

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

DISTRICT COURT
SAN JUAN COUNTY NM
FILED
2013 FEB 12 AM 10:30

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: Notice of discovery impasse and filing of United States objections and response to discovery about other water claims by the U.S. on the Colorado River system

NUMBER OF PAGES: 2 +6 attached

DATE OF MAILING: February 11, 2013

**NOTICE OF IMPASSE AND
FILING OF THE UNITED STATES OBJECTIONS AND RESPONSES
TO DISCOVERY CONCERNING OTHER WATER CLAIMS BY THE U.S.**

The Community Ditch Defendant-counterclaimants and other cooperating defendants submit herewith the responses and objections of the United States to discovery requests concerning other water claims and obligations of the United States. The United States objections and responses were served on or about December 28, 2012.

Some portions of the responses are highlighted for the convenience of the court and the parties. The objections and responses are submitted in connection with the ongoing discovery disputes between the plaintiffs and defendants in this case, and not for the truth of

SCANNED

the assertions made by the United States. The defendants dispute the accuracy of most of the assertions made in the responses, particularly the assertion that answers to the propounded discovery can reasonably be ascertained from the documents. In most instances, the United States has not answered the discovery, and has pointed to documents which also do not answer the questions propounded.

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 11th day of February, 2013, 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: wrnavajointerse@nmcourts.gov and to the filing list referred to in paragraph 8 of the court's November 19, 2012 Corrected Order.

/s/ Victor R. Marshall

Victor R. Marshall, Esq.

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

AB-07-1

Claims of the Navajo Nation

NAME OF PARTY: The United States of America

DESCRIPTIVE SUMMARY: The United States responses to Victor Marshall's seventh set of discovery requests concerning other water claims and obligations of the United States

NUMBER OF PAGES: 6

DATE OF SERVICE: December 28, 2012

RESPONSES OF THE UNITED STATES TO THE MARSHALL INTERESTS SEVENTH SET OF DISCOVERY REQUESTS CONCERNING OTHER WATER CLAIMS BY THE UNITED STATES

The Marshall Interests served the United States with their seventh set of discovery requests entitled *Joint Discovery About Other Water Claims by the United States* (November 30, 2012) ("Seventh Discovery Request").¹ The United States responds to the discovery requests below.²

General Objection: The Marshall Interests' discovery requests are unmoored from this Court's previous orders and from the New Mexico Rules of Civil Procedure. The Marshall Interests have issued discovery requests to the United States that are broader than anything previously submitted

¹ Since Marsh 26, 2012, the Marshall Interests have issued eight distinct sets of discovery requests on the United States to which the United States has properly and completely responded. As well, the Marshall Interests have informally sought information from the United States, to which the United States has also properly and completely responded.

² Because of absences during the holiday season, the United States must wait until immediately after the New Year to secure statements under oath as required by Rule 1-033(C)(1). The United States will provide the Marshall Interests with such statement as soon as such statements are available.

by any non-settling party. Such discovery requests are unreasonably broad in scope, seek wholly irrelevant information, are contrary to the previous orders of the Court and are contrary to the New Mexico Rules of Civil Procedure. Rule 1-026(B)(2)(a), NMRA. Specifically, the Marshall Interests seek information about water claims, potential water claims, and, generally, all potential obligations of the United States that may have throughout the entirety of the Colorado River Basin that may (or may not) directly or indirectly have impact in New Mexico. Similarly, throughout discovery requests the discovery requests unreasonably define the "San Juan River Basin" as an area inclusive of "the basin within New Mexico and other states, e.g. Colorado." See Order Concerning the Objections of the Navajo Nation, the United States and the State of New Mexico to Discovery Requests (July 9, 2012) (the Court has previously ruled that discovery requests that seek information concerning matters beyond the San Juan River Basin of New Mexico are overly broad).

Nonetheless consistent with the United States' previous responses to discovery and this Court's orders and to minimize the discovery dispute that the United States maintains with the Marshall Interest, the United States provides the responses below based upon information concerning the San Juan River Basin of New Mexico and maintained by the United States Department of the Interior. Simultaneously prepared with these responses, the United States has filed motion for a protective order that asks that this Court protect the United States from the sweeping scope of the Marshall Interests discovery requests.

INTERROGATORY NO. 1: In addition to the claims which the United States is asserting on behalf of the Navajo Nation in case number AB 07-1, does the United States claim any other water rights in the San Juan River basin, on behalf of itself or others?

Objections of the United States:

Objection No. 1 – The interrogatory seeks information that is plainly not relevant to these settlement proceedings nor would the information lead to admissible evidence for these proceedings. Other water rights claims that the United States might make on behalf of itself or others has no effect on those water rights claims that the United States might pursue or settle on behalf of the Navajo Nation. Further, any litigation or settlement of the Navajo Nation's water rights is in no way affected by the water rights that the United States might pursue or settle for itself or others. As such, the Marshall Interests' interrogatory violates fundamental principles of discovery and serves no legitimate purpose. Rule 1-026(B)(1), NMRA (discovery only proper on those matters "relevant to the subject matter involved in the pending action").

