objected to pages in New Mexico's Response identified by the U.S., there are citations to 15 of these paragraphs (4, 8, 14-15, 17-19, 21-22, 37, 40, 47, 53, 57), but there is no reference to the remaining 18 of these paragraphs (2, 9-13, 17, 20, 24-26, 28, 49, 51-52, 54-56).

When the 12 objected-to paragraphs/sub-paragraphs in the Serrano Declaration are matched with the nine objected to pages in New Mexico's Response identified by the U.S., there are citations to nine of these paragraphs (8, 13-15, 19, 26, 29, 31-32), but there is no reference to the remaining three of these paragraphs (35-37).

[4] New Mexico notes here, for the record, that to the extent the United States, and Texas, objects at the summary judgment stage to the admissibility of any statements made or opinions offered by any of New Mexico's experts, the United States' and Texas's experts must also be subjected to the same scrutiny.

on such matters. U.S. Mot., 6-7, 8-9, 12. However, the United States then devotes the majority of its Motion to objecting to a significant number of sentences and paragraphs in each of their declarations on the ground that they allegedly lack personal knowledge of the facts and matters stated, or of the facts and matters on which their opinions rely (U.S. Mot., 1, 4, 6-9, 12-14). This is wrongheaded.

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." Fed. R. Evid. 702. Under Rule 703, "[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," and "[i]f 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." Fed. R. Evid. 703; *see also Daubert v. Merrell Dow Pharms., Inc*., 509 U.S. 579, 592 (1993) ("Unlike an ordinary witness … an expert is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation.") (citing Fed. R. Evid. 702, 703); *Admiral Ins. Co. v Joy Contrs., Inc*., 19 N.Y.3d 448, 457 (Ct. App. N.Y. 2012) ("an expert's opinion need not be based upon personal knowledge") (citation omitted). "[T]his 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." *Daubert*, 509 U.S. at 592; *see also id.* at 595 ("Rule 703 provides that expert opinions based on otherwise inadmissible hearsay are to be admitted [] if the facts or data are 'of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject.'") (quoting Fed. R. Evid. 703). Under 704, expert opinion is also "not objectionable just because it embraces an ultimate issue." Fed. R. Evid. 704(a); *see also e.g.*, *United States v. Bedford*, 536

F.3d 1148, 1158 (10th Cir. 2008) (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.") (citation omitted); *United States v. Dazey*, 403 F.3d 1147, 1172 (10th Cir. 2005) (where an opinion is offered on an ultimate issue, the question is whether "the expert's testimony assists, rather than supplants, the [fact finder's] judgment.").

In the context of a summary judgment motion, the fourth circuit has clarified that:

> the Federal Rules of Evidence provide special rules regarding the admissibility of the opinion testimony of experts.… Fed. R. Evid. 1101(b) makes the Federal Rules of Evidence generally applicable to all civil actions.… Reading [Fed. R. Evid. 703] in tandem with Rule 56(e) affects the parameters of the Rule 56(e) 'personal knowledge' requirement for expert witnesses. In order for the affidavit of an expert witness to satisfy Rule 56(e), the 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, 1995 U.S. App. LEXIS 12604 *14-15 (4th Cir. 1995); *see also e.g.*, *Wilson v. City of Los Angeles*, 2021 U.S. Dist. LEXIS 10241 *41 (C.D. Cal. Jan. 8., 2021) ("When a party offers expert affidavits in the summary judgment context, the Court may consider such evidence if it is presented in admissible form, *i.e*., the declarant is qualified to give an expert opinion and the factual basis for the opinion is stated in the declaration.") (citing Fed. R. Civ. P. 56(c)(4) and Fed. R. Evid. 703, 705); *Marine Polymer Techs., Inc. v. HemCon, Inc*., 2009 U.S. Dist. LEXIS 23987 *3 (D.N.H. Mar. 24, 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)."); *Doe v. Cutter Biological, Inc*., 971 F.2d 375, 385 n.10 (9th Cir. 1992) ("Rule 56(e)'s 'personal knowledge' requirement does not negate an expert witness' right under F.R. Evid. 703 to base her or his opinion

on data 'made known to the expert,' which 'need not be admissible in evidence.'); *Colgan v. Fisher Scientific Co*., 935 F.2d 1407, 1423 n.15 (3rd Cir. 1991) (Fed. R. Civ. P. 56(c) "should [be] considered in tandem with Fed. R. Evid. 703.").

For the reasons set out below, the United States' objections to certain sentences and paragraphs in each of the Barroll Declaration (2d), the Lopez Declaration (2d), the Lee Wilson Declaration, and the Stevens Declaration (2d) are, therefore, entirely without merit. With three very limited exceptions (concerning the Barroll Declaration (2d), the Lopez Declaration (2d), and the Lee Wilson Declaration), the United States does not question the expertise of any of the aforementioned declarants. And the United States does not question whether the facts or data they rely on are the "kinds" that experts in their respective fields "would reasonably rely on … in forming an opinion." Fed. R. Evid. 702, 703. Instead, the United States focusses its objection on their alleged lack of personal knowledge of the facts stated, or of the facts underlying their opinions. As a general matter, and for the reasons explained below, this objection is misplaced. The statements and opinions of each of these experts are admissible provided they have personal knowledge of the underlying facts or data, *or* have "been made aware of" or have "personally observed" these facts or data. Fed. R. Evid. 602, 703. Further, these experts do not need to have "observed or participated in the gathering of the data underlying [their] opinion[s]." *Huber*, 1995 U.S. App. LEXIS 12604 *15. What matters is if they "formed an expert opinion based on [their] own assessment of the data"—they did. *Id.*

Further, the fact that Dr. Barroll and Mr. Lopez were also put forward, by New Mexico, to give Rule 30(b)(6) testimony on behalf of the State as to certain matters, does not in any way negate their status as an expert witness in this case as regards all statements made, and testimony given in their roles as experts. U.S. Mot., 6, 8; Fed. R. Civ. P. 30(b)(6).

