

DISTRICT COURT  
SAN JUAN COUNTY NM  
FILED

2012 NOV 28 PM 4:03

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 RESPONSE TO THE SETTLING PARTIES' MOTION FOR  
CLARIFICATION AND MOTION FOR EXTENSION OF TIME TO REPLY TO THE  
HORNER MOTION**

SUMMARY

1. Name of party filing the present document: **Gary L. Horner**
2. Title of the present document: **GARY L. HORNER'S RESPONSE TO THE SETTLING PARTIES' MOTION FOR CLARIFICATION AND MOTION FOR EXTENSION OF TIME TO REPLY TO THE HORNER MOTION**
3. Descriptive summary of the relief sought: **The Settling Parties should not be allowed an extension of time to respond to GARY L. HORNER'S MOTION FOR THE DETERMINATION OF THE APPLICABLE STANDARD FOR THE DETERMINATION OF FEDERAL RESERVED WATER RIGHTS.**
- 4: Number of pages of the present document: **12**

COMES NOW Gary L. Horner, Esq., *In Propria Persona* (hereinafter referred to in the first person), in response to the SETTLING PARTIES' MOTION FOR CLARIFICATION AND MOTION FOR EXTENSION OF TIME TO REPLY TO THE HORNER MOTION, which was filed in the present matter on November 21, 2012 ("SP Motion for Extension").

*Horner's Response to the Settling Parties'  
Motion for Extension of Time*

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As and for good cause for said Response, I state:

**I. Responses to Horner's Motion re Reserved Rights were due by Monday, November 26, 2012.**

Pursuant to the Settling Parties' Request for Clarification, the Settling Parties assert that:

“Because the appropriate time for filing responses to the Horner Motion appears ambiguous under the aforementioned procedural orders governing this proceeding, the Settling Parties request clarification from the Court as to the date responses are due.” SP Motion for Extension, pp. 2-3.

However, there is no ambiguity. In fact, the Settling Parties point out in the SP Motion for Extension (footnote 1, p. 2), that pursuant to the November 19, 2012, CORRECTED ORDER SUMMARIZING DISCOVERY ACTIVITIES DISCUSSED AT THE NOVEMBER 6, 2012 DISCOVERY CONFERENCE (“Corrected Order”), the Court ordered that:

“The Court hereby amends the Order Mandating Alternative Method of Service for Orders, Motions, Notices, and Other Court Papers, filed September 28, 2011, to specify that the time period for responding to motions, notices, or other court papers filed after the date of this order shall be triggered by electronic service of the court paper rather than by the Bi-Weekly Report and shall otherwise conform to the Rules of Civil Procedure. . . .” Corrected Order, ¶ 6, p. 2.

The quoted language was precisely the same as originally stated in the Court's ORDER SUMMARIZING DISCOVERY ACTIVITIES DISCUSSED AT THE NOVEMBER 6, 2012 DISCOVERY CONFERENCE, entered November 16, 2012 (¶ 7, p. 2). Said language was also a direct reflection of the request made by Mr. Pollack at the November 6, 2012 Discovery Conference.

NMRA Rule 1-007.1 (D), regarding responses to motions, provides:

“Unless otherwise specifically provided in these rules, any written response and all affidavits, depositions or other documentary evidence in support of the response shall be filed within fifteen (15) days after service of the motion. If a party fails to file a response within the prescribed time period the court may rule with or without a hearing.”

GARY L. HORNER'S MOTION FOR THE DETERMINATION OF THE  
APPLICABLE STANDARD FOR THE DETERMINATION OF FEDERAL RESERVED

WATER RIGHTS (“Horner’s Motion re Federal Reserved Rights”), and GARY L. HORNER’S BRIEF IN SUPPORT OF GARY L. HORNER’S MOTION FOR THE DETERMINATION OF THE APPLICABLE STANDARD FOR THE DETERMINATION OF FEDERAL RESERVED WATER RIGHTS (“Horner’s Brief re Federal Reserved Rights”) were both filed in the present matter on November 8, 2012, and an email message containing said documents was sent to the Court’s list server the same day. Accordingly, pursuant to said Rule 1-007.1 (D), the deadline for filing responses to Horner’s Motion re Federal Reserved Rights was Friday, November 23, 2012. The Court was closed for Thanksgiving on November 23<sup>rd</sup>, so, responses to Horner’s Motion re Federal Reserved Rights were due by Monday, November 26, 2012. No party filed a response to Horner’s Motion re Federal Reserved Rights by November 26, 2012.

