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 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

Stuart L. Somach, Esq.*
Andrew M. Hitchings, Esq.
Robert B. Hoffman, Esq.
Francis M. Goldsberry II, Esq.
Theresa C. Barfield, Esq.
Sarah A. Klahn, Esq.
Brittany K. Johnson, Esq.
Richard S. Deitchman, Esq.
SOMACH SIMMONS & DUNN, PC
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
Telephone: 916-446-7979
ssomach@somachlaw.com
**Counsel of Record*

February 5, 2021

TABLE OF CONTENTS

Page

TABLE OF CONTENTS (Continued)

PAGE

ATTACHMENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES (Continued)

Page(s)

Statutes

Court Rules

I. OBJECTIONS AND REPLY TO NEW MEXICO'S CONSOLIDATED STATEMENT OF FACTS

A. The "Consolidated Statement of Facts" is Improper and Should Be Stricken

On November 5, 2020, the State of Texas (Texas), the United States, and the State of New Mexico (New Mexico) filed separate and distinct motions for partial summary judgment. Each party filed evidence, and proffered facts, in support of each motion. New Mexico filed three motions, each based on different facts and legal issues. On December 22, 2020, the parties filed oppositions to the November 5, 2020 filings, with supporting evidence. Texas filed separate oppositions to each of New Mexico's three motions and responded to the facts asserted in support of each motion. Texas filed a separate response to the United States' motion. New Mexico, however, filed a "consolidated statement of material facts, in connection with its responses to Texas's and the United States' " motions. *See* New Mexico Consolidated Statement of Material Facts (Dec. 22, 2020), at 2. According to New Mexico, the "consolidated set includes *all* of the Undisputed Material Facts" from each of its three motions, "in addition to any additional material facts that New Mexico alleges for the purposes of its response to the Texas and United States'" motions. *See* New Mexico Consolidated Statement of Material Facts (Dec. 22, 2020), at 2 (emphasis added).

New Mexico's filing of a "consolidated statement" results in what purports to be one single set of facts and evidence responsive to all motions, and supporting all three of its own motions, without any differentiation as to what "facts" and what "evidence" New Mexico proffers in support of, or in opposition to, the individual motions. This is both substantively and procedurally improper, and Texas requests that the "consolidated statement" be stricken in its entirety. Indeed, when parties submit cross-motions for summary judgment, "each motion must be considered on its own merits" and in fulfilling its duty to review each cross-motion separately, the court "must review the evidence submitted in support of each cross-

motion." *Fair Hous. Council v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001); *see also Kohl v. Ass'n of Trial Lawyers of Am.*, 183 F.R.D. 475, 478 (D. Md. 1998) (When a court is confronted with cross-motions for summary judgment, the court must consider each party's motion individually to determine if that party has satisfied the summary judgment standard.).

Although there is a similar set of legal issues between the Texas and New Mexico motions addressing the apportionment issue, the motions must nonetheless be considered individually on their own merits. Moreover, the other two "damages" motions filed by New Mexico are entirely separate and distinct. Now, with its "consolidated statement," New Mexico includes all of the facts and evidence submitted in support of its two "damages" motions, in opposition to the Texas and United States motions, which are unrelated. Thus, many of the facts, and supporting evidence, set forth in the "consolidated statement" are irrelevant to the Texas and United States motions. Similarly, many of the facts and evidence that New Mexico asserts in opposition to the United States' summary judgment motion are irrelevant to the Texas motion. In many instances, it is not at all clear which motion, or opposition, New Mexico intends to support with its facts and evidence and, at any rate, its attempt to insert facts dealing with its unrelated damages motions into its opposition to the Texas motion is improper and creates confusion.

B. Texas's Objections and Reply to the "Consolidated Statement of Facts"

Subject to Texas's objection stated *supra* at section I.A, Texas submits its evidentiary objections and reply to the New Mexico Consolidated Statement of Material Facts (Consolidated Statement) hereinbelow at section III, and attached hereto as Exhibit A. Texas's Exhibit A is designed as a tool for the Special Master to review, in one location, all of the New Mexico facts/evidence, including identification of where New Mexico uses the

facts/evidence in each of its five filed briefs, and Texas's objections and responses to the facts/evidence.

Specifically, Exhibit A includes an identical recitation of all of the information in New Mexico's Consolidated Statement, in table form, plus adds additional columns to identify where New Mexico cited the particular fact/evidence in each of the five briefs it has submitted, including its three motions for partial summary judgment filed on November 5, 2020, and its two response briefs filed on December 22, 2020. Texas includes columns identifying with particularity whether each fact is responsive to the Texas Motion and/or the United States' Motion for Partial Summary Judgment, including page numbers where New Mexico cites the fact/evidence in each of the response briefs.

Texas also includes columns that summarize its evidentiary objections, as well as responds to the New Mexico facts. Regarding evidentiary objections, Texas discusses several general objections to New Mexico's evidence below, at section III. The general objections discussed at section III below are enumerated and incorporated by the assigned number where applicable within the "evidentiary objections" column of Exhibit A. Regarding the New Mexico facts, Exhibit A includes a "Texas's Response" column. This column focuses on whether New Mexico's purported "material facts" serve to meet its burden of proof on summary judgment, or whether Texas's facts remain undisputed. Fed. R. Civ. P. 56(a), 56(c)(1).

Of particular note, Texas did not utilize its Reply Brief in Support of its Motion for Partial Summary Judgment ("Texas Reply Brief" or "TX Reply Brief") as an opportunity to present all of the evidence that it would otherwise use at trial for the purpose of disputing the facts/evidence cited by New Mexico in New Mexico's Response to Texas's Motion for Partial Summary Judgment ("NM Response" or "New Mexico Response") to the Texas

Motion. New Mexico's burden in opposing the Texas Motion is to present "significant probative evidence demonstrating the existence of a triable issue of fact." *Resolution Tr. Corp. v. Murray*, 935 F.2d 89, 92 (5th Cir. 1991) (quoting *Southmark Props. v. Charles House Corp.*, 742 F.2d 862, 877 (5th Cir. 1984)). As set forth in the Texas Reply Brief, as well as Texas's objections and responses to New Mexico's facts/evidence reflected in Exhibits A and B, New Mexico failed to meet its burden of proof to refute the Texas Motion. However, if the Special Master and Court determine that New Mexico has met its threshold burden in response to the Texas Motion, then the matter must proceed to trial on the issues where New Mexico has shown a material dispute. Texas will, at trial, present responsive evidence and expressly reserves its right to object to, challenge, oppose and/or otherwise rebut at trial all of the facts/evidence proffered by New Mexico. The Texas Reply Brief, however, is not the procedurally appropriate, or mandated, way to do so. Fed. R. Civ. P. 56.

II. OBJECTIONS AND REPLY TO NEW MEXICO'S APPENDIX 1 IN RESPONSE TO THE TEXAS MOTION

In conjunction with New Mexico's Response to the Texas Motion, New Mexico attached as "Appendix 1" a "table assigning 'TAF' [Texas Allegation of Fact] numbers and reflecting dispute by New Mexico." *See* Appendix 1: Texas Allegations of Fact, attached to the NM Response ("NM Appendix 1" or "New Mexico Appendix 1") at 1. In the table, New Mexico lists groups of facts relied upon by Texas in the Texas Motion and states whether the facts are disputed by New Mexico. *Id.* at 1-37.

Attached hereto as Exhibit B is Texas's response to New Mexico's Appendix 1. Similar to Texas's Exhibit A, Texas's Exhibit B is also designed as a tool for the Special Master to review, in one location, all of the facts/evidence set forth in Texas's Motion, New Mexico's responses to the facts, and Texas's response thereto. Notably, New Mexico did

not object to the form or content of any of Texas's proffered evidence. Fed. R. Civ. P. 56(c)(2).

Exhibit B includes an identical recitation of all of the information in New Mexico's Appendix 1, plus adds an additional column reflecting Texas's response. Texas's response focuses on whether New Mexico's responses to the Texas facts meet its burden of proof on summary judgment, or whether the Texas facts remain undisputed. Fed. R. Civ. P. 56(a), 56(c)(1).

III. GENERAL OBJECTIONS TO EVIDENCE PROFFERED BY NEW MEXICO

Pursuant to Federal Rule of Civil Procedure 56, a "party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible at trial." Fed. R. Civ. P. 56(c)(2). Objection to evidence in a motion for summary judgment serves the function of an objection at trial, regardless of the pretrial setting. *Id.*, advisory committee's note to 2010 amendment.

