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 CONOCOPHILLIPS AND EL PASO NATURAL GAS COMPANY'S JOINT MOTION WITH THE SAN JUAN WATER COMMISSION TO STAY CONSIDERATION OF GARY L. HORNER'S MOTION ON THE APPLICABLE STANDARD FOR DETERMINATION OF FEDERAL RESERVED WATER RIGHTS

SUMMARY

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

2. Title of the present document: **GARY L. HORNER'S RESPONSE TO CONOCOPHILLIPS AND EL PASO NATURAL GAS COMPANY'S JOINT MOTION WITH THE SAN JUAN WATER COMMISSION TO STAY CONSIDERATION OF GARY L. HORNER'S MOTION ON THE APPLICABLE STANDARD FOR DETERMINATION OF FEDERAL RESERVED WATER RIGHTS**

3. Descriptive summary of the relief sought: **The consideration of GARY L. HORNER'S MOTION FOR THE DETERMINATION OF THE APPLICABLE STANDARD FOR THE DETERMINATION OF FEDERAL RESERVED WATER RIGHTS should not be stayed**

4: Number of pages of the present document: **42**

COMES NOW Gary L. Horner, Esq., *In Propria Persona* (hereinafter referred to in the first person), in response to the CONOCOPHILLIPS AND EL PASO NATURAL GAS

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COMPANY'S JOINT MOTION WITH THE SAN JUAN WATER COMMISSION TO STAY CONSIDERATION OF GARY L. HORNER'S MOTION ON THE APPLICABLE STANDARD FOR DETERMINATION OF FEDERAL RESERVED WATER RIGHTS, which was apparently filed in the present matter on November 26, 2012 ("CP/EPNG Motion to Stay").

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

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Description: **Page:**

I. Procedural History.

GARY L. HORNER'S MOTION FOR THE DETERMINATION OF THE APPLICABLE STANDARD FOR THE DETERMINATION OF FEDERAL RESERVED WATER RIGHTS ("Horner's Motion re 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 Reserved Rights") were both filed in the present matter on November 8, 2012. Horner's Motion re Reserved Rights, and associated Brief, were filed in accordance with the ORDER (1) GRANTING SETTLING PARTIES' MOTION TO EXTEND CERTAIN DEADLINES AND (2) SETTING SCHEDULE GOVERNING DISCOVERY AND REMAINING PROCEEDINGS entered in the present matter on February 3, 2012 (hereinafter referred to as the "2/3/12 Scheduling Order"); the AMENDED ORDER SETTING SCHEDULE GOVERNING DISCOVERY ON THE NON-SETTLING PARTIES AND REMAINING PROCEEDINGS, entered in the present matter on August 7, 2012 ("8/7/12 Scheduling Order"), as well as the SECOND AMENDED ORDER SETTING SCHEDULE GOVERNING DISCOVERY ON THE NON-SETTLING PARTIES AND REMAINING PROCEEDINGS, entered in the present matter on November 6, 2012 ("11/6/12 Scheduling Order").

All of said Scheduling Orders provided that:

> "**On or after October 5, 2012**: Any party may file proposed common issues of fact or law that are ripe for resolution." 2/3/12 Scheduling Order, ¶ 5; 8/7/12 Scheduling Order, ¶ 4; and 11/6/12 Scheduling Order, ¶ 2.

It should be noted that I have been trying to get the issues presented in Horner's Motion re Reserved Rights before the Court for consideration for more than fourteen (14) years. The

issues and arguments presented in Horner's Motion re Reserved Rights were in essence set forth in DEFENDANT RICHARD AND V1CKEY 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 ("Austins' Objection"), 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 (Austins' Memorandum"). At such time I was not a party to the matter, and I was not representing the Austin's, or any other party in the matter. However, I did assist the Austins by drafting the Austins' Memorandum.

Then, on December 15, 1998, the Court entered an ORDER GRANTING JOINT MOTION TO STRIKE AUSTINS' REVISED OBJECTION AND ALL SUBSEQUENT DOCUMENTS FILED TO DATE BY THE AUSTINS IN THE JICARILLA EXPEDITED INTER SE PROCEEDING. (It is of interest to note, that the reasoning the Court gave for striking the Austins' documents was that I had assisted in their preparation - a rather unique perspective that a parties' contentions should not be considered by the court because such parties had the assistance of a lawyer.) The bottom line was that the Court refused to consider the issues presented by the Austin's Objection and Austin's Memorandum.

In December 2003, the State of New Mexico and the Navajo Nation released for the first time a draft of their proposed Navajo Settlement and Proposed Decrees. On June 23, 2004, I filed my MOTION TO ENJOIN THE EXECUTION OF THE NAVAJO WATER RIGHTS SETTLEMENT ("Motion to Enjoin" - Said Motion to Enjoin is hereby incorporated herein by reference in its entirety.). Similarly, on July 21, 2004, the San Juan Agricultural Water Users Association filed SAN JUAN AGRICULTURAL WATER USERS ASSOCIATION'S MOTION TO RESTRAIN PLAINTIFF FROM APPROVING AND EXECUTING THE PROPOSED SETTLEMENT AGREEMENT. Then, on August 13, 2004, I filed GARY HORNER'S BRIEF REGARDING MOTION TO ENJOIN THE EXECUTION OF THE NAVAJO WATER RIGHTS SETTLEMENT ("Brief re Motion to Enjoin" - Said Brief re Motion to Enjoin is hereby incorporated herein by reference in its entirety). Most of the issues and arguments of Horner's Motion re Reserved Rights were set forth in said Motion to Enjoin and Brief re Motion to Enjoin. A Hearing was held on said Motions on August 20, 2004.

