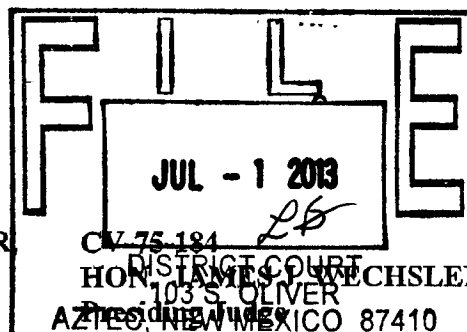


STATE OF NEW MEXICO
SAN JUAN COUNTY
THE ELEVENTH JUDICIAL DISTRICT COURT



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 Motion to Strike Affidavit of Jim Rogers.
NUMBER OF PAGES: 4
DATE OF FILING: Filed on June 28, 2013.

STATE'S MOTION TO STRIKE AFFIDAVIT OF JIM ROGERS

The State of New Mexico *ex rel.* State Engineer ("State") submits this 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"). A copy of the affidavit is attached as Exhibit 1.

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. These paragraphs are not based on Rogers' personal knowledge and Rogers has not shown

affirmatively that he is competent to testify to these matters. In support of this Motion, the State states the following:

1. Pursuant to Rule 1-056(E) NMRA setting forth the form of affidavits to be submitted in support or opposition to a motion for summary judgment, "affidavits 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."

2. The New Mexico Rules of Evidence provide: "If 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.

3. 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).

4. 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"); the alleged "problems" of the cost of building, maintaining and repairing the NIIP irrigation canals and the cost of pumping water; the suitability of NIIP lands for sustained irrigation at reasonable cost; and the allegedly higher evaporation rates at NIIP. See Rogers Affidavit at paragraphs 3, 4 and 5.

5. The affidavit fails to affirmatively demonstrate that Rogers 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. Because the fundamental requirement of personal knowledge has not been established, his opinions are not rationally based on his perceptions and are therefore inadmissible under Rule 11-701 NMRA.

6. 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 affirmatively show that he is competent to testify to these matters stated in the affidavit.

7. The State has contacted counsel regarding this Motion, and only counsel for the Navajo Nation has responded. The Navajo Nation concurs in this Motion.

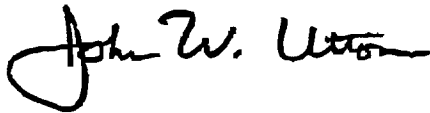
For the foregoing reasons, the State respectfully requests that the Court enter an Order striking paragraphs 3, 4, and 5 of the April 15, 2013 Affidavit of Jim Rogers.

Respectfully submitted, this 28th day of June 2013.

STATE OF NEW MEXICO



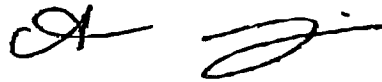
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CERTIFICATE OF SERVICE

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



Arianne Singer

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

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

Plaintiff,

vs.

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

Defendants.

AB-07-1
Claims of Navajo Nation

No. CV 75-184
Honorable James J. Wechsler
Presiding Judge

AFFIDAVIT OF JIM ROGERS

STATE OF NEW MEXICO)
) ss
COUNTY OF SAN JUAN)

I, Jim Rogers, being duly sworn, allege and state:

1. My name is Jim Rogers. I live in Waterflow, New Mexico near the Navajo Indian Irrigation Project. I am a farmer, rancher, and cattleman. I have lived and farmed in this valley for more than 40 years, and my family for 70 years before that. My property gets water from the Jewett Valley Water Users Association. I have been the chairman of that Association and overseen the operation and delivery of water from it since 1996. This ditch was constructed by the farmers in this valley well before 1900. It continues to be operated by these farmers.

2. For these same more than 40 years I have observed NIIP and NAPI operations on a regular basis. On average I would say that I visit NIIP-NAPI around six to twelve times per year, mostly during the growing season, I buy commodities such as hay,



silage, corn, and potatoes for my cattle-feeding operation. I know and regularly talk with the people at NIIP-NAPI.

3. As part of my business I follow what is happening at NIIP-NAPI, including its financial performance and the problems in irrigating that terrain. To the best of my knowledge and experience, NIIP-NAPI has never been able to make a profit for any period of years, taking into account all the costs necessary to operate NIIP-NAPI. I have followed the feed-lot operations since inception, and note that they have never been competitive in that market place.

4. From my observations, the primary problems are the cost of building, maintaining and repairing the hundreds of miles of canals and pipelines needed to transport water so far from the San Juan River, and the cost of pumping water uphill. A secondary problem is that the terrain at NIIP is more exposed to the wind, meaning higher evaporation rates. I operate sprinklers on a portion of my farm, and when the wind blows, the sprinklers must be run longer, resulting in much higher production costs.

5. The community ditches down in the valley operate by gravity flow from the San Juan River, so they do not have the additional costs necessary to operate that NIIP-NAPI does. Based upon my own observations of NIIP-NAPI over many years, it is not an economically viable irrigation project. The lands occupied by NIIP are not suitable for sustained irrigation at reasonable cost.

FURTHER AFFLIANT SAYETH NOT.

/s/ Jim Rogers
JIM ROGERS

SUBSCRIBED AND SWORN TO before me by Jim Rogers on April ____, 2013.

Notary Public

My commission expires