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

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| STATE OF NEW MEXICO ex rel. State Engineer and THE UNITED STATES OF AMERICA, | ) | No. 68cv7488-BB-ACE |
| | ) | No. 70cv8650-BB-ACE |
| Plaintiffs | ) | Consolidated |
| v. | ) | |
| | ) | Rio Santa Cruz and |
| JOHN ABBOTT, et al., | ) | Rio de Truchas Stream Systems |
| Defendants | ) | Pueblo Subproceeding II |

**TRUCHAS ACEQUIAS' MOTION TO COMPEL PRODUCTION BY OHKAY OWINGEH**

Defendants Acequia Madre de Truchas, Acequia del Llano, Acequia de La Posesion, Acequia del Llano de Abeyta, and Acequia de Los Llanitos (collectively "Truchas Acequias") file this Motion to Compel Production by Ohkay Owingeh, and in support of this motion would show:

**Background Facts**

1. In February 2005, the United States, in its trust capacity for the Pueblo of Ohkay Owingeh (formerly known as the Pueblo of San Juan and hereinafter simply "the Pueblo" or "Ohkay Owingeh"), filed its Complaint in this subproceeding to determine the Pueblo's historic and present claims to the waters of the Rio Santa Cruz and Rio de Truchas. The Complaint requests relief on behalf of "[t]he Pueblo of San Juan, and the United States for the benefit of the Pueblo of San Juan."

2. In April 2005, Ohkay Owingeh filed its Complaint in this subproceeding. The Pueblo's Complaint incorporates by reference significant portions of the United States'

Complaint filed in February 2005, and requests relief based largely on the allegations contained in the United States' Complaint.

3. In 2002, the United States retained Kurt F. Anschuetz, an anthropologist, to provide "litigative consultant services" to the United States in connection with this subproceeding. Dr. Anschuetz was formally designated as a testifying witness in September 2006, in a disclosure filed by the United States. Dr. Anschuetz simultaneously submitted a report in this subproceeding, co-authored by Christopher Banet and Eileen Camilli, entitled "Documentation of Pre-Columbian Pueblo Farmland Irrigation on the San Juan Pueblo Grant Near the San Juan Airport Within the Geographic Scope of New Mexico v. Abbott" and dated September 22, 2006.

4. In August 2007, the Pueblo filed its disclosure of experts, designating the following testifying experts: Richard Ford, William Hudspeth, Michael Marshall and Henry Walt, Stephen Hall, Thomas Merlan, and Mark Miller. Each of these experts simultaneously submitted a report in this subproceeding, dated either July or August 2007.

5. During his deposition in this case on May 19, 2009, Dr. Anschuetz disclosed that, in addition to serving as a testifying expert for the United States in this case, he was also retained in 2005 to "provide technical assistance" to Ohkay Owingeh, helping the Pueblo identify and recruit experts to work on the case and providing information for requests for proposals for those experts. Dr. Anschuetz indicated that he could not recall either his specific rates charged to the Pueblo or the amounts paid to him by the Pueblo for his services in this case to date.

6. Subsequent discovery in this case has revealed that, in addition to helping recruit the Pueblo's testifying experts—Richard Ford, Michael Marshall, Thomas Merlan, Mark Miller, Stephen Hall, and William Hudspeth—

a. Dr. Anschuetz is the "Team Leader" of the Pueblo's panel of experts—by contract, all of the experts are to work in consultation with him in developing their proposals and reports;

b. Dr. Anschuetz was responsible for identifying and generally providing "relevant background reading materials" to the experts;

c. Dr. Anschuetz was responsible for making available to the experts "copies of the documentation and assessment of . . . complexes in the Rio de Truchas watershed and . . . in the El Llano watershed compiled during comprehensive archeological studies conducted by the Department of Justice and the Bureau of Indian Affairs for the New Mexico v. Abbott case;"

d. Dr. Anschuetz authored an earlier "Homeland Study Report" (see paragraph 9 below), containing "information compiled for the 13 cultural sites important to Ohkay Owingeh within the Rio de Truchas and Rio de Santa Cruz watersheds," which the experts were required to review;

e. Dr. Anschuetz was responsible for leading reconnaissance surveys with the experts, including "site visits to selected Tewa habitations and agricultural field complexes in the Rio de Santa Cruz and El Llano watersheds with which [he had] familiarity . . . followed by the joint documentation of several small Tewa

agricultural filed sites in the Rio de Santa Cruz watershed that [he] previously [had] seen . . . [and] an initial reconnaissance of the Rio Truchas watershed;"

f. Dr. Anschuetz was to be consulted by the experts, at the completion of the orientation phase, along with "other team members and attorneys to identify particular tracts and physiographic settings within the project area that possess the greatest potentials to yield archeological sites evidencing the late pre-Columbian and early Historic period Tewa occupancy and use of water;" and

g. Dr. Anschuetz, in conjuction with Richard Ford, was to be consulted by the experts during any review of Tewa ceramics "for information supporting the argument that Sankawi Black-on-cream pottery persisted at least through the Pueblo Revolt of 1680."

