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 REPLY IN SUPPORT OF ITS MOTION TO STRIKE DECLARATIONS

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I. INTRODUCTION

The United States files this Reply in Support of its Motion to Strike statements in 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 ("Wilson Decl."), to the extent these declarants testified to matters beyond their personal knowledge or technical expertise. S.M. Doc. No. 475 (filed Feb. 5, 2021). For the reasons outlined in the United States' Motion to Strike and set forth in more detail below, this Court should strike all statements that do not comport with Rule 56 of the Federal Rules of Civil Procedure. New Mexico's arguments should be rejected. *See* State of New Mexico's Resp. to the U.S. Mot. to Strike Decls. ("Resp."), S.M. Doc. No. 478 (filed Feb. 22, 2021).

II. ARGUMENT

A. Declaration Testimony that Does Not Satisfy Rule 56(c)(4) is Properly Subject to a Motion to Strike.

As a preliminary matter, the statements in New Mexico's declarations that do not satisfy Rule 56 are properly subject to a motion to strike. *See*, *e.g.*, 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). To be considered on a motion for summary judgment, a declaration "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 to the matters stated." Fed. R. Civ. P. 56 (c)(4). Courts have consistently held that declaration

testimony that does not meet these requirements is subject to a motion to strike and will not be considered in ruling on a motion for summary judgment.[1]

To support its argument that a motion to strike is improper, New Mexico relies on two district court decisions representing a minority view that a motion to strike is only appropriate with regard to a pleading, as defined by Federal Rules of Civil Procedure 7. *See* Resp. 7 (citing *In re Sum of $66,839.59*, 119 F. Supp. 2d 1358, 1359 n.1 (N.D. Ga. 2000), and *Lombard v. MCI Telecommc'ns Corp.*, 13 F. Supp. 2d 621, 625 (N.D. Ohio 1998)). These decisions do not establish controlling or even persuasive authority. To the contrary, every court of appeals to address the issue has held that a court may strike improper affidavit or declaration testimony used to support or to oppose a motion for summary judgment, *supra* n.1, and the Special Master in *Kansas v. Colorado* did just that. *See Kansas v. Colorado*, 1994 WL 16189353, at *155–156. Indeed, as New Mexico concedes, Resp. 6 n.2, courts have stricken improper testimony from affidavits or declarations attached to summary judgment briefing under Rule 12 and Rule 56. *Judicial Watch, Inc.*, 224 F.R.D. at 263-64. Further, because the federal rules are used as a guide but do not rigidly govern original actions, *see* S. Ct. R. 17, the Court may consider the United States' arguments without regard to the form of pleading.[2] The United States' challenges to New Mexico's declarations are properly before the Court.

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[1] *Livick v. The Gillette Co.*, 524 F.3d 24, 28 (1st Cir. 2008); *Hollander v. Am. Cyanamid Co.*, 172 F.3d 192, 197-98 (2d Cir. 1999); *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 962 (4th Cir. 1996); *Thomas v. Atmos Energy Corp.*, 223 F. App'x 369, 373-75 (5th Cir. 2007); *Ondo v. City of Cleveland*, 795 F.3d 597, 612 (6th Cir. 2015); *Clark v. Takata Corp.*, 192 F.3d 750, 760-61 (7th Cir. 1999); *Jain v. CVS Pharmacy Inc.*, 779 F.3d 753, 758 (8th Cir. 2015); *Bliesner v. Commc'n Workers of Am.*, 464 F.3d 910, 915 (9th Cir. 2006); *Argo v. Blue Cross & Blue Shield of Kansas, Inc.*, 452 F.3d 1193, 1199-1200 (10th Cir. 2006); *Broughton v. Sch. Bd. of Escambia Cnty., Fla.*, 540 F. App'x 907, 911 (11th Cir. 2013); *Jud. Watch, Inc. v. U.S. Dep't of Commerce*, 224 F.R.D. 261, 263 (D.D.C. 2004).

[2] The United States appropriately brought this Motion to Strike "under Rules 12(f), 56(c) & (e) of the Federal Rules of Civil Procedure, Rule 17 of the Rules of the Supreme Court, and

New Mexico's other attacks on the form of the Motion to Strike are also without merit. Contrary to New Mexico's assertion, Resp. 8, the United States sufficiently identified those portions of the various declarations that violate the requirements of Rule 56. In resolving a motion to strike, courts require the movant to specify the portions of the declaration that are objectionable. *Ascom Hasler Mailing Sys., Inc. v. U.S. Postal Serv.*, 815 F. Supp. 2d 148, 163 (D.D.C. 2011) (noting that courts use "a scalpel, not a butcher knife[]" when striking improper portions of a declaration on summary judgment. (citation omitted)). Here, in compliance with that requirement, the United States identified the specific sentences or portions thereof that should be excluded in both the motion to strike and proposed order, and it also, for convenience, provided exhibits illustrating the specific sentences that the Court should strike. *See* Exhibits 1-6. It is difficult to fathom how the United States could have been any more specific in its request, and New Mexico has not cited any authority or example to show otherwise.

