

DISTRICT COURT
SAN JUAN COUNTY NM
FILED

2013 FEB 27 PM 4: 24

STATE OF NEW MEXICO
SAN JUAN COUNTY
THE ELEVENTH JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO, *ex rel.* STATE ENGINEER,

Plaintiff,

CV-75-184
HON. JAMES J. WECHSLER
Presiding Judge

vs.

THE UNITED STATES OF AMERICA, *et al.*,

Defendants,

SAN JUAN RIVER
GENERAL STREAM
ADJUDICATION

THE JICARILLA APACHE TRIBE AND THE
NAVAJO NATION,

Claims of the Navajo Nation
Case No. AB-07-1

Defendant-Intervenors.

NAME OF PARTY: State of New Mexico *ex rel.* State Engineer ("the State").

DESCRIPTIVE SUMMARY: State's Brief in Support of Motion to Strike Filing of Exhibit by Community Ditch Defendants.

NUMBER OF PAGES: 4

DATE OF FILING: Filed on February 27, 2013.

**STATE'S BRIEF IN SUPPORT OF MOTION TO STRIKE
FILING OF EXHIBIT BY COMMUNITY DITCH DEFENDANTS**

Pursuant to the Local Court Rules for the Eleventh Judicial District, LR 11-104, the State of New Mexico *ex rel.* State Engineer ("State") submits this Brief in Support of the *State's Motion to Strike the Filing of Exhibit: Allocation of Water Under Colorado River Compacts* filed by Community Ditch Defendants on February 4, 2013 and *Revised Calculations About Allocation of Water Under Colorado River Compacts*, filed on February 15, 2013 (collectively "*Filing of Exhibit*"). Community Ditch Defendants are seeking to have the Court accept into the

SCANNED

record evidence that is not properly before the Court. The *Filing of Exhibit* includes an exhibit that makes various inaccurate factual allegations and purports to illustrate flow allocations under the 1922 Colorado River Compact and the 1948 Upper Colorado River Basin Compact if the Settlement Agreement is implemented. The State requests the Court to strike the *Filing of Exhibit* for the reasons set forth below.

I. Legal Standard

Generally, a motion to strike seeks to strike an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter from a pleading. See Rule 1-012(F) NMRA. However, the Court also has inherent power to strike filings to “... regulate [its] docket, promote judicial efficiency, and deter frivolous filings.” *State ex rel. New Mexico Hwy. & Transp. Dept. v. Baca*, 120 N.M. 1, 4 (1995). Here, the Filing of Exhibit is inappropriate and not in accordance with accepted legal practice. Allowing Community Ditch Defendants to improperly introduce evidence into the record is unfairly prejudicial to Plaintiff and the other parties and promotes judicial inefficiency in requiring other parties and the Court to needlessly expend limited resources in responding to this improper litigation practice.¹ The Court should exercise its inherent power to strike the filing.

A motion to strike may also be made where matters have been improperly pleaded. See *Peoples v. Peoples*, 72 N.M. 64 (1953). The Rules of Civil Procedure establish when a party may submit documentary evidence to the Court outside of a trial or evidentiary hearing. Documentary evidence in the form of supporting affidavits may be submitted with a motion for summary judgment pursuant to Rule 1-056(B) NMRA. Rule 1-007.1 NMRA, governing motion practice, permits a movant to submit documentary evidence with an opposed motion or brief that requires consideration of facts not of record. Rule 1-007.1(C) provides:

¹ On February 16, 2013, the United States filed an Objection to the Notice of Filing.

Notwithstanding the provisions of any other rule, the movant may file with any opposed motion a brief or supporting points with citations or authorities. **If the motion requires consideration of facts not of record, the movant shall file copies of all affidavits, depositions or other documentary evidence to be presented in support of the motion.** Motions to amend pleadings shall have attached the proposed pleading. A motion for judgment on the pleadings presenting matters outside the pleading shall comply with Rule 1-056 NMRA. A motion for new trial shall comply with Rule 1-059 NMRA.

Rule 1-007.1(C) NMRA (emphasis added). Here, Community Ditch Defendants' *Filing of Exhibit* was improperly pleaded because it was not filed with an opposed motion or brief as allowed by Rule 1-007.1 NMRA or submitted with a motion for summary judgment pursuant to Rule 1-056(B) NMRA.

There is no provision in the Rules of Civil Procedure for submitting documentary evidence during pre-trial proceedings independent of a properly filed brief or pleading. Community Ditch Defendants state that the Exhibit is submitted "in connection with" the United States' Motion for Protective Order. However, the Exhibit was not included with Community Ditch Defendants' January 15, 2013 *Joint Response to the United States' Motion for Protective Order*. Moreover, Community Ditch Defendants have not filed a motion seeking to amend their response. Thus, the Filing of Exhibit violates the Rules of Civil Procedure.

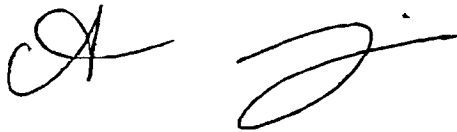
The Rules of Civil Procedure are designed to afford fairness to all parties. *See, e.g., In re T.C.*, 118 N.M. 352, 354, (Ct. App. 1994) (noting that the Rules of Civil Procedure provide fairness and certainty in proceedings). Acceptance of the *Filing of Exhibit* into the record violates that concept of fairness. The *Filing of Exhibit* has not been subjected to any test of admissibility, nor has it been properly authenticated, introduced by a competent witness, or subjected to cross-examination. Thus, it is unfair to the other parties to accept the Exhibit into the record as evidence in this proceeding.

II. Conclusion.

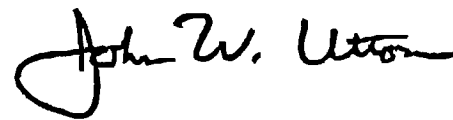
The *Filing of Exhibit* by the Community Ditch Defendants violates the Rules of Civil Procedure, constitutes a misuse of the litigation process, and is outside any accepted legal practice. The Court should exercise its inherent power to exercise control over this proceeding and strike the Filing of Exhibit from the record.

Respectfully submitted, this 27th day of February 2013.

STATE OF NEW MEXICO



Arienne Singer
Special Assistant Attorney General
New Mexico Office of the State Engineer
P.O. Box 25102
Santa Fe, NM 87504-5102
(505) 827-6150



John W. Utton
Special Assistant Attorney General
Sheehan & Sheehan, P.A
Post Office Box 271
Albuquerque, New Mexico 87103
(505)247-0411

CERTIFICATE OF SERVICE

I certify that on this 27th day of February 2013, at approximately 4:00 pm, an electronic copy of this *Brief in Support of Motion to Strike Exhibit* was served by attaching an electronic copy to an email sent to: wmavajointerse@nmcourts.gov and aoocaj@nmcourts.gov and to the February 25, 2013 Amended Service List.

/s/ Arienne Singer