

DISTRICT COURT
SAN JUAN COUNTY NM
FILED

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

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

Plaintiff,

vs.

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

Defendants.

D-1116-CV-75-184
HON. JAMES J. WECHSLER
Presiding Judge

SAN JUAN RIVER
GENERAL STREAM
ADJUDICATION

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

NAME OF PARTY: Navajo Nation.

DESCRIPTIVE SUMMARY: The Navajo Nation provides notice of a discovery dispute with the Community Ditch Defendants concerning the *Navajo Nations' Discovery Requests of the Marshall Interests*.

NUMBER OF PAGES: 54 (9 page notice plus 45 pages of attachments).

DATE OF FILING: February 1, 2013.

**THE NAVAJO NATION'S NOTICE OF
DISCOVERY DISPUTE WITH THE COMMUNITY DITCH DEFENDANTS**

Pursuant to the Court's Order of November 19, 2012, the Navajo Nation provides notice of a discovery dispute with the Community Ditch Defendants.

On November 2, 2012, the Navajo Nation served the Community Ditch Defendants with the *Navajo Nation's Discovery Requests of the Marshall Interests* (a copy of which is attached as Exhibit A).¹ The Navajo Nation primarily sought to inquire into the bases for various statements

¹ The discovery was directed to "the Marshall Interests" because of the ongoing uncertainty as to the identity of the objecting parties purported to be represented by Victor R. Marshall & Associates, P.C. The discovery also sought to ascertain the identity of the parties represented by that firm.

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asserted in the *Answer, Objections, and Counterclaim by Community Ditch Defendant-Counterclaimants* (filed Oct. 19, 2012) (“Community Ditch Objections”).

The responses filed by the by Community Ditch Defendants included objections to every discovery request. *See Responses by Community Ditch Defendant-Counterclaimants to Navajo Nation’s Discovery* (filed Nov. 13, 2012) (“Community Ditch Responses”) (a copy of which is attached as Exhibit B). Subsequently, the Navajo Nation joined with the United States in responding to the objections raised by the Community Ditch Defendants and other non-settling parties. *The Navajo Nation’s Joinder in the United States’ Response to Discovery Objections of Non-Settling Parties* (filed Nov. 20, 2012).

In resolving the matter of the non-settling parties’ discovery objections, the Court determined that the following discovery sought by the Navajo Nation is “relevant, and that supplemental responses, if any, [would be] due Dec. 21, 2012:

Interrogatories 8, 11, 12, 13, 15, 18, 19, 20, 22, 26, and 28.

Requests for Production 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32.”

Order Concerning the Responses and Objections of the [N]On-Settling Parties to Discovery Requests (filed Nov. 30, 2012) (“Discovery Objections Order”) at 9. The Court also clarified that the “parties shall follow Rule 1-033(C)(1) with respect to the requirement that interrogatories be responded to under oath.” *Id.* at 3, ¶ 6.

To date, the Community Ditch Defendants have not supplemented their initial discovery responses of November 13, 2012. The Navajo Nation and the Community Ditch Defendants disagree about two major issues. First, the parties disagree whether the each of the Community Ditch Defendants must verify their respective answers to each interrogatory. Second, they disagree whether the Community Ditch Defendants are required to supplement their initial

responses in light of the Discovery Objections Order. Counsel for the Navajo Nation and counsel for the Community Ditch Defendants have been unable to resolve these matters. The e-mail exchanges between counsel discussing the two issues are attached as Exhibits C and D, respectively.

I. Each of the Community Ditch Defendants should be required to verify the interrogatories submitted on their behalf.

The discovery served on the Community Ditch Defendants was directed to:

Each Person and Organization (1) who has filed a notice of intent to participate; (2) who objects to the Settlement Motion; and (3) who is represented by Victor Marshall and/or Victor Marshall and Associates.

Navajo Nations' Discovery Requests of the Marshall Interests at 1. The Instructions made it clear that “**Specific Responses to Each Discovery Request By Each Objecting Party [was] Required.**” *Id.* at 2 (emphasis in original). The responses to the discovery requests were signed by Victor R. Marshall, counsel for the Community Ditch Defendants; none of the interrogatory answers were verified as required by Rule 1-033(C)(2), NMRA. On January 6, 2013, Undersigned counsel notified Mr. Marshall by e-mail that the responses were not verified. Almost two months after the Community Ditch Responses was filed, Mr. Marshall filed with the Court an affidavit from Jim Rogers, purporting to verify the interrogatory answers. *Verification* (filed Jan. 10, 2013). Although the *Verification* does not describe Mr. Rogers capacity to execute the verification, Mr. Marshall advised counsel for the Navajo Nation that Mr. Rogers is a director and the secretary/treasurer of the San Juan Agricultural Water Users Association (“SJAWUA”), one of the twenty five (25) organizations Mr. Marshall entered an appearance on behalf of on September 15, 2011. Given the description provided by Mr. Marshall of Mr. Rogers’ official position, the Navajo Nation assumes that the Mr. Rogers’ verification was

submitted on behalf of SJAWUA; Mr. Rogers would not appear to lack authority to verify the responses for any Community Ditch Defendant other than himself or the organization he represents. Indeed, Rule 1-033 simply does not permit a single party to verify answers to interrogatories on behalf of any other party. *See Nagler v. Admiral Corporation*, 167 F.Supp. 413 (S.D.N.Y 1958) (“There is no authorization either in the rules or in the orders heretofore entered for the so-called ‘consolidated answers’ in which the four plaintiffs jointly answer the bulk of the interrogatories. Rule 33 requires that interrogatories shall be answered ‘separately and fully under oath’. The order of [the court] cannot be construed to authorize the plaintiffs to ‘consolidate’ their answers as they have done.”) No verifications were provided on behalf of the other twenty-four organizations or any of the individuals Mr. Marshall purports to represent. *See Notice of Current Representation in Light of Order Granting Motions to Strike* (filed Dec. 12, 2011) at 2 (identifying as clients “[t]hose persons who filed notices of intent to participate listing the [Marshall] firm by name by the court-established deadline of September 16, 2011”).

Mr. Marshall was required by the Court’s Order of November 30, 2011 to identify, within 45 days of that order, those parties with whom he has an attorney-client relationship. *Memorandum Opinion and Order Granting Motions to Strike* (filed Nov. 30, 2011) at 22. At no time has Mr. Marshall disclosed to the Court or to the Settling Parties a comprehensive list of the parties he purports to represent. The Navajo Nation is entitled to know who the objectors are and the bases of their objections. The Navajo Nation is also entitled to know whether the responses provided by the Community Ditch Defendants reflect the views of the objecting parties, or are just the views of their counsel.

The Court should order Mr. Marshall to have each of the Community Ditch Defendants who wish to continue participating in the Navajo *Inter Se* to read the Community Ditch Responses and to verify the answers to interrogatories pursuant to Rule 1-033.

II. The Community Ditch Defendants should be required to provide supplemental responses to the discovery.

The Discovery Objections Order identified the following discovery requests by the Navajo Nation as “Discovery sought is relevant, supplemental responses, if any due December 21, 2012:

Interrogatories 8, 11, 12, 13, 15, 18, 19, 20, 22, 26, and 28.
Requests for Production 5, 6, 7, 8, and 10 through 32.”

Discovery Objections Order at 9. The Court defined the phrase “Discovery sought is relevant, supplemental responses, if any, Due December 21, 2012” as meaning “the Non-Settling Parties’ responses that may be inadequate may be supplemented with information no later than December 21, 2012.” *Id* at 4. The Community Ditch Defendants did not submit supplemental responses to the Navajo Nation’s discovery requests. The Community Ditch Defendants’ responses were inadequate for each discovery request for the reasons stated below.

The responses to Interrogatories 8, 11, 13, 18, 19, and 20 simply allege that the Settling Parties or other parties have information that might support various allegations asserted in the Community Ditch Objections. The interrogatories did not request identification of who might have information to support the allegations made, but requested the bases that the Community Ditch Defendants had for making the allegations. The responses were inadequate. In the e-mail correspondence with counsel for the Community Ditch Defendants, Mr. Marshall asserted:

We already answered them. If and when the plaintiffs answer our discovery requests, and we have time to digest the info, we will supplement per the Rules of Civil Procedure.

E-mail of January 30, 2013 (attached as Ex. D). The fact that a response was made to an interrogatory does not mean the response was adequate. *See* Discovery Objections Order at 4. Moreover, a response to an interrogatory concerning the bases of the allegations made in the Community Ditch Objections cannot assert that a response will be supplemented once additional discovery is conducted. In this case, the Community Ditch Objections were signed by Mr. Marshall on October 19, 2012, as counsel for the Community Ditch Defendants. Mr. Marshall's signature "constitutes a certificate that [he] has read the pleading, . . . , that the best of [his] knowledge, information and belief there is good ground to support it; and that is not interposed for delay." Rule 1-011(A), NMRA. Since Mr. Marshall certified that there were good grounds for the allegations made in the Community Ditch Objections, the interrogatories can be answered without additional discovery. The Court should order the Community Ditch Defendants to provide supplemental responses to Interrogatories 8, 11, 13, 18, 19, and 20.

Interrogatory 12 requested the basis for the statement at paragraph 108 of the Community Ditch Objections that "because of NIIP's geographical location, NIIP's transportation costs are high, which increases its costs and reduces the prices buyers will pay for its products." The response that "NIIP is located many miles from a railway, an interstate, or a navigable river" does not provide any basis for the allegation that NIIP's transportation costs were high. The response was inadequate, and the Court should order the Community Ditch Defendants to provide a supplemental response to Interrogatory 12.

Interrogatory 15 requested the basis for the statement found in paragraph 111 of the Community Ditch Objections that, "in the river valley, the Navajo Nation has claimed amounts of acreage and amounts of water and priority dates which are grossly excessive and not supported by the facts." The response that the "purported hydrographic survey prepared for this

case cannot be trusted” is unresponsive and inadequate. The Court should order the Community Ditch Defendants to provide a supplemental response to Interrogatory 15.