To the extent that New Mexico argues that the United States did not provide sufficient analysis in support of its argument, New Mexico is mistaken. The United States clearly identified the sentences that do not comply with Rule 56 and stated its rationale for its objections. In addition to providing a comprehensive list of the specific statements challenged, the United States pointed to specific averments to serve as an illustration of each declarants' inadmissible statements. New Mexico was on sufficient notice of the basis for the United States' Motion to Strike as evidenced by its summary of the portions of the declarations that the United States sought to strike in its Response. *See*, *e.g.* Resp. 2-3, 8 n.3.

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the points and authorities cited in its motion." Mot. to Strike 1. Even if this Court determined that the Federal Rules of Civil Procedure do not provide a vehicle for a motion to strike, under S. Ct. R. 17, the Court is not confined to these rules.

New Mexico further asserts that responding to the Motion to Strike is overly "burdensome" and "unreasonable" because "the United States has objected to a significant number of sentences and paragraphs in New Mexico's declarations that New Mexico does not cite to, or rely on, in New Mexico's Response." Resp. 8 & n.3. New Mexico cites no authority for denying a motion to strike based on the burden the motion imposes on the respondent. Here, in any event, any burden on New Mexico is the result of New Mexico's litigation decision to submit three rounds of declarations from experts and other witnesses, totaling over 308 pages, and New Mexico's apparent failure to limit its declarants to testifying to matters within their personal knowledge. Moreover, New Mexico's objection to the identification of particular statements New Mexico believes to be insignificant because it did not rely upon the statements in its Response demonstrates that the Motion to Strike is justified as to those statements. New Mexico identifies the specific paragraphs on which it purportedly relies on in its Response. *See* Resp. 8-9 n.3. Based on that clarification, the Court should strike all other paragraphs in the declarations.

This Court should reject New Mexico's objections to the form of the United States' Motion to Strike. For the reasons stated in the Motion to Strike and expanded on below, the Court should disregard the portions of each challenged declaration that are not based on personal knowledge.

B. This Court Should Strike the Portions of Dr. Stevens' Second Declaration that Are Not Based on Personal Knowledge.

The United States moves to strike the Second Declaration of Dr. Jennifer Stevens because it is based almost entirely on hearsay consisting of Dr. Stevens' opinions or interpretations of historical documents. New Mexico fails to show otherwise. New Mexico's blanket assertion that Dr. Stevens "is competent to testify as to facts and data she has been made aware of, or has

personally observed[,]" Resp. 28, does not establish any basis in personal knowledge for any particular statements in her declaration, including the examples the United States cited in its Motion to Strike.

New Mexico makes no attempt to distinguish the Special Master's analysis in *Kansas v. Colorado*, which is directly on point. *Kansas v. Colorado*, 1994 WL 16189353, at *155–56; *see also* Fed. R. Civ. P. 56 (c)(4), (e); Mot. to Strike 3-4. In *Kansas v. Colorado*, the Special Master held that declarations that were not based on personal knowledge—including statements made by an expert historian based on a "review of primary historical documents"—are inadmissible hearsay[3] that cannot be considered under Rule 56. *Kansas v. Colorado*, 1994 WL 16189353, at *155. The Special Master also noted that expert testimony that involved interpretation of the Compact and related legislation at issue "presents questions of law, to be decided by the Court." *Id.* (citations omitted). The same is true here. Dr. Stevens offers nothing more than her interpretation of primary historical documents that the Court can read and interpret for itself. *See generally* Stevens Decl. ¶¶ 3-32.

New Mexico cites no authority for the consideration of an expert historian *declaration* on summary judgment. The two decisions New Mexico cites involved *Daubert* challenges to a historian's ability to offer expert opinion at trial. *New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185, 262 (E.D.N.Y Oct. 30, 2007); *Langbord v. U.S. Dep't of the Treasury*, 2009 U.S. Dist. LEXIS 40083, at *10 (E.D. Pa. May 11, 2009). In these cases, the Court found that the

[3] New Mexico incorrectly asserts that the United States did not challenge Dr. Stevens' statements as hearsay. Resp. 29. As New Mexico acknowledges, the "primary basis" for the United States' Motion to Strike is that the declarants "do not have personal knowledge" and "therefore, [the challenged] statements are inadmissible hearsay." *Id.* at 1. Moreover, the United States challenged Dr. Stevens' testimony by reference to the Special Master's analysis in *Kansas v. Colorado*, which held that stricken statements were inadmissible hearsay. *See supra*.

experts' testimony, including testimony that relied upon documents containing hearsay, was permissible under Federal Rules of Civil Procedure 703. *Id*. Here, the issue is whether New Mexico may properly rely on a declaration from Dr. Stevens on summary judgment when that declaration is not based on her personal knowledge as required by Rule 56(c)(4). Accordingly, these cases are inapposite to issues before the Court in the instant case.

Just as this Court properly struck an expert historian's statements in a declaration based on his interpretation of primary historical documents in *Kansas v. Colorado*, this Court should reject Dr. Stevens' interpretation of historical documents in the instant case. Accordingly, this Court should strike Paragraphs 3-32. *See* Exhibit 1.