Said Motion to Enjoin was subsequently denied pursuant to the Court's ORDER entered September 17, 2004. Pursuant to said Order, the Court stated:

> "the Court concludes that the appropriate time for the Court to consider the issues raised by the Motions as well as additional motions or objections that may be filed relating to the Settlement Agreement, is in the *inter se* proceeding to be commenced for the express purpose of determining whether the Court should enter the Partial Final Decree adopting the terms of the Settlement Agreement.
>
> "**IT IS FURTHER ORDERED** that the above Motions be and the same are hereby denied.
>
> "**IT IS FURTHER ORDERED** that all issues raised in the Motion Hearing on August 20, 2004 be preserved for presentation during an Expedited *inter se* proceeding after the parties to the Settlement Agreement have filed their Motion requesting that the Court enter a Partial Final Decree." Order, pp. 1-2. Emphasis added.

As indicated above, although the Court denied my Motion to Enjoin in 2004, the Court preserved all of the issues previously raised by me, with respect to Navajo Settlement and

Proposed Decrees, for consideration during the present expedited *inter se* proceeding.

On August 19, 2010, the Court formally established the present expedited *inter se* proceeding pursuant to the ORDER ESTABLISHING INITIAL PROCEDURES FOR ENTRY OF A PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION ("Order re Initial Procedures"), p. 10. The Order re Initial Procedures, also stated that (the Rules of Civil Procedure to the contrary notwithstanding):

> "Pursuant to Rule 1-042 NMRA, the issue of whether the Court should approve the settlement of the Navajo Nation's claims is severed (the "Severed Issue") from all other issues in the proceeding, and all discovery, dispositive motions and other matters not related to the severed issue are stayed pending further order of this Court. In addition, all discovery and motion practice related to the Severed Issue are stayed, unless leave is obtained from this Court, pending entry of a Rule 1-016 Scheduling Order adopting a discovery and case management plan for resolution of the severed issue." Order re Initial Procedures, p. 11. Emphasis added.

A mandatory scheduling conference was subsequently set for October 3, 2011. On September 29, 2011, prior to said scheduling conference, the Special Master entered a SCHEDULING ORDER GOVERNING INITIAL PRETRIAL ACTIVITIES ("9/29/2011 Scheduling Order"). Said 9/29/2011 Scheduling Order provided once again that:

> "All discovery is stayed pending the entry of a scheduling order governing discovery and other pretrial matters by the Court or the Special Master." 9/29/2011 Scheduling Order, p. 5. Emphasis added.

Similarly, the 9/29/2011 Scheduling Order put off until some future time when an additional scheduling order would be entered, the consideration of issues such as "A procedure for identifying, consolidating and resolving objections concerning common issues of fact or law" and "A procedure for identifying and resolving dispositive issues as soon as they are ripe for resolution." 9/29/2011, Scheduling Order, p. 6.

On February 3, 2012, the Court entered the 2/3/12 Scheduling Order, whereby for the first time, the Court established that:

> "**On or after October 5, 2012**: Any party may file proposed common issues of fact or law that are ripe for resolution." 2/3/12 Scheduling Order, ¶ 5; 8/7/12 Scheduling Order, ¶ 4; and 11/6/12 Scheduling Order, ¶ 2.

Accordingly, on November 8, 2012, I filed the subject Horner's Motion re Reserved Rights.

Then, on November 21, 2012, the Settling Parties filed the SETTLING PARTIES' MOTION FOR CLARIFICATION AND MOTION FOR EXTENSION OF TIME TO REPLY TO THE HORNER MOTION ("SP Motion for Extension"). Pursuant to said SP Motion for Extension, the Settling Parties sought an indefinite extension of time (possibly until April 10, 2013) to respond to Horner's Motion re Reserved Rights.

Further, on November 26, 2012, ConocoPhillips and El Paso Natural Gas Company ("CP/EPNG"), both represented by Adam Rankin, filed the subject CP/EPNG Motion to Stay. Said CP/EPNG Motion to Stay was filed Jointly with the San Juan Water Commission ("SJWC"). Pursuant to said CP/EPNG Motion to Stay, CP/EPNG, and the SJWC[1] ("Movants") sought to stay the briefing and consideration of Horner's Motion re Reserved Rights until after the close of discovery on March 1, 2013. It is curious to note that when I requested the concurrence of the other Parties to this case, prior to the filing of Horner's Motion re Reserved Rights, CP/EPNG, the SJWC and Victor Marshall all stated that they took "no position" regarding Horner's Motion re Reserved Rights. Bloomfield Schools did not respond to my request for concurrence. Now Movants seek to stay the consideration of Horner's Motion re Reserved Rights, but, it is not at all clear that Movants ever intend to respond to Horner's Motion re Reserved Rights.

