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

REPLY IN SUPPORT OF THE UNITED STATES' CROSS-MOTION FOR ENTRY OF PROTECTIVE ORDERS

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INTRODUCTION

The parties are in agreement that protective orders are necessary to protect, among other things, information whose confidentiality the United States is statutorily obligated to safeguard under Section 304 of the National Historic Preservation Act, 54 U.S.C. § 307103. Plaintiff takes issue with the statutory authorities the United States cites as establishing the need for protective orders, which is a pointless distraction because Plaintiff itself acknowledges that there are several "federal laws [that] establish a public policy to limit or bar the public or outside individuals from accessing" tribal "cultural patrimony." ECF 105 at 9; see id. at 8-9, citing the Native American Graves Protection and Repatriation Act of 1990, 25 U.S.C. 3001, the National Historic Preservation Act, 54 U.S.C. § 300101(6), and the American Indian Religious Freedom Act 42 U.S.C. 1996. Several Pueblos, including the Jemez Pueblo, have traditionally used the Valles Caldera for religious and other activities, and the United States is statutorily bound to respect those Pueblo's privacy interests. ECF 108-3 (Declaration of Dr. Stephanie Toothman); ECF 108-4 (Declaration of Dr. Anastasia Steffen).

Thus the only issue before the Court is what terms are appropriate for the protective orders that the parties agree are necessary. Initially, Plaintiff neglected to provide the Court proposed orders, and seeks to do so now with its Reply Memorandum, ECF 109, which is of course inappropriate. *Xiotech Corp. v. Express Data Prod. Corp*., No. 6:13-CV-861 MAD TWD, 2013 WL 4425130, at *7 (N.D.N.Y. Aug. 14, 2013) (rejecting a proposed order submitted with a reply memo because "[t]he Court will not accept new arguments, raised for the first time in reply papers"); *Presley v. Torrence*, No. 3:13-CV-05040-BHS, 2013 WL 1414869, at *1 (W.D. Wash. Apr. 8, 2013) (refusing to consider improperly filed rely memo and proposed order). Plaintiff's

objections to the United States' proposed orders are, moreover, insubstantial, in part because they ignore the principle of proportionality that governs all discovery in the federal courts.[1]

ARGUMENT

Plaintiffs' main objection to the order proposed for protecting information produced by the United States concerns the provision that the United States be able to make a blanket confidentiality designation. But that is the most practical solution, it is the same solution as that adopted by Judge Hogan, in *Sisseton Wahpeton Oyate et al v. Jewell et al*. (D.D.C. No. 1:13-cv-601) (see ECF 108-5), and it is consistent with principles of proportionality.

Plaintiff's objections to the proposed order governing information produced by Plaintiff are similarly unrealistic.

1. PLAINTIFFS' OBJECTIONS TO THE PROPOSED ORDER GOVERNING DOCUMENTS PRODUCED BY THE UNITED STATES CONTRAVENE THE PRINCIPLE OF PROPORTIONALITY

In December 2015, a series of amendments to the Federal Rules were enacted to improve a system of civil litigation that "in many cases ... has become too expensive, time-consuming, and contentious, inhibiting effective access to the courts." Chief Justice John Roberts, "2015 Year–End Report on the Federal Judiciary," Dec. 31, 2015 (Roberts Report), at 4, available at http://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf. To counter these

[1] Plaintiff devotes some energy to arguing that the United States has been "dilatory" and has somehow waived arguments and obligations – even going so far as to suggest that the United States has somehow "waived" its statutory obligations to consult with Indian Tribes. Agreeing on appropriate protective orders has obviously been a challenge for the parties, but the charge of dilatoriness is both incorrect and irrelevant. And the United States neither has nor could waive its statutory obligations; nor can this Court accept Plaintiff's invitation to ignore the United States' statutory duties.

problems, the 2015 amendments placed a greater emphasis on judicial involvement in discovery and case management and cooperation among litigants' counsel. *Id*. at 5.

Rule 26, which governs discovery, was among the rules amended. Rule 26(b)(1) now includes a discussion of proportionality, stating

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

As Chief Justice Roberts wrote of these amendments, "[t]he key here is careful and realistic assessment of actual need" that may "require the active involvement of a neutral arbiter—the federal judge—to guide decisions respecting the scope of discovery." *Id*. at 7.[2] Proportionality, the Chief Justice emphasized, is a "common-sense concept." *Id*. at 6.

