

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

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

Plaintiff,

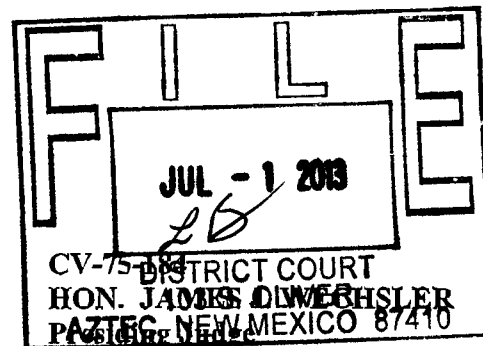
vs.

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

Defendants,

THE JICARILLA APACHE TRIBE AND THE
NAVAJO NATION,

Defendant-Intervenors.



SAN JUAN RIVER
GENERAL STREAM
ADJUDICATION

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

NAME OF PARTY: State of New Mexico *ex rel.* State Engineer.

DESCRIPTIVE SUMMARY: State's Brief in Support of Motion to Strike April 15, 2013 Affidavit of Jim Rogers.

NUMBER OF PAGES: 5

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**STATE'S BRIEF IN SUPPORT OF MOTION TO STRIKE
AFFIDAVIT OF JIM ROGERS**

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 Affidavit of Jim Rogers filed on April 15, 2013 in support of the Community Ditch Defendants' *Motion for Partial Summary Judgment Concerning NIIP* ("Rogers Affidavit"). The State objects to and moves to strike paragraphs 3, 4, and 5 of the Rogers Affidavit. These paragraphs fail to comply with the express provisions of Rule 1-056(E)

NMRA setting forth the requirements of admissibility for an affidavit in support of a motion for summary judgment. These paragraphs are not based on Rogers' personal knowledge and Rogers has not shown affirmatively that he is competent to testify to these matters. Furthermore, these paragraphs contain opinion testimony by a lay witness and thus are not admissible under the New Mexico Rules of Evidence. The State requests the Court to strike the Rogers Affidavit for the reasons set forth below.

I. Legal Standard

The summary judgment rules provide specific requirements for affidavits. Affidavits to be submitted in support of a motion for summary judgment "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." Rule 1-056(E) NMRA. The proper response to an affidavit that fails to satisfy applicable procedural rules is a motion to strike the non-conforming affidavit. See *Chavez v. Ronquillo*, 92 N.M. 442, 445 (Ct. App. 1980); see also *Carter v. Burn Construction Company, Inc.*, 85 N.M. 27 (Ct. App. 1973) (holding that an affidavit is subject to a motion to strike). Affidavits which contain material excluded by the Rules of Evidence should be stricken. *Hurst v. The Citadel, Ltd.*, 111 N.M. 566, 569 (Ct. App. 1991).

II. Argument

In his affidavit, Rogers makes various statements of opinion regarding the financial performance, profitability, and economic competitiveness and viability of the Navajo Indian Irrigation Project ("NIIP") and the Navajo Agricultural Products Industry ("NAPI"). See Rogers Affidavit at paragraph 3, paragraph 5. Rogers further offers opinions regarding the alleged "problems" of the cost of building, maintaining and repairing the NIIP irrigation canals and the

cost of pumping water, and states that "lands occupied by NIIP are not suitable for sustained irrigation at reasonable cost." See Rogers Affidavit at paragraphs 4 and 5. Finally, Rogers offers opinions regarding the allegedly higher evaporation rates at NIIP because it is "more exposed to the wind". Rogers Affidavit at paragraph 4.

