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

PUEBLO OF JEMEZ,

Plaintiff,

v.

UNITED STATES,

Defendant,

and

NEW MEXICO GAS COMPANY,

Defendant-in-Intervention.

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

PLAINTIFF'S REPLY IN FURTHER SUPPORT OF ITS MOTION FOR PROTECTIVE ORDER AND MOTION TO COMPEL

-AND-

PLAINTIFF'S RESPONSE TO THE UNITED STATES' CROSS-MOTION FOR ENTRY OF PROTECTIVE ORDER

I. INTRODUCTION

The United States ("US") does not contest that the parties shared an understanding that both sides have confidential information that should be subject to a protective order. The US also does not contest that it became unresponsive to Plaintiff's efforts to resolve the proper scope of a protective order, which forced the Pueblo to bring the Motion for Protective Order and Motion to Compel ("Motions")(ECF No. 105) [1]. As the US apparently concedes:

- In April of 2016, the US proposed a joint stipulated confidentiality order that was included in a proposed discovery order, which would protect both parties[2]. April 13, 2016 email without enclosures, Exhibit A.
- In May of 2016, the US then proposed a separately joint confidentiality order. May 5, 2016 email, Exhibit B.
- Around August of 2016, the US said in a conference call that it wanted to remove itself as a party to the proposed order, stating that the US was analyzing whether federal law required tribal consultation before the US produced information that might require a protective order.[3]
- The Pueblo sent a red lined draft proposed protective order to the US on September 8, 2016. Exhibit C.
- The US then became unresponsive to the Pueblo's attempts to finalize a protective order regarding the Pueblo's documents and did not take any concrete steps to obtain a protective order to address any confidentiality concerns the US believed it might have.

[1] For sake of ease and because of page restrictions, the Pueblo has not included the many drafts of the protective orders exchanged by the parties.
[2] In its first draft, the US asserted only that the Archaeological Resource Protection Act and National Historic Preservation Act applied and agreed those would be dealt with on a case-by-case basis.
[3] As the US did not raise the issue of tribal consultation in its Response or its responses to discovery requests, the US has waived that issue.

- At the time the Pueblo began drafting these pending Motions in December 2016, the US had not responded to the Pueblo's September 8 draft nor had it proposed an order concerning its confidential information. Indeed, the US did not propose an order until the day before the US filed its Opposition to Plaintiff's Motion for Protective Order and Motion to Compel and the Cross-Motion for Entry of Protective Order (the "Response"), which was a Sunday. January 22, 2017 email without enclosures, Exhibit D.

The Pueblo has tried for at least eight months to resolve these issues. The US has been dilatory. The Pueblo has been forced to resort to filing the Motions to move these important matters forward. Although the Motions have finally prodded the US into clarifying its position with regards to the Pueblo's confidential information ("Jemez Order"), the US still has failed to meet it burden to establish a need for a protective order for the US' information ("US Order") except for identifying constraints that it believes may exist under the National Historic Preservation Act ("NHPA"). Also, the Pueblo opposes the process proposed by the US for the US Order, because it allows the US to escape it obligations and improperly shifts the US's responsibility under the rules onto the Pueblo.

II. JEMEZ ORDER

The only issue remaining as to the Jemez Order is as to form. The US' Response does not address or dispute the Pueblo's comprehensive grounds for protecting the Pueblo's confidential, religious, and culturally sensitive information. Specifically, the Response does not dispute that: a) the Pueblo has taken steps to maintain the confidentiality of the information; b) the Pueblo would be harmed if the confidential information was publically available; or c) public policy supports limited access to the confidential information. As these assertions are

undisputed, the Court should find that a protective order is appropriate for the Pueblo[4].

The only argument that the US seems to make about the Jemez Order is that the relief requested in the Motions is "bare bones." That argument ignores the seven to eight drafts of a protective order exchanged since April 2016. The US knows that the Pueblo is asking for specific, detailed protections, as demonstrated in multiple drafts of the proposed order that were exchanged and should have been reviewed by the US[5]. *See*, e.g., the Pueblo's proposed order that was sent to the US on September 8, 2016, Exhibit C.

Since the filing of the Motions, the Pueblo and the US have narrowed their disagreement to two issues. The Pueblo's proposed order is attached as Exhibit E, and a red-lined order highlighting what the Pueblo understands to be the disputed provisions is attached as Exhibit F.