7. Additional contract terms between Ohkay Owingeh and its testifying experts require that the experts' archeological surveys proceed "using the methods and procedures for documenting and evaluating water use functions introduced and refined during the orientation phase," that the experts consult with the other team members throughout the duration of the studies "to allow the realization of the required interdisciplinary effort," that the experts "consult with the other team members and attorneys before committing greater effort in a revised sample design," and that the experts make available to one another their relevant findings from their respective studies.[1]

[1] The contract provisions reflected in paragraphs 6 and 7 are contained in the Scope of Work agreement between Ohkay Owingeh and its testifying experts Michael Marshall and Henry Walt. A copy of this agreement is attached to this motion as Exhibit A. Some of the same provisions are contained in Ohkay Owingeh's agreements with other testifying experts, which also contain

8. The Pueblo's experts testified during their depositions that in general they, as well as Dr. Anschuetz, performed in accordance with these contract terms. They received background and other information from Dr. Anschuetz, he gave them extensive orientations (in some cases between one and two weeks), they consulted with him and he with them, he participated in their archeological reconnaissances and field studies and they generally relied on him for help and direction, they attended numerous meetings with him and with the Pueblo's legal team, and they participated in reviewing and revising reports together. In addition, most of the experts make extensive references to Dr. Anschuetz and his work in their own reports—in one case, Dr. Anschuetz is referenced or cited more than one hundred times. See Exhibit C attached to this motion.

9. In addition to his work in this case, in 2001 Dr. Anschuetz authored a report, with Thomas Merlan and T.J. Ferguson, entitled "San Juan Pueblo's Enduring Associations with Its Traditional Homelands: Archeological, Historical, and Ethnographic Documentation of the Tewa Cultural Landscape." This report was prepared on behalf of the Pueblo pursuant to a grant from the Pueblo to the Rio Grande Foundation for Communities and Cultural Landscapes, for whom Dr. Anschuetz has served as program director and consulting anthropologist/archeologist since 1998. In 2006, Dr. Anschuetz included this Homeland Study Report in a list of recommended reading and advised the pueblo's experts that it "provides much baseline information relevant to the current *New Mexico v. Abbott* case."

10. In 2003 Dr. Anschuetz presented a paper, "Draft: The Reflection of European History on Pueblo Water Uses: A Refraction of Indigenous Cultural-Historical Process," at the

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additional provisions. See Exhibit B for some of the relevant contract provisions between Ohkay Owingeh and its other testifying experts.

American Society of Ethnohistory Annual Conference in Riverside, California. In 2006 he advised the Pueblo's experts that this narrative would serve "as the foundation for our story about Tewa water use at the time of First Contact."[2]

11. Following Dr. Anschuetz's deposition in this case in May 2009, the Truchas Acequias submitted informal discovery requests to Ohkay Owingeh, requesting production of, among other things, all agreements by and between the Pueblo and Dr. Anschuetz, all payments made by the Pueblo to Dr. Anschuetz, and all communications by and between the Pueblo and Dr. Anschuetz.

12. Because Ohkay Owingeh objected to producing these materials, and because the Truchas Acequias sought to propound additional discovery requests, in September 2009 the Truchas Acequias submitted formal requests for production to the Pueblo. The Pueblo provided its objections and responses in November 2009. Copies of the Truchas Acequias' requests and Ohkay Owingeh's objections and responses, including a privilege log, are attached to this Motion as Exhibits D and E.

13. The Truchas Acequias contend that Ohkay Owingeh's objections are not well founded, and request that the Court compel the production in question.

**Requests and Objections**

Kurt Anschuetz

As reflected in its responses to Request Nos. 1, 4, 7, 10, and 13, Ohkay Owingeh has objected to producing materials reflecting requests for proposals or other solicitations concerning

[2] Dr. Anschuetz authored additional papers in 2005 and 2006, which too were recommended by him to the other experts for, among other things, "interpreting the archaeological traces of old fields and villages" and "building arguments about how the Tewa sustained their occupancy of their homeland."