On November 8, 2012, the Court issued a NOTICE OF HEARING, setting a hearing in

[1] The Bloomfield Schools and the Marshall interests (Community Ditch Defendants) also concurred in the Conoco Motion to Stay.

the present matter for November 28, 2012. Pursuant to said Notice of Hearing, the hearing was to be held at the Aztec District courthouse, and the Court indicated that the Matters to be Heard at said hearing were:

> "1.) Non-Settling Parties Responses and Objections to Initial Discovery Requests 2.) Discovery Conference immediately following #1"

On November 13, 2012, the Court issued an AMENDED NOTICE OF HEARING BY VIDEO CONFERENCE. Pursuant to said Amended Notice of Hearing, the Court indicated that the matters to be heard remained unchanged, but that hearing was to be held in Santa Fe at the New Mexico Court of Appeals, and at the Aztec District courthouse (by video link).

Both the SP Motion for Extension and the CP/EPNG Motion for Stay requested that said Motions be heard by the Court at the previously scheduled November 28, 2012 hearing.

By the time of the November 28, 2012 hearing, I had not yet filed responses to either the SP Motion for Extension or the CP/EPNG Motion to Stay. In fact, the SP Motion for Extension was filed on Wednesday, November 21, 2012, the day before Thanksgiving. Thursday and Friday, November 22nd and 23rd, the Court was closed for Thanksgiving. Therefore, there existed only two working days between the filing of the SP Motion for Extension and the Wednesday, November 28, 2012 hearing. Further, the CP/EPNG Motion to Stay was filed on Monday, November, 26, 2012, leaving just one working day between the filing of said Motion and the hearing on Wednesday, November 28, 2012.

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."

Therefore, I should have had at least until Thursday, December 6, 2012 to respond to the

SP Motion for Extension, and at least until Tuesday, December 11, 2012 to respond to the CP/EPNG Motion to Stay.

As previously stated, the Court had not indicated in any manner, that it intended to hear either the SP Motion for Extension, or the CP/EPNG Motion to Stay at said hearing. However, just in case, I had prepared GARY L. HORNER'S RESPONSE TO THE SETTLING PARTIES' MOTION FOR CLARIFICATION AND MOTION FOR EXTENSION OF TIME TO REPLY TO THE HORNER MOTION ("Horner's Response to SP Motion for Extension"). I completed Horner's Response to SP Motion for Extension the night before the November 28, 2012 hearing. I brought it to the hearing, but I was not able to get it to the Court, and serve it on the other Parties, by the time of the hearing. Further, it was not at all clear that it was necessary to do so, since the Court had given no indication that it intended to hear such matters at such hearing. By the time of said November 28, 2012 hearing, I had not had sufficient time to prepare a response to the CP/EPNG Motion to Stay.

Then, during the morning portion of the November 28, 2012 hearing, the Court indicated that it did intend to hear both the SP Motion for Extension and the CP/EPNG Motion to Stay after the lunch break. During the lunch break, I inquired of the court clerks whether or not it was possible to file Horner's Response to SP Motion for Extension, and somehow get it to Santa Fe for the Court's consideration before the Court considered the matter.[2] It was concluded that it was not possible to file Horner's Response to SP Motion for Extension, and get it to the Judge, prior to the Court's consideration of the matter that afternoon. Accordingly, I did not file Horner's Response to SP Motion for Extension during the lunch break.

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[2] I was in Aztec, the Court was in Santa Fe, and during the hearing we were connected by video link.

During the afternoon session of the November 28, 2012 hearing, the Court proceeded to hear and consider the subject matters. Ultimately, the Court ruled, over my objection, that no one need respond to Horner's Motion re Reserved Rights apparently until after the close of discovery (March 1, 2013).[3] Immediately after the November 28, 2012 hearing, I filed Horner's Response to SP Motion for Extension with the Court, and later that day, served a copy of said document on the other Parties to this case by email, 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 ("9/28/11 Order"), and the CORRECTED ORDER SUMMARIZING DISCOVERY ACTIVITIES DISCUSSED AT THE NOVEMBER 6, 2012 DISCOVERY CONFERENCE, ¶¶ 6 and 8, entered in the present matter on November 19, 2012 ("11/19/12 Order").

The CP/EPNG Motion to Stay appears to be similar in many respects to the SP Motion for Extension. Therefore, for efficiency purposes I hereby incorporate herein by reference said Horner's Response to SP Motion for Extension, in its entirety, and I will address herein the differing points raised pursuant to the CP/EPNG Motion to Stay.

II. Introduction.

It should be noted that the Scheduling Orders in the present matter required that Objectors file their objections to the Navajo Settlement and Proposed Decrees by September 21, 2012. However, said Scheduling Orders do not require that the Settling Parties ever respond to such

[3] The current schedule requires that dispositive motions be filed by March 15, 2013. Whereas March 15, 2013 is a deadline for the filing of dispositive motions, nothing in the Scheduling Orders precludes the filing of dispositive motions before that date. However, pursuant to the Scheduling Orders, regardless of when any such dispositive motion is filed, responses to any such dispositive motion are not due until April 10, 2013.

objections. Further, such objections do not trigger the consideration of the Court with respect to any issue presented therein.