Interrogatory 22 requested the basis for the statement found in paragraph 142 of the Community Ditch Objections “that the proposed agreement would give the Navajo Nation far more water than is needed to meet the minimum needs of the Navajo population living on the reservation in New Mexico.” The Community Ditch Defendants were asked to identify and describe completely and in all detail the amount of water that is needed to meet the “minimum needs of the Navajo population living on the reservation in New Mexico.” The response that the “Defendants cannot quantify this amount at this time, but the amount is far less than the amounts in the proposed agreement” was inadequate. The Court should order the Community Ditch Defendants to provide a supplemental response to Interrogatory 22.

Interrogatory 26 requested the basis for the statement found in paragraph 147 of the Community Ditch Objections “that the amount of water needed for the minimal needs of 40,000 people is much smaller than the amounts provided in the Settlement Agreement.” The Community Ditch Defendants were asked identify and describe completely and in all detail the amount of water that is needed for the “minimal needs of 40,000 people.” The response that “[r]oughly 40,000 members of the Navajo Tribe do not need 608,000 acre feet of water in order to live on the reservation in New Mexico” was inadequate. The Court should order the Community Ditch Defendants to provide a supplemental response to Interrogatory 26.

Interrogatory 28 requested, pursuant to Rule 30(B)(6), that the Community Ditch Defendants “designate one or more persons who may be deposed or testify regarding the substance the responses to the RFA, Interrogatory Nos. 1 – 27, and RFP Nos. 1 – 32.” The “preliminary identification of witnesses filed November 13, 2012” was an inadequate response.

The Court should order the Community Ditch Defendants to provide a supplemental response to Interrogatory 28 and name their Rule 30(B)(6) witnesses.

With respect to the Requests for Production, the Community Ditch Defendants did not produce a single document, nor did they identify a single document, with the exception of a quote from the book *Blood and Thunder*. The responses to Requests for Production simply incorporated their responses made to the interrogatories and are inadequate. The Court should order the Community Ditch Defendants to provide supplemental responses to Requests for Production 5, 6, 7, 8, and 10 through 32.

Respectfully submitted this 1st day of February, 2013.

NAVAJO NATION



Stanley M. Pollack
Navajo Nation Department of Justice
Post Office Drawer 2010
Window Rock, Navajo Nation (AZ) 86515
(928) 871-7510

Samuel D. Gollis, Attorney at Law, P.C.
901 Rio Grande Boulevard, Suite F-144
Albuquerque, New Mexico 87104
(505) 883-4696

Attorneys for the Navajo Nation

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January, 2013 an electronic version of *The Navajo Nation's Notice of Discovery Dispute with the Community Ditch Defendants* was served by electronic mail to wnavajointerse@nmcourts.gov and aoccaj@nmcourts.gov and to the following distribution list:

Name	Representing	e-mail
Seth R. Fullerton	ABCWUA & City of Espanola	srfullerton@newmexicowaterlaw.com
Jay F. Stein	ABCWUA & City of Espanola	jfstein@newmexicowaterlaw.com
Justin B. Breen	Cities of Aztec & Bloomfield	jbb@keleher-law.com
Richard B. Cole	Cities of Aztec & Bloomfield	rbc@keleher-law.com
Cassandra R. Malone	Cities of Aztec & Bloomfield	crm@keleher-law.com
Richard T. Tully	B-Square Ranch	tullylawfirm@qwestoffice.net
Maria O'Brien	BHP Navajo Coal and Enterprise Field Services	mobrien@modrall.com
Christina C. Sheehan	BHP Navajo Coal and Enterprise Field Services	ccs@modrall.com
Rebecca Dempsey	Bloomfield Schools	rdempsey@cuddymccarthy.com
Victor R. Marshall	Community Ditch Defendants	victor@vrmarshall.com
Adam G. Rankin	Conoco Phillips & EPNG	agrakin@hollandhart.com
Mark Sheridan	Conoco Phillips & EPNG	msheridan@hollandhart.com
James C. Brockmann	City of Gallup	jcbrockmann@newmexicowaterlaw.com
Kyle Harwood	HMC Leasing	kyle@harwood-consulting.com
Herbert A. Becker	Jicarilla Apache Nation	herb.becker@jaassociatesnm.com
Natasha Cuylear	Jicarilla Apache Nation	natasha.cuylear@jaassociatesnm.com
Gary Risley	La Plata Acequia Assn.	gary@risleylaw.net
Priscilla A. Shannon	McCarty Trust	pshannonlaw@yahoo.com
Arianne Singer	State of New Mexico	arianne.singer@state.nm.us
John W. Utton	State of New Mexico	jwu@sheehansheehan.com
Robert E. Oxford	Pro Se	bjoxford@yahoo.com
Gary L. Horner	Pro Se	ghorner@zianet.com
Jolene L. McCaleb	San Juan Water Commission	jmccaleb@taylormccaleb.com
Liz N. Taylor	San Juan Water Commission	etaylor@taylormccaleb.com
David Gehlert	United States	david.gehlert@usdoj.gov
Andrew J. "Guss" Guarino	United States	guss.guarino@usdoj.gov
Leander Bergen	Ute Mountain Ute Tribe	lbergen@nativeamericanlawyers.com
Celene Hawkins	Ute Mountain Ute Tribe	chawkins@utemountain.org
Peter Ortego	Ute Mountain Ute Tribe	portego@utemountain.org



Stanley M. Pollack

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

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

Plaintiff,

vs.

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

Defendants,

THE JICARILLA APACHE TRIBE AND THE
NAVAJO NATION,

Defendant-Intervenors.

D-1116, CV-75-184
HON. JAMES J. WECHSLER
Presiding Judge

SAN JUAN RIVER
GENERAL STREAM
ADJUDICATION

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

NAME OF PARTY: The Navajo Nation

DESCRIPTIVE SUMMARY: The Navajo Nation's discovery requests of the Marshall Interests

NUMBER OF PAGES: 14

DATE OF Service: November 2, 2012

NAVAJO NATIONS' DISCOVERY REQUESTS OF THE MARSHALL INTERESTS

To: Each Person and Organization (1) who has filed a notice of intent to participate; (2) who objects to the Settlement Motion; and (3) who is represented by Victor Marshall and/or Victor Marshall and Associates

c/o Victor R. Marshall

Counsel of Record for San Juan Agricultural Water Users Association; Hammond Conservancy District; Bloomfield Irrigation District; various ditches; and various members thereof

Victor R. Marshall & Associates, P.C.

12509 Oakland NE

Albuquerque, NM 87122

Pursuant to the Court's order, the Navajo Nation, in coordination with the United States and the State of New Mexico, submits the discovery requests described below to each client (whether an organization or natural person) of Victor R. Marshall and/or Victor R. Marshall & Associates, P.C. who has previously submitted a Notice of Intent to Participate in the above-

captioned sub-file proceeding (otherwise referred to as the “Navajo *Inter Se* Proceeding”) and who objects to the Settlement Motion¹. See *Amended Order Setting Schedule Governing Discovery on the Non-Settling Parties and Remaining Proceedings* (Aug. 7, 2012). Pursuant to Rules 26, 33, 34, and 36 of the New Mexico Rules of Civil Procedure, **each** Marshall Interest is directed to separately respond to the discovery requests (requests for admission (“RFA”), interrogatories, and requests for production of documents (“RFP”)) provided below.

Instructions

Specific Responses to Each Discovery Request By Each Objecting Party Required: Each person or entity identified above is instructed to respond to each and every interrogatory, RFP, and RFA in writing and completely. Responses to interrogatories must be provided under oath. Rule 33(C)(1), NMRA. In the event you have an objection to any discovery request, you must specifically describe your objection and you must nonetheless respond to the discovery request. If you find any request vague or ambiguous, you must nonetheless respond to the discovery request to the best of your ability and state any assumptions or limitations that you made to formulate a response to the discovery request.

Publically Available Documents: For any document requested, if your response is that such document need not be produced because it is publically available and easily accessible by the Settling Parties at an Internet location, provide the specific uniform resource locator (URL) or Internet/Web address where the document can be specifically found.

Definitions

“**Answer, Objections, and Counterclaim**” refers to the Answer, Objections, and Counterclaim by Community Ditch Defendant-Counterclaimants filed on October 19, 2012, in this proceeding by the Marshall Interests.

¹ Throughout these discovery requests these individuals (whether an organization or a natural person) will be individually referred to as “Marshall Interest” or “non-settling party.”

“**Document**” includes, but is not limited to, all written and graphic material in whatever form (including drafts) regardless the medium (paper, electronic, etc) by which information is preserved.

“**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.

“**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*.

Interrogatories

Pursuant to Rule 1-033, NMRA, the Navajo Nation issues the following interrogatories to each Marshall Interest.

Interrogatory No. 1: Describe completely and in all detail every basis you have for the statement found in paragraph 69 of the Answer, Objections, and Counterclaim that the Navajos have not been irrigating from rivers for a long time.

Interrogatory No. 2: Describe completely and in all detail every basis you have for the statement found in paragraph 78 of the Answer, Objections, and Counterclaim that the Navajo Nation has waived its water rights.

Interrogatory No. 3: Describe completely and in all detail every basis you have for the statement found in paragraph 92 of the Answer, Objections, and Counterclaim that the Settlement Agreement is inconsistent with the Echo Ditch Decree and would impair water rights which were decreed by the court in the Echo Ditch Decree.

Interrogatory No. 4: Describe completely and in all detail every basis you have for the statement found in paragraph 94 of the Answer, Objections, and Counterclaim that the Settlement Agreement must be rejected because the Navajo Nation and the United States did not apply for and obtain valid permits and licenses for the diversion or consumption of water in accordance with New Mexico law.

