ELEVENTH JUDICIAL DISTRICT
COUNTY OF SAN JUAN
STATE OF NEW MEXICO

STATE OF NEW MEXICO ex rel.
State Engineer,
Plaintiff,
v.
UNITED STATES OF AMERICA, et al.,
Defendants.
v.
THE JICARILLA APACHE TRIBE and the
NAVAJO NATION,
Defendant-Intervenors.

No. CV 75-184
SAN JUAN RIVER
ADJUDICATION SUIT

Claims of the Navajo Nation
Case No.: AB-07-1

GARY L. HORNER'S OPTIONAL SUPPLEMENTAL BRIEF REGARDING WHAT LEGAL STANDARDS GOVERN THE COURT'S DECISION FOR APPROVAL OF THE PROPOSED DECREES

SUMMARY

1. Name of party filing the present document: **Gary L. Horner**

2. Title of the present document: GARY L. HORNER'S OPTIONAL SUPPLEMENTAL BRIEF REGARDING WHAT LEGAL STANDARDS GOVERN THE COURT'S DECISION FOR APPROVAL OF THE PROPOSED DECREES

3. Descriptive summary of the relief sought: **This document generally responds to the Court's REQUEST FOR SUPPLEMENTAL BRIEFING, filed in the present matter on December 19, 2011, and specifically addresses the questions presented therein.**

4: Number of pages of the present document: **10**

COMES NOW Gary L. Horner, Esq., *In Propria Persona* (hereinafter referred to in the first person), in response to the Court's REQUEST FOR SUPPLEMENTAL BRIEFING, filed in the present matter on December 19, 2011 (hereinafter referred to as the Court's "Request").

Accordingly, I state:

Introduction.

At the December 14, 2011 hearing[1] regarding the appropriate legal standards and burden of proof to be applied in the present matter, the Court expressed that the legal standards and burdens of proof to be applied were not clear to the Court from the briefs filed to date. It appears that the confusion is caused by the Settling Parties' positions on these matters.

The Settling Parties would have the Court consider their proposed Decrees to be consent decrees, and that the appropriate legal standard for the consideration of such Decrees is whether they are fair, reasonable, and consistent with applicable law and the public interest. The Settling Parties characterize such standard as a "fair and reasonable" standard. In so doing, they simply lop off the requirement of ever being required to show that such Decrees are consistent with applicable law. I contend that such Decrees have no basis in any law whatsoever, and in fact, said Decrees violate nearly every applicable law.

Previously, the Settling Parties in essence argued that: such Decrees were the product of arms length negotiations; therefore, they are fair and reasonable, and presumptively valid; that the Settling Parties have met their burden; and that the burden of proof should now shift to any objector to show that said Decrees are not fair, not reasonable, not consistent with applicable law or the public interest; and that said Decrees should be binding on all water users in the Basin. I have previously addressed such arguments at length. Such issues were heard by the Special Master at a hearing conducted on November 17, 2009.

At such time, the Settling Parties apparently came to realize that their position on such issues was woefully inadequate and they basically withdrew from consideration the issues

[1] Said hearing was conducted by video link, and technical difficulties with such link prevented the completion of such hearing at such time. Accordingly, said hearing has now been rescheduled for January 4, 2012.

regarding the legal standards and burdens of proof to be applied. In the intervening two years, the Settling Parties have regrouped. On January 3, 2011, the United States filed THE UNITED STATES' STATEMENT OF CLAIMS OF WATER RIGHTS IN THE NEW MEXICO SAN JUAN RIVER BASIN ON BEHALF OF THE NAVAJO NATION ("Statement of Claims"). Pursuant to said Statement of Claims, the United States asserts a claim for more than 920,000 afy, with a priority date from time immemorial, within the Basin on behalf of the Navajo Nation.

Now, the Settling Parties argue that the subject Decrees are smaller than the claims made by the United States, and intend to use a comparison between the subject Decrees and the larger Statement of Claims as evidence that the subject Decrees are "fair and reasonable" and "in the public interest." In that regard, the Settling Parties once again argue that they have already met their burden under such "fair and reasonable" standard, and that the burden of proof should now shift to any objector to show that the subject Decrees are not fair, not reasonable, and not consistent with applicable law or the public interest.

The result of the Settling Parties arguments is that they would never be required to show that the subject Decrees are consistent with any law. Certainly, if the subject Decrees have no basis in the law, neither does the much larger claim submitted by the United States.

