

DISTRICT COURT
SAN JUAN COUNTY NM
FILED

2013 JUL 22 PM 2:43

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.

DESCRIPTIVE SUMMARY: State's Reply to *Community Ditch Defendants' Response to Motion to Strike Affidavit of Jim Rogers*.

NUMBER OF PAGES: 4

DATE OF FILING: Filed on July 22, 2013.

STATE'S REPLY TO COMMUNITY DITCH DEFENDANTS' RESPONSE TO MOTION TO STRIKE AFFIDAVIT OF JIM ROGERS

The State of New Mexico *ex rel.* State Engineer ("State") submits this Reply to the *Community Ditch Defendants' Response to Motion to Strike the Affidavit of Jim Rogers* filed on July 5, 2013 ("*Community Ditch Defendants' Response*"). As set forth in the State's motion to strike, the statements by Rogers that NIIP is not practicably irrigable acreage ("PIA") are not based on his personal knowledge, are conclusory, and are inadmissible opinion testimony.

Community Ditch Defendants assert that the motion to strike is untimely because "the settling parties were required to controvert the affidavit by May 10, 2013", the deadline for

responses to dispositive motions. *Community Ditch Defendants' Response* at 2. Specifically, Community Ditch Defendants contend that the State did not controvert the "facts" set forth in paragraphs 1-6 of their April 15 motion for partial summary judgment or in paragraphs 2-5 of Rogers' affidavit. *Community Ditch Defendants' Response* at 3, 4. However, these statements are not facts that are susceptible to being controverted, but rather are inadmissible opinions and conclusions. The State timely objected to all such statements in its May 10, 2013 *Consolidated Response to Motions Filed by Community Ditch Defendants, Gary L. Horner, Robert E. Oxford and Defendants B Square Ranch, LLC et al on April 15, 2013* ("State's Consolidated Response"). See *State's Consolidated Response* at 6-7. Furthermore, the Court has not established any deadlines for filing of motions to strike in this case. The State may file such a motion at any time.

Community Ditch Defendants state that "[i]n his affidavit, Mr. Rogers testified about the fact that NIIP is not PIA." *Community Ditch Defendants' Response* at 1. However, Rogers' assertions regarding PIA consist of argument and inadmissible opinions and conclusions, not "facts". See, e.g., *Travelers Ins. Co. v. D. & D. Contracting*, 962 F.2d 971, 972 (10th Cir.1992) (conclusory affidavits may be stricken). Under the New Mexico Rules of Civil Procedure and Rules of Evidence, Rogers may testify to facts based upon his personal knowledge, and he may testify to his opinions that are rationally based upon his perceptions. However, as a lay witness he may not offer opinion testimony that is based on scientific, technical or other specialized knowledge. Rule 11-701(C) NMRA. A determination of PIA must be supported by scientific and technical testimony from experts such as soil scientists, hydrologists, geologists, agronomists, economists, and engineers. See, e.g., *State ex rel. Martinez v. Lewis*, 116 N.M. 194, 206 (Ct.App.1993). Evidence is needed on soil type and quality, climate and growing season,

water quantity and quality, market factors and prices, equipment, labor, and financing. *Id.* at 206 (Ct.App.1993). Rogers has not established that he possesses the necessary expertise to provide such scientific or technical testimony. Thus, these statements should be stricken as improper opinion testimony.

Moreover, whether NIIP is PIA need not be determined by this Court in deciding whether to enter the proposed decrees. The State has not taken the position, as stated by the Community Ditch Defendants, that NIIP is not PIA. *See Community Ditch Defendants' Response* at 4. Instead, the State has stated that the PIA standard does not apply to NIIP because it is an already existing and authorized project. *See State's Memorandum in Support of Motion for Entry of Proposed Decrees* at 10. While the Navajo Nation may pursue a PIA claim in litigation if the Court does not enter the proposed decrees, PIA is not, as Community Ditch Defendants claim (see *Community Ditch Defendants' Response* at 5), the only means by which Indian water rights may be quantified. The Arizona Supreme Court, for one, has rejected the argument that PIA was adopted by the United States Supreme Court "as the universal measure of Indian reserved water rights" (quoting the Special Master's Report in *Arizona v. California*, 460 U.S. 605 (1983)). *In re General Adjudication of All Rights to Use Water in Gila River System & Source*, 201 Ariz. 307, 317 (2001). The Court ultimately adopted a test that considers other elements such as a tribe's culture, history, natural resources, and present and future population. *Id.* at 319-320. *See also State ex rel. Martinez v. Lewis*, 116 N.M. 194 (Ct.App.1993) in which the court upheld an award of 2,300 acre-feet per year to the Mescalero Apache Tribe for a variety of homeland purposes.

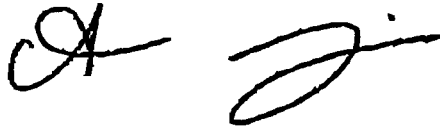
Finally, Community Ditch Defendants misstate the law in their discussion of *U.S. v. Winters*. *Winters* is a recognition that Indian tribes hold water rights in lands set aside by

Congress as reservations and that those rights had priority as of the date of the reservation. See *U.S. v. Winters*, 207 U.S. 564 (1908). While *Winters* suggests that the amount of water reserved is the amount of water needed to fulfill the purpose of the reservation, it does not establish any standard – based on practicably irrigable acreage or any other measure – for quantification of reserved water rights. Thus, there is no basis for Community Ditch Defendants' assertion that *Winters* is a PIA case. See *Community Ditch Defendants' Response* at 5.

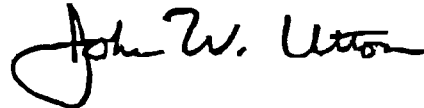
For these reasons and the reasons set forth in the State's July 1, 2013 *Motion to Strike Affidavit of Jim Rogers*, the Court should grant the motion.

Respectfully submitted, this 22nd day of July 2013.

STATE OF NEW MEXICO



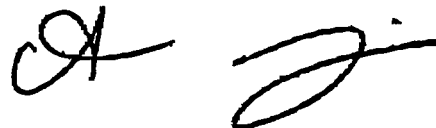
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CERTIFICATE OF SERVICE

I certify that on this 22nd day of July 2013, at approximately 3 pm, an electronic copy of this Reply to Response to 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