

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

UNITED STATES OF AMERICA’S MOTION TO STRIKE DECLARATIONS

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MOTION TO STRIKE

New Mexico seeks to present its legal argument through declarations and argue the existence of disputed issues of fact where there are none. The United States hereby moves to strike¹ the Second Declaration of Margaret Barroll, PhD (“2d Barroll Decl.”), the Second Declaration of John D’Antonio (“2d D’Antonio Decl.”), the Second Declaration of Estevan R. Lopez, P.E. (“2d Lopez Decl.”), the Declaration of Ryan J. Serrano (“Serrano Decl.”), the Second Declaration of Jennifer Stevens, PhD (“2d Stevens Decl.”), and the Declaration of Lee Wilson, PhD (“Lee Decl.”), to the extent those declarants testify to matters beyond their personal knowledge or technical expertise. The portions of New Mexico’s Response to the United States’ Motion for Partial Summary Judgment (“N.M. Resp.”) based on these portions of the declarations should also be disregarded. This motion is based on Rules 12(f), 56(c) & (e) of the Federal Rules of Civil Procedure, Rule 17 of the Rules of the Supreme Court, and the points and authorities stated below.

BACKGROUND

The United States filed its Motion for Partial Summary Judgment on November 5, 2020. In support of the Motion, the United States listed 93 statements of undisputed material facts that were based on the testimony of New Mexico’s fact witnesses, experts, and witnesses designated under Rule 30(b)(6) of the Federal Rules of Civil Procedure.

New Mexico also moved for summary judgment on November 5 in three separate motions. In support of those motions, New Mexico submitted a compendium of exhibits that included declarations from New Mexico’s expert hydrologist Dr. Margaret Barroll, expert on

¹ By filing this motion to strike, the United States does not concede that any evidence New Mexico seeks to present would be admissible or would affect the outcome of the case.

water administration and management Estevan R. Lopez, P.E., expert historian Dr. Jennifer Stevens, and State Engineer John D’Antonio, a fact witness. Texas argues that these declarations are inadmissible in support of New Mexico’s motions. *See generally* Tex. Evidentiary Objections & Resp. to N.M.’s Facts.

On December 22, New Mexico responded to the motions filed by the United States and Texas. It submitted an additional compendium of exhibits, including new declarations from Dr. Barroll, Dr. Stevens, Mr. D’Antonio, and Mr. Lopez. It also included a declaration from Ryan Serrano, the Lower Rio Grande Water Master within the Office of the State Engineer, and Dr. Lee Wilson, PhD, a non-retained rebuttal witness. New Mexico cites portions of these declarations in an attempt to demonstrate the existence of disputed issue of fact precluding summary judgment on the United States’ motion.

LEGAL STANDARDS

A party opposing summary judgment has the burden to demonstrate by citation to specific evidence that there are disputed issues of material fact for trial. Fed. R. Civ. P. 56(c). Generally, the non-moving party must show that the evidence cited will be admissible at trial, or susceptible to admission without dispute. Fed. R. Civ. P. 56(c) , (e); *McCaskill v. Ray*, 279 F. App’x 913, 914–15 (11th Cir. 2008) (concluding that “[u]nder Federal Rule of Civil Procedure 56(e), affidavits, supporting or opposing summary judgment, must be made on personal knowledge and must set forth facts that would be admissible evidence.”). For this reason, the non-moving party may introduce testimony through affidavits based on personal knowledge. Fed. R. Civ. P. 56(c)(4). Affidavits that attest to matters outside the affiant’s personal knowledge are inadmissible hearsay that cannot be considered as a basis for denying summary judgment. *Id.* *See* Special Master’s Report and Recommendation Regarding Winter Storage

Motions, *Kansas v. Colorado*, No. 105, Orig., 1994 WL 16189353, at *155–56 (U.S. Oct. 3, 1994); *see also U.S. Structures, Inc. v. J.P. Structures, Inc.*, 130 F.3d 1185, 1189 (6th Cir. 1997) (noting that under Rule 56(e) “evidence submitted in opposition to a motion for summary judgment must be admissible” and “hearsay evidence...must be disregarded.”).