Then, the Settling Parties argue that the burden should now shift to any objector to show that he is prejudiced or harmed by the subject Decrees. In fact, the Settling Parties have consistently argued that if any objector does not demonstrate such harm when such objection is filed, that such objection should be routinely dismissed without further consideration.

The Settling Parties understand the difficulty in proving such prejudice or harm, because such prejudice or harm has not happened yet. The Navajo Nation has not yet obtained such water rights, and any objectors would be required to prove how their own use of water would be

adversely affected in the future. Thus, the Settling Parties can be expected to argue that even if objectors present evidence with respect to such prejudice or harm, such evidence should be rejected by the Court because it is speculative.

Further, the Setting Parties can be expected to argue that the subject Decrees would not adversely affect the water rights of any objector, in that such water rights would still exist after the subject Decrees are entered.

This problem is "paper" water versus "wet" water. It would not be the water rights ("paper" water) that would be lost by existing water users, but rather, ("wet") water would no longer be available to such existing water users after the subject Decrees are entered. That is, once the Navajo Nation becomes entitled to use, or lease to others (even other out-of-state entities) enormous quantities of water that the Navajo Nation has never used before, with a right that would in essence be senior to nearly every other water user in the Basin; existing users' right to use water would be displaced by the senior Navajo water rights, even though their "water rights" would still exist.

But then, even if any objector is able to successfully show the Court that he will be harmed by the subject Decrees, such harm becomes irrelevant. If the Navajo Nation is actually entitled to such water rights, the Navajo Nation would obtain such water rights, regardless of whether others are harmed. Such is simply the nature of the New Mexico constitutional doctrine of prior appropriation. In an adjudication suit, senior water rights are routinely awarded to those entitled to such rights, even though junior water rights holders will be prejudiced or harmed by the determination of such senior water rights.

I have previously discussed these issues regarding harm to objectors. In fact, pursuant to the SCHEDULING ORDER GOVERNING PRETRIAL ACTIVITIES, which was entered in the

present matter on September 29, 2011 by the Special Master Stephen Snyder (hereinafter referred to as the Special Master's "Scheduling Order"), the Special Master ordered that objections be filed with respect to the subject Decrees by March 2, 2011. However, pursuant to said Scheduling Order, the Special Master actually eliminated the requirement that objectors must show harm as an element of their objection.

So, the question here should not be whether any objector will be harmed by the subject Decrees, but whether, the Navajo Nation is actually entitled to such water rights in the first place; that is, whether the subject Decrees are consistent with applicable law? The Settling Parties desperately seek to avoid the consideration of the issue of whether the subject Decrees are consistent with applicable law.

Specifically, the Court's first question was:

> "1. Should the Settling Parties be required to present evidence supporting each element of each water right included in the Settlement Agreement?"

The short answer to said question is "Yes."

Section 72-4-17 NMSA [Suits for determination of water rights; parties; hydrographic survey; jurisdiction; unknown claimants. (1965)] provides:

> "In any suit for the determination of a right to use the waters of any stream system, all those whose claim to the use of such waters are of record and all other claimants, so far as they can be ascertained, with reasonable diligence, shall be made parties. When any such suit has been filed the court shall, by its order duly entered, direct the state engineer to make or furnish a complete hydrographic survey of such stream system as hereinbefore provided in this article, in order to obtain all data necessary to the determination of the rights involved. . . . The court in which any suit involving the adjudication of water rights may be properly brought shall have exclusive jurisdiction to hear and determine all questions necessary for the adjudication of all water rights within the stream system involved; and may submit any question of fact arising therein to a jury or to one or more referees, at its discretion; and the attorney general may bring suit as provided in Section 72-4-15 NMSA 1978 in any court having jurisdiction over any part of the stream system, which shall likewise have exclusive jurisdiction for such purposes, and all unknown persons who may claim any interest or right to the use of the waters of any such system, and the unknown heirs of any deceased person who made claim of any right or interest to the waters of such stream system in his lifetime, may be made parties in such suit by their names as near as the same can be ascertained . . . ." Emphasis added.

Section 72-4-19 NMSA [Adjudication of rights; decree filed with state engineer; contents of decree] (1907) provides

> "Upon the adjudication of the rights to the use of the waters of a stream system, a certified copy of the decree shall be prepared and filed in the office of the state engineer by the clerk of the court, at the cost of the parties. Such decree shall in every case declare, as to the water right adjudged to each party, the priority, amount, purpose, periods and place of use, and as to water used for irrigation, except as otherwise provided in this article, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority." Emphasis added.