One dispute is whether Anna Stephens, a Valles Caldera National Preserve ("VCNP") employee who the US asserts it will have testify as an expert, should be treated in the same fashion as all other experts[6]. The Pueblo does not object to Ms. Stephen receiving the confidential information as an expert witness for the US, but she should be treated just like all other experts. Specifically, Ms. Stephen should be required to sign a confidentiality agreement

[4] The majority of the US Response is a cross-motion, seeking to protect allegedly confidential information to be produced by the US.

[5] Because the US had become unresponsive, the Pueblo did not know if the US was going to agree to the grounds of the Motion or merely dispute the form. The Pueblo therefore did not attach a proposed order to its Motion or lodge one with the Court. *See*, CM/ECF Administrative Procedures, Section 12, Proposed Orders, Section (a).

[6] In discussions with the US in the fall of 2016, the Pueblo proposed to prohibit fact witnesses from access to confidential information but allow access to all expert witnesses. The US agreed that the US' confidential materials should not be shared with the Pueblo's fact witnesses, which included a staff archaeologists and the Jemez Governor. Yet the US demanded that fact witnesses from the VCNP receive special treatment. *See*, proposed orders, attached to the Response as ECF Nos. 108-1 and 108-2. It appears that the US has changed its position, and now is asking that one employee of the VCNP who will serve as an expert witness, and her assistant, have access to the Pueblo's confidential information. *See*, Exhibit F.

just as all other experts will be required to do. Anyone who assists Ms. Stephen should also be required to sign a confidentiality agreement, as will every other assistant or contractor. The Pueblo proposes that the Pueblo's confidential information be shared in the same manner as the US's confidential information. But the US, without justification, demands that this one proposed expert witness be given special privileges by the Court and the parties.

The second dispute concerns the Pueblo's desire to specifically limit how its confidential religious and cultural resources are used by the US. The Pueblo's confidential information should not be used outside this litigation, and should not be used in VCNP displays, research outside this litigation or for any "public education".[7] There is no harm in including these specific requirements when failing to do so could result in improper disclosure. If the US does not intend to use this information outside the litigation, then there is no reasonable reason for its objection to this language.

As detailed in the memorandum in support of the original Motions, there has been a long history of outsiders, including the US, claiming to be acting in the best interest of the Pueblo, along with other tribes, and then releasing information against tribal wishes. ECF Nos. 105, at 5-6, 105-4, ¶¶ 6, 7 10 and 13. Without restating all of those reasons, the Pueblo reiterates the need to include this specific language because of harm that has occurred in the past and that could occur without this language in the future. The proposed clarifying language helps prevent any misunderstandings.

[7] The US claims that VCNP employees would have to review the Pueblo's confidential information to determine if the VCNP already possesses the information. That is not true. If the VCNP was not given access to the Jemez confidential information, then there would be no dispute that the information was not obtained through the litigation.

III. US ORDER - PLAINTIFF'S REPLY IN SUPPORT OF ITS MOTION TO COMPEL AND RESPONSE TO THE US' CROSS-MOTION

The suggestion by the US that it has previously proposed a US Order to the Pueblo misrepresents the communications between the parties. Apart from the initial joint US proposed confidentiality order (that the US subsequently changed to apply only to the Pueblo), the Pueblo did not receive a proposed US Order from the US until after the Pueblo filed its Motions and a day before the US filed its Response. Additionally, the US' allegation that the Pueblo has an obligation to propose an order for the US is not consistent with the rules or the law[8]. Rule 26(b)(5) of the Federal Rules of Civil Procedure places the burden on the US to expressly make its claim for protection and to describe the nature of the documents at issue. Rule 26(c) of the Federal Rules of Civil Procedure and related caselaw indicate that a protective order is only appropriate upon a showing of specific and particular facts by the party seeking the protection. Despite previous statements over the past eight month that the US has been analyzing these issues, the Response fails to make the required showing. [9]

A. Except for information subject to the NHPA, the Court should deny the US' motion for a protective order because the US has failed to establish sufficient grounds.