A court may strike all improper portions of an affidavit used to support or oppose a motion for summary judgment. Fed. R. Civ. P. 12(f), 56(e); *see also Judicial Watch, Inc. v. U.S. Dep’t of Commerce*, 224 F.R.D. 261, 263 & n.1 (D.D.C. 2004); *Canady v. Erbe Elektromedizin GmbH*, 384 F. Supp. 2d 176, 180 (D.D.C. 2005), *aff’d*, 182 F. App’x 988 (Fed. Cir. 2006). The court may strike an affidavit, or portions thereof, because the affiant: (a) lacks personal knowledge; (b) sets forth facts inadmissible at the time of trial; or (c) is not competent to testify. *Id.*; Fed. R. Civ. P. 56(c)(4). The “requirement of personal knowledge by the affiant is unequivocal, and cannot be circumvented,” and “[a]n affidavit based merely on information and belief is unacceptable.” *See Londrigan v. Federal Bureau of Investigation*, 670 F.2d 1164, 1174 (D.C. Cir. 1981) (citations omitted); *Hansen v. PT Bank Negara Indonesia (Persero)*, 706 F.3d 1244, 1250 (10th Cir. 2013) (noting that “[u]nder the personal knowledge standard, an affidavit is inadmissible if ‘the witness could not have actually perceived or observed that which he testifies to.’”)(citation omitted); *Bolen v. Dengel*, 340 F.3d 300, 313 (5th Cir. 2003) (noting that “Rule 56(e) requires statements in affidavits to be based on personal knowledge and not based on information and belief.”).

ARGUMENT

A. The portions of the declarations that are not based on personal knowledge should be stricken.

1. Dr. Stevens

During discovery in this case, New Mexico identified Dr. Stevens as an expert historian. Dr. Stevens produced an expert report and a rebuttal report. She also gave testimony at two depositions. In her new declaration, Dr. Stevens offers opinion testimony on the same subjects as her expert reports. Except for her statements about her experience and expertise, Dr. Stevens' statements are not based on personal knowledge. *See generally* 2d Stevens Decl. ¶¶ 3-32, NM-EX-011. Rather, Dr. Stevens' assertions are based on her review of historical documents. *Id.* For example, Dr. Stevens opines that the Compacting States understood that the Compact would provide a reasonable path forward for new water resource development throughout the basin, subject to the rights of each state. 2d Stevens Decl. ¶ 12, NM-EX-011; *see also* N.M. Resp. 22-23 (citing 2d Stevens Decl. ¶ 12). In support of this assertion, Dr. Stevens interprets Richard Burges' Comments on Compact Negotiations. *See* 2d Stevens Decl. ¶ 12, NM-EX-011 (citing NM-EX-333). This is improper. New Mexico cites Dr. Stevens' declaration as evidence showing a disputed issue of fact in its response.² *See* N.M. Resp. 3-5, 13, 20, 22-23.

Dr. Stevens' testimony is not admissible because it is based on her review of historical documents, not personal knowledge. *See Kansas v. Colorado*, 1994 WL 16189353, at *155-56 (striking affidavit testimony from Kansas's expert historian as to the intent of Compact negotiators because that testimony was "based upon his review of primary historical documents, and represents his conclusions rather than factual evidence not otherwise available to the Court"). Accordingly, the Court should strike Paragraphs 3-32 and the portions of New Mexico's brief that rely upon these statements. *See* Exhibit 1; N.M. Resp. 3-5, 13, 20, 22-23.

² New Mexico's Response Brief refers to Dr. Stevens' Second Declaration as NM-EX-011, NM-EX-010, and NM-EX-005. *See, e.g.* N.M. Resp., 3, 5, 13. For purposes of this Motion to Strike, the United States assumes that all of these references are intended to cite to Dr. Stevens' Second Declaration, NM-EX-011.

