

FILE

JUN - 7 2019

STATE OF NEW MEXICO
SAN JUAN COUNTY
ELEVENTH JUDICIAL DISTRICT COURT

DISTRICT COURT
103 S. OLIVER

STATE OF NEW MEXICO, ex rel.
STATE ENGINEER,

D-1116-CV-75434
AZULC, NEW MEXICO 87410
Hon. James J. Wechsler
Presiding Judge

Plaintiff,

SAN JUAN RIVER STREAM
SYSTEM ADJUDICATION

v.

THE UNITED STATES OF AMERICA, et al.,

Defendants,

v.

THE JICARILLA APACHE TRIBE and the
NAVAJO NATION,

Defendants-Intervenors.

DESCRIPTIVE SUMMARY: The Navajo Nation should be compelled to provide more complete answers to the discovery served on January 23, 2019.

NUMBER OF PAGES: 4 + 3-page exhibit

DATE OF FILING: June 7, 2019.

REPLY IN SUPPORT OF MOTION TO COMPEL

The Navajo Nation has not fully answered the discovery propounded on January 23, 2019. This fact is confirmed by the Tribe's May 24 response to the motion to compel.

The Tribe has not made adequate efforts to locate all records relating to the creation of the legal services organization that was named DNA. DNA was created as a program under ONEO, the Office of Navajo Economic Opportunity. The Navajo government set up

this agency to run programs funded by the War on Poverty, so that the Tribe would control them, rather than the BIA. Exhibit X, Peter Iverson, *Dine: A History of the Navajos*, at 236 (2002), attached hereto. DNA's Articles of Incorporation were signed by Peter MacDonald, the director of ONEO. See Exhibit 1 to the brief in support of the Rule 1-504(B) motion, filed January 17, 2019. Therefore there must be records at ONEO concerning DNA's creation. No one disputes that ONEO was part of the Navajo Tribe during the relevant time.

Therefore the conclusory affidavit from Ms. Yellow Eagle is insufficient. She has no personal knowledge about ONEO or the current whereabouts of its records. She does not say that she made any attempt to locate ONEO records. Whether or not ONEO is "defunct", ONEO records may exist in archives or storage. See *XTO Energy, Inc. v. ATD, LLC*, 2016 WL 1730171, at *23 (D.N.M. Apr. 1, 2016). See also *Landry v. Swire Oilfield Services, L.L.C.*, 323 F.R.D. 360, 396 (D.N.M. 2018) ("Defendants have 'control' over the requested records, because, among other things, the Defendants have 'the practical ability to request . . . [the] information'").

Additionally, her affidavit states that she looked for resolutions "concerning DNA", but she does not say that she searched for resolutions about legal services before DNA was given that name. During its formative stages, DNA did not have a definite name.

Peter MacDonald has first-hand knowledge about DNA's creation. After his service at ONEO, Mr. MacDonald was elected to four terms as Chairman of the Navajo Tribe. Upon information and belief Mr. MacDonald lives on the Reservation. During the last

month, Mr. MacDonald has been quoted frequently in the press as President of the Navajo Code Talkers Association.

Mr. MacDonald will also have first-hand knowledge about the lawyers who worked on Navajo water claims. During the Senate subcommittee hearings in January 1972, Chairman MacDonald relied on DNA legal memos as part of the his advocacy to Congress. See Exhibit 9 to the brief in support of the Rule 1-054(B) motion, filed January 17, 2019 (the Hanley and MacMeekin legal memos).

Likewise, Peterson Zah has first-hand knowledge about DNA's creation and its work on Navajo water rights. Mr. Zah served as Assistant Director and then Director of DNA, and later became Chairman and President of the Tribe. Mr. Zah participated actively in the 1972 Senate hearings.

