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

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

Plaintiff,

v.

UNITED STATES OF AMERICA, *et al.*,

Defendants,

JICARILLA APACHE TRIBE
and the NAVAJO NATION,

Defendant-Intervenors.

CV-75-184
Hon. James J. Wechsler
Presiding Judge

SAN JUAN RIVER
ADJUDICATION

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

ORDER CONCERNING MOTIONS TO CORRECT THE AUGUST 16, 2013 ORDER REGARDING THE WATER RIGHTS OF THE NAVAJO NATION

This matter comes before the Court on five motions to correct the Court's Order Granting the Settlement Motion for Entry of Partial Final Decrees Describing the Water Rights of the Navajo Nation entered August 16, 2013 (August 16, 2013 Order).[1] The Court reviews the motions as motions for reconsideration and requests

[1]The motions for reconsideration are (1) the State's Motion to Correct Order Granting the Settlement Motion For Entry of Partial Final Decrees Describing the Water Rights of the Navajo Nation, filed September 5, 2013; (2) Motion for Correction of Factual Record and August 16 Opinion Concerning NIIP, filed September 5, 2013 by the Community Ditch Defendants; (3) Motion for Correction of Record and August 16 Opinion Concerning Expert Reports, filed September 5, 2013 by the Community Ditch Defendants; (4) Motion for Correction of Factual Record and August 16 Opinion Concerning Navajo Population, filed September 5, 2013 by the Community Ditch Defendants; (5) Motion by Robert E. Oxford for Corrections Concerning Hogback and Fruitland, filed September 5, 2013. Responses include (1) Response of the Navajo Nation and United States in Opposition to the Motions of Community Ditch Objectors and

for relief pursuant to Rule 1-060 NMRA.

Following a telephonic hearing on the Community Ditch Defendants' August 21, 2013 Motion for a Reasonable Time to Address the Issues Raised by the Court's August 16, 2013 Opinion, the Court entered its August 28, 2013 Order Granting the Community Ditch Defendants' Motion Regarding Time to File Motions to Address the Order Granting the Settlement Motion. That Order required that all motions addressing the August 16, 2013 Order be filed no later than September 5, 2013 and that any references to materials in the record before the Court on dispositive motions be specifically identified with respect to the relevant location(s) of the materials.

Being fully advised in the premises, the Court finds that one of the motions to correct the August 16, 2013 Order should be GRANTED and that four should be DENIED for the reasons set forth below.

1. State's Motion to Correct Order Granting the Settlement Motion for Entry of Partial Final Decrees Describing the Water Rights of the Navajo Nation

The State of New Mexico asks the Court to clarify that the alternate water provision under Section 9.2 of the Settlement Agreement is not conditioned on the Navajo Reservoir containing at least one million acre-feet of storage water, a finding

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Robert E. Oxford Seeking "Correction" of the Order Granting the Settlement Motion, filed September 20, 2013; and (2) the State's Response to Community Ditch Defendants' and Robert E. Oxford's Motions for Correction of Record, filed September 20, 2013. The Community Ditch Defendants filed replies on October 1, 2013, and Robert E. Oxford filed a reply on October 4, 2013.

that the Court made in its August 16, 2013 Order at page 21. The State correctly notes that the 225 cfs minimum direct-flow provision in Section 9.1 of the Settlement Agreement addresses the 225 cfs minimum direct-flow provision that is triggered when there is one million acre-feet in the reservoir:

> 9.1 Administration of Navajo Reservoir Releases.
>
> Subject to applicable federal law, whenever total storage in Navajo Reservoir is anticipated to exceed, or does exceed, a 1,000,000 acre-feet threshold at the end of May of the current year, excluding storage in any top water bank established in Navajo Reservoir pursuant to section 10401(b) of the Settlement Act, the Navajo Nation and the United States, acting in its capacity as trustee for the Navajo Nation, will not challenge the New Mexico State Engineer during the irrigation season making available to direct-flow water users in the San Juan River below Navajo Dam up to 225 cubic-feet-per-second (cfs) as measured at the San Juan River at Archuleta gauging station if inflow to the reservoir is determined to be less than 225 cfs . . .