E. The United States' Objections Based on Personal Knowledge Are Overbroad

Finally, the U.S. Motion largely rests on the objection that the identified sentences and paragraphs in New Mexico's Declarations are not admissible because the declarant allegedly does not have personal knowledge of the facts stated, or relied upon. Even as regards New Mexico's fact witnesses, this objection is overbroad.

Pursuant to the Federal Rules of Evidence, "[e]very person is competent to be a witness unless the[] rules provide otherwise." Fed. R. Evid. 601. Under Rule 602, a lay (non-expert) "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." Fed. R. Evid. 602. This requirement of "personal knowledge" stands in contrast to evidence that is instead based merely on information and belief. "Evidence is inadmissible under Rule 602 only if in the proper exercise of the trial court's discretion it finds that the witness could not have actually perceived or observed that which he testified to." *United States v. Neal*, 36 F.3d 1190, 1206 (1st Cir. 1994) (internal quotation and citation omitted). "Although first-hand observation is the most common form of personal knowledge, first-hand observation is not the only basis for personal knowledge." *L.A. Times Communs., LLC v. Dep't of the Army*, 442 F. Supp. 2d 880, 886 (C.D. Cal., Jul. 24. 2006). For example, "[p]ersonal knowledge may be inferred from a declarant's position." *In re Kaypro,* 218 F.3d 1070, 1075 (9th Cir. 2000) (a corporate officer's five-year tenure "len[t] support to his claim of 'personal knowledge' of industry practice."). Where a declarant establishes "that their testimony is based on personal knowledge acquired through their positions and performance of their job duties," they "can testify about practices or procedures in place before [they were] employed with the organization about which [they are] relating information." *L.A. Times Communs.*, 442 F. Supp. at 886-87. Also, a declaration or "affidavit can adequately support a

motion for summary judgment when the affiant's personal knowledge is based on a review of her employer's business records and the affiant's position with the employer renders her 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).

Further, lay witnesses may offer opinion testimony, provided such testimony is "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge" (which is the province of an expert). Fed. R. Evid. 701; *see also Neal*, 36 F.3d at 1206 ("Personal knowledge can include inferences and opinions, so long as they are grounded in personal observation and experience.") (internal quotation and citation omitted). "The distinction between lay and expert witness testimony is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field." *United States v. Grace*, 568 Fed. Appx. 344, 354 (5th Cir. 2014) (quotation omitted); *see also United States v. Sosa*, 513 F.3d 194, 200 (5th Cir. 2008) ("a lay opinion must be the product of reasoning processes familiar to the average person in everyday life.") (citation omitted).

As to the United States' specific objection that declarants' reliance on the deposition testimony, declarations and expert reports of others is inadmissible hearsay, under Federal Rule of Civil Procedure 56(c)(2), such objection is only sound where "the material cited … *cannot be presented in a form that would be admissible in evidence*." Fed. R. Civ. P. 56(c)(2) (emphasis added). As the Advisory Committee Notes explain, this "objection functions much as an objection at trial, adjusted for the pretrial setting. The burden is on the proponent to show that the material is admissible as presented *or* to explain *the admissible form that is anticipated*." Fed. R. Civ. P.

56(c)(2), Notes of Advisory Committee on 2010 Amendments (emphasis added). Applying this standard, the pertinent question at summary judgment is whether the evidence presented is admissible in content, not whether the offering party has presented it a manner that is admissible in form:

> The requirement is that the party submitting the evidence show that it will be possible to put the information, the substance or content of the evidence, into an admissible form. In other words, the party submitting the material must be able to demonstrate how it will be possible to introduce the content or substance of the material at trial. … If the person who made the statement has personal knowledge of the relevant substance of the statement and is expected to be available to testify at trial, the statement could be considered one that it would be possible to put into admissible form.

Moore's Federal Practice § 56.91[2] (2021); *see also id.* at § 56.91[3] ("If th[e] witness is available and competent, he or she could give this testimony in court and it would not be objectionable."); *Sandoval v. Cty. of San Diego*, 2021 U.S. App. LEXIS 866 *16 (9th Cir. 2021) ("If the contents of a document can be presented in a form that would be admissible at trial—for example, through live testimony by the author of the document—the mere fact that the document itself might be excludable hearsay provides no basis for refusing to consider it on summary judgment.") (citation omitted). For example, where "the objected-to documents either reflect the personal knowledge of individuals who could be called to testify at trial or will likely be admissible at trial under exceptions to the hearsay rule," there is no legitimate objection. *Sandoval*, 2021 U.S. App. LEXIS 866 *16. This includes "expert witnesses [who] can testify about the opinions expressed in their expert reports." *Id.* New Mexico expects that all of the identified declarants and experts, and all of the identified deponents will be present and available to testify at trial. The United States' objection to any reliance on deposition testimony, declarations or expert reports, therefore, lacks merit.

II. United States Motion as it Relates to Dr. Barroll is Misplaced

The U.S. Motion, as it relates to each of paragraphs 13-21, 23-24, 27, 28, 29 (sentences 1-4, 6-7), 33, 37 (sentence 2), 38 (sentence 2), 39 (sentence 7), 43, 50 (sentences 3-6, 8), 53, 54 (sentences 3-4), 55-57, 62 (sentences 2-3), 65, 67, 72, and 75-79 of the Barroll Declaration (2d)—and relatedly, to pages 1-8, 10, 14-15, 24-26, 28-29, 43-48, 51, 54-55, 62-63 of New Mexico's Response to the U.S. Summary Judgment Motion—is additionally misplaced for two reasons:

A. Dr. Barroll Has Extensive Personal Knowledge of Current and Historical Project Operations, Project Accounting, The Cropping Pattern and Groundwater Pumping on Project Acreage

Dr. Barroll has a Bachelor's degree (with Honors) in Physics from Swarthmore College, Pennsylvania, and a Master's degree and Ph.D. in Geophysics, from New Mexico Institute of Mining and Technology in Socorro, New Mexico. Her Ph.D. work involved groundwater modeling. NM-EX 001, Declaration of Margaret Barroll, Ph.D. in Support of the State of New Mexico's Partial Summary Judgment Motions, dated Nov. 4, 2020 (Barroll Decl. (1d)), ¶ 4. 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 to the New Mexico Interstate Stream Commission ("ISC"). *Id.* at ¶ 6. Currently, Dr. Barroll is a senior water resources hydrogeologist consultant. She is also performing ongoing work for the OSE on Rio Grande and Pecos River basin issues. *Id.* at ¶ 7.