Interrogatory No. 5: Describe completely and in all detail every basis you have for the statement found in paragraph 101 of the Answer, Objections, and Counterclaim that all of the water used for NIIP is wasted.

Interrogatory No. 6: Describe completely and in all detail every basis you have for the statement found in paragraph 102 of the Answer, Objections, and Counterclaim that there are a variety of factors that make NIIP impracticable for irrigation.

Interrogatory No. 7: Describe completely and in all detail every basis you have for the statement found in paragraph 103 of the Answer, Objections, and Counterclaim that the lands occupied by NIIP are too far from the San Juan River in horizontal terms.

Interrogatory No. 8: Describe completely and in all detail every basis you have for the statement found in paragraph 104 of the Answer, Objections, and Counterclaim that the climate at NIIP makes it impracticable for sustained irrigation at reasonable cost.

Interrogatory No. 9: Describe completely and in all detail every basis you have for the statement found in paragraph 105 of the Answer, Objections, and Counterclaim that the soil at NIIP is poor, sandy, and low on natural nutrients.

Interrogatory No. 10: Describe completely and in all detail every basis you have for the statement found in paragraph 106 of the Answer, Objections, and Counterclaim that NIIP has high percolation rates, so much of the water is lost rather than being captured by the crops.

Interrogatory No. 11: Describe completely and in all detail every basis you have for the statement found in paragraph 107 of the Answer, Objections, and Counterclaim that because NIIP is far from the river, there is very little return surface flow or recharge of the river or underground water in the alluvium in the river valley.

Interrogatory No. 12: Describe completely and in all detail every basis you have for the statement found in paragraph 108 of the Answer, Objections, and Counterclaim that because of NIIP's geographical location, NIIP's transportation costs are high, which increases its costs and reduces the prices buyers will pay for its products.

Interrogatory No. 13: Describe completely and in all detail every basis you have for the statement found in paragraph 109 of the Answer, Objections, and Counterclaim that since its inception and annually ever since, the actual costs of NIIP have always been greater than its revenues.

Interrogatory No. 14: Describe completely and in all detail every basis you have for the statement found in paragraph 110 of the Answer, Objections, and Counterclaim that NIIP has never been an economically viable irrigation project, so it is a waste of money as well as water.

Interrogatory No. 15: Describe completely and in all detail every basis you have for the statement found in paragraph 111 of the Answer, Objections, and Counterclaim that, in the river valley, the Navajo Nation has claimed amounts of acreage and amounts of water and priority dates which are grossly excessive and not supported by the facts.

Interrogatory No. 16: Describe completely and in all detail every basis you have for the statement found in paragraph 114 of the Answer, Objections, and Counterclaim that there is not adequate water supply available in the San Juan Basin pursuant to New Mexico's allocation under the two compacts governing the Colorado River to meet the water requirements of the Settlement Agreement, the Settlement Act, and state law.

Interrogatory No. 17: Describe completely and in all detail every basis you have for the statement found in paragraph 115 of the Answer, Objections, and Counterclaim that the 2007 BOR hydrographic determination was not based on sound science and does not meet *Daubert* standards.

Interrogatory No. 18: Describe completely and in all detail every basis you have for the statement found in paragraph 116 of the Answer, Objections, and Counterclaim that the hydrographic determination is incorrect and contrary to the ruling in *San Juan Water Commission v. D'Antonio*, No. D-1116-CV-2008-1699, Order (Aug. 16, 2011), because the hydrographic determination is based in part on the availability of water from the downsized Animas La Plata project.

Interrogatory No. 19: Describe completely and in all detail every basis you have for the statement found in paragraph 117 of the Answer, Objections, and Counterclaim that the hydrographic determination is incorrect because it overestimates the current and future water

supply in the Colorado River system and ignores the best available scientific data on global warming and its effects on the Southwest United States.

Interrogatory No. 20: Describe completely and in all detail every basis you have for the statement found in paragraph 118 of the Answer, Objections, and Counterclaim that the hydrographic determination adopts a defective and inconsistent method for calculating evaporation.

Interrogatory No. 21: Describe completely and in all detail every basis you have for the statement found in paragraph 138 of the Answer, Objections, and Counterclaim that the San Juan River contains 60% of all the stream surface water in New Mexico.

Interrogatory No. 22: Describe completely and in all detail every basis you have for the statement found in paragraph 142 of the Answer, Objections, and Counterclaim that the proposed agreement would give the Navajo Nation far more water than is needed to meet the minimum needs of the Navajo population living on the reservation in New Mexico. Please identify and describe completely and in all detail the amount of water that is needed to meet the “minimum needs of the Navajo population living on the reservation in New Mexico.”

Interrogatory No. 23: Describe completely and in all detail every basis you have for the statement found in paragraph 143 of the Answer, Objections, and Counterclaim that there are approximately 42,000 Native Americans living on the Navajo Reservation.

Interrogatory No. 24: Describe completely and in all detail every basis you have for the statement found in paragraph 144 of the Answer, Objections, and Counterclaim that fewer than 40,000 members of the Navajo Nation live on the Navajo Reservation in New Mexico.

Interrogatory No. 25: Describe completely and in all detail every basis you have for the statement found in paragraph 145 of the Answer, Objections, and Counterclaim that the population of the Navajo Reservation is decreasing, not increasing.

Interrogatory No. 26: Describe completely and in all detail every basis you have for the statement found in paragraph 147 of the Answer, Objections, and Counterclaim that the amount of water needed for the minimal needs of 40,000 people is much smaller than the amounts provided in the Settlement Agreement. Please identify and describe completely and in all detail the amount of water that is needed for the “minimal needs of 40,000 people.”

Interrogatory No. 27: Describe completely and in all detail every basis you have for the statement found in paragraph 148 of the Answer, Objections, and Counterclaim that the water needs of the Navajo Nation can and must be satisfied by conservation measures and please describe completely and in detail those conservation measures.

Interrogatory No. 28: Pursuant to Rule 30(B)(6), designate one or more persons who may be deposed or testify regarding the substance of your response to the RFA, Interrogatory Nos. 1 – 27, and RFP Nos. 1 – 32. If more than one person is identified, describe with reasonable particularity those matters to which each person is capable of testifying.

Request for Admission

Admit that you claim a water right for agricultural or irrigation purposes.

Request for Production of Documents

Pursuant to Rule 1-034, NMRA, the Navajo Nation issues the following RFPs to each Marshall Interest.

RFP No. 1: If your response to the Request for Admission was an admission, provide all records showing the amounts of water used in your operations since inception, including the amounts of water diverted, pumped, consumed, evaporated, lost, or returned to the San Juan River.

RFP No. 2: If your response to the Request for Admission was an admission, provide all financial and operating statements or reports for your operations since inception, whether audited or unaudited, including annual profit and loss statements, statements of assets and liabilities, and cash flow statements.

RFP No. 3: If your response to the Request for Admission was an admission, provide all records showing costs and expenses for your operations since inception which might not be fully reflected in the statements or reports requested in RFP No. 2, including construction costs, capital costs, interest costs, maintenance, depreciation, electricity and utility costs, and overhead, labor or other costs. This request includes costs and expenses which might be borne by other entities such as the federal government or State of New Mexico.

RFP No. 4: If your response to the Request for Admission was an admission, provide all reports or analyses of your operations since inception, such as agricultural or agronomic reports, economic performance reports, economic feasibility reports, and reports to government agencies.

RFP No. 5: As associated with Interrogatory No 1, provide every document in your possession that describes every basis for the statement found in paragraph 69 of the Answer, Objections, and Counterclaim that the Navajos have not been irrigating from rivers for a long time.

RFP No. 6: As associated with Interrogatory No 2, provide every document in your possession that describes every basis for the statement found in paragraph 78 of the Answer, Objections, and Counterclaim that the Navajo Nation has waived its water rights.

RFP No. 7: As associated with Interrogatory No. 3, provide every document in your possession that describes every basis for the statement found in paragraph 92 of the Answer, Objections, and Counterclaim that the Settlement Agreement is inconsistent with the Echo Ditch Decree and would impair water rights which were decreed by the court in the Echo Ditch Decree.

RFP No. 8: As associated with Interrogatory No. 4, provide every document in your possession that describes every basis for the statement found in paragraph 94 of the Answer, Objections, and Counterclaim that the Settlement Agreement must be rejected because the Navajo Nation and the United States did not apply for and obtain valid permits and licenses for the diversion or consumption of water in accordance with New Mexico law.

RFP No. 9: Provide all permits and/or licenses entitling you to divert or consume water in accordance with New Mexico law.

RFP No. 10: As associated with Interrogatory No. 5, provide every document in your possession that describes every basis for the statement found in paragraph 101 of the Answer, Objections, and Counterclaim that all of the water used for NIIP is wasted.

RFP No. 11: As associated with Interrogatory No. 6, provide every document in your possession that describes every basis you have for the statement found in paragraph 102 of the Answer, Objections, and Counterclaim that there are a variety of factors that make NIIP impracticable for irrigation.

RFP No. 12: As associated with Interrogatory No. 7, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 103 of the Answer, Objections, and Counterclaim that the lands occupied by NIIP are too far from the San Juan River in horizontal terms.

RFP No. 13: As associated with Interrogatory No. 8, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 104 of the Answer, Objections, and Counterclaim that the climate at NIIP makes it impracticable for sustained irrigation at reasonable cost.

RFP No. 14: As associated with Interrogatory No. 9, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 105 of the Answer, Objections, and Counterclaim that the soil at NIIP is poor, sandy, and low on natural nutrients.

RFP No. 15: As associated with Interrogatory No. 10, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 106 of the Answer, Objections, and Counterclaim that NIIP has high percolation rates, so much of the water is lost rather than being captured by the crops.