As noted by the court in *Larson v. AT & T Mobility LLC*, 687 F.3d 109, 131 (3d Cir. 2012), the principle of proportionality in discovery has also been developed by the Sedona Conference. The Sedona Conference's commentary on proportionality discusses six principles intended to guide both bench and bar in applying the concept of proportionality to civil litigation. The sixth principle states that "[t]echnologies to reduce cost and burden should be considered in

[2] The principle of proportionality was not new in 2015; it had been a part of the Federal Rules since 1983. See Fed. R. Civ. P. 26(b)(1) advisory committee's note to 2015 amendment; *In re Cooper Tire & Rubber Co*., 568 F.3d 1180, 1184 (10th Cir. 2009) (observing under the former Rule 26(b)(1), all discovery was subject to the limitations of Rule 26(b)(2)(iii) that considered proportionality). But it was in 2015 that proportionality was moved into the text of Rule 26 as a fundamental limit on discovery.

the proportionality analysis." 11 The Sedona Conf. J. (2010) at 291-92.[3] Designating the Valles Caldera files as confidential is here, as in *Sisseton Wahpeton*, effectively a technology to reduce cost and burden.

As explained in the attached declaration by Dr. Steffen, for the United States to conduct a confidentiality review of the files of the Valles Caldera Preserve would take hundreds of hours. The archived files of the Valles Caldera Trust, which went out of existence in October, 2015, contain approximately one terabyte of data (approximately 320,000 files, including documents, GIS datasets, pictures, and other miscellaneous file types) that appear to be responsive to Plaintiff's discovery requests. The in-use server for the Preserve contains an additional approximately 40,000 – 50,000 files, consisting of nearly one terabyte of data. Declaration of Anastasia Steffen, Ph.D, filed herewith as Exhibit A.

As Plaintiff notes, tribal confidences implicate several privacy-mandating statutes. In addition, materials protected by the Privacy Act and attorney-client privileges would have to be screened on a file-by-file basis if a blanket confidentiality designation is not allowed. Id. ¶ 9.

The amount of time and effort required to conduct a file-by-file review, moreover, does not take into account the fact that where materials to be produced relate to confidences of local

[3] While the Sedona Conference on Proportionality focuses on electronic discovery, the principles have equal applicability to discovery as a whole. *See, e.g., Chen-Oster v. Goldman, Sachs & Co.*, 285 F.R.D. 294, 303 (S.D.N.Y. 2012) (commenting that a party may resist discovery of non-computerized documents or of ESI on grounds that the discovery sought is disproportionate); *see also Lynn, Witt v. GC Servs. Ltd. P'ship*, 307 F.R.D. 554, 569 (D. Colo. 2014) ("All discovery is subject to the [proportionality] limitations imposed by Rule 26(b)(2)(c)") (citation, internal quotes, omitted.)

Pueblos other than Jemez, the United States would likely need to consult with the affected Tribes. And virtually nothing of value would be produced by the effort. Plaintiffs' labors would not be diminished: whether the United States conducts an initial confidentiality review or not, Plaintiffs' counsel will need to review materials produced to assess their significance to the claims and defenses in the litigation. Rather than putting the United States to a pointless labor of months' duration, the proposed blanket designation will impose on plaintiff the minimal burden of providing the United States a list of bates numbers identifying documents as to which Plaintiff wants the confidentiality designation lifted.

In this case, allowing a blanket confidentiality designation will:

- Obviate the need for a confidentiality review process that would take months and hundreds of valuable man-hours, as well as consultation processes that could consume substantial additional time, all of which will be wasted effort with respect to any documents Plaintiffs choose not to use;
- Remove a significant delay factor;
- Impose almost zero additional burden on Plaintiffs, who will need to review produced records anyway in preparing for trial.

The blanket designation is in effect a cost-shifting mechanism, although the cost to be shifted involves (mostly) labor rather than dollars. *See Thornton v. Morgan Stanley Smith Barney, LLC*, 2013 WL 1890706 *1 (N.D. Okla. 2013) (noting the authority of a court to condition the discovery of certain items by "requiring the party seeking the discovery to pay some or all of the costs"); *Fiber Optic Designs, Inc. v. New England Pottery, LLC*, 262 F.R.D. 586, 587 (D.Colo.2009) (noting the "role and impact of discovery on the civil justice system" and how cost-shifting may help the complex problem); *Semsroth v. City of Wichita*, 239 F.R.D. 630, 637–38 (D. Kan. 2006) (setting forth factors to use when considering cost-shifting in the electronic discovery context). In this case, however, it is not cost-*shifting* so much as cost-

elimination, because the inconvenience imposed on Plaintiff is virtually nil. Rule 26 puts the question "whether the burden or expense of the proposed discovery outweighs its likely benefit." Here the question is whether the burden and expense of conducting a document-by-document confidentiality review outweighs the benefits such a review would provide. Because the burden is large, and the benefits virtually nil, the answer to the question posed is straightforward.