Dr. Anschuetz, agreements or contracts concerning Dr. Anschuetz, invoices submitted by Dr. Anschuetz, compensation paid to Dr. Anschuetz, and communications with and by Dr. Anschuetz, on the ground that he is a non-testifying expert and consultant only, with respect to whom production is protected or prohibited under Rule 26(b)(3) and (b)(4)(B). Rule 26(b)(3) is a codification of the work product doctrine, which protects from disclosure "documents and tangible things . . . prepared in anticipation of litigation or for trial" by or for a party or that party's representative, while Rule 26(b)(4)(B) protects from disclosure "the facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial," unless the requesting party can show exceptional circumstances under which he cannot obtain the information by other means.

The Truchas Acequias contend that neither of these provisions protects the requested materials from disclosure. To begin with, given that Dr. Anschuetz's primary role is and has been to serve as "Team Leader" of the Pueblo's assembled experts, he has not been a consultant to counsel but has served an entirely different role, and Ohkay Owingeh could not have had an expectation that any communications by or with him could remain privileged or protected. Not only is Dr. Anscheutz himself a testifying expert in this case, with and from whom all communications, documents and other materials are discoverable, but his communications with the Pueblo's other testifying experts are also all fully discoverable. Counsel for Ohkay Owingeh cannot do indirectly that which it cannot do directly—namely, counsel cannot communicate with its testifying experts via a so-called consulting expert and protect those communications, when the same communications, if made directly between counsel and the testifying experts, are fully

discoverable. And although courts have recognized that there may be limited circumstances in which an expert can serve as both a testifying witness and a consultant to counsel, the cases have routinely held that the consulting role must be in an area *outside* the subject of the witness' proposed testimony and any ambiguities must be resolved in favor of disclosure.

There can no longer be any doubt that Rule 26 requires disclosure of *all* information provided to or obtained by testifying experts, whether or not relied upon by them in formulating their opinions. *See, e.g.,* ***Reg'l Airport Auth. v. LFG***, 460 F.3d 697 (6th Cir. 2006) ("Rule 26 creates a bright-line rule mandating disclosure of all documents . . . given to testifying experts"). Documents that must be disclosed include both attorney-client communications and work product materials that have been shared with an expert; as the court explained in ***In re Pioneer Hi-Bred Int'l, Inc.***, 238 F.3d 1370 (Fed. Cir. 2001): "[B]ecause any disclosure to a testifying expert in connection with his testimony assumes that privileged or protected material will be made public, there is a waiver to the same extent as with any other disclosure." *Id.* at 1375-76. *See also* ***Sandia Vista L.L.C. v. Teresa I, L.L.C.***, No. 05-1154 WJ/LTG (D.N.M. December 27, 2006) ("all material provided to an expert witness who is expected to testify . . . is discoverable").

In this instance, Ohkay Owingeh must disclose all communications with Dr. Anschuetz, himself a testifying expert, as well as any and all communications by Dr. Anschuetz with Ohkay Owingeh's testifying experts. These communications include not only substantive discussions, but contracts, invoices and any other materials and information exchanged between the parties.

In ***B.C.F. Oil Refining v. Consol. Edison Co.***, 171 F.R.D. 57 (S.D.N.Y. 1997), the court addressed the "two hats" problem of an expert who serves as both consultant and testifying

witness. Relying on and quoting from ***Beverage Marketing v. Ogilvy & Mather Direct Response, Inc.***, 563 F.Supp 1013 (S.D.N.Y. 1983), it wrote:

> It is conceivable that an expert could be retained to testify and in addition to advise counsel *outside* of the subject of his testimony. Under such a circumstance it might be possible to claim a work product privilege if this delineation were clearly made.

*Id.* at 61 (emphasis added). In ***State v. Tyson Foods, Inc.***, Case No. 05-CV-329-GKF/PJC (N.D. Okla. June 2, 2009), the court ordered disclosure of requested information, finding that the expert's role as project manager over all the consultants in that case was pervasive and comprehensive and that the delineation between his two roles as consultant and testifying expert was not clear. Reasoning that ambiguities must be resolved in favor of disclosure, the court wrote:

> This result is mandated by the policies underlying the requirement that a testifying expert disclose all materials that he considered in reaching his opinion, and on the rule that the party seeking to compel the production of the documents "should not have to rely on the [resisting party's] representation that the documents were not considered by the expert in forming his opinion."

