IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA and ZUNI INDIAN TRIBE Plaintiffs, -v- STATE OF NEW MEXICO, ex rel. State ENGINEER, et al. Defendants	)	07cv00681-BB ZUNI RIVER BASIN ADJUDICATION Subproceeding 1 Zuni Indian Claims

UNITED STATES' MOTION FOR A PROTECTIVE ORDER

The United States of America ("United States"), through undersigned counsel, hereby moves the Court to enter a protective order concerning discovery served in this case by Defendant Broe Land Acquisitions, III, LLC ("Broe") that exceeds the number of interrogatories allowed by Fed.R.Civ.P. 33(a)(1), seeks to conduct discovery outside the framework for this adjudication established by the Special Master's scheduling orders, and is otherwise unduly burdensome. In support of this motion, the United States asserts the following:

1. On February 4, 2010, Broe served *Defendant Broe Land Acquisitions, III, LLC's First Interrogatories, Requests for Production and Requests for Admission to Plaintiff United States of America* (the "Broe Requests") upon the United States. A copy of the Broe Requests is attached as Exhibit A to this motion.

The Broe Requests Exceed the Fed.R.Civ.P. 33(a)(1) Numerical Limit for Interrogatories

2. Fed.R.Civ.P. 33(a)(1) provides: "***Number***. Unless otherwise stipulated or ordered by the court, a party may serve on any other party no more than 25 written interrogatories, including all discrete subparts." No stipulation or order entered in this case alters

this Rule 33(a)(1) limitation. The Advisory Committee notes to the 1993 Amendments that added the numerical limitation state:

> because the [interrogatory] device can be costly and may be used as a means of harassment, it is desirable to subject its use to the control of the court consistent with the principles stated in Rule 26(b)(2), particularly in multi-party cases where it has not been unusual for the same interrogatory to be propounded to a party by more than one of its adversaries.
>
> Each party is allowed to serve 25 interrogatories upon any other party, but must secure leave of court (or a stipulation from the opposing party) to serve a larger number. **Parties cannot evade this presumptive limitation through the device of joining as "subparts" questions that seek information about discrete separate subjects.** However, a question asking about communications of a particular type should be treated as a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately for each such communication.

(Emphasis added.) Discussing Rule 33(a)(1), the opinion in Williams v. Board of County Commmisioners, 192 F.R.D. 698, 701 (D. Kansas 2000), notes:

> Interrogatories often contain subparts. Some are explicit and separately numbered or lettered, while others are implicit and not separately numbered or lettered. Extensive use of subparts, whether explicit or implicit, could defeat the purposes of the numerical limit contained in Rule 33(a), or in a scheduling order, by rendering it meaningless unless each subpart counts as a separate interrogatory.

Interpreting Rule 33(a)'s numerical limitation, the court in Willingham v. Ashcroft, 226 F.R.D. 57, 59 (D.D.C. 2005) said: "once a subpart of an interrogatory introduces a line of inquiry that is separate and distinct from the inquiry made by the portion of the interrogatory that precedes it, the subpart must be considered a separate interrogatory no matter how it is designated." Another often-cited case on the subject explains the test as follows:

> Probably the best test of whether subsequent questions, within a single interrogatory, are subsumed and related, is to examine whether the first question is primary and subsequent questions are secondary to the primary question. Or, can the subsequent question stand alone? Is it independent of the first question? Genuine subparts should not be counted as separate interrogatories. However, discrete or separate questions should be counted as separate interrogatories, notwithstanding they are joined by a conjunctive word and may be related.

Kendall v. GES Exposition Services, Inc., 174 F.R.D. 684, 685-6 (D. Nevada 1997).