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 regarding the LRG has

involved, among other things, an in-depth review of Rio Grande Project ("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.

Through her positions at the OSE, and through her ongoing work for the OSE; as a result of her performing her employment and engagement duties; and through her review of business records, documents and data as a result of those employment and engagement duties, Dr. Barroll has gained personal knowledge of all of the facts and matters stated in in each of sentences and paragraphs of the Barroll Declaration (2d) identified in the U.S. Motion.

B. Dr. Barroll is an Expert Witness And is Competent to Present Opinions Based on Facts or Data She is Aware of or Has Personally Observed

Further, as the United States acknowledges, Dr. Barroll is an expert witness in this case. U.S. Mot., 1, 5. As an expert, in addition to those facts she has personal knowledge of, Dr. Barroll is also competent to testify on facts and data she has been made aware of, or has personally observed. Dr. Barroll has personally analyzed, and has made her own assessment of all of the facts and data which she states, and on which she relies, in the Barroll Declaration (2d). All of these sentences and paragraphs are, therefore, admissible.

The United States objects to paragraphs 8 and 9 in the Barroll Declaration (2d) on the ground that that Dr. Barroll is allegedly not an expert regarding "the [Rio Grande] Compact,"

("Compact") and so she cannot make statements or offer opinions on matters relating to the Compact. This objection also lacks merit. Dr. Barroll testified at her deposition that she does not "regard [her]self as an expert on the Compact or what the Compact law is." Barroll 2/6/20 Tr. 313:19-21; *see also* Barroll 7/9/20 Tr. 27:25 ("I'm not an expert on the Compact itself"); Barroll 8/7/20 Tr. 188:25 ("I'm not a Compact expert."). This fact does not negate Dr. Barroll's ability to make the statements she made or offer the opinions she has given, either as a lay witness, or as an expert in this case. Fed. R. Evid. 703.

In paragraph 8 of the Barroll Declaration (2d), Dr. Barroll simply quotes two definitions from the Compact, verbatim, without any additional comment. Whether or not Dr. Barroll is an expert on the issue of Compact interpretation, does not negate the legitimacy of her providing this background paragraph, setting out the Compact definitions of two terms she later uses, as shorthand, in her declaration. In paragraph 9 of the Barroll Declaration (2d), there are four sentences, only one of which concerns interpretation of the Compact. Dr. Barroll states: "The Compact provides limits and constraints on upstream storage that are initiated when Project Storage." [sic] Barroll Declaration (2d), ¶9.[5] This statement is relevant to Project operations, a subject on which Dr. Barroll has extensive personal knowledge, and on which she is an expert in this case.

Further, to the extent the United States objects to Dr. Barroll's citation to, or reliance on the testimony of others, in her declaration, in the form of citations to declarations, expert reports, or deposition transcripts, such objections lack merit for the reasons set out above. At the summary judgment stage, this form over substance objection should be dismissed, not least because

[5] There is a typographical error in this one sentence: it should read: "The Compact provides limits and constraints on upstream storage that are initiated when Project Storage falls below certain thresholds."

all identified declarants, experts, and deponents will be present and available to testify at trial. Fed. R. Civ. P. 56(c)(2); Moore's Federal Practice § 56.91[2], [3] (2021); *Sandoval*, 2021 U.S. App. LEXIS 866 *15-16.

For all of the above reasons, the U.S. Motion as it relates to Dr. Barroll should be dismissed.

III. United States Motion as it Relates to Mr. Lopez is Misplaced

The U.S. Motion, as it relates to each of paragraphs 4-37, 38 (sentences 1-5), and 39-41 of the Lopez Declaration (2d)—and relatedly, to pages 2-4, 7-8, 10-11, 35, 38, 39 of New Mexico's Response to the U.S. Summary Judgment Motion—is additionally misplaced for three reasons:

A. Mr. Lopez Has Extensive Personal Knowledge of Matters Relating to the Compact, its Administration and History, the Interaction of the Compact and the Project, and Groundwater Pumping in Project Acreage

Mr. Lopez was the Director of the New Mexico ISC from January 2003 until October 2014. In that position, he supervised and directed all aspects of ISC business, which included negotiating compacts with other states to settle interstate controversies, including concerning interstate stream systems; investigating water supply to, among other things, protect, conserve and develop the water and stream systems of New Mexico; and instituting on behalf of New Mexico, negotiations and, where necessary, legal proceedings. NM-EX 003 Declaration of Estevan R. Lopez, P.E., in Support of New Mexico's Motions for Partial Summary Judgment, dated November 5, 2020 (Lopez Decl. (1d)), ¶ 7. As Director of the ISC, Mr. Lopez was also responsible for, among other things, understanding New Mexico's rights and obligations relative to other compacting states, confirming compact accounting, supervising intrastate actions to comply with compacts and decrees, and interacting with other compacting states. *Id.* While he was the Director of the ISC, Mr. Lopez also served as New Mexico Engineer Advisor to the Rio Grande Compact Commission ("RGCC"), and as Deputy New Mexico State Engineer. *Id.* at ¶¶ 7-8. As a result, Mr. Lopez has extensive knowledge and experience concerning the Compact.

In 2014, Mr. Lopez was appointed by United States President Barack Obama to serve as the Commissioner for the United States Bureau of Reclamation ("Reclamation"). Mr. Lopez served in this role from October 2014 to January 2017. *Id.* at ¶ 4. As the Commissioner for Reclamation, Mr. Lopez directed all aspects of Reclamation business, managing water throughout seventeen (17) western states, including almost 200 Reclamation water projects. *Id*. Reclamation is one of the primary federal agencies charged with development and implementation of water policy and water planning in the western United States. In this role, Mr. Lopez provided informational briefings to Congress, both formally in Committee and Sub-committee hearings, and informally. He also responded to requests for information, and interacted extensively with water managers across the 17 states. *Id.*

Through his positions at the ISC, as New Mexico Engineer Advisor to the RGCC, and as Deputy New Mexico State Engineer; as a result of his performing his employment and engagement duties; and through his review of business records, documents and data as a result of those employment and engagement duties, Mr. Lopez has gained personal knowledge of all of the facts and matters stated in each of sentences and paragraphs of the Lopez Declaration (2d) identified in the U.S. Motion.

