

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

STATE OF NEW MEXICO, *ex rel.*  
State Engineer

Plaintiff,

vs.

ROMAN ARAGON, *et al.*,

Defendants.

69cv07941-MV-LFG

RIO CHAMA STREAM SYSTEM

Section 1, Chama Mainstream

Acequia de Chamita  
Subfile 267, Tract 22.17

**MOTION IN LIMINE BY STATE OF NEW MEXICO  
TO PROHIBIT OPINION TESTIMONY BY DAVID ORTIZ**

The Plaintiff State of New Mexico on the relation of the State Engineer (“State”) requests that in hearings on the disputed priority of the water rights in subfile 267 (tract 22.17), the Court prohibit opinion testimony by David Ortiz concerning the first Spanish settlement in New Mexico at the Pueblo of San Juan (1598 - 1602) (now Ohkay Owingeh), and in support states the following:

1. In their initial disclosures, Defendants David Ortiz and Cecilia Ortiz (Defendants) failed to identify an expert witness to support their claims at trial. *See Joint Status Report and Provisional Discovery Plan* at 3 (Doc. 10687, filed February 17, 2012). Defendants have not identified an expert in any supplemental disclosure. Reports from experts under Fed. R. Civ. P. 26(a) were due no later than March 15, 2012. *Id.* at 4. Defendants failed to produce such a report. Discovery in this matter closed on July 15, 2012. *Id.*
2. The only witness that Defendants have identified is David Ortiz, who is not a qualified expert and who apparently intends to testify as a lay witness.
3. Under Federal Rule of Evidence 701, lay witnesses may only offer opinions based on

their own perceptions and may not offer opinions based on scientific, technical or other specialized knowledge. Fed. R. Evid. 701.

4. Events surrounding the first Spanish settlement in New Mexico at the Pueblo of San Juan were certainly not within the personal perception of any individuals alive today including Mr. Ortiz. Mr. Ortiz has no personal knowledge of these events. In addition, any opinion testimony by Mr. Ortiz on events surrounding the Spanish settlement at the Pueblo of San Juan (1598 - 1602) would be based upon inferences from the historical record. Opinion testimony of this type is limited to individuals such as historians who may be qualified to testify as an expert by knowledge, skill, experience, training or education. *See* Fed R. Evid. 702. The specialized knowledge of historians, and their qualifications to testify as experts under Rule 702, have been recognized by the Federal Courts. *See, e.g. New York v. Shinnecock Indian Nation*, F. Supp. 2<sup>nd</sup> 185, 260-62 (E.D.N.Y. 2007), *vacated and remanded on other grounds*, 686 F.3d 133 (2nd Cir. 2012); *see also Baker v. Buffenbarger*, 2006 U.S. WL 140548, \*3, \*6 (N.D. Ill. Jan 13, 2006).

5. Since Mr. Ortiz is not an expert, nor offered as a qualified expert, he cannot offer opinion testimony on events outside his own perception. He also cannot offer opinions based on specialized knowledge such as the interpretation of the historical record in this case. As a lay witness, his testimony is limited to events within his own perception and personal knowledge. *See* Fed. R. Evid. 602, 701.

WHEREFORE the State of New Mexico requests that the Court prohibit opinion testimony by David Ortiz concerning the first Spanish settlement in New Mexico at the Pueblo of San Juan (1598 - 1602) in hearings on the disputed priority of the water rights in subfile 267 (tract 22.17).

Respectfully submitted,

/s/ Ed Newville  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 11<sup>th</sup> day of October 2012, I filed the foregoing electronically through the CM/ECF system which caused the parties listed on the electronic service list, as more fully set forth in the Notice of Electronic Filing, to be served via electronic mail, and served the following non-CM-ECF participants in the manner indicated.

Via first class mail, postage prepaid addressed as follows:

David Ortiz  
Cecilia Ortiz  
P.O. Box 1082  
San Juan Pueblo, NM 87566

/s/ Ed Newville  
EDWARD G. NEWVILLE