IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Grace M. Goodeagle, et al.,	)	
Plaintiffs,	)	No. 12-431L
v.	)	Hon. Thomas C. Wheeler
The United States,	)	
Defendant.	)	
Quapaw Tribe of Oklahoma (O-Gah-Pah), a federally recognized Indian nation,	)	
Plaintiff,	)	No. 12-592L
v.	)	Hon. Thomas C. Wheeler
The United States,	)	
Defendant.	)	
Thomas Charles Bear, et al.,	)	
Claimants,	)	No. 13-51X
v.	)	Hon. Thomas C. Wheeler
The United States,	)	
Defendant.	)	

PLAINTIFF/CLAIMANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR DISCOVERY RELIEF

Table of Contents

Table of Authorities ii

Table of Exhibits iv

Argument 1

I. Even if the Quapaw's discovery requests were overly broad (which they were not), under Rule 34 the Government nevertheless had a duty to organize the documents it produced so they would be usable 1

A. The paper files the Government produced are not "electronically stored information" under Rule 34 2

B. The Government did not supply adequate metadata to allow the Quapaw to digitally sort the documents it produced 5

C. The Quapaw's requests for production were sufficiently specific for the Government to organize and label them 10

D. The Quapaw seek discovery relief under Rule 34, not expanded discovery obligations, as the Government erroneously argues, "because plaintiffs are Indians" 13

II. After refusing to provide a deponent on multiple topics, the Government should not be allowed to present testimony on those same topics 14

A. The Quapaw did not waive or withdraw their deposition demands 15

B. Yates failed to testify on the topics for which the Government produced him as a witness 18

III. The Government is also incorrect in its contention that the Quapaw failed to comply with the Court's damages order 19

Conclusion 20

Table of Authorities

Cases

Ak-Chin Indian Cmty. v. United States,
85 Fed. Cl. 397 (2009) 4, 5, 9, 10

Anderson Living Trust v. WPX Energy Prod., LLC,
298 F.R.D. 514 (D.N.M. 2014) 4

City of Colton v. Am. Promotional Events, Inc.,
277 F.R.D. 578 (C.D. Cal. 2011) 10

Dairyland Power Coop. v. United States,
79 Fed. Cl. 722 (2007) 12, 19

Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.,
497 F.3d 1135 (10th Cir. 2007) 16

EEOC v. Thurston Motor Lines, Inc.,
124 F.R.D. 110 (M.D.N.C. 1989) 16

Enargy Power (Shenzhen) Co. v. Xiaolong Wang,
No. 13-11348-DJC, 2014 WL 4687542 (D. Mass. Sept. 17, 2014) 3, 5

Franco-Gonzalez v. Holder,
No. 10-2211-DMG, 2013 WL 8116823 (C.D. Cal. May 3, 2013) 3

Great Am. Ins. Co. of N.Y. v. Vegas Constr. Co., Inc.,
251 F.R.D. 534 (D. Nev. 2008) 16

H & L Assocs. of Kansas City, LLC v. Midwestern Indem. Co.,
No. 12-2713-EFM-DJW, 2013 WL 5774844 (D. Kan. Oct. 25, 2013) 13

Hopi Tribe v. United States,
782 F.3d 662 (Fed. Cir. 2015) 14

New Eng. Carpenters Health Benefit Fund v. First DataBank, Inc.,
242 F.R.D. 164 (D. Mass. 2007) 15

Osage Tribe of Indians of Okla. v. United States,
96 Fed. Cl. 390 (2010) 2

Reilly v. Natwest Markets Grp.,
181 F.3d 253 (2d Cir. 1999) 15, 16

United States v. Jicarilla Apache Nation,
131 S. Ct. 2313 (2011) 13

United States v. Magnesium Corp. of Am.,
No. 2:01-40-01CV40 BD, 2006 WL 2222358 (D. Utah Aug. 2, 2006) 4, 5

United States v. Taylor,
166 F.R.D. 356 (M.D.N.C. 1996) 15, 16

W. Res., Inc. v. Union Pac. R.R. Co.,
No. 00-2403-CM, 2001 WL 1718368 (D. Kan. Dec. 5, 2001) 11, 12, 13

Rules

Fed. R. Civ. P. 34 ..... 3, 4

Fed. R. Evid. 501 13

RCFC 30 ..... 18, 19, 20

RCFC 34 ..... 2, 3, 4, 5

RCFC 37 ..... 19, 20

Table of Exhibits

Ex. 1: Declaration of W. Huntzinger (Sep. 28, 2015)

Ex. 2: Excerpts from Status Conference Transcript (Dec. 16, 2014)

Ex. 3: Letter from S. Terrell to N. Marzulla (Dec. 19, 2014)

Ex. 4: Letter from S. Terrell to N. Marzulla (Mar. 19, 2015)

Ex. 5: Plaintiffs/Claimants' Supplemental Interrogatory (Apr. 13, 2015)

Ex. 6: Defendant's Response to Plaintiffs/Claimants' Supplemental Interrogatory (May 13, 2015)

Ex. 7: Email correspondence between N. Marzulla and S. Terrell (May 13 and 21, 2015)

Ex. 8: Letter from N. Marzulla to S. Terrell (July 1, 2015)

Ex. 9: Excerpts from Status Conference Transcript (July 17, 2015)

Ex. 10: Email from I. Gaunt to S. Terrell (Sep. 11, 2015)

PLAINTIFF/CLAIMANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR DISCOVERY RELIEF

Plaintiffs/Claimants**,** the Quapaw Tribe of Oklahoma (the O-Gah-Pah), Grace Goodeagle, et al., and Thomas Charles Bear, et al., (collectively "the Quapaw") brought this motion for discovery relief, asking this Court to require the Government to label and organize the hundreds of thousands of documents it produced, as Rule 34 requires. But in response, the Government devotes much of its brief to complaining about the alleged overbreadth of the Quapaw's document requests—and not to its Rule 34 duty to organize and label the documents it did produce. And the Government's claim that the Quapaw waived their right to take the depositions of Government representatives on several topics after the Government refused to produce any witness, as Rule 30(b)(6) requires, is based on no evidence at all—and is flatly contradicted by the correspondence between the parties and the uncontradicted declaration of the Quapaw's counsel. Finally, the Government erroneously contends that its witness was well-prepared to testify under Rule 30(b)(6), and that any topics for which it failed to designate a witness were objectionable. To avoid trial-by-ambush, the Quapaw ask this Court not to allow the Government to present testimony at trial for which it has refused to produce a witness.