B. Mr. Lopez is an Expert Witness And is Competent to Present Opinions Based on Facts or Data He is Aware of or Has Personally Observed

Further, as the United States acknowledges, Mr. Lopez is an expert witness in this case. U.S. Mot., 1-2, 7. As an expert, in addition to those facts he has personal knowledge of, Mr. Lopez is also competent to testify on facts and data he has been made aware of, or has personally observed. Mr. Lopez has personally analyzed, and has made his own assessment of all of the facts which he states, and on which he relies, in the Lopez Declaration (2d). All of these sentences and paragraphs are, therefore, admissible.

In addition, the United States objects to paragraph 23 in the Lopez Declaration (2d) on the ground that matters of history and Project operation are outside the scope of Mr. Lopez's expertise. These objections lack merit. Mr. Lopez testified at deposition that he has not "operated" a Reclamation project, that while he was employed by Reclamation he did not work "with the Rio Grande project," that he is "not the expert historian" in this case, that he is "not an attorney," and that he does not "purport to be an expert on law or legal questions." U.S. Mot., 8-9; Lopez 2/26/20 Tr. 22:2-7, 23:1-3; Lopez 7/6/20 Tr. 25:7-8, 27:7. These facts do not negate Mr. Lopez's ability to make the statements he made or offer the opinions he has given, either as a lay witness, or as an expert in this case. Fed. R. Evid. 701, 703. In paragraph 23 of the Lopez Declaration (2d), Mr. Lopez makes certain statements as to his understanding of the Compact. Mr. Lopez has personal knowledge of these facts and matters through his positions at the ISC, as New Mexico Engineer Advisor to the RGCC, and as Deputy New Mexico State Engineer; as a result of his performing his employment and engagement duties; and through his review of business records, documents and data as a result of those employment and engagement duties. In any event, as an expert in this case, Mr. Lopez has personally analyzed, and has made his own assessment of all of the facts and matters which he states, and on which he relies, in paragraph 23 of the Lopez Declaration (2d).

Further, to the extent that the United States objects to Mr. Lopez's citation to, or reliance on the testimony of others, in his declaration, in the form of citations to declarations, expert reports, or deposition transcripts, such objections lack merit for the reasons set out above. New Mexico expects all identified declarants, experts, and deponents will be present and available to testify at trial. Fed. R. Civ. P. 56(c)(2); Moore's Federal Practice § 56.91[2], [3] (2021); *Sandoval*, 2021 U.S. App. LEXIS 866 *15-16.

C. The United States Challenge to Certain Sentences or Paragraphs in the Lopez Declaration (2d) as Comprising Legal Opinion Are Unfounded

The United States also challenges paragraphs 3, 18-20, and 22-24 of the Lopez Declaration (2d) on the ground that these paragraphs allegedly contain "legal arguments" and "legal conclusions." U.S. Mot., 8. For the reasons set out below, this challenge is unfounded.

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." Fed. R. Evid. 702. 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." *Dazey*, 403 F.3d at 1172 (10th Cir. 2005); *see also Bedford*, 536 F.3d at 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."). Further, while "an expert may not state legal conclusions drawn by applying the law to the facts … an expert may refer to the law in expressing his or her opinion." *Bedford*, 536 F.3d at 1158 (internal quotations and citation omitted); *United States v. Richter*, 796 F.3d 1173, 1196 (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). As the Tenth Circuit has explained—there is no:

> per se bar on any expert testimony which happens to touch on the law; an expert may be called upon to aid the jury in understanding the facts in evidence even though reference to those facts is couched in legal terms. Expert testimony on legal issues crosses the line between the permissible and impermissible when it attempts to define the legal parameters within which the jury *must* exercise its fact-finding function.

Smith v. Ingersoll-Rand Co., 214 F.3d 1235, 1246 (10th Cir. 2000) (internal quotations and citations omitted; emphasis in original).

As an initial matter, it is not clear what the United States means by "legal arguments." In any event, neither the Federal Rules of Evidence nor the Federal Rules of Civil Procedure *per se* forbid Mr. Lopez from making any statements which the United States may perceive to be "legal arguments." Further, as to alleged "legal conclusions," no single sentence in any of paragraphs 3, 18-20, and 22-24 exclusively comprises a legal opinion or legal conclusion. At most, a limited number of sentences comprise mixed statements of fact and law, in that Mr. Lopez states relevant facts and then states his understanding as to how these facts relate to the law. In none of these paragraphs does Mr. Lopez cross the line and offer exclusively a legal opinion, or "attempt[] to define the legal parameters within which the jury must exercise its fact-finding function." *Smith*, 214 F.3d at 1246.

For all of the above reasons, the U.S. Motion as it relates to Mr. Lopez should be dismissed.

IV. United States Motion as it Relates to Dr. Wilson is Misplaced

The U.S. Motion, as it relates to each of paragraphs 4 (sentences 3-6), 6(a) (sentence 3), 6(b) (part of sentence 2, sentences 3-4), 6(e), 6(g) (sentences 1, part of sentence 2, sentences 3-4), 6(h), and 9 of the Lee Wilson Declaration—and relatedly, to pages 6, 10, and 52 of New Mexico's Response to the U.S. Summary Judgment Motion—is additionally misplaced for three reasons.

A. Dr. Wilson Has Personal Knowledge of Matters Relating to Hydrology and Water Use in the Lower Rio Grande, particularly as they Concern the City of Las Cruces

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. Dr. Wilson has been a consultant

to the City of Las Cruces for 40 years. Lee Wilson Declaration, 2.

Through this work on the Rio Grande, and for the City of Las Cruces, and from reviewing as part of this work, among other things, business records, documents and data, Dr. Wilson has gained extensive personal knowledge of the facts and matters stated in the Lee Wilson Declaration.