In contrast, Section 9.2 provides for direct-flow releases from Navajo irrigation projects when the direct flow of the San Juan River is insufficient to supply current beneficial, direct-flow uses:

> 9.2 Alternative Water Source for San Juan River Uses
>
> 9.2.1 When the direct flow of the San Juan River is insufficient to supply current beneficial uses under direct-flow water rights in New Mexico, the Navajo Nation agrees to make water available from the Settlement Contract to supply the Navajo Nation's uses under the reserved rights for Shiprock municipal uses and the Hogback-Cudei and Fruitland-Cambridge irrigation projects ... provided, that:
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> (1) the maximum amount of water to be made available from the Settlement Contract for this purpose during any one year is 12,000 acre-feet ....

Accordingly, the Court grants the State's motion and modifies the last sentence of paragraph 3)b. to read: "Under the Settlement Agreement, the Navajo Nation must first utilize up to 12,000 afy of stored water from Navajo Reservoir, subject to the conditions set forth in paragraph 9.2 of the Settlement Agreement. Settlement Agreement ¶ 9.2; Leeper Aff. ¶¶ 63, 73."

2. Community Ditch Defendants' Motion for Correction of Factual Record and August 16, 2013 Opinion Concerning Navajo Population

The Community Ditch Defendants' motion to correct the August 16, 2013 Order concerning the Navajo population is one of three motions requesting the Court to correct the factual record. The Community Ditch Defendants attach four exhibits to their motion. Exhibits A, B, and C are census documents that the Community Ditch Defendants obtained from the Navajo Nation during the course of discovery. Exhibit D is an excerpt from Dr. Gretchen Greene's affidavit that was filed in support of the United States' Technical Report B. The exhibits and the manner in which the Community Ditch Defendants state that they appear in the record are:

- Exhibit A consists of four pages of population data for each Navajo Nation Chapter in Arizona, New Mexico, and Utah. This exhibit was produced in discovery by the Navajo Nation in response to the Community Ditch Defendants' requests and was provided to all parties by way of the Utton Center repository on August 17, 2012 in Responses

of the Navajo Nation to the Marshall Interests' Joint Discovery Requests Concerning Navajo Population.

- Exhibit B (also marked POP-03), "American Indian Resident Population by Chapter over Four Decades," was also produced during discovery by the Navajo Nation and was filed with the Court in its entirety on November 29, 2012 as an attachment to the Navajo Nation's Certificate of Service of Information Concerning 2010 Census.
- Exhibit C, "Navajo Nation American Indian and Non-Indian Population by Chapter, Sub-Totals by Agency, Census 2010," was produced by the Navajo Nation on August 17, 2012 in Responses of the Navajo Nation to the Marshall Interests' Joint Discovery Requests Concerning Navajo Population.
- Exhibit D consists of excerpts from Dr. Greene's affidavit, which was filed with the Court in its entirety on April 15, 2013 as an attachment to the Navajo Nation's and United States' Joint Memorandum in Support of the Settlement Motion.

The Community Ditch Defendants assert that the Court overlooked facts in the record concerning the Navajo Nation census data and, by doing so, erroneously discounted the evidence of population declines referred to in an affidavit by Jim

Rogers. The Community Ditch Defendants also argue that Dr. Greene, the United States' expert who prepared Report B, *Future Navajo Nation Population and Domestic, Commercial, Municipal & Light Industrial (DCMI) Water Need Estimates in the San Juan River Basin,* did not use the 2010 census data in her report and further did not explain the exclusion of that data from her report. Consequently, the Community Ditch Defendants conclude that there are disputed questions of fact relating to the future Navajo Nation population projections.

Exhibits A, B, and C, however, are documents that were produced during discovery, and none of the documents was presented to the Court in connection with the dispositive motions. In particular, the Exhibit A, B, and C documents were neither included nor cited in the Community Ditch Defendants' Motion for Partial Summary Judgment Concerning the Minimum Needs of the Navajo Reservation in New Mexico (filed April 15, 2013) or in their response to the Settling Parties' dispositive motions. Rule 1-056 NMRA requires that parties provide the Court with all documentation supporting or responding to a dispositive motion, or refer with specificity to the court record.

The substantive requirements of Rule 1-056 have been addressed before in this proceeding. In their responses to dispositive motions filed in May 2013, several parties argued that certain of the dispositive motions did not comply with the

requirements of Rule 1-056 in various ways. The Court explained how the motions were considered:

> In considering the dispositive motions, the Court is concerned with whether the parties have presented proper support for their positions in the form of legal analysis and/or competent evidence. The Court will therefore address the substance of the dispositive motions and will not address objections directed to the technical, as opposed to the substantive, requirements of Rule 1-056.

August 16, 2013 Order at 13.