C. This Court Should Strike the Portions of Dr. Barroll's Second Declaration that Violate Rule 56.

Dr. Barroll's Second Declaration contains numerous statements that are not based upon her personal knowledge and are outside of her expertise. Under Rule 56, statements in declarations must be made on personal knowledge and declarations "asserting personal knowledge must include enough factual support to show that the [declarant] possesses that knowledge." *El Deeb v. Univ. of Minn.*, 60 F.3d 423, 428 (8th Cir. 1995) (citations omitted). New Mexico makes two attempts to evade the import of Rule 56. First, New Mexico contends that Dr. Barroll has personal knowledge of the testimony she provided. Second, New Mexico argues that she may provide testimony as an expert or lay witness. Both arguments fail. Much of Dr. Barroll's testimony relies on her interpretation of historical primary sources, rests on the testimony of other individuals, and strays into matters to which she is not qualified to opine.

1. This Court should reject Dr. Barroll's statements that are not based on her personal knowledge.

As with Dr. Stevens' reliance on primary sources, Dr. Barroll's testimony that interprets primary sources to opine on project history or operation suffers from the same fatal flaw: it lacks

personal knowledge. Fed. R. Civ. P. 56 (c)(4); *see*, *generally* 2d Barroll Decl. (interpreting the Bureau of Reclamation Final Environmental Impact Statement, the Operations Manual, the Conover Reports, and the Rio Grande Project Histories). Again, New Mexico fails to show why this inadmissible testimony should not be barred under *Kansas v. Colorado*. *See* 1994 WL 16189353, at *155–56. For the same reasons cited therein, *supra* 4-5, the statements that rely on her interpretation of documents should be excluded.

New Mexico also contends that, as an expert witness, Dr. Barroll is capable of presenting opinions based on her experience, and based on facts or data she is aware of or has personally observed. Resp. 10-12, 17. The fact that Dr. Barroll is designated as a 30(b)(6) witness does not exempt her testimony from the personal knowledge requirement. *See*, *e.g.*, *Soutter v. Equifax Info. Servs. LLC*, 299 F.R.D. 126, 131-32 (E.D. Va. 2014) (holding that declarations from Rule 30(b)(6) witnesses must satisfy the requirement that they be based on personal knowledge); *see also HealthBanc Int'l, LLC v. Synergy Worldwide, Inc.*, No. 2:16-cv-00135-JNP-PMW, 2019 WL 3500896, at *12-13 (D. Utah Aug. 01, 2019) (summarizing split in authority on personal knowledge requirement and holding that it applies). "[P]ersonal knowledge is the predicate of reliability." *Soutter*, 299 F.R.D. at 131 (citing Fed. R. Evid. 602). Here, the Court need not reach the issue because Dr. Barroll does not purport to offer the testimony in her declaration on behalf of the State of New Mexico.

Dr. Barroll's declaration is replete with statements that are not based on her personal knowledge or within the scope of her designated expertise. *See generally* 2d Barroll Decl. Throughout her testimony, Dr. Barroll cites, and relies upon, assertions made by other witnesses in their expert reports, declarations, and depositions, including the deposition testimony of Reclamation personnel. *See id.* ¶ 13 (relying on deposition testimony from Reclamation

personnel to comment on Reclamation's deliveries); *id.* ¶ 15 (relying on Dr. Stevens' expert report); *id.* ¶ 28 (relying on Mr. Lopez's expert report); *id.* ¶ 29 (relying on the declaration of Dr. Wilson and Gilbert Barth); *id.* ¶¶ 43, 75-78 (relying on the second declaration of Mr. D'Antonio). There is no indication from Dr. Barroll's declaration that these statements are within her first-hand experience. *See generally id.* Nor is there an indication that Dr. Barroll reviewed the underlying data or basis for the assertions made by other witnesses. *Id*. Dr. Barroll is not competent to opine on matters outside the scope of her expertise. *Id.* For example, Dr. Barroll relies upon Dr. Stevens' assertions in her expert report to discuss drought in the 1940s. *Id.* ¶ 15. Dr. Barroll has not been identified as an expert historian. In effect, Dr. Barroll's statements that rely upon another witness's testimony amount to nothing more than conjecture based on information and belief. *Livick*, 524 F.3d at 28 (holding that the "requisite personal knowledge must concern facts as opposed to conclusions, assumptions, or surmise." (citation omitted)); *Patterson v. Cnty. of Oneida, N.Y.*, 375 F.3d 206, 219 (2d Cir. 2004) (concluding that Rule 56's requirement that "affidavits be made on personal knowledge is not satisfied by assertions made 'on information and belief.'" (citation omitted)). Accordingly, it is inappropriate to accept these statements and opinions as fact.

