

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

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

CV-75-184

Plaintiff

HON. JAMES J. WECHSLER
Presiding Judge

vs.

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

SAN JUAN RIVER
ADJUDICATION

Defendants

THE JICARILLA APACHE TRIBE AND THE
NAVAJO NATION

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

Defendant-Intervenors

NAME OF PARTY FILING THE PRESENT DOCUMENT: The United States of America.

DESCRIPTIVE SUMMARY: The United States seeks a Protective Order against all inquiry in the *Joint Discovery About Other Water Claims by the United States* reaching outside the San Juan River Basin in New Mexico and against Interrogatories Nos. 6, 7, 8, 9 and 10. The United States is entitled to a Protective Order against those Interrogatories because they are irrelevant and would be unduly burdensome to respond to.

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THE UNITED STATES' MOTION FOR PROTECTIVE ORDER

Introduction

Parties represented by Victor R. Marshall & Assocs., P.C. have served the United States with *Joint Discovery About Other Water Claims by the United States* ("Other Claims Discovery"). The Other Claims Discovery consists of ten (10) interrogatories and a related Request for Production that seek information regarding water rights claims the United States has made, or may make, on behalf of federal entities unrelated to the Navajo Nation, as well as information regarding the United States' potential exercise of regulatory "rights or duties or obligations" throughout the entire Colorado River Basin.¹

Because neither the United States' claims on behalf of other federal entities nor its potential exercise of regulatory authority have any bearing on this Court's evaluation of the Settlement Agreement, all of the Other Claims Discovery is improper and objectionable. Nonetheless, because the United States seeks to minimize the scope of any discovery dispute, we have responded to five (5) of the interrogatories – those that could be responded to without undue burden.² With respect to those interrogatories, the United States seeks only a Protective Order affirming that the scope of all discovery responses is properly limited to the San Juan River Basin in New Mexico. Additionally, the United States seeks a Protective Order barring Interrogatory numbers 6 – 9 because those interrogatories are directed at the United States' exercise of its statutory and regulatory obligations unrelated to the Settlement Agreement and

¹ Pursuant to Rule 1-026(C) NMRA, copies of the discovery requests containing objectionable requests are attached as Exhibit A. In this Memorandum, individual discovery requests will be cited by the type of request and the number. Interrogatory will be abbreviated as "Int," e.g., Int. No. 1.

² The United States' responses are subject to specific objections set forth in the *Responses of the United States to the Marshall Interests Seventh Set of Discovery Requests Concerning Other Water Claims by the United States*.

therefore will not produce information useful in evaluating the Settlement Agreement and are outside the scope of discovery as defined by this Court. Further, responding to those interrogatories, which address the entire Colorado River Basin, would be unduly burdensome as the value of the information generated would be dwarfed by the cost of obtaining it. Finally, because all of the discovery contained within the Other Claims Discovery is improper, the United States seeks a Protective Order against Interrogatory No. 10, which asks the United States to designate witnesses to testify regarding the subject matter of Interrogatories Nos. 1 - 9.

Standard of Review

This Court's July 9, 2012 ORDER CONCERNING THE OBJECTIONS OF THE NAVAJO NATION, THE UNITED STATES AND THE STATE OF NEW MEXICO TO DISCOVERY REQUESTS ("July Objections Order") recognized that although objectors must have the ability to test the strength and weaknesses of the Navajo claims, "the right to discovery is not unlimited and [discovery] must be targeted to that which permits an evaluation of the Settlement Agreement."³ *Id.* at 2 (quoting SPECIAL MASTER'S APRIL 15, 2010 REPORT . . .) (emphasis added); see also e.g., *Edens v. Edens*, 2005-NMCA-033 ¶ 29, 137 N.M. 207, 215-16 (affirming order that precluded discovery into an issue that was not before the court for resolution). In so holding, the Court applied the familiar requirement of Rule 1-026(C) NMRA that discovery be limited to subjects "relevant to the subject matter involved in the pending action." E.g., *Wallis v. Smith*, 2001-NMCA-017 ¶ 20, 130 N.M. 214, 219 (NM App. 2001) (quoting Rule 1-026(B)(1)).

³ The Court also reminded the parties that "the time line in this proceeding demonstrates the need to focus discovery." *Id.* That point has particular relevance here. As is explained below, completely responding to the Other Claims Discovery would substantially delay these proceedings.