Texas objects to multiple categories of evidence proffered by New Mexico, and referred to in its Consolidated Statement, as well as its Appendix I, as set forth below. These enumerated objections are incorporated by reference into Texas's Exhibits A and B.

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

Texas objects to New Mexico's reliance on the Declaration of Margaret Barroll, Ph.D. in Support of State of New Mexico's Partial Summary Judgment Motions and the Second Declaration of Margaret Barroll, Ph.D. (Barroll Declarations). The Barroll Declarations are identified as NM-EX 001 and NM-EX 006 by New Mexico and appended to the folder titled "NM Exhibits Compendium." The Barroll Declarations are inadmissible

evidence to the extent she asserts the truth of facts to which she has no personal knowledge and to the extent she opines on subject matters outside her area of expertise.

The moving party must support its assertions by "citing to particular parts of materials in the record including . . . affidavits or declarations." Fed. R. Civ. P. 56(c)(1)(A). "The principles governing admissibility of evidence do not change on a motion for summary judgment. Rule 56(e) provides that affidavits in support of and against summary judgment " 'shall set forth such facts as would be admissible in evidence.' " Fed. R. Civ. P. 56(e); *see also Cmty. of Roquefort v. William Faehndrich, Inc*., 303 F.2d 494, 498 (2d Cir. 1962) ("Since the object [of summary judgment] is to discover whether one side has no real support for its version of the facts, the Rule specifically states that affidavits shall 'set forth such facts as would be admissible in evidence.' (Citation omitted)"); *Raskin v. Wyatt Co*., 125 F.3d 55, 66, (2nd Cir. 1997); *Lavespere v. Niagara Mach. & Tool Works, Inc*., 910 F.2d 167, 175-76 (5th Cir. 1990).

Such affidavits or declarations "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). The requirement of personal knowledge may be only overcome if a "reasonable person[] could differ as to whether the witness had an adequate opportunity to observe" the facts to which the declarant attests. *See Strong v. Valdez Fine Foods*, 724 F.3d 1042, 1045 (9th Cir. 2013). The Barroll Declarations (numbered NM-EX 001 & NM-EX 006) include references to and interpretation of the 1938 Rio Grande Compact, a topic on which Margaret Barroll (hereinafter referred to as "Margaret Barroll" or Peggy Barroll") testified at multiple depositions in this litigation, is outside her expertise[1]:

[1] Excerpts from Margaret Barroll's depositions cited herein are attached to the Texas Appendix of

- Oral and Videotaped Deposition of Peggy Barroll, Vol. 2 (Feb. 6, 2020):
    - At 313:15-21: "Q. Do you have an opinion -- an expert opinion about the quantity of water that was apportioned to Texas under the 1938 Compact? A. Well, Texas -- I don't regard myself as an expert on the Compact or what the Compact law is." TX_MSJ_007284.
    - At 318:8-12: "Q. What period was used for the Colorado delivery requirements to New Mexico within the Compact? A. I'm afraid I don't know the Compact that well that I could tell you." TX_MSJ_007289.
- Oral and Videotaped Deposition of Peggy Barroll (July 9, 2020):
    - At 27:21-25: "Q. I think we established at your first deposition that you're not an expert on the Compact itself; is that -- is that -- do I recall that correctly? A. I'm not an expert on the Compact itself." TX_MSJ_007305.
- Oral and Videotaped Deposition of Peggy Barroll, Vol. 2 (Aug. 7, 2020):
    - At 188:22-25: "A. I think that the -- my understanding from a Compact perspective that -- that if EBID is shorted, then New Mexico, under the Compact, is shorted. But, again, as we said earlier, I'm not a Compact expert." TX_MSJ_0007261.

Texas objects to New Mexico's use of the Barroll Declarations (NM-EX 001 & NM-EX 006) to the extent that Margaret Barroll asserts the truth of facts to which she has no personal knowledge and asserts opinions on topics outside of her expertise (i.e., the "1938 Rio Grande Compact"[2]).

Texas requests that the following paragraphs from the Barroll Declarations (NM-EX 001 & NM-EX 006) be stricken in their entirety for the reasons that they assert opinions on topics outside of Margaret Barroll's expertise and/or on topics in which she previously testified she does not have personal knowledge (e.g., interpretation of and circumstances surrounding the 1938 Rio Grande Compact): paragraphs 15, 16, 17 of the first Barroll Declaration (NM-EX 001) and paragraph 8 and the second sentence of paragraph 9

Evidence in Support of Texas's Oppositions to the State of New Mexico's Motions for Partial Summary Judgment and Briefs in Support.

[2] 1938 Rio Grande Compact, Act of May 31, 1939, Pub. L. No. 76-96, ch. 155, 53 Stat. 785.

of the second Barroll Declaration (NM-EX 006). Texas requests that these objectionable paragraphs and sentences of the Barroll Declarations be stricken as evidence in support of New Mexico's Motions and the Response.

B. 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 New Mexico's reliance on the Declaration of Estevan R. Lopez, P.E. in Support of State of New Mexico's Motions for Partial Summary Judgment and the Second Declaration of Estevan R. Lopez in Support of [sic]" (Lopez Declarations). The Lopez Declarations are identified as NM-EX 003 and NM-EX 008 by New Mexico and appended to the folder titled "NM Exhibits Compendium." Texas further objects to New Mexico's reliance on the four expert reports of Mr. Lopez dated October 31, 2019, June 15, 2020, July 15, 2020, and September 15, 2020 (Lopez Reports). The Lopez Reports are identified as NM-EX 107 through NM-EX 110 in New Mexico's motions appended to the folder titled "NM Exhibits Compendium." The Lopez Declarations and Lopez Reports are inadmissible evidence to the extent Mr. Lopez opines on subject matter outside his area of expertise.

The moving party must support its assertions by "citing to particular parts of materials in the record including . . . affidavits or declarations." Fed. R. Civ. P. 56(c)(1)(A). The principles governing admissibility of evidence do not change on a motion for summary judgment. Rule 56 provides that affidavits in support of and against summary judgment "shall set out facts that would be admissible in evidence." Fed. R. Civ. P. 56(c)(4); *see also Cmty. of Roquefort*, 303 F.2d at 498 ("Since the object [of summary judgment] is to discover whether one side has no real support for its version of the facts, the Rule specifically states that affidavits shall 'set forth such facts as would be admissible in evidence.' (Citation omitted)"); *Raskin,* 125 F.3d at 66; *Lavespere*, 910 F.2d at 175-76.

Such affidavits or declarations "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). The requirement of personal knowledge may be only overcome if a "reasonable person[] could differ as to whether the witness had an adequate opportunity to observe" the facts to which the declarant attests. *See Strong*, 724 F.3d at 1045. The Lopez Declarations (numbered NM-EX 003 & NM-EX 008) and the Lopez Reports (NM-EX 107 through NM-EX 110) include legal conclusions, historical information, and statements regarding the operation of the Rio Grande Project, all topics on which Mr. Lopez testified at depositions in this litigation are outside his expertise[3]:

- Oral and Videotaped Deposition of Estevan Lopez (Feb. 26, 2020):
    - At 15:8-18: "Q. . . . what's the purpose of having your testimony in this case? Do you have an understanding of that? A. Well, I think the purpose is as laid out in this case, but more broadly and more generally, I think this case is about the Compact and so, at least from my perspective, it seems appropriate to give us some perspective about that Compact. Q. Based on your time as head of the Interstate Stream Commission? A. Primarily. That's -- that's what I worked on." TX_MSJ_007340.
    - At 22:2-7: "Q. . . . which [Reclamation project] have you had specific experience with operations of? [objection omitted] A. Well, I think I've had specific -- not to say I've operated them. I haven't operated a single one of them." TX_MSJ_007343.
    - At 23:1-3: "Q. Now, when you were at Reclamation, what was your involvement with the Rio Grande Project." A. None." TX_MSJ_007344.
- Remote Oral and Videotaped Deposition of Estevan Lopez, Vol. 1 (Jul. 6, 2020):
    - At 25:2-8: "Q. The first thing I want to do is if I understood your testimony with respect to the first report, you are not purporting . . . to be an expert regarding legal questions; . . . is that correct? A. That's correct. I'm not -- not an attorney. I don't purport to be an expert on law or legal questions." TX_MSJ_007358.

[3] Excerpts from Mr. Lopez's depositions cited herein are attached to the Texas Appendix of Evidence in Support of Texas's Oppositions to the State of New Mexico's Motions for Partial Summary Judgment and Briefs in Support.

- At 26:24-7: "Q. And the same is true with respect to . . . the historical information you provide in your report; you're not offering that as a expert historian, but rather based on stuff you read? [objection omitted] A. That's -- that's correct. I am not the expert historian." TX_MSJ_007359-007360.