It appears that the only way Objectors can initiate the consideration of any issue with respect to the Navajo Settlement and Proposed Decrees is to file a separate motion, or to simply proceed to trial, assuming that they have somehow established the necessity for such trial. Therefore, somewhere along the line it will be necessary for Objectors to file motions, such as Horner's Motion re Reserved Rights, if they expect any of the issues presented in their objections to ever be considered by the Court.

Movants first generally assert that:

> "A stay is necessary to allow the non-settling parties to evaluate the Settlement Agreement, the Settling Parties' claims, initial discovery responses and document production." CP/EPNG Motion to Stay, pp. 1-2.

Ultimately, Movants request that:

> "the Court stay briefing and consideration of the Horner Motion until after the close of discovery on March 1, 2013. If the Court declines to grant this Motion, however, ConocoPhillips, EPNG, and the San Juan Water Commission request that the Parties to this proceeding have twenty days from the date of an order denying this motion within which to respond to the Horner Motion." CP/EPNG Motion to Stay, p. 4.

In support of said request, Movants generally make three points. First, CP/EPNG and other Non-Settling Parties are still evaluating the terms of the Settlement Agreement, the Proposed Decrees, and the Settling Parties' claims. Second, the Horner's Motion re Reserved Rights raises issues that will require briefing after the Parties have had an opportunity to undertake discovery to address them. Third, Horner's Motion re Reserved Rights, as a motion pursuant to Rule 1-056, is premature at this stage of discovery.

None of the CP/EPNG points justify the requested stay of Horner's Motion re Reserved Rights, and each such point will be addressed herein in turn.

III. It is not appropriate to stay Horner's Motion re Reserved Rights while Movants attempt to evaluate the terms of the Settlement Agreement, the Proposed Decrees, and the Settling Parties' claims.

Regarding Movants' first point - that CP/EPNG and other Non-Settling Parties are still evaluating the terms of the Settlement Agreement, the Proposed Decrees, and the Settling Parties' claims - Movants specifically state:

> ""A stay is necessary to allow the non-settling parties to evaluate the Settlement Agreement, [and] the Settling Parties' claims . . . ." CP/EPNG Motion to Stay, p. 1.

Similarly, Movants state:

> "4. Discovery has just started in this proceeding. ConocoPhillips and EPNG and other Non-Settling Parties are still evaluating the . . . terms of the Settlement Agreement, the provisions of the Proposed Decrees, and the Settling Parties' claims. This work is necessary to understand the nature of the Navajo Nation's claims and the Settling Parties' theory in support of the Settlement Agreement and their motion to approve the proposed decrees."
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> * * *
>
> "6. The Horner Motion is premature, therefore, until the claims of the Navajo Nation and Settling Parties can be evaluated in light of full discovery on these issues. Neither the Court nor the parties to this proceeding are prepared to properly address this issue at this early stage of discovery when the Settling Parties' theory of the Navajo Nation's claims remain uncertain. Only after discovery is complete, when the claims and theories have been fully evaluated, will this motion be ripe for consideration.
>
> "7. Accordingly, consideration of this issue should be stayed until the Non-Settling Parties have had sufficient time to evaluate the Settling Parties' claims, the provisions of the Settlement Agreement and Proposed Decrees, and the documents and technical reports produced in support thereof." CP/EPNG Motion to Stay, p. 3.

The proposed Navajo Settlement and Proposed Decrees were first released to the public in December 2003. The Navajo Settlement was first executed by the State of New Mexico and the Navajo Nation on April 19, 2005. The Settlement Act ("Northwestern New Mexico Rural Water Projects Act, Public Law 111-11, Title X, Subtitle B) was approved by Congress on March 30, 2009. The Settling Parties' SETTLEMENT MOTION OF UNITED STATES, NAVAJO NATION AND STATE OF NEW MEXICO FOR ENTRY OF PARTIAL FINAL DECREES, was filed in the present matter on January 3, 2011 ("Settlement Motion"). Accordingly, Movants have had nearly nine years to evaluate the terms of the Settlement Agreement, the Proposed Decrees, and the Settling Parties' claims.

Therefore, it is not at all clear how an additional four months is realistically going to help Movants with respect to their evaluation of the terms of the Settlement Agreement, the Proposed Decrees, and the Settling Parties' claims.

With respect to the Settling Parties' legal "theories" underlying the Navajo Settlement and Proposed Decrees, such theories are not likely to be determined during the course of discovery. The discovery process is generally intended to explore the facts related to a particular case. The legal authorities upon which a party relies in support of a claim for relief, are generally set forth in a parties' pleadings (complaint, answer, etc.). Unfortunately, in the present matter the Settling Parties have not been required to file a complaint, or otherwise set forth the authority or theories upon which they rely in support of the Settlement Motion.

However, pursuant to the 2/3/12 Scheduling Order, the Court ordered that by April 2, 2012, the State shall file a statement of the legal and factual bases for the Navajo Settlement. (2/3/12 Scheduling Order, p. 2, ¶ 1 (d).) On April 12, 2012, the State filed in the present matter the STATE OF NEW MEXICO'S STATEMENT OF LEGAL AND FACTUAL BASES FOR THE SETTLEMENT ("Statement re Bases"). On September 7, 2012, the State filed the STATE OF NEW MEXICO'S REVISED STATEMENT OF LEGAL AND FACTUAL BASES FOR SETTLEMENT ("Revised Statement re Bases"). (It should be noted that neither the U.S. nor the Navajo Nation signed, adopted, joined, or have indicated that they in any manner agreed with either of said Statements.)