*Id.* at p. 15 (quoting *In re Air Crash*, 2001 WL 777433, at 4). A resisting party's burden is a high one; in ***Emcore Corp. v. Optium Corp.***, Civil Action No. 06-1202 (W.D. Pa. December 11, 2007), the court concluded that the resisting party meets it burden "when the documents *could not have been considered by the expert in forming his opinion, as when they are reviewed by the expert[] only after he has testified* . . . ." (emphasis added). *See also* ***Furniture World, Inc. v. D.A.V. Thrift Stores***, 168 F.R.D. 61, 63 (D.N.M. 1996) ("a person initially selected to testify as an expert at trial cannot be shielded from questioning by later being also designated as a consultant and invoking the work product doctrine. Counsel must choose to designate an expert as either one who will testify at trial *or* consult with counsel.").

Here, Dr. Anschuetz was hired as a "consultant" by Ohkay Owingeh at the very same time that he was consulting and preparing to testify for the United States in its trust capacity for the Pueblo. He was hired by the Pueblo for services in the very same subject area as his services for the United States—his background in and knowledge of the anthropology of the area—and the Truchas Acequias are entitled to explore, prior to trial, the extent to which his work for Ohkay Owingeh bears on both his own testimony and the testimony of the Pueblo's experts, with whom Dr. Anschuetz has consulted so extensively. Had Ohkay Owingeh wanted to protect its communications, it could have and should have retained an expert who was not already expected to testify and whose primary role was to advise counsel, not to select, direct, and consult with the Pueblo's testifying experts.

By involving himself intimately in the work of the other experts in this case, Dr. Anschuetz became in effect an assistant to those experts—his role was analogous to that of the assistants or assisting experts who could not be shielded from discovery in ***Herman v. Marine Midland Bank***, 207 F.R.D. 26 (W.D.N.Y. 2002), and ***Dura Automotive Systems v. CTS Corp.***, 285 F.3d 609 (7th Cir. 2002). In ***Herman***, the plaintiff sought a protective order with respect to the deposition of Eugene Sommer, who had co-authored a report with Howard Gordon, a business valuation expert. While acknowledging that a person who assists another in formulating expert opinions normally need not testify, the court concluded that an assistant is nonetheless subject to deposition. It wrote:

> [T]he expert report submitted by Mr. Gordon was the result of substantial collaborative work by he and Mr. Sommer. Mr. Sommer performed more than half of the total 329.25 hours it took to generate the expert report, and accounted for more than half of the $61,305.00 fee. Under these circumstances, the fruits of Gordon Associates' labor is indivisible, and defendant is entitled to explore what Mr. Sommer did.

207 F.R.D. at 31. In ***Dura Automotive***, the court pointed out that it makes no difference if the assistant is merely a data gather or an independent expert; in either case, the assistant is subject to discovery:

> An expert witness is permitted to use assistants in formulating his expert opinion, and normally they need not themselves testify. [Citations omitted.] The opposing party can depose them in order to make sure they performed their tasks competently . . . .

285 F.3d at 612-13. If the assistant can be deposed, he can also be compelled to produce documents. *See, e.g.,* ***Heitmann v. Concrete Pipe Machinery***, 98 F.R.D. 740 (E.D. Mo. 1983) (Rule 26(b)(4) allows a court to order the production of documents as well as depositions).

Dr. Anschuetz in this case effectively "directed the show." He selected all but one of the Pueblo's experts (although he did not select Henry Walt, Mr. Walt routinely works with Michael Marshall, whom Dr. Anschuetz *did* select), he wrote or helped write their contracts, he gave them extensive background materials and lengthy orientations, he assisted with and often directed their research,[3] he attended and presided over their meetings, and he helped review and

[3] In the case of Dr. Hudspeth, Dr. Anschuetz provided extensive notes that formed the basis of Dr. Hudspeth's report outline. Not only did Dr. Anschuetz provide key references, all of which were used and incorporated by Dr. Hudspeth; he also made very specific suggestions about evidence to consider and arguments to make. For example, his notes state: "[Hudspeth's examination] will also consider the pollen evidence cited by researchers working in the Tewa Basin in support of their argument that Tewa populations produced crops of useful native plants, such as Cheno-Ams and prickly pear, in their fields even during the times that they left their complexes in fallow."

