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

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

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,
et al.,

Defendants,

THE JICARILLA APACHE TRIBE AND THE
NAVAJO NATION,

Defendants-Intervenors.

CV-75-184
HON. JAMES J.

Presiding Judge

SAN JUAN RIVER BASIN
ADJUDICATION

Subfile AB-07-1
Claims of the Navajo Nation

DESCRIPTIVE SUMMARY: San Juan Water Commission responds in opposition to the Navajo Nation's motion for a protective order concerning NIIP discovery.

NAME OF PARTY: San Juan Water Commission

NUMBER OF PAGES: 11

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SAN JUAN WATER COMMISSION'S RESPONSE TO MOTION FOR PROTECTIVE ORDER AND RESPONSE OF THE NAVAJO NATION TO MOTION TO COMPEL CONCERNING NIIP

COMES NOW San Juan Water Commission ("SJWC"), by and through its counsel of record, TAYLOR & McCALEB, P.A., and hereby responds in opposition to the Motion for Protective Order and Response of the Navajo Nation to Motion to Compel Concerning NIIP filed October 16, 2012 (the "Motion").

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Introduction

On September 27, 2012, the Community Ditch Defendants filed a Second Motion to Compel Discovery Concerning NIIP ("Motion to Compel"). The Community Ditch Defendants objected (at 2) that the Settling Parties, including the Navajo Nation, had not adequately produced documents concerning the Navajo Indian Irrigation Project ("NIIP"), such as financial statements from years prior to 2006, documents relevant to the costs and expenses of NIIP, and documents showing the amount of water used by NIIP. In response, the Navajo Nation filed its Motion, which simply

> reasserts its objection to the original discovery for the reason that none of [the] information sought is relevant to any issue in the Navajo *Inter Se*. The Navajo Nation is entitled to a protective order pursuant to Rule 1-026(C) NMRA to prevent any further discovery of financial records, operational records, or other matters concerning practicably irrigable acreage ('PIA') of NIIP.

Motion at 3.

The Navajo Nation's Motion does not meet the test for a protective order under New Mexico Rule of Civil Procedure 1-026(C). This Court already determined that the requested NIIP information is relevant to this *inter se* proceeding. The Navajo Nation's *new* argument—that NIIP information is irrelevant because of certain language in the legislative history of the NIIP Act—has been waived because it was not raised in a timely manner. Moreover, the new argument is simply wrong as a matter of law. Thus, the Navajo Nation has not proved that the production of NIIP information would subject it to "annoyance, embarrassment, oppression or undue burden or expense," as required by Rule 1-026(C) for issuance of a protective order.

Of more concern, the Navajo Nation has asked this Court to determine a substantive legal question about the applicability of the practicably irrigable acreage ("PIA") standard to NIIP in the guise of a request for a protective order based on the ground of "relevance." SJWC disputes the Navajo Nation's newly revealed legal theory that this Court is precluded from considering the PIA status of NIIP (both its irrigated and unirrigated acreage) because legislative history purportedly indicates Congress believed, more than 40 years ago, that NIIP had "economic and engineering *feasibility*." Motion at 4 (emphasis added). SJWC requests the right to brief that legal issue thoroughly if and when the Navajo Nation files a proper motion for summary judgment. This important legal issue should not be briefed and determined through a simple discovery motion. Regardless, for the reasons discussed in Section "C" below, the Navajo Nation's contention is wrong and should be rejected.

Argument

A. This Court Previously Determined That NIIP Is a Relevant Issue in This *Inter Se* Proceeding; the Navajo Nation Waived Any Discovery Objection Concerning Alleged Congressional Pre-Determination of NIIP's Status as "PIA."

Back in June, the Navajo Nation objected to the very same discovery requests that underlie the current Motion and also objected to other NIIP discovery requested by the Cities of Aztec and Bloomfield and Gary Horner. Objections of the Navajo Nation and the United States to Discovery Requests at 18–21, 23-24, and Attachments B (at 12-14 re: Interrogatory No. 17), D (at 1–2 re: Request Nos. 1-4), H (at 4 re: Interrogatory No. 5) (June 15, 2012). This Court overruled the Navajo Nation's objections and ordered the Navajo Nation to respond to the NIIP discovery requests and to produce the requested NIIP documents. Order Concerning the Objections of the Navajo Nation, the United