**II. Allowing the Settling Parties until April 10, 2013 to respond to Horner’s Motion re Reserved Rights would be so unfair as to represent a denial of due process.**

The Settling Parties state that:

“at the November 6, 2012 Discovery Conference the Court appeared to suggest that the time for responses to motions concerning ‘common issues of fact or law that are ripe for resolution’ would be April 10, 2013, consistent with the *Second Amended Order Setting Schedule Governing Discovery on the Non-Settling Parties and Remaining Proceedings* (Nov. 6, 2012) (“November 6, 2012 Order”) at 3, ¶ 9.b.) SP Motion for Extension, p. 2. Footnote omitted.

I certainly do not recall any suggestion by the Court that responses to motions regarding “common issues of fact or law” would not be due until April 10, 2013. In fact, said November 6, 2012 Order specifically provides:

- “9. **Dispositive Motions**
- “a. **March 15, 2013:** Settling Parties’ memorandum in support of the Settlement Motion of the United States, Navajo Nation and State of New Mexico for Entry of Partial Final Decrees, filed January 3, 2011.
  - “b. **April 10, 2013:** Responses to dispositive motions.
  - “c. **April 24, 2013:** Replies to responses to dispositive motions.
  - “d. **Week of May 6, 2013:** Hearing on dispositive motions.” November 6, 2012 Order, pp. 2-3.

In that regard, said November 6, 2012 Order, ¶ 9, was referring to a motion for summary judgment anticipated to be filed by the Settling Parties, pursuant to which they would seek the approval of the Navajo Settlement and Proposed Decrees.

By way of contrast, said November 6, 2012 Order, ¶3, p. 2, provides that:

**“On or after October 5, 2012:** Any Party may file proposed common issues of fact or law that are ripe for resolution.”

Previously, the Court had consistently denied any opportunity to present or consider such common issues of fact or law. Pursuant to said paragraph 3, the Court was for the first time allowing the presentation and consideration of such common issues of fact or law. Further, the Court was clearly indicating an intent to consider such common issues as they were presented. There is simply no legitimate credible reading of the November 6, 2012 Order that motions regarding such common issues of fact or law could be presented on or after October 5, 2012, but that interested parties had until March 15, 2013 to respond to such motions, or that the Court would not consider or decide such motions regarding common issues until the week of May 6, 2013.

If the November 6, 2012 Order were to be applied as suggested by the Settling Parties, the Settling Parties would have more than five months (November 8, 2012 until April 10, 2013) to respond to Horner’s Motion re Reserved Rights, while I would have only two weeks (April 10, 2012 until April 24, 2013) to reply to such response. I hope that such a schedule would appear as unfair to the Court as it does to me. Such a schedule would be so unfair as to represent a denial of due process.<sup>1</sup>

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<sup>1</sup> It should be noted that I fully intend to file additional motions regarding common issues of fact or law. My intention is to stagger the filings such that each can individually be given ample consideration by the Court (breaking them into bite-sized pieces), rather than amassing all of the issues in one single motion, or presenting all of

**III. The Settling Parties have not pointed out any factual issues that they need explore via the discovery process before being able to fully respond to Horner's Motion re Reserved Rights.**

The Settling Parties state:

“Notwithstanding the desire of the Settling Parties to expedite these proceedings, in the event the Court determines that December 3, 2012 is the date for filing of responses, the Settling Parties hereby move for an extension of time within which to file their responses to the Horner Motion. This motion is made in recognition of the fact that the parties are engaged in extensive discovery and the Horner Motion, which raises numerous broad legal issues, was accompanied by a 58 page brief, excluding attachments. The Settling Parties respectfully suggest that this matter, including the date responses to the Horner Motion are due be discussed at the November 28, 2012 Discovery Conference.” SP Motion for Extension, p. 3.