While summary judgment is a "drastic remedy, to be used with great caution, and never as a substitute for a trial on the merits," *Fidelity National Bank v. Tommy L. Goff, Inc.*, 1978-NMSC-074, ¶ 6, 92 N.M. 106, 583 P.2d 470, it is a useful tool that saves a court and parties time and resources in resolving issues. The requirements of Rule 1-056 that both the movant and the respondent "refer with particularity to the record" are central to a court's role in evaluating a summary judgment motion. A court is not required to look through the record to find support for a party's position, in particular, when there are large volumes of record documents. *See Carmen v. San Francisco Unified School District*, 237 F.3d 1026, 1031 (9th Cir. 2001) (stating that material facts must be established by references to the district court file and set forth in the briefs). *Carmen* was decided under the previous Fed. R. Civ. P. 56(e), which

required only, like Rule 1-056, that the adverse party set forth specific facts showing the existence of a genuine issue for trial.[2] Even so, the Ninth Circuit stated:

> Requiring the district court to search the entire record for a genuine issue of fact, even though the adverse party does not set it out in the opposition papers, is also profoundly unfair to the movant. The gist of a summary judgment motion is to require the adverse party to show that it has a claim or defense, and has evidence sufficient to allow a jury to find in its favor on that claim or defense. The opposition sets it out, and then the movant has a fair chance in its reply papers to show why the respondent evidence fails to establish a genuine issue of material fact. If the district court, or later this court, searches the whole record, in practical effect, the court becomes the lawyer for the respondent, performing the lawyer's duty of setting forth specific facts showing that there is a genuine issue for trial. The movant is then denied a fair opportunity to address the matter in the reply papers.

Carmen, 237 F.3d at 1031.

The parties in this case were not ordered to file discovery documents. *See* Rule 1-005(e) NMRA (prohibiting the filing of certain discovery materials unless ordered by the court). From the outset of this case, the Court anticipated that a large volume of documents would be produced during discovery. In order to permit all parties access to these materials without burdening any party with onerous duplicating and mailing costs, the Court designated the Stell Water Ombudsman Program of the Utton Center at UNM as the Discovery Document E-Repository. *See* Notice Regarding Discovery Document E-Repository, entered February 22, 2012 and

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[2] The current Fed. R. Civ. P. 56 requires every party to supports its assertions by citing to particular materials in the record.

Order (1) Granting Settling Parties' Motion to Extend Certain Deadlines and (2) Setting Schedule Governing Discovery and Remaining Proceedings entered February 3, 2012.

The Community Ditch Defendants were required to specifically include or refer to the Exhibit A, B, and C documents in connection with the dispositive motions, for the benefit of both the Court and other parties. It is now too late in the proceedings to ask the Court to consider them, and the Court declines to do so.

In contrast to the Exhibit A, B, and C documents, the Community Ditch Defendants' Exhibit D (Dr. Greene's affidavit) was filed and is part of the record and was considered by the Court in its deliberations.

With regard to the Community Ditch Defendants' complaint that Dr. Greene did not explain her omission of the 2010 census data in her report, the Court notes that the Community Ditch Defendants had the burden of rebutting the Settling Parties' *prima facie* case regarding each element of the Settling Parties' burden of proof. The Community Ditch Defendants did not create a record in connection with the dispositive motions based on evidence that would be admissible at trial (such as pursuing the deposition testimony of Dr. Greene) on the point it now raises.

The Court addresses one further procedural matter with respect to this motion. In their October 1, 2013 Reply on Motion for Correction Concerning Navajo

Population, citing Rule 1-007.1(D) NMRA, the Community Ditch Defendants argue that because the United States, Navajo Nation, and the State of New Mexico filed no substantive response to the motion, those parties "conceded the motion." Reply at 1-2. Rule 1-007.1(D) addresses the presentation of motions:

> D. Response. Unless otherwise specifically provided in these rules, any written response and all affidavits, depositions or other documentary evidence in support of the response shall be filed within fifteen (15) days after service of the motion. If a party fails to file a response within the prescribed time period the court may rule with or without a hearing.

Nothing in Rule 1-007.1(D) would allow the Court to conclude that the opposing parties concede the motion.[3]

Accordingly, the Community Ditch Defendants' motion is denied.