2. PLAINTIFFS' OBJECTIONS TO THE PROPOSED ORDER GOVERNING DOCUMENTS PRODUCED BY THE PLAINTIFF ARE IMPRACTICAL

The parties are not very far apart with respect to a protective order governing materials produced by Jemez. The two (related) issues outstanding involve confidential materials that are already in the United States' possession, and the treatment of the Preserve's resident archaeologist, Dr. Anastasia Steffen.

Plaintiff's proposed paragraph 5 (ECF 110-6 at 3) pertains to information regarding sacred "[s]ites or ceremonial objects" identified by Plaintiff but already known to the Preserve "through information available to [it] prior to this litigation." Plaintiff proposes that, with respect to any such information, the United States be required to notify Plaintiff thirty days prior to "any action being taken" – "any action" referring, presumably, to actions involving the use of sensitive information. Compliance with this requirement is both unnecessary and an impossibility.

The Preserve possesses gigabytes of historical and archaeological information, much of which is potentially sensitive. The Preserve uses that information on a regular basis, as by, for example, the Preserve's in-house archaeologist Dr. Steffen. In their use of such information, the staff of the Preserve are already obligated, under several mandatory statutes, to preserve tribal

confidences. Placing limits on what the Preserve can do with information already in its possession is therefore both burdensome and unnecessary.

The thirty-day notice requirement is also hopelessly vague. Does "any action" include reading a document? Does the Preserve's staff need to notify Plaintiff any time they review, edit, or discuss sensitive materials that Plaintiff itself provided to the Preserve in years past?

Compliance with the thirty-day notice requirement is also impossible. Under Plaintiffs' proposed order, the staff of the Preserve – with the possible exception of Dr. Steffen and her assistant (see below) – are not authorized to see confidential information that Jemez produces in this case. If they can't see the information, how are they supposed to determine that that information is already in the Preserve's files? And if Dr. Steffen is the exception to this rule, is she to spend the next years of her life exhaustively reviewing the Preserve's archaeological and historical files whenever the Plaintiff produces confidential information?

Finally, the import of the entire agreement is that information already in the Preserve's files will be subject to all of the protective order's prohibitions and requirements – including the requirement that it be destroyed when the lawsuit ends – if by chance that information is also included in materials produced by Plaintiff in this lawsuit. Obviously the United States cannot agree to such a thing. The Preserve's archives of historical and archaeological information is important to the Preserve's mission and purpose.

Another problem with paragraph 5 is the requirement that "any documents containing Confidential Information shall be destroyed or returned at the end of litigation." As noted, application of this requirement to information already in the Preserve's files is unreasonable. Also, this language would literally apply to briefs and other filings made under seal, and to the

reports prepared by the United States' expert witnesses. But the United States cannot agree to destroy its litigation records; nor can it agree to destroy its experts' reports. It has been an historical commonplace for the United States to have to defend similar or related tribal claims in multiple lawsuits filed at different times. The United States may have a very real need for its experts' work product in the future. What the United States *can* agree to – and has in fact agreed to – is a commitment that the experts will return or destroy any confidential source documents obtained from Plaintiff through discovery. *See* ECF 110-6 at 6 (requiring experts to return or destroy source materials as well as "any notes, summaries, synopsis, abstract, digest, copies, maps, recordings, photographs, or electronic images created from Confidential Information."). That should be enough.

The final substantive issue involves Dr. Steffen. The United States has agreed that its expert witnesses will all sign a confidentiality agreement that effectively binds them to carry out the requirements of the protective order. We have also agreed that, among the staff of the Preserve, access to Plaintiff-produced confidential materials will be limited to Dr. Steffen and her assistant, Ms. Hannah Van Vlack.[4] Plaintiff insists that Dr. Steffen and Ms. Van Vlack also sign confidentiality agreements.

The United States opposes Plaintiff's position on the grounds that it is an offense to Dr. Steffen and Ms. Van Vlack. These women are professionals. They are already statutorily bound to respect tribal confidences under a number of federal statutes, including those invoked by Plaintiff

[4] The United States had also requested, quite reasonably, that the Director of the Preserve, Jorge Silva-Bañuelos, have access, but we have acceded to Plaintiff's request that Mr. Silva-Bañuelos be excluded.

itself. And Plaintiff has offered no reason for doubting Dr. Steffen's or Ms. Van Vlack's dedication and ability to fulfil their professional and statutory duties.

CONCLUSION

Accordingly, the United States respectfully requests that plaintiff's motion for protective order, and motion to dismiss, be denied, and that the Court enter the protective orders filed as ECF 108-1 and ECF 108-2.

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Certificate of Service

I hereby certify that on February 27, 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/Peter Kryn Dykema
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