3. The Broe Requests include interrogatories numbered 1 through 18, many of which include separately numbered subparts. *See* Interrogatory Nos. 6, 7, 8, 9, 10, 11, 12, and 15. Applying the test illuminated by the authorities cited in the preceding Paragraph 2 of this motion, the United States asserts there are in fact 80 discrete interrogatories in the Broe Requests, as indicated in the rectified set of interrogatories attached as Exhibit B to this motion. In some instances, the United States asserts that a Broe interrogatory that did not, as served, contain any numbered subparts, does in fact contain discrete subparts. For example, Interrogatory No. 2 contains one discrete subpart asking for an identification of boundaries of lands, and a second discrete subpart asking for an identification of documents. Analyzing a similar compound interrogatory that asked for employee qualifications and also "any document in which these qualifications are articulated," the Kendall court found:

> the first question asks for a description of qualifications. The second question asks for a description of documents. The first question can be answered fully and completely without answering the second question. The second question is totally independent of the first and not "factually subsumed within and necessarily related to the primary question." See Lawrence v. First Kansas Bank & Trust Co., 169 F.R.D. 657, 660-661 (D. Kan. 1996). The second question is really a fugitive request for production of documents and the discovery effort would be better served in that format.

174 F.R.D. at 686. Likewise, here the first question in Broe Interrogatory No. 2, about boundaries, can be fully and completely answered without answering the second question about documents describing or depicting the boundaries.

On the other hand, there are some separately-numbered subparts of Broe interrogatories that appear to be necessarily related to each other, such as the repeated requests for identification of whether a water feature has been continually used and for identification of

"the dates and causes of any non-use." The United States has counted such subparts separately-numbered by Broe as being, in fact, only one discrete interrogatory. See, e.g., Interrogatory No. 6, Discrete Subpart D, in Exhibit B.

Nonetheless, every discrete subpart identified in the attached Exhibit B "introduces a line of inquiry that is separate and distinct from the inquiry made by the portion of the interrogatory that precedes it." Willingham, 226 F.R.D. at 59. In consequence, the Broe Requests vastly exceed the applicable numerical limit for interrogatories in Rule 33(a) and the United States is entitled to a protective order requiring Broe to specify 25, and only 25, of the 80 discrete interrogatories identified in Exhibit B that the United States is to answer.[1]

The Broe Requests are Inconsistent with the Letter and the Spirit of the Special Master's Scheduling Orders.

4. The *Scheduling Order* the Special Master entered in this Subproceeding on September 24, 2008 [Doc. No. 264], included, in Section IV, a Case Plan and Schedule which established a scheduling framework for discovery, motions practice, and trial concerning two classifications of the water rights claims filed in this subproceeding. The first classification encompassed claims based on evidence of past or present irrigation by means of permanent works ("PPPW"), and the second classification involved claims for rights to use water for domestic, commercial, municipal, or industrial purposes ("DCMI"). The *Scheduling Order* established separate schedules for each classification, with specific deadlines established for disclosures of expert reports, discovery completion, pretrial motions, final lists of witnesses and

[1] In accordance with this Court's decision in Allahverdi v. Regents of the University of New Mexico, 228 F.R.D. 696, 698 (2005), the United States is answering none of Broe's interrogatories, pending resolution of the present motion. Requests for Production Nos. 1, 2, 10, 11, 12, and 13 expressly reference the answers to Interrogatories and the United States, accordingly, also is not responding to these requests beyond preserving objections.

exhibits, and trial. Notably, Section IV. C. of the *Scheduling Order* provided that "[t]he scheduling of discovery and trial of all other claims in this Subproceeding shall be determined at a Scheduling and Mangement Conference to be set following the conclusion of the DCMI trial." This phased and sequential approach to discovery and trial of the different classifications of claims has been preserved in subsequent orders amending the Subproceeding schedule on December 4, 2009 [Doc. No. 280] and January 28, 2010 [Doc. No. 283]. Under the current amended schedule, proceedings involving disclosure of expert reports, discovery, and trial concerning the DCMI claims are to begin in May of 2012, after the PPPW trial now set for September of 2011. Counsel for Broe was consulted, and participated in the proceedings leading to the Special Master's adoption of the *Scheduling Order,* and has never objected to either the *Scheduling Order* or the subsequent orders amending the schedule.