2. Dr. Barroll

New Mexico also identified Margaret Barroll, PhD, as an expert hydrologist. Dr. Barroll produced an expert report, a rebuttal report, a supplemental rebuttal report, and a “second edition” of her supplemental rebuttal report. She gave testimony in her expert capacity over five days between February and August 2020. New Mexico subsequently designated Dr. Barroll as a witness to testify on New Mexico’s behalf under Rule 30(b)(6) of the Federal Rules of Civil Procedure. Dr. Barroll was designated to testify as to New Mexico’s state law administration, implementation, and enforcement in “(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.” *See* N.M.’s Am. Objs. & Witness Designations to the U.S.’ Notice of Rule 30(b)(6) Dep., filed October 15, 2020, at 10. New Mexico also designated Dr. Barroll to speak to its “policies relating to administration of water delivered to EBID pursuant to the 1938 contracts between the United States and the districts, the 1979/1980 operation and maintenance transfer contracts between the United States and the districts, and the 2008 Operating Agreement.” *Id.* at 11. Dr. Barroll gave testimony in her capacity as a witness under Rule 30(b)(6) on October 21, 2020. New Mexico proffers a new declaration from Dr. Barroll with its response brief. New Mexico refers to this declaration as Dr. Barroll’s “Second Declaration” to distinguish it from the declaration Dr. Barroll previously provided in connection with New Mexico’s motions for summary judgment.

Dr. Barroll offers testimony in her declaration purportedly to clarify technical data. 2d Barroll Decl. ¶ 5, NM-EX-006. But, substantial sections of her declaration go beyond technical discussion and describe aspects of Project history or operation that are based on Dr. Barroll’s

review of primary sources, not her personal knowledge.³ *See generally*, 2d Barroll Decl. ¶¶ 13-81, NM-EX-006. This is evident in Dr. Barroll's numerous citations to the Bureau of Reclamation Final Environmental Impact Statement (NM-EX-529), the Operations Manual (NM-EX-531), the Conover Reports (NM-EX-343, NM-EX-424), and the Rio Grande Project Histories (NM-EX-417, NM-EX-419, NM-Ex-420), among other historical documents. *See, e.g., Id.* ¶¶ 13-25. New Mexico cites some of these portions in its response. N.M. Resp. 1-8, 10, 14-15, 24-26, 28-29, 43-48, 51, 54-55, 62-63.

Dr. Barroll's assertions are inadmissible evidence to the extent she asserts the truth of facts to which she has no personal knowledge. The fact that Dr. Barroll was designated and testified as a witness under Rule 30(b)(6) does not compel a different conclusion. Some courts have held that declarations from Rule 30(b)(6) witnesses must satisfy the requirement that they be based on personal knowledge. *See, e.g., Soutter v. Equifax Info. Servs.*, 299 F.R.D. 126, 131-32 (E.D. Va. 2014); *see also Health Banc Int'l, LLC v. Synergy Worldwide, Inc.*, No. 2:16-cv-00135-JNP-PMW, 2019 WL 3500896, at *12-13 (D. Utah Aug. 1, 2019) (summarizing split in authority on personal knowledge requirement and holding that personal knowledge requirement applies). Here, the Court need not reach the issue because Dr. Barroll does not purport to offer the testimony in her affidavit on behalf of the State of New Mexico.

In addition to making assertions on statements that are based on her review of primary sources, Dr. Barroll makes several assertions about the Compact, a subject in which Dr. Barroll agrees she is not an expert. *See, e.g.* 2d Barroll Decl. ¶¶ 8-9, NM-EX-006; *see also* Barroll

³ Dr. Barroll's second declaration includes many statements that likely do not satisfy the personal knowledge requirement. However, the United States has limited this Motion to Strike to those statements that are offered to interpret the contents of a document or other secondary source without the application of Dr. Barroll's knowledge or expertise.

2/6/20 Tr. 313:15-21, 318:8-16; Barroll 7/9/20 Tr. 27:20-25; Barroll 8/7/20 Tr. 188:22-25

(conceding that she is not an expert on the Compact.). Given Dr. Barroll's incompetence to testify to facts regarding the Compact, the Court should exclude her opinions on this subject matter because they are nothing more than conjecture, which is prohibited under Rule 56(e). *Judicial Watch, Inc.*, 224 F.R.D. at 265 (citing *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992)) (holding that unsubstantiated opinion, which would be precluded at trial by Fed. R. Evid. 701, is subject to strike pursuant to Rule 56(e)'s personal knowledge requirement, as well as the admissibility and competency requirements); *see also* Fed. R. Evid. 701(c) (only allowing lay testimony that is "not based on scientific, technical, or other specialized knowledge within the scope of [Fed. R. Evid.] 702), 702 (only allowing expert testimony from "a witness who is qualified as an expert . . . ").

This Court should reject New Mexico's attempt to introduce statements outside of Dr. Barroll's personal knowledge. Accordingly, the Court should strike the following statements: 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. *See* Exhibit 2. In addition, the Court should disregard the following portions of New Mexico's response brief that rely on these assertions: N.M. Resp. 1-8, 10, 14-15, 24-26, 28-29, 43-48, 51, 54-55, 62-63.