Texas objects to New Mexico's use of the Lopez Declarations (NM-EX 003 & NM-EX 008) and the Lopez Reports (NM-EX 107 through NM-EX 110) to the extent that Mr. Lopez asserts the truth of facts to which the declarant has no personal knowledge and asserts opinions on topics outside of Mr. Lopez's expertise (i.e., legal conclusions, historical information, and statements regarding the operation of the Rio Grande Project).

Texas requests that the following paragraphs from the Lopez Declarations be stricken in their entirety for the reason that they assert opinions on topics outside of Mr. Lopez's expertise: paragraphs 4, 7, 12-15, 17, 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, 40-41 of the second Lopez Declaration (NM-EX 008). Texas further requests that all references to the objectionable subject matter as described herein that is contained within the Lopez Reports be stricken. Texas requests that these objectionable paragraphs of the Lopez Declarations and sections of the Lopez Reports be stricken as evidence in support of New Mexico's Motions.

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

Texas objects to New Mexico's reliance on the Second Declaration of John D'Antonio, Jr. (D'Antonio Declaration). The D'Antonio Declaration is identified as NM-EX-007 in the Response appended to the folder titled "NM Exhibits Compendium." The D'Antonio Declaration is inadmissible evidence to the extent Mr. D'Antonio opines on subject matter outside his personal knowledge and expertise, including legal conclusions and historical circumstances surrounding the negotiation of the 1938 Rio Grande Compact.

The moving party must support its assertions by "citing to particular parts of materials in the record including . . . affidavits or declarations." Fed. R. Civ. P. 56(c)(1)(A).

The principles governing admissibility of evidence do not change on a motion for summary judgment. Rule 56 provides that affidavits in support of and against summary judgment "shall set out facts that would be admissible in evidence." Fed. R. Civ. P. 56(c)(4); *see also Cmty. of Roquefort*, 303 F.2d at 498 ("Since the object [of summary judgment] is to discover whether one side has no real support for its version of the facts, the Rule specifically states that affidavits shall 'set forth such facts as would be admissible in evidence.' (Citation omitted)"); *Raskin,* 125 F.3d at 66; *Lavespere*, 910 F.2d at 175-76.

Such affidavits or declarations "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. Civ. P. 56(c)(4). The requirement of personal knowledge may be only overcome if a "reasonable person[] could differ as to whether the witness had an adequate opportunity to observe" the facts to which the declarant attests. *See Strong*, 724 F.3d at 1045. The D'Antonio Declaration (numbered NM-EX 007) includes legal conclusions and historical information regarding the 1938 Rio Grande Compact, topics on which Mr. D'Antonio testified at depositions in this litigation are outside his personal knowledge and/or expertise[4]:

- Remote Oral and Videotaped Deposition of John D'Antonio, Vol. 1 (Jun. 24, 2020):
    - At 56:22-57:16: "Q. . . . as the state engineer . . . who would you say in the State of New Mexico is the person that has the most knowledge about New Mexico's obligations under the Rio Grande Compact? A. I would say probably . . . two people, former ISC Director Estevan Lopez, and . . . Rolf Schmidt-Petersen, if I had to name two. Q. What about you? A. Well, I was gone for . . . seven-and-a-half years in my role with the U.S. Army Corps of Engineers . . . so I would put those two experience and continuity a little bit ahead of mine with respect to being experts on the Compact. Q. And that

[4] The excerpt from Mr. D'Antonio's deposition cited herein is attached to the Texas Appendix of Evidence in Support of Texas's Oppositions to the State of New Mexico's Motions for Partial Summary Judgment and Briefs in Support.

> includes New Mexico's obligations under the . . . Compact? A. Yes." TX_MSJ_007728-007729.

Texas objects to New Mexico's use of the D'Antonio Declaration to the extent that Mr. D'Antonio asserts the truth of facts to which the declarant has no personal knowledge and asserts opinions on topics outside of Mr. D'Antonio's expertise.

Texas requests that the following paragraphs from the D'Antonio Declaration be stricken in their entirety because they assert opinions on topics outside of Mr. D'Antonio's personal knowledge and/or expertise: paragraphs 8-21, 49, 52, 58 (NM-EX 007). Texas requests that these objectionable paragraphs of the D'Antonio Declaration be stricken as evidence in support of New Mexico's Response.

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

Texas objects to New Mexico's reliance on the First Declaration of Ryan J. Serrano (Serrano Declaration). The Serrano Declaration is identified as NM-EX 010 in the Response appended to the folder titled "NM Exhibits Compendium." The Serrano Declaration is inadmissible evidence to the extent Mr. Serrano opines on subject matter outside his personal knowledge and expertise.

The moving party must support its assertions by "citing to particular parts of materials in the record including . . . affidavits or declarations." Fed. R. Civ. P. 56(c)(1)(A). The principles governing admissibility of evidence do not change on a motion for summary judgment. Rule 56 provides that affidavits in support of and against summary judgment "shall set out facts that would be admissible in evidence." Fed. R. Civ. P. 56(c)(4); *see also Cmty. of Roquefort*, 303 F.2d at 498 ("Since the object [of summary judgment] is to discover whether one side has no real support for its version of the facts, the Rule specifically states that affidavits shall 'set forth such facts as would be admissible in evidence.' (Citation omitted)"); *Raskin,* 125 F.3d at 66; *Lavespere*, 910 F.2d at 175-76.

Such affidavits or declarations "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. Civ. P. 56(c)(4). The requirement of personal knowledge may be only overcome if a "reasonable person[] could differ as to whether the witness had an adequate opportunity to observe" the facts to which the declarant attests. *See Strong*, 724 F.3d at 1045. The Serrano Declaration (NM-EX 010) includes statements regarding the economic value of agriculture in New Mexico that are plainly outside the scope of Mr. Serrano's personal knowledge and Mr. Serrano has not been offered as an expert agricultural economist. Texas objects to New Mexico's use of the Serrano Declaration to the extent that Mr. Serrano asserts the truth of facts to which the declarant has no personal knowledge and asserts opinions on topics outside of Mr. Serrano's expertise.

Texas requests that the following paragraph from the Serrano Declaration be stricken in its entirety because it asserts opinions on topics outside of Mr. Serrano's personal knowledge and/or expertise: paragraph 8 (NM-EX 010). Texas requests that this objectionable paragraph of the Serrano Declaration be stricken as evidence in support of New Mexico's Response.

E. <u>Objection #5: Second Declaration of Rolf I. Schmidt-Petersen [NM Exhibit 009]</u>

Texas objects to New Mexico's reliance on the Second Declaration of Rolf I. Schmidt-Petersen (RSP Declaration). The RSP Declaration is identified as NM-EX 009 in the Response appended to the folder titled "NM Exhibits Compendium." The RSP Declaration is inadmissible evidence to the extent Mr. Schmidt-Petersen opines on subject matter that is not relevant to New Mexico's Response: the RSP Declaration does not state with specificity the facts in Texas's Motion that it is in response to and includes substantial narrative regarding subject matter of New Mexico's counterclaims that were

dismissed by the Special Master on March 31, 2020.[5] The RSP Declaration does not include relevant evidence and thus is not admissible. Fed. R. Evid. 402.

The moving party must support its assertions by "citing to particular parts of materials in the record including . . . affidavits or declarations." Fed. R. Civ. P. 56(c)(1)(A). The principles governing admissibility of evidence do not change on a motion for summary judgment. Rule 56 provides that affidavits in support of and against summary judgment "shall set out facts that would be admissible in evidence." Fed. R. Civ. P. 56(c)(4); *see also Cmty. of Roquefort*, 303 F.2d at 498 ("Since the object [of summary judgment] is to discover whether one side has no real support for its version of the facts, the Rule specifically states that affidavits shall 'set forth such facts as would be admissible in evidence.' (Citation omitted)"); *Raskin,* 125 F.3d at 66; *Lavespere*, 910 F.2d at 175-76.

Such affidavits or declarations "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). Evidence that is not relevant is not admissible. Fed. R. Evid. 402. Evidence is relevant if it "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; *United States v. McVeigh*, 153 F.3d 1166, 1190 (10th Cir. 1998) (stating that "under Rule 401 a fact is 'of consequence' when its existence would provide the fact-finder with a basis for making some inference, or chain of inferences, about an issue that is necessary to a verdict"); *D'Onofrio v. Vacation Publ'ns, Inc.*, 888 F.3d 197, 208-09 (5th Cir. 2018) (addressing the competence of summary judgment evidence).