Otherwise, a parties' theories are generally considered to be protected from discovery as attorney work product. In that regard, NMRA Rule 1-026 B(5) provides:

> "In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney or other representative of a party concerning the litigation." Emphasis added.

Accordingly, Movants cannot realistically expect to discover the Settling Parties' theories underlying the Navajo Settlement and Proposed Decrees. Moreover, to date, it does not appear that Movants' have sought to discover the Settling Parties' theories underlying the Navajo Settlement and Proposed Decrees.

Therefore, it is not appropriate to stay Horner's Motion re Reserved Rights while Movants attempt to evaluate the terms of the Settlement Agreement, the Proposed Decrees, and the Settling Parties' claims, or while Movants attempt to discover the Settling Parties' theories.

However, the determination of the legal standard for the determination of federal reserved rights in the present matter should be of considerable assistance with respect to Movants' efforts to evaluate the terms of the Settlement Agreement, the Proposed Decrees, and the Settling Parties' claims.

IV. Horner's Motion re Reserved Rights does not require the discovery of any factual issues, and therefore, the consideration of such Motion need not await the completion of discovery.

Regarding Movants' second point - that Horner's Motion re Reserved Rights raises issues that will require briefing after the Parties have had an opportunity to undertake discovery to address them - Movants specifically state:

> "A stay is necessary to allow the non-settling parties to evaluate . . . the Settling Parties' . . . initial discovery responses and document production." CP/EPNG Motion to Stay, pp. 1-2.

Similarly, Movants state:

> "3. The Horner Motion raises substantive issues of fact and law central to this proceeding that require discovery, which is ongoing. . . .
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> * * *
>
> "5. As discovery has only recently commenced, the Non-Settling Parties are still actively undertaking discovery to address these issues, and the issues raised in the Horner Motion. These issues, including those raised in the Horner Motion, will require briefing *after* the Parties have had an opportunity

to undertake discovery to address them." CP/EPNG Motion to Stay, pp. 2-3

It should be abundantly clear to all current participants to this matter that the Navajo Settlement and Proposed Decrees encompass vast amounts of water rights in excess of the current uses of the Navajo Nation. However, I fully comprehend that it is probably not at all clear to many participants to this matter, just what is/are: the precise extent of the current water uses of the Navajo Nation; the amount of water available in the Basin; and the potential adverse impacts of the Navajo Settlement and Proposed Decrees on other water users. Therefore, I comprehend the need for discovery with respect to such matters, in order that such other water users might be able to fully comprehend and evaluate the true impacts of the Settlement Agreement, the Proposed Decrees, and the Settling Parties' claims on other water users.

It is true that discovery in the present matter was only allowed to begin on June 1, 2012, and that significant time is required to fully explore the facts relevant to the Court's consideration of the Navajo Settlement and the Proposed Decrees. It is also true that significant time is needed to digest the voluminous information received so far from the Settling Parties, and to determine what other information needs to be obtained.

However, the Navajo Settlement and Proposed Decrees were drafted almost exclusively from the perspective that the water rights of the Navajo Settlement and Proposed Decrees were federal reserved water rights. It does not appear to me that the water rights of the Navajo Settlement and Proposed Decrees bear any legitimate relationship to federal reserved water rights. Accordingly, Horner's Motion re Reserved Rights seeks a determination by the Court of the applicable standard for the determination of federal reserved water rights.

It is hard to imagine how an issue could possibly present a more purely legal question than my request for the determination of the applicable standard for the determination of federal

reserved water rights.

It appears that the CONOCOPHILLIPS AND EL PASO NATURAL GAS COMPANY'S OBJECTIONS AND RESPONSES TO THE PROPOSED DECREES, that was filed in the present matter on September 21, 2012 ("CP/EPNG Objections"), largely assert that water rights of the Navajo Settlement and Proposed Decrees are not consistent with a practically irrigable acreage ("PIA") standard of federal reserved water rights.

Pursuant to Horner's Motion re Reserved Rights, I assert that PIA is not the applicable standard for the determination of federal reserved water rights. However, I further assert that:

> "the appropriate standard for the determination of federal reserved water rights for Indian Tribes is that such federal reserved rights are limited to the minimal needs of the Tribe at the time of the creation of the reservation; such federal reserved rights must be narrowly quantified to meet the original, primary purpose of the reservation, no more; both the asserted water right and the specific purposes for which the land was reserved must be examined to ascertain that without the water the purposes of the reservation would be entirely defeated; water for secondary purposes must be acquired under state law; a Tribe is not entitled to water rights for future uses; such rights may be lost for nonuse; such rights do not include the right to use, lease, or market such water off of the reservation; and such rights must be narrowly construed;" Horner's Motion re Reserved Rights, p. 8.

