IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

State of North Dakota, Plaintiff, vs. United States of America, Defendant.	)))))))))	Case No. 1:19-cv-150 **ORDER**

The United States moves under Federal Rule of Civil Procedure 26(c) for a protective order regarding North Dakota's proposed Rule 30(b)(6) deposition topics. The primary dispute concerns Topic 20, which seeks testimony from the United States about decisions to withhold or deploy federal law enforcement in response to protest activity involving a pipeline construction project.[1] (Doc. 260). The United States argues Topic 20 is not relevant to North Dakota's claims and, even if relevant, seeks information disproportionate to the needs of the case. (Doc. 261). North Dakota responded, (Doc. 264), and the United States replied, (Doc. 268).

Background

The State of North Dakota filed its complaint against the United States on July 18, 2019, alleging employees of the United States Army Corps of Engineers ("USACE" or "Corps") and other federal employees committed various torts by inviting, enabling, and

[1] In addition to Topic 20, the United States seeks a protective order regarding Topics 10, 13, and 18 "to the extent that they include information from federal agencies other than the Corps" and "are read to include law enforcement activities." (Doc. 261, p. 8). Throughout the order, "Topic 20" refers to both Topic 20 and those aspects of Topics 10, 13, and 18 that concern decisions to deploy or withhold law enforcement resources of federal agencies other than the United States Army Corps of Engineers.

encouraging people protesting against of the Dakota Access Pipeline (DAPL) to engage in dangerous and illegal conduct on and near federal lands. (Doc. 1). More specifically, North Dakota claims federal employees' actions and inactions during eight months in 2016-17—when several thousand persons engaged in protest activity against construction of the DAPL in Morton County, North Dakota—resulted in North Dakota incurring costs of law enforcement time and first responder time. Id. North Dakota brought claims under the Federal Tort Claims Act (FTCA) seeking $38,005,071.66 in damages. Id. After a motion to dismiss for lack of jurisdiction was granted in part and denied in part,[2] the United States filed its answer on October 19, 2020. (Doc. 44). The parties have since engaged in extensive discovery.

During discovery, the parties' disagreement on the extent of the United States' liability has caused repeated disputes. In March 2021, North Dakota moved to compel production of documents from four federal agencies in addition to the Corps. In that motion, North Dakota argued that "the United States, acting through several of its component federal agencies (not just the USACE) committed tortious acts." (Doc. 67, p. 11). The United States responded that the alleged tortious conduct was based only "on the actions or inactions by USACE individuals to purportedly allow protests on USACE-managed land" and argued discovery from other federal agencies was therefore not relevant to North Dakota's claims. (Doc. 72, p. 1).

[2] North Dakota brought five claims in its complaint: public nuisance, negligence, gross negligence, civil trespass, and negligence in failing to adhere to an assumed Good Samaritan duty. (Doc. 1). In an order on the United States' motion to dismiss for lack of subject matter jurisdiction, the district judge dismissed the Good Samaritan negligence claim but held the court has jurisdiction over North Dakota's four other tort claims—negligence, gross negligence, public nuisance, and civil trespass. (Doc. 38).

In an order granting the motion to compel, this court declined to consider "whether North Dakota can recover for any acts of employees of agencies other than the [Corps]." (Doc. 77, p. 9). Rather, North Dakota's motion was granted because even if its claims were limited to actions of Corps employees, "that would not foreclose North Dakota from seeking discovery from other federal agencies who possess relevant information." Id. The United States appealed the order to the district judge and requested clarity regarding the scope of North Dakota's claims. (Doc. 89). The district judge affirmed the order and stated that "[d]efining with particularity the scope of the claims as they relate to discovery is a task not for determining the scope of discovery, but for summary judgment after discovery has occurred." (Doc. 96, p. 4).