RFP No. 16: As associated with Interrogatory No. 11, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 107 of the Answer, Objections, and Counterclaim that because NIIP is far from the river, there is very little return surface flow or recharge of the river or underground water in the alluvium in the river valley.

RFP No. 17: As associated with Interrogatory No. 12, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 108 of the Answer, Objections, and Counterclaim that because of NIIP's geographical location, NIIP's transportation costs are high, which increases its costs and reduces the prices buyers will pay for its products.

RFP No. 18: As associated with Interrogatory No. 13, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 109 of the Answer, Objections, and Counterclaim that since its inception and annually ever since, the actual costs of NIIP have always been greater than its revenues.

RFP No. 19: As associated with Interrogatory No. 14, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 110 of the Answer, Objections, and Counterclaim that NIIP has never been an economically viable irrigation project, so it is a waste of money as well as water.

RFP No. 20: As associated with Interrogatory No. 15, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 111 of the Answer, Objections, and Counterclaim that, in the river valley, the Navajo Nation has claimed amounts of acreage and amounts of water and priority dates which are grossly excessive and not supported by the facts.

RFP No. 21: As associated with Interrogatory No. 16, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 114 of the Answer, Objections, and Counterclaim that there is not adequate water supply available in the San Juan Basin pursuant to New Mexico's allocation under the two compacts governing the Colorado River to meet the water requirements of the Settlement Agreement, the Settlement Act, and state law.

RFP No. 22: As associated with Interrogatory No. 17, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 115 of the Answer, Objections, and Counterclaim that the 2007 BOR hydrographic determination was not based on sound science and does not meet *Daubert* standards.

RFP No. 23: As associated with Interrogatory No. 18, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 116 of the Answer, Objections, and Counterclaim that the hydrographic determination is incorrect and contrary to the ruling in *San Juan Water Commission v. D'Antonio*, No. D-1116-CV-2008-1699, Order (Aug. 16, 2011), because the hydrographic

determination is based in part on the availability of water from the downsized Animas La Plata project.

RFP No. 24: As associated with Interrogatory No. 19, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 117 of the Answer, Objections, and Counterclaim that the hydrographic determination is incorrect because it overestimates the current and future water supply in the Colorado River system and ignores the best available scientific data on global warming and its effects on the Southwest United States.

RFP No. 25: As associated with Interrogatory No. 20, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 118 of the Answer, Objections, and Counterclaim that the hydrographic determination adopts a defective and inconsistent method for calculating evaporation.

RFP No. 26: As associated with Interrogatory No. 21, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 138 of the Answer, Objections, and Counterclaim that the San Juan River contains 60% of all the stream surface water in New Mexico.

RFP No. 27: As associated with Interrogatory No. 22, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 142 of the Answer, Objections, and Counterclaim that the proposed agreement would give the Navajo Nation far more water than is needed to meet the minimum needs of the Navajo population living on the reservation in New Mexico.

RFP No. 28: As associated with Interrogatory No. 23, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 143 of the Answer, Objections, and Counterclaim that there are approximately 42,000 Native Americans living on the Navajo Reservation.

RFP No. 29: As associated with Interrogatory No. 24, provide every document in your possession that describes completely and in all detail every basis you have for the statement

found in paragraph 144 of the Answer, Objections, and Counterclaim that fewer than 40,000 members of the Navajo Nation live on the Navajo Reservation in New Mexico.

RFP No. 30: As associated with Interrogatory No. 25, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 145 of the Answer, Objections, and Counterclaim that the population of the Navajo Reservation is decreasing, not increasing.

RFP No. 31: As associated with Interrogatory No. 26, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 147 of the Answer, Objections, and Counterclaim that the amount of water needed for the minimal needs of 40,000 people is much smaller than the amounts provided in the Settlement Agreement.

RFP No. 32: As associated with Interrogatory No. 27, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 148 of the Answer, Objections, and Counterclaim that the water needs of the Navajo Nation can and must be satisfied by conservation measures.

Respectfully submitted this 2nd day of November, 2012.

THE NAVAJO NATION



Stanley M. Pollack
M. Kathryn Hoover
Navajo Nation Department of Justice
P. O. Drawer 2010
Window Rock, Navajo Nation (AZ) 86515
(928) 871-7510

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

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

Plaintiff,

vs.

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

Defendants.

AB-07-1

Claims of Navajo Nation

No. CV 75-184

Honorable James J. Wechsler

Presiding Judge

DESCRIPTIVE SUMMARY: Responses by Community Ditch
Defendant-counterclaimants to Navajo Nation's Discovery.

NUMBER OF PAGES: 23

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**RESPONSES BY COMMUNITY DITCH DEFENDANT-
COUNTERCLAIMANTS TO NAVAJO NATION'S DISCOVERY**

Interrogatories

Pursuant to Rule 1-033, NMRA, the Navajo Nation issues the following interrogatories to each Marshall Interest.

Interrogatory No. 1: Describe completely and in all detail every basis you have for the statement found in paragraph 69 of the Answer, Objections, and Counterclaim that the Navajos have not been irrigating from rivers for a long time.

RESPONSE:

This interrogatory mischaracterizes and misquotes paragraph 69, which reads as follows:

The pueblos, unlike the Navajos, have been irrigating from rivers for a long time, so they have substantial water rights under the strict rules of prior appropriation and beneficial use, with a very early priority. Unfortunately, these rights have not yet been adjudicated.

As compared with the pueblos, relatively few Navajos irrigated from the San Juan River on a permanent basis prior to the construction of irrigation works by the US.

Most Navajos do not live close to the San Juan River, so they cannot irrigate from the river, unlike many pueblos.

For more on this topic, see Hampton Sides, *Blood and Thunder: The Epic Story of Kit Carson and the Conquest of the American West*, at 26 (2006):

Mainly, though, the Navajo raiders were interested in obtaining sheep and goats. The Navajo, almost alone among American Indians of the West, were primarily a pastoral people—shepherds, shearers, eaters of mutton, drinkers of goat's milk, master spinners of wool. Navajos followed the slow and watchful life known among anthropologists as *transhumance*, a methodical seminomadism built around the seasonal moving of flocks to higher and lower ground in search of grass. This way of life was, in fact, an ancient and widespread practice throughout the world but nearly unheard of

in North America. As pastoralists, the Navajo lifestyle was in some sense more akin to that of ancient Greeks, Hebrews, and Arabs than to contemporary tribes of Native Americans.

Interrogatory No. 2: Describe completely and in all detail every basis you have for the statement found in paragraph 78 of the Answer, Objections, and Counterclaim that the Navajo Nation has waived its water rights.

RESPONSE:

The federal legislation in the 1950s was intended to satisfy all of the Navajo Nation's potential claims to the Colorado River system, including its claims, for all Navajo lands, which are located in Utah, Arizona, and New Mexico.

Interrogatory No. 3: Describe completely and in all detail every basis you have for the statement found in paragraph 92 of the Answer, Objections, and Counterclaim that the Settlement Agreement is inconsistent with the Echo Ditch Decree and would impair water rights which were decreed by the court in the Echo Ditch Decree.

RESPONSE:

The Echo Ditch Decree establishes water rights which cannot be directly or collaterally challenged. All of the water rights confirmed by the Echo Ditch Decree take priority over any water claims by or on behalf of the Navajo Nation, except perhaps for some relatively small amounts based on prior appropriation and beneficial use in the Hogback-Cudei and Fruitland areas.

Interrogatory No. 4: Describe completely and in all detail every basis you have for the statement found in paragraph 94 of the Answer, Objections, and Counterclaim that the Settlement Agreement must be rejected because the Navajo Nation and the United States did not apply for and obtain valid permits and licenses for the diversion or consumption of water in accordance with New Mexico law.

RESPONSE:

The proposed agreement must be rejected because the Navajo Nation and the United States did not apply for and obtain valid permits and licenses for the diversion or

consumption of water in accordance with New Mexico law. They applied for various permits, but those applications were never published as required by New Mexico law. Those applications were not approved by the State Engineer in accordance with the mandatory procedures and standards set forth in New Mexico's water code. Some of the applications were merely endorsed as received by the State Engineer.

The files relating to these applications cannot be relied upon as accurate or complete, because the OSA has no system for ensuring the integrity, accuracy and completeness of those files. For many years the files have been open to anyone who insisted on looking at them, without any system to prevent persons from destroying, altering, or adding documents in the file.

Inter alia, the plaintiffs have never complied with the application and permit requirements set forth in NMSA 1978, §§ 72-5-1, -2, -3, -4 (publication), -5, -6, -7, -21, -31. See Exhibit 1 to the answer and counterclaim.

In particular, the plaintiffs did not publish notice of the applications as required by § 72-5-4, so that objections or protests could be filed under § 72-5-5. Upon information and belief, the plaintiffs may have colluded to evade publication, so that they could incorrectly claim that the river was fully appropriated by virtue of the applications, and so that they could deprive other water users of proper notice and the right to challenge the applications.

Because the procedures in §§ 72-5-1, *et seq.* were not followed, the Navajo Nation and the U.S. are not entitled to a 1955 priority date. The last sentence of § 72-5-4 specifically governs this situation, as follows:

In case of failure to file satisfactory proof of publication in accordance with the rules within the time required, the

application shall be treated as an original application filed on the date of receipt of proofs of publication in proper form.

See also the pending requests for admission to the plaintiffs, asking them to admit that the permit applications were never published.

Interrogatory No. 5: Describe completely and in all detail every basis you have for the statement found in paragraph 101 of the Answer, Objections, and Counterclaim that all of the water used for NIIP is wasted.

RESPONSE:

Decades of actual experience have proved that NIIP is not practicably irrigable acreage (PIA) under the criteria in *State ex rel. Martinez v. Lewis*, 116 N.M. 194, 861 P.2d. 235 (Ct. App. 1993), and other PIA cases.