New Mexico argues that such statements are permissible because New Mexico expects all identified declarants, experts, and deponents will be present and available to testify at trial. Resp. 19.[4] This rationale is flawed. New Mexico assumes that witness availability is equivalent

[4] New Mexico recycles a generic argument that, to the extent a declarant relied upon the testimony of others in form of declarations, expert reports, or depositions, New Mexico expects all identified witnesses to be "present and available to testify at trial." Resp. 15; *see also id.* at 21 (regarding Mr. Lopez's testimony); Resp. 32 (regarding Mr. D'Antonio's testimony); *id.* at 34-35 (regarding Mr. Serrano's testimony). For reasons stated above, these statements are not, and cannot, be based on personal knowledge, and they will not be admissible at trial. Accordingly, the Court should strike these statements.

to admissibility at trial. Rule 56(c)(4) provides, "[a]n affidavit or declaration used to support or oppose a motion 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." New Mexico makes no effort to show how another witness's availability cures the fact that such statements are not based on personal knowledge of the *declarant*, the *declarant* is competent to make the assertions, or that such assertions will be admissible at trial. As Courts have previously made clear, "the mere possibility that a hearsay statement will be presented in the form of admissible evidence at trial does not warrant consideration of hearsay evidence at the summary-judgment stage." *Tomaszewski v. City of Phila.*, 460 F. Supp. 3d 577, 596 (E.D. Pa. 2020), *appeal dismissed*, No. 20-2184, 2020 WL 7366324 (3d Cir. Aug. 5, 2020) (cleaned up). The Court should reject the statements that are not based on personal knowledge.

2. The Court should strike Dr. Barroll's testimony interpreting the Compact.

While New Mexico acknowledges that Dr. Barroll conceded she is not an expert on the Rio Grande Compact ("Compact"), it argues that this does not negate her ability to offer opinions as a lay witness or an expert. Resp. 17-18 (citing Fed. R. Evid. 703). This is simply incorrect.

Interpreting the Compact calls for a legal conclusion, which is a function reserved for the Court. *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (noting an interstate compact is "a legal document"). New Mexico acknowledges that Dr. Barroll quotes two Compact terms, out of context, to provide "background" for the "one [sentence that] concerns *interpretation* of the Compact." Resp. 18 (emphasis added). In effect, Dr. Barroll attempts to define two terms in the Compact to draw a conclusion. On its face, this calls for a legal conclusion and is inappropriate. This Court should strike the instances where Dr. Barroll provides legal conclusions labeled as opinions. *Aronson v. Cap. One Fin. Corp.*, 125 F. Supp. 2d 142, 143–44 (W.D. Pa. 2000); *see*

also Harrah's Ent., Inc. v. Ace Am. Ins. Co., 100 F. App'x 387, 394 (6th Cir. 2004) (concluding a court should strike affidavits that do no more than reach legal conclusions).

New Mexico's argument that these statements are within the scope of Dr. Barroll's expertise for Project operations or can be construed as lay opinion is unavailing. Federal Rule of Evidence 701 provides that lay opinion testimony may be admissible in some instances if it is limited to one that is (1) "rationally based on the witness's perception;" (2) "helpful to [] understanding the witness's testimony or to determin[e] a fact in issue;" and, (3) "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701. New Mexico makes no attempt to show how interpreting the Compact could possibly be based on Dr. Barroll's perception and within the realm of common experience. *Id*. It is clear that such assertions stray far beyond the permissible bounds of lay opinion. Additionally, Dr. Barroll admitted that she is not an expert on the Compact, and, as previously discussed, does not have the requisite personal knowledge. Barroll 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. New Mexico's attempt to reframe Dr. Barroll's improper interpretation of the Compact as lay or expert testimony should be rejected.

While New Mexico tries to couch the United States' Motion to Strike as a "form over substance objection," it is clear that these statements lack the trustworthiness that Rule 56 was intended to ensure. Resp. 18. The Court should strike the statements identified in Exhibit 2.

D. The Court Should Strike the Portions of Mr. Lopez's Second Declaration that Violate Rule 56.

Mr. Lopez's Second Declaration suffers from defects similar to those of Dr. Barroll's. Mr. Lopez notes upfront that his second declaration is a summary of his expert report, and is based on his "experience[] and research." 2d. Lopez Decl. ¶ 3. Mr. Lopez's testimony consists primarily of legal conclusions based on his interpretation of the Compact and the Downstream

Contracts, which are legal determinations solely within the province of the Court. Additionally, Mr. Lopez's testimony is not based on his personal knowledge,[5] and is improper expert and lay opinion.

In its Response to the United States' Motion to Strike Declarations, New Mexico appears to offer three defenses of Mr. Lopez's improper statements: (1) Mr. Lopez's testimony is not "exclusively" composed of legal conclusions; (2) Mr. Lopez has personal knowledge of the matters in his testimony through his employment; and, (3) Mr. Lopez's testimony is expert or lay opinion testimony. Resp. 19-23. All three of these defenses fail.

1. This Court should strike the statements in Mr. Lopez's Declaration that purport to state legal conclusions as facts.

Mr. Lopez's Second Declaration consists largely of statements interpreting the meaning of the Compact and the Contracts. However, testimony offering legal conclusions, such as the meaning of the Compact or Contracts, invades the province of the Court and should be disregarded. *Harrah's Ent., Inc.*, 100 F. App'x at 394 (concluding a court should strike legal conclusions from affidavits); *Travelers Indem. Co. of Am. v. Holtzman Props., LLC*, No. 4:08-CV-351-CAS, 2009 WL 995464, at *6 (E.D. Mo. Apr. 14, 2009).

