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

DESCRIPTIVE SUMMARY: The OSE and NN and US have belatedly moved to strike the April 15 affidavit of Jim Rogers concerning NIIP. The settling parties did not dispute Mr. Rogers' testimony as required by Rule 1-056. Indeed, the settling parties agree with Mr. Rogers that NIIP is not PIA.

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COMMUNITY DITCH RESPONSE TO MOTION TO STRIKE AFFIDAVIT OF JIM ROGERS

The OSE and the Navajo Nation have belatedly moved to strike the affidavit of Jim Rogers which was filed on April 15, 2013 as an exhibit in support of the motion for partial summary judgment concerning NIIP. In his affidavit, Mr. Rogers testified about the fact that NIIP is not PIA (practicably irrigable acreage), based upon his own personal observations and experience. The OSE and NN and US did not controvert Mr. Rogers' testimony in any way, as is required by Rule 1-056. Rather, the US and NN and OSE have repeatedly conceded the fact that NIIP is not PIA. So the motion to strike is too late. What

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is more, the US and NN and OSE actually agree with Mr. Rogers about the fact that NIIP is not PIA.

Motions to strike are disfavored and rarely granted. And they cannot be an after-the-fact substitute for a proper and timely response under Rule 1-056 to the motion for partial summary judgment on NIIP. Furthermore, Mr. Rogers' testimony is fact testimony based on his personal observations and experience, so it is admissible under the Rules of Evidence.

The Community Ditch Defendants submit that the "motion to strike" should be denied for a variety of reasons, including the following:

1. The motion to strike is untimely, because the settling parties were required to controvert the affidavit by May 10, 2013.

According to the court's scheduling order, motions for summary judgment were due on April 15, 2013, and responses were due on May 10, 2013. When the US and NN and OSE responded to the motion for partial summary judgment on NIIP, they did not controvert any of the facts stated by Jim Rogers in his affidavit. They did not challenge his competence to testify from personal observations about NIIP and the difficulties of irrigation. And they did not introduce any contrary affidavits, expert or otherwise. *State ex rel. Bardacke v. New Mexico Fed. Sav. & Loan Ass'n*, 102 N.M. 673, 675, 699 P.2d 604, 606 (1985) (where the facts set forth in affidavits are uncontroverted, the facts must be taken as true); *Carrillo v. Hoyl*, 85 N.M. 751, 752, 517 N.M. 73, 74 (Ct. App. 1973) (same); *Wisehart v. Mountain States Tel. & Tel. Co.*, 80 N.M. 251, 253, 453 P.2d 771, 773 (Ct. App.), *cert. denied*, 80 N.M. 234, 453 P.2d 597 (1969).

The US and NN and OSE merely filed more legal briefs reiterating their theories about the applicable law. Their witnesses did not submit sworn affidavits claiming that NIIP was PIA. [Such a claim would have been patently untrue, and a clear violation of Rule 1-011.] Therefore the plaintiffs admitted the facts stated in the motion and in Mr. Rogers' affidavit.

2. The settling parties agree with Mr. Rogers that NIIP is not PIA.

The April 15 motion for partial summary judgment stated:

> There is no genuine issue as to the following material facts:
> 1. The land occupied by NIIP is not practicably irrigable acreage (PIA).
> 2. NIIP is not a beneficial (nonwasteful) use of water.
> 3. The lands occupied by NIIP are not suitable to sustained irrigation at reasonable cost.
> 4. The NIIP land is not suitable for irrigation at reasonable cost primarily due to its geography. The NIIP land is located far above the San Juan River in vertical elevation. The NIIP land is distant from the San Juan River in horizontal terms.
> 5. The United States, the Navajo Nation, and the State are not making a PIA claim for NIIP or NAPI.
> 6. Since its inception, the cost of building and operating NIIP-NAPI has substantially exceeded the revenue of NIIP-NAPI. . . .

The Navajo Nation and the United States and the OSE did not controvert any of these specifically numbered facts, as required by Rule 1-056(D)(2).

In support of these numbered and undisputed facts, Jim Rogers submitted sworn testimony based on more than 40 years of his personal experience in irrigating farmland with water from the San Juan River:

> 2. For these same more than 40 years I have observed NIIP and NAPI operations on a regular basis. . . .

> 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.
>
> 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.

The US and NN and OSE did not dispute any of the facts which Mr. Rogers observed in his affidavit.