These assertions by Rogers are opinion testimony unsupported by substantiated facts. Rogers fails to affirmatively demonstrate that he has personal, first-hand knowledge regarding the financial performance, profitability, and economic viability of NIIP and NAPI, the cost of building and maintaining the NIIP irrigation canals, and the cost of pumping water to NIIP upon which to base his opinions. By his own assertion, Rogers' knowledge of NIIP and NAPI operations is based solely upon his visits to purchase agricultural products during the growing season, talking to people, and "following" what is happening at NIIP and NAPI. See Rogers Affidavit at paragraphs 2 and 3. These assertions fail to lay an adequate foundation of first-hand knowledge for the opinions offered in the affidavit. Thus, paragraphs 2, 3, and 4 fail to meet the first requirement of Rule 1-056(E) NMRA that affidavits in support of a motion for summary judgment shall be made on personal knowledge.

The second requirement of Rule 1-056(E) is that facts set forth in an affidavit must be admissible under the New Mexico Rules of Evidence. Rule of Evidence 11-701 governs the admissibility of opinion testimony by lay witnesses. Under Rule 11-701, "[i]f a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is (A) rationally based on the witness's perception, (B) helpful to clearly understanding the witness's testimony or to determining a fact in issue, and (C) not based on scientific, technical, or other specialized knowledge within the scope of Rule 11-702 NMRA". Rule 11-701 NMRA. Generally, "witnesses must testify to facts, and not to opinions." *Duke City Lumber Co. v. N.M. Envtl.*

Improvement Bd., 95 N.M. 401, 405 (Ct. App. 1980). However, under Rule 11-701 a lay witness can testify as to his opinions based on personal perceptions. *Jesko v. Stauffer Chemical Company*, 89 N.M. 786, 788 (Ct. App. 1976). A lay person who gives opinion testimony must show first-hand knowledge of the facts supporting his opinion and “a rational connection between the observations made and the opinion formed.” *State v. Luna*, 92 N.M. 680, 684 (Ct. App. 1979). Because the fundamental requirement of personal knowledge of the financial performance, profitability, and economic viability of NIIP and NAPI, the cost of building and maintaining the NIIP irrigation canals, the cost of pumping water to NIIP, and evaporation rates and exposure to wind at NIIP has not been established, Rogers’ opinions are not rationally based on or connected to his perceptions and are therefore inadmissible under Rule 11-701 NMRA.

Furthermore, the New Mexico Rules of Evidence explicitly prevent lay witnesses from offering opinion testimony that is “based on scientific, technical or other specialized knowledge within the scope of Rule 11-702 NMRA.” Rule 11-701(C) NMRA. Rogers has not been identified as an expert witness in this proceeding, and has not established that he possesses the requisite knowledge, skill, experience, training, or education qualifying him as an expert witness competent to testify regarding the financial operations or economic viability of NIIP or NAPI, the suitability of NIIP for sustained irrigation, or evaporation rates and exposure to wind at NIIP. Thus, Rogers has failed to meet the third requirement of Rule 1-056(E) and affirmatively show that he is competent to testify to the matters stated in the affidavit.


III. Conclusion

The opinions offered in paragraphs 3, 4 and 5 of the Rogers Affidavit are not based upon personal knowledge and are improper expert testimony. These paragraphs fail to comply with the rules for summary judgment and the rules of evidence and should be stricken. For the

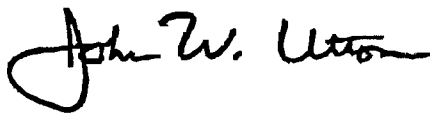
foregoing reasons, the State respectfully requests that the Court enter an Order striking paragraphs 3, 4, and 5 of the April 15, 2013 Affidavit of Jim Rogers.

Respectfully submitted, this 28th day of June 2013.

STATE OF NEW MEXICO



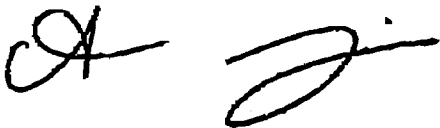
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CERTIFICATE OF SERVICE

I certify that on this 28th day of June 2013, at approximately 4:00 pm, an electronic copy of this Brief in Support of Motion to Strike was served by attaching an electronic copy to an email sent to: wnavajointerse@nmcourts.gov and aoccaj@nmcourts.gov and to the February 25, 2013 Amended Service List.



Arianne Singer