Dr. Anschuetz was also actively involved in Marshall and Walt's Truchas field work; in April, May and June 2007, he spent several days doing reconnaissance work in the Truchas drainage, after Marshall found the "Truchas area . . . proving difficult to locate and identify cultural features."

revise their reports.[4] By specific contract provision, he was the "Team Leader" with whom all other experts were to consult. The time Dr. Anschuetz has expended in this endeavor, as well as the remuneration paid to him by Ohkey Owingeh, is no doubt substantial. The Truchas Acequias are entitled to discover the agreements between Ohkay Owingeh and Dr. Anschuetz, his invoices submitted and his compensation received, and all communications by and to Dr. Anschuetz, in order to establish not only the extent of his involvement in the preparation or revision of the other experts' reports, *see* ***Herman v. Marine Midland Bank****, supra*, but also any biases he may have, either as a testifying witness himself or as an assistant to other experts, in favor of Ohkay Owingeh or the United States in its trust capacity for Ohkay Owingeh.

In ***Schledwitz v. U.S.***, 169 F.3d 1003 (6th Cir. 1999), the court held that bias is always relevant in assessing a witness's credibility. In that case, it ruled that a criminal defendant was entitled to expose an expert witness's extensive involvement in an investigation against the defendant, when the witness was presented at trial as a neutral, detached expert. The court pointed out:

> The Supreme Court has defined bias as "the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party." United States v. Abel, 469 U.S. 45, 52 (1984).

The Truchas Acequias are entitled to do similarly here—to the extent that Dr. Anschuetz is presented at trial as a neutral expert on behalf of the United States, the Truchas Acequias are

[4] In at least two instances Dr. Anschuetz actively revised and rewrote the experts' reports. He provided nine single-spaced pages of comments on and proposed revisions to Marshall and Walt's Chapter 3 alone. See Exhibit F attached to this motion. He also appears to have provided extensive comments on and proposed revisions to Miller's hydrology report. The Truchas Acequias are specifically requesting production of all Anschuetz comments on and revisions to all experts' reports, including all chapters and all drafts.

entitled to present evidence of his prior and ongoing relationship with Ohkay Owingeh, for whom the United States is acting in its trust capacity. That evidence includes not only all communications but all soliciations, all agreements by and between Dr. Anschuetz and Ohkay Owingeh, all invoices submitted, and all compensation paid and received.

In ***In Re Welding Fume Products Liability Litigation***, 534 F.Supp.2d 761 (N.D. Ohio 2008), the court had entered a standing discovery order requiring all parties to disclose "the fact of, and the amounts of, payments they made, either directly or indirectly, to any entity (whether an individual or an organization) that has authored or published any study, article, treatise, or other text upon which any expert in this . . . litigation relies, or has relied." When several parties objected to making the required disclosures, the court reviewed its order and the reasons for it, pointing out all parties' extensive reliance on various learned treatises. It explained:

> In a very real way . . . the authors of these articles and studies have a strong presence in the courtroom, providing "virtual testimony" through repeated quotation and citation by the parties' attorneys and experts.
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> * * *
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> [T]he assumption underlying the learned treatise exception that the author has "no bias in a particular case" is not always true. . . . Indeed, there is little doubt that, as might any witness who testifies live in the courtroom, the author of a learned treatise whose statements are admissible in court . . . may also suffer prejudices or biases. The most obvious of these possible biases is receipt of money from one of the parties. Just as an expert who testifies live may reasonably be asked, for the purpose of revealing possible bias, whether and to what extent he has received remuneration from a party, it is reasonable for a litigant to want to reveal to the jury any financial incentives supplied by another party to the author of a learned treatise introduced at trail. And, as this [litigation] reveals, the magnitude of the financial incentives in question can be substantial.

*Id.* at 764 – 66. The court ruled that all payments—both before and after publication—had to be disclosed, because simple fairness allows parties to discover possible sources of bias, an

exceptional circumstance under Rule 26(b)(4)(B). 534 F.Supp.2d at 768. With respect to post publication payments, the court wrote:

> [P]ayments made to an author after he has published his article or study "may be even more probative of bias. It is not inconceivable that the authors of these articles were told by the Defendants, or simply understood through other means, that they would receive lucrative consulting contracts only if they managed to put certain favorable opinions into print. In this way, the Defendants could have even more control over the substance of the publications than if they were to pay in advance.

*Id.* at 770. The court concluded by pointing out that bias is also reflected in the fact that consultation has occurred. *Id.*

In the present proceeding, Dr. Anschuetz, in addition to serving as Team Leader and an ongoing resource to the Pueblo's testifying experts, also authored numerous articles and publications relied upon and cited extensively by them. Exhibit C attached to this motion reflects, as to each of the Pueblo's testifying experts, the number of Anschuetz articles and publications cited by them and the number of citations made to each publication. As pointed out above, one expert—William Hudspeth—cites to 18 Anschuetz articles and publications (including two personal communications) more than 100 times.