I understand there is an extreme time crunch going on with respect to discovery. In fact, the schedule being imposed to meet the overall December 31, 2013 deadline is nearly unbearable. However, Horner's Motion re Reserved Rights presents nearly purely legal issues. There appears to be no necessity to discover any facts in order to respond to Horner's Motion re Reserved Rights. Certainly, the Settling Parties have not pointed out any factual issues that they need to explore via the discovery process before being able to fully respond.

**IV. The Settling Parties have had more than 14 years to develop a response to the issues presented pursuant to Horner's Motion re Reserved Rights.**

The issues presented in Horner's Motion re Reserved Rights are not new to the Settling Parties. Essentially all of the issues and arguments presented in Horner's Motion re Reserved Rights were set forth more than two months ago in GARY L. HORNER'S OBJECTIONS: TO

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such issues in a single post-trial brief. The Settling Parties' proposal here would give the Settling Parties months to respond to each motion, while I would be required to reply to all of their responses at one time, and all within one two week period. In that regard, it should be kept in mind that the Settling Parties' proposal represents a problem of fairness that just compounds in the future.

I would hope that the consideration of such issues at earlier stages in this proceeding would have the additional benefit of limiting the factual issues that need to be addressed in the discovery process, and at trial. I tend to cringe at the prospect of a trial in the present matter where none of such legal issues have been determined or limited prior to trial. I would hope that the Court would see the merit to this approach.

THE SETTLEMENT MOTION OF UNITED STATES, NAVAJO NATION AND STATE OF NEW MEXICO FOR ENTRY OF PARTIAL FINAL DECREES; AND THE PROPOSED DECREES ASSOCIATED WITH SAID SETTLEMENT MOTION, which was filed with this Court on September 24, 2012 (Horner's Objections to Navajo Settlement").

Further, the issues and arguments presented in Horner's Motion re Reserved Rights were set forth more than eight years ago pursuant to my MOTION TO ENJOIN THE EXECUTION OF THE NAVAJO WATER RIGHTS SETTLEMENT, which was filed in the present matter on June 23, 2004 ("Motion to Enjoin"), and GARY HORNER'S BRIEF REGARDING MOTION TO ENJOIN THE EXECUTION OF THE NAVAJO WATER RIGHTS SETTLEMENT, which was filed in the present matter on August 13, 2004 (Brief re Motion to Enjoin").

Further, the issues and arguments presented in Horner's Motion re Reserved Rights were in essence set forth more than fourteen (14) years ago pursuant to DEFENDANT RICHARD AND VICKEY AUSTIN'S OBJECTION to the Proposed PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE JICARILLA APACHE TRIBE, which was filed in the present (Jicarilla) matter on August 17, 1998, and RICHARD AND VICKY AUSTIN'S MEMORANDUM: IN RESPONSE TO THE UNITED STATES AND JICARILLA APACHE TRIBE MEMORANDUM IN SUPPORT OF JOINT MOTION FOR ENTRY OF THE PARTIAL FINAL DECREE ON THE WATER RIGHTS OF THE JICARILLA APACHE TRIBE; and IN REPLY TO THE JOINT RESPONSE TO AUSTINS' REVISED OBJECTION TO THE PROPOSED PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE JICARILLA APACHE TRIBE, which was filed in the present (Jicarilla) matter on or about October 13, 1998.

Therefore, the Settling Parties have had more than 14 years to figure out how to respond to the issues and arguments presented in Horner's Motion re Reserved Rights. Certainly, the Settling Parties should have taken such issues into consideration during the negotiation of the Navajo Settlement.

The Settling Parties' attempt to now seek an extension of time to respond to Horner's Motion re Reserved Rights underscores the fact that the Settling Parties simply have no legitimate meritorious response to Horner's Motion re Reserved Rights.

Otherwise, the Settling Parties have not even attempted to provide a reason why they could not timely respond to Horner's Motion re Reserved Rights.

Accordingly, the SP Motion for Extension should be denied.