[5] *See* March 31, 2020 Order lodged with the Special Master as Docket No. 338 (March 31, 2020 Order).

The RSP Declaration (numbered NM-EX 009) includes broad statements regarding New Mexico's "compact compliance" and "water administration" that Mr. Schmidt-Petersen states are in response to "Texas and the United States . . . misunderstandings relating to New Mexico actions." RSP Declaration, para. 4. The RSP Declaration 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. The RSP Declaration does not address the issues presented by the Texas Motion. In addition, the RSP Declaration seeks to address subjects pertaining to New Mexico's counterclaims, which were dismissed by the Special Master on March 31, 2020. For example, the RSP Declaration, paragraph 16, describes the "ISC's work" relating to New Mexico's "[a]ccrued credit" water in Elephant Butte Reservoir and subsequent relinquishment for use by the Rio Grande Project. The Special Master dismissed New Mexico's third counterclaim which relates to New Mexico's claims against the United States regarding accrued credit water. March 31, 2020, at 30. To the extent Mr. Schmidt-Petersen provides narrative on subject matter relating to New Mexico's dismissed counterclaims, the RSP Declaration is not relevant and would be inadmissible at trial and should be stricken as evidence in support of New Mexico's Motions and/or Response.

Texas requests that the RSP Declaration be stricken in its entirety for the reason that 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. The RSP Declaration is not relevant, would be inadmissible at trial, and should be stricken as evidence in support of New Mexico's Motions and/or Response.

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

Texas objects to New Mexico's reliance on the Declaration of Lee Wilson, Ph.D. (Wilson Declaration). The Wilson Declaration is identified as NM-EX 013 in the Response appended to the folder titled "NM Exhibits Compendium." Paragraphs 8 and 9 of the Wilson Declaration seek to address "[f]acts alleged by the State of Texas" (*see* Wilson Declaration at 5) and are inadmissible evidence to the extent Dr. Wilson asserts improper legal opinions and conclusions, that are speculative and lack foundation, and makes irrelevant statements that do not materially address Texas's stated material facts. Fed. R. Evid. 402, 704.

The moving party must support its assertions by "citing to particular parts of materials in the record including . . . affidavits or declarations." Fed. R. Civ. P. 56(c)(1)(A). The principles governing admissibility of evidence do not change on a motion for summary judgment. Rule 56 provides that affidavits in support of and against summary judgment " 'shall set out facts that would be admissible in evidence.' " Fed. R. Civ. P. 56(c)(4); *see also Cmty. of Roquefort*, 303 F.2d at 498 ("Since the object [of summary judgment] is to discover whether one side has no real support for its version of the facts, the Rule specifically states that affidavits shall 'set forth such facts as would be admissible in evidence.' (Citation omitted)"); *Raskin,* 125 F.3d at 66; *Lavespere*, 910 F.2d at 175-76.

Such affidavits or declarations "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). Evidence that is not relevant is not admissible. Fed. R. Evid. 402. Evidence 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; *McVeigh*, 153 F.3d at 1190

(stating that "under Rule 401 a fact is 'of consequence' when its existence would provide the fact-finder with a basis for making some inference, or chain of inferences, about an issue that is necessary to a verdict"); *D'Onofrio,* 888 F.3d at 208-09 (addressing the competence of summary judgment evidence).

Paragraph 8 of the Wilson Declaration refers to pages 22-23 of the Texas Motion and Dr. Wilson states that he "understand[s] [those pages] to be a recognition that the City [of Las Cruces] has a right to use water released from Elephant Butte Reservoir." Wilson Declaration, para. 8. Dr. Wilson's statement is not relevant, constitutes improper legal opinion, lacks foundation and is speculative. Fed. R. Evid. 401, 402, 704. Dr. Wilson's understanding regarding whether Texas "recogni[zes]" anything in this litigation is not relevant and not responsive to Texas's stated material facts. Fed. R. Evid. 401, 402.

Paragraph 9 of the Wilson Declaration does not materially dispute Texas's stated material facts relating to the 1938 Condition and constitutes improper legal opinion. Fed. R. Evid. 401, 402, 704. Dr. Wilson's statement regarding the "D-2 curve" conflates issues relating to Rio Grande Project accounting with the Rio Grande Compact claims at issue in this litigation. Paragraph 9 of the Wilson Declaration should further be stricken as not relevant to the issues presented. Fed. R. Evid. 401, 402.

Texas requests that the following paragraphs from the Wilson Declaration be stricken in their entirety for the reason that they assert improper legal opinions that are both speculative and lack foundation and include irrelevant statements that do not materially address Texas's stated facts: paragraphs 8-9 (NM-EX 013). Texas requests that these objectionable paragraphs of the Wilson Declaration be stricken as evidence in support of New Mexico's Motions and/or Response.

G. Objection #7: Expert Reports [NM Exhibits 100-127]

Texas objects to New Mexico's reliance on expert reports as evidence in support of its response to the Texas Motion. This includes the exhibits New Mexico identifies as NM-EX 100 through NM-EX 127 and appended to the folder titled "NM Exhibits Compendium." New Mexico attempts to use retained expert reports that have been disclosed in this matter since as early as May of 2019. New Mexico even includes ten reports (NM-EX 104, 105, 106, 111, 114, 115, 119, 120, 124, & 126) that are authored by experts disclosed by Texas and the United States. To be admissible at trial, an exhibit must first be authenticated. To properly authenticate an exhibit as evidence, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). New Mexico makes no attempt whatsoever to verify the authenticity of any of these reports in whole or in part. Regarding, for example, New Mexico's disclosed expert Margaret Barroll, Ph.D., who also submitted separate declarations in support of New Mexico's Motions (NM-EX 001 & NM-EX 006), this expert merely states that she wrote several reports during the course of the litigation and otherwise fails to make any statement to identify any of her reports as true and accurate, the cornerstone of evidence authentication. *See* NM-EX 001, at 1. The expert reports, NM-EX 100 through NM-EX 127, are inadmissible evidence because they do not include affidavits verifying their authenticity. *Scott v. Edinburg*, 346 F.3d 752, 759-60 (7th Cir. 2003); *Haywood v. Lucent Techs., Inc.*, 323 F.3d 524, 533 (7th Cir. 2003).

The moving party must support its assertions by "citing to particular parts of materials in the record including . . . affidavits or declarations." Fed. R. Civ. P. 56(c)(1)(A). Such affidavits or declarations "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).

"The principles governing admissibility of evidence do not change on a motion for summary judgment. Rule 56(e) provides that affidavits in support of and against summary judgment 'shall set forth such facts as would be admissible in evidence.' " Fed. R. Civ. P. 56(e); *see also Cmty. of Roquefort*, 303 F.2d at 498 ("Since the object [of summary judgment] is to discover whether one side has no real support for its version of the facts, the Rule specifically states that affidavits shall 'set forth such facts as would be admissible in evidence.' (Citation omitted)"); *Raskin,* 125 F.3d at 66; *Lavespere*, 910 F.2d at 175-76. As such, expert reports may be rejected as evidence on summary judgment if they fail to include a supporting affidavit to verify its authenticity. *Scott*, 346 F.3d at 759-60; *Haywood*, 323 F.3d at 533.

The New Mexico Motions and its Response cite to expert reports (NM-EX 100 through NM-EX 127) none of which include a supporting affidavit to verify its authenticity or truth and accuracy of the information contained in each report. The expert reports submitted in support of New Mexico's Motions and Response (NM-EX 100 through NM-EX 127) are inadmissible and should be stricken.

H. Objection #8: Non-Authenticated Transcripts and Documents [NM Exhibits 200-252, 400-550, 600-606]

Texas objects to New Mexico's reliance on several categories of documents: (i) non-authenticated copies of deposition testimony [NM-EX 200 through NM-EX 252], (ii) general non-authenticated documents [NM-EX 400 through NM-EX 550], and (iii) non-authenticated hearing transcripts, pleadings, and other litigation documents [NM-EX 600 through NM-EX 606]. A wide range of documents may be submitted as evidence on summary judgment including deposition transcripts, documents, and interrogatory answers.

Fed. R. Civ. P. 56(c)(1)(A). However, exhibits may only be considered on summary judgment to the extent that the contents of the exhibit in question would be admissible at trial. Fed. R. Civ. P. 56(c)(4). To be admissible at trial, an exhibit must first be authenticated. To properly authenticate an exhibit as evidence, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). This requires the evidence to be submitted under oath. Fed. R. Civ. P. 56(c)(4). Without authentication, "documents cannot be considered in a motion for summary judgment." *Besett v Wadena Cty.,* 890 F. Supp. 2d 1076, 1092 (D. Minn. 2012) (citing *Orr v. Bank of Am.,* 285 F.3d 764, 773 (9th Cir. 2002)).