The SAN JUAN WATER COMMISSION'S INITIAL OBJECTIONS TO THE NAVAJO WATER RIGHTS SETTLEMENT AND PROPOSED DECREES was filed in the present matter on September 24, 2012 ("SJWC Objections"). Pursuant to the SJWC Objections, the SJWC asserted that the Navajo Settlement conflicts with the PIA requirements of *Lewis*. However, the SJWC discovery requests are essentially devoid of any requests related to either PIA, or federal reserved rights generally. The only SJWC discovery regarding federal reserved rights have to do with SJWC's contention that the Navajo Nation waived its federal reserved water rights claims in exchange for water for the Navajo Indian Irrigation Project ("NIIP"). Accordingly, it does not appear that the SJWC can legitimately assert that Horner's Motion re Reserved Rights should be stayed until the completion of discovery.

Therefore, it appears that Horner's Motion re Reserved Rights is not inconsistent with Movants' Objections. I also do not comprehend how either granting or denying Horner's Motion re Reserved Rights would foreclose, or adversely affect, Movants' positions. In fact, if Horner's Motion re Reserved Rights is granted as proposed, the result should work to the benefit of Movants' positions, and further, should narrow the issues to be considered by the Court and even drastically reduce the extent of the discovery that needs to be undertaken in the present matter.

For instance, if it is determined that PIA is not the applicable standard, all of those issues related to such a PIA standard would not be relevant and would not require discovery. Similarly, if it is determined that federal reserved water rights only encompass the minimal needs of an Indian Tribe as of the date of the creation of the reservation, most of the water rights of the Navajo Settlement and Proposed Decrees would not be entitled to a priority date of June 1, 1868. Moreover, if it is determined that federal reserved water rights do not include water rights for future uses, or the right to lease or subcontract water to third parties off of the reservation, then the Navajo Nation would need to look to some other authority as a basis for any water rights for the use of water in excess of current uses.

I believe that Horner's Motion re Reserved Rights presents purely legal issues. I understand that significant legal research may be required by others to adequately respond to said Motion. However, I do not believe that said Motion, as presented, requires the discovery of any factual issues in the present matter, or that the consideration of such Motion must necessarily await the completion of discovery in the present matter.

V. Horner's Motion re Reserved Rights is not a motion for summary judgment, and it is critical to hear said Motion as soon as possible.

Regarding Movants' third point - that Horner's Motion re Reserved Rights, as a motion pursuant to Rule 1-056, is premature at this stage of discovery - Movants specifically state:

> "The Horner Motion raises substantive issues of fact and law central to this proceeding that require discovery, which is ongoing. Because the Horner Motion seeks to obtain declaratory judgment on the issue of the determination of federal reserved water rights, it is a motion pursuant to Rule 1-056 NMRA, and is premature at this stage of discovery." CP/EPNG Motion to Stay, p. 2, ¶ 3.

The only authority Movants cite in support of their Motion is that:

> "The Court has 'supervisory control over [its] docket[] and inherent power to manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases.' *Lewis v, Samson,* 2001-NMSC-035, ¶ 26, 131 N.M. 317, 35 P.3d 972 (quoting *Pizza Hut, Inc. v. Branch,* 89 N.M. 325, 327-28, 552 P.2d 227, 229-30 (Ct. App. 1976)). It also has discretion to continue consideration of a premature motion for summary judgment. Rule 1-056(F) NMRA; *Diversified Dev. & Inv., Inc. v. Heil,* 119 N.M. 290, 296, 889 P.2d 1212, 1218 (1995) ('Generally, a court should not grant summary judgment before a party has completed discovery, . . . particularly when further factual resolution is essential to determine the central legal issues.'). Requests to stay consideration of summary judgment motions when key facts are not finally decided should be treated liberally. *Azar v. Prudential Ins. Co. of Am.,* 2003-NMCA-062, ¶¶ 83-84, 133 N.M. 669, 68 P.3d 909 (reversing partial summary judgment where the facts were not sufficiently developed)." CP/EPNG Motion to Stay, p. 2, ¶ 1.

A. Horner's Motion re Reserved Rights is not a motion for summary judgment.

Horner's Motion re Reserved Rights is not a motion for summary judgment. NMRA Rule 1-056 addresses motions for summary judgments. Specifically, Rule 1-056 (A) provides:

> "A. **For claimant.** A party seeking to recover upon a claim, counterclaim or cross-claim or to obtain a declaratory judgment may move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof."

In fact, Horner's Motion re Reserved Rights does not seek any form of judgment at all. Black's Law Dictionary, 5th Edition, defines "Judgment" as:

> "The official and authentic decision of a court of justice upon the respective rights and claims of the parties to an action or suit therein litigated and submitted to its determination. The final decision of the court resolving the dispute and determining the rights and obligations of the parties. The law's last word in a judicial controversy, it being the final determination by a court of the rights of the parties upon matters submitted to it in an action or proceeding, Towley v. King Arthur Rings, Inc., 40 N.Y.2d 129, N.Y.S.2d 80, 351 N.E.2d 728, 730. Conclusion of law upon facts found or admitted by the parties or upon their default in the course of the suit. Decision or sentence of the law, given by a court of justice or other competent

tribunal, as the result of proceedings instituted therein, Allegheny County v. Maryland Casualty Co., C.C.A.Pa., 132 F.2d 894, 897; State v. Siglea, 196 Wash. 283, 82 P.2d 583, 584. Decision or sentence of the law pronounced by the court and entered upon its docket, minutes or record. Determination of a court of competent jurisdiction upon matters submitted to it. State ex rel. Curran v. Brookes, 142 Ohio St. 107, 50 N.E.2d 995, 998. Determination or sentence of the law, pronounced by a competent judge or court, as the result of an action or proceeding instituted in such court, affirming that, upon the matters submitted for its decision, a legal duty or liability does or does not exist."