3. *Estevan Lopez*

Mr. Estevan Lopez's Second Declaration suffers from similar defects. *See generally* NM-EX-008. New Mexico disclosed Mr. Lopez as a water administration and management expert. Mr. Lopez produced an expert report, a rebuttal expert report, two supplemental rebuttal expert reports, and his first declaration. He also gave testimony in his expert capacity over five

days between May 2019 and October 2020. New Mexico subsequently designated Mr. Lopez as a witness to testify on New Mexico's behalf under Rule 30(b)(6) of the Federal Rules of Civil Procedure. New Mexico designated Mr. Lopez to testify as to New Mexico's counterclaims against the United States and Texas related to the Compact, and New Mexico's administration, implementation, and enforcement objections under the Compact and under state laws, regulations, and policies, as well as its actions in delivery of water below Elephant Butte. N.M.'s Objs. & Witness Designations to the U.S. Notice of 30(b)(6) Dep. & to Tex.'s Cross-Notice, September 10, 2020, at 7-11. Mr. Lopez gave testimony in his capacity as a witness under Rule 30(b)(6) on September 18, 2020. Now, New Mexico proffers a new declaration from Mr. Lopez with its response brief. New Mexico refers to this declaration as Mr. Lopez's "Second Declaration" to distinguish it from the declaration Mr. Lopez provided in connection with New Mexico's motions for summary judgment.

While Mr. Lopez frames his second declaration as a summary of his expert report, most of his assertions are no more than legal arguments and conclusions that rely on his interpretation of the Compact, expert reports, and other primary sources. 2d Lopez Decl. ¶ 3, NM-EX-008; *see, e.g. id.* ¶¶ 18-20, 22-24. For example, Mr. Lopez relies on his reading of S.E. Reynolds, The Rio Grande Compact (April 29, 1968), Dr. Barroll's Expert Report, and Dr. Steven's declaration to opine on Compact apportionment. *Id.* ¶23. Mr. Lopez cannot rely on historical documents, Dr. Barroll's expert report, and Dr. Steven's declaration to overcome the fact that he is not competent to opine on matters outside of his personal knowledge. Additionally, Mr. Lopez makes assertions related to the operation of the Rio Grande Project and includes legal conclusions, which Mr. Lopez testified is outside the scope of his expertise. *See generally id.* (discussing Compact); Lopez 2/26/20 Tr. 15:5-18, 22:2-7, 23:1-3; Lopez 7/6/20 Tr. 25:2-8,

26:24-25, 27:1-7 (admitting that he is not qualified as an expert historian or to provide legal opinions, and he has never operated the Rio Grande Project); *see also* Fed. R. Evid. 701, 702. New Mexico cites some of these portions in its response. N.M. Resp. 2-4, 7-8, 10-11, 35, 38, 39.

Mr. Lopez's statements are not based on personal knowledge and the Court should exclude them.⁴ *See, e.g., Soutter*, 299 F.R.D. at 131-32 (holding that declarations from Rule 30(b)(6) witnesses must satisfy the requirement that they be based on personal knowledge); *see also Health Banc Int'l*, 2019 WL 3500896, at *12-13 (summarizing split in authority on personal knowledge requirement and holding that it applies).

Under Rule 56(e), Paragraphs 4-37, 38 (sentences 1-5), and 39-41 are statements for which Mr. Lopez lacks the requisite personal knowledge to render him competent to attest to any set of facts underlying these statements. N.M. Resp. 2-4, 7-8, 10-11, 35, 38, 39; *see also* Exhibit 3. As such, the Court should strike these unsubstantiated statements.

4. John D'Antonio

John D'Antonio, served as State Engineer from 2003-2011, and 2019-present. New Mexico disclosed him as a fact witness. Mr. D'Antonio gave testimony over several days of depositions in May and June 2020. New Mexico did not designate him as a witness under Rule 30(b)(6) of the Federal Rules of Civil Procedure. New Mexico has proffered a "Second Declaration" by Mr. D'Antonio with its response brief in an attempt to provide "a broad overview of New Mexico authority and practice both in the state-wide, comprehensive context, as well as to specific issues relevant to this litigation." 2d D'Antonio Decl. ¶ 3A, NM-EX-007.