From their own independent research, movants have already identified the following DNA lawyers and staff who worked on water rights: Ted Mitchell, Ben Hanley, Douglas MacMeekin, Bob Hilgendorf, Michael Gross, Ted Mitchell, Peterson Zah, and Leo Haven. To answer the interrogatory, the Nation must make reasonable inquiry by contacting these people and asking them who else worked on water rights – lawyers and non-lawyers. This is needed to comply with Rule 1-026(B)(3):

Witnesses and exhibits. Parties may obtain discovery of the identity of each person expected to be called as a witness at trial, the subject matter of the witness's expected testimony and the substance of the witness's testimony. Parties may also discover the name, address and telephone number of each individual likely to have discoverable information that another party may use to support its claims or defenses as well as the subjects of such information.

See also Rule 1-037(A)(3) ("an evasive or incomplete answer is to be treated as a failure to answer"). The discovery responses must be supplemented to provide this information about

the above persons and any other persons who have first hand knowledge about the subjects of this discovery.

Wherefore, the Navajo Nation should be ordered to make further investigations and inquiries, to supplement its responses, and to provide the information set forth in Rule 1-026. Movants should be awarded costs and fees in connection with this motion.

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 7th day of June, 2019, a true and correct copy of the foregoing was served on the all counsel on the Electronic Service List for D-1116-CV-7500184 by emailing the filing to sanjuanwater-grp@nmcourts.gov and sanjuanwater@nmcourts.gov.

/s/ Victor R. Marshall

Victor R. Marshall, Esq.

Diné

A HISTORY OF THE NAVAJOS



Peter Iverson

Featuring photographs by Monty Roesse

EXHIBIT

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Diné

A HISTORY OF THE NAVAJOS

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assume important positions. Navajo studies were featured at the heart of the curriculum, with Kenneth Begay (silversmithing), Mike Mitchell (history and culture), William Morgan (language), Mabel Myers (weaving), Ruth Roessel (director, history and culture), and Atah Chee Yellowhair (basketry) among the instructors. Teddy Draper, Mike Etsitty, Nathan Silversmith, and Erwin Wayne taught in adult basic education. Other initial Navajo faculty members included Elouise Jackson (English), Grace McNeley (English), Priscilla Mowrer (sociology), Paul Platero (sciences), and Rudy Sells (mathematics). Key Navajo staff members included Tommy Begay (comptroller), Margaret Etsitty (counselor), Dean Jackson (federal programs), Jack Jackson (dean of students and basketball coach), and Agatha Yazzie (registrar).

The college achieved noteworthy successes on several fronts, but its nonacademic environment limited its ability to attract and keep students. Those who lived on campus were sentenced to reside in Dormitory Nine, with no rugs on the floor, no carpeting in the hallways, harsh overhead lighting, and paper-thin walls. The high school furnished the cook, the food, and high school students whose presence extended the lines in the cafeteria. The cook obviously regarded pepper as a dangerous spice and his concoctions lacked imagination, variety, or taste. Students complained constantly about the food. One expressed his unhappiness in the student newspaper: "My socks have absorbed so much starch they walk by themselves!" Those enrolled at the college played basketball in a high school gym, saw movies in a high school auditorium, checked books out of a high school library, and attended class in high school classrooms. It is not surprising that they wondered about whether they were attending "a real college." Many Farms' centrally isolated location did not aid those who needed a change of scenery.¹⁶ In sum, by the early 1970s, the future well-being of the Navajos' own college remained very much in doubt, despite the need for a Diné institution of higher education.

IMPACT OF THE OFFICE OF NAVAJO ECONOMIC OPPORTUNITY AND THE DNA LEGAL SERVICES PROGRAM

The ONEO was not a Navajo idea. The office emerged because of money available through the federal government's "War on Poverty" during the 1960s. The Navajo Nation brushed aside the BIA's request to administer a local program sponsored through the Office of Economic Opportunity (OEO) and decided to run the program itself. An initial grant of \$920,000 from the OEO in January 1965 launched ONEO. By May 1965, Peter MacDonald had become executive director of ONEO. He remained at the helm until he resigned to run for chairman.¹⁷

In one way or another, different ONEO programs soon affected the lives of most Diné. The Legal Services, Home Improvement Training, the Navajo Culture Center, the Neighborhood Youth Corps, Local Community