

DISTRICT COURT
SAN JUAN COUNTY NM
FILED
2013 MAY 20 PM 7:35

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

STATE OF NEW MEXICO, *ex rel.*
State Engineer,

Plaintiff,

vs.

D-1116- CV 75-184
Hon. James J. Wechsler

UNITED STATES OF AMERICA, *et al.*,

Defendants.

AB-07-1
Claims of the Navajo Nation

JICARILLA APACHE TRIBE and the
NAVAJO NATION,
Defendant-Intervenor.

**ORDER DENYING COMMUNITY DITCH DEFENDANTS'
ADDITIONAL MOTION TO COMPEL CONCERNING NIIP-NAPI**

The Community Ditch Defendants' April 1, 2013 motion to compel discovery regarding the Navajo Indian Irrigation Project (NIIP) and the Navajo Agricultural Products Industry (NAPI) alleges that (1) the Settling Parties have failed to adequately respond to requests for documents and interrogatories and (2) the Navajo Nation's designated Rule 1-030(B)(6) witness did not possess the requisite knowledge to adequately answer certain questions about the financial history and performance of NIIP and NAPI. After full briefing, a hearing on this matter was conducted on April 30, 2013.¹

**The Court Has Previously Determined That Discovery
Responses Regarding NIIP Are Adequate**

The Community Ditch Defendants have already filed several motions seeking to compel

¹On April 17, 2013, the Navajo Nation filed a response in opposition; on April 29, 2013, the Community Ditch Defendants filed a reply.

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discovery concerning NIIP. In response to the Community Ditch Defendants' September 27, 2012 motion to compel discovery, the Court determined that the Navajo Nation was in the process of identifying responsive documents and that the United States had adequately responded to the discovery requests. Order Concerning Motion to Compel Discovery Regarding NIIP, entered November 6, 2012. After permitting the Community Ditch Defendants to propound ten additional interrogatories regarding NIIP to the Navajo Nation and the United States (*see* Order concerning the Community Ditch Parties' Discovery Requests Regarding NIIP, entered November 30, 2013), the Community Ditch Defendants advised the Court that the Navajo Nation had failed to adequately answer the additional interrogatories and improperly referred to documents that had already been provided, instead of responding with a complete answer. Notice of Impasse and Filing of Navajo Nation's Responses and Objections to Additional Interrogatories on NIIP, filed February 12, 2013. The Community Ditch Defendants' objections were overruled. Order Regarding Notice of Impasse with the Navajo Nation, entered February 25, 2013. To date, Community Ditch Defendants have not presented any new facts supporting their arguments.

The Navajo Nation's Rule 1-030(B)(6) Witness Provided Adequate Deposition Responses

The focus of the Community Ditch Defendants' motion concerns the deposition of the Navajo Nation's designated Rule 1-030(B)(6) witness, Lionel Haskie, the Operations and Maintenance Manager at NAPI. The Community Ditch Defendants maintain that Mr. Haskie was unable to answer questions at his deposition about the subjects upon which he had been designated by the Navajo Nation. Mr. Haskie was designated as a Rule 1-030(B)(6) witness regarding Interrogatory Nos. 1 through 6, as follows (*see* the Navajo Nation's additional responses and objections to the Community Ditch Defendants' additional interrogatories on NIIP, filed as an

addendum to the Community Ditch Defendants' February 12, 2013 Notice of Impasse):

Interrogatory No. 1: With respect to NIIP, who provided what functions at what times? Please identify the specific agencies or contractors which have performed particular functions for NIIP at various times, such as the BOR, the BIA, NIIP, NAPI, other agencies of the United States or the Navajo Nation, and government contractors.

Interrogatory No. 2: Who paid for what expenses of NIIP at what times, and out of which appropriations or other funds?

Interrogatory No. 3: What were the "sources and uses of funds" for NIIP since inception?

Interrogatory No. 4: What are the total capital costs for NIIP since inception, and who has paid them, and from what appropriations or other sources? This includes the costs of all infrastructure, including Navajo Dam; the diversion structures, canals, siphons, pipes, pumps, tanks, and sprinklers that convey water to NIIP; roads; controls; computers and software; farm machinery; and buildings, plant and equipment.

Interrogatory No. 5: Who incurred labor and management costs for NIIP at what times?

Interrogatory No. 6, Part 1: In terms of construction and capital costs, what else needs to be done to complete NIIP and extend it to approximately 110,000 acres of irrigated land?

Interrogatory No. 6, Part 2: What are the planned stages, when will those stages occur, how much will completion cost, and when will NIIP be completed?

Interrogatory No. 6, Part 3: What is the probability that NIIP will be fully completed?

The Community Ditch Defendants' motion identifies one substantive deficit in Mr. Haskie's deposition testimony: "[h]e has no personal knowledge or experience about the financial performance of NIIP-NAPI, such as the actual cost of building the infrastructure or the overall expenses and revenue of NIIP-NAPI." Motion at 1. This contention is not supported by the deposition transcript, filed as an

addendum to the Navajo Nation's response. In particular, Mr. Haskie provided substantive responses to questions concerning the source of NIIP funding, Haskie deposition pages, 69 - 77; the process for addressing certain identified project deficiencies and project operations that have associated energy costs, *Id.* at 98-109; and certain NAPI expenses and NIIP operational costs, *Id.* at 127-142.

Moreover, although the Community Ditch Defendants identified the costs associated with NIIP operations as a key focus of their inquiry, they opted to depose only one Rule 1-030(B)(6) witness. As pointed out by the Navajo Nation, the United States identified Michael Howe, Bureau of Indian Affairs, and Douglas Dockter, Bureau of Reclamation, as Rule 1-030(B)(6) witnesses with regard to the relevant NIIP interrogatories. The Navajo Nation's response appended email correspondence between the United States and the Community Ditch Defendants indicating that the United States attempted to confirm a date and location for these depositions. Despite these efforts, the Community Ditch Defendants did not schedule depositions for Messrs. Dockter and Howe.²

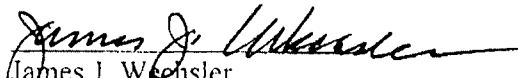
Finally, the Community Ditch Defendants' argument that discovery was frustrated because Mr. Haskie failed to bring documents to the deposition is not well-founded. As noted by the Navajo Nation, all documents that were used or consulted in preparation of responses to Interrogatory Nos. 1 through 6 had already been provided to the Community Ditch Defendants in the Navajo Nation's response to the Request for Production and counsel for the Navajo Nation offered an electronic copy of the documents at the deposition. Haskie deposition page, 145.

²At the April 30, 2013 hearing, the Navajo Nation reiterated its concern that Messrs. Dockter and Howe had been designated as Rule 1-030(B)(6) witnesses by the United States, and that the Community Ditch Defendants had not responded to the United States' efforts to schedule depositions. In response, the Community Ditch Defendants suggested that email correspondence would clarify the Navajo Nation's contentions. In the May 1, 2013 Order Concerning Supplemental Documentation, the Court requested supplemental documentation to clarify efforts to schedule depositions. The Community Ditch Defendants' subsequent filing on May 6, 2013 did not provide any correspondence or documents concerning the United States' designated witnesses.

IT IS THEREFORE ORDERED THAT:

- (1) the Community Ditch Defendants' Additional Motion to Compel is DENIED; and
- (2) having failed to establish that the Navajo Nation has not adequately responded to discovery, the Community Ditch Defendants' request for costs and attorney fees is hereby DENIED.

IT IS SO ORDERED.


James J. Wechsler
Presiding Judge