New Mexico attached excerpts from 53 deposition transcripts in this case to its compendium of exhibits and cites to the transcripts repeatedly in its Motions and its Response. However, New Mexico failed to authenticate any of the deposition transcripts. New Mexico failed to attach portions of the transcripts where each witness was sworn in by the court reporter. Moreover, New Mexico failed to attach witness certifications, confirming that the witness was indeed given the oath and that the transcript is true and correct.[6] Further, New Mexico only provided the transcript pages for the specific cited testimony and excluded transcript pages that would provide context for purposes of foundation and personal knowledge. Fed. R. Evid. 602. In sum, all the deposition transcripts in New Mexico's compendium (NM-EX 200 through NM-EX 252) and relied upon by New Mexico in the Motions and Response, should be stricken as inadmissible.

[6] The witness certifications in this case state the following above the signature line: "I, [witness name], solemnly swear or affirm under the pains and penalties of perjury that the foregoing pages contain a true and correct transcript of the testimony given by me at the time and place stated with the corrections, if any, and the reasons therefor noted on the foregoing correction page(s)." *See*, *e.g.*, Signature of Witness for Transcript of Oral and Videotaped Deposition of Peggy Barroll (Jul. 9, 2020) at TX_MSJ_007310.

In addition, a substantial number of other documents New Mexico cites and relies on as "evidence" in the Motions and Response are not authenticated. The following exhibits appended to the folder titled "NM Exhibits Compendium" are not authenticated by any means: NM-EX 400 through NM-EX 550.[7] Texas objects to New Mexico's use of and reliance on these documents because they are not properly identified or authenticated. Texas requests that the preceding list of non-authenticated and/or improperly identified documents relied upon by New Mexico be stricken as evidence in support of the Motions or the Response.

Finally, the documents labeled NM-EX 600 through NM-EX 606 include copies of what appear to be the following documents: NM-EX 600 appears to be a copy of the Transcript of August 19, 2015 Oral Argument before A. Gregory Grimsal, Esq. Special Master; NM-EX 601 appears to be a copy of State of Texas's Response to State of New Mexico First Set of Interrogatories to the State of Texas (Aug. 28, 2020); NM-EX 602 appears to be a copy of the United States of America's Response to New Mexico's First Set of Requests for Admission (Nov. 4, 2019); NM-EX 603 appears to be a copy of the State of New Mexico's Objections and Responses to the State of Texas's First Set of Requests for Admission to the State of New Mexico (Sep. 2, 2020); NM-EX 604 appears to be a copy of a document titled "Appendix A. – Resume of Dr. Lee Wilson" with no date; NM-EX 605 appears to be a copy of a document titled "Appendix B. – Expert Testimony of Dr. Lee Wilson" with no date; and NM-EX 606 appears to be a copy of a table titled "Comparison of

[7] Texas does not object to the following documents referenced in the Declaration of Jennifer Stevens, Ph.D. in Support of New Mexico's Motions for Partial Summary Judgment (NM-EX 005) and the Second Declaration of Jennifer Stevens, Ph.D. (NM-EX 011) for failure to authenticate: NM-EX 300 through NM-EX 352. Texas raises other specific evidentiary objections to NM-EX- 00 through NM-EX 352, to the extent applicable, in the table below.

Select Texas and New Mexico Water Administration Facts" with no date. Texas objects to NM-EX 600 through NM-EX 606 because they are not properly authenticated. Fed. R. Evid. 901(a). New Mexico made no attempt to authenticate NM-EX 600 through NM-EX 606 as true and correct copies of the documents they purport to be. Thus, Texas requests that all non-authenticated hearing transcripts, pleadings, and related litigation documents (NM-EX 600 through NM-EX 606) relied upon by New Mexico be stricken as evidence in support of New Mexico's Motions and the Response for failure to properly authenticate documents.

I. Objection #9: Violations of the "Sham" Declaration Rule [NM Exhibits 006 – 008, 011, 012]

In its Response, New Mexico cites to the declarations of its agents and experts in a manner that purportedly shows a genuine dispute to exist over virtually every fact that Texas has alleged. In many instances however, a particular declaration is cited in response to a fact that its very author has admitted unambiguously in prior sworn deposition testimony. In such instances, the declaration either flatly contradicts the witness's prior testimony, or does not actually address the specific fact it purportedly responds to. In both cases the effect is the same: the declaration fails to show that the fact is genuinely in dispute.

Courts hold "with virtual unanimity" that a party "cannot create a genuine issue of fact sufficient to survive summary judgment simply by contradicting his or her own previous sworn statement (by, say, filing a later affidavit that flatly contradicts that party's earlier sworn deposition) without explaining the contradiction or attempting to resolve the disparity." *Cleveland v. Policy Mgmt. Sys. Corp*., 526 U.S. 795, 806, 807 (1999) (compiling cases). "[A] deposition is the time for the plaintiff to make a record capable of surviving summary judgment – not a later filed affidavit," *Cowan v. Prudential Ins. Co. of Am*., 141 F.3d 751, 756 (7th Cir. 1998), and this "sham affidavit rule" precludes a party from

creating an issue of material fact by contradicting prior sworn testimony unless they can offer "persuasive reasons for believing the supposed correction" is more accurate than the prior testimony. *Galvin v. Eli Lilly & Co*., 488 F.3d 1026, 1030 (2007). The "very purpose of the summary judgment motion [is] to weed out unfounded claims, specious denials, and sham defenses[.]" *Bank of Ill. v. Allied Signal Safety Restraint Sys*., 75 F.3d 1162, 1169 (7th Cir. 1996). If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, the utility of summary judgment as a procedure for screening out sham issues of fact would be greatly diminished. *Hacienda Records, L.P. v. Ramos*, 718 F. App'x 223, 235 (5th Cir. 2018).

While strong, the rule against contradictory affidavits is not absolute, but none of the declarations challenged herein resemble one of the exceptions to that rule. *See Progressive N. Ins. Co. v. McDonough*, 608 F.3d 388, 391 (8th Cir. 2010) (contradictory testimony offered to create genuine factual dispute is typically only allowed when the party was confused and needs to clarify an earlier statement); *Commer. Underwriters Ins. Co. v. Aires Envtl. Servs*., 259 F.3d 792, 799 (7th Cir. 2001) (parties may generally not "patch-up potentially damaging deposition testimony" with a contradictory affidavit—only if the party offers a suitable explanation such as "confusion, mistake, or lapse in memory [] for the discrepancy.").

Based on the foregoing, Texas requests that the following statements set forth in Declarations submitted by New Mexico be stricken:

1. <u>NM-EX 007, John D'Antonio 2nd Decl.</u>

a. <u>Paragraphs 1-11, 21, 23-28, 43-49, 55, 57-59</u>

Texas's undisputed material fact number 178 states:

> Notwithstanding the closing of the basin, groundwater pumping in New Mexico continued unabated. In 2010, New Mexico determined the

> groundwater basin was being mined. Mining of a groundwater basin means that more water is being pumped from the groundwater basin than can be replaced, causing groundwater levels to decline and causing the further depletion of the volume of water available to Texas. Groundwater pumping in New Mexico continues unabated today. The net result is that, notwithstanding the ongoing and recognized depletion of surface water flow through New Mexico's groundwater pumping in New Mexico below Elephant Butte Reservoir, pumping continues unabated, to the detriment of Texas. *See* Exhibit B.

In Appendix 1, New Mexico cites to paragraphs 1-11, 21, 23-28, 43-49, 55, and 57-59 by Declarant D'Antonio as "evidence" in an attempt to create a material dispute to Texas's fact number 178. In sum, D'Antonio describes what he purports to be New Mexico's compliance and enforcement processes and concludes that it is "incorrect and disingenuous to assert that New Mexico in any sense fails in its water administration responsibilities or Compact obligations." *See* NM-EX 007, John D'Antonio Second Declaration (D'Antonio 2nd Decl.), para. 58. However, New Mexico's attempt to create a material dispute with these statements violates the "sham" declaration rule as articulated above. Specifically, Declarant D'Antonio previously testified in this case in a manner that is directly contradictory to the statements in the D'Antonio Declaration as follows:

- Excerpts from the John D'Antonio Deposition on 6/25/2020 (D'Antonio Depo., 6/25/20):
    - 165:13-25 (the "[2008] operating agreement exacerbated groundwater pumping within the State of New Mexico and that groundwater level has not recovered since that operating agreement has been put in place."). TX_MSJ_007776.
    - 188:17-189:4 (admission that as of 2005, "groundwater use has increased in the Lower Rio Grande."). TX_MSJ_007781-007782.
    - 189:21-190:12 (the 2008 Operating Agreement "is forcing New Mexico to pump much greater amounts of groundwater."). TX_MSJ_007782-007783.
    - 199:3-200:6 (the intent of the AWRM initiative was to "keep [groundwater pumping] in control" and make "corrections within New Mexico," and that "we definitely *would have been* able to do that," but the 2008 Operating Agreement "flipped that strategy on its head because it so exacerbated the

> need for New Mexico to pump additional groundwater before we could put this active water resource management initiative in place."). TX_MSJ_007787-007786.