3. Community Ditch Defendants' Motion for Correction of Factual Record and August 16, 2013 Opinion Concerning NIIP

The Community Ditch Defendants assert that the Court has overlooked or misapprehended the factual record concerning the Navajo Indian Irrigation Project (NIIP) and whether NIIP is practicably irrigable acreage (PIA), a term used in federal Indian water rights cases that refers to a method to evaluate whether an agricultural project is economically viable. The bases of this assertion are that no Settling Party has claimed that NIIP is PIA, and the evidence both in the record and outside of the

[3] The Community Ditch Defendants argue the same point in their October 1, 2013 Reply on Motion for Correction of Factual Record and August 16, 2013 Opinion Concerning NIIP.

record indicates that NIIP is not PIA. Implicit in the Community Ditch Defendants' motion is the suggestion that the Court specifically found that NIIP could be shown to qualify as a PIA project for purposes of evaluating "whether there is a reasonable basis to conclude that the Settlement Agreement provides for less than the potential claims that could be secured at trial." This inquiry represents one of the elements of proof that the Court established for determining whether the Settlement Agreement is fair, adequate, and reasonable. August 16, 2013 Order at 4.

To support their assertions, the Community Ditch Defendants refer to evidence of NIIP costs. Before turning to the merits of the Community Ditch Defendants' assertions, the Court notes that this evidence is not in the record and was not previously cited in connection with the dispositive motions. Specifically, on pages 6-7 of their motion, the Community Ditch Defendants refer to an excerpt from a financial statement of Navajo Agricultural Products Industries (NAPI) that is a copy of the excerpt quoted in the Community Ditch Defendants' September 26, 2012 Second Motion to Compel Discovery Concerning NIIP at pages 4-5. The actual report from which the section was excerpted was produced during discovery on August 17, 2012 by the Navajo Nation, but it was neither included with the Community Ditch Defendants' filings in connection with the dispositive motions, nor

referenced in those motions. As discussed above, the report excerpt will not be considered now.

The question of NIIP's economic viability was only one of the factors considered by the Court in its evaluation of the Settlement Agreement. In evaluating whether the Settling Parties met their burden of showing that there is a reasonable basis to conclude that the Settlement Agreement provides for less than the potential claims that could be secured at trial, the Court analyzed the Settling Parties' technical evidence that supported their case regarding future water rights claims for the Navajo Nation and the Non-Settling Parties' rebuttals. August 16, 2013 Order at 28-43. In reaching the conclusion that the Settling Parties successfully presented a *prima facie* case supporting this element of proof, the Court specifically did not base its analysis solely on a strict construction of PIA. Rather, the Court noted that cost was only one aspect of an economic analysis, August 16, 2013 Order at 38, and concluded that the Settling Parties had provided a "reasonable basis" from which to conclude that claims based on economic viability *could* be secured at trial, August 16, 2013 Order at 34 (emphasis added). The Court further concluded that, after considering the evidence presented by the Non-Settling Parties, the Non-Settling Parties did not successfully rebut the *prima facie* case. August 16, 2013 Order at 43.

Further, as explained in the August 16, 2013 Order, the Court considered several other factors in reaching its conclusion regarding the element of proof: (1) at trial, the United States could claim priority dates of "time immemorial" for Navajo Nation water rights associated with Navajo Reservation lands within the San Juan River Basin and 1849 for lands taken into trust after the 1849 Treaty (August 16, 2013 Order at 33); (2) by subordinating priorities and employing other mitigating provisions, the Settlement Agreement reduces the Navajo Nation's rights to water in relation to other users, compared to the rights likely to be secured at trial (August 16, 2013 Order at 43); and (3) the total amount of the Settlement Agreement is less than the Navajo Nation's currently, federally authorized rights to water pursuant to the 1962 NIIP Act, Pub. L. No. 87-483, 76 Stat. 96, 96-102 (current version at 43 U.S.C. §§ 620, 620a, 620d, 620f) for both NIIP and the combined Hogback-Cudei and Fruitland-Cambridge irrigation projects (August 16, 2013 Order at 21, 43).

The Community Ditch Defendants' assertions do not give the Court any reason to reconsider its order. Accordingly, the motion is denied.

4. Community Ditch Defendants' Motion for Correction of Record and August 16, 2013 Opinion Concerning Expert Reports

The Community Ditch Defendants assert that the expert reports relied on by the Court to conclude that the Settling Parties had presented a *prima facie* case supporting their burden of proof were filed but were neither admitted into evidence

nor subjected to the foundational scrutiny required of expert reports. The Community Ditch Defendants further state that the record shows that the experts' affidavits indicate that the experts relied on work done by others without checking the accuracy of the work. Consequently, the Community Ditch Defendants argue that there was no way for the Court to evaluate the weight of each expert's report. The Community Ditch Defendants' October 1, 2013 reply adds that, because most of the expert affidavits were filed after the close of discovery, the defendants were unable to depose the experts, the Court should read the affidavits and note the absence of predicate facts; and the affidavits were deliberately written as to obfuscate key points.