States and the State of New Mexico to Discovery Requests at 5–6 (July 9, 2012) (the "Order"). In so doing, this Court held (at 3) that (i) "irrigation projects located within the Navajo Nation . . . directly relate to the potential claims that could be secured at trial; (ii) "actual water usage . . . is relevant to a PIA analysis"; and (iii) "studies assessing PIA . . . directly relate to the potential claims that could be secured at trial . . . ." Evidence concerning NIIP falls into each of these categories of relevant information. Thus, through its previous Order requiring the Navajo Nation to respond to the NIIP discovery requests, this Court already determined the relevance of those requests. In addition, after hearing, this Court entered a second order requiring the Navajo Nation to produce certain "NIIP reports, analyses, and water use records." Order Concerning Objections to Discovery Requests Ruled "Overly Broad" at 2 (Jul. 24, 2012).

Via its Motion, the Navajo Nation attempts to get a "second bite at the apple" concerning the relevance of NIIP in order to get this Court to reverse its previous ruling on the issue. In so doing, it raises a completely new relevance objection. This new objection should be rejected because, by failing to raise it in its earlier objections to the NIIP discovery, the Navajo Nation waived it. As the United States District Court for the District of New Mexico has explained, the failure to object to a discovery request (whether an interrogatory or a request for production) within the time frame fixed by the Rules of Civil Procedure constitutes waiver of the objection. *Lucero v. Martinez*, 2006 WL 1304945 at *2 (D. N.M. 2006); *see also Lucero v. Valdez*, 240 F.R.D. 591, 593 (D. N.M. 2007) ("It is well established that all objections to discovery requests must be timely or they are waived"); *United Nuclear Corp. v. General Atomic Co.*, 96 N.M. 155, 224, 629 P.2d 231, 300 (1980) (objections to interrogatories must be raised within time

provided by rule or within any extension of time granted by trial court). Here, the deadline for the Navajo Nation to specify all objections to the NIIP discovery requests was June 15, 2012. Order (1) Granting Settling Parties' Motion to Extend Certain Deadlines and (2) Setting Schedule Governing Discovery and Remaining Proceedings at 3 (Feb. 3, 2012). Further, the Navajo Nation also failed to raise the NIIP/PIA relevance issue at the July 18, 2012, hearing on its objections or in its August 17, 2012, Response of the Navajo Nation to Joint Request Concerning NIIP Project (in which the Navajo Nation agreed to produce various NIIP documents).

Significantly, the generic "not relevant" objection asserted by the Navajo Nation to the NIIP discovery requests on June 15 was not sufficient to preserve the objection it now raises. In its objection to each and every NIIP discovery request, the Navajo Nation simply asserted that the information requested is "not relevant to any issue associated with the Settlement Motion nor would the sought information lead to admissible evidence." *E.g,* Objections, Attachment D at 1. Such "boilerplate objections in response to a [discovery] request . . . are widely rejected" because they "fail[] 'to make particularized objections, . . . which constitute[s] waiver of those objections.'" *Frontier-Kemper Constructors, Inc. v. Elk Run Coal Co.*, 246 F.R.D. 522, 528 (S.D. W. Va. 2007) (quoting *Sabol v. Brooks*, 469 F.Supp.2d 324, 328-29 (D. Md. 2006)); *see also Lackey v. Mesa Petroleum Co.*, 90 N.M. 65, 68, 559 P.2d 1192, 1195 (Ct. App. 1976) (general objection that requested information is irrelevant is "insufficient"). To meet the "specificity" or "particularized objections" test, an objection must explain "why or how the request" is irrelevant. *See Athridge v. Aetna Cas. & Surety Co.*, 184 F.R.D. 181, 191 (D.D.C. 1998) (applying test to "unduly burdensome" objections). Failure to do so

constitutes waiver of the objection. *Id.*; *see also Mancia v. Mayflower Textile Servs. Co.*, 253 F.R.D. 354, 363-64 (D. Md. 2008) ("boilerplate, non-particularized objection . . . waive[s] any legitimate objection [the party] may have had"). Because the Navajo Nation was required to explain all grounds for its relevance objection "with specificity" four months before it filed the pending Motion, its new, more specific objection on relevance grounds, the new objection should be denied as waived.