Argument

I. Even if the Quapaw's discovery requests were overly broad (which they were not), under Rule 34 the Government nevertheless had a duty to organize the documents it produced so they would be usable

From the beginning of discovery the Quapaw have objected to the Government's refusal to tell them what documents it was producing and what (if any) of the Quapaw's requests for

production the documents responded to.[1] But the Government has insisted that it has no Rule 34 duty to organize or label the documents it produces—a job it delegated to its multi-million-dollar testifying expert witness, Chavarria.[2]

As a result, the 822,334 documents the Government has produced—including a dump of 614,308 documents in the final six weeks of discovery—are not organized in any way, imposing an enormous burden on the Quapaw, which is a small tribe lacking a budget to hire an expensive team to code, search, and analyze the documents the Government has produced.[3] Without organizational structure, as required by Rule 34, the Government's document production is largely inaccessible to the Quapaw, putting them at a severe disadvantage in proving their case.

A. The paper files the Government produced are not "electronically stored information" under Rule 34

Rule 34 draws a sharp distinction between documents and electronically stored information, stating that a party may request production of "any designated documents or electronically stored information."[4] Critical here, Rule 34 specifies one procedure for producing documents and a different procedure for producing electronically stored information:

> **(E) Producing the Documents or Electronically Stored Information.** Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:
>
> (i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

---

[1] Pls./Claimants' Mot. for Discovery Relief at 10–12 (Aug. 14, 2015) (*Goodeagle* Doc. 106, *Quapaw Tribe* Doc. 108, *Bear* Doc. 92).
[2] Def.'s Opp. at 17–18 (*Goodeagle* Doc. 109, *Quapaw Tribe* Doc. 113, *Bear* Doc. 95).
[3] *Cf. Osage Tribe of Indians of Okla. v. United States*, 96 Fed. Cl. 390, 449–50 (2010) ("Plaintiff explains that the Osage Nation has litigated on the basis of the Andersen Report because it does not have the resources to revisit the massive amounts of entirely disorganized records that have been provided, or to litigate discovery disputes over those that have not been provided." (internal quotation omitted)).
[4] RCFC 34(a)(1)(A).

> (ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.[5]

In addition, the notes to the 2006 Amendment to Rule 34 make clear that even electronic information should be subject to "comparable requirements" regarding organization and labeling:

> Rule 34(b) provides that a party must produce documents as they are kept in the usual course of business or must organize and label them to correspond with the categories in the discovery request. The production of electronically stored information should be subject to comparable requirements to protect against deliberate or inadvertent production in ways that raise unnecessary obstacles for the requesting party. Rule 34(b) is amended to ensure similar protection for electronically stored information.[6]

Contrary to the Government's main contention, courts have repeatedly held that production of scanned paper documents is a production of documents under subsection (b)(2)(E)(i) of Rule 34, requiring that they be organized and labeled by request category, and that scanning a paper document does not convert it into electronically stored information:

> [B]ecause the documents were originally kept in hard copy but were produced in a CD–ROM, they were not produced as they are kept in the usual course of business . . . . Accordingly, the Court finds that the Defendants must organize and label the documents produced on June 19, 2014 to correspond to the categories in Plaintiffs' request for production of documents.[7]

In *United States v. Magnesium Corp. of America*, in which the defendant produced hard copies of documents on CDs to the United States, the Government argued the opposite of its position in this case, successfully asserting that "USM has provided no 'key' or other mechanism that would enlighten the United States as to why certain documents were produced. To the

[5] RCFC 34(b)(2)(E).
[6] Fed. R. Civ. P. 34, Advisory Committee Notes to the 2006 Amendment; *see also Franco-Gonzalez v. Holder*, No. 10-2211-DMG, 2013 WL 8116823, at *3 (C.D. Cal. May 3, 2013) (ordering defendants to provided unlocked versions of electronic documents "either as they are kept in the ordinary course of business or organized and labeled to correspond to the categories of the requests to which they are responsive").
[7] *Enargy Power (Shenzhen) Co. v. Xiaolong Wang*, No. 13-11348-DJC, 2014 WL 4687542, at *4 (D. Mass. Sept. 17, 2014).

contrary, USM's production more closely resembles the type of 'document dump' courts find inadequate."[8]

In *Anderson Living Trust v. WPX Energy Production, LLC*,[9] the case on which the Government relies here, the court similarly held that scanned documents remain "documents" for Rule 34 purposes—and are not transmuted into electronically stored information simply because they have been scanned:

> First, it is unclear whether hard copy document production even *could* be produced as ESI and still be "in the usual course of business." Fed. R. Civ. P. 34(b)(2)(E)(i). If the quintessential example of producing hard copy documents in the usual course of business involves handing over the keys to the filing room, then it is hard to see how an ESI production could ever provide a comparably true-to-life picture of the business' hard copy document organization.[10]

