

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

Pueblo of Jemez,

Plaintiff,

v.

United States,

Defendant.

Case No. 1:12-cv-800-RB-WPL

**UNITED STATES' OPPOSITION TO PLAINTIFF'S
MOTION FOR PROTECTIVE ORDER AND MOTION TO COMPEL, AND
CROSS-MOTION FOR ENTRY OF PROTECTIVE ORDERS**

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Dated: January 23, 2017

INTRODUCTION

On December 22, 2016, Plaintiff Pueblo of Jemez filed a motion for protective order and motion to compel. ECF 105. The motions implicate complex confidentiality issues potentially arising under (*inter alia*) the Privacy Act, 5 U.S.C. § 552a; Section 304 of the National Historic Preservation Act (“NHPA”), 54 U.S.C.A. § 307103 (“Section 304”)¹, the Archeological Resources Protection Act, 16 U.S.C. § 470hh(a), the Indian Mineral Development Act, 25 U.S.C. § 2103(c), the Mineral Leasing Act, 30 U.S.C. § 208–1, the Surface Mining Control and Reclamation Act, 30 U.S.C. § 1201, the Defense Production Act, 50 U.S.C. App. § 2155(e), the Trade Secrets Act, 18 U.S.C. § 1905; the Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. 3001, and the American Indian Religious Freedom Act of 1978, 42 U.S.C. 1996.

Plaintiff’s motion for a protective order seeks an order governing information provided by Plaintiff to the United States. Plaintiff’s motion to compel relates to pending Pueblo document production requests served on the United States, and is contingent upon the Court’s entering a second protective order “similar to the one being proposed by the Pueblo.” ECF 105 at 10. But Plaintiff does not actually furnish either a proposed order that would protect information produced by Plaintiff or an order that would protect information produced by the United States. Instead, Plaintiff asks the Court to fashion orders out of whole cloth, the only guidance given being that the order “limit[] any use of [covered] information to this litigation, barring any other uses, and restricting access of this information to attorneys and experts.” ECF 105 at 1.

¹ Previously codified at 16 U.S.C. § 470w–3.

Plaintiff's motions are inappropriate. There is no dispute that some of the discoverable information relevant to Plaintiff's suit is subject to confidentiality requirements under one or more statutes, or that protective orders are the appropriate mechanisms to guard against misuse of that information. But the bare bones orders Plaintiff proposes are woefully inadequate, being overly restrictive in at least one respect and insufficiently restrictive in many others. Attached as Exhibits A and B are protective orders and associated declarations that the United States proposes be entered to protect information produced by the United States (Exhibit A)² and information produced by the Pueblo of Jemez (Exhibit B).³ Both are substantially similar to protective orders entered by the federal courts in other lawsuits between Indian Tribes and the United States, and both are sufficiently detailed to assure substantial fairness and to prevent misunderstanding and confusion.

ARGUMENT

While several confidentiality statutes are implicated by Plaintiff's motion, we will focus on Section 304 of the NHPA. Section 304 provides that the head of an agency:

after consultation with the Secretary [of Interior], shall withhold from disclosure to the public, information about the location, character, or ownership of a historic resource if the Secretary and the agency determine that disclosure may —

- (1) cause a significant invasion of privacy;
- (2) risk harm to the historic resources; or
- (3) impede the use of a traditional religious site by practitioners.

² The proposed protective order governing documents to be produced by the United States is also attached to the declaration of Dr. Stephanie Toothman, Ph.D., the Keeper of the National Register of Historic Places, Exhibit C. Defendant-Intervenor agrees to this Order. Pueblo of Jemez has expressed general interest in such an order, but the Parties were unable to reach agreement on such an order prior to the United States filing this brief.

³ The proposed protective order governing documents to be produced by the Pueblo of Jemez contains the United States' modifications to a document originally proposed by the Pueblo of Jemez.

54 U.S.C. § 307103. The regulations further provide that “[w]hen the head of a Federal agency or other public official has determined that information should be withheld from the public pursuant to these criteria, the Secretary, in consultation with such Federal agency head or official, shall determine who may have access to the information for the purposes of carrying out the act.” 36 C.F.R. § 800.11(c)(1). Section 304 therefore “allow[s] a federal agency to withhold information about historic or archaeological sites from the public in some circumstances” *Diné Citizens Against Ruining Our Env’t v. Klein*, No. 07-CV-01475 JLK, 2009 WL 2407653, *1 n.1 (D. Colo. Aug. 3, 2009).⁴

The Secretary has delegated her Section 304 authority (and responsibilities) to Dr. Stephanie Toothman, Ph.D., who is the Keeper of the National Register of Historic Places, and is Associate Director for Cultural Resources, National Park Service. Exhibit C (Toothman declaration) ¶¶ 2, 5.

