

DISTRICT COURT
SAN JUAN COUNTY NM
FILED

2013 FEB 19 PM 4:00

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

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

Plaintiff,

AB-07-1

Claims of Navajo Nation

vs.

No. CV 75-184

Honorable James J. Wechsler
Presiding Judge

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

Defendants.

DESCRIPTIVE SUMMARY: Response to notice of discovery dispute.

NUMBER OF PAGES: 4

DATE OF FILING: February 19, 2013

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

The Navajo Nation has filed a document styled "The Navajo Nation's Notice of Discovery Dispute with the Community Ditch Defendants." This appears to be only a notice of discovery dispute, and not a motion to compel. The United States has joined in the "notice." The State of New Mexico has not joined with the Navajo Nation or the United States in this discovery dispute.

The "notice" is not well-taken, for many reasons.

First, the "notice" is unintelligible. It does not state with any clarity what the notice-givers want the court to do, if anything. Do they want several thousand individual water

users to swear, sign, and have notarized individual responses to each set of interrogatories by the Navajo Nation and the United States? That would require hundreds or thousands of individual attested signatures, which would be infeasible. The parties have exchanged several emails asking the United States and the Navajo Nation to state specifically what they want, but their responses have been elliptical.

Second, the “notice” overlooks the fact that the discovery responses have been verified. *See* Verification of Jim Rogers, filed January 10, 2013.

Third, the “notice” is moot, because this matter is governed by the court’s order of February 8, 2013, and by Rule 1-026(E) of the Rules of Civil Procedure which provides that “a party has a duty to seasonably supplement or amend a prior response to an interrogatory, request for production, or request for admission” The Community Ditch Defendants have already supplemented their responses, and will continue to do so in accordance with the rules.

Fourth, the “notice” is inconsistent with the “Order Concerning the Responses and Objections of the [N]on-Settling Parties to Discovery Requests” ¶ (3)(C) (Nov. 30, 2011), whereby the court directed that individual water users were not required to provide information about their own individual water interests in this inter se.

Fifth, by statute and case law, unincorporated associations like the community ditches have the authority to bring and defend lawsuits on behalf of their members. NMSA 1978, § 53-10-5 (1937); *New Mexico Cattle Growers Ass’n v. United States Fish and Wildlife Serv.*, 81 F. Supp. 2d 1141, 1152 (D.N.M. 1999), *rev’d on other grounds*, 248 F.3d 1277 (10th Cir.

2001); *National Trust for Historic Preservation v. City of Albuquerque*, 117 N.M. 590, 594, 874 P.2d 798, 802 (Ct. App. 1994).

Sixth, acequia organizations like community ditches have authority to represent their members. NMSA 1978, § 73-2-11; *State ex rel. State Engineer v. Lewis*, Nos. 20,294 and 22,600 (currently in the Fifth Judicial District), "Order Granting in Part and Denying in Part the State of New Mexico's Motion To Dismiss the Claims of Thirteen Acequias" (5th Jud. Dist. Ct. Sept. 16, 2011), attached as Exhibit C to "Response to Objections" (Oct. 13, 2011), filed herein. In the present case, the court has reserved and not yet made a ruling on this point.

Seventh, individual water rights owners have no significant personal knowledge about the answers to the interrogatories. For example, an ordinary individual water rights owner has no personal knowledge about NIIP's financial data, the 2007 hydrologic determination, the unpublished permit applications by the U.S. and the Navajo Nation, and the Colorado River Basin Water Supply and Demand Study from the Department of the Interior.

Eighth, this court has repeatedly ruled that this case deals only with the water rights claimed by the United States on behalf of the Navajo Nation, not the water rights of anybody else in the San Juan River basin. This means that the information about the Navajo claims is uniquely in the possession and control of the United States, or the Navajo Nation, or the state engineer, not the defendants.

Ninth, collection of signed and notarized signatures from individual water rights holders is not reasonably calculated to lead to the discovery of admissible evidence.

Tenth, this "notice" is unduly burdensome. It is designed to force the defendants to deplete their litigation resources in an exercise which has no probative value.

Eleventh, this "notice" is designed to force defendants to waste time on distractions so that defendants cannot complete the discovery which they need by March 1. The defendants the United States and the Navajo Nation are trying to run out the clock to prevent the defendants from completing discovery into the central dispositive issues in this case.

Respectfully submitted,

VICTOR R. MARSHALL & ASSOCIATES, P.C.

By /s/ Victor R. Marshall

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th 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: wnavajointerse@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.