Objection No. 2 - The Court instructed all non-settling parties to submit their discovery requests to the Settling Parties before June 1, 2012. Order ... *Setting Schedule Governing Discovery* ... (February 3, 2011) § 2.c. This interrogatory generally seeks information concerning matters that should have been inquired of the United States before June 1, 2012. As the Marshall Interests have failed to comply with the Court's previous order, their request of the United States is in violation of the Court's Order and constitutes an unreasonable, cumulative burden.

Response of the United States: Without waiving the objections made, the United States asserts the following. The United States has claimed and will continue to claim other water rights in the San Juan River Basin of New Mexico on its own behalf and on behalf of others as required by law. On September 26, 2008, the United States filed claims on behalf of the Bureau of Land United States' Responses to Mr. Marshall's November 30, 2012, Discovery Requests

Management in Phases I and II of the La Plata Subsection. Further, in 2002 the United States issued *The United States Statement of Position* (December 23, 2002) that described the United States' position concerning the nature of the United States remaining claims in this adjudication and to the extent that the Marshall Interests seek more detail concerning the United States' position, the Marshall Interests may continue to rely upon the descriptions provided there.

INTERROGATORY NO. 2: Does the United States claim any water rights in the San Juan River basin for endangered species, including the razorback sucker (*Xyrauchen texanus*); Colorado pikeminnow, formerly known as the Colorado squawfish (*Ptychocheilus lucius*); humpback chub (*Gila cypha*); bonytail chub or bonytail (*Gila elegans*); and southwestern willow flycatcher (*Empidonax trailli extimus*)?

Objections of the United States: The United States incorporates the objections articulated in response to Interrogatory No. 1 (Objection Nos. 1 and 2).

Response of the United States: Without waiving the objections made, the United States asserts that it does not claim any water rights in the San Juan River Basin in New Mexico for any endangered species. Nonetheless, the United States complies with all federal statutes that relate to recognized endangered species (such as the Endangered Species Act (16 U.S.C. 1531 *et seq.*) and such compliance will necessarily impact the action that a federal agency may or may not take regarding endangered species.

INTERROGATORY NO. 3: What are the minimum flows which the United States currently requires (or intends to require) in the San Juan River below Shiprock for the protection of endangered species? Please include the cfs and acre-feet for the base flow and also for the additional spring releases from Navajo Dam. Please include the time period when these flows apply, including the spring ramp up period, the peak period, and the ramp down period, and explain how the U.S. decides what quantities to require.

Objections of the United States: The United States incorporates the objections articulated in response to Interrogatory No. 1 (Objection Nos. 1 and 2).

Objection No. 3 - The Court has previously ruled that discovery requests that seek information concerning the application of the ESA are irrelevant to these proceedings. See July 12, 2012 Order at pg. 10 (ruling Mr. Horner's RFP No. 32 concerning ESA application irrelevant).

Response of the United States: Without waiving the objections made, the manner in which the United States determines minimum flows in the San Juan River below Shiprock for the protection of endangered species is thoroughly described in the document titled "Environmental Impact Statement and Record of Decision for Re-Operation of Navajo Reservoir." This document has been previously identified in response to previous discovery requests and can be found at and downloaded from www.usbr.gov/uc/envdocs/eis/navajo/navresops_Feis.html. Further, the United States has previously provided the analysis underlying that document in its production under the category Endangered Species Act in the following files: (1) Flow Recommendations files combined 1; (2) Flow Recommendations files combined 2; (3) San Juan River Flow

Recommendations Report Holden May 1999; and (4) Animas La Plata Biological Opinion. To the extent that the interrogatory seeks information not described in the referenced reports, the United States has not previously performed an analysis to provide the information requested and is under no obligation to perform such expert analysis for the Marshall Interests.

INTERROGATORY NO. 4: Does the United States claim any water rights in the San Juan River basin on behalf of any Native American tribe other than the Navajo Nation, for example the Ute Mountain Ute Tribe or the Southern Ute Indian Tribe?

Objections of the United States: The United States incorporates the objections articulated in response to Interrogatory No. 1 (Objection Nos. 1 and 2).

Response of the United States: Without waiving the objections made, the United States incorporates the response articulated in response to Interrogatory No. 1. Further, the United States has recently issued water rights claims on behalf of the Ute Mountain Ute Tribe; these claims are on file with and publically available through the Eleventh Judicial District of New Mexico. *See United States' Amended Supplemental Answer with Respect to Claims on Behalf of the Ute Mountain Ute Tribe* (October 1, 2007).