Counsel for the Truchas Acequias cannot effectively cross-examine either Dr. Anschuetz or the other Pueblo experts with whom Dr. Anschuetz has worked so closely, or otherwise adequately prepare for trial, without full discovery concerning the relationship between Dr. Anschuetz and Ohkay Owingeh. As the court pointed out in ***TV-3, Inc. v. Royal Ins. Co.***, 193 F.R.D. 490 (S.D. Miss. 2000):

> We do not imply that this is the case in the present litigation, but only the most naïve of experienced lawyers or judges could fail to realize that in our present legal culture money plus the proper "marching orders" will get an "expert" witness who will undertake to prove almost anything.

*Id.* at 492.

For the foregoing reasons, the Truchas Acequias request that Ohkay Owingeh be ordered to produce the documents and materials in question, including but not limited to:

- All solicitations, etc. that Kurt Anschuetz responded to during the period 2000 to the present;
- All agreements by and between Ohkay Owingeh and Kurt Anschuetz;
- All invoices submitted by Kurt Anschuetz and all compensation paid to him by Ohkay Owingeh during the period 2000 to the present;
- All communications by and between Ohkay Owingeh and Kurt Anschuetz during the period 2000 to the present;
- All communications by and between Ohkay Owingeh and/or Kurt Anschuetz and any other testifying expert retained by Ohkay Owingeh, including specifically all Anschuetz comments on and revisions to all experts' reports, including all chapters and all drafts.

Thomas Merlan, Richard Ford

In its responses to Requests Nos. 2, 3, 5, 6 (Ford prior to 2006), 8, 9 (Ford prior to 2006), 11, 12, 14, 15, 16, and 17, Ohkay Owingeh objects to producing the requested documents and materials related to Thomas Merlan and Richard Ford, testifying experts for the Pueblo, on the ground that Merlan and Ford were initially hired as consultants to counsel (in 2005) and only later designated as testifying witnesses (in 2006). Ohkay Owingeh contends that production of any documents or materials predating the experts' formal designation as testifying witnesses is protected or prohibited under Rule 26(b)(3) and (b)(4)(B), as well as by the work product doctrine.

Here, again, however, Ohkay Owingeh is mistaken. As the court points out in ***Construction Industry Services v. Hanover Ins. Co.***, 206 F.R.D. 43 (E.D. N.Y. 2002), "[i]f chronology was determinative, the opportunity for parties to shield disclosure of otherwise

discoverable documents considered by their experts simply by hiring those individuals first as consultants and later as experts would be too great." *Id.* at 53. In that case, the plaintiffs argued that that their expert had been hired as a consultant to address *liability* issues, but later served as a testifying expert with respect to *damages* issues, thus shielding earlier communications from disclosure. The court rejected this argument, questioning how the expert, "in his capacity as a damages expert, could not have considered, on some level, his comprehensive knowledge of, and pre- and post-litigation exposure to, all confidential information regarding the lawsuit." *Id.* Production was ordered.

Ohkay Owingeh does not even attempt to make a distinction here (indeed, the Pueblo admits that both were solicited for assistance and/or consultation in the preparation of the Pueblo's claims—see Exhibit D at pp. 2 – 3),[5] arguing only that Merlan and Ford were hired as consultants first, designated as testifying witnesses second. Under these circumstances, if Ohkay Owingeh did not want the information disclosed, it "need only [have] with[held] it from the testifying expert, or decline[d] to morph a consulting expert into an expert witness." ***State v. Tyson Foods, Inc.***, *supra*, at p. 9.

In ***Wilson v. Wilkinson***, No. 2:04-cv-00918 (S.D. Ohio, May 19, 2006), the plaintiff made a similar argument with respect to his expert, hired in 2004 as a consultant and designated

[5] Merlan's 2006 contract with the Pueblo provides specifically: "Contractor's work on this Contract will continue the research begun by Contractor on the Pueblo's behalf during 2005 and concluded with the submission of a draft report on February 1, 2006." This report was not kept confidential and obviously related to Merlan's continuing work as a testifying expert because in May 2006, Kurt Anschuetz writes Richard Ford: "Thankfully, Tom prepared a nice piece of work amid all the uncertainty last fall, which we can work from . . . . I hope that we will be able to give you a copy of Tom's report next week." (E-mail communication dated 5/5/2006.)

as a testifying witness a year later. Pointing out that the expert was consulted on the same issues for which he was retained to testify, the court ordered discovery. The court concluded:

> [N]either the "exceptional circumstances" of Federal Rule of Civil Procedure 26(b)(4), nor the work product doctrine of Federal Rule of Civil Procedure 26(b)(3) apply to a consulting expert who has been designated as an expert witness, particularly where, as here, his role as a consultant is closely intertwined with his role and opinions as a testifying expert.