Accordingly, Declarant D'Antonio's attempt to create a disputed fact, where there otherwise was not a disputed fact as confirmed by his own testimony, is improper and should be stricken.

b. Paragraphs 57-59

Texas's undisputed material fact number 179 states:

> All wells continued unregulated groundwater pumping until December 3, 2004, when the OSE ordered the creation of a Water Master District on the Lower Rio Grande, appointed a water master, and ordered measurement and reporting of groundwater pumping. While New Mexico now measures how much groundwater is pumped, New Mexico has taken no action to establish a system for administration as required to meet downstream interstate delivery entitlements. *See* Exhibit B.

In Appendix 1, New Mexico also cites to paragraphs 57-59 by Declarant D'Antonio as "evidence" in an attempt to create a material dispute to Texas's fact number 179. As discussed above, in paragraphs 57-59, Declarant D'Antonio describes what he purports to be New Mexico's compliance and enforcement processes and concludes that it is "incorrect and disingenuous to assert that New Mexico in any sense fails in its water administration responsibilities or Compact obligations." *See* NM-EX 007, D'Antonio 2nd Decl., para. 58. However, New Mexico's attempt to create a material dispute with these statements violates the "sham" declaration rule as articulated above. Specifically, Mr. D'Antonio, as well as one of New Mexico's designated Rule 30(b)(6) witnesses, previously testified in this case in a matter that is directly contradictory to the statements in the D'Antonio Declaration as follows:

- D'Antonio Depo., 6/25/2020:

    - 201:5-8 ("[Y]ou really can't manage what you don't measure, so it was necessary to put . . . the meters in place and require the meters to be there."). TX_MSJ_007789.

    - 156:10-157:7 ("New Mexico farmers can use [Project surface water] to total consumption. So they can use some of their return flows on -- on their project lands within New Mexico until that surface water allocation is used -- is totally used."). TX_MSJ_007769-007770.

    - 157:10-158:17 (New Mexico has no obligation to Texas under the Compact once it delivers water to Elephant Butte Reservoir). TX_MSJ_007770-007771.

- D'Antonio Depo. 6/24/2020:

    - 37:10-38:1 (the focus of New Mexico's impairment protection efforts is on New Mexico users, and benefit to Texas is "ancillary"). TX_MSJ_007725_06-007725_07.

- Excerpts of Rule 30(b)(6) Deposition of Cheryl Thacker, 9/18/2020 (Thacker 30(b)(6) Depo., 9/18/2020)[8]:

    - 69:5-10 ("absolutely right" that Thacker "not aware of specific activities New Mexico has done to enforce compliance with the Rio Grande Compact"). TX_MSJ_007708.

    - 79:21-80:7 (neither D'Antonio nor anyone at the State Engineer's Office has ever given LRG staff "instructions or guidance about the role of the Compact in [their] professional duties"). TX_MSJ_007714_05-007714_06.

[8] New Mexico designated Cheryl Thacker to testify on behalf of the state of New Mexico pursuant to a Rule 30(b)(6) Deposition Notice. *See* Theresa C. Barfield Declaration at TX_MSJ_000704-000705, Exh. 1, New Mexico's September 10, 2020 Objections to the United States' Notice of 30(b)(6) Deposition and to State of Texas's Cross-Notice (NM Objections) at TX_MSJ_000706-000728. New Mexico designated Ms. Thacker to "provide testimony as to New Mexico's administration, implementation, and enforcement as to the three (3) identified subjects." NM Objections at TX_MSJ_000706-000728. The three subjects were: "(1) delivery of Rio Grande Compact water to the State of New Mexico, (2) delivery of Rio Grande Compact water to the State of Texas, and (3) water released from storage to meet Compact irrigation demands below Elephant Butte Reservoir." *Id.*; Thacker 30(b)(6) Depo., 9/18/2020, at TX_MSJ_001355, 12:5-25. New Mexico's counsel narrowed that designation during the deposition to "state law, regulations, and policies with the administration of water in the LRG." Thacker 30(b)(6) Depo., 9/18/2020, at TX_MSJ_001361, 18:1-4.

Accordingly, Declarant D'Antonio's attempt to create a disputed fact, where there otherwise was not a disputed fact as confirmed by his own testimony, and the testimony of New Mexico's designated Rule 30(b)(6) witness, is improper and should be stricken.

c. Paragraphs 8, 23

Texas's undisputed material fact number 193 states:

> On numerous occasions, New Mexico witnesses have referred to "conjunctive use" of groundwater and surface water supplies as if allowing groundwater use to replace unavailable surface water is an acceptable means of controlling depletions. Plainly stated, it is not – conjunctive use simply means that surface water shortages will be made up for with groundwater pumping. *See* Exhibit B.

In Appendix 1, New Mexico cites to paragraphs 8 and 23 by Declarant D'Antonio as "evidence" in an attempt to create a material dispute to Texas's fact number 193. In those paragraphs, Declarant D'Antonio asserts that "[a]ny suggestion that the New Mexico State Engineer ignored or failed to understand the science of conjunctive management cannot be supported in the light of New Mexico's general history of comprehensive water administration, as well as New Mexico's specific history of taking strong action to ensure compliance with the Rio Grande Compact." *See* NM-EX 007, D'Antonio 2nd Decl., para. 8. Declarant D'Antonio also declared that there have been no groundwater permits granted since the LRG Groundwater Basin was declared in 1980, without "conditions to ensure that no new depletions would be caused to the surface waters of the Rio Grande." *Id.* at para. 23. Declarant D'Antonio cited to Cheryl Thacker's deposition testimony as support for paragraph 23. *Id.* However, Declarant D'Antonio conspicuously cited only to Ms. Thacker's layperson deposition testimony, not the deposition testimony given by Ms. Thacker as a Rule 30(b)(6) witness on behalf of New Mexico.

However, New Mexico's attempt to create a material dispute with Declarant D'Antonio's statements violates the "sham" declaration rule articulated above. Specifically,

Declarant D'Antonio himself testified in a manner that unambiguously admits Texas's undisputed material fact number 193 and directly contradicts his declaration. D'Antonio Depo. 8/14/2020, 24:16-24 ("[T]hey're the same . . . conjunctive use or supplemental use of the groundwater."). Additionally, Cheryl Thacker testified as a New Mexico Rule 30(b)(6) agent in a manner that unambiguously admits Texas's undisputed material fact number 193, and directly contradicts statements by D'Antonio, particularly regarding Mew Mexico's actions to ensure Compact compliance:

- Thacker 30(b)(6) Depo., 9/18/2020:
    - 34:20-39:24 (Q. As long as the groundwater pumper was within this permitted amount, and I think you've defined this permitted amount as 4.5 acre-foot for most irrigation uses, subtracting off their surface water allocation, then they had a permitted amount of water to pump from the ground for that year; is that correct? A. Yes.) TX_MSJ_007705_03-007705_08.
    - 69:5-10 ("absolutely right" that Thacker "not aware of specific activities New Mexico has done to enforce compliance with the Rio Grande Compact."). TX_MSJ_007708.
    - 79:21-80:7 (neither D'Antonio nor anyone at the State Engineer's Office has ever given LRG staff "instructions or guidance about the role of the Compact in [their] professional duties."). TX_MSJ_007714_05-007714_06.

Accordingly, Declarant D'Antonio's attempt to create a disputed fact, where there otherwise was not a disputed fact as confirmed by his own testimony and the testimony of New Mexico's designated Rule 30(b)(6) witness, is improper and should be stricken.

d. Paragraphs 38-48

Texas's undisputed material fact number 188 states:

> In 2005 and 2006, the OSE began an effort to promulgate district specific regulations under the AWRM statute for the Lower Rio Grande at least in part to avoid a lawsuit from Texas. *See* Exhibit B.