Throughout his declaration, Mr. Lopez repeatedly offers testimony construing the meaning of the Compact and its terms. *See*, *e.g*. 2d Lopez Decl. ¶4 (interpreting various articles of the Compact); *Id.* ¶ 5 (interpreting "scope of apportionment"); *Id.* ¶ 24 (noting that an "apportionment of Project water supply . . . can be inferred by reading the Compact together with the contemporaneous Downstream Contracts."). In other instances, Mr. Lopez attempts to

[5] To the extent he relies upon historical documents, those statements are barred under *Kansas v. Colorado*. *Supra*, 4-5.

explain as fact the negotiators' intent behind the Compact. *See*, *e.g.*, *id.* ¶ 7 (concluding that there is no schedule similar to those in Articles III and IV for deliveries to Texas at the state line, although quite clearly the Compact drafters could have done so if that was their intent."); *Id.* ¶ 10 ("Clearly, if the Compact negotiators intended to so constrain the operation of the Project, they knew how to do so. Yet they chose not to."). In other statements, Mr. Lopez purports to state as fact what the obligations are under the Compact. *See*, *e.g.*, *id.* ¶ 24 (interpreting the Compact to conclude that there is no requirement that New Mexico deliver a certain amount of water to the New Mexico-Texas state line . . . .). These attempts to offer legal conclusions as fact are improper.

New Mexico argues that none of Mr. Lopez's assertions "exclusively comprises a legal opinion or legal conclusion." Resp. 23. Additionally, New Mexico argues that Mr. Lopez may offer an opinion on the ultimate issue under Rule 704 of the Federal Rules of Evidence. *Id.* 22-23. Although Rule 704 was amended so as not to preclude expert testimony on an ultimate issue, the amendment was not intended to allow an expert to advise the court on what outcome to reach. Fed. R. Evid. 704; *Beres v. United States*, 143 Fed. Cl. 27, 66 (2019). "[N]o witness, whether a fact or expert witness, is permitted to offer his or her own legal interpretation because it usurps the province of the court to determine the law." *Silver State Solar Power S., LLC v. United States*, No. 18-266T, 2020 WL 6139865, at *4 (Fed. Cl. Oct. 19, 2020) (citing *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1212 (D.C. Cir. 1997) ("Expert testimony that consists of legal conclusions cannot properly assist the trier of fact . . . and thus it is not 'otherwise admissible.'" (citation omitted))).

As illustrated above, Mr. Lopez's comments do more than touch on the law—they make legal conclusions as to the meaning of the Compact and the Contracts. In effect, Mr. Lopez's

testimony does nothing more than advise the Court on how to interpret the Compact and Contract provisions. New Mexico's counsel could have made each of these arguments in its motion for summary judgment briefs. But it would be unfair for the Court to confer upon these legal arguments the elevated stamp of "expert" fact. Matters of law are ultimately reserved for the Court and these improper legal conclusions disguised as fact should be disregarded.

2. The Court should strike Mr. Lopez's testimony where he is not qualified as an expert and lacks personal knowledge.

New Mexico's argument that Mr. Lopez may testify as an expert or lay witness is equally flawed. As an initial matter, Mr. Lopez is not qualified as an expert to opine on these subjects. Mr. Lopez testified that he is not an expert historian, he is not an attorney, and he is not an expert on the law. 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 Project). Additionally, Mr. Lopez lacks the personal knowledge to make these assertions as either an expert or lay witness.[6]

Nonetheless, New Mexico contends that Mr. Lopez has personal knowledge to support each of his assertions in his second declaration based on his professional experience and review of business records. Resp. 19-20. While Courts have found that personal knowledge can be inferred from a declarant's position, *DIRECTV, Inc. v. Budden*, 420 F.3d 521, 530 (5th Cir. 2005) (citations omitted), Courts have also held that there must be enough factual support to show the declarant actually gained this knowledge through his position. *El Deeb*, 60 F.3d at 428.

[6] Mr. Lopez was designated as a witness under Rule 30(b)(6) but does not purport to offer the testimony in his affidavit in that capacity, and even if he had, the 30(b)(6) designation would not change the analysis. *See*, *e.g.*, *Soutter*, 299 F.R.D. at 131-32; *see also Health Banc Int'l.*, 2019 WL 3500896, at *12-13.

Here, Mr. Lopez's second declaration does not provide the necessary factual support to illustrate that he has gained personal knowledge to provide testimony on how the Compact was implemented and how the Project was operated between 1938 and the early 2000s. Nowhere in Mr. Lopez's Second Declaration or in New Mexico's subsequent response brief is there any indication of what business records Mr. Lopez relied upon during the course of his employment to provide the personal knowledge to support these assertions. At best, Mr. Lopez has limited institutional knowledge as to how the Compact was implemented.