Furthermore, the Government erroneously argues that *Anderson Living Trust* involved "very similar facts"[11] to this case, overlooking that the parties in *Anderson* had agreed to a discovery stipulation so Rule 34 did not apply: "The parties mutually agreed to transmit discovery in ESI format—despite both parties' knowledge that many of the requested items existed in hard copy."[12] Since no such stipulation exists in this case, Rule 34's prescribed procedure applies, requiring that the Government organize and label them to correspond to the categories in the request, "[u]nless otherwise stipulated or ordered by the court."[13]

The Government fails to distinguish *Ak-Chin Indian Community v. United States*,[14] a case in which the "Plaintiff filed a motion to compel, contending that defendant's responses are

---

[8] *United States v. Magnesium Corp. of Am.*, No. 2:01-40-01CV40 BD, 2006 WL 2222358, at *5 (D. Utah Aug. 2, 2006).
[9] *Anderson Living Trust v. WPX Energy Prod., LLC*, 298 F.R.D. 514 (D.N.M. 2014).
[10] *Id.* at 527.
[11] Def.'s Opp. at 25 (*Goodeagle* Doc. 109, *Quapaw Tribe* Doc. 113, *Bear* Doc. 95).
[12] *Anderson Living Trust*, 298 F.R.D. at 526.
[13] RCFC 34(b)(2)(E).
[14] *Ak-Chin Indian Cmty. v. United States*, 85 Fed. Cl. 397 (2009).

insufficient and that defendant should be required to 'produce . . . responsive documents to [plaintiff] and to organize and label such documents to correspond to the categories in [plaintiff's] requests, as required by [Rule 34 of the Rules of the United States Court of Federal Claims (RCFC)].'"[15] Although *Ak-Chin* involved the production of boxes of paper documents rather than scans of those documents, this distinction does not help the Government. *Ak-Chin* holds that Rule 34 productions of documents—and specifically, tribal documents from the American Indian Records Repository (AIRR)—must be organized and labeled by request category.[16] And that rule applies whether the documents are produced in hard copy, as in *Ak-Chin*, or as scans of those hard copies.[17]

Here, the documents stored at the AIRR and the Federal Records Center are paper documents stored in boxes—not electronically stored information—and the Government scanned these documents and then uploaded them to CDs or DVDs for production.[18] Therefore, the requirement of Rule 34(b)(2)(E)(i) applies, requiring the Government to organize and label them to correspond to the categories in the request.

B. The Government did not supply adequate metadata to allow the Quapaw to digitally sort the documents it produced

The Government's claim that it produced adequate metadata fields to permit the Quapaw "to quickly sort and search AIRR documents by date or by document type"[19] is just not so. The Quapaw's lead paralegal, Wendy Huntzinger, states in her attached declaration that none of the Government's forty-five document productions provide the type of metadata needed to perform

[15] *Ak-Chin*, 85 Fed. Cl. at 399 (alterations in original).
[16] *Id.* at 402.
[17] *Enargy Power*, 2014 WL 4687542, at *4; *Magnesium Corp. of Am.*, 2006 WL 2222358, at *5.
[18] *See* Def.'s Mot. to Modify Scheduling Orders, Ex. 5, Decl. of M. Evans ¶ 6 (Aug. 12, 2014) (*Goodeagle* Doc. 62-1, *Quapaw Tribe* Doc. 47-1, *Bear* Doc. 42-1).
[19] Def.'s Opp. at 16 (*Goodeagle* Doc. 109, *Quapaw Tribe* Doc. 113, *Bear* Doc. 95).

useful queries—basic information such as the subject or type of the document or the name of the person it pertains to:

> All 45 of the government's productions have insufficient metadata to formulate useful queries. For the metadata provided by the Government to be useful, the Government would need to provide a better description of each document, including information such as the person or persons it pertains to, the type of document, and the subject matter of the document.[20]

The single document the Government provides[21] is not typical of the mass of its productions, which are either missing metadata altogether or provide incomprehensible entries to populate the metadata fields: "Contrary to the Government's assertions, many of the productions are either missing populated metadata for entire categories, missing descriptions for specific entries, or contain such incomprehensible descriptions as to be rendered useless."[22]

More typical of the Government's document productions is Production ALX920_004 from the AIRR, which describes 14,343 documents only as "letter," "fax," "statement," "telegram," or "untitled," without providing any information about the sender, receiver, or subject of the document.[23] But this metadata does not allow the Quapaw to electronically sort letters, faxes, or statements concerning mining royalties (for example) from those dealing with rights-of-way or trust accounts—making these titles essentially worthless.

Likewise, Government production GB_Quapaw0008 contains 509 documents without metadata for either the "Title" or "DocumentDate" fields, while Government production GB_Quapaw009 contains 298 documents without metadata for either the "FolderTitle" or "Title" fields.[24] Unsurprisingly, the Quapaw are "unable to perform searches that would yield

[20] Ex. 1, Huntzinger Decl. ¶ 5.
[21] Def.'s Opp. at 24 (*Goodeagle* Doc. 109, *Quapaw Tribe* Doc. 113, *Bear* Doc. 95).
[22] Ex. 1, Huntzinger Decl. ¶ 6.
[23] *Id.* ¶ 6(d).
[24] *Id.* ¶ 6(a).

successful results" when metadata fields are left completely blank.[25]

A third example of completely meaningless metadata is Government production QUAPAW_NARA002, consisting of 14,301 documents, in which "[a] majority of the records are described as 'CCF 1907-1939 Quapaw' in the Title field, and the remainder of the records is described as 'Entry 102.'"[26]

The Quapaw's initial brief describes how only 120 out of the 7,250 documents in Government production RDE920_002 related to the Quapaw Tribe.[27] The Quapaw could not determine the relevance of these documents, which actually concerned other tribes and their oil-and-gas operations (the Quapaw have none), from the metadata the Government provided, since "Quapaw" only appeared in the metadata for three documents.[28] The Quapaw's paralegal "only determined that 120 of the documents related to the Quapaw Tribe because of optical character recognition ('OCR') processing and our internal review that we completed at an additional expense, not because of the metadata the Government provided."[29]

