

DISTRICT COURT
SAN JUAN COUNTY NM
FILED

2012 DEC 20 PM 1:39

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.

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

Defendants,

SAN JUAN RIVER
GENERAL STREAM
ADJUDICATION

THE JICARILLA APACHE TRIBE AND THE
NAVAJO NATION,

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

Defendant-Intervenors.

NAME OF PARTY: San Juan Water Commission

DESCRIPTIVE SUMMARY: San Juan Water Commission's Supplemental Responses to the State of New Mexico's Discovery Requests

NUMBER OF PAGES: 8 + 2-page exhibit

DATE OF SERVICE: December 20, 2012

**SAN JUAN WATER COMMISSION'S SUPPLEMENTAL RESPONSES TO
THE STATE OF NEW MEXICO'S DISCOVERY REQUESTS**

Pursuant to the Court's August 7, 2012, Amended Order Setting Schedule Governing Discovery on the Non-Settling Parties and Remaining Proceedings, the Court's November 30, 2012, Order Concerning the Responses and Objections of the Non-Settling Parties to Discovery Requests, and New Mexico Rules of Civil Procedure 1-026, 1-033, 1-034, and 1-036, San Juan Water Commission ("SJWC") hereby supplements its previous responses to the discovery requests propounded by the State of New Mexico as follows:

*SJWC's Supplemental Response to the
State's Discovery Requests*

Definitions

a. "Settlement Act" refers to the Northwestern New Mexico Rural Water Projects Act of 2009, Public Law 111-11, 123 Stat. 1367. Copies of the Settlement Act are publically available at numerous sources including www.gpo.gov/fdsys/pkg/PLAW-111publ11/pdf/PLAW-111publ11.pdf.

b. "Settlement Agreement" refers to the settlement agreement signed by the State of New Mexico, the Navajo Nation, and the United States on December 17, 2010 and includes the partial final decree and the supplemental partial final decree. A copy of the settlement agreement of December 17, 2010 and the Partial Final Decree were filed with the Court on January 3, 2011 as attachments to the *Settlement Motion of United States, Navajo Nation and State of New Mexico for Entry of Partial Final Decrees*. The final draft supplemental partial final decree was filed with the Court on April 2, 2012 as an attachment to the *Supplemental Partial Final Judgment and Decree of the Water Rights of the Navajo Nation*.

Responses to Requests for Admission

Request for Admission No. 5: Admit that the provisions of sections 9.1, 9.2 and 9.3 of the *San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement*: (1) reduce or eliminate impacts on junior water rights in the basin in New Mexico, including the SJWC and its member entities; and (2) can be provided only through settlement, and cannot be provided by the Court through litigation of the Navajo Nation's water right claims.

RESPONSE: SJWC objects to Request for Admission No. 5 because it seeks a pure legal conclusion, rather than (i) a statement or opinion of fact or (ii) the application of law to fact. Such a request is improper under New Mexico Rule of Civil Procedure 1-036(A). See *Stark-Romero v. National R.R. Passenger Co.*, 275 F.R.D. 551, 554 (D. N.M. 2011) (interpreting Federal Rule of Civil Procedure 36(a)). SJWC also objects to Request for Admission No. 5

because it is ambiguous as it provides no basis of comparison concerning the reduction or elimination of "impacts on junior water rights in the basin in New Mexico."

Notwithstanding these objections, and in compliance with the Court's November 30, 2012, Order Concerning the Responses and Objections of the Non-Settling Parties to Discovery Requests, SJWC admits:

(1) the provisions of sections 9.1, 9.2 and 9.3 of the *San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement* reduce or eliminate impacts on junior water rights in the basin in New Mexico, including the SJWC and its member entities, in comparison with the January 3, 2011, United States' Statement of Claims of Water Rights in the New Mexico San Juan River Basin on Behalf of the Navajo Nation (the "U.S. Statement of Claims"); and

(2) the provisions of sections 9.1, 9.2 and 9.3 of the *San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement* can be provided only through settlement, and cannot be provided by the Court through litigation of the Navajo Nation's water right claims.

If SJWC has misinterpreted subparagraph (1) of the State's request for admission, SJWC requests clarification concerning the reduction or elimination of impacts on junior water rights—as compared to what? If SJWC receives clarifying information from the State, SJWC will seasonably supplement its response to this request for admission.

Answers to Interrogatories

Interrogatory No. 5: Unless your response to Request for Admission No. 5 was an unqualified admission, describe completely and in all detail every basis for your denial. Also identify all persons on whom the SJWC may rely to provide expert testimony as to the meaning, interpretation and application of these provisions.

ANSWER: Based on SJWC's objections to Request for Admission No. 5, which are specifically incorporated, SJWC objects to this interrogatory. SJWC also objects to this

interrogatory as overbroad to the extent it requests "in all detail every basis for [SJWC's denial]." Notwithstanding these objections, SJWC does not need to answer this Interrogatory No. 5 because SJWC has admitted Request for Admission No. 5 by comparing Sections 9.1, 9.3 and 9.3 of the Settlement Agreement with the U.S. Statement of Claims. If SJWC has misinterpreted the State's request for admission, SJWC will seasonably supplement both its response to the request for admission and its response to this interrogatory upon receipt of clarifying information from the State.