To the extent New Mexico argues that such testimony constitutes lay opinion, it is clear from an examination of the declaration that Mr. Lopez's testimony strays far beyond the permissible bounds of lay testimony. Fed. R. Evid. 701. There is no indication that these statements were derived from his first-hand, personal experience, and that they do not require specialized knowledge. The Court should reject New Mexico's attempt to present legal conclusions under the guise of expert or lay opinion.

Under Rule 56, the Court should strike the statements identified in Exhibit 3 because they consist of legal conclusions and Mr. Lopez lacks the requisite personal knowledge to render him competent to attest to the facts underlying the statements.

E. This Court Should Strike the Portions of Mr. D'Antonio's Second Declaration that Violate Rule 56.

New Mexico repeats the familiar refrain that Mr. D'Antonio is competent to testify to all of the statements made in his Second Declaration because he has personal knowledge through his employment at the Office of the State Engineer ("OSE") and through his review of documents.[7]

[7] New Mexico notes "to the extent that Mr. D'Antonio offers lay opinions on such matters, they are opinions that are rationally based on his perception, which are helpful to understanding his testimony or to determining a fact in issue." Resp. 32. Importantly, Mr. D'Antonio is only identified as a fact witness. Therefore, his opinions must be limited to lay witness testimony.

As noted previously, while a declarant may satisfy the personal knowledge requirement based on their employment position, they must still provide sufficient facts to illustrate that personal knowledge was based on their observations and experiences during their employment. *Hill v. Se. Freight Lines, Inc.*, 877 F. Supp. 2d 375, 382 (M.D.N.C. 2012), *aff'd*, 523 F. App'x 213 (4th Cir. 2013) (concluding that an affiant, through his affidavit, failed to show that he has the personal knowledge to make broad statements of fact). Personal knowledge may include basic inferences as long as they are "grounded in observation or other first-hand personal experience" and are not "speculations, hunches, intuitions, or rumors about matters remote from that experience." *Visser v. Packer Eng'g Assocs., Inc.*, 924 F.2d 655, 659 (7th Cir. 1991) (citations omitted). Here, Mr. D'Antonio's declaration fails to provide sufficient context to show that he has the personal knowledge through his employment to make these assertions.

Mr. D'Antonio's Second Declaration provides sweeping generalizations about the operations at OSE prior to his employment. For example, Mr. D'Antonio noted that "*[a]ny* suggestion that the New Mexico State Engineer ignored or failed to understand the science of conjunctive management cannot be supported . . . ." 2d D'Antonio Decl. ¶ 8 (emphasis added). Additionally, Mr. D'Antonio makes a number of statements summarizing former State Engineer Steve Reynolds' account of Project History from the 1980s—a period of time he was not employed by OSE. *See*, *e.g. id.* ¶ 13. Importantly, Mr. D'Antonio's declaration does not provide any insight as to what documents he personally reviewed that could support such statements. Rather, Mr. D'Antonio either (1) does not provide a citation, or (2) cites Dr. Barroll's expert report and Mr. Cortez's affidavit. *Id*. Such statements—that are not based on the declarant's observation of concrete facts—are inadmissible. *Cf. Hill*, 877 F. Supp. 2d at 382 (holding that statements in an affidavit that an individual "always got the job done" or "always

got his freight delivered" contained generalizations that would require continuous tracking and the affiant failed to show he had personal knowledge to make such broad statements of fact; and the affiant could not have made any personal observations after his employment ended).

Furthermore, in other statements, Mr. D'Antonio speculates as to the subjective intent of other states, the quality of Texas' groundwater administration, and another party's future legal strategy. *See*, *e.g.*, *id.* ¶ 8 (speculating that "[f]ollowing State Engineer Reynolds' lead, many other prior appropriation states" adopted conjunctive management schemes."); *id.* ¶ 37(c) (speculating as to the United States' interests and legal strategy in future matters); *id.* ¶ 52 (speculating that New Mexico's concerns fell on "deaf ears" and Texas sued New Mexico "[i]n retaliation"); *id.* ¶ 56 (speculating as to the effect of Texas' groundwater use on Project Supply), *id.* ¶ 57 (speculating that there is a "complete lack of Texas groundwater administration"). Speculation about the subjective intent of another party, future events, and the specifics of another State's water administration are clearly outside of Mr. D'Antonio's personal knowledge, and, therefore, must be rejected. *Harlen Assocs. v. Inc. Vill. of Mineola*, 273 F.3d 494, 499 (2d Cir. 2001) (concluding that "mere speculation and conjecture is insufficient to preclude the granting of the motion [for summary judgment]." (citations omitted)).