The Government's discussion of how it labeled a single document, an individual Indian account application,[30] is not representative of how it labeled the other 822,000-plus documents it produced.[31] The Government produced that single document from AIRR as one of 33,656 completely unorganized documents in Government production ALX920_006 on a DVD, which the Government sent with an enclosure letter reading:

---

[25] Ex. 1, Huntzinger Decl. ¶ 6(a).
[26] *Id.* ¶ 6(i).
[27] Pls./Claimants' Mot. at 15 (*Goodeagle* Doc. 106, *Quapaw Tribe* Doc. 108, *Bear* Doc. 92).
[28] Ex. 1, Huntzinger Decl. ¶ 6(b).
[29] *Id.* ¶ 6(b).
[30] Def.'s Opp. at 24 (*Goodeagle* Doc. 109, *Quapaw Tribe* Doc. 113, *Bear* Doc. 95).
[31] *See* Huntzinger Decl. ¶ 6 and Attachment A (Aug. 14, 2015) (*Goodeagle* Doc. 106-2, *Quapaw Tribe* Doc. 108-2, *Bear* Doc. 92-2).

> The documents on the enclosed DVDs were the result of the United States' review of documents at the American Indian Records Repository. Documents on the enclosed DVDs include: Individual Indian Money account case files, statements, jacket files, and related correspondence; chat files including bills for collection, chat sales agreements, and related correspondence; leases and encumbrances including, but not limited to, farming and grazing, town lots, and rights of way, and related correspondence; trespass and holdover-tenant related documents; Indian mineral assessment records; soil survey reports; Tar Creek environmental assessment and remediation documents; and probate records. As such, these documents are responsive to requests for production numbers 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 15 in *Goodeagle* and *Bear*, and requests for production numbers 2, 3, and 4 in *Quapaw Tribe*.[32]

The documents themselves were not organized by title, folder or in any other way, but appeared to be copied to the DVD in random order. And this letter is typical—almost word-for-word—of the enclosure letters the Government sent with each DVD it produced.[33]

Confusingly, the Government references the AIRR search terms that it provided to the Quapaw. But those were terms it used to find boxes at AIRR, and are completely useless for finding individual documents produced by the Government. As the Quapaw's counsel told the Court, "the Government did give us a multi-page search parameter list, which, quite frankly, to anyone who is not a computer geek, was pretty much Greek to the Tribe. There's not much we can do with that and not much we can offer."[34]

Because the Quapaw raised the Government's refusal to label or organize the documents it produced as a discovery issue in April 2014, in response to the Government's very first document production,[35] and at numerous times throughout the discovery process,[36] the

[32] Ex. 3, Letter from S. Terrell to N. Marzulla (Dec. 19, 2014).
[33] *See, e.g.*, Ltr. from S. Terrell to N. Marzulla (Apr. 7, 2014) (*Goodeagle* Doc. 106-6, *Quapaw Tribe* Doc. 108-6, *Bear* Doc. 92-6); Ltr. from S. Terrell to N. Marzulla (Sep. 2, 2014) (*Goodeagle* Doc. 106-9, *Quapaw Tribe* Doc. 108-9, *Bear* Doc. 92-9); Ltr. from S. Terrell to N. Marzulla (Apr. 15, 2015) (*Goodeagle* Doc. 106-17, *Quapaw Tribe* Doc. 108-17, *Bear* Doc. 92-17).
[34] Ex. 2, Tr. 5:3–7 (Dec. 16, 2014).
[35] Pls.' Br. at 10–12 (*Goodeagle* Doc. 106, *Quapaw Tribe* Doc. 108, *Bear* Doc. 92).

Government's claim that the Quapaw waited until after discovery closed to raise this issue is factually incorrect.[37] In addition, the Government produced the majority of the unorganized and unlabeled documents—614,308 of them—in the last six weeks of discovery, after which the Quapaw timely filed this motion. And the Quapaw drafted this motion in direct response to this Court's July 17, 2015 Order scheduling briefing on outstanding discovery issues,[38] in response to the Government's request prior to the July 17, 2015 status conference that the parties brief these issues.[39] So the Government has no excuse for failing to comply with Rule 34.

While the Government also claims that its "litigation consultants" (the firm of Chavarria, a testifying expert witness for the Government) have spent thousands of hours and millions of dollars just to respond to the Quapaw's discovery request,[40] these resources were not devoted to the Quapaw's benefit—the Government produced unorganized and unlabeled documents to the Quapaw. A simple solution to the current problem would be for the Government to now provide these organized and labeled documents if it has them, or to agree to produce them once it has organized and labeled them for its own use.

Finally, the Government erroneously asserts that the Quapaw have an equal duty to the Government to search public repositories for responsive documents.[41] This Court has held, however, that as trustee the Government bears the burden of searching for responsive documents—even if the documents are equally available to the Quapaw.[42]

And this Court has previously held that when the Government possesses superior

---

[36] *See* Pls.' Br. at 13 (*Goodeagle* Doc. 106, *Quapaw Tribe* Doc. 108, *Bear* Doc. 92).
[37] Def.'s Opp. at 6 (*Goodeagle* Doc. 109, *Quapaw Tribe* Doc. 113, *Bear* Doc. 95).
[38] Order (July 17, 2015) (*Goodeagle* Doc. 102, *Quapaw Tribe* Doc. 103, *Bear* Doc. 89).
[39] *See* Ex. 9, Tr. 6:14–23 (July 17, 2015).
[40] Def.'s Opp. at 5 (*Goodeagle* Doc. 109, *Quapaw Tribe* Doc. 113, *Bear* Doc. 95).
[41] *Id.* at 3.
[42] *Ak-Chin Indian Cmty.*, 85 Fed. Cl. at 402.