5. Ignoring the phased approach adopted in this Subproceeding's scheduling orders, the Broe Requests seek information purportedly relevant to all aspects of the United States' *Subproceeding Complaint* [Doc. No. 1]. For example, Interrogatory Nos. 5, 16, 17, and 18, and Request for Production No. 14, broadly seek information relating to all of the United States' claims in the Subproceeding.[2] Interrogatory 17 even seeks identification of "any" expert witnesses, "the subject matter on which the expert is expected to testify, the substance of the facts and opinions to which the expert is expected to testify, and summary [sic] of the grounds for each opinion," ignoring the facts that, (a) as to PPPW claims, the United States has already, on November 5, 2008, disclosed the requested information, (b) as to DCMI claims, the Special

[2] Interrogatory Nos. 2, 3, and 4; Request for Production Nos. 1 and 2; and the Requests for Admission in the Broe Requests also seek general information, but of a type not inherently tied to the specific claims the United States has asserted. Because any responsive information may pertain to PPPW claims, the United States does not contend that these specific requests violate the letter or spirit of the Special Master's scheduling orders.

Master's scheduling orders do not require the United States to provide the information requested by Broe until May 2, 2012, and (c) as to all other claims the United States' obligation to disclose expert reports is yet to be scheduled. Interrogatory 13 asks only for information concerning the United States' DCMI claims. Interrogatory 12 includes a series of questions concerning the United States claims for tracts irrigated by means of seasonal or temporary works, and Interrogatory 14 asks for the "entire factual basis" for the United States' claim based on practicably irrigable acreage – both categories of claims that have yet not been scheduled for discovery or trial and that, pursuant to Section IV. C. of the *Scheduling Order*, will not be scheduled until after the conclusion of the DCMI trial.

6. Interrogatory Nos. 6, 7, 8, and 9 each make a number of discrete inquiries concerning all of the United States' claims for, respectively, impoundments, reservoirs, wells, and springs. These claims are not currently scheduled for adjudication in themselves, although it is true that the reservoirs and some of the impoundments, wells, and springs are related to the PPPW claims as sources of the water used to irrigate the PPPW acreages. Broe nowhere asks which of the impoundments, reservoirs, wells, and springs relate to the pending PPPW claims and these Interrogatories clearly are not, as written, limited in scope to such PPPW-related features. To the extent they seek information concerning the features that are not related to the PPPW claims, these interrogatories, and the similarly over-broad Requests for Production Nos. 3, 5, 6, and 16, concern matters that are not relevant to any of the claims or defenses the Special Master has scheduled for adjudication in the current phase of the adjudication.

7. The United States is willing to provide Broe with discoverable information concerning the PPPW claims, that is, admissible evidence or information likely to lead to the discovery of evidence admissible in the now-scheduled PPPW trial. However, permitting Broe

to now conduct discovery that is relevant only to non-PPPW claims is a waste of resources, and an unfair burden on the United States in the circumstances of this case. No party will be prejudiced if such discovery is postponed until the phases of the case in which it is relevant. Accordingly, the United States moves the Court to enter a protective order pursuant to Fed.R.Civ.P. 26(c)(1)(B) and (D) restricting Broe to conducting discovery only as to information relevant to the PPPW claims until after the conclusion of the PPPW trial.

The Broe Requests are Unduly Burdensome and Expensive

8. The Broe Requests purport to require the United States to produce documents and other information in the possession of any United States agency, employee or agent. The United States has nearly 2.7 million civilian employees working for the courts, the Congress, 15 executive Cabinet departments and about 70 independent agencies, including the Postal Service, and an unknown number of contractors acting on its behalf at any given time. Literally construed, the Broe Requests demand that the United States respond on behalf of the entire federal government "its . . . agents, employees, attorneys, investigators, and anyone acting on . . . its . . . behalf." Broe Requests at 3. The requests do not exclude any federal office, employee, or agent from consideration.