Interrogatory No. 6: Explain how potential testimony described in *San Juan Water Commission's Initial Disclosures in Support of its Objections to the Navajo Nation Water Rights Settlement and Proposed Decrees* regarding the history of the Animas La Plata Project and drafting and adoption of section 72-5-33 NMSA is relevant to the scope of the Navajo *inter se* proceedings.

ANSWER: In its previous answer to this Interrogatory No. 6, SJWC explained how "potential testimony . . . regarding the history of the Animas La Plata Project and drafting and adoption of section 72-5-33 NMSA is relevant to the scope of the Navajo *inter se* proceedings." In its November 20, 2012, Response to the San Juan Water Commission's Responses to the State's Discovery Requests (at 2-3), the State complained that SJWC's previous answer did not "describe any testimony and how it is relevant" or "provide a summary of that testimony." SJWC assumes those two State complaints provide the basis for the Court's order overruling SJWC's "objections" and its requirement that SJWC answer Interrogatory No. 6.¹ SJWC therefore supplements its previous answer to Interrogatory No. 6 as follows:

¹ SJWC did not object to Interrogatory No. 6, but the Court has "overruled" SJWC's "objections" and ordered that SJWC respond to the Interrogatory. See November 30, 2012, Order Concerning the Responses and Objections of the Non-Settling Parties to Discovery Requests (at 10). SJWC assumes the Court has ordered SJWC to provide information in response to the State's complaints that SJWC's previous answer did not (i) "describe any testimony and how it is relevant" or (ii) "provide a summary of that testimony."

In its September 21, 2012, initial disclosures, SJWC identified the following individuals as likely to have or to develop discoverable information about the history of the Animas-La Plata Project and/or the drafting and adoption of Section 72-5-33:

1. L. Randy Kirkpatrick (history of the Animas-La Plata Project and the drafting of Section 72-5-33)
2. Mark Duncan (history of the Animas-La Plata Project and the drafting of Section 72-5-33)
3. Larry Brewer (history of the Animas-La Plata Project and the drafting of Section 72-5-33)
4. Tom Turney (history of the Animas-La Plata Project and the drafting of Section 72-5-33)
5. Wayne Cook (history of the Animas-La Plata Project)
6. Philip B. Mutz (history of the Animas-La Plata Project)
7. Rick L. Gold (history of the Animas-La Plata Project)
8. Pat Page (history of the Animas-La Plata Project)

Currently, SJWC intends to present testimony only from the following individuals concerning the history of the Animas-La Plata Project and/or the drafting and adoption of Section 72-5-33.

A description and summary of their anticipated testimony also is provided:

1. L. Randy Kirkpatrick. Mr. Kirkpatrick, Executive Director of SJWC, is expected to testify concerning both the history of the Animas-La Plata Project and the drafting and adoption of Section 72-5-33. Mr. Kirkpatrick's testimony will address the history of the downsizing of the Animas-La Plata Project and SJWC's involvement in the amendment of Section 72-5-33 to authorize SJWC's appropriation of water released from Permit No. 2883 upon the downsizing of the Animas-La Plata Project. In sum, Mr. Kirkpatrick will testify that unappropriated water is available to satisfy SJWC's Application No. 4818 because the originally planned Animas-La Plata Project will not be constructed and the "extra" water reserved for the

Project in 1956 through Notice of Intention No. 2883, and confirmed in 1959 through Permit No. 2883, has been released for appropriation by SJWC under Section 72-5-33(A)(2). Further, because SJWC applied to appropriate the released Animas-La Plata Project water almost five years before the signing of the Settlement Agreement, the Settlement Agreement's Section 8.0 provisions awarding 50 percent of the released water to the Navajo Nation illegally interferes with SJWC's pre-existing rights. Finally, Mr. Kirkpatrick will testify that other provisions of the Settlement Agreement adversely impact SJWC's rights in Application No. 4818.

2. Tom Turney. Former New Mexico State Engineer Tom Turney is expected to testify concerning both the history of the Animas-La Plata Project and the drafting and adoption of Section 72-5-33. His testimony is expected to be similar to the testimony he previously provided in *SJWC v. D'Antonio*, No. CV-2008-1699-8, which can be found at Bates Nos. SJWC 07976-08008.

3. Wayne Cook. Former Executive Director of the Upper Colorado River Commission Wayne Cook is expected to testify concerning the history of the Animas-La Plata Project. His testimony is expected to be similar to the testimony he previously provided in *SJWC v. D'Antonio*, No. CV-2008-1699-8, which can be found at Bates Nos. SJWC 07959-07975.