INTERROGATORY NO. 5: Does the United States claim any water rights in the San Juan River basin for national forests, Bureau of Land Management lands, or other federal lands, or other federal purpose?

Objections of the United States: The United States incorporates the objections articulated in response to Interrogatory No. 1 (Objection Nos. 1 and 2).

Response of the United States: Without waiving the objections made, the United States incorporates the response articulated in response to Request No. 1.

INTERROGATORY NO. 6: Does the United States have any other claims or rights or duties or obligations which might affect water flows in the San Juan River basin, or the amount of water which can be diverted or consumed in New Mexico? If so, please identify and describe each such right, duty or obligation, and explain how it might affect water flows or amounts, and under what conditions.

Objections of the United States: The United States incorporates the objections articulated in response to Interrogatory No. 1 (Objection Nos. 1 and 2). Further, this interrogatory generally seeks, without limit, a yet unperformed analysis with respect to every possible regulatory obligation that the United States may have that may affect water "diverted and consumed in New Mexico." Such an overly broad request is contrary the Court's previous orders, *see* Order of July 9, 2012, and is plainly unduly burdensome, *see* Rule 1-026(B)(2)(a), NMRA. Finally, simultaneously filed with these discovery responses, the United States has moved the Court for a protection order with respect to this interrogatory and the United States will refrain from further responding to this interrogatory unless otherwise ordered by the Court.

INTERROGATORY NO. 7: Does the United States claim any other water rights or obligations in the Upper Basin of the Colorado River which might directly or indirectly affect the amount of water available for diversion or use in New Mexico?

Objections of the United States: The United States incorporates the objections articulated in response to Interrogatory No. 1 (Objection Nos. 1 and 2). Further, this interrogatory appears to have no limit as it generally seeks information concerning all “obligations” throughout the Lower Colorado River Basin that “might directly or indirectly” affect water in the San Juan River Basin of New Mexico. Such an overly broad request is contrary the Court’s previous orders, *see* Order of July 9, 2012, and is plainly unduly burdensome, *see* Rule 1-026(B)(2)(a), NMRA. Finally, simultaneously filed with these discovery responses, the United States has moved the Court for a protection order with respect to this interrogatory and the United States will refrain from further responding to this interrogatory unless otherwise ordered by the Court

INTERROGATORY NO. 8: Does the United States claim any other water rights or obligations in the Lower Basin of the Colorado River which might directly or indirectly affect the amount of water available for diversion or use in New Mexico?

Objections of the United States: The United States incorporates the objections articulated in response to Interrogatory No. 7.

INTERROGATORY NO. 9: Does the United States claim any other water rights or obligations with regard to the Colorado River which might directly or indirectly affect the amount of water available for diversion or use in New Mexico, such as treaty obligations to Mexico, shortage sharing agreements, or agreements for operating the River?

Objections of the United States: The United States incorporates the objections articulated in response to Interrogatory No. 7.

INTERROGATORY NO. 10: If the answer to any of the foregoing interrogatories is “yes,” please identify and describe each water right claimed by the United States, including the nature, purpose, amount, and priority of each such right or obligation, and identify a person or persons to testify about the right or obligation pursuant to Rule 1-030(B)(b), NMRA.

Objections of the United States: The United States incorporates by reference the objections articulated in response to Interrogatory Nos. 1 through 9. Further, because all of the inquiries in the Marshall Interests’ Discovery Requests Concerning Other Water Claims and Obligations of the United States lacks relevance to the Court’s review of the Settlement Agreement, the United States has moved the Court for a Protective Order with respect to this interrogatory and the United States will refrain from further responding to this interrogatory unless otherwise ordered by the Court

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION OF DOCUMENTS NO. 1: Please produce records relating to the answer to each of the above interrogatories.

Objections of the United States: The United States incorporates by reference the objections articulated in response to Interrogatory Nos. 1 through 9.

Response of the United States: Without waiving the objections made, to the extent that the United States has relied on any document to prepare responses to the interrogatories listed above, the United States has identified those documents on which it relies in the response to the interrogatory.

Respectfully submitted this 28th day of December, 2012.

UNITED STATES OF AMERICA



Andrew J. "Guss" Guarino
U.S. Department of Justice
Environment and Natural Resources Division
999 18th Street, South Terrace, Suite 370
Denver, CO 80202
(303) 844-1343

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of December 2012, a true and accurate copy of **RESPONSES OF THE UNITED STATES TO THE MARSHALL INTERESTS SEVENTH SET OF DISCOVERY REQUESTS CONCERNING OTHER WATER CLAIMS BY THE UNITED STATES** was served by attaching an electronic copy to an email sent to the following address, wnavajointerse@nmcourts.gov, and to those e-mail addresses identified in the *ORDER SUMMARIZING DISCOVERY ACTIVITIES DISCUSSED AT THE NOVEMBR 6, 2012 DISCOVERY CONFERENCE* (November 16, 2012).