PIA is one specific application of the more general concept of beneficial use/prohibition of waste, as applied to irrigation.

Interrogatory No. 6: Describe completely and in all detail every basis you have for the statement found in paragraph 102 of the Answer, Objections, and Counterclaim that there are a variety of factors that make NIIP impracticable for irrigation.

RESPONSE:

Some of the various factors are set forth in paragraphs 101 through 110 of the Answer, Objections, and Counterclaim.

Additional factors are set forth in the NIIP financial statements.

Other additional factors will be found in the documents on undisclosed NIIP expenses which the defendants have requested from the plaintiffs, and which have not yet been provided, for example, the costs for pumping water uphill, maintaining roads, and maintaining and repairing the canal infrastructure.

Interrogatory No. 7: Describe completely and in all detail every basis you have for the statement found in paragraph 103 of the Answer, Objections, and Counterclaim that the lands occupied by NIIP are too far from the San Juan River in horizontal terms.

RESPONSE:

This geographical information can be found in maps in the possession of the plaintiffs, including the United States Geographical Survey (USGS) topographic maps for NIIP and the surrounding area.

The geographical information can also be viewed by going on Google Earth, <http://www.google.com/earth/index.html>, and flying to NIIP. Google Earth contains a wealth of geographical information, including aerial photos, oblique views, maps, elevations, etc.

Also, the geographic facts can be observed by driving on United States Highway 550 south of Bloomfield, stopping and getting out of the car, and looking around.

Interrogatory No. 8: Describe completely and in all detail every basis you have for the statement found in paragraph 104 of the Answer, Objections, and Counterclaim that the climate at NIIP makes it impracticable for sustained irrigation at reasonable cost.

RESPONSE:

The United States, including the United States weather service and the Navajo Nation have climate records for NIIP and the surrounding area. The community ditch defendant-counterclaimants do not have these climate records.

Interrogatory No. 9: Describe completely and in all detail every basis you have for the statement found in paragraph 105 of the Answer, Objections, and Counterclaim that the soil at NIIP is poor, sandy, and low on natural nutrients.

RESPONSE:

The United States and the Navajo Nation and NIIP probably assemble records in the ordinary course of business about the soil conditions at NIIP.

The soil conditions can also be observed by going to NIIP and walking around.

Interrogatory No. 10: Describe completely and in all detail every basis you have for the statement found in paragraph 106 of the Answer, Objections, and Counterclaim that NIIP has high percolation rates, so much of the water is lost rather than being captured by the crops.

RESPONSE:

The soil at NIIP is sandy, so it has high percolation rates compared with richer soils. The United States and the Navajo Nation and NIIP probably have records about percolation rates, because they irrigate that land. The community ditch defendant-counterclaimants do not.

Interrogatory No. 11: Describe completely and in all detail every basis you have for the statement found in paragraph 107 of the Answer, Objections, and Counterclaim that because NIIP is far from the river, there is very little return surface flow or recharge of the river or underground water in the alluvium in the river valley.

RESPONSE:

The United States and the Navajo Nation and NIIP and the state engineer have records about surface or subsurface return flows. The community ditch defendant-counterclaimants do not.

Interrogatory No. 12: Describe completely and in all detail every basis you have for the statement found in paragraph 108 of the Answer, Objections, and Counterclaim that because of NIIP's geographical location, NIIP's transportation costs are high, which increases its costs and reduces the prices buyers will pay for its products.

RESPONSE:

NIIP is located many miles from a railway, an interstate, or a navigable river. These facts can be obtained from <https://maps.google.com/> or www.MapQuest.com/ or apple maps.

Interrogatory No. 13: Describe completely and in all detail every basis you have for the statement found in paragraph 109 of the Answer, Objections, and Counterclaim that since its inception and annually ever since, the actual costs of NIIP have always been greater than its revenues.

RESPONSE:

This information is in the possession of the plaintiffs, including the United States, the Navajo Nation, NIIP, NAPI, BIA, BOR, and the state engineer. Defendant-counterclaimants have been seeking this information in discovery for months, and have been met with of refusals and evasions from the plaintiffs. Plaintiffs have not yet provided all of the financial and operating statements, or the information about all the expenses which are not reflected in the operating statements. Counsel for the defendant-counterclaimants asked to go inspect the records at NIIP during his trip to Aztec for the last hearing on October 25, 2012, but the Navajo Nation refused to make these arrangements. Defendant-counterclaimants are seeking yet another order from Judge Wechsler, so that they can depose the employees and contractors of the plaintiffs who have actual knowledge about these matters.

Interrogatory No. 14: Describe completely and in all detail every basis you have for the statement found in paragraph 110 of the Answer, Objections, and Counterclaim that NIIP has never been an economically viable irrigation project, so it is a waste of money as well as water.

RESPONSE:

See the responses to the above interrogatories.

See also Answer, Objections, and Counterclaim, paragraphs 102-110.

NIIP has not created family farms, as originally intended, or much employment for the Navajo Nation. Some of NIIP's functions have been outsourced to non-Navajo contractors.

Interrogatory No. 15: Describe completely and in all detail every basis you have for the statement found in paragraph 111 of the Answer, Objections, and Counterclaim that, in the river valley, the Navajo Nation has claimed amounts of acreage and amounts of water and priority dates which are grossly excessive and not supported by the facts.

RESPONSE:

These facts would be found in an objective hydrographic survey of actual historical uses, which the state engineer was legally required to do by law, but did not. The U.S. and the Navajo Nation have claimed acreage and water in excess of their actual uses. The purported hydrographic survey prepared for this case cannot be trusted, because it was prepared by the Navajo Nation and the U.S., who are advocates for the Navajos.

Also, upon information and belief, the purported hydrographic survey is not based on any significant amount of new survey work in the field.

Interrogatory No. 16: Describe completely and in all detail every basis you have for the statement found in paragraph 114 of the Answer, Objections, and Counterclaim that there is not adequate water supply available in the San Juan Basin pursuant to New Mexico's allocation under the two compacts governing the Colorado River to meet the water requirements of the Settlement Agreement, the Settlement Act, and state law.

RESPONSE:

Inter alia, the compacts overestimated the amount of water available. See also answers to Interrogatory Nos. 17 and 18.

Interrogatory No. 17: Describe completely and in all detail every basis you have for the statement found in paragraph 115 of the Answer, Objections, and Counterclaim that the

2007 BOR hydrographic determination was not based on sound science and does not meet *Daubert* standards.

RESPONSE:

The plaintiffs prepared the hydrologic determination, so they are the only ones who can explain how they arrived at their conclusions.

Upon information and belief, their logic runs something like this:

1. There is less water in the Colorado River reservoirs;
2. Therefore there is less evaporation from these reservoirs;
3. Therefore more water is available from the Colorado River system.

Also, the determination is based in part on the supposed availability of water from the downsized Animas La Plata project. Downsizing a paper project only creates paper water, not wet water. And Judge Rosier Sanchez has ruled on this issue. See answer to next interrogatory.

Also, the determination does not take into account the best and most current scientific studies on the past, present and future water supply in the Colorado River system.

Interrogatory No. 18: Describe completely and in all detail every basis you have for the statement found in paragraph 116 of the Answer, Objections, and Counterclaim that the hydrographic determination is incorrect and contrary to the ruling in *San Juan Water Commission v. D Antonio*, No. D-1116-CV-2008-1699, Order (Aug. 16, 2011), because the hydrographic determination is based in part on the availability of water from the downsized Animas La Plata project.

RESPONSE:

The plaintiffs have all of the documents relating to this case; the community ditch defendants do not. The San Juan Water Commission also has documents and first-hand knowledge of that case.

Interrogatory No. 19: Describe completely and in all detail every basis you have for the statement found in paragraph 117 of the Answer, Objections, and Counterclaim that the hydrographic determination is incorrect because it overestimates the current and future water supply in the Colorado River system and ignores the best available scientific data on global warming and its effects on the Southwest United States.

RESPONSE:

This information is available to the United States, which has a legal obligation to take it into consideration. These matters are the subject of ongoing discovery, which is barely started, including depositions of Mr. Whipple and others who were involved in the hydrologic determination.

Furthermore, the plaintiffs have spoliated evidence which would show that they ignored the mounting scientific evidence, such as BOR emails.

Interrogatory No. 20: Describe completely and in all detail every basis you have for the statement found in paragraph 118 of the Answer, Objections, and Counterclaim that the hydrographic determination adopts a defective and inconsistent method for calculating evaporation.

RESPONSE:

The plaintiffs prepared the hydrologic determination, so they are the only ones who can explain how they arrived at their conclusions.

Upon information and belief, their logic runs something like this:

1. There is less water in the Colorado River reservoirs;
2. Therefore there is less evaporation from these reservoirs;
3. Therefore more water is available from the Colorado River system.

Interrogatory No. 21: Describe completely and in all detail every basis you have for the statement found in paragraph 138 of the Answer, Objections, and Counterclaim that the San Juan River contains 60% of all the stream surface water in New Mexico.

RESPONSE:

This interrogatory misquotes and mischaracterizes paragraph 138, which reads as follows:

138. The San Juan River contains 60% of all the stream surface water in New Mexico. This is the best available estimate, as the OSE seems to have no real idea of the aggregate stream water in New Mexico.

The 60% figure comes from the Colorado River Users Association. <http://www.crwua.org/> “The Colorado River Water Users Association is a non-profit, non-partisan organization, formed to plan, study, formulate and advise on ways to protect and safeguard the interests of all who use the Colorado River.”

Interrogatory No. 22: Describe completely and in all detail every basis you have for the statement found in paragraph 142 of the Answer, Objections, and Counterclaim that the proposed agreement would give the Navajo Nation far more water than is needed to meet the minimum needs of the Navajo population living on the reservation in New Mexico. Please identify and describe completely and in all detail the amount of water that is needed to meet the “minimum needs of the Navajo population living on the reservation in New Mexico.”