Further, the New Mexico Supreme Court in *State ex rel. Reynolds v. Sharp*, 66 N.M. 192, 344 P.2d 943 (1959) reaffirmed that:

> "It is true that no decree declaring 'the priority, amount, purpose, periods and place of use * * * the specific tracts of land to which it shall be appurtenant, together with other necessary conditions to define the right and its priority' as required by [72-4-19 NMSA 1978], can be entered . . . until hydrographic surveys thereon have been completed and all parties impleaded, at which time it is contemplated a further hearing to determine the relative rights of the parties, toward the other, will be held." *State ex rel. Reynolds v. Sharp*, at 196. Emphasis added.

On the other hand, the Settling Parties can be expected to argue that the answer to said Question No. 1 is "No." The Settling Parties can be expected to argue that the subject Settlement Agreement and proposed Decrees do include "each element of each water right included in the Settlement Agreement," in compliance with said §72-4-19 and *Sharp*.

However, I dispute the validity of the water rights set forth in the proposed Decrees. I assert that such Settlement Agreement and proposed Decrees would give to the Navajo Nation as much as 400,000 acre-feet per year ("afy") more than it has ever used before; that there exists no basis in any law for such a Decree; and that, in fact, such proposed Decrees violate the law in many ways. Therefore, issues of both fact and law exist with respect to the water rights associated with the subject Settlement Agreement and proposed Decrees. Thus, in accordance with said §72-4-17, this Court should hear and determine all of such disputed issues, and the Settling Parties should be required to present evidence supporting each element of each water right included in the Settlement Agreement.

Specifically, the Court's second question was:

> "2. If the requirement described in Question 1 is adopted, what are the respective burdens of the Settling Parties and the objectors?"

Obviously, it is the Settling Parties that seek the requested relief (the approval of the subject Settlement Agreement and proposed Decrees) from the Court. Therefore, just as obviously, it is the Settling Parties burden to establish that they are entitled to such relief; that is, it is the burden of the Settling Parties to establish that they are entitled to each element of the water rights included within the subject Settlement Agreement and proposed Decrees. If the Settling Parties meet such burden, the burden will shift to objectors to show that the Settling Parties are not entitled to such requested relief. Therefore, the Settling Parties should be required to demonstrate that they are entitled to their requested relief before any objector is required to file any objection to the subject Settlement Agreement or proposed Decrees.

One very significant problem in the present matter is that pursuant to the Scheduling Order objectors must file objections to the proposed Decrees by March 2, 2012. Specifically said Scheduling Order provides:

> "3. **On or before March 2, 2012**, all parties to this proceeding, except for the Settling Parties, shall file an objection or other response to the Settlement Motion stating whether or not they object to entry of the Proposed Decrees by the Court. All objections or other responses ('Responses') to the Proposes Decrees shall contain:
>
> "(a) The name and address of the objector or other respondent (the 'Respondent')
>
> "(b) A statement of the legal basis for the Response and the facts alleged in support thereof. If the Respondent does not claim ownership of a water right, the Response, in addition to stating its legal and factual basis, shall state the reasons why the Respondent contends it has standing to participate in this proceeding.
>
> "(c) A disclosure of (i) the name, address and telephone number of each individual likely to have discoverable information that the Respondent may use to support it position, and (ii) a description, by category and location, of all documents, electronically stored information and tangible things in the possession, custody or control of the Respondent that the Respondent may use to support its position. The legal and factual bases for all Responses shall be stated with particularity. Responses will be subject to a motion to dismiss if they are so vague and ambiguous as to preclude the Settling Parties from reasonably understanding their basis or if the Responses otherwise do not confirm to the requirements of this order. Responses may be amended, as if they were answers to a complaint, in accordance with Rule 1-015. **A default judgment dismissing with prejudice any objection a party may have to the Proposed Decrees may be entered**

> **against any party who, without good cause, fails to file a Response or make the required disclosures as required by this order.**" Scheduling Order, ¶ E. 2., pp. 4-5. (Bold typeface in original.)