⁴ Just as with Dr. Barroll's statements that relied on primary sources, the fact that New Mexico designated Mr. Lopez and he testified as a witness under Rule 30(b)(6) does not compel a different conclusion and the Court need not reach this issue because Mr. Lopez does not purport to offer the testimony in his affidavit on behalf of the State of New Mexico.

In doing so, Mr. D’Antonio opines on subjects beyond his personal knowledge, resulting in nothing more than conjecture.

The Court should strike the portions of Mr. D’Antonio’s declaration that are not based on his personal knowledge as State Engineer from 2003-2011 and 2019 to present. For example, Mr. D’Antonio offers testimony regarding New Mexico’s administration of groundwater or lack thereof prior to 1980. *Id.* ¶ 12. He claims there was no need for a priority adjudication in these years, and that it was unnecessary for the State to exercise groundwater water regulatory authority because the Project was delivering waters to lands operating as a single unit. *Id.* Although he does not explain what he means by these statements, his statements are nevertheless opinions and not based on personal knowledge. The Court should strike these statements.

The Court should also strike the following statements, which are not based on Mr. D’Antonio’s personal knowledge: 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). *See* Exhibit 4. Similarly, the Court should strike the following portions of the Response Brief that rely on these statements: N.M. Resp. 1-2, 5-11, 31, 53-57.

5. Ryan Serrano

New Mexico also disclosed Ryan Serrano, Water Master for the Lower Rio Grande Division, as a fact witness. Mr. Serrano was deposed over two days in February and April 2019.

New Mexico did not designate him as a witness under Rule 30(b)(6). *See* N.M. Disclosure of Expert Witness, October 31, 2019. New Mexico proffered a declaration from Mr. Serrano with its response brief that is intended to demonstrate the adequacy of New Mexico’s system for administering water rights below Elephant Butte. *See* N.M. Resp. 56. While some portions of Mr. Serrano’s declaration are based on personal knowledge, other parts are not. For example, Mr. Serrano testifies to matters that pre-date his employment with the Office of the State Engineer. *See, e.g.*, Serrano Decl. ¶ 15 , NM-EX-010 (characterizing Water Master Sheldon Dorman’s testimony related to administration in 2007, two years before Mr. Serrano began working at the Office of the State Engineer); *Id.* ¶ 2 (noting that he began work at the Office of the State Engineer in June 2009). Mr. Serrano does not explain the basis for this knowledge concerning management decisions in which he was not involved. *Judicial Watch, Inc.*, 224 F.R.D. at 264 (holding that portions of a declaration were opinion statements based on another person’s notes and concerned procedures the declarant was unaware of must be struck for lack of personal knowledge.); *Londrigan v.*, 670 F.2d at 1175 (holding that under Rule 56(e), the portion of an FBI agent’s affidavit that discussed “assumptions made by persons interviewed by other FBI agents” could not possibly have been based on personal knowledge and should have been stricken); *Perez v. Lorraine Enters., Inc.*, 769 F.3d 23, 30 (1st Cir. 2014) (affirming that a restaurant co-owner’s testimony regarding the practice of providing information about wages was inadmissible as evidence because she did not participate in the hiring process and thus did not have personal knowledge about it). Because Mr. Serrano does not have personal knowledge as to the Office of the State Engineer’s administration and enforcement prior to his employment in 2009, these statements are contrary to the principle that affidavits be based on “personal knowledge” that “would be admissible in evidence.” Fed. R. Civ. P. 56(c)(4), (e) . Accordingly,

the Court should strike all statements from Mr. Serrano's First Declaration that are not based on his personal knowledge.

In addition, Mr. Serrano offers improper opinion testimony. New Mexico declined to designate Mr. Serrano as an expert witness. Yet, Mr. Serrano testifies to the economic value of agriculture. New Mexico relies on Mr. Serrano's testimony for the assertion that an injunction would impact New Mexico's agricultural economy south of Elephant Butte because pecans are an important cash crop. N.M. Resp. 52 (citing Serrano Decl. ¶ 8). Under Federal Rule of Evidence 701, Mr. Serrano's testimony is limited to his personal experiences and perceptions that are helpful to understanding his testimony, and are not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. Mr. Serrano's testimony regarding the agricultural economy is not based on his personal knowledge, and is therefore inadmissible. The Court should strike Paragraph 8 of Mr. Serrano's First Declaration in its entirety.