The US has failed to set forth grounds for a protective order under any federal statute

[8] The Response complains that the Pueblo has failed to propose an "order that would protect information produced by the US." But it is the US, not the Pueblo, which has the obligation to protect US information. Moreover, the Pueblo cannot speculate as to what statutes might impose an obligation on the US when the US has failed to identify what information is being withheld as required by Rule 26 of the Federal Rules of Civil Procedure. Absent a protective order, the Pueblo has no obligation to protect the US and its information. Indeed, it would seem to create a conflict for the Pueblo if it attempted to do so.

[9] Confusingly, the Response requests that the Court deny the Pueblo's motion to compel, which requests either that the US produce withheld information or clarify its confidentiality concerns. As the US has brought a cross-motion, the Pueblo assumes that the US agrees with the Pueblo's alternative request and is now asking the Court enter an Order specifying the protections to be given to information produced by the US.

except the NHPA. Merely listing a series of federal laws, likely copied from another pleading, that may apply without any further analysis, does not comply with the Federal Rules of Civil Procedure. Therefore, any US Protective Order should be restricted to the NHPA.

Rule 26(b)(5) states:

> When a party withholds information otherwise discoverable by claiming that information is privileged or subject to protection as trial preparation material, the party must: (i) expressly make the claim; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed – and do so in a manner that, without revealing information itself privilege or protected, will enable other parties to assess the claim.

Rule 26(b)(5), Fed. R. Civ. P.

The US did not raise any confidentiality concerns in its initial disclosures. Thereafter, in its responses to the Pueblo's request for production, the US made one objection to production based on confidentiality concerns. The US's response to Request for Production No. 5 states that there are field notes related to tribal uses that may be subject to Section 304 of the NHPA. *See*, Exhibit B to Response, ECF No. 105-1, 22. The US has also produced two privilege logs, only one of which indicates that four pages of documents are being withheld because, according to the US, they contain "sensitive cultural resource information related to tribal use of Redondo Peak, withheld pending court-approved confidentiality and protective order." *See*, privileged log, attached as Exhibit G. The US did not cite to any other statutes regarding confidentiality in its discovery responses or privilege logs.

Months after responding to discovery, the US is now raising new objections purportedly based on a list of newly identified federal statutes. The US' Response cites to ten statutes *that might apply*, but only addresses how the US believes Section 304 of the NHPA applies. The Response states that the requested discovery *may* implicate:

> "complex confidentiality issues potentially arising under (inter alia) the Privacy

> Act, 5 U.S.C. § 552s, Section 304 of the National Historic Preservation Act ("NHPA"), 54 U.S.C.A. §307103 ("Section 304"), the Archeological Resource 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 Secret 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."

ECF No. 108 at 2 (Emphasis added).

But these citations do not correlate with the citations in the US' proposed order, further undermining the validity of the US' argument as to their applicability here. *See*, Exhibit A to the Response, ECF No. 108-1 at 2. The US' proposed order cites to nine statutes, rather than ten. Of the ten, only seven correspond with the citations in the Response. Three acts in the Response are not cited to in the proposed order: the Defense Production Act, 50 U.S.C. App. § 2155(e); 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). Two acts cited in the proposed order are not in the Response: the Antiquities Act, 54 U.S.C. §320301 and the National Park Omnibus Management Act, Section 207, 54 U.S.C. §100707.

Not only has the US failed to unequivocally assert what acts apply as required by Rule 26(b)(5) of the Federal Rules of Civil Procedure, but the US has not even provided consistent citations for those laws that might apply. Without this information neither the Pueblo nor the Court can make a determination as to whether a protective order is appropriate. "It is the party seeking the protective order who has the burden to show good cause for a protective order." *S2 Automation LLC v. Micron Tech., Inc.*, 283 F.R.D. 671, 680 (D.N.M. 2012), citing *Velasquez v. Frontier Med. Inc.*, 229 F.R.D. 197, 200 (D.N.M. 2005); *and Accord Murphy v. Gorman*, 271 F.R.D. 296, 303 (D.N.M. 2010). The party seeking the protective order must submit "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory

statements." *Id*, citing *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n. 16. As the US has the failed to demonstrate specific circumstances that would warrant a protective over, the Court should deny the US' motion as to all statutes except for the NHPA.