Although a lack of relevance is one basis for a Protective Order, it is not the only basis. Rule 1-026(C) NMRA authorizes the Court to enter “any order which justice requires to protect a party from . . . undue burden or expense.” NMRA 1-026(C); *e.g.*, *Does I through III v. Roman Catholic Church*, 1996-NMCA-094 ¶ 13, 122 N.M. 307, 311 (district court has broad discretion in considering a request for a protective order). Among other reasons, “[a] request for discovery may properly be denied if the request is speculative or if such discovery would amount to a mere fishing expedition.” *Cantrell v. W & C Contracting Co., Inc.*, 112 N.M. 609, 614 (Ct. App. 1991). Further, discovery may properly be denied or limited if a party requesting discovery already has sufficient information regarding the subject matter of the proposed discovery. *DeTevis v. Aragon*, 104 N.M. 793, 798, 727 P.2d 558, 563 (Ct. App. 1986). Finally, and of particular importance here, discovery may be denied where the burden or expense of responding to the discovery outweighs its likely benefit. *E.g.*, ORDER DENYING THE UNITED STATES’ MOTION FOR RECONSIDERATION . . . at 2 (Dec. 20. 2012).

The Scope of the United States’ Request for a Protective Order

Interrogatory numbers 1, 2, 4 and 5 ask the United States to identify potential “other” water right claims it may make within the San Juan River Basin. Although those claims can shed no light on this Court’s review of the Settlement Agreement, and though the United States has asserted specific objections to those interrogatories, the United States is providing responsive information for potential claims within the San Juan River Basin *in New Mexico*.

Thus the United States seeks a Protective Order against those Interrogatories only to the extent the interrogatories seek information regarding potential claims outside the State of New Mexico.⁴

Interrogatory No. 6 requests that the United States identify any “*other* claims or rights or duties or obligations”⁵ potentially affecting water flow or the use of water in New Mexico. In other words, the interrogatory asks the United States to identify any statutory or regulatory authority or obligations *unrelated to the Settlement Agreement* that might affect water flow or the use of water anywhere in New Mexico. The request is not only unduly broad in scope,⁶ but more importantly here, the United States’ potential to exercise its regulatory through means other than the Settlement has no bearing on evaluation of the Settlement. Moreover, the request is overly broad geographically because it is not limited to seeking information within the San Juan River Basin in New Mexico. In fact, it seeks information regarding the United States exercise of its regulatory authority both within the San Juan River Basin outside of New Mexico and within the State of New Mexico outside of the San Juan River Basin.

⁴ Pursuant to the Court’s ORDER SUMMARIZING DISCOVERY ACTIVITIES DISCUSSED AT THE NOVEMBER 6, 2012 DISCOVERY CONFERENCE (November 16, 2012), the United States asked Mr. Marshall to resolve the parties’ dispute regarding Interrogatories numbers 1, 2, 4 and 5 by agreeing to confine his requests to the San Juan River basin in New Mexico. Mr. Marshall declined to do so.

⁵ The request for information regarding “claims” in Interrogatory No. 6 merely repeats requests made in prior Interrogatories. *See* Exhibit A at Ints. Nos. 1, 2, 4 and 5. Accordingly, the United States’ Motion focuses on the Interrogatory’s request regarding the United States “rights or duties or obligations;” *i.e.*, the United States’ regulatory obligations and authority.

⁶ Among the many statutes which might create a “right or duty or obligation” potentially affecting water flow or the use of water are the Comprehensive Environmental Response, Compensation, and Liability Act (42 U.S.C. § 9601 *et seq.*); the Safe Drinking Water Act (42 U.S.C. § 300f *et seq.*); the Federal Water Pollution Control Act (33 U.S.C. § 1251 *et seq.*); the Endangered Species Act (16 U.S.C. § 1531 *et seq.*); the Resource Conservation and Recovery Act (42 U.S.C. § 6901 *et seq.*); the Federal Power Act (16 U.S.C. § 791a *et seq.*), the Mexican Water Treaty of 1944, the Colorado River Compact of 1922, the Upper Colorado River Basin Compact of 1948, the La Plata River Compact and the Animas-La Plata Project Compact.

The United States seeks a Protective Order against Interrogatories Nos. 7, 8 & 9 because they collectively seek the identification of any “other water rights *or obligations*,” anywhere within the Colorado River basin which “might directly or indirectly affect the amount of water available for diversion or use in New Mexico.”⁷ The interrogatories are improper because they seek irrelevant information regarding the United States’ exercise of its regulatory authority and are so broad they would be unduly burdensome to respond to.

Finally, because all of the Other Claims Discovery is addressed to matters unnecessary to permit an evaluation of the Settlement Agreement, the United States seeks a Protective Order against Interrogatory No. 10, which asks the United States to identify witnesses to provide deposition testimony regarding the subject matter of Interrogatories Nos. 1 – 9.