B. Dr. Wilson is an Expert Witness And is Competent to Present Opinions Based on Facts or Data He is Aware of or Has Personally Observed

Further, as the United States acknowledges, Dr. Wilson is an expert witness in this case. U.S. Mot., 12. As an expert, in addition to those facts he has personal knowledge of, Dr. Wilson is also entitled to testify on facts and data he has been made aware of, or has personally observed. Dr. Wilson has personally analyzed, and has made his own assessment of all of the facts and data which he states, and on which she relies, in the Lee Wilson Declaration. All of these sentences and paragraphs are, therefore, admissible.

C. The United States Objection to Any Statements by Dr. Wilson in Paragraphs 4 and 6 of the Lee Wilson Declaration Lack Merit

The United States also objects to certain sentences in paragraph 4 in the Lee Wilson Declaration on the grounds that that Dr. Wilson is not a historian expert and does not have personal knowledge of the facts stated. U.S. Mot., 12-13. In paragraph 4, Dr. Wilson is responding to a statement identified by the United States to be a material undisputed fact. The United States stated in USMF 56 that:

> [t]he City of Las Cruces (the City or Las Cruces), which is located partly within the EBID boundary, had two wells in use prior to 1937, five wells in use as of 1947, and 45 wells in use as of 2017, many of them drilled after 1980.

Lee Wilson Declaration, ¶ 4. In paragraph 4 of his declaration, Dr. Wilson, with his extensive personal knowledge of matters concerning the City of Las Cruces, and as an expert in this case, responded:

> Dr. Douglas R. Littlefield, a professional historian who has long conducted research regarding the City's water supply, has documented that use of surface water to supply the city's businesses and homes dates back to 1849, more than a century before Conover's report. He has further documented how groundwater contributed to the City's supply in the 1870s, and that by 1937 this supply came from many wells other than the two recognized by Conover. This establishes that Conover's report is incomplete as to the City's water supply in1937. USMF 56 is therefore disputed.

Id. The facts and matters stated in this paragraph are clearly within Dr. Wilson's personal knowledge, let alone his knowledge and expertise as an expert in this case. In this paragraph, Dr. Wilson relies on the kind of historical information that he typically relies upon when analyzing water priority issues. In this paragraph 4, he confirms Las Cruces' surface water use in 1849 and the use of neighborhood wells in the developing community starting in the 1870s. The objection by the United States to paragraph 4 in the Lee Wilson Declaration, therefore, lacks merit.

The United States also objects to certain sentences in paragraph 6 of the Lee Wilson Declaration on the grounds that Dr. Wilson does not have personal knowledge of the facts stated. U.S. Mot., 12-13. These objected to statements all concern facts relating to the City of Las Cruces that the United States allege in its USMF 57 are material and undisputed. Dr. Wilson states at the start of paragraph 6 that, on the contrary, "USMF 57 is incomplete and therefore misleading." Lee Wilson Declaration, ¶ 6. Again Dr. Wilson is testifying based on his extensive personal knowledge of matters concerning the City of Las Cruces, and as an expert in this case. Dr. Wilson then states numerous facts and provides reasoning in paragraph 6—including in 6(a), (b), (e), (g) and (h)—that he says show that, and how, USMF 57 is incomplete and misleading. The United States' objections that Dr. Wilson allegedly has no personal knowledge of the facts and matters—regardless that he is an expert in this case and thus can testify beyond his personal knowledge—are misguided. It is plain that these are precisely the types of facts and matters that Dr. Wilson has extensive personal knowledge of, as a result of his being a consultant to the City of Las Cruces,

including on issues of surface and groundwater hydrology, water rights, and water use in the LRG and in the Project, for the last 40 years.[6] Paragraph 6 concerns hydrologic issues. Dr. Wilson has decades of experience analyzing and modeling hydrologic issues on the Rio Grande for municipalities, tribes, and other interests. Further, as an expert in this case, the United States' objections are entirely without merit.

D. The United States Objection to Any Statements by Dr. Wilson on the Ground that they are Legal Conclusions Lacks Merit

The United States further objects to paragraph 9 in the Lee Wilson Declaration on the ground that Dr. Wilson allegedly "makes a number of legal conclusions" in this paragraph "which he is not qualified to assert." U.S. Mot., 13. As an initial matter, to the extent that the United States intends to levy this same objection to any other statement in the Lee Wilson Declaration, the United States has failed to identify and particularize such objection—any additional such objection should, therefore, be dismissed. As to paragraph 9, Dr. Wilson 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.

Lee Wilson Declaration, ¶ 9. The United States fails to identify any particular statement in this paragraph, that the United States alleges is a "legal conclusion"—and there is no legal conclusion in this paragraph. Dr. Lee Wilson points out, in this paragraph 9, the fact that:

> The Texas claim that non-Project water uses were frozen by adoption of the 1938 Rio Grande Compact is not consistent with the

[6] Paragraph 6 in the Lee Wilson Declaration addresses aspects of the City of Las Cruces water balance in relation to surface flows of the Rio Grande and groundwater use in the Rio Grande Underground Water Basin.

> 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.

Id. And points out the fact that:

> 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.

Id. Dr. Wilson then expresses his opinion that he "consider[s] Dr. King's report to correctly dispute the Texas claim." *Id.* Dr. Wilson offers no improper legal opinion, or conclusion in this paragraph 9. The United States' objection to this paragraph should, therefore, be dismissed. The United States' related request that any statement on any of pages 6, 10 or 52 of New Mexico's Response to the U.S. Summary Judgment Motion should also be dismissed, for all of the above reasons.

For all of the above reasons, the U.S. Motion as it relates to Dr. Wilson should be dismissed.

V. United States Motion as it Relates to Dr. Stevens is Misplaced

The U.S. Motion, as it relates to each of paragraphs 3-32 of the Stevens Declaration (2d)—and relatedly, to pages 3-5, 13, 20, 22-23 of New Mexico's Response to the U.S. Summary Judgment Motion—is additionally misplaced for two reasons. By its Motion, the United States seeks to, in effect, strike all of the Stevens Declaration (2d) on the ground that Dr. Steven does not have personal knowledge of all of the facts and matters stated in that declaration. The United States' objections are misguided.