The Community Ditch Defendants' motion includes Exhibit A, which consists of excerpts from the affidavits of John Leeper and John Whipple, two of the Settling Parties' affiants, and Dr. Greene, author of the United States' Technical Report B. Dr. Leeper's affidavit describes the settlement process, the Settlement Agreement, and the United States' claims on behalf of the Navajo Nation. It was attached to the April 15, 2013 Joint Memorandum of the Navajo Nation and the United States in Support of the Settlement Motion. Mr. Whipple's affidavit was attached to the State of New Mexico's April 15, 2013 Memorandum in Support of Settlement Motion for Entry of Partial Final Decrees. He describes the settlement process, the Settlement Agreement, and the existing or previous, federally authorized water projects. He also

references the data from the Bureau of Indian Affairs on which he relied to describe the projects. The last page of Exhibit A is a page from Dr. Greene's affidavit. Dr. Greene certifies that she is the principal author of the report, that she has reviewed the materials summarized above (relating to Report B), and that, to the best of her knowledge, the materials she reviewed were true and correct.

The Court found that the report authors attested sufficiently to the truth and accuracy of their work, which, by implication, included the work of others. Experts are entitled to rely on other experts' data. *See* Rule 11-703 NMRA ("An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed.") The reports and supporting affidavits provided the foundation for the Court's conclusion that the Settling Parties' presented a *prima facie* case in support of the Settlement Agreement. The Community Ditch Defendants and the other Non-Settling Parties had the opportunity and the responsibility to seek discovery concerning the reports, whether by propounding interrogatories and/or deposing the primary report authors and other individuals who were identified by the United States as having information, before the close of discovery, which ended

March 31, 2013.[4] These challenges should have been raised in response to the dispositive motions, and the Court declines to consider them now.

In addition to not raising these objections in a timely manner, the Community Ditch Defendants present no basis for their assertion that the experts who prepared the expert reports failed to check the accuracy and reliability of the work done by others that was used in the reports. The Community Ditch Defendants have also failed to provide any evidence or cite any legal authority showing that the facts included in the experts' affidavits and reports would not be admissible in evidence. *See* Rule 1-056(E) (requiring supporting and opposing affidavits be made on personal knowledge and set forth such facts as would be admissible in evidence). Accordingly, the Community Ditch Defendants' motion is denied.

5. Motion by Robert E. Oxford for Corrections Concerning Hogback and Fruitland

Robert E. Oxford asserts that the Court's conclusions regarding the Hogback and Fruitland irrigation projects were erroneous, specifically, that the Court misread what Dr. Leeper and Mr. Whipple stated in their affidavits concerning the acreages

[4] On January 27, 2012 the United States filed a document titled *Technical Reports Supporting the United States' Statement of Claims of Water Rights in the New Mexico San Juan River Basin on Behalf of the Navajo Nation and Disclosures of Individuals with Information Concerning such Technical Reports.* The document describes the technical reports and names each report's author, in addition to including the names of individuals who might also have additional information concerning the reports. Counsel for the United States certified that counsel [who had previously entered appearances] were served with the document and an electronic copy of all exhibits (the reports) on a DVD, and that all exhibits were furnished to the Utton Center for posting on the website maintained for this proceeding.

of the projects. These assertions are based on Mr. Oxford's personal disagreements with the affiants' conclusions, his observations regarding the projects' diversion figures, his work at the Office of the State Engineer, and his experience that the BIA records on which the acreage figures are based are unreliable.[5]

Mr. Oxford should have raised his point regarding the unreliability of BIA data in connection with the dispositive motions, and it is too late now to do so. However, the Court takes into consideration the fact that Mr. Oxford is a non-lawyer appearing *pro se* in this proceeding, and, therefore, the Court has reviewed the Leeper and Whipple affidavits again to ensure that the reasons underlying the August 16, 2013 Order's conclusions are clear.