In that regard, Horner's Motion re Reserved Rights does not seek a decision of this Court regarding the respective rights and claims of the parties. Said Motion does not seek a final decision of this Court resolving the dispute and determining the rights and obligations of the parties. Said Motion does not seek the law's last word in the present matter. Said Motion does not seek the final determination by this Court of the rights of the parties. Said Motion does not seek a conclusion of law upon facts found or admitted by the parties or upon their default in the course of the suit. Said Motion does not seek a determination or sentence of the law, by this Court, affirming that, a legal duty or liability does or does not exist.

Similarly, NMRA Rule 1-054 [Judgments; costs] provides:

"A. **Definition; form.** "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master or the record of prior proceedings.

"B. **Judgment upon multiple claims or involving multiple parties.**

"(1) Except as provided in Subparagraph (2) of this paragraph, when more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim or third-party claim, the court may enter a final judgment as to one or more but fewer than all of the claims only upon an express determination that there is no just reason for delay. In the absence of such determination, any order or other form of decision, however designated, which adjudicates fewer than all the claims shall not terminate the action as to any of the claims and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

"(2) When multiple parties are involved, judgment may be entered adjudicating all issues as to one or more, but fewer than all parties. Such judgment shall be a final one unless the court, in its discretion, expressly provides otherwise and a provision to that effect is contained in the judgment. If such provision is made, then the judgment shall not terminate the action as to such party and shall be subject to revision at any time before the entry of judgment adjudicating all claims and the rights and liabilities of all the parties."

In that regard, Horner's Motion re Reserved Rights does not seek, and would not result in: a decree or order from which an appeal lies: a final judgment as to one or more but fewer than all of the claims; or a final judgment adjudicating all issues as to one or more, but fewer than all

parties.

Simply put, Horner's Motion re Reserved Rights does not seek a judgment at all, and therefore, is not a motion for summary judgment.

B. Horner's Motion re Reserved Rights is not a dispositive motion.

Regarding dispositive motions, the 11/6/12 Scheduling Order provides:

"**Dispositive Motions**

"a. **March 15, 2013:** Setting 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." 11/6/12 Scheduling Order, pp. 2-3, ¶ 9.[4]

The Microsoft Encarata College Dictionary, First Edition 2001, defines "dispositive" as: "deciding the final outcome of a court case." In that regard, said 11/6/12 Scheduling 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.

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[4] The 11/6/12 Scheduling Order pushed back somewhat the deadlines regarding dispositive motions previously established by the Court.

Previously, the 2/3/12 Scheduling Order, p. 4, ¶ 7 provided:

"**Dispositive Motions**

"a. **March 1, 2013:** Dispositive motions by any party, including the Setting 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 1, 2013:** Responses to dispositive motions.

"c. **April 16, 2013:** Replies to responses to dispositive motions.

"d. **Week of May 6, 2013:** Hearing on dispositive motions."

Previously, the 8/7/12 Scheduling Order, p. 3, ¶ 10, provided:

"**Dispositive Motions**

"a. **March 1, 2013:** Setting 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 1, 2013:** Responses to dispositive motions.

"c. **April 16, 2013:** Replies to responses to dispositive motions.

"d. **Week of May 6, 2013:** Hearing on dispositive motions."

As set forth herein above, Horner's Motion re Reserved Rights is not a motion for summary judgment. Further, said Motion is not a dispositive motion because it does not seek a decision regarding the final outcome of the present matter. Therefore, to any extent that said paragraph 9 of the 11/6/12 Scheduling Order applies to anyone other than the Settling Parties, said paragraph 9 does not apply to Horner's Motion re Reserved Rights since said Motion is not a dispositive motion.

C. Horner's Motion re Reserved Rights seeks the determination of a Question of Law.

Rather, Horner's Motion re Reserved Rights seeks the determination of a very significant question of law in the present matter. The New Mexico Rules of Civil Procedure for the District Courts do not directly address motions for the determination of questions of law. However it is instructive to note that the Colorado Rules of Civil Procedure ("C.R.C.P.") have been amended for the specific purpose of distinguishing between motions for summary judgment and motions for the determination of questions of law. In that regard, Colorado has added a section "h" to C.R.C.P. Rule 56. Specifically, C.R.C.P. Rule 56 (h) provides:

> "**Determination of a Question of Law.** At any time after the last required pleading, with or without supporting affidavits, a party may move for determination of a question of law. If there is no genuine issue of any material fact necessary for the determination of the question of law, the court may enter an order deciding the question." C.R.C.P. Rule 56(h).