9. Appendix 1 of the *Zuni River Basin Hydrographic Survey Report for Subarea 7* ("Subarea 7 HSR"), filed with the Court in the main case (No. 01cv00072) on January 13, 2006 [see Doc. No. 464], identified Broe as the named defendant in Subfile No. ZRB-3-0017, which included nine stock ponds and three livestock wells. No other Hydrographic Survey Report filed in the main case mentions Broe, and the United States has never been informed that Broe claims any water uses within the scope of the Zuni River Basin Adjudication other than those identified by the Subarea 7 HSR.

10. Broe's interests in this adjudication, as identified by the Hydrographic Survey, may be sufficient to establish standing to participate in this Subproceeding. However, those interests are not sufficient to entitle Broe to a fishing expedition involving the entire federal government. Fed.R.Civ.P. 26(b)(2)(C) provides:

> On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:
> (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
> . . .; or
> (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of discovery in resolving the issues.

The United States submits that, to the extent the Broe Requests purport to require a search of locations other than (a) New Mexico offices and agencies of the Bureau of Indian Affairs, Southwest Region; (b) the Department of the Interior's Office of the Solicitor, Southwest Regional Office in Albuquerque, New Mexico; (c) the Department of Justice's Environment and Natural Resources Division; or (d) locations in the custody or control of the expert witnesses retained by the United States for purposes of this adjudication, the Broe Requests are unreasonably cumulative or duplicative, and the burden and expense of the proposed discovery outweighs its likely benefit, considering the needs of the case. Accordingly, the United States is entitled to a protective order limiting the extent of Broe's discovery to the locations (a) through (d) referenced in this paragraph.

11. On February 23, 2010, Counsel for the United States transmitted a letter to Counsel for Broe, via email and regular mail, requesting that Broe (a) agree to a four-month extension of time for the United States' response to the Broe Requests, based on estimates from

the Bureau of Indian Affairs of the time required to review potential document locations for responsiveness and privilege; (b) withdraw several interrogatories relating only to claims other than the PPPW claims in this Subproeeding; (c) agree that the other interrogatories included in the Broe Requests be understood to relate only to PPPW claims; (d) specify no more than 25 of the interrogatories, including discrete subparts, to be answered by the United States; (e) narrow the scope of locations that are to be searched in response to Request for Production No. 16, and (f) specify search terms to be used in querying available document collections. The United States' letter requested a response by the close of business on February 26, 2010. Counsel for Broe did not respond until March 1, 2010. On that date, Counsel for Broe sent an email indicating only that a response would be prepared in the "next day or so" and requesting that the United States "hold off filing anything until that time." As of the time of this filing, the United States has received no further response from Broe. Because the 30-day period provided by the Federal Rules for the United States to respond to the Broe Requests expires in less than a week, Counsel for the United States believes further delay in presenting this dispute to the Court would be imprudent. Nonetheless, the United States remains willing to reach a reasonable accommodation with Broe.

CONCLUSION

Discussing the terms of Rule 26(b)(2), the Supreme Court in Crawford-El v. Britton, 523 U.S. 574, 598 (1998), observed: "Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly and to dictate the sequence of discovery." For the foregoing reasons, the United States respectfully moves the Court to exercise its discretion and enter an order (1) relieving the United States of any obligation to respond to Broe's interrogatories until such time as Broe designates not more than 25 of the interrogatories, including discrete subparts,

listed in Exhibit B; (2) prohibiting Broe from conducting discovery that is relevant only to Subproceeding claims other than PPPW claims until the trial of PPPW claims is concluded; and (3) providing that, for purposes of responding to Broe's Requests, the United States is not obligated to search locations other than (a) New Mexico offices and agencies of the Bureau of Indian Affairs, Southwest Region; (b) the Department of the Interior's Office of the Solicitor, Southwest Regional Office in Albuquerque, New Mexico; (c) the Department of Justice's Environment and Natural Resources Division; or (d) locations in the custody or control of the expert witnesses retained by the United States for purposes of this adjudication.

Dated: March 2, 2010

/s/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on March 2, 2010, I filed the foregoing *United States' Motion For A Protective Order* electronically through the CM/ECF system, which caused CM/ECF participants to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

_____/s/_____
Bradley S. Bridgewater