Mr. D'Antonio also summarizes legal authorities and opines on legal obligations. *See*, *e.g.*, 2d D'Antonio Decl. ¶¶ 2, 4, 8, 14, 11, 37(a), 37(c), 47. In other averments, his assertions rest on his interpretation of other exhibits or the testimony of another witness through their deposition, declaration, or expert report. *See, e.g. Id.* ¶¶12, 13, 18, 19, 20, 47, 49, 53(b), 55. New Mexico argues, without any legal support, that it is "legitimate for Mr. D'Antonio to refer the Court to other New Mexico declarations filed during summary judgment briefing, where these declarations explain certain facts and matters in more detail." Resp. 32 n.9. This

unsupported argument fails. Such statements lack personal knowledge, are cumulative, and are irrelevant. Additionally, Mr. D'Antonio is not qualified to opine on such matters. Fed. R. Evid. 701, 703. Declarations are not intended to provide the parties with an opportunity to revise and supplement expert reports, depositions, and other forms of testimony, particularly when they were authored by another witness.

Nowhere in Mr. D'Antonio's Declaration, or in New Mexico's subsequent Response Brief, is there support for how these assertions fall within Mr. D'Antonio's personal knowledge. Because the statements highlighted in Exhibit 4 amount to no more than speculation and conjecture, they should be stricken from the summary judgment record.[8] *See* Exhibit 4.

F. The Court Should Strike the Portions of Ryan Serrano's Declaration that Violate Rule 56.

New Mexico disclosed Ryan Serrano as a fact witness. Yet, New Mexico now argues that Mr. Serrano has the personal knowledge to opine on matters that ostensibly occurred prior to his employment at OSE and to make other assertions outside of his personal knowledge. Additionally, New Mexico asserts that Mr. Serrano is competent to speak to the statistics related to the agricultural economy in New Mexico. This Court should strike Mr. Serrano's statements because: (1) his declaration fails to include any factual support to establish he possesses personal

[8] New Mexico argues that the United States has not challenged any of these statements on the ground that they lack "sufficient guarantees of trustworthiness" and are less "probative on the point for which [they are] offered than any other evidence" that could have been "obtain[ed] through reasonable efforts." Resp. 32 n.8 (citing Fed. R. Evid. 807) (regarding Mr. D'Antonio); Resp. 34 n.11 (regarding Mr. Serrano). This argument lacks merit. The nature of the United States' Motion to Strike is that such statements are not trustworthy and should be barred under Fed. R. Civ. P. 56. Inherent in that motion is the assertion that statements lacking personal knowledge are nothing more than hearsay. *See also* Resp. 1-2 (acknowledging that the "primary basis" for the motion to strike is that the declarants "do not have personal knowledge" and "therefore, these statements are inadmissible hearsay").

knowledge to make these assertions, and (2) he is not competent to opine on matters requiring specialized knowledge.

1. The Court should reject the statements to which Mr. Serrano does not have personal knowledge.

New Mexico offers no explanation for how Mr. Serrano has personal knowledge of actions that took place prior to his tenure at the OSE. Resp. 34. Instead, New Mexico provides the blanket assertion that Mr. Serrano gained this knowledge through his employment and review of business records. Resp. 34. Personal knowledge can be inferred from a declarant's employment position, but it must be grounded in first-hand experience and not based on speculation. *Hill*, 877 F. Supp. 2d at 382; *see also Visser*, 924 F.2d at 659 (citations omitted).

Mr. Serrano's declaration makes a number of sweeping generalizations about facts outside of his personal knowledge. For example, he notes that since the 1980s, each one of OSE's 2,678 permits to existing irrigation well water rights went through "the rigorous and comprehensive analysis required for the permitting process." Serrano Decl. ¶ 19. Mr. Serrano did not start working at OSE until nearly three decades later. There is no basis provided to demonstrate that he personally observed the permitting process for the 2,678 permits. Nor is there any indication that he reviewed business documentation that detailed the specifics of each permit. *Cf. Hill*, 877 F. Supp. 2d at 382 (holding that statements in an affidavit that contained sweeping generalizations that would require continuous tracking were inappropriate where the affiant failed to show he had personal knowledge to make such broad statements of fact). There is simply no factual support provided to establish that Mr. Serrano's statements are grounded in his observation of concrete facts.

In other statements, Mr. Serrano speculates as to the intent or knowledge of another entity. For example, Mr. Serrano speculates that "Reclamation is apparently supportive of these

water sharing arrangements." Serrano Decl. ¶ 32. New Mexico does not attempt to explain, nor can it, how Mr. Serrano has personal knowledge as to the Reclamation's position on any matter.

New Mexico also contends that Mr. Serrano may provide testimony based on his interpretation of another individual's expert report or deposition transcripts. Resp. 34-35. In support of this argument, New Mexico recycles its argument that it "expects that all declarants, experts, and deponents will be present and available to testify at trial," and, that, to the extent Mr. Serrano references Mr. D'Antonio's testimony, Mr. Serrano is "just summarizing" what he said at his deposition. Resp. 34-35. This rationale is flawed on multiple levels.

As previously mentioned, *supra* 8-9, the argument that the witnesses will be available at trial incorrectly conflates availability with admissibility. These statements are not, and simply cannot be based on his personal knowledge. Additionally, summary testimony provided by a declarant is irrelevant, and therefore, not admissible. Fed. R. Evid. 401-402 (relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence).