A. Dr. Stevens is an Expert Witness And is Competent to Make Statements and Present Opinions Based on Facts or Data She is Aware of or Has Personally Observed

As the United States acknowledges, Dr. Stevens is an expert witness in this case. U.S. Mot., 2, 4; *see also* NM-EX 112, Stevens Rep.; NM-EX 113, Stevens Reb. Rep. As an expert, Dr.

Stevens is competent to testify as to facts and data she has been made aware of, or has personally observed.

Dr. Stevens has personally analyzed, and has made her own assessment of all of the facts and data which she states, and on which she relies, in the Stevens Declaration. In addition, Courts have recognized that:

> In cases involving the testimony of historians … the reliable methodology often consists of the review of the pertinent historical documents. It is also well-established that an expert's reliable methodology may consist primarily of applying his personal knowledge and experience to the facts of a case.

Langbord v. United States Dep't of the Treasury, 2009 U.S. Dist. LEXIS 40083 *10 (E.D. Pa. May 11, 2009) (internal quotation and citations omitted). And that consideration of historian expert testimony:

> clearly assists the Court as the trier of fact, at a minimum, in identifying the ancient documents and historical events that may be relevant on this issue and providing testimony about the historical context for these documents and events to ensure that the meaning of the documents and/or events are not being misunderstood due to the substantial passage of time.

New York v. Shinnecock Indian Nation, 523 F. Supp. 2d 185, 262 (E.D.N.Y. Oct. 30, 2007). The United States does not challenge, in its Motion, Dr. Steven's expertise, or the reliability of her methodology. As Dr. Stevens explains in her expert report in this case, she was retained:

> to investigate the history of New Mexico and Texas's use of the Rio Grande waters, especially leading up to and during negotiations for the Rio Grande Compact of 1938.… To conduct this study, I employed the typical and accepted historical research methodology. I began by reviewing materials provided to me … all of which can be found at the New Mexico Office of the State Engineer (NM OSE) Library. I then traveled to and/or reviewed primary sources from a variety of repositories.

NM-EX 112, Stevens Rep., 8. Dr. Stevens then "reviewed and analyzed" relevant documents, and wrote her reports. *Id.* at 9; *see also* NM-EX 113, Stevens Reb. Rep. (in which Dr. Stevens considered and responded to the report of Texas expert Dr. Scott Miltenberger).

Under Federal Rules of Evidence 803, "[a] statement in a document that was prepared before January 1, 1998, and whose authenticity is established" is "not excluded by the rule against hearsay." Fed. R. Evid. 803, 803(16). The United States does not, in its Motion, challenge the authenticity of any such documents Dr. Stevens cites to, or relies on. Therefore, even if Dr. Stevens were to rely on such statement for "the truth of the matter asserted," there is no hearsay objection. Further, Dr. Steven's testimony as set out in the Stevens Declaration assists the Court as the trier of fact, not least in that Dr. Stevens identifies ancient documents and historical events, and explains their historical context.

B. The United States Motion as it Relates to Dr. Stevens Lacks Merit

The United States seeks to strike essentially all of the Stevens Declaration (2d) on the ground of lack of personal knowledge. For the reasons set out herein, this objection lacks merit. Dr. Stevens has been made aware of, or has personally observed each of the facts and matters she states, and on which she relies, in each of the above paragraphs—she has personally analyzed these facts and matters, and made her own assessment of them. She has applied her personal knowledge and experience to the facts, and she has identified relevant ancient documents and historical events, and has explained their historical context. *See e.g.*, generally, NM-EX 112, Stevens Rep.; NM-EX 113, Stevens Reb. Rep. The United States' request that these sentences and paragraphs be struck on the ground that Dr. Stevens is incompetent to testify as to the facts and matters stated, and the opinions she offers, therefore lack merit, and should be dismissed.

VI. United States Motion as it Relates to Mr. D'Antonio is Misplaced

The U.S. Motion, as it relates to each of paragraphs 2, 4, 8 (sentences 2-7), 9, 9 n.3&4, 10, 11 (sentence 2), 12-13, 14, 14 n.5, 15 (sentence 1), 17 (part of sentence 1), 18, 18 n.6, 19 (part of sentence 1, sentence 2), 20, 21 n.8, 22 (sentence 3), 22 n.9, 23 (sentence 2), 24 (sentence 2), 25 (sentence 4), 26 (sentences 2-3), 28, 37(a) (sentence 3 and the bullets in their entirety), 37(a) n.11, 37(b) (sentence 2), 37(b) n.12 (sentences 1, 5), 37(c) (bullet 1 in its entirety, part of sentence 1 on bullet 2), 37(c) n.13, 37(c) n.14 (sentence 1), 40 n.15, 44 (sentence 5), 47, 49 (sentence 3-4, part of sentence 5), 51-52, 53 (sentence 7), 54 n.20, 55, 56 (part of sentence 1), and 57 (sentence 3) of the D'Antonio Declaration (2d)—and relatedly, to pages 1-2, 5-11, 31, and 53-57 of New Mexico's Response to the U.S. Summary Judgment Motion—is additionally misplaced for two reasons:

A. Mr. D'Antonio Has Personal Knowledge of the Facts and Matters Stated

Mr. D'Antonio is the State Engineer for the State of New Mexico. NM-EX 002, D'Antonio Decl. (1d), ¶ 2. In this position, Mr. D' Antonio heads the New Mexico OSE. The OSE is the executive agency charged with the management and administration of all waters in New Mexico. Mr. D'Antonio has held this position since March 2019. He also held this same position between January 2003 and November 2011. *Id.* In addition, from April 1998 to August 2002, Mr. D'Antonio was a Supervisor and was then a Director in the Water Resource Allocation Program of the OSE. *Id.* at ¶ 5. In these 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 for New Mexico. Among other duties, he was responsible in these roles, for all technical and administrative activities concerning water rights administration, and the development, utilization, conservation, and protection of New Mexico's water resources. *Id.*