Said requirement to file objections by March 2, 2012 represents a *de facto* shifting of the burden of proof to objectors, even before the present burden of proof issues have been heard and determined by the Court. Therefore, said March 2, 2012 deadline for filing objections should be eliminated. Objectors should not be required to file any objections until after: a reasonable period for discovery has ended; and the Settling Parties have presented evidence that they are entitled to their requested relief.

Specifically, the Court's third Question was:

> "3. Identify and present your position on any other relevant issues that the Court should consider if the Settling Parties are required to present evidence demonstrating each element of each water right in the Settlement Agreement."

The Court should consider that the entire concepts of negotiated settlements, consent decrees and expedited *inter ses* are fatally flawed from their inception. Such concepts simply allow the Settling Parties, and in particular the State (Office of the State Engineer - "OSE"), to do an end run around the entire body of law with respect to water rights.

In the present matter, by virtue of such concepts of negotiated settlements and consent decrees, the OSE would give to the Navajo Nation as much as 400,000 afy more than it has ever used before (and with respect to which the Navajo Nation can demonstrate no reasonably foreseeable use); while at the same time, shaving as much (previously adjudicated) water rights as possible from existing irrigation users.

As bad as the present problem is, with respect to the subject Settlement Agreement and proposed Decrees (and such problem is enormous), the problems generally with respect to

negotiated settlements, consent decrees and expedited *inter ses* gets much worse. That is, the OSE is now utilizing the concepts of such negotiated settlements, consent decrees and expedited *inter ses* in water rights adjudication suits all across the State. The result is that the entire body of water law has been completely thrown out the window in such adjudication suits. What remains is simply the allocation of water rights within the State of New Mexico based merely on the whim of the OSE.

Judge Wechsler stands in a very unique position: presiding over several water rights adjudication suits within the State of New Mexico at the same time; while at the same time being a sitting Court of Appeals judge. The burden on Judge Wechsler must be enormous and incredibly complex. However, this must give Judge Wechsler a very unique view of what is going on in the various adjudication suits across the State.

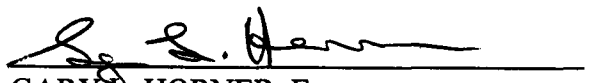
I sincerely hope that Judge Wechsler will come to comprehend the enormous problems and prejudice caused by the OSE's use of such negotiated settlements, consent decrees and expedited *inter ses*; and that Judge Wechsler will once and for all put an end to the use of such negotiated settlements, consent decrees and expedited *inter ses* in water rights adjudication suits. We desperately need to get back to the law and appropriate procedures in order to provide fundamental fairness and justice within the water right adjudication suits across the State of New Mexico. The very future of our community and our State depends on it.

Specifically here, the Court should first reject outright the subject Settlement Agreement and proposed Decrees. Then, the Court should consider and determine such issues as: does the concept of federal reserved water rights include water for future uses, and may such water rights be lost by non-use; what is the nature and extent of any right the Navajo Nation may have acquired by virtue of the concept of federal reserved water rights; and what is the nature and

extent of any right the Navajo Nation may have acquired by virtue of contracts with the United States? These issues are of the utmost significance; to date, they have simply been avoided; and there is currently no provision in any scheduling order for the consideration of such issues.

Then, the Court should require that the Settling Parties prove every element of each water right claimed by the Navajo Nation, before any other water user is required to submit any objection to any Navajo Nation water rights claim.

Respectfully submitted by:



January 3, 2012
Date

GARY L. HORNER, Esq.
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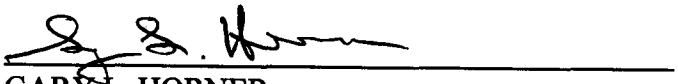
PROOF OF SERVICE BY ELECTRONIC TRANSMISSION

I HEREBY CERTIFY - in accordance with the ORDER MANDATING ALTERNATIVE METHOD FOR SERVICE OF ORDERS, MOTIONS, NOTICES AND OTHER COURT PAPERS, entered in the present matter on September 28, 2011 by the Honorable James Wechsler, Presiding Judge - that a true copy of the foregoing was served on the parties and Claimants in the present matter, by attaching a copy of said document to an email sent to the following email list server(s) maintained by the Court, this 3rd day of January, 2012:

wrnavajointerse@nmcourts.gov

Further, in accordance with the Court's Request, that a true copy of the foregoing was emailed to Celina Jones, AOC staff attorney, this 3rd day of January, 2012, at:

aoccaj@nmcourts.gov



GARY L. HORNER