In June 2022, the United States moved for a case management order, asking the court to resolve the "uncertainty regarding [North Dakota's] claims" and confirm that North Dakota's claims were limited to the failure of Corps employees to follow certain mandatory permit procedures. (Doc. 209, p. 2). North Dakota opposed the motion and responded that it had not expanded its theory of liability since initiating its FTCA claim. (Doc. 227, p. 2). The district judge denied the United States' motion for a case management order on October 27, 2022. (Doc. 280).

This order addresses the most recent discovery dispute. On September 28, 2022, the United States moved for a protective order regarding Rule 30(b)(6) deposition Topic 20 and aspects of Topics 10, 13, and 18. (Doc. 260; Doc. 261). Topic 20 requests testimony from the United States on "[d]ecisions by USA to provide or withhold law

enforcement assistance to State and local authorities" during the DAPL protest. (Doc. 264, p. 1).[3]

Law and Discussion

Under Rule 26(c), a party from whom discovery is sought—here, the United States—may move for a protective order. If the discovery sought is unduly burdensome, the court may, upon a showing of good cause, issue an order striking or modifying the discovery request. Fed. R. Civ. P. 26(c). The United States, as the moving party, bears the burden of showing good cause. Sherman v. Sheffield Fin., LLC, 338 F.R.D. 247, 252 (D. Minn. 2021). "A court has broad discretion in determining whether a protective order is warranted and the appropriate degree of protection." Id.

"Proper preparedness for a Rule 30(b)(6) deposition requires the good faith of both parties." CMI Roadbuilding, Inc. v. Iowa Parts, Inc., 322 F.R.D. 350, 361 (N.D. Iowa 2017). "[T]he requesting party must reasonably particularize the subjects about which it wishes to inquire." Dwelly v. Yamaha Motor Corp., 214 F.R.D. 537, 540 (D. Minn. 2003). "In return, 'the responding party must make a conscientious, good-faith effort to designate knowledgeable persons . . . and to prepare them to fully and

[3] Topics 10, 13, and 18 request, in part, similar testimony. Topic 10 requests testimony regarding "[a]ctions considered and taken by USA in response to use/occupation of Corps-managed lands by someone without either written permission or Special Use permit." Topics 13 and 18, both limited to actions taken by the Corps, the Department of Interior, and the Department of Justice, request testimony on "[a]ctions taken by the United States . . . during the DAPL Protests regarding Corps-managed lands" for certain purposes and "[r]esources of any sort provided, or decisions or considerations regarding whether or how to provide such resources, to North Dakota from August 1, [2016,] through March 1, 2017 related to the DAPL Protests and the occupation of Corps-managed Oahe Project lands." (Doc. 264, pp. 1-2).

unevasively answer questions about the designated subject matter.'" CMI Roadbuilding, 322 F.R.D. at 361 (quoting Dwelly, 214 F.R.D. at 540)).

The United States contends Topic 20 is not relevant to North Dakota's claims and, even if relevant, seeks information disproportionate to the needs of the case. (Doc. 261). Rule 26(b)(1) permits discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." "[T]he standard of relevance in the context of discovery is broader than in the context of admissibility." Humphreys & Partners Architects, LP v. Com. Inv. Props. Inc., No. 4:19CV3046, 2020 WL 3971604, at *2 (D. Neb. July 14, 2020). Proportionality is determined by considering, among other things, "the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1).

1. Relevance Under Rule 26(b)(1)

The United States argues there is good cause to strike Topic 20 because it is not relevant to North Dakota's claims.[4] (Doc. 261, p. 3). Both parties recognize that Topic 20's relevance to North Dakota's claims depends on what actions of employees of the United States constitute an alleged breach of duty under state tort law. Which actions constitute the alleged breach of duty, referred to as the "tortious conduct," has been the subject of disagreement throughout the litigation.[5]

[4] Rule 26(c) does not include irrelevance as a basis for a protective order. That said, the court agrees with the United States that if the discovery sought is irrelevant, "it follows that it imposes an undue burden." (See Doc. 261, p. 10).