The United States objects to all of the above-identified sentences and paragraphs of the D'Antonio Declaration (2d) on the ground that Mr. D'Antonio allegedly does not have personal

knowledge of the facts and matters stated in those sentences/paragraphs. U.S. Mot. 10. The United States further objects to the subset of paragraphs 22 (sentence 3), 23 (sentence 2), 26 (sentence 2-3), 37 n.11, 40 n.15, and 53 (sentence 6) of the D'Antonio Declaration (2d) on the ground that Mr. D'Antonio allegedly lacks the personal knowledge required to rely on the deposition testimony he cites to in these statements/paragraphs. *Id.* at 13. And to the subset of paragraphs 12 (sentences 1, 6), 13 (sentence 5), 14 n.5, 18 (sentence 2), 20, 47 (sentence 3), and 49 (sentence 4) of the D'Antonio Declaration (2d) on the ground that Mr. D'Antonio allegedly lacks the personal knowledge required to rely on the declaration or expert report of another person, that he cites to in these sentences/paragraphs. U.S. Mot. 14. For the reasons set out herein, the United States' objections to these sentences and paragraphs lack merit:

- *Water rights and management in New Mexico, including issues relating to historic water rights and management* - paragraphs 2, 9-11, 17, 25-26, 44, 53;
- *Groundwater pumping and wells in the LRG* – paragraphs 18-20, 22-24, 57;
- *Water administration duties and powers of the New Mexico State Engineer, currently and historically* - paragraphs 4, 8, 55;
- *Project operations, their interaction with New Mexico water rights and management, and Project Supply* – paragraphs 12-13, 15, 47, 49, 51-52, 54 (footnote 20), 56;
- *The Compact and its interaction with New Mexico water rights and management* – paragraphs 14[7]-15;

[7] As one example, the U.S. seeks to strike footnote 5 of the D'Antonio Declaration (2d). In this footnote 5, Mr. D'Antonio responds to statements made by Texas expert Dr. Miltenberger relating to a certain document alleged to be an OSE document. Among other things, Mr. D'Antonio confirms that he is "not aware of this document and after diligent investigation the document is not within OSE files and no OSE personnel are familiar with the document." D'Antonio Declaration (2d), ¶ 14 n.5. There is no legitimate basis for the U.S. to seek to have the statements in this footnote struck on the ground that Mr.

- *The Stream System 101 LRG Adjudication Order. Stream System 103 and 104* – paragraphs 37(a), (b) (c) (including footnotes 13 and 14).

Through his position as the State Engineer for New Mexico, and through his various positions at the OSE; as a result of his performing his employment duties; and through his review of business records, documents and data as a result of those employment duties, Mr. D'Antonio has gained personal knowledge of the facts and matters stated in each of these paragraphs.[8] Further, to the extent that Mr. D'Antonio offers lay opinions on such matters, they are opinions that are rationally based on his perception, which are helpful to understanding his testimony or to determining a fact in issue. Fed. R. Evid. 701.

In addition, to the extent that the United States objects to Mr. D'Antonio's citation to, or reliance on the testimony of others, in his declaration, in the form of citations to declarations, expert reports, or deposition transcripts, such objections lack merit for the reasons set out above.[9] New Mexico expects all identified declarants, experts, and deponents will be present and available to testify at trial. Fed. R. Civ. P. 56(c)(2); Moore's Federal Practice § 56.91[2], [3] (2021); *Sandoval*, 2021 U.S. App. LEXIS 866 *15-16.

For all of the above reasons, the U.S. Motion as it relates to Mr. D'Antonio should be dismissed.

D'Antonio lacks personal knowledge of the facts stated—on the contrary, these facts and entirely within his personal knowledge.

[8] In any event, for example, the United States has not challenged any of these statements on the ground that they lack "sufficient guarantees of trustworthiness" and are *less* "probative on the point for which [they are] offered than any other evidence" that could have been "obtain[ed] through reasonable efforts." Fed. R. Evid. 807.

[9] It is also legitimate for Mr. D'Antonio to refer the Court to other New Mexico declarations filed during summary judgment briefing, where these declarations explain certain facts and matters in more detail. *See e.g.*, D'Antonio Declaration (2d), ¶¶ 21, n.8; 22 (including n.9); 23-26; 28.

VII. United States Motion as it Relates to Mr. Serrano is Misplaced

Finally, the U.S. Motion, as it relates to each of paragraphs 8, 13(f) (sentence 3), 14(g) (sentences 2-3), 15, 19 (sentence 2), 26 (sentence 1), 29, 31 n.6 (sentence 2), 32 (sentence 7), 35-36, and 37 (sentence 2) of the Serrano Declaration—and relatedly, to pages 1, 5-7, 9-10, 17, 52, and 56 of New Mexico's Response to the U.S. Summary Judgment Motion—is additionally misplaced for two reasons:

A. Mr. Serrano Has Personal Knowledge of the Facts and Matters Stated

Mr. Serrano was Assistant LRG Water Master at the New Mexico OSE from 2009 through 2012. Serrano Declaration, ¶ 3. In May 2012, Mr. Serrano was promoted to Water Master for the LRG Water Master District. *Id.* The LRG Water Master District includes the Elephant Butte Irrigation District ("EBID"). *Id.* At the OSE, Mr. Serrano's responsibilities include:

(a) Controlling illegal diversions (i.e. any diversion without a water right, or in excess of the elements or conditions of a water right);

(b) Measuring and reporting water usage within the District;

(c) Controlling out-of-priority diversions;

(d) Administering water usage according to agreements entered into by the water right owners of the district; and

(e) Coordinating, where indicated, with the United States Bureau of Reclamation and EBID.

Id. at ¶ 5.