B. The Navajo Nation Has Not Established That It Is Entitled to a Protective Order Under Rule 1-026(C).

Rule 1-026(C) allows a court to issue a protective order "for good cause" when "justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense." However, the Motion fails to set forth any allegation that the NIIP discovery subjects it to "annoyance, embarrassment, oppression or under burden or expense." The burden to demonstrate good cause rests on the Navajo Nation. *Krahling v. Executive Life Ins. Co.*, 1998-NMCA-071, ¶ 14, 125 N.M. 228, 959 P.2d 562. To establish good cause, the Navajo Nation must allege a "clearly defined and serious injury . . . with specificity." *Id.* at ¶ 15 (quotation marks and citation omitted). Because the Motion does not make a showing of any "clearly defined serious injury," this Court has no basis to weigh the Non-Settling Parties' "need for information against the injury that might result [to the Navajo Nation] if uncontrolled disclosure is compelled." *Id.* (citing *Pansy v. Borough of Stroudsberg*, 23 F.3d 772, 787 (3d Cir. 1994)). Accordingly, the Motion should be denied.

C. The Navajo Nation's PIA Argument Is Legally Faulty and Provides No Basis for a Determination that NIIP Information Is Irrelevant to this *Inter Se* Proceeding.

Through its Motion, the Navajo Nation hopes to obtain a ruling from this Court on a significant question of law without the burden of satisfying the summary judgment standard of Rule 1-056(C), which requires proof "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Navajo Nation asserts (at 5) that this Court is precluded from considering NIIP information because "[a]s a matter of federal law, the water rights for NIIP have been determined, and a PIA analysis is inapposite." That legal question should be resolved in a summary judgment proceeding after full briefing by all parties, and not via a discovery dispute. Nevertheless, the Navajo Nation's legal argument is simply wrong and should be rejected.

In order for this Court to evaluate whether the Navajo Settlement and proposed final decree award less water than the Navajo Nation "could have secured at trial," it must determine the amount of water to which the Navajo Nation is entitled under the PIA standard.[1] *See generally State ex rel. Martinez v. Lewis*, 116 N.M. 194, 861 P.2d 235 (Ct. App. 1993) (applying PIA standard to quantify reserved *Winters* rights of the Mescalero Apache Tribe). The Navajo Nation appears to concede (at 7) that the PIA standard applies to this Court's evaluation of the Navajo Settlement, but for the fact that NIIP is an "existing" (but incomplete) irrigation project. The Navajo Nation has provided no

[1] In its Order Establishing the Legal Standards for Evaluating the Proposed Decrees and Respective Burdens of Proof at 2-3 (Feb. 3, 2012), this Court held that the Settling Parties must prove, *inter alia*, that "the settlement is less than the potential claims that could be secured at trial . . . ."

authority for its contention that the usual PIA analysis does not apply to existing irrigation projects, other than a vague reference (at 7) to the *Lewis* court's recognition that the issue before it concerned only proposed irrigation projects.

The Navajo Nation's citation to *Lewis* does not support its position because, under the facts of that case, the Court of Appeals did not consider whether the PIA standard applies to an existing irrigation project when an Indian tribe's federal reserved *Winters* rights are being quantified. There is no language in *Lewis* that can be read to limit the application of the PIA standard to *only* "new" diversions of water, as asserted (at 7) by the Navajo Nation. Obviously, information concerning NIIP—both the completed portion and the uncompleted portion—is relevant to an evaluation of the number of acres on the Navajo Reservation that are capable of sustained irrigation, based on arability and engineering feasibility, at a reasonable cost. *Lewis*, 116 N.M. at 206, 861 P.2d at 247. While evidence of irrigation at NIIP may support a finding that the acres already irrigated meet the PIA standard, the Navajo Nation has cited no law supporting a conclusion that a PIA analysis of those acres—or especially the acres that never have been irrigated—is preempted by the mere existence of the project, as opposed to some proposed future project. Indeed, the unirrigated NIIP acres fall into the category of a proposed future project.

The Navajo Nation goes on to argue (at 4) that this Court cannot evaluate NIIP under the PIA standard because "[t]he feasibility of NIIP has already been determined by Congress." That "feasibility finding," according to the Navajo Nation, appears in a 1961 Senate report by the Committee on Interior and Insular Affairs. However, the Committee's findings were made and published two years *before* the United States

Supreme Court established the PIA standard as the method of quantifying the reserved *Winters* rights of Indian tribes in *Arizona v. California*, 373 U.S. 546, 600-01 (1963). Thus, there is no evidence of congressional consideration of the PIA standard applicable to this *inter se* under *Lewis*.