[5] Tortious conduct is the "act or omission" that "is of such a character as to subject the actor to liability under the principles of the law of Torts." Restatement (Second) of Torts § 6 (1965). In other words, tortious conduct is the behavior that

Both parties articulated their theory of the case in their briefs on this motion and in their briefs on the motion for a case management order. On October 27, 2022, the district judge ruled on the United States' motion for a case management order and clarified the scope of North Dakota's claims. In denying the motion, the district judge stated "[t]he liability of the United States in this matter flows directly from the USACE's actions, not the actions of other agencies. But the other agencies may have contributed to the damages suffered by North Dakota and are, therefore, relevant for discovery and potential recovery." (Doc. 280, p. 9). Further, the district judge noted that "[s]imply because the other agencies' actions or omissions may not form the basis for the liability of the United States does not mean they do not hold information that is discoverable in this case or that they did not cause damage to North Dakota for which it may recover." Id. at 7.

Additionally, discovery produced to date shows the Corps worked closely with other federal agencies throughout the DAPL protests. The Corps had limited law enforcement authority, as both the United States and North Dakota recognize in their briefs. (Doc. 261, p. 6; Doc. 264, p. 14). The United States asserts the Corps requested law enforcement assistance from other federal agencies and, at times, received "some help but not all that was requested." (Doc. 261, p. 11). North Dakota points out that General Todd Semonite, chief of engineers of the Corps, testified that the United States' response to the DAPL protests was "an interagency and Administration decision" and that the Department of Interior, the Department of Justice, and the Department of

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constitutes the party's breach of the duty "to conduct himself [sic] in a particular manner." Id. § 4.

Defense were behind certain decisions. (Doc. 264-1, p. 1). Thus, considering the district judge's recent order and the coordination between the Corps and other federal agencies, the court finds Topic 20 relevant to North Dakota's claims for purposes of Rule 26(b)(1).

The court recognizes that the United States maintains North Dakota's reliance on federal law enforcement decisions is barred by the FTCA and the political question doctrine. (Doc. 261, p. 2). These jurisdictional arguments may be addressed at a later time. See Nat. Res. Def. Council v. Curtis, 189 F.R.D. 4, 8 (D.D.C. 1999) ("[P]ermitting discovery and leaving the question of the sufficiency of plaintiffs' case as a matter of law to a point after discovery closes is the way in which the federal courts handle such matters.")

2. Topic 20's Relevance to Mitigation of Damages

In addition to asserting Topic 20 is relevant to its claims, North Dakota contends "the times when the United States' refused to provide law enforcement assistance despite its availability, and whether those actions contributed to the need for North Dakota to provide its own law enforcement" are relevant to North Dakota's response to the United States' argument that North Dakota failed to mitigate its damages. (Doc. 264, p. 14).

The United States responds that none of North Dakota's damages depend on "the decisions or rationale of federal law enforcement agencies." (Doc. 261, p. 12). And "[n]either the State nor the United States has asserted a claim or defense through which a law enforcement decision by a non-Corps agency would reduce that amount." Id. Further, even if decisions to deploy federal law enforcement were relevant, the United States contends North Dakota would need to know only what federal law enforcement was actually provided—not what could have been provided. Id.

An injured party has a responsibility to mitigate its damages. The injured party "can recover from the delinquent party only such damages as he could not, with reasonable effort, have avoided." Hanson v. Boeder, 727 N.W.2d 280, 283 (2007). North Dakota's $38,005,071.66 claim for damages is based on its calculation of "environmental and property damages" and resources expended by the state on "law enforcement and emergency personnel." (Doc. 1, p. 35). The United States asserts it has not put forward a defense through which law enforcement decision-making or capabilities of non-Corps agencies would reduce that amount. (Doc. 261, p. 12). An assertion that North Dakota failed to mitigate its damages would depend on actions taken by North Dakota, not any action or inaction of any federal agency. To the extent North Dakota would rely on its requests for federal law enforcement assistance in response the United States' mitigation defense, North Dakota already possesses relevant information. Thus, Topic 20 is not relevant to North Dakota's response to the United States' argument that North Dakota failed to mitigate its damages.