knowledge, the Government is obligated to search repositories such as the AIRR for responsive documents—and label those documents accordingly:

> [D]efendant is not only more familiar with the documents that it stores at the AIRR, defendant is also much more familiar with the tools used to identify potentially responsive documents. Defendant itself created the BISS database. Defendant employs research staff at the AIRR who have a working knowledge of the software associated with the BISS. Defendant also contracts with a public accounting firm which routinely performs searches for documents stored at the AIRR.[43]

C. The Quapaw's requests for production were sufficiently specific for the Government to organize and label them

While claiming that labeling and categorizing the documents it produced "would be a daunting and difficult task,"[44] the Government also suggests that this is what it has done: "This document can accordingly be quickly identified—and similar documents identified and sorted—from the provided metadata by a search based on document date, document type, the plaintiff's name (Joe Dale Woodward), or the account number . . . ."[45] The Government thus provides itself no excuse for failing to label the documents it produced as Rule 34 requires:

> Rule 34 is generally designed to facilitate discovery of relevant information by preventing attempts to hide a needle in a haystack by mingling responsive documents with large numbers of nonresponsive documents" and "[a] producing party fails to meet its Rule 34 obligations by producing a mass of undifferentiated documents for the responding party to inspect."[46]

As the Government admits, even if "plaintiffs' document requests are overly broad, the United States 'has a duty under the . . . rules to respond to the extent that discovery requests are

[43] *Ak-Chin Indian Cmty.*, 85 Fed. Cl. at 403 (internal citations omitted).
[44] Def.'s Opp. at 26 (*Goodeagle* Doc. 109, *Quapaw Tribe* Doc. 113, *Bear* Doc. 95).
[45] *Id.* at 24.
[46] *City of Colton v. Am. Promotional Events, Inc.*, 277 F.R.D. 578, 584–85 (C.D. Cal. 2011).

not objectionable.'"[47] The Government evidently found at least some of the Quapaw's requests for production sufficiently specific, since it produced 822,334 documents that it claims were responsive to those requests. And it is those 822,334 documents, totaling 1.4 million pages, that Rule 34 required the Government to organize and label.

The Government's argument that "there could be no meaningful categorization where every document is responsive to large numbers of plaintiffs' individual requests"[48] finds no support in the actual requests for production themselves—which the Government fails to quote or cite. For example, the Government cannot explain why it cannot distinguish documents relating to "royalties owed . . . in connection with any mining activities"[49] from documents relating to "lease payments . . . in connection with any agricultural leasing" of Quapaw lands,[50] or "records of land sales of Quapaw allotted lands,"[51] or documents relating to the distribution of all funds appropriated or paid to any Quapaw Tribal member as a result of the 1954 decision of the Indian Claims Commission."[52] Yet the Government routinely characterized its document productions as being responsive to all of these requests.[53]

Nor does the Government explain why it could not distinguish those documents from

---

[47] Def.'s Opp. at 23 (*Goodeagle* Doc. 109, *Quapaw Tribe* Doc. 113, *Bear* Doc. 95) (citing *W. Res., Inc. v. Union Pac. R.R. Co.*, No. 00-2403-CM, 2001 WL 1718368, at *3 (D. Kan. Dec. 5, 2001)).
[48] Def.'s Opp. at 26 (*Goodeagle* Doc. 109, *Quapaw Tribe* Doc. 113, *Bear* Doc. 95).
[49] Pls./Claimants' First Set of Requests for Production at 4, Request for Prod. No. 2 (Mar. 14, 2014) (*Goodeagle* Doc. 106-5, *Quapaw Tribe* Doc. 108-5, *Bear* Doc. 92-5).
[50] *Id.* at 4, Request for Prod. No. 3.
[51] *Id.* at 4, Request for Prod. No. 4.
[52] *Id.* at 6, Request for Prod. No. 18.
[53] *See, e.g.*, Ex. 4, Ltr. from S. Terrell to N. Marzulla at 1 (Mar. 19, 2015); Ltr. from S. Terrell to N. Marzulla (Apr. 7, 2014) (*Goodeagle* Doc. 106-6, *Quapaw Tribe* Doc. 108-6, *Bear* Doc. 92-6); Ltr. from S. Terrell to N. Marzulla (Sep. 2, 2014) (*Goodeagle* Doc. 106-9, *Quapaw Tribe* Doc. 108-9, *Bear* Doc. 92-9); Ltr. from S. Terrell to N. Marzulla (Apr. 15, 2015) (*Goodeagle* Doc. 106-17, *Quapaw Tribe* Doc. 108-17, *Bear* Doc. 92-17).

others requested by the Quapaw, such as "copies of the BIA Manual, Directives, federal regulations, policies or other guidance . . . that describe the roles and responsibilities of BIA and BIA officials for trust, restricted, or fee property located on the Quapaw reservation,"[54] or "maps depicting the location of the Quapaw Tribal members' original allotments."[55]

And the Government made no attempt to even sort tribal records from individual documents, such as the Quapaw's requests for records relating to "the Government's receipt, deposit, investment, retention, disbursement or transfer of any money received for the benefit of the Quapaw Tribe,"[56] "the creation or existence of any right-of-way, easement or other usufructuary right on any Quapaw tribal land,"[57] or "payment of any amounts to the Quapaw Tribe under the provisions of the Treaty of 1833."[58] Many of the Government's document productions also state that the documents are being produced as a supplement to the Government's initial disclosures, in addition to requests for production, further confusing matters.