In Appendix 1, New Mexico cites to paragraphs 38-48 by Declarant D'Antonio as "evidence" in an attempt to create a material dispute to Texas's fact number 188. In those

paragraphs, Declarant D'Antonio asserts that paragraphs 38-48 purportedly demonstrate a material dispute by outlining the chronology of New Mexico's still-unrealized effort to promulgate alternative administration regulations in the lower Rio Grande area of New Mexico. However, New Mexico's attempt to create a material dispute with these statements violates the "sham" declaration rule as articulated above. Specifically, Declarant D'Antonio previously testified in this case in a manner that is directly contradictory to the statements in the D'Antonio Declaration as follows:

- D'Antonio Depo., 6/25/2020
    - 197:16-198:12 (admission that in 2005, he was concerned that if New Mexico "[doesn't] address groundwater pumping and its impact on surface water, Texas in a sense may go to the Supreme Court to complain about it," and further that "the Supreme Court could require offsets for all post-Compact [post-1938] groundwater pumping."). TX_MSJ_007785-007786.

Accordingly, Declarant D'Antonio's attempt to create a disputed fact, where there otherwise was not a disputed fact as confirmed by his own testimony, and the testimony of New Mexico's designated Rule 30(b)(6) witness, is improper and should be stricken.

e. <u>Paragraph 40</u>

Texas's undisputed material fact number 192 states:

> New Mexico could actively curtail groundwater pumping to ensure delivery of Texas's apportionment without interference. The [New Mexico] Legislature has directed the State Engineer to engage in this type of "active" administration. See, supra, section G.4 (discussion of AWRM); however, New Mexico has admitted it considered but ultimately rejected regulations which would have required curtailment of wells in the Lower Rio Grande. *See* <u>Exhibit B</u>.

In Appendix 1, New Mexico cites to paragraph 40 by Declarant D'Antonio as "evidence" in an attempt to create a material dispute to Texas's fact number 192. In that paragraph, Declarant D'Antonio asserts, in pertinent part:

> The AWRM Framework Rules' identification of the possibility of Alternative Administration allows the State Engineer to support water right owners'

> creation of agreements that share shortages among themselves. . . . Throughout New Mexico I have frequently observed a cultural preference for working out water shortage situations rather than for enforcement of a strict priority call completely cutting off certain water rights. *See* NM-EX 007, D'Antonio 2nd Decl., para. 40.

New Mexico attempts to create a material dispute with these statements which imply that New Mexico has in fact implemented such shortage-sharing schemes. This violates the "sham" declaration rule articulated above. Specifically, Declarant D'Antonio and New Mexico's designated Rule 30(b)(6) witness Cheryl Thacker unambiguously admitted in prior depositions that no such arrangements exist in the Lower Rio Grande:

- Thacker 30(b)(6) Depo., 9/18/2020:
  - 77:3-78:7 (cannot cite to any examples of shortage-sharing arrangements in the Lower Rio Grande). TX_MSJ_007714_03-007714_04.
- D'Antonio Depo., 6/25/2020:
  - 202:8-11 (no cooperative agreements for shortage sharing developed yet). TX_MSJ_007790.

Accordingly, Declarant D'Antonio's attempt to create a disputed fact, where there otherwise was not a disputed fact as confirmed by his own testimony, and the testimony of New Mexico's designated Rule 30(b)(6) witness, is improper and should be stricken.

f. <u>Paragraphs 38-42</u>

Texas's undisputed material fact number 189 states:

> However, according to Dr. Barroll: ". . . so far in the Lower Rio Grande, we have not done active curtailment of any water rights." Footnote 42: Barroll Depo., 2/5/2020, at TX_MSJ_000901, 56:19-20; see also D'Antonio Depo., 6/26/2020, at TX_MSJ_000847, 325:21-23 ("[The district-specific regulations] aren't in place yet, so any active curtailment with respect to water administration, that piece is not in place yet."). *See* <u>Exhibit B</u>.

In Appendix 1, New Mexico cites to paragraphs 38-42 by Declarant D'Antonio as "evidence" in an attempt to create a material dispute to Texas's fact number 189. In those paragraphs, Declarant D'Antonio merely recites the purpose and goals of New Mexico's

AWRM framework, and states that, "While the case [challenging the AWRM rules] worked through the court system, the State Engineer refrained from implementing some of the provisions being challenged, while working toward accomplishment of the goals and intent of the AWRM Framework Rules." *See* NM-EX 007, D'Antonio 2nd Decl., para. 42. New Mexico's attempt to create a material dispute with these statements violates the "sham" declaration rule articulated above. Specifically, Mr. D'Antonio unambiguously confirmed Texas's undisputed material fact in two prior deposition sessions in this matter, part of which is directly cited in Texas's undisputed material fact, which Declarant D'Antonio now contradicts:

- D'Antonio Depo.,6/26/2020:
    - 325:21-23 ("[The district-specific regulations] aren't in place yet, so any active curtailment with respect to water administration, that piece is not in place yet."). TX_MSJ_000847.
- D'Antonio Depo., 6/25/2020:
    - 200:7-204:8 (concrete steps New Mexico has taken "to improve the regulation of groundwater pumping" are the 1999 Mesilla Valley Administrative Guidelines; the 2004 well metering order; and establishment of the LRG Water Master District. As for "[w]hat alternative methods have been developed since 2005," New Mexico has only "teed those issues up."). TX_MSJ_007788-007792.

Accordingly, Declarant D'Antonio's attempt to create a disputed fact, where there otherwise was not a disputed fact as confirmed by his own testimony, is improper and should be stricken.

g. <u>Paragraph 14, footnote 5</u>

Texas's undisputed material fact number 172 states:

> Finally, in the early 1980s, an internal study of streamflow depletion below Elephant Butte Reservoir conducted by State Engineer Reynolds' office concluded that groundwater development since the 1950s in New Mexico had altered flows to such an extent that greater releases were required from the

> Reservoir for the same quantity of water to reach the city of El Paso under the accepted 1938 Condition. *See* Exhibit B.

In Appendix 1, New Mexico cites to paragraph 14, footnote 5 by Declarant D'Antonio as "evidence" in an attempt to create a material dispute to Texas's fact number 172. In footnote 5 to paragraph 14, Declarant D'Antonio unequivocally disavows knowledge of a historical document relied upon by Texas's expert Scott Miltenberger, and referred to in paragraph 61 of Scott Miltenberger's Declaration in support of the Texas Motion (TX_MSJ_001618-001619). Declarant D'Antonio further states that "no OSE personnel are familiar with the document" and that he has "no reason to believe this document or the conclusions therein were created or endorsed by the OSE." *See* NM-EX 007, D'Antonio 2nd Decl., para. 14, n.5. Declarant D'Antonio also expressly references New Mexico's Response to Texas's Request for Admission (RFA) No. 57. *Id.*

Texas's RFA No. 57 asked New Mexico to admit the authenticity of the document discussed in Declarant D'Antonio's paragraph 14, footnote 5. *See* Barfield Decl. at TX_MSJ_000704-000705, State of New Mexico's Objections and Supplemental Responses to the State of Texas's First Set of Requests for Admission to the State of New Mexico (Oct. 30, 2020) at TX_MSJ_000729-000756, RFA No. 57, at TX_MSJ_000748. In New Mexico's response to RFA No. 57, New Mexico stated: "information New Mexico knows or can readily obtain is insufficient to enable it to admit or deny Texas's request." *Id.* Yet, Declarant D'Antonio, as the New Mexico State Engineer (with the broad powers and authority described in his Declaration), stated the exact opposite.

New Mexico's attempt to create a material dispute with these statements violates the "sham" declaration rule articulated above. Accordingly, Declarant D'Antonio's attempt to create a disputed fact, where there otherwise was not a disputed fact as confirmed by his own testimony, is improper and should be stricken.

2. NM-EX 006, Barroll 2nd Declaration

a. Paragraph 81

Texas's undisputed material fact number 179 states:

> All wells continued unregulated groundwater pumping until December 3, 2004, when the OSE ordered the creation of a Water Master District on the Lower Rio Grande, appointed a water master, and ordered measurement and reporting of groundwater pumping. While New Mexico now measures how much groundwater is pumped, New Mexico has taken no action to establish a system for administration as required to meet downstream interstate delivery entitlements. *See* Exhibit B.