RESPONSE:

That is one of the questions yet to be answered in this case. The Community Ditch Defendants cannot quantify this amount at this time, but the amount is far less than the amounts in the proposed agreement.

Interrogatory No. 23: Describe completely and in all detail every basis you have for the statement found in paragraph 143 of the Answer, Objections, and Counterclaim that there are approximately 42,000 Native Americans living on the Navajo Reservation.

RESPONSE:

See document attached to responses to U.S. discovery. According to 2010 census data – 42,127 people live on the Navajo Reservation in New Mexico who describe themselves as Native Americans, American Indian, Alaska native, etc.

The United States has or should have this information, because the Constitution requires the United States to conduct a census every 10 years. The Navajo Nation has or should have this information as well, because the Navajo Nation needs this information to function properly.

Interrogatory No. 24: Describe completely and in all detail every basis you have for the statement found in paragraph 144 of the Answer, Objections, and Counterclaim that fewer than 40,000 members of the Navajo Nation live on the Navajo Reservation in New Mexico.

RESPONSE:

Not all Native Americans are enrolled members of the Navajo Tribe. See previous response.

Interrogatory No. 25: Describe completely and in all detail every basis you have for the statement found in paragraph 145 of the Answer, Objections, and Counterclaim that the population of the Navajo Reservation is decreasing, not increasing.

RESPONSE:

See previous response. According to some news media accounts, the overall population of the Navajo reservation in all 3 states dropped about 3% from 2000 to 2010. Defendant-counterclaimants have requested the relevant census data, but plaintiffs have not produced it.

Interrogatory No. 26: Describe completely and in all detail every basis you have for the statement found in paragraph 147 of the Answer, Objections, and Counterclaim that the amount of water needed for the minimal needs of 40,000 people is much smaller than the amounts provided in the Settlement Agreement. Please identify and describe completely and in all detail the amount of water that is needed for the “minimal needs of 40,000 people.”

RESPONSE:

This is an issue which will be determined by the court. Roughly 40,000 members of the Navajo Tribe do not need 608,000 acre feet of water in order to live on the reservation in New Mexico.

Interrogatory No. 27: Describe completely and in all detail every basis you have for the statement found in paragraph 148 of the Answer, Objections, and Counterclaim that the water needs of the Navajo Nation can and must be satisfied by conservation measures and please describe completely and in detail those conservation measures.

RESPONSE:

The United States and the Navajo Nation have information about the conservation measures that can be used to conserve water on the reservation. Furthermore, the Navajo Reservation has significant water resources within the reservation that can be used to meet local needs, including lakes, streams, and underground water. Most domestic and household needs can be met by drilling domestic wells, as is done throughout New Mexico, or by creating small community water systems supplied by a local well. In most instances, this is more water efficient and cost efficient than taking water from the San Juan River.

In addition, even if the *Winters* cases applied, which they do not, there is nothing in the *Winters* cases that impliedly reserves water for needs which can be met from water resources within the reservation, thus avoiding adverse impacts on non-Indians who rely on the San Juan River, such as the community ditch defendant-counterclaimants.

Interrogatory No. 28: Pursuant to Rule 30(B)(6), designate one or more persons who may be deposed or testify regarding the substance of your response to the RFA, Interrogatory Nos. 1 – 27, and RFP Nos. 1 – 32. If more than one person is identified, describe with reasonable particularity those matters to which each person is capable of testifying.

RESPONSE:

See preliminary identification of witnesses filed November 13, 2012.

Request for Admission

Admit that you claim a water right for agricultural or irrigation purposes.

RESPONSE:

Admit that the community ditch defendant-counterclaimants claim water rights for agricultural or irrigation purposes, including but not limited to those set forth in the Echo Ditch Decree. The community ditch defendant-counterclaimants also claim water rights for domestic, municipal, industrial and other beneficial uses

Request for Production of Documents

Pursuant to Rule 1-034, NMRA, the Navajo Nation issues the following RFPs to each Marshall Interest.

RFP No. 1: If your response to the Request for Admission was an admission, provide all records showing the amounts of water used in your operations since inception, including the amounts of water diverted, pumped, consumed, evaporated, lost, or returned to the San Juan River.

RESPONSE:

Objection. This information is irrelevant, burdensome, and not reasonably calculated to lead to admissible evidence. The court has already ruled that objectors do not need to prove their water rights in order to object. Furthermore, objectors' water rights are not the subject of this expedited inter se, case No. AB-07-1. Those water rights will be the subject of the general adjudication, case No. CV 75-184.

In this case, AB-07-1, the issue before the court is whether to approve or not approve the proposed settlement agreement exactly in its current form, without any changes or additions or conditions. This can be done without the discovery requested in this RFP

RFP No. 2: If your response to the Request for Admission was an admission, provide all financial and operating statements or reports for your operations since inception, whether audited or unaudited, including annual profit and loss statements, statements of assets and liabilities, and cash flow statements.

RESPONSE:

See response to RFP No. 1.

RFP No. 3: If your response to the Request for Admission was an admission, provide all records showing costs and expenses for your operations since inception which might not be fully reflected in the statements or reports requested in RFP No. 2, including construction costs, capital costs, interest costs, maintenance, depreciation, electricity and utility costs, and overhead, labor or other costs. This request includes costs and expenses which might be borne by other entities such as the federal government or State of New Mexico.

RESPONSE:

See response to RFP No. 1.

RFP No. 4: If your response to the Request for Admission was an admission, provide all reports or analyses of your operations since inception, such as agricultural or agronomic reports, economic performance reports, economic feasibility reports, and reports to government agencies.

RESPONSE:

See response to RFP No. 1.

RFP No. 5: As associated with Interrogatory No. 1, provide every document in your possession that describes every basis for the statement found in paragraph 69 of the Answer, Objections, and Counterclaim that the Navajos have not been irrigating from rivers for a long time.

RESPONSE:

See response to Interrogatory No. 1.

RFP No. 6: As associated with Interrogatory No. 2, provide every document in your possession that describes every basis for the statement found in paragraph 78 of the Answer, Objections, and Counterclaim that the Navajo Nation has waived its water rights.

RESPONSE:

See response to Interrogatory No. 2.

RFP No. 7: As associated with Interrogatory No. 3, provide every document in your possession that describes every basis for the statement found in paragraph 92 of the Answer, Objections, and Counterclaim that the Settlement Agreement is inconsistent with the Echo Ditch Decree and would impair water rights which were decreed by the court in the Echo Ditch Decree.

RESPONSE:

See response to Interrogatory No. 3.

RFP No. 8: As associated with Interrogatory No. 4, provide every document in your possession that describes every basis for the statement found in paragraph 94 of the Answer, Objections, and Counterclaim that the Settlement Agreement must be rejected because the Navajo Nation and the United States did not apply for and obtain valid permits and licenses for the diversion or consumption of water in accordance with New Mexico law.

RESPONSE:

See response to Interrogatory No. 4.

RFP No. 9: Provide all permits and/or licenses entitling you to divert or consume water in accordance with New Mexico law.

RESPONSE:

See response to RFP No. 1.

RFP No. 10: As associated with Interrogatory No. 5, provide every document in your possession that describes every basis for the statement found in paragraph 101 of the Answer, Objections, and Counterclaim that all of the water used for NIIP is wasted.

RESPONSE:

See response to Interrogatory No. 5.

RFP No. 11: As associated with Interrogatory No. 6, provide every document in your possession that describes every basis you have for the statement found in paragraph 102 of the Answer, Objections, and Counterclaim that there are a variety of factors that make NIIP impracticable for irrigation.

RESPONSE:

See response to Interrogatory No. 6.

RFP No. 12: As associated with Interrogatory No. 7, provide every document in your possession that describes completely and in all detail every basis you have for the statement

found in paragraph 103 of the Answer, Objections, and Counterclaim that the lands occupied by NIIP are too far from the San Juan River in horizontal terms.

RESPONSE:

See response to Interrogatory No. 7.

RFP No. 13: As associated with Interrogatory No. 8, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 104 of the Answer, Objections, and Counterclaim that the climate at NIIP makes it impracticable for sustained irrigation at reasonable cost.

RESPONSE:

See response to Interrogatory No. 8.

RFP No. 14: As associated with Interrogatory No. 9, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 105 of the Answer, Objections, and Counterclaim that the soil at NIIP is poor, sandy, and low on natural nutrients.

RESPONSE:

See response to Interrogatory No. 9.

RFP No. 15: As associated with Interrogatory No. 10, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 106 of the Answer, Objections, and Counterclaim that NIIP has high percolation rates, so much of the water is lost rather than being captured by the crops.

RESPONSE:

See response to Interrogatory No. 10.

RFP No. 16: As associated with Interrogatory No. 11, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 107 of the Answer, Objections, and Counterclaim that because NIIP is far from the river, there is very little return surface flow or recharge of the river or underground water in the alluvium in the river valley.

RESPONSE:

See response to Interrogatory No. 11.

RFP No. 17: As associated with Interrogatory No. 12, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 108 of the Answer, Objections, and Counterclaim that because of NIIP's geographical location, NIIP's transportation costs are high, which increases its costs and reduces the prices buyers will pay for its products.

RESPONSE:

See response to Interrogatory No. 12.

RFP No. 18: As associated with Interrogatory No. 13, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 109 of the Answer, Objections, and Counterclaim that since its inception and annually ever since, the actual costs of NIIP have always been greater than its revenues.

RESPONSE:

See response to Interrogatory No. 13.

RFP No. 19: As associated with Interrogatory No. 14, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 110 of the Answer, Objections, and Counterclaim that NIIP has never been an economically viable irrigation project, so it is a waste of money as well as water.

RESPONSE:

See response to Interrogatory No. 14.