*See also* ***Euclid Chemical Co. v. Vector Corrosion Technology***, No. 1:05 CV 80 (N.D. Ohio, May 29, 2007) (ordering disclosure of all information to and from the expert, "dating back to the inception of his work as a consultant and/or non-testifying expert in anticipation of litigation" more than six years earlier).

Merlan and Ford are also cited extensively by other testifying experts in this case—the information pertaining to them is therefore discoverable on the further ground of bias, as explained in ***In Re Welding Fume Products Liability Litigation***. *See* pp. 13 – 14, above. Richard Ford, for example, incorporates verbatim (and generally without attribution) extensive sections of Merlan's 2001 Homeland Study Chapter 5 into his own report in this case. Compare Ford report at pp. 2.6 – 2.8 with Merlan Chapter 5 at pp. 5.3 – 5.5, Ford report at pp. 4.4 – 4.5 with Merlan Chapter 5 at pp. 5.19 – 5.20, 5.23, and Ford report at pp. 4.13 – 4.16 with Merlan Chapter 5 at pp. 5.36 – 5.38. Ford is in turn cited and referenced extensively by other experts, including Hudspeth (his bibliography includes four Ford articles or publications), Marshall and Walt (their references include four Ford articles or publications), and Anschuetz (his report with Camilli and Banet includes references to five Ford articles or publications).

The Truchas Acequias request that Ohkay Owingeh be ordered to produce all requested materials pertaining to Thomas Merlan and Richard Ford, including but not limited to:

- All solicitations, etc. that Thomas Merlan responded to during the period 2000 to the present;
- All solicitations, etc. that Richard Ford responded to during the period 2000 to the present
- All agreements by and between Ohkay Owningeh and Thomas Merlan;
- All agreements by and between Ohkay Owingeh and Richard Ford;
- All invoices submitted by Thomas Merlan and all compensation paid to him by Ohkay Owingeh during the period 2000 to the present;
- All invoices submitted by Richard Ford and all compensation paid to him by Ohkay Owingeh during the period 2000 to the present;
- All communications by and between Ohkay Owingeh and Thomas Merlan during the period 2000 to the present;
- All communications by and between Ohkay Owingeh and Richard Ford during the period 2000 to the present;
- All communications by and between Ohkay Owingeh and/or Thomas Merlan and any other testifying expert retained by Ohkay Owingeh;
- All communications by and between Ohkay Owingeh and/or Richard Ford and any other testifying expert retained by Ohkay Owingeh.

Sue-Ellen Jacobs

In response to Request No. 19, Ohkay Owingeh objects to producing its agreements with Sue-Ellen Jacobs, a Tewa linguist "who was retained as a non-testifying expert . . . for purposes of interviewing elders from within the Pueblo." Exhibit D at pp. 7 - 8. Had Ms. Jacobs' input stopped there, Okhay Owingeh's objection might have merit, but her input did not stop there. Her work is cited no fewer than thirty times by Richard Ford's report, which includes the following acknowledgment: "This report has benefited immensely from the assistance of Dr. Sue-Ellen Jacobs. Dr. Jacobs provided many important manuscripts needed for the report and help[ed] to conduct the interviews with elders on Ohkay Owingeh." Ford report at p. 1.5.[6] Ohkay Owingeh's

[6] Ohkay Owingeh's contract with Dr. Ford requires him "to work with Councilman Herman Ogoyo and Dr. Sue-Ellen Jacobs in connection with interviews of Pueblo elders to obtain information and opinions from them on Pueblo land and water use in the Tewa Basin since pre-Columbian times . . . ."

agreements with Dr. Jacobs are therefore discoverable under the reasoning of ***Herman v. Marine Midland Bank*** and ***Dura Automotive Systems v. CTS Corp.***—see pp. 10 - 11, above—by sharing her work with the Pueblo's testifying experts, Ms. Jacobs became in effect an assistant to them, and Ohkay Owingeh should be ordered to produce the information requested.