As discussed, one element in demonstrating that the Settlement Agreement was fair and reasonable was that there was a reasonable basis for the Court to conclude that the Settlement Agreement provides for less than the potential claims that could be secured at trial. The Court reviewed the available evidence and determined that the Settling Parties had presented a *prima facie* showing and that the Non-Settling

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[5]These specific assertions, however, were not raised in Mr. Oxford's April 12, 2013 Motion for Summary Judgment or his response to the Settling Parties' dispositive motions. Rather, in one reference on pages 3-4 of his summary judgment motion, Mr. Oxford noted an apparent conflict. While the United States' Proposed Final Judgment and Decree includes a diversion right of 48,550 acre-feet and a depletion right for 21,280 acre-feet for irrigation of 8,830 acres in the Hogback project, Mr. Whipple, on behalf of the Interstate Stream Commission, had stated that only about 4,500 acres were ever irrigated in one year. Based on Mr. Whipple's information, Mr. Oxford concluded that the larger amount of acreage should actually be categorized as a "future use" rather than an historic or existing use. Mr. Oxford reiterated his position on the historic/existing use and future use characterizations in paragraphs 10 and 13 of his affidavit attached to his May 10, 2013 Response to the Settling Parties Memorandums in Support of the Settlement Motion.

Parties' evidence did not rebut that showing. August 16, 2013 Order at 34, 43. In addition to that determination, the Court also acknowledged that the Settlement Agreement provided for less water than was authorized in the 1962 NIIP Act for both NIIP and the combined Hogback-Cudei and Fruitland-Cambridge irrigation projects. August 16, 2013 Order at 21, 43.

Another element the Court considered in evaluating whether the Settlement Agreement was fair and reasonable was whether the provisions contained in the Settlement Agreement and the Proposed Decrees would reduce or mitigate impacts on junior water rights. August 16, 2013 Order at 4. The Court found that one mitigating provision was that the combined acreage associated with the Hogback-Cudei and Fruitland-Cambridge projects was limited to 12,165 acres, less than half of the 26,000 acres authorized in the Congressional Record for the 1962 NIIP Act. August 16, 2013 Order at 21.

Mr. Oxford asserts that the BIA data is completely unreliable on the basis of his personal observations and professional experience working for the Office of the State Engineer. His personal observations, permitted by Rule 11-701 NMRA, however, are not supported by any facts that would explain his opinion. *See Santa Fe Trail Ranch II v. Board of County Comm'rs.*, 1998-NMCA-009, ¶ 15, 125 N.M. 360, 961 P.2d 785 (holding that an "affidavit without any explanation of the

underlying factual basis for its conclusions does not serve to create a material issue of fact"); *Waterfall Community Water Users Ass'n*, 2009-NMCA-101, ¶ 23, 147 N.M. 20, 216 P.3d 270 (holding that unsupported and conclusory statements by an operator of domestic water system about the source and discharge pattern of water related to a community water system "are neither competent nor admissible and are therefore insufficient to defeat summary judgment"). Mr. Oxford's professional experience might have qualified him as a Rule 11-702 NMRA expert for purposes of testifying about the unreliability of BIA data, but Mr. Oxford did not designate himself as a potential expert witness for purposes of trial.

The Court has reviewed Mr. Oxford's assertions regarding the Court's misreading the portions of the Whipple and Leeper affidavits regarding maximum diversion rates and irrigated acreages and is satisfied that the Court fully and correctly understood the projects' diversion rates and the implications of historical acreage figures. Mr. Whipple does not address maximum diversion rates in his affidavit; rather, at pp. 5-8 of his April 15, 2013 affidavit, paragraphs 1 and 2, he describes the historical genesis of the projects, the scope of existing rights, and potential future claims. Dr. Leeper did, however, testify about the historic maximum diversion rate for the Hogback-Cudei and Fruitland-Cambridge irrigation projects:

> 71. The Partial Final Decree limits the irrigation project diversions limits [sic] the maximum rate that water can be diverted at

any point in time ("maximum instantaneous diversion rate") to the same per-acre diversion rates that were used in the Echo Ditch decree. The resulting maximum instantaneous diversion rates for these projects are 221 and 100 cfs, respectively. Without the Settlement, the Navajo Nation could secure as its water rights the historic maximum instantaneous diversion rates rangi g from 524 to 1,209 cfs. As incorporated in the Partial Final Decree, the Crop Irrigation Requirements, the Field Diversion Requirements and the Project Diversion Requirements are essentially consistent with the Echo Ditch Decree methodologies. All of these values are significantly less than the claim.

Mr. Oxford's motion is denied.

IT IS SO ORDERED.

James J. Wechsler
Presiding Judge