This is not a motion to compel production of additional documents, so neither of the cases the Government cites, *Dairyland Power*[59] and *Western Resources, Inc.*,[60] has anything to do with the issue in this case: whether the Government must organize and label the documents it did produce so the Quapaw can tell which request for production they are responsive to. In

[54] Pls./Claimants' First Set of Requests for Production at 7, Request for Prod. No. 21 (Mar. 14, 2014) (*Goodeagle* Doc. 106-5, *Quapaw Tribe* Doc. 108-5, *Bear* Doc. 92-5).
[55] *Id.* at 7, Request for Prod. No. 22.
[56] Tribe's First Set of Requests for Production at 2, Tribe's Request for Prod. No. 1 (Apr. 25, 2014) (*Goodeagle* Doc. 106-7, *Quapaw Tribe* Doc. 108-7, *Bear* Doc. 92-7).
[57] *Id.* at 2, Tribe Request for Prod. No. 2.
[58] *Id.* at 3, Tribe Request for Prod. No. 5.
[59] *Dairyland Power Coop. v. United States*, 79 Fed. Cl. 722 (2007).
[60] *W. Res., Inc. v. Union Pac. R.R. Co.*, No. 00-2403-CM, 2001 WL 1718368 (D. Kan. Dec. 5, 2001).

addition, to the extent the decision in *Western Resources* suggests that the term "relating to" makes some document requests overbroad, a subsequent magistrate's decision from the same court holds that this is not necessarily so:

> The Court agrees that the construction of the request is sufficiently definite because the context of the omnibus phrase relates to a specific set of documents that, in turn, relates back to the issues in this case. Defendant's overly broad objection to Request Nos. 21 based upon its use of the terms "regarding, reflecting or relating to" is therefore overruled.[61]

D. The Quapaw seek discovery relief under Rule 34, not expanded discovery obligations, as the Government erroneously argues, "because plaintiffs are Indians"

Rule 34 applies here regardless of the fact that this case involves an Indian tribe. So the Government's entire discussion of the Supreme Court's ruling in *United States v. Jicarilla Apache Nation*[62] is beside the point. In addition, the Government overreads that case, which held only that the fiduciary exception to the attorney-client privilege under Fed. R. Evid. 501 did not apply to the general trust relationship between the United States and Indian tribes. The Supreme Court stated the issue before it in *Jicarilla* as determining whether the attorney/client privilege applied to legal advice given to the Government as fiduciary for the Indians:

> In this case, we consider whether the fiduciary exception applies to the general trust relationship between the United States and the Indian tribes. We hold that it does not.[63]

The Supreme Court's decision in *Jicarilla* had nothing to do with the producing party's Rule 34 duty to label and organize the documents it produced. Rather, it dealt with whether those documents had to be produced at all—and held that they did not.

---

[61] *H & L Assocs. of Kansas City, LLC v. Midwestern Indem. Co.*, No. 12-2713-EFM-DJW, 2013 WL 5774844, at *12 (D. Kan. Oct. 25, 2013).
[62] *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011).
[63] *Id.* at 2318.

The Government's citation to *Hopi Tribe v. United States*[64] is puzzling, since that case holds that the Government does not have a trust responsibility to provide safe water, and again has nothing to do with document organization and labeling requirements under Rule 34: "[T]he sources of law relied on by the Hopi Tribe do not establish a specific fiduciary obligation on the United States to ensure adequate water quality on the Hopi Reservation."[65]

II. After refusing to provide a deponent on multiple topics, the Government should not be allowed to present testimony on those same topics

The Government cites to no correspondence, no declaration, nor anything else supporting its argument that the Quapaw waived or abandoned some of their deposition topics. The Government also does not challenge the correspondence between the parties and the declaration of Nancie G. Marzulla—which directly contradicts the Government's argument in its opposition. True, the Quapaw amended their deposition notice to reflect the topics the Government did agree to produce a responsive witness to testify about, but that does not constitute waiver of the topics originally noticed, which the Government flatly refused to produce any witness for. The Government cites to nothing stating that the revised notice was to be anything other than a record-keeping device to clarify the time, place, and topics for which Yates was to testify. But the bottom line is this: The Quapaw submit that the deposition transcript shows that Paul Yates was not adequately prepared to testify even as to the narrowed topics. The Government disagrees. So what the Quapaw are asking this Court for now is an order stating the Government is bound by Yates' deposition testimony at trial. The Quapaw do not want to be ambushed at trial with a Yates who has suddenly become extremely well prepared and knowledgeable on topics for which he was utterly unable to testify about in his deposition.

[64] *Hopi Tribe v. United States*, 782 F.3d 662 (Fed. Cir. 2015).
[65] *Hopi Tribe*, 782 F.3d at 671.

The Government also argues that the topics in the Quapaw's deposition notice are overly broad. The Quapaw disagree. So be it, and the parties further disagree about the Government's obligation to produce a responsive witness. But there should be no disagreement that the Government cannot conduct trial by ambush—cannot refuse to produce a witness for deposition on a particular topic, but then produce one at trial:

> If it did not have any employees who had any knowledge about a topic, it was not required to provide an answer and thereby take a stance or assert a position, but as a consequence, it also could not offer any evidence, direct or rebuttal, or argument at trial as to that topic.[66]

A. The Quapaw did not waive or withdraw their deposition demands

The Government's assertion that the Quapaw withdrew or waived their demands that the Government produce a Rule 30(b)(6) witness on numerous topics is untrue, as shown by the declaration of Nancie G. Marzulla with attached correspondence.[67] The Government offers neither a declaration of its counsel nor a single item of evidence to contradict Marzulla—and nothing at all to suggest that the Quapaw waived this claim.