As explained in the declaration of Anastasia Steffen, PhD,⁵ the Valles Caldera Preserve – the land at issue in Plaintiff’s quiet title suit – is archaeologically rich and extraordinarily well-studied. Exhibit D (Steffen Declaration) ¶ 4. The Preserve’s records, as a result, contain a

⁴ Similarly, information protected by 25 U.S.C. § 2103(c) (2000), enacted as part of the Indian Mineral Development Act of 1982 (“IMDA”), 25 U.S.C. § 2101, et seq., which provides that information regarding Indian mining activities “shall be held by the Department of the Interior as privileged proprietary information of the affected Indian or Indian tribe,” can be disclosed pursuant to a protective order. *See Jicarilla Apache Nation v. United States*, 60 Fed. Cl. 611, 611–12 (2004) (existence of protective order allowed discovery of Indian mining information.). And the Privacy Act explicitly provides that its prohibitions on release can be resolved by securing a protective order from the Court. 5 U.S.C. § 552a(b)(11).

⁵ Dr. Steffen, a professional anthropologist, serves as the Interdisciplinary Scientist/Communicator at the Valles Caldera National Preserve in Jemez Springs, New Mexico.

wealth of information about historic and ongoing use of the Preserve, by several area Pueblos. Use of the Preserve by regional Pueblos includes religious practices, hunting and gathering, and other social observances. *Id.* at ¶ 5. Many of these records fall squarely within the ambit of Section 304. As Dr. Steffen also notes, there is evidence that members of one Pueblo may have tampered with a site sacred to another Pueblo. *Id.* at ¶ 9. The concerns that animate Section 304 are vividly present.

Dr. Toothman has reviewed the attached proposed Protective Order (Exhibit A) and has concluded that, if that order is adopted as an order of the Court, and if fully complied with, the risk of the harms identified in Section 304 will be satisfactorily removed. Ex. C (Toothman Declaration) ¶ 7. By contrast, the bare bones orders suggested by Plaintiff's motion would *not* satisfy the United States' obligations under Section 304 with respect to any historic properties eligible for the National Register. Plaintiff does not, for example, say anything about the disposition of confidential materials at the conclusion of the litigation or provide any mechanism for addressing any disputes regarding whether information labeled as "Confidential" is, in fact, confidential. The United States' proposed orders cover those subjects in detail. Ex. A at ¶¶ 10, 13, 14; Ex. B at 13, 14. Nor does Jemez's proposal address how materials identified as confidential can be used in this litigation in a manner that preserves their confidentiality and sufficiently guards against public disclosure. Defendant respectfully submits that Plaintiff's failure to address these issues in its bare bones proposal would destroy any protections the suggested orders might otherwise provide for documents provided by the United States.⁶ And,

⁶ As Plaintiff notes, ECF 105 at 7-9, and as set forth above, the Government is subject to statutes that restrict its dissemination of certain information.

as the Keeper of the National Register of Historic Places, Dr. Toothman's conclusion that the proposed order governing the production of documents by the United States, if entered and adhered to, would sufficiently restrict the release of information so as not cause a significant of invasion of privacy, risk harm to the historic properties, or impede the use of traditional religious sites by practitioners should be accorded deference.

At the same time, Plaintiff's proposed restriction on providing documents produced by Plaintiff only to "attorneys and experts" is overly restrictive. Both attorneys and experts work with staff who will need access. Also, attorneys with the Justice Department are of course working closely with the Superintendent of the Preserve, Jorge Silva-Bañuelos. As director of the client agency, Mr. Silva-Bañuelos will likely need access to discovery materials. Similarly, Dr. Steffen – a critically important and uniquely knowledgeable consultant, who will not necessarily be a testifying witness and who therefore may not be an "expert" as Plaintiff uses the term – must have access.

The United States' proposed orders address all of these issues, and more.

Plaintiff's motion for protective order should therefore be denied, and the United States' proposed orders entered as orders of the Court. The proposed orders fully address the concerns Plaintiff has articulated in its motion, and does so in a far more circumspect manner. Nor is there anything unusual or untoward about the United States' proposed orders. *See, e.g., Jicarilla Apache Nation v. United States*, 60 Fed. Cl. 413 (2004) (issuing detailed protective order similar to those proposed by the United States here, although differing where the needs of the particular case differed). An order very similar to that proposed here for materials produced by the United

States was approved and entered by Judge Hogan on December 3, 2015, in *Sisseton Wahpeton Oyate et al v. Jewell et al.* (D.D.C. No. 1:13-cv-601) (see minute order of same date) (Ex. E).

At the same time, Plaintiff's motion to compel must be denied. It is critical that a protective order be entered prior to the United States' producing materials as to which the United States has confidentiality duties, because "absent a protective order, parties to a lawsuit may disseminate materials obtained during discovery as they see fit." *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 858 (7th Cir.1994). Indeed, absent sufficiently restrictive protective orders the United States is *precluded* from releasing sensitive or confidential materials by several statutes, and Plaintiff concedes that the documents it has requested include such materials.

CONCLUSION

Accordingly, the United States respectfully requests that Plaintiff's motion for protective order, and motion to compel be denied, and that the Court enter the protective orders attached hereto as Exhibits A and B.

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Certificate of Service

I hereby certify that on January 23, 2017, I filed the above pleading with the Court's CMS/ECF system, which will send notice of such to each party of record.

s/ Matthew Marinelli _____
Matthew Marinelli