The United States objects to all of the above-identified sentences and paragraphs of the Serrano Declaration on the ground that Mr. Serrano allegedly does not have personal knowledge of the facts and matters stated in those sentences/paragraphs. U.S. Mot. 11-12. The United States further objects to the subset of paragraphs 10, 14 (g) (sentences 2-3), and 15 on the ground that Mr. Serrano allegedly lacks the personal knowledge required to rely on the deposition testimony

he cites to in these statements/paragraphs. *Id.* at 14. And to paragraph 37 on the ground that Mr. Serrano allegedly lacks the personal knowledge required to rely on the declaration or expert report of another person, that he cites to in these sentences/paragraphs. *Id*. For the reasons set out herein, the United States' objections to these sentences and paragraphs lack merit:

- *Water use and management in the LRG* – paragraphs 13(f), 14(g),[10] 15
- *Irrigation well metering in the LRG* – paragraph 19;
- *Surface water pumping by Reclamation and the International Boundary Water Commission (IBWC)* – paragraph 29;
- *Effects of the 2008 Operating Agreement* – paragraphs 35-37.

Through his position as Assistant LRG Water Master and LRG Water Master at the OSE; as a result of his performing his employment duties; and through his review of business records, documents and data as a result of those employment duties, Mr. Serrano has gained personal knowledge of the facts and matters stated in each of these paragraphs.[11] Further, to the extent that Mr. Serrano offers lay opinions on such matters, they are opinions that are rationally based on his perception, which are helpful to understanding his testimony or to determining a fact in issue. Fed. R. Evid. 701.

In addition, to the extent the United States objects to Mr. Serrano's citation to, or reliance on the testimony of others, in his declaration, in the form of citations to declarations, expert reports,

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[10] To the extent that Mr. Serrano references the deposition testimony of Mr. D'Antonio in paragraph 14(g), these statements also are not hearsay because Mr. Serrano simply repeats or summarizes what Mr. D'Antonio said at his deposition. Mr. Serrano is not independently relying on the facts or matters stated by Mr. D'Antonio for the truth of the matters stated. In any event, New Mexico expects that Mr. D'Antonio will be present and available to testify at trial, so the United States objection to these sentences, under Rule 56(c), lacks merit and should be dismissed. Fed. R. Civ. P. 56(c)(2); Moore's Federal Practice § 56.91[2], [3] (2021); *Sandoval*, 2021 U.S. App. LEXIS 866 *15-16.

[11] In any event, for example, the United States has not challenged any of these statements on the ground that they lack "sufficient guarantees of trustworthiness" and are *less* "probative on the point for which [they are] offered than any other evidence" that could have been "obtain[ed] through reasonable efforts." Fed. R. Evid. 807.

or deposition transcripts, such objections lack merit for the reasons set out above.[12] New Mexico expects all identified declarants, experts, and deponents will be present and available to testify at trial. Fed. R. Civ. P. 56(c)(2); Moore's Federal Practice § 56.91[2], [3] (2021); *Sandoval*, 2021 U.S. App. LEXIS 866 *15-16.

B. Mr. Serrano Is Competent to Give Opinion Testimony on Matters Rationally Within His Perception

The United States also objects to paragraph 8 of the Serrano Declaration—and relatedly, to page 52 of New Mexico's Response—on the ground that this paragraph contains "improper opinion testimony" and "Mr. Serrano's testimony regarding the agricultural economy is not based on his personal knowledge." U.S. Mot., 12.[13] Paragraph 8 provides 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.

Serrano Declaration, ¶ 8. This paragraph is cited in New Mexico's Response as follows:

> In addition, an injunction would severely impact New Mexico's agricultural economy south of Elephant Butte, with compounding effects on the rest of this region. Pecan production in New Mexico is centered in the Lower Rio Grande and is New Mexico's number one cash crop. NM-EX 010, Serrano Decl. at ¶ 8. Chile and onion production in New Mexico (primarily in Lower Rio Grande) is in

[12] It is also legitimate for Mr. Serrano to refer the Court to other New Mexico testimony, where this testimony explains certain facts and matters in more detail. *See*, *e.g.*, Serrano Declaration, ¶¶ 10, 14, 31 (n. 6), 36. And where Mr. Serrano explains such testimony and/or clarifies potential confusion. *See*, *e.g. id.* at ¶¶ 26, 31 (n.6), 37.

[13] To the extent the U.S. also objects to paragraph 22 in the Serrano Declaration, Mr. Serrano has personal knowledge of the facts and matters stated in this paragraph, for the reasons set out above. To the extent Mr. Serrano expresses a lay opinion in this paragraph 22, he is competent to do so because such opinion falls within Rule 701 (it is rationally based on his perception, and is helpful to understanding his testimony or to determining a fact in issue). Fed. R. Evid. 701.

the top five for total production in the nation. *Id*.

New Mexico's Response, 52.

First, as to personal knowledge. In this paragraph 8, Mr. Serrano refers and cites to the State of New Mexico OSE LRG Water Master Annual Report 2018 Accounting Year (NM-EX 540). Mr. Serrano has personal knowledge of this document because it is his document. He authored it during the course of his employment at the OSE, he oversaw its production, and his name is on the front cover. There can, therefore, be no serious challenge to the fact that Mr. Serrano has personal knowledge of the facts and matters stated in this document, and also, by extension, of those facts and matters he then states in paragraph 8 of his declaration.

Second, the facts and matters stated in all but the first sentence of paragraph 8 are not opinions. They are facts stated in Mr. Serrano's own report, to which he references and cites. As to this first sentence, the opinion that "[t]he LRG's agricultural importance to New Mexico is significant" clearly falls within the category of an admissible lay opinion because it is "rationally based" on his "perception" of the facts set out in his own document, and such opinion is "helpful to clearly understanding [his] testimony [and] to determining a fact in issue." Fed. R. Evid. 701. There can, therefore, be no serious challenge that paragraph 8 is admissible.

For all of the above reasons, the U.S. Motion as it relates to Mr. Serrano should be dismissed.

CONCLUSION

For the reasons set out above, the Court should dismiss the United States Motion to Strike any sentence or paragraph of the Barroll Declaration (2d), the Lopez Declaration (2d), the Lee Wilson Declaration, the Stevens Declaration (2d), the D'Antonio Declaration (2d), and the Serrano Declaration. The Special Master should also dismiss the United States Motion to the extent it

seeks to disregard or strike any statement made in New Mexico's Response to the U.S. Summary Judgment Motion that cites to or relies upon these Declarations.

Respectfully submitted,
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