The Quapaw set out their position in Marzulla's April 13, 2015, letter to DOJ counsel, the same day they issued their amended Notice of Deposition. The Government could not mistake this language for a waiver:

> The Government's objections do not obviate its obligation to designate a 30(b)(6) witness for these topics: "[T]here is no provision in the rules which provides for a party whose deposition is noticed to serve objections so as to be able to avoid providing the requested discovery until an order compelling discovery is issued." *New Eng. Carpenters Health Benefit Fund v. First DataBank, Inc.*, 242 F.R.D. 164, 166 (D. Mass. 2007). The Second Circuit, for example, affirmed a district court's decision to preclude the trial testimony of two witnesses after the defendant refused to produce the witnesses for a 30(b)(6) deposition in a timely manner. *Reilly v. Natwest Markets Grp.*, 181 F.3d 253, 268–69 (2d Cir. 1999);

[66] *United States v. Taylor*, 166 F.R.D. 356, 359 (M.D.N.C. 1996).
[67] Decl. of N. Marzulla (Aug. 14, 2015) (*Goodeagle* Doc. 106-1, *Quapaw Tribe* Doc. 108-1, *Bear* Doc. 92-1).

> *see also id.* ("Having determined that NatWest violated both Rule 30(b)(6) and Judge Sprizzo's order, we have little difficulty in concluding that barring Adams and Letzler from testifying about Reilly's work was proper."); *Ecclesiastes 9:10-11-12, Inc. v. LMC Holding Co.*, 497 F.3d 1135, 1147 (10th Cir. 2007) ("Ecclesiastes could have explained its purported inability to provide information responsive to the notice. Then, failing a negotiated resolution with defendants, Ecclesiastes could have sought a protective order from the district court."); *EEOC v. Thurston Motor Lines, Inc.*, 124 F.R.D. 110, 114 (M.D.N.C. 1989) (imposing Rule 37 sanctions when a successor to a corporate party refused to designate a 30(b)(6) witness because the successor "had absolutely no right . . . to refuse to designate a witness. If it had an objection to discovery, its opportunity was to request a protective order . . . ."); *see generally* 8A WRIGHT & MILLER, FED. PRACTICE & PROC. CIV. § 2103 (3d ed.) ("Defendant could not avoid the obligation to produce a witness by serving objections to the notice.").[68]

Marzulla's April 13, 2015 letter discusses each topic for which the Government has refused to produce a witness. As to topic 2 (payment for rights-of-way), for instance, Marzulla states:

> I have no choice but to conclude that the Government is refusing to produce a witness to testify about this topic for any years prior to 2007. *See Great Am. Ins. Co. of N.Y. v. Vegas Constr. Co., Inc.*, 251 F.R.D. 534, 539 ("[I]t is not uncommon to find that a corporation no longer employs individuals who have memory of distant events, or to find that individuals with knowledge are deceased. 'These problems do not relieve a corporation from preparing its Rule 30(b)(6) designee to the extent matters are reasonably available, whether from documents, past employees, or other sources.' (quoting *United States v. Taylor*, 166 F.R.D. 356, 361 (M.D.N.C. 1996)). Please be advised that we will object to the Government's use of any witness to testify about this topic for any years except for 2007 to present at trial or in any dispositive briefing. *See Reilly*, 181 F.3d 253, 268 (2d Cir. 1999) ("When a party fails to comply with Rule 30(b)(6), Rule 37 allows courts to impose various sanctions, including the preclusion of evidence.").[69]

As to topic 14 the letter states:

> **Topic No. 14:** We did not agree to remove this topic from our list of subjects for our 30(b)(6) designations. Because we understand your response to be that you continue to refuse to produce a witness to testify on this topic, however, please be advised because you have refused to produce a witness to testify about this topic,

[68] Ltr. from N. Marzulla to S. Terrell at 1–2 (Apr. 13, 2015) (*Goodeagle* Doc. 106-16, *Quapaw Tribe* Doc. 108-16, *Bear* Doc. 92-16).
[69] *Id.* at 3.

> we will object to the Government's use of any witness to testify about this topic at trial or in any dispositive briefing.[70]

The letter has very similar discussions of topics 3, 5, 6, 10, 11, 12, 14, and 16.[71]

The Government is also incorrect in asserting that the Quapaw's Rule 30(b)(6) topics were improper because other less burdensome means were available for discovery. Again, the Government fails to identify exactly which topics it is referring to. During the parties' attempt to resolve their discovery issues short of bringing this motion, the Quapaw did agree to submit an interrogatory in lieu of conducting a deposition on topic number 12, with the understanding that the Government would fully answer the interrogatory and not simply object: "12. The Government's actions in the clean-up of environmental contamination from the Plaintiffs/Claimants' land, and the costs of that clean-up."[72]

The Quapaw propounded this interrogatory as a substitute for topic 12:

> **PLAINTIFFS/CLAIMANTS' INTERROGATORY NO. 16 AND TRIBE'S INTERROGATORY NO. 13**
>
> Please describe in detail all activities, and provide a detailed statement of all costs, the United States has incurred, relating or concerning the identification, evaluation, quantification, treatment, storage, transportation, cleanup or remediation of any contamination, pollution, or hazardous substance or waste on Quapaw tribal or members' lands. Please also provide a detailed description of all such remediation activities the United States plans for the future, and an estimate of cost of such activities.[73]

In response, on May 13, 2105, the Government provided a partial answer,[74] to which counsel for the Quapaw again objected, sending this email to Stephen Terrell on May 21, 2015:

---

[70] Ltr. from N. Marzulla to S. Terrell at 4 (Apr. 13, 2015) (*Goodeagle* Doc. 106-16, *Quapaw Tribe* Doc. 108-16, *Bear* Doc. 92-16).
[71] *Id.* at 3–4.
[72] Notice of 30(b)(6) Deposition of United States at 6 (Mar. 16, 2015) (*Goodeagle* Doc. 106-10, *Quapaw Tribe* Doc. 108-10, *Bear* Doc. 92-10).
[73] Ex. 5, Pls./Claimants' Supplemental Interrogatory (April 13, 2015).
[74] Ex. 6, Def.'s Response to Pls./Claimants' Supplemental Interrogatory (May 13, 2015).