3. Proportionality Under Rule 26(b)(1)

The parties also dispute whether, if relevant, Rule 30(b)(6) depositions on Topic 20 seek information proportional to the needs of the case. Rule 26(b)(1) permits discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Factors to be considered in determining proportionality are (1) the importance of the issues at stake in the action, (2) the amount in controversy, (3) the parties' relative access to relevant information, (4) the parties' resources, (5) the importance of the discovery in resolving the issues, and (6) whether the burden or expense of the proposed discovery outweighs its likely benefit. Fed. R. Civ. P. 26(b)(1).

The United States argues Rule 30(b)(6) depositions on Topic 20 would burden multiple federal agencies and submitted affidavits from employees of three agencies—the Federal Bureau of Investigation (FBI), United States Marshals Service (USMS), and the Department of Interior—detailing the extent of that burden.[6] (Doc. 261-4; Doc. 261-5; Doc. 261-6). The United States explains there is "no single repository" at the FBI or USMS regarding Topic 20 and thus those agencies would be forced to take additional, burdensome steps to compile relevant information for potential deponents to review. (Doc. 261, p. 14). Further, the United States argues North Dakota's alleged damages of $38,005,071.66 is small relative to its biannual budget and this is "simply a tort case." Id.

North Dakota responds "this case is anything but simple" and contends its asserted damages of $38,005,071.66 is a large amount regardless of the state's biannual budget. (Doc. 264, p. 16). As to burden, North Dakota notes both parties have expended substantial resources in the discovery process and asserts the United States "can work with personnel who have already been responding to discovery requests and review evidence that has already been collected to date to determine the best non-Corps personnel who are responsive" to Topic 20. Id. Further, North Dakota suggests the document discovery already produced can operate as a central repository for identifying Rule 30(b)(6) witnesses who have responsive information. Id. at 17.

In reply, the United States contends it has produced 118,000 documents from non-Corps custodians and "having a witness digest that information in preparation to

[6] The United States also argues Topic 20 would "call for privileged information" but does not identify the asserted privilege nor further develop the argument. (Doc. 261, p. 2).

testify would take months." (Doc. 268, p. 7). Further, the United States contends North Dakota is requesting not only information from documents but for "testimony about *all* law enforcement decisions by federal agencies and the rationales for them." Id. Thus, according to the United States, the documents produced to date would not cover all aspects of Topic 20.

This court has previously acknowledged that "the issues at stake are important, as evidenced by the amount in controversy." (Doc. 77, p. 11). Rule 30(b)(6) depositions on Topic 20 are important to resolving whether the United States breached its duty with respect to third persons occupying federal land. The United States has been aware of North Dakota's theory of the case since at least this court's March 2021 order, and thousands of documents from non-Corps agencies have been produced. Thus, the United States should be prepared to produce witnesses on Topic 20.

That said, the court recognizes that reasonably preparing witnesses for Rule 30(b)(6) depositions on Topic 20 may involve significant resources. Accordingly, North Dakota is directed to specifically identify the documents or issues about which it intends to inquire regarding Topic 20. (See Doc. 268-1, p. 4). Moreover, the testimony should be limited to the period from approximately August 2016 to March 2017. As North Dakota suggests, the United States need not search for additional documents not already compiled in order to prepare the deponents to testify. With those limitations, considering the importance and burden of the requested discovery, the court finds Rule 30(b)(6) on Topic 20 to be proportional to the needs of the case.

Conclusion

For those reasons, the United States' motion for a protective order, (Doc. 260), is **DENIED**. Under Civil Local Rule 72.1(D)(2), any party may appeal this order to the

presiding district judge within fourteen days of today's date, "unless a different time is prescribed by the magistrate judge." In light of deadlines that have been established for completion of discovery and filing additional motions, the court orders that any appeal be filed by **November 7, 2022.**

IT IS SO ORDERED.

Dated this 31st day of October, 2022.

/s/ Alice R. Senechal
Alice R. Senechal
United States Magistrate Judge