The fact that NIIP is not PIA has been conceded by the settling parties, many times over. See their statement of claims, which does not include a PIA claim; their objections to discovery about the operating and capital costs of NIIP; and their statements to the court on April 30, 2013:

> MR. POLLACK: Your Honor, first of all, we don't think that it's the court's role here to determine what the water rights are for NIIP. . . .
> But with respect to the water rights for NIIP, no one here is arguing that the water rights for NIIP are based on practicably irrigable acreage. And we have been consistent on that from the beginning. . . . [W]e were not basing the water rights for NIIP on PIA. We were not basing it either in the settlement or in the United States statement of claim based on PIA, and that the water right for NIIP is a water right that has been established by Congress, and that the court cannot, cannot abrogate a congressional authorization of water.

Partial transcript of hearing on April 30, 2013, Exhibit 1 to Reply on Motion for Partial Summary Judgment #4 – NIIP (May 24, 2013).

3. Mr. Rogers' undisputed testimony is admissible, along with all of the other undisputed evidence that NIIP is not PIA.

PIA is the essential, unavoidable element of any *Winters* claim. *Winters* itself is a PIA case, wherein the court awarded water for gravity irrigation of "approximately about 30,000 acres are susceptible of irrigation with the waters of Milk river." *Winters v. United States*, 143 F. 740, 741 (9th Cir. 1906). In *Arizona v. California*, 373 U.S. 546, 601 (1963), the Supreme Court held that PIA was the only way to quantify reserved rights for Indian tribes. "The only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage."

PIA is a specific application of the universal rule of beneficial use. Reclamation Act of 1902, 43 U.S.C. § 372.

> § 372. Water right as appurtenant to land and extent of right.
>
> The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

Beneficial use is a question of fact, not of law. See *Arizona v. California*, 373 U.S. at 557, n.23; *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1133 (10th Cir. 1981). Since the settling parties long ago conceded the fact that NIIP is not PIA, why are they now complaining that Mr. Roger agrees with them?

Mr. Rogers is testifying about facts, not opinions. Those facts are based upon his own personal observations and experience, as the affidavit states. And the settling parties

have agreed with those facts. In any water adjudication, irrigators are competent to testify about their experience and the problems encountered in irrigation. Otherwise the only witnesses in a stream adjudication would be bureaucrats from the OSE and their expensive hired experts. Perhaps this is why the OSE really wants to prevent water users like Mr. Rogers from testifying, so that the OSE would have a monopoly on testimony.

Furthermore, Rule 11-107 allows Mr. Rogers to offer such testimony even if it is deemed to be an opinion, because it is rationally based on the witness' perceptions, helpful to determining a fact in issue, and not based on specialized knowledge that requires an expert witness. See *Jesko v. Stauffer Chemical Co.*, 89 N.M. 786, 788, 558 P.2d 55, 57 (Ct. App. 1976) (farmer could testify that chemical which admittedly caused damage to two fields of corn was also the cause of damage to the third, founded upon his observation of the fields and the characteristics of the damage, since his opinion was rationally based on his own perceptions, helpful to the determination of the causation issue, and admissible).

4. The motion to strike is not supported by any evidence.

In support of their motion to strike, the settling parties have not submitted any admissible evidence to controvert what Mr. Rogers has said. They have submitted no evidence to refute Mr. Rogers' sworn testimony that he has personal knowledge about the matters in his affidavit. All they have submitted is the unsworn and uninformed assertions of two lawyers – Misty Braswell, Esq. and Arianne Singer, Esq. The opinions of lawyer advocates are certainly not admissible as evidence. *V.P. Clarence Co. v. Colgate*, 115 N.M. 471, 472, 853 P.2d 722, 723 (1993) ("briefs and arguments of counsel are not evidence upon which a trial court can rely in a summary judgment proceeding"); *G & G Serves, Inc. v. Agora*

Syndicate, Inc., 2000-NMCA-003, ¶ 51, 128 N.M. 434, 993 P.2d 751 ("arguments of counsel are not evidence"); *Farmers Ins. Group v. Martinez*, 107 N.M. 82, 63, 752 P.2d 797, 798 (Ct. App. 1988) ("[I]t was in the form of argument of counsel and not evidence. Such argument alone cannot provide the basis for dismissing a case.").

The lawyers for the settling parties have no idea what Mr. Rogers knows, or the bases for his testimony. Mr. Rogers has been listed as a witness, but they have never sought to depose him, either before or after he submitted his affidavit.

CONCLUSION

The motion to strike should be denied.

Respectfully submitted,

VICTOR R. MARSHALL & ASSOCIATES, P.C.

By /s/ Victor R. Marshall
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CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2013, a true and correct copy of the foregoing was served on the parties and claimants by attaching a copy of said document to an email sent to the following list server: wmavajointerse@nmcourts.gov and to the filing list referred to in the Notice of Amended Service List filed February 25, 2013.

/s/ Victor R. Marshall
Victor R. Marshall, Esq.