> Dear Stephen: I have been out of town and unable to respond to your objections (in lieu of a response) to the Quapaw's supplemental interrogatory regarding environmental clean-up costs. As you know, I agreed to remove this topic from our list of Rule 30 (b)(6) deposition topics based on your assurance that you would not simply object to the interrogatory and fail to provide the requested information. But instead of providing the requested information per our agreement, you instead sent me a slew of boiler-plate objections and no information whatsoever. Needless to say, I could not be more disappointed in your failure to deal squarely with me on this issue. Given that you have refused to produce a witness for deposition on this topic and have refused to fulfill your agreement to provide the requested information by interrogatory, I will begin drafting the discovery dispute memo for us to jointly submit to the Court on this and other pending matters in which you have failed to comply with the spirit and express requirements of the discovery rules. Please be advised that we reserve the right to seek costs associated with this endeavor. Regards, Nancie.[75]

Although the Government responded to this email by stating that it had intended all along to preserve its substantive objections to the topic, and explaining that it had provided some information, the Government nevertheless failed to provide a complete response to this interrogatory. Therefore, its suggestion now that the Quapaw's deposition topics could all be addressed by other means—such as interrogatories—rings hollow.

B. Yates failed to testify on the topics for which the Government produced him as a witness

As the Quapaw explained in their motion for discovery relief, the Government designated Bureau of Indian Affairs Superintendent of the Miami Agency, Paul Yates, to testify on eight RCFC 30(b)(6) topics (four of them limited to his personal knowledge since he took over the office in 2007). And as the Quapaw detailed in their motion, Yates was unknowledgeable and completely unprepared to testify about the narrowed topics. Therefore, the Government's opposition, which goes on at length about the Government not having a duty to produce a witness for overly broad topics, fails to explain why Yates was not able to testify about the narrowed topics the Government agreed to produce him to testify about.

[75] Ex. 7, Email from N. Marzulla to S. Terrell (May 21, 2015).

> If an RCFC 30(b)(6) deponent produces a witness who has insufficient knowledge concerning the areas of inquiry, essentially defeating the purpose of the discovery process, then RCFC 37(b)(2) allows courts to impose various sanctions. These measures include . . . [a]n order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence." RCFC 37(b)(2)(A), (B).[76]

III. The Government is also incorrect in its contention that the Quapaw failed to comply with the Court's damages order

The Government argues that the scheduling order should be enlarged by three months because the Quapaw failed to comply with the Court's pretrial orders on damages.[77] The accusation is simply untrue. The Quapaw timely provided to the Government their schedules of damages along with supporting spreadsheets on July 1, 2015.[78] What the Quapaw did do, however, was reserve the right to supplement these damages disclosures to allow for the fact that the Tribe and experts were struggling with the Government's massive dump of documents during the final six weeks of discovery.

On September 11, 2015, the Quapaw did supplement their damages disclosures and included additional damages estimates for mining and chat claims, removed the interest amounts claimed to be consistent with the Court's July 28, 2015 ruling, and separated the damages in the *Bear* case from the other two cases (per the Government's request).[79]

So although the Quapaw disagree that there was any failure to timely comply with the Court's scheduling order on damages, the Quapaw (as they previously stated) will not object to the Government taking additional time to review and analyze the supplemental damages estimates submitted to them on September 11, 2015. The Quapaw would be willing to discuss with the Government an enlargement by three months of the entire schedule but since that

[76] *Dairyland*, 79 Fed. Cl. at 714–15.
[77] Def.'s Opp. at 35–36 (*Goodeagle* Doc. 109, *Quapaw Tribe* Doc. 113, *Bear* Doc. 95).
[78] Ex. 8, Ltr. from N. Marzulla to S. Terrell (July 1, 2015) (enclosing damages matrices).
[79] Ex. 10, Email from I. Gaunt to S. Terrell (Sept. 11, 2015).

discussion has not yet occurred, are not in a position as of the filing of this reply to state a position on this proposal.

Conclusion

For all these reasons, the Quapaw ask the Court to issue an order (1) requiring the Government to organize and label the previously produced documents to correspond to the Quapaw's requests for production, and (2) barring the Government from producing any testimony on any topic for which it has refused to produce a witness to testify under Rule 30(b)(6), or beyond that of the testimony of its 30(b)(6) witnesses. Finally, the Quapaw ask this Court under Rule 37 to order the Government to reimburse the Quapaw for the costs and fees associated with preparing this motion.

Respectfully submitted,

September 28, 2015

s/ Nancie G. Marzulla
Nancie G. Marzulla
Roger J. Marzulla
MARZULLA LAW LLC
1150 Connecticut Avenue, N.W.
Suite 1050
Washington, D.C. 20036
(202) 822-6760 (telephone)
(202) 822-6774 (facsimile)
Nancie@marzulla.com
Roger@marzulla.com

Counsel for Plaintiffs/Claimants

Of Counsel:

Stephen R. Ward, Esq.
John L. Williams, Esq.
Daniel E. Gomez, Esq.
R. Daniel Carter, Esq.
Conner & Winters, LLP
4000 One Williams Center
Tulsa, Oklahoma 74172-0148
(918) 586-8978 (telephone)
(918) 586-8698 (facsimile)
sward@cwlaw.com
jwilliams@cwlaw.com
dgomez@cwlaw.com
dcarter@cwlaw.com