Argument

I. THE UNITED STATES IS ENTITLED TO A PROTECTIVE ORDER LIMITING THE SCOPE OF ALL RESPONSES TO THE SAN JUAN RIVER BASIN IN NEW MEXICO AND PRECLUDING INQUIRY INTO POTENTIAL RIGHTS, DUTIES OR OBLIGATIONS OF THE UNITED STATES.

A. The United States Is Entitled to a Protective Order Against Interrogatories 6, 7, 8 & 9 Because its Statutory and Regulatory Rights, Duties and Obligations Have No Bearing on Evaluation of the Settlement.

As was explained above, Interrogatory No. 6 asks the United States to identify any “rights or duties or obligations” which might affect water flows in the San Juan River Basin, or the amount of water which can be diverted or consumed in New Mexico. Exhibit A, Int. No. 6. Similarly, Interrogatories 7, 8 and 9 ask the United States to identify “obligations” within the Colorado River Basin which might directly or indirectly affect the amount of water available for diversion or use in New Mexico.

⁷ The Interrogatories differ geographically in that Interrogatory No. 7 addresses the Upper Basin of the Colorado River, Interrogatory No. 8 the Lower Basin and Interrogatory No. 9, the Colorado River itself.

This Court has already recognized that inquiry into the United States' regulatory "rights, duties and obligations" must be barred – even if those obligations potentially affect water use – because it has no bearing on any issue before this Court. For instance, Mr. Horner's *First Set of Interrogatories to the United States* included an interrogatory which sought to have the United States explain the application of Section 7 of the Endangered Species Act "ESA" to the flow of water within the San Juan River Basin and the application of the ESA to the Navajo Nation and the Settlement. The Court sustained the United States' objections to that interrogatory. July Objections Order at 10 (ruling on Horner Int. No. 23). Similarly, the Court sustained objections to discovery regarding the State's authority to prevent or require the release of water from federal projects. *Id.* (ruling on Horner Int. No. 33).

The Court's holdings in that regard are unquestionably correct. First, as the United States has explained previously, the waiver of sovereign immunity under which the United States is participating in these proceedings does not extend to review of agency administrative decisions. *E.g., In Re: the Application for Water Rights of United States of America*, 101 P.3d 1072, 1079-80 (Colo. 2004) ("The McCarran Amendment does not assert or imply that a state court would have jurisdiction to review the decision making process of federal entities.").

Second, the discovery addresses United States' "other" rights, duties and obligations, *i.e.*, those not derived from the Settlement. Those obligations simply have no bearing on this Court's review of the Settlement, and information regarding the United States' other obligations would shed no light on any of the four criteria this Court is applying to review of the Settlement. *See* AMENDED ORDER ESTABLISHING LEGAL STANDARDS at 3 (April 19, 2012) ("ORDER ON STANDARDS"). For instance, it may be that the United States has, or someday will,

condition use of a federal facility in some way that potentially affects flows in a stream within the San Juan Basin in New Mexico. But that exercise of the United States' regulatory authority would not be required by, or pursuant to, the Settlement. Thus it cannot inform the Court's consideration of any of the four criteria the Court has identified. Moreover, the United States' exercise of its regulatory authority will continue pursuant to the relevant statutes regardless of this Court's ruling on the Settlement.

Third, as this Court has recognized, a mere relation to potential water use is not enough to establish relevancy to this proceeding. This Court's July Objections Order recognized that questions related to the available water supply in the San Juan Basin *may* be relevant, but only if they "relate[] to the Settling Parties' obligation to demonstrate that 'the provisions contained in the Settlement Agreement will reduce or eliminate impacts on junior water rights' [or] address issues of additional releases and water administration under the Settlement Agreement." July Objections Order at 3. Interrogatories directed at the United States potential exercise of its regulatory authority do neither.

Finally, even if the United States' "other" rights, duties and obligations could somehow be construed as relevant to this proceeding, there still would be two good reasons to award the United States a Protective Order. One, the burden and expense of responding would far outweigh the likely benefit. The potentially relevant statutes identified in Footnote 6 are administered by a host of different federal agencies, the vast majority of which are not participating in these proceedings. Those agencies have countless offices scattered throughout the Colorado River Basin. Those offices may or may not have records of regulatory actions falling within the scope of the discovery requests, but even merely ascertaining whether they do

would be an expensive and time consuming process that would only serve to delay these proceedings.