Miscellaneous

A. In its response to Request No. 18, Ohkay Owingeh objects to producing agreements between it and the Santa Clara Pueblo concerning the facts and/or issues made the basis of this case on the ground that the agreements were made in the pursuit of compromise and are inadmissible under Rule 408 of the Rules of Evidence. Rule 408 prohibits the introduction of offers of compromise or compromise agreements only when offered "to prove liability for or invalidity of the claim or its amount;" the rule specifically does not require exclusion "when the evidence is offered for another purpose."

In this case, the Truchas Acequias are not tendering evidence but are seeking discovery of agreements (which may or may not be compromise agreements) between Ohkay Owingeh and Santa Clara that may have a bearing on the reports and testimony of Ohkay Owingeh's testifying experts. Documents produced by Ohkay Owingeh to date reveal that various discussions between Ohkay Owingeh and Santa Clara could have influenced various experts' reports. See, for example, Exhibit G attached to this motion, wherein Richard Ford writes: "Rumors are swirling that there may be a settlement to get Ohkay Owingeh out of the Santa Cruz part of the case. If so, what does that do to our reports and further research? . . . Santa Clara has had an interesting way to stay on top of their claim to the Santa Cruz area." The Truchas Acequias

request production of the memorandum of understanding between Ohkay Owingeh and Santa Clara reflected in the attached privilege log.

B. In its response to Request No. 22, Ohkay Owingeh states that it has produced all time logs for William Hudspeth "which are in the Pueblo's files." Unfortunately, the time logs provided are incomplete; while Dr. Hudspeth was under contract and began submitting invoices in May 2006, completing his principal work in August 2007, the Pueblo has submitted monthly time logs for May, June, July and August 2007 only. The Truchas Acequias request that the Pueblo obtain from Dr. Hudspeth copies of his monthly time logs for the period May 2006 through April 2007, for production to the Truchas Acequias.[7]

C. The Truchas Acequias have reason to believe that some or all of the Pueblo's non-expert witnesses were offered compensation in exchange for their time and testimony in this case. See, for example, Exhibit H attached to this motion. The Truchas Acequias request that Ohkay Owingeh be compelled to produce, pursuant to Request for Production 19,[8] any and all agreements and related documents reflecting promises of compensation or compensation paid to Ohkay Owingeh's non-expert witnesses in this case.

D. During the depositions of the Pueblo's non-expert witnesses in December 2009, most if not all of the five witnesses in question spoke about sacred and ceremonial sites and customs that they contend support the Pueblo's claims in this case, yet due to the sacred and ceremonial

[7] The Truchas Acequias make a similar request with respect to all other discovery made the subject of this motion—to the extent Ohkay Owingeh is unable to locate responsive materials in its own files, those materials should be obtained from the experts in question, for production to the Truchas Acequias.

[8] This information is also discoverable in response to the Truchas Acequias' Interrogatory No. 2 to Ohkay Owingeh, wherein Ohkay Owingeh was asked to disclose all communications between the Pueblo's fact witnesses and any other witnesses in the case.

nature of the sites and customs in question, they were unwilling to disclose relevant details about the sites and customs—their names, locations, identifying characteristics, purposes, etc. The Truchas Acequias request that the Pueblo and its witnesses be compelled to provide the relevant details of any sacred and ceremonial sites and customs that will be used by the Pueblo to support its claims in this case, or, absent such disclosure, that the Pueblo and its witnesses by prohibited from relying on such sites and customs in support of the Pueblo's claims. [The parties are attempting to resolve this issue pending the court's consideration of this motion.]

Good-Faith Request for Concurrence

Counsel for the Truchas Acequias and Ohkay Owingeh have conferred in good-faith and at this time have been unable to resolve their differences concerning the requests made the subject of this motion. Counsel for Ohkay Owingeh will continue to consult with counsel for the Truchas Acequias, and counsel for Ohkay Owingeh expects to be producing many of the documents requested. Counsel will notify the court if and when their differences are resolved.

Wherefore, the Truchas Acequias respectfully request that Ohkay Owingeh be compelled and ordered to make the discovery requested herein.

Respectfully submitted,

Humphrey & Odé, P.C.

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By: Connie Odé

P.O. Box 1574
El Prado, New Mexico 87529
(575) 758-2203
(575) 758-5129 Fax

**Certificate of Service**

I hereby certify that on the 15th day of January, 2010, I served a copy of this document electronically through the CM/ECF system.

_____
Connie Odé