In Appendix 1, New Mexico cites to paragraph 81 by Declarant Barroll as "evidence" in an attempt to create a material dispute to Texas's fact number 179.[9] In paragraph 81, Declarant Barroll claims that "New Mexico is developing mechanisms to address these groundwater issues, and is currently implementing a Pilot Project to reduce groundwater depletions in the LRG." *See* NM-EX 006, Barroll 2nd Decl., para. 81. However, New Mexico's attempt to create a material dispute with this statement violates the "sham" declaration rule as articulated above. Specifically, Declarant Barroll previously testified in this case in a manner that is directly contradictory to the statement in her Declaration, including testimony wherein she was testifying as an agent of New Mexico as a Rule 30(b)(6) designated witness:

- Excerpts from the Peggy Barroll Deposition on 7/9/20 (Barroll Depo., 7/9/20):
  - 110:9-111:19 (State has no unilateral authority to control groundwater mining – "water right owners can use the water that they have a right to."). TX_MSJ_007616_03-007616_04.
  - 111:20-112:18 (declaring groundwater basin, adjudicating water rights, metering wells, and the cited pilot program are the only measures taken to control groundwater mining in the LRG). TX_MSJ_007616_04-007616_05.

[9] Declarant D'Antonio's statements referable to Texas's undisputed material fact number 179 were previously discussed *supra,* at section III.I.1.b.

- 113:4-114:2 (OSE has taken no curtailment action to address the LRG groundwater mining problem; diversions legal under state law in combination with the 2008 Operating Agreement are the cause of the drawdown, not illegal diversions). TX_MSJ_007616_06-007616_07.

- Excerpts of Rule 30(b)(6) Deposition of Peggy Barroll, 10/21/2020 (Barroll 30(b)(6) Depo., 10/21/2020):

  - 58:3-66:2 (New Mexico has conceived a pilot program involving payment to farmers for fallowing land which "*might* turn into the basis for an alternative administration scheme"; pilot program is voluntary; New Mexico has done no formal evaluation of individual farmer interest; pecan farmers are not expected to participate). TX_MSJ_007669_03-007669_07.

Accordingly, Declarant Barroll's attempt to create a disputed fact, where there otherwise was not a disputed fact as confirmed by her own testimony, including testimony given by Declarant Barroll as a designated Rule 30(b)(6) witness, is improper and should be stricken.

b. Paragraphs 35, 37, 52

Texas's undisputed material fact number 162 states:

> In this matter, it is undisputed that groundwater pumping in New Mexico below Elephant Butte Reservoir depletes surface water flow of the Rio Grande, and that groundwater pumping has increased substantially since 1938. *See* Exhibit B.

In Appendix 1, New Mexico cites to paragraphs 35, 37 and 52 by Declarant Barroll as "evidence" in an attempt to create a material dispute to Texas's fact number 162. Declarant Barroll states that the Rio Grande within the LRG and El Paso valley has historically had both gaining and losing reaches, implying no overall depletion increase (Barroll 2nd Decl., para. 35); and that pumping in both New Mexico and Texas "may cause stream depletions" and affects surface flows, implying a parity (Barroll 2nd Decl., paras. 37, 52).

However, New Mexico's attempt to create a material dispute with these statements violates the "sham" declaration rule as articulated above. Specifically, Declarant Barroll

previously testified in this case in a manner that is directly contradictory to the statements in her Declaration as follows:

- Barroll Depo. 2/6/2020:
    - 242:17-247:5 ("The deviations from the D2 curve have a number of causes. Part of that cause would be increases in depletions in New Mexico since the D2 period. . . . I would say that the deviation from D2 is caused by increased depletions, . . . the amount of increased depletions since the D2 period, I would say the majority of those would have occurred in New Mexico."). TX_MSJ_007747-007752.

Accordingly, Declarant Barroll's attempt to create a disputed fact, where there otherwise was not a disputed fact as confirmed by her own testimony, is improper and should be stricken.

c. Paragraphs 13, 36, 37, 38

Texas's undisputed material fact number 124 states:

> The phenomenon of reduced river flows caused by groundwater withdrawals is an underlying component of what is referred to as streamflow depletions, and these streamflow depletions have increased along the Rio Grande within the Rincon and Mesilla basins since significant groundwater development began in the early 1950s. *See* Exhibit B.

In Appendix 1, New Mexico cites to paragraphs 13, 36, 37 and 38 by Declarant Barroll as "evidence" in an attempt to create a material dispute to Texas's fact number 124. Several of those paragraphs are irrelevant to Texas's material fact. In paragraph 37, however, Declarant Barroll states that pumping in both New Mexico and Texas "may cause stream depletions" implying a parity. Barroll 2nd Decl., paras. 37, 52. New Mexico's attempt to create a material dispute with these statements violates the "sham" declaration rule as articulated above. Specifically, Declarant Barroll previously testified in this case in a manner that is directly contradictory to the statements in her Declaration as follows:

- Barroll Depo. 2/6/2020:
    - 242:17-247:5 ("The deviations from the D2 curve have a number of causes. Part of that cause would be increases in depletions in New Mexico since the D2 period. . . . I would say that the deviation from D2 is caused by increased depletions, . . . the amount of increased depletions since the D2 period, I would say the majority of those would have occurred in New Mexico."). TX_MSJ_007747-007752.

Accordingly, Declarant Barroll's attempt to create a disputed fact, where there otherwise was not a disputed fact as confirmed by her own testimony, is improper and should be stricken.

3. NM-EX 011, Jennifer Stevens 2nd Declaration

a. Paragraph 30

Texas's undisputed material fact number 167 states: "Few groundwater wells were in use at the time of Compact adoption in 1938." *See* Exhibit B.

In Appendix 1, New Mexico cites to paragraph 30 by Declarant Stevens as "evidence" in an attempt to create a material dispute to Texas's fact number 167. In paragraph 30 Declarant Stevens states:

> Municipalities downstream of Elephant Butte Dam had long relied on groundwater for their supplies, and farmers used wells, too. According to U.S. Geological Survey's Charles S. Slichter writing about groundwater supplies in the Mesilla Valley in 1905, a "number of pumping wells have been installed for the purpose of obtaining ground water for irrigation." *See* NM-EX 011, Stevens 2nd Decl., para. 30.

New Mexico's attempt to create a material dispute with this statement violates the "sham" declaration rule as articulated above. Specifically, Declarant Stevens previously testified in this case in a manner that unambiguously contradicts the implication that paragraph 30 describes the state of affairs in 1938:

- Excerpts from the Stevens Deposition on 7/27/2020 (Stevens Depo., 7/27/20):
    - 44:14-45:9 (admission that there were few wells within EBID as of 1938 because "they were displaced when surface water became readily available

when the project went in"; as of 1947, there were only 37 wells in EBID.). TX_MSJ_007810-007811.

Accordingly, Declarant Stevens' attempt to create a disputed fact, where there otherwise was not a disputed fact as confirmed by her own testimony, is improper and should be stricken.

b. Paragraph 31

Texas's undisputed material fact number 165 states: "As early as the 1900s, studies determined that the groundwater and surface water in the Rio Grande below Elephant Butte Reservoir were interconnected." *See* Exhibit B.

In Appendix 1, New Mexico cites to paragraph 31 by Declarant Stevens as "evidence" in an attempt to create a material dispute to Texas's fact number 165. In paragraph 31 Declarant Stevens states, in pertinent part: "[S]cientific understanding of the relationship between groundwater and surface water in the Rio Grande Basin was limited at the time that the 1938 Compact was signed, and Texas's delegation fought to keep it that way." *See* NM-EX 011, Stevens 2nd Decl., para. 31. New Mexico's attempt to create a material dispute with these statements violates the "sham" declaration rule articulated above. Specifically, Dr. Stevens previously testified in this case in a manner that is directly contradictory to the implication that the groundwater/surface water interconnection below Elephant Butte was not understood at the time of the Compact:

- Stevens Depo., 7/27/2020:
    - 57:6-65:6 (acknowledgement of 1905 USGS report concluding "The observation of the test wells show that the ground waters in the Mesilla Valley originate in the floodwaters of the river," and that "Any greater rate of pumping would have a tendency to lower the water plane below its initial value and make a draft upon the permanent supply stored in the gravels."). TX_MSJ_007816-007824.

Accordingly, Declarant Stevens' attempt to create a disputed fact, where there otherwise was not a disputed fact as confirmed by her own testimony, is improper and should be stricken.

Dated: February 5, 2021

Respectfully submitted,

s/ Stuart L. Somach

STUART L. SOMACH, ESQ.*
ANDREW M. HITCHINGS, ESQ.
ROBERT B. HOFFMAN, ESQ.
FRANCIS M. GOLDSBERRY II, ESQ.
THERESA C. BARFIELD, ESQ.
SARAH A. KLAHN, ESQ.
BRITTANY K. JOHNSON, ESQ.
RICHARD S. DEITCHMAN, ESQ.
SOMACH SIMMONS & DUNN, PC
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
Telephone: 916-446-7979
ssomach@somachlaw.com

**Counsel of Record*