Testimony concerning both the history of the Animas-La Plata Project and the drafting and adoption of Section 72-5-33 is relevant to this *inter se* proceeding because SJWC has applied to appropriate the water that has been released from the Animas-La Plata Project pursuant to Section 72-5-33 (Application No. 4818). Various terms of the Settlement Agreement interfere with SJWC's right to appropriate released Animas-La Plata Project water because there is not enough Colorado River water available within New Mexico's Colorado River apportionment to

fulfill both the Settlement Agreement and SJWC's Application No. 4818. See SJWC's Responses to the United States' Discovery Requests (Nov. 5, 2012) (responses to Interrogatory Nos. 1 and 2, at 7-12, 14-15).

Responses to Requests for Production of Documents

General Objection

SJWC objects to each request for production to the extent it seeks documents protected by the attorney-client privilege or the work product doctrine. Subject to the specific objections set forth in the responses to each individual request below, SJWC has provided responsive, non-privileged documents. SJWC already has provided a privilege log identifying documents withheld from production on the basis of the attorney-client privilege or the work product doctrine.

RFP No. 8: Produce all documents, maps, reports, analyses, studies, or communications which you intend to rely upon to support the contention in *the San Juan Water Commission's Initial Objections to the Navajo Nation Water Rights Settlement and Proposed Decrees* that "the Navajo Settlement Conflicts with the PLA Requirements of Lewis."

RESPONSE:

SJWC objects to this request for production as overbroad to the extent it seeks "all documents" on which SJWC intends to rely to support its contention. As discovery is ongoing, it is not possible at this time for SJWC to provide each and every document supporting its contention. Without waiving this objection, SJWC hereby supplements its previous response to this RFP No. 8 by stating it may rely on:

1. the various technical reports submitted by the United States on January 30, 2012, in support of the United States' January 3, 2011, Statement of Claims of Water Rights in the New Mexico San Juan River Basin on Behalf of the Navajo Nation; and

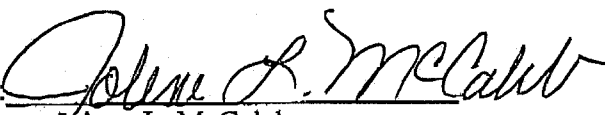
2. the September 6, 2012, State of New Mexico Technical Assessment of the San Juan River Basin in New Mexico Navajo Nation Water Rights Settlement Agreement prepared by John Whipple.

SJWC is not producing copies of these documents as they already are in the possession of the State of New Mexico. SJWC will seasonably supplement its answer to this RFP as discovery proceeds.

A Verification signed by L. Randy Kirkpatrick, Executive Director of San Juan Water Commission, is attached hereto as Exhibit A.

Dated this 20th day of December, 2012.

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

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

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CV-75-184
HON. JAMES J. WECHSLER
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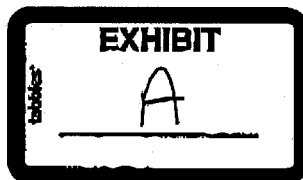
SAN JUAN RIVER BASIN
ADJUDICATION

Subfile AB-07-1
Claims of the Navajo Nation

**VERIFICATION OF SJWC'S SUPPLEMENTAL RESPONSES TO THE
STATE OF NEW MEXICO'S DISCOVERY REQUESTS**

I, L. Randy Kirkpatrick, being first duly sworn under oath, state:

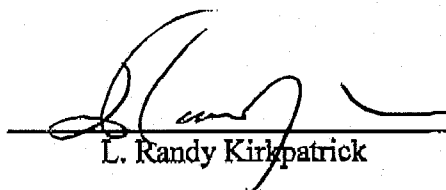
1. I am Executive Director of San Juan Water Commission. I have held this position since 1993.
2. Based on my experience as Executive Director of San Juan Water Commission, I have personal knowledge of the history of the Animas-La Plata Project, SJWC's Application No. 4818 and the issues involved in the associated litigation, *San Juan Water Commission v. D'Antonio*, the amendment of NMSA Section 72-3-33, the development of the 2007 Hydrologic Determination and appended Depletion Schedule for the State of New Mexico, SJWC's repayment contracts with the Bureau of Reclamation, State Engineer Permit No. 2883, the Navajo Nation's protest of Application No. 4818, the State Engineer's rejection of the Application, the negotiation process for the Settlement Agreement, SJWC's water rights and



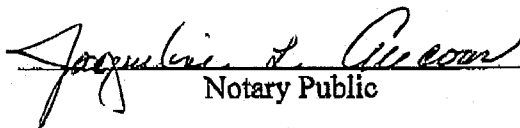
water permits, the supply of water available to meet SJWC's diversion demands, and SJWC's statements and actions taken concerning the Settlement Agreement.

3. I have participated in the preparation of and reviewed the responses set forth in San Juan Water Commission's Supplemental Responses to the State of New Mexico's Discovery Requests. The responses were prepared based on information contained within the records of San Juan Water Commission or within the documentation produced by other parties in this lawsuit.

4. The factual assertions in the San Juan Water Commission's Supplemental Responses to the State of New Mexico's Discovery Requests are true and correct to the best of my knowledge.


L. Randy Kirkpatrick

SUBSCRIBED, SWORN TO AND ACKNOWLEDGED before me this 17 day of December, 2012, by L. Randy Kirkpatrick.


Notary Public

My Commission Expires:

October 22, 2013