Nor would Congress have the authority to bind this Court to any such PIA analysis, assuming it did one. In New Mexico, "only the courts are given the power and authority to adjudicate water rights." *State ex rel. Reynolds v. Lewis*, 84 N.M. 768, 772, 508 P.2d 577, 581 (1973). There is no authority for the proposition that Congress can adjudicate an Indian tribe's reserved water rights through its authorization of an irrigation project; nor is there any evidence that it attempted to do so. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is"); State *ex rel. Village of Los Ranchos de Albuquerque v. City of Albuquerque*, 119 N.M. 150, 156, 889 P.2d 185, 191 (1994) (citing *Marbury*) (reviewability of legislative act by judicial branch is "implicit and inherent . . . in the division of powers between the three branches of government").

Further, the Navajo Nation's contention (at 4-5) that this Court is bound by "federal law"—meaning the congressional determination regarding the "feasibility of NIIP"—is wrong for two reasons. First, the NIIP legislation and its legislative history simply reflect the grant of authority to the federal government to construct NIIP; NIIP's feasibility under the PIA standard is yet to be determined. Second, the case cited (at 5) by the Navajo Nation for the proposition that this Court "is bound to follow federal law" does not apply here. In *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983), the United States Supreme Court addressed only the issue of state court vs. federal court

jurisdiction over the adjudication of Indian water rights under the McCarran Amendment. In so doing, the Supreme Court emphasized that its decision recognizing state court jurisdiction "in no way changes the substantive law by which Indian rights in state water adjudications must be judged. State courts, as much as federal courts, have a solemn obligation to follow federal law." *Id.* at 571. That federal law is the PIA standard established in *Arizona v. California.*

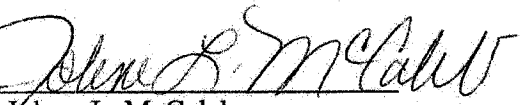
Finally, as recognized (at 6) by the Navajo Nation, it currently has a *permitted* and *contractual* right to a certain amount of water for NIIP, which has a priority date of 1955 based on the Notice of Intention to Make Formal Application for Permit in OSE File No. 2849. SJWC does not dispute the Navajo Nation's permit or contract at this time. However, the existence of the permit from the Office of the State Engineer and the contract with the United States does not make a PIA analysis "inapposite" on the ground that the Navajo Nation is "not seeking a new diversion of water for NIIP," as the Navajo Nation contends (at 6). Through the Navajo Settlement and proposed final decree, the Navajo Nation seeks to *convert* its permitted rights into federal reserved *Winters* rights. In fact, the Navajo Nation is attempting to quantify its *Winters* rights on the basis of its NIIP permit and to modify the priority date of those rights from 1955 to 1868. It is that attempted transformation of the permitted rights into reserved rights that is subject to PIA analysis. If the Navajo Nation were to accept the terms of its permit as its water right, no PIA analysis would be required because the NIIP right would be set at the amount of water beneficially used with a priority date of 1955.

Conclusion

This Court already has ruled that discovery concerning NIIP is relevant and proper. The Navajo Nation's attempt to obtain the Court's determination of a significant legal standard through a discovery motion rather than a motion for summary judgment is improper and should fail. SJWC therefore respectfully requests that the Court deny the Navajo Nation's request for a protective order. If, however, the Court decides to consider the substantive merits of the Navajo Nation's new "relevance" theory, SJWC respectfully requests that the Court either reject the Navajo Nation's contention for the reasons set forth above in Section "C", or wait to consider the issue after the Navajo Nation files an appropriate motion for summary judgment and the Court receives full briefing on the issue.

Respectfully submitted,

TAYLOR & McCALEB, P.A.

By: 

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Certificate of Service

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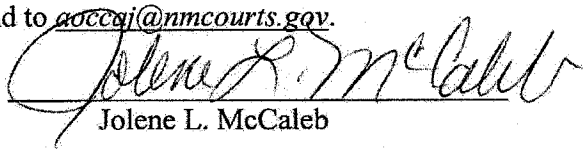

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