**V. The Court should enter an order consistent with the relief requested pursuant to Horner's Motion re Reserved Rights.**

As previously indicated herein, pursuant to said Rule 1-007.1, responses to Horner's Motion re Federal Reserved Rights were due by November 23, 2012. The subject SP Motion for Extension was filed on November 21, 2012, or the last business day before responses were due to Horner's Motion re Federal Reserved Rights (November 22, 2012 was Thanksgiving). The Settling Parties did not file a response to Horner's Motion re Reserved Rights by said deadline, apparently relying upon the SP Motion for Extension to somehow toll said deadline to file such response.

However, we just went through this! The Court had imposed a deadline of September 21, 2012 for the filing of objections to the Navajo Settlement and Proposed Decrees. Prior to said deadline, on September 13, 2012, the Cities of Aztec and Bloomfield filed the CITIES'

MOTION TO EXTEND ALL SCHEDULED DEADLINES (by 120 days). Then, the next day, on September 14, 2012, the San Juan Water Commission filed the SAN JUAN WATER COMMISSION'S MOTION TO EXTEND REMAINING CASE MANAGEMENT DEADLINES BY 180 DAYS. Apparently relying on said motions for extension of time to toll the time for filing objections to the Navajo Settlement and Proposed Decrees, several Parties did not file such objections by the September 21<sup>st</sup> deadline.

Then, on October 4, 2012, the Navajo Nation filed the NAVAJO NATION'S MOTION TO DISMISS CERTAIN NON-SETTLING PARTIES FOR FAILURE TO COMPLY WITH COURT'S SCHEDULING ORDERS ("Motion to Dismiss"). That is, pursuant to said Motion to Dismiss, the Navajo Nation sought to dismiss from this action, all of those Parties who had not filed objections to the Navajo Settlement and Proposed Decree by the September 21, 2012 deadline.

Pursuant to said Motion to Dismiss, the Navajo Nation specifically stated:

"The non-compliant parties represented by counsel, and Robert E. Oxford, each filed motions to extend all the deadlines established in the Scheduling Orders shortly before the September 21 Deadline. The Court has not ruled on those motions and the pendency of such motions does not excuse the non-compliant parties' failure to comply with the September 21 Deadline. Although undersigned Counsel have not found a reported case addressing the effect of pending but unresolved motions to extend deadlines, an unreported decision makes clear that the non-compliant parties ignore the deadlines imposed by scheduling orders at their peril. "Pendency of a motion for enlargement of time does not relieve the movant of the responsibility to comply with an existing deadline. If it did, parties could routinely ignore established deadlines by filing motions for enlargement of time on or shortly before a deadline." *Ellison v. Windt*, 2001 WL 118617, at \*2 (M.D.Fla. Jan.24, 2001). Footnote 4, p. 5. Emphasis added.

The issues regarding said motions for extension of time and the Navajo Nation's corresponding Motion to Dismiss were heard by the Court at a hearing held on October 25, 2012.

In deciding such issues, the Court stated (at 4:12 p.m.):

"I am going to deny the motion to dismiss. The nature of the ... the nature of the request is an extreme sanction, and given the nature of this proceeding, I don't believe that an extreme sanction, such as dismissal, is appropriate. I thought about lesser sanctions, but none were proposed, and so I am not going to issue any lesser sanctions. But, I do want to underscore that in my eyes, the actions of not filing objections and



responses as of September 21<sup>st</sup>, was not permitted merely because the motion for extension was filed. I want to underscore that as we proceed in this proceeding, that every filing is significant and tied to every other filing, and if you don't do a filing, even if you file a motion to extend it, you do that at your own risk. That's how I saw this one. Not because it's like filing a response to a motion or a ... or even an answer to a complaint in a regular civil proceeding, where you file your motion and then ... and of course other parties are going to accord you a professional courtesy in doing something like that, assuming that you have a proper reason to do it. And of course, the court is going to do that, or at least that would be my take on it. But, here we have a different ... we had a different situation. We had a situation where everything is so integrated, and the time of each action pertains to the other parties' actions. And that's what we have going forward, and so, I am going to deny this motion because of the nature of this proceeding, because of the significant public interest involved in this proceeding, I don't believe that the extreme sanction of dismissal is appropriate. I do want everyone to know how the Court views not filing ... or not meeting filing obligations." Emphasis added.

