

DISTRICT COURT
SAN JUAN COUNTY NM
FILED

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

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

Plaintiff,

AB-07-1
Claims of Navajo Nation

vs.

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

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

Defendants.

DESCRIPTIVE SUMMARY: The expert affidavits were filed after the discovery cut-off, so defendants had no opportunity to depose the experts on their affidavits; the court has misunderstood what the experts actually said; the settling parties deliberately obfuscate historic versus projected uses; they confuse admissibility with reliability; the settling parties must show that the BIA data is reliable, and no one testified that it is.

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REPLY CONCERNING EXPERT AFFIDAVITS

First, most of the expert affidavits were filed in April 2013, after the court's discovery cutoff. Therefore the defendants were deprived of the opportunity to depose the experts on their affidavits.

Second, the affidavits do not actually say what the settling parties argue in their briefs. The court needs to read the affidavits themselves, not the gloss on the affidavits, and to take note of the predicate facts which are absent from the affidavits.

Third, the affidavits are craftily written to obfuscate certain key points. For example, the settling parties and their experts usually rely on a technique that might be called

“obfuscation by conjunction or disjunction.” Some examples: “historic or projected uses”; “historic and future uses”; “historic and future acreage”.

At his first hearing, Special Master Snyder tried to cut through this obfuscation technique by repeatedly asking the settling parties, “How much is past use versus future use?” He never got a straight answer.

Fourth, the burden is placed on the settling parties to show that their expert opinion testimony is based upon reliable data. In this instance none of the expert witnesses vouched for the accuracy of the underlying data on which they based their opinions. The foundation for their opinions is missing, because no one testified that BIA records and permits accurately show the number of acres actually being irrigated and cultivated at a particular time. Since the expert witnesses could not and did not vouch for the accuracy of the base data in their affidavits, this testimony could have been supplied by someone else, such as the person who actually inspected the records and assembled the data, if such a person exists. Or the settling parties could have submitted an affidavit from some BIA employee who was prepared to swear under oath that those records are accurate. The settling parties produced no such witness, by affidavit or otherwise. And if they had, the defendants would have conducted discovery to debunk those assertions.

Fifth, the settling parties are confusing admissibility and reliability. Although an expert may utilize information sources which might themselves not be admissible, this does not relieve him of the duty to show that his opinions are based on reliable data, rather than based on speculation or even worse, false data. If expert witnesses were allowed by the courts to rely on false data for their conclusions, experts would command even higher hourly rates than they do now.

Sixth, the facts about Hogback and Fruitland are disputed by Jim Rogers and Bob Oxford, among others. These witnesses have personal knowledge, so their testimony cannot be disregarded on summary judgment. There is a factual dispute in the record that precludes summary judgment for the settling parties.

Seventh, the supposed CFS numbers for Hogback and Fruitland are suspect on their face, since they are absurdly high.

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 October 1, 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: wrvajointerse@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.