For the reasons stated above, 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 declaration are not admissible and should be stricken. *See* Exhibit 5. Similarly, the Court should strike the following portions of the Response Brief that rely on these assertions: N.M. Resp. 1, 5-7, 9-10, 17, 52, 56.

6. *Lee Wilson*

Dr. Lee Wilson, PhD, was disclosed as a non-retained rebuttal expert witness. He was deposed in July 2020. New Mexico proffers a declaration from Dr. Wilson with its response brief. This Court should strike Dr. Wilson's statements to the extent he opines on subjects that are outside of his personal knowledge and expertise, or offers a legal conclusion. For example, Dr. Wilson points to a historian's "documentation" that dates as far back as 1849 in an attempt to

create a genuine issue of material fact. *See* Lee Decl. ¶ 4, NM-EX-013. While it is unclear what documentation Dr. Wilson is referring to, it is clear that this is improper testimony as he does not have personal knowledge on this topic. Dr. Wilson also makes a number of legal conclusions, which he is not qualified to assert. *See, e.g., id.* ¶ 9. Therefore, this Court should strike the following improper statements: 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. *See* Exhibit 6. The Court should also reject the portions of the brief that rely on these unsupported assertions: N.M. Resp. 6, 10, 52.

7. Statements Relying on Deposition Testimony

This Court should also reject New Mexico's attempt to use this declaration as a vehicle to amend, supplement, or summarize the substance of a witness's deposition testimony. To the extent that a declarant cites to another individual's deposition testimony, it should be excluded because the declarant lacks the requisite personal knowledge. Fed. R. Civ. P. 56(c), (e); *Londrigan*, 670 F.2d at 1175. For example, Mr. Serrano notes in his declaration—without citation—that he read Dr. Barroll's deposition testimony related to overdiversions and it was misstated. Serrano Decl. ¶ 26, NM-EX- 010. The Court should reject New Mexico's bid to amend or rely on the substance of another's deposition testimony and strike the following statements:

- Second Declaration of Margaret Barroll, PhD, NM-EX-006: Paragraph 13 (sentence 4);
- Second Declaration of John R. D'Antonio, Jr., NM-EX-007: Paragraphs 22 (sentence 3), 23 (sentence 2), 26 (sentence 2-3), 37 n.11, 40 n.15, and 53 (sentence 6);
- Second Declaration of Estevan R. Lopez, NM-EX-008: Paragraphs 35 n.7, and 39 (sentence 2);

- First Declaration of Ryan J. Serrano, NM-EX-010: Paragraphs 10, 14 (g) (sentences 2-3), and 15.

This Court should reject these unsupported statements offered without personal knowledge.

8. Statements Relying on Another Witness's Expert Report or Declaration

As with a declarant's reliance on another individual's deposition testimony, a declarant's reliance on the declaration or expert report of another individual suffers the same fatal flaw: it lacks personal knowledge. Fed. R. Civ. P. 56(e). Therefore, the Court should strike the following unsubstantiated assertions:

- Second Declaration of Margaret Barroll, PhD, NM-EX-006: 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;
- Second Declaration of John R. D'Antonio, Jr., NM-EX-007: Paragraphs 12 (sentences 1, 6), 13 (sentence 5), 14 n.5, 18 (sentence 2), 20, 47 (sentence 3), and 49 (sentence 4);
- Second Declaration of Estevan R. Lopez, NM-EX-008: 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);
- First Declaration of Ryan J. Serrano, NM-EX-010: Paragraph 37.

The Court should strike these assertions because they are not based on the Declarant's personal knowledge.

CONCLUSION

For the foregoing reasons, the Court should grant the United States' Motion to Strike should. A proposed order is attached herewith.

Respectfully submitted this 5th day of February, 2021.

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Plaintiff,

v.

STATE OF NEW MEXICO and

STATE OF COLORADO,

Defendants

OFFICE OF THE SPECIAL MASTER

CERTIFICATE OF SERVICE

This is to certify that on the 5th day of February, 2021, I caused a true and correct copy of the **UNITED STATES OF AMERICA’S MOTION TO STRIKE DECLARATIONS** to be served via electronic mail upon those individuals listed on the Service List, attached hereto.

Respectfully submitted,

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