Two, responding would require the United States to speculate on actions it might – or might not – take in the future. As this Court has implicitly recognized, discovery which requires speculation is improper. *Id.* at 7 (ruling on B Square discovery); *see also Cantrell v. W & C Contracting Co., Inc.*, 112 N.M. 609, 614 (Ct. App. 1991) (“[a] request for discovery may properly be denied if the request is speculative or if such discovery would amount to a mere fishing expedition”).

B. The United States is Entitled to a Protective Order Limiting its Obligation to Respond to Matters Inside the San Juan River Basin in New Mexico.

This Court’s July Objections Order repeatedly found discovery addressed to matters outside the San Juan River Basin in New Mexico improperly broad. June Objections Order at 10 (ruling on Horner Int. Nos. 8, 14, 15). Again the Court was unquestionably correct in its ruling because the potential effect of actions outside the San Juan River Basin in New Mexico are so attenuated that the cost of identifying and documenting them greatly exceeds the value of the information to be obtained.

The United States has singled out Interrogatories 7, 8 and 9 because they are addressed to the entire Colorado River Basin and thus are even more distant from these proceedings and particularly egregious. While Interrogatories 7 – 9 are nominally directed to water availability in New Mexico, responding would require the United States to comb records from numerous federal agencies and offices scattered throughout the Colorado River Basin, an area of approximately 246,000 square miles. The burden and expense of surveying every federal office within that area would be astronomical. In that sense, the Interrogatories are no different than Mr. Horner’s Interrogatory No. 13, which asked the United States to address water use, and

specifically identify federal water use, throughout the Colorado River Basin. This Court properly barred that Interrogatory and should bar the Marshall Interests' Interrogatories 6, 7, 8 and 9 as well. *See* July Objection Order at 10 (ruling on Horner Int. No. 13).

C. The United States is Entitled to a Protective Order Against Interrogatory No. 10 Because the United States Should Not be Burdened With Providing Testimony on Irrelevant Matters.

Interrogatory No. 10 asks the United States to designate witnesses to testify to the subject matter of Interrogatories Nos. 1 – 9. As is set forth above, Interrogatories Nos. 6 – 9 address the United States' potential exercise of its regulatory authority and are patently irrelevant. Although the United States has responded to Interrogatories Nos. 1 – 5 to the extent they seek information within the San Juan River Basin in New Mexico, the United States has done so solely to limit the scope of the discovery dispute placed before this Court and without waiver of its objection that the requests are irrelevant. And irrelevant they are. Interrogatory No. 3 is irrelevant for the same reason as Interrogatories 6 – 9, it addresses the United States' regulatory authority.⁸ Interrogatories Nos. 1, 2, 4 & 5, while at least addressed to water rights issues, are no more relevant. Simply put, what claims the United States may anticipate filing on behalf of other federal agencies or other tribes has no bearing on any of the criteria set by this Court for review of the Settlement. A Protective Order is warranted because no party should be burdened with having to provide witnesses and deposition testimony on irrelevant subject matter. *See Paragon Foundation, Inc. v. N.M. Livestock Board*, 2006-NMCA-004 ¶ 33, 138 N.M. 761, 769 (discovery which would “serve[] no purpose” is properly barred); *see also e.g., Jimenez v.*

⁸ Unlike Interrogatories 6 – 9, which seek information and speculation on the United States' exercise of any regulatory authority throughout the Colorado River Basin, Interrogatory No. 3 seeks information regarding the application of the Endangered Species Act (“ESA”) at a particular location. This Court has already ruled inquiry into the potential application of the ESA improper. July Objection Order at 10 (ruling on Horner Int. No. 23).

City of Chicago, 733 F.Supp.2d 1268, 1273 (W.D. Wash. 2010) (production of information that is not relevant is an inherently undue burden and appropriately barred).

Conclusion

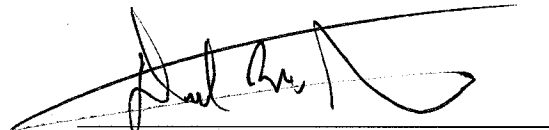
For the reasons set forth above, the United States is entitled to a Protective Order directing that:

1. In responding to discovery, the United States is not obligated to address matters arising outside of the San Juan River Basin in New Mexico.
2. Interrogatories 6, 7, 8, 9 and 10 are quashed.

DATED this 28th day of December, 2012.

Respectfully Submitted,

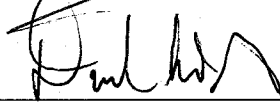
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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of December, 2012, a true and correct copy of the forgoing was served on all parties by attaching a copy of said document to an email sent to wrnavajointerse@nmcourts.gov.



DAVID W. GEHLERT