RFP No. 20: As associated with Interrogatory No. 15, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 111 of the Answer, Objections, and Counterclaim that, in the river valley, the Navajo Nation has claimed amounts of acreage and amounts of water and priority dates which are grossly excessive and not supported by the facts.

RESPONSE:

See response to Interrogatory No. 15.

RFP No. 21: As associated with Interrogatory No. 16, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 114 of the Answer, Objections, and Counterclaim that there is not adequate water supply available in the San Juan Basin pursuant to New Mexico's allocation

under the two compacts governing the Colorado River to meet the water requirements of the Settlement Agreement, the Settlement Act, and state law.

RESPONSE:

See response to Interrogatory No. 16.

RFP No. 22: As associated with Interrogatory No. 17, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 115 of the Answer, Objections, and Counterclaim that the 2007 BOR hydrographic determination was not based on sound science and does not meet *Daubert* standards.

RESPONSE:

See response to Interrogatory No. 17.

RFP No. 23: As associated with Interrogatory No. 18, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 116 of the Answer, Objections, and Counterclaim that the hydrographic determination is incorrect and contrary to the ruling in *San Juan Water Commission v. D Antonio*, No. D-1116-CV-2008-1699, Order (Aug. 16, 2011), because the hydrographic determination is based in part on the availability of water from the downsized Animas La Plata project.

RESPONSE:

See response to Interrogatory No. 18.

RFP No. 24: As associated with Interrogatory No. 19, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 117 of the Answer, Objections, and Counterclaim that the hydrographic determination is incorrect because it overestimates the current and future water supply in the Colorado River system and ignores the best available scientific data on global warming and its effects on the Southwest United States.

RESPONSE:

See response to Interrogatory No. 19.

RFP No. 25: As associated with Interrogatory No. 20, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 118 of the Answer, Objections, and Counterclaim that the hydrographic determination adopts a defective and inconsistent method for calculating evaporation.

RESPONSE:

See response to Interrogatory No. 20.

RFP No. 26: As associated with Interrogatory No. 21, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 138 of the Answer, Objections, and Counterclaim that the San Juan River contains 60% of all the stream surface water in New Mexico.

RESPONSE:

See response to Interrogatory No. 21.

RFP No. 27: As associated with Interrogatory No. 22, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 142 of the Answer, Objections, and Counterclaim that the proposed agreement would give the Navajo Nation far more water than is needed to meet the minimum needs of the Navajo population living on the reservation in New Mexico.

RESPONSE:

See response to Interrogatory No. 22.

RFP No. 28: As associated with Interrogatory No. 23, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 143 of the Answer, Objections, and Counterclaim that there are approximately 42,000 Native Americans living on the Navajo Reservation.

RESPONSE:

See response to Interrogatory No. 23.

RFP No. 29: As associated with Interrogatory No. 24, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 144 of the Answer, Objections, and Counterclaim that fewer than 40,000 members of the Navajo Nation live on the Navajo Reservation in New Mexico.

RESPONSE:

See response to Interrogatory No. 24.

RFP No. 30: As associated with Interrogatory No. 25, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 145 of the Answer, Objections, and Counterclaim that the population of the Navajo Reservation is decreasing, not increasing.

RESPONSE:

See response to Interrogatory No. 25.

RFP No. 31: As associated with Interrogatory No. 26, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 147 of the Answer, Objections, and Counterclaim that the amount of water needed for the minimal needs of 40,000 people is much smaller than the amounts provided in the Settlement Agreement.

RESPONSE:

See response to Interrogatory No. 26.

RFP No. 32: As associated with Interrogatory No. 27, provide every document in your possession that describes completely and in all detail every basis you have for the statement found in paragraph 148 of the Answer, Objections, and Counterclaim that the water needs of the Navajo Nation can and must be satisfied by conservation measures.

RESPONSE:

See response to Interrogatory No. 27.

Respectfully submitted,

VICTOR R. MARSHALL & ASSOCIATES, P.C.

By /s/ Victor R. Marshall

Victor R. Marshall
Attorneys for San Juan Agricultural Water Users
Association; Hammond Conservancy District;
Bloomfield Irrigation District; various ditches; and
various members thereof.
12509 Oakland NE
Albuquerque, NM 87122
505-332-9400 / 505-332-3793 FAX

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of November, 2012, a true and correct copy of the foregoing was served on the parties and claimants by attaching a copy of said document to an email sent to the following list server: wrmavajointerse@nmcourts.gov.

/s/ Victor R. Marshall

Victor R. Marshall, Esq.

Stanley M. Pollack

From: Stanley M. Pollack
Sent: Monday, January 28, 2013 3:33 PM
To: 'Victor R. Marshall'
Cc: 'Sheri Heying (sheri@vrmarshall.com)'; 'Shirley Meridith (shirley@vrmarshall.com)'; 'Guarino, Guss (ENRD) (Guss.Guarino@usdoj.gov)'; 'Samuel Gollis'; 'John Utton'; 'Arianne Singer (arianne.singer@state.nm.us)'
Subject: RE: what are you asking ...Re: Navajo Inter Se AB-07-1 Filing - Verification re Community Ditch Responses to Discovery

Victor,

Please let me know whether you will be responding to the discovery request per my email of January 11. I plan to submit a notice of discovery dispute and/or motion to compel on January 30.

Stanley M. Pollack, Assistant Attorney General
Water Rights Unit
Navajo Nation Department of Justice
P.O. Drawer 2010
Window Rock, AZ 86515

928.871.7510
928.871.6200 (Fax)
928.205.5891 (Cell)

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From: Stanley M. Pollack
Sent: Wednesday, January 23, 2013 8:59 AM
To: 'Victor R. Marshall'
Cc: Sheri Heying (sheri@vrmarshall.com); Shirley Meridith (shirley@vrmarshall.com); Guarino, Guss (ENRD) (Guss.Guarino@usdoj.gov); Samuel Gollis; John Utton; Arianne Singer (arianne.singer@state.nm.us)
Subject: RE: what are you asking ...Re: Navajo Inter Se AB-07-1 Filing - Verification re Community Ditch Responses to Discovery

Victor,

The Court's Order of November 30, 2011 required you to identify, within 45 days, those parties with whom you have an attorney-client relationship. You have never complied with this order. We are asking you, not Loressa, to identify your clients. This is a reasonable request. We are entitled to know who the objectors are and the bases of their objections. At the last Discovery Hearing, in response to questions posed by the Court, you properly responded that you were not expressing your personal opinion, but the position of your clients. However, your email suggests that you have filed discovery responses on behalf of all your clients without ascertaining the bases of their objections. At this point, verified responses have been filed on behalf of the San Juan Agricultural Water Users Association only. We respectfully suggest that you either have each of the objectors you represent respond to the discovery as requested or that you withdraw the Notices of Intent to Participate for any client you believe is unable to participate in this *inter se* proceeding in a meaningful manner.

Stanley M. Pollack, Assistant Attorney General
Water Rights Unit
Navajo Nation Department of Justice
P.O. Drawer 2010
Window Rock, AZ 86515

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From: Victor R. Marshall [<mailto:victor@vrmarshall.com>]
Sent: Monday, January 21, 2013 12:16 PM
To: Stanley M. Pollack
Cc: Sheri Heying (sheri@vrmarshall.com); Shirley Meridith (shirley@vrmarshall.com); Guarino, Guss (ENRD) (Guss.Guarino@usdoj.gov); Samuel Gollis; John Utton; Arianne Singer (arianne.singer@state.nm.us); Victor Marshall
Subject: what are you asking ...Re: Navajo Inter Se AB-07-1 Filing - Verification re Community Ditch Responses to Discovery

Stanley & Guss-

Pls excuse the tardiness. I am just now turning to this, because I have a cert petition due shortly in the NM Supreme Ct. plus computer network issues

Turning to your email, I'm not clear what you are asking, in concrete terms. Are you demanding that each individual water owner submit a separate signed and notarized discovery response? There are hundreds or thousands of them, so that would be impossible. (You can check with Loressa about the tallies she keeps on defendants.)

Please let me know exactly what steps you are asking us to take, so I can respond intelligently.

Regards,
Victor

On 1/11/2013 4:23 PM, Stanley M. Pollack wrote:

Victor,

Thank you for providing the verification from Jim Rogers on behalf of SJAWUA, one of the twenty five community ditches or associations you entered an appearance on behalf of on September 15, 2011. In addition, pursuant to your December 12, 2011 filing, you purport to represent not only these twenty five entities but also "[t]hose persons who filed notices of intent to participate listing the [Marshall] firm by name by the court-established deadline of September 16, 2011."

Please note that the Navajo Nation's discovery was directed to:

Each Person and Organization (1) who has filed a notice of intent to participate; (2) who objects to the Settlement Motion; and (3) who is represented by Victor Marshall and/or Victor Marshall and Associates.

See: NAVAJO NATIONS' DISCOVERY REQUESTS OF THE MARSHALL INTERESTS at page one. The Instructions, on page two, make it clear that each objecting party is under an obligation to respond to the discovery:

Specific Responses to Each Discovery Request By Each Objecting Party Required: Each person or entity identified above is instructed to respond to each and every interrogatory, RFP, and RFA in writing and completely. Responses to interrogatories must be provided under oath. (emphasis in the original)

At this point in time, it appears that the SJAWUA is the only objecting party responding to the discovery. This was not apparent until you provided only Mr. Rogers' verification to the discovery and no verification for all the objecting parties. I am requesting that each objecting party you represent respond to the discovery as previously directed.

Thank you for your anticipated cooperation.

