

DISTRICT COURT
SAN JUAN COUNTY NM
FILED
2013 SEP 20 PM 3:05

**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.

**SAN JUAN RIVER
GENERAL STREAM
ADJUDICATION**

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

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

**THE JICARILLA APACHE TRIBE AND THE
NAVAJO NATION,**

Defendant-Intervenors.

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

DESCRIPTIVE SUMMARY: State's Response to *Community Ditch Defendants' Motion for Correction of Record and August 16 Opinion Concerning Expert Reports* and *Motion by Robert E. Oxford for Corrections Concerning Hogback and Fruitland*. The report of the State's expert witness is admissible under the New Mexico Rules of Evidence, there is no evidence that factual statements in the expert witness' affidavit are incorrect, and the Motions should be denied.

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DATE OF FILING: Filed on September 20, 2013.

**STATE'S RESPONSE TO COMMUNITY DITCH DEFENDANTS AND
ROBERT E. OXFORD'S MOTIONS FOR CORRECTION OF RECORD**

The State of New Mexico *ex rel.* State Engineer ("State") submits this Response to the September 5, 2013 *Community Ditch Defendants' Motion for Correction of Record and August 16 Opinion Concerning Expert Reports*, ("CDD Motion") and *Motion by Robert E. Oxford for Corrections Concerning Hogback and Fruitland* ("Oxford Motion"). Community Ditch

Defendants request the Court "correct its mischaracterization of the factual record and its August 16 opinion" regarding the expert testimony of several witnesses, including the State's expert witness, John Whipple. See CDD Motion at p. 2. Community Ditch Defendants argue that because, in some instances, Mr. Whipple's opinion was informed by or based upon reports prepared by others, it is inadmissible. Mr. Oxford argues that the records relied upon by Mr. Whipple are unreliable and that Mr. Whipple failed to independently verify the accuracy of those records, and therefore the Court should not rely upon Mr. Whipple's opinions. See Oxford Motion at p. 2.

The New Mexico Rules of Evidence provide that

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted.

NMRA Rule 11-703. The test for admissibility of an expert's opinion based on facts not in evidence is whether the source relied upon by the expert is reliable. *State v. Rupp*, 120 Ariz. 490, 498 (App.1978). Trustworthiness of a source comes from external indicia of reliability, such as a routine and customary business record or preparation of a report by a disinterested, expert third party. *Bryan v. John Bean Division of FMC Corp.*, 566 F.2d 541, 545 (5th Cir.1978). Moreover, an affidavit containing an expert's opinions need not be based on the expert's personal knowledge to be admissible at trial, and therefore, to be considered for summary judgment. *Estate of Keeney*, 1995-NMCA-102.

The testimony objected to by Community Ditch Defendants and Mr. Oxford indicates that Mr. Whipple relied upon records prepared by the Bureau of Indian Affairs ("BIA"), a federal government agency. See Exhibit A to CCD Motion at pp. 9-10. Community Ditch Defendants and Mr. Oxford provide no evidence that that the BIA records relied upon by Mr. Whipple are

unreliable or untrustworthy. These records are routine and customary business records kept by an agency of the United States government. Furthermore, the BIA records of irrigated acreage, land use permits, and crop utilization surveys relied upon by Mr. Whipple are of the type that an expert preparing a report discussing irrigation projects and water uses would reasonably rely on. Thus, Mr. Whipple's opinions based upon them are admissible under NMRA Rule 11-703.

Mr. Oxford further contends that Mr. Whipple's statements regarding the maximum peak acreage irrigated on the Hogback and Fruitland projects are incorrect.¹ See Oxford Motion at pp. 2-3. He provides no basis for these claims. The maximum peak irrigated acreage figures in Mr. Whipple's affidavit are derived from BIA records. As noted above, these records are routine government records and there is no evidence that they are incorrect or unreliable. Moreover, the quantification of irrigable acreage for adjudication of water rights for the Hogback and Fruitland projects is not based upon historic irrigation alone. As explained in Mr. Whipple's affidavit, the amount of irrigable acreage recognized in the Decree is based upon existing BIA Land Use Permits. See Whipple Affidavit at ¶ 32. Furthermore, as the Court determined, quantification of *Winters* rights is not limited to historic beneficial use. See August 16, 2013 *Order Granting the Settlement Motion for Entry of Partial Final Decrees Describing the Water Rights of the Navajo Nation*, at pp. 49-51. Thus, for purposes of entering the Decrees, the amount of historically irrigated acreage at the Hogback and Fruitland projects is simply irrelevant.

Community Ditch Defendants further argue that expert witnesses, including Mr. Whipple, "relied upon reports and raw data collected by unidentified persons, using unidentified methods, and unspecified records." See CDD Motion at pp. 1-2. In fact, Mr. Whipple provides the basis, and sources relied upon, for each opinion offered in his affidavit. The examples

¹ Mr. Whipple's affidavit does not assert combined historic diversion rates of 524 to 1,209 cfs for the Hogback and Fruitland projects.

provided by Community Ditch Defendants all refer to Mr. Whipple's review of BIA records. Community Ditch Defendants do not provide any examples of opinions or statements in Mr. Whipple's affidavit in which he failed to provide a basis or source. Furthermore, the evidence in the record, including Mr. Whipple's affidavit, was deemed sufficient by the Court, which determined that the settlement motion should be granted and the proposed decrees entered without the need for an evidentiary hearing. See *Order Granting the Settlement Motion for Entry of Partial Final Decrees Describing the Water Rights of the Navajo Nation* entered August 16, 2013 and *Decision Regarding the Need for an Evidentiary Hearing*, entered July 12, 2013. If Community Ditch Defendants wished to explore the bases for Mr. Whipple's opinions beyond what is provided in his affidavit, they could have done so through a deposition. However, Community Ditch Defendants elected not to depose Mr. Whipple, even though the Court granted them additional time to take the depositions of three expert witnesses, including Mr. Whipple (see *Third Amended Order Granting Motions to Extend Deadlines in Part and Setting Schedule Governing Discovery and Remaining Proceedings*, entered on March 15, 2013).

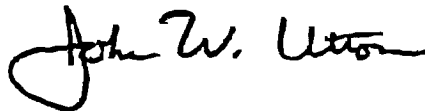
Having failed to explore the bases for Mr. Whipple's opinions through cross-examination, Community Ditch Defendants may not now complain they do not fully understand the bases for those opinions. For these reasons, the Motion for Correction of Record should be denied.

Respectfully submitted, this 20th day of September 2013.

STATE OF NEW MEXICO



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CERTIFICATE OF SERVICE

I certify that on this 20th day of September 2013, at approximately 4:00 pm, an electronic copy of this Response to Motions to Correct Record was served by attaching an electronic copy to an email sent to: wrnavajointerse@nmcourts.gov and aoccaj@nmcourts.gov and to the February 25, 2013 Amended Service List.



Misty M. Braswell