Then, the very next filing obligation the Settling Parties encounter is the obligation to file a response to Horner's Motion re Reserved Rights. And what do they do? They file the subject SP Motion for Extension the last business day before their responses were due, and then simply ignore their obligation to timely file their response. Absolutely, unbelievable.

Therefore, as a sanction for failing to timely file a response to Horner's Motion re Reserved Rights, and for relying on the SP Motion for Extension and thereby ignoring the deadline for such responses - in direct contravention of the Court's recent pronouncements, and the Settling Parties' own stated positions - I request that the Court deny the Settling Parties any further opportunity to respond to Horner's Motion re Reserved Rights, and enter an order consistent with the relief requested pursuant to said Horner's Motion re Reserved Rights.

## **VI. Conclusion - Request for Relief.**

As pointed out above, the Settling Parties have had 14 years to prepare a response to the issues presented in Horner's Motion re Reserved Rights. To date, the Settling Parties have never responded to such issues, so I have never seen any such response from the Settling Parties. Now, the Settling Parties assert that they should have an additional five months to respond (until April 10, 2012), and that I should be required to reply to such response within 14 days (April 24,

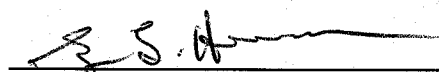
2012). What the Settling Parties seek is extremely prejudicial, represents a denial of fundamental fairness and due process, and is manifestly unjust.

Obviously, the Settling Parties have no intention to be fair. The reason is just as obvious, if the Settling Parties play fairly, they lose.

Beyond that, the Settling Parties demonstrate a very significant problem here. That is, the Settling Parties apparently do not feel obligated to follow any particular law, or even orders of this Court. Apparently, the Settling Parties see the law and the orders of this Court as only burdens that their opponents must bear. They apparently see themselves as above the law - after all they are the government - and what court, legislature, or congress has any authority to tell them what to do? At some point, the Settling Parties need to be reminded that the law applies to them as well, and it appears that a heavy hand will be required to leave an impression on their minds sufficient to actually alter their course of their conduct.

Accordingly, as a sanction for failing to timely file a response to Horner's Motion re Reserved Rights, and for relying on the SP Motion for Extension and thereby ignoring the deadline for such responses - in direct contravention of the Court's recent pronouncements, and the Settling Parties' own stated positions - I hereby request that the Court deny the Settling Parties any further opportunity to respond to Horner's Motion re Reserved Rights, and enter an order consistent with the relief requested pursuant to Horner's Motion re Reserved Rights.

Respectfully, submitted by:

  
\_\_\_\_\_  
GARY L. HORNER, Esq.,

November 28, 2012  
\_\_\_\_\_  
Date

*In Propria Persona*  
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**PROOF OF SERVICE BY ELECTRONIC TRANSMISSION**

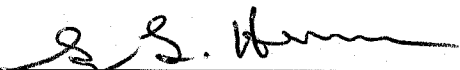
I HEREBY CERTIFY - in accordance with the ORDER MANDATING ALTERNATIVE METHOD FOR SERVICE OF ORDERS, MOTIONS, NOTICES AND OTHER COURT PAPERS, entered in the present matter on September 28, 2011 by the Honorable James Wechsler, Presiding Judge - that a true copy of the foregoing was served on the parties 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 28<sup>th</sup> day of November, 2012:

[wrnavajointerse@nmcourts.gov](mailto:wrnavajointerse@nmcourts.gov)

Further, pursuant to the Court's CORRECTED ORDER SUMMARIZING DISCOVERY ACTIVITIES DISCUSSED AT THE NOVEMBER 6, 2012 DISCOVERY CONFERENCE, entered in the present matter on November 19, 2012, that a true copy of the foregoing document was emailed to the following individuals, this 28<sup>th</sup> day of November, 2012.

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GARY L. HORNER