2. The Court should strike the statements that require expert opinion.

New Mexico argues that Mr. Serrano should be allowed to testify as to statistics about the agricultural economy based on his personal knowledge. Resp. 35. This argument misses the mark.

New Mexico declined to designate Mr. Serrano as an expert witness, much less an expert agricultural economist. S.M. Doc. No. 408 (filed Oct. 01, 2020); Fed. R. Civ. P. 26 (a)(2). Moreover, New Mexico concedes, as it must, that 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. Rule 701 provides that lay opinion testimony may be admissible in some instances, but it does not negate the requirement that the witness have personal knowledge of the facts underlying the opinion. *United States v. Peoples*, 250 F.3d 630, 641 (8th Cir. 2001).

New Mexico's argument hinges on the point that Mr. Serrano cited a Water Master's Report produced by OSE. Resp. 35-36 (citing Serrano Decl. ¶ 8). Yet, this Report, NM-EX-540, reveals that the data Mr. Serrano summarized was based on the New Mexico Department of Agriculture's 2017 Agricultural Statistics. *Id.* at 1. While Mr. Serrano may have referenced those figures in the Report, the information was collected and analyzed by another state agency. Deriving such statistics is certainly outside the perception of a lay witness. Fed. R. Evid. 701, 703. There is nothing in the record that indicates Mr. Serrano has the personal knowledge to support such statements regarding statistics or the agricultural economy. The Court should strike this testimony as improper lay opinion.

Because Mr. Serrano's statements lack the requisite personal knowledge under Rule 56, and he is not designated as an expert or qualified to opine on such matters, the Court should strike the statements identified in Exhibit 5.

G. The Court should Strike the Portions of Dr. Lee Wilson's Declaration that Violate Rule 56.

Dr. Wilson's declaration includes statements that rely on multiple layers of hearsay offered for the truth of the matter asserted, are not based on personal knowledge, and draw improper legal conclusions. Dr. Wilson's improper testimony illustrates precisely why personal

knowledge is necessary to safeguard the reliability and trustworthiness of statements Rule 56 is intended to protect.

As previously noted, testimony that is based on the interpretation of historical documents is barred under *Kansas v. Colorado*. *See supra* 4-5. For example, in Paragraph 4 of Dr. Wilson's declaration he notes that:

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

Wilson Decl. at ¶ 4. In short, Dr. Wilson presents his interpretation of an unknown number of unidentified documents ostensibly authored by Dr. Douglas R. Littlefield that analyzes an unspecified number of documents dating back to 1849. Without further explanation, New Mexico purports that these statements "are clearly within Dr. Wilson's personal knowledge" and he "relies on the kind of historical information that he typically relies upon when analyzing water priority issues." Resp. 25. Setting aside the fact that Dr. Wilson does not identify the documents he relied upon and that he is not identified as an expert historian, these broad statements are the type of testimony rejected by the Court in *Kansas v. Colorado*. In that case, the Special Master determined that an expert historian—the same Dr. Douglas R. Littlefield—was incompetent to provide testimony of this nature because he lacked personal knowledge. *Kansas v. Colorado*, 1994 WL 16189353, at *155–56; *see also* Fed. R. Civ. P. 56(c)(4), (e). The Special Master in *Kansas v. Colorado* concluded that this review of primary historical documents was inappropriate because it represents the expert historian's conclusions rather than factual evidence not otherwise available to the Court. 1994 WL 16189353, at *155–56. In this case, Dr. Wilson's

proposed testimony is one step even further removed from the expert historian's analysis in *Kansas v. Colorado*. This inadmissible hearsay evidence that is not based on personal knowledge cannot be considered on a motion for summary judgment. *Id.*; Fed. R. Civ. P. 56; Fed. R. Evid. 801(c).

Dr. Wilson also makes a number of improper legal conclusions he is not qualified to make and for which he lacks the requisite personal knowledge. *See*, *e.g.*, Wilson Decl. ¶ 6(a) (concluding that effluent can be considered "imported supply"); *id.* ¶ 6 (g) (concluding that the City's pumping was "grandfathered in when the D-2 curve was adopted); *id.* ¶ 6 (h) (concluding that the City is "entitled through its ownership of water righted land in EBID" to a certain amount of stream depletions); *id.* ¶ 9 (discussing the 1938 condition and D-2 Curve as relates to the Rio Grande Project accounting with the Rio Grande Compact). Dr. Wilson's declaration lacks any factual support to show that he actually possesses such knowledge. Such conclusory statements without any evidentiary basis cannot be considered in determining summary judgment. *Aronson*, 125 F. Supp. 2d. at 143–44.

This Court should strike the improper statements identified in Exhibit 6.

III. Conclusion

New Mexico fails to explain away the myriad of evidentiary shortcomings in its declarations. For the reasons stated in the United States' Motion to Strike and in this Reply, the Court should strike all statements that run afoul of Rule 56. *See* Exhibits 1-6.

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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

CERTIFICATE OF SERVICE

This is to certify that on the 6th day of April, 2021, I caused a true and correct copy of the **UNITED STATES OF AMERICA'S REPLY IN SUPPORT OF ITS 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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