Stanley M. Pollack, Assistant Attorney General
Water Rights Unit
Navajo Nation Department of Justice
P.O. Drawer 2010
Window Rock, AZ 86515

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>From: Victor Marshall [<mailto:victor@vrmarshall.com>]
>Sent: Thursday, January 10, 2013 2:04 PM
>To: wrrnavajointerse@nmcourts.gov; Tully, Richard; John Utton; Singer, Arianne, OSE; Guss Guarino; David Gehlert; Stanley Pollack; Kathryn Hoover; Samuel Gollis; Victor Marshall; Richard Cole; Cassandra Malone; Justin Breen; Adam Rankin; Mark Sheridan; James Brockmann; Seth Fullerton; Jay Stein; Jolene McCaleb; Elizabeth Taylor; Gary Risley; Priscilla Shannon; Celene Hawkins; Lee Bergen; Peter Ortego; Herbert Becker; Rebecca Dempsey; Maria O'Brien; Kyle Harwood; Robert Oxford; Gary Horner; vrm; Sheri Heying; Shirley Meridith
>Subject: Navajo Inter Se AB-07-1 Filing - Verification re Community Ditch Responses to Discovery
>
>Dear Counsel,
>
>Attached please find Verification re Community Ditch Responses to Discovery, fax-filed this afternoon.
>
>Victor Marshall

Stanley M. Pollack

From: Stanley M. Pollack
Sent: Wednesday, January 30, 2013 12:41 PM
To: Victor R. Marshall
Cc: Guarino, Guss (ENRD); Shirley Meridith; Singer, Arianne, OSE; John W. Utton; Gollis Samuel (sgollis@hotmail.com); Sheri Heying; Rick Tully; GARY RISLEY; Richard Cole; Cassandra R. Malone; Adam Rankin
Subject: RE: more misrepresentations aboutRe: Navajo Nation Discovery Requests

Victor,

Judge Wechsler did not view this as "nonsense." Apparently you are willing to accept the rulings of the Court granting your objections to certain discovery requests but not those rulings finding that the other discovery requested is relevant. Supplementation is required because the responses you submitted on behalf of the Community Ditch Defendants were wholly insufficient for the reasons set forth in my original email.

The schedule for supplemental responses was for such responses to be filed by December 21, 2012. I am simply asking you to propose a schedule for you to file the supplemental responses.

Please propose a schedule or, in the alternative, let me know whether I should refer the matter to Judge Wechsler for his consideration.

Stanley M. Pollack, Assistant Attorney General
Water Rights Unit
Navajo Nation Department of Justice
P.O. Drawer 2010
Window Rock, AZ 86515

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From: Victor R. Marshall [mailto:victor@vrmarshall.com]
Sent: Wednesday, January 30, 2013 11:49 AM
To: Stanley M. Pollack
Cc: Guarino, Guss (ENRD); Shirley Meridith; Singer, Arianne, OSE; John W. Utton; Gollis Samuel (sgollis@hotmail.com); Sheri Heying; Rick Tully; GARY RISLEY; Richard Cole; Cassandra R. Malone; Adam Rankin
Subject: Re: more misrepresentations aboutRe: Navajo Nation Discovery Requests

Stanley -

This is the same nonsense that Guss used.

a. We already answered them. If and when the plaintiffs answer our discovery requests, and we have time to digest the info, we will supplement per the Rules of Civil Procedure.

b. We got nothing new before Dec 21, except we saw the BOR study & gave you the internet link. [By the way, we have no duty to point out docs which the plaintiffs already So there was nothing to supplement.

c. Has the court set a regular supplementation schedule? I don't think so. What do you propose?

d. Have any of the plaintiffs supplemented their responses?

Victor

On 1/30/2013 11:18 AM, Stanley M. Pollack wrote:

Victor,

Please see page 9 of the attached *Order Concerning the Responses and Objections of the [N]On-Settling Parties to Discovery Requests*, November 30, 2012:

Discovery sought is relevant, supplemental responses, if any, due Dec.21, 2012:

Interrogatories 8, 11, 12, 13, 15, 18, 19, 20, 22, 26, and 28.

Requests for Production 5, 6, 7, 8, and 10 through 32.

These are the very same discovery requests referenced in my email below.

Stanley M. Pollack, Assistant Attorney General
Water Rights Unit
Navajo Nation Department of Justice
P.O. Drawer 2010
Window Rock, AZ 86515

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From: Victor R. Marshall [<mailto:victor@vrmarshall.com>]

Sent: Wednesday, January 30, 2013 10:48 AM

To: Stanley M. Pollack

Cc: Guarino, Guss (ENRD); Shirley Meridith; Singer, Arianne, OSE; John W. Utton; Gollis Samuel (sgollis@hotmail.com); Sheri Heying; Shirley Meridith; Victor Marshall; Rick Tully; GARY RISLEY; Richard Cole; Cassandra R. Malone; Adam Rankin

Subject: more misrepresentations aboutRe: Navajo Nation Discovery Requests

Stanley - What order are you talking about ? Your email is completely inaccurate; the judge sustained most of of our objections.

Here is the order on the Community Ditch responses. The judge sustained most of our objections. Why are you misrepresenting what he did? (Guss tried the same tactic,)

Objections overruled

Request for Production 5

Objections sustained I or Discovery Sought Deemed Not Directly Relevant

Interrogatories 3, 5, 8, 9, 11,
12, 13 and 14

Requests for Production 2, 3,
4, 7, 8, 10, 11, 12, 13 and 14

Discovery sought is relevant, supplemental responses, if any, due Dec.
21,2012

Intenogatoriesl, 2, 4, 6, 7, 15 and 16

Requests for Production 1, 5 and6

If you are talking about some other order, please email it to me.

Victor

On 1/29/2013 8:54 PM, Stanley M. Pollack wrote:

Victor,

In preparation for the February 4, 2013 Discovery Conference, I have again reviewed the *Responses by Community Ditch Defendant-Counterclaimants to Navajo Nation's Discovery*, November 13, 2012. The Court's Order of November 30, 2012 rejected the Community Ditch Defendants' objections that the following discovery was not relevant:

Interrogatories 8, 11, 12, 13, 15, 18, 19, 20, 22, 26, and 28.
Requests for Production 5, 6, 7, 8, and 10 through 32.

Supplemental Responses were due on December 21, 2012. The Community Ditch Defendants have not provided the Supplemental Responses.

All of the discovery matters identified above concerned the bases for various allegations made in the *Answer, Objections, and Counterclaim by Community Ditch Defendant-Counterclaimants*, filed October 19, 2012.

The responses to Interrogatories 8, 11, 13, 18, 19, and 20 simply allege that the Settling Parties or other parties have information that might support the allegations. The interrogatories did not request you to identify who might have information to support the allegations made, but requested the bases that the Community Ditch Defendants had for making the allegations. The responses were inadequate or unresponsive, and Judge Wechsler agreed.

Interrogatory 12 requested the basis for the statement at paragraph 108 of the Answer, Objections, and Counterclaim that because of NIIP's geographical location, NIIP's transportation costs are high, which increases its costs and reduces the prices buyers will pay for its products that NIIP's transportation costs were high. The response that "NIIP is located many miles from a railway, an interstate, or a navigable river" was inadequate or unresponsive, and Judge Wechsler agreed.

Interrogatory 15 requested the basis for the statement found in paragraph 111 of the Answer, Objections, and Counterclaim that, in the river valley, the Navajo Nation has claimed amounts of acreage and amounts of water and priority dates which are grossly excessive and not supported by the facts. The Community Ditch Defendants did not provide a basis or any facts to support the statement. The response was inadequate or unresponsive, and Judge Wechsler agreed.

Interrogatory 22 requested the basis for the statement found in paragraph 142 of the Answer, Objections, and Counterclaim that the proposed agreement would give the Navajo Nation far more water than is needed to meet the minimum needs of the Navajo population living on the reservation in New Mexico. The Community Ditch Defendants were asked to identify and describe completely and in all detail the amount of water that is needed to meet the "minimum needs of the Navajo population living on the reservation in New Mexico." The response that the "Defendants cannot quantify this amount at this time, but the amount is far less than the amounts in the proposed agreement" was inadequate or unresponsive, and Judge Wechsler agreed.

Interrogatory 26 requested the basis for the statement found in paragraph 147 of the Answer, Objections, and Counterclaim that the amount of water needed for the minimal needs of 40,000 people is much smaller than the amounts provided in the Settlement Agreement. The Community Ditch Defendants were asked identify and describe completely and in all detail the amount of water that is needed for the "minimal needs of 40,000 people." The response that "[r]oughly 40,000 members of the Navajo Tribe do not need 608,000 acre feet

of water in order to live on the reservation in New Mexico” was inadequate or unresponsive, and Judge Wechsler agreed.

Interrogatory 28 requested pursuant to Rule 30(B)(6), that the Community Ditch Defendants designate one or more persons who may be deposed or testify regarding the substance of your response to the RFA, Interrogatory Nos. 1 – 27, and RFP Nos. 1 – 32. Judge Wechsler agreed that the “preliminary identification of witnesses filed November 13, 2012 was inadequate or unresponsive.

With respect to the Requests for Production, the Community Ditch Defendants did not produce a single document, nor did they identify a single document, with the exception of a quote from the book *Blood and Thunder*. Judge Wechsler found the responses to Requests for Production 5, 6, 7, 8, and 10 through 32 to be inadequate.

Please let me know when you will be filing Supplemental Responses to these discovery requests. I also want to remind you that the discovery was served on “Each Person and Organization (1) who has filed a notice of intent to participate; (2) who objects to the Settlement Motion; and (3) who is represented by Victor Marshall and/or Victor Marshall and Associates.” Your signature on the responses and Mr. Roger’s subsequent affidavit is insufficient verification for all of the “Community Ditch Defendants.”

Your anticipated cooperation is appreciated.

Stanley M. Pollack, Assistant Attorney General
Water Rights Unit
Navajo Nation Department of Justice
P.O. Drawer 2010
Window Rock, AZ 86515

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928.871.6200 (Fax)
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