B. A protective order is appropriate for information subject to the NHPA.

The US has provided some analysis of the application of the NHPA and the need for a protective order under that act. Therefore, the Pueblo is not asking that the information to be produced by the US be subject to release to the public, and agrees that a protective order is appropriate to the extent required under that act. *See, Duling v. Griestede's Operating Corp*., 266 F.R.D. 66 (S.D.N.Y 2010) (A protective order limiting the use of sensitive information was warranted to balance the interests of the parties, public access use, and privacy interests.) However, the Pueblo objects to the form proposed by the US because it is not restricted to the NHPA and because the procedure is inappropriate as explained below.

C. The Pueblo objects to the US's proposal for the US Order.

The Pueblo has attached as Exhibit H its proposed changes to the form of the US Order. As stated above, the Pueblo objects to the inclusion of acts other than the NHPA in the US Order. Additionally, the Pueblo has rejected language that contradicts the requirements under Rule 26(b) that the US has the burden to review and identify confidential information. Essentially, the US proposed order turns the Federal Rules of Civil Procedure on their head, allowing the US to mark everything confidential without review. Then after the documents are marked, the Pueblo would have to undergo a process if it did not think a document should be confidential[10]. The Pueblo should not have to bear such expense and burden, and it is the US's

[10] Although the US proposed order states that the Pueblo does not have "an affirmative duty or obligation to conduct a review to determine the confidentiality" of the US' documents, it ignores that claim by imposing a process that shifts the burden of identifying what is, and is not,

obligation to have some knowledge about what documents it is producing and identify documents that are confidential.

The US claims it cannot make an initial determination under Rule 26(b)(5) because it would take a year to review the documents. *See*, February 3 email, attached as Exhibit I. This assertion is without basis. Even if US's assertion is true, which the Pueblo disputes, the US has had since at least April of 2016 to make such determinations. If the US had begun its review at that time, then the US would be finished within a few months from now. And the US' position begs the question: if it would take the US that long, why would the process be any easier for the Pueblo?

However, it is unlikely that such a review would take a year. It appears that to comply with Section 304 of the NHPA generally, the VCNP should have already made at least an initial assessment of what information might impede the use of traditional religious sites by practitioners. One also assumes that the archeological records are maintained separately from the other VCNP records, which would narrow the number of documents that the US would need to review. Also, the Pueblo understands that the US maintains these documents electronically and that it has the ability to perform a computer search for documents requiring protection. This search would further decrease the pool of information that has to be reviewed manually. Additionally, the US will not have waived confidentiality if it fails to initially identify material as confidential. *See,* Exhibit I. First, the Pueblo has agreed to a claw back provision in the US Order that would allow the US to claim confidentiality if there was an inadvertent disclosure. *See*, Exhibit H, p. 8, ¶ 10(c). Also, the Federal Rules of Civil Procedure and the Federal Rules of Evidence clarify that a party making a privilege claim does not waive the privilege upon

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confidential onto the Pueblo.

disclosure and can later claim the information as privileged. *See*, Rule 26(b)(5)(B), Fed. R. Civ. P. and Rule 502(d), Fed. R. Evid. Thus, the US can perform a preliminary review of its documents without reading every sentence of a document and not waive confidentiality should it later determine the document should be protected. As the US has not demonstrated a need for a procedure that would alleviate the US of it obligation under the Federal Rules of Civil Procedure, the Pueblo's proposed US order should be adopted.

CONCLUSION

The Pueblo respectfully requests that the Court grant the Pueblo's motion for protective order and enter the Jemez Order proposed by the Pueblo as Exhibit E. Additionally, the Pueblo requests that the Court issue a US Order to protect the information subject to NHPA in the form attached as Exhibit H, but deny all other relief requested by the US.

Respectfully Submitted,

JOHNSON BARNHOUSE & KEEGAN LLP

/s/ Christina S. West

Christina S. West
Randolph H. Barnhouse
7424 4th Street NW
Los Ranchos de Albuquerque, NM 87107
(505) 842-6123 (telephone)
(505) 842-6124 (facsimile)
cwest@indiancountrylaw.com
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the day of February 13, 2017, I filed the foregoing electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Peter Dykema, Peter.dykema@usdoj.gov
Matthew Marinelli, Matthew.marinelli@usdoj.gov
Attorneys for Defendant United States

Kirk R. Allen, kallen@mstlaw.com
Stephen B. Waller swaller@mstlaw.com
Attorneys for Defendant-in-Intervention NMGC

/s/ Christina S. West
Christina S. West