In the *Matter of Bd. of County Comm'rs of County of Arapahoe*, 891 P.2d 952 (Colo. 1995), a suit for the determination of water rights for a proposed large trans-basin water project, the Colorado Supreme Court considered numerous issues of law that had been presented to the water court below pursuant to said C.R.C.P. Rule 56(h). Regarding said C.R.C.P Rule 56(h), the *Arapahoe* Court stated:

> "'The purpose of Rule 56(h) is, to allow the court to address issues of law which are not dispositive of a claim (thus warranting summary judgment) but which nonetheless will have a significant impact upon the manner in which the litigation proceeds. [Resolving such issues] will enhance the ability of the parties to prepare for and realistically evaluate their cases . . . and allow the parties and the court to eliminate significant uncertainties on the basis of briefs and argument, and to do so at a time when the determination is thought to be desirable by the parties.'
> 5 Robert Hardaway & Sheila Hyatt, *Colorado Civil Rules Annotated* § 56.9 (1985)." Arapahoe, at 963, n.14.

In that regard, Colorado has recognized, and addressed by said Rule 56(h), the need for the resolution of threshold issues, which set the legal standards by which cases must be judged, and that the timely resolution of such issues is critical to enable an efficient trial for both the court and the parties.

Horner's Motion re Reserved Rights seeks the determination of a question of law with respect to a threshold issue in the present matter, that is, the determination of the applicable standard for the determination of federal reserved water rights. There are no genuine issues of any material fact necessary for the determination of the subject question of law. In fact, pursuant to Horner's Motion re Reserved Rights, I seek the determination of the legal standard that will ultimately be applied to the facts with respect to issues regarding the water rights to be awarded to the Navajo Nation in the present matter.

D. The sooner Horner's Motion re Reserved Rights is considered and decided by the Court, the better.

As noted by C.R.C.P, 56(h), a motion for the determination of a question of law is timely at any time after the last required pleading. Such a motion need not await significant discovery, since such motion by its very nature does not address specific factual issues.

Not only is the timely resolution of the question of law presented in Horner's Motion re Reserved Rights critical to enable an efficient trial for both the Court and the Parties, the timely

resolution of said question of law should be of enormous benefit with respect to the narrowing of the factual issues that need to be explored during the discovery phase of this proceeding.

Therefore, the sooner Horner's Motion re Reserved Rights is considered and decided by the Court, the better for the Court and all Parties involved in this proceeding,

E. Delaying the consideration of Horner's Motion re Reserved Rights, and all motions regarding questions of law, to the currently proposed schedule regarding dispositive motions would be extremely inefficient.

The Court appears concerned that the time constraints of the current discovery schedule are so demanding that it would be appear inappropriate to impose an additional burden on the parties to address Horner's Motion re Reserved Rights at this point. However, if the Court's concern is that significant time will be required to address this Motion, the time problem will be only compounded by moving this Motion, and others, to the even more compressed schedule set forth for dispositive motions. Said Schedule currently provides:

> **"Dispositive Motions**
>
> "a. **March 15, 2013:** Setting 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." 11/6/12 Scheduling Order, pp. 2-3, ¶ 9.

Within said schedule would be a motion for summary judgment by the Settling Parties, motions for summary judgment by other Parties, Horner's Motion re Reserved Rights, probably several other motions regarding questions of law by me, a motion for summary judgment by me, and any number of other motions by other Parties. Delaying the consideration of Horner's Motion re Reserved Rights, and all motions regarding questions of law, to the currently proposed schedule regarding dispositive motions would be extremely inefficient. Certainly, delaying all

such motions until after discovery closes will allow no opportunity to reduce the discovery burden on the Parties. Further, delaying he consideration of all such motions to just before trial leaves all of the Parties in a state of chaos with regard to their trial preparation, including decisions regarding the issues that need to be addressed at trial, the determination of the necessity of witnesses and exhibits, as well as the preparation of findings and conclusions and post-trial briefs. Such a schedule regarding dispositive motions will make the current discovery schedule look like a cakewalk.

VI. Horner's Motion re Reserved Rights should not be stayed, where it appears that Movants cannot realistically be expected to take advantage of such stay and contribute significantly to the consideration of the issues presented in said Motion.

Unfortunately, the Movants do not appear to comprehend the benefits of the timely resolution of Horner's Motion re Reserved Rights. But, then again, Movants sought an extension of time to file their Objections in this matter. (See, SAN JUAN WATER COMMISSIONS MOTION TO EXTEND REMAINING CASE MANAGEMENT DEADLINES BY 180 DAYS, filed September 14, 2012; and CONOCOPHILLIPS AND EL PASO NATURAL GAS COMPANY'S JOINDER IN THE SAN JUAN WATER COMMISSIONS MOTION TO EXTEND REMAINING CASE MANAGEMENT DEADLINES BY 180 DAYS, filed September 18, 2012.) That is, Movants also did not appear to be prepared to articulate an objection to the Navajo Settlement and Proposed Decrees by the September 21, 2012 deadline, even though the Navajo Settlement and Proposed Decrees had been released to the public nearly nine years earlier (December 2003). In that regard, it does not appear that staying Horner's Motion more than an additional four months (until April 10, 2013) could really be expected to

assist the Movants all that much.

Certainly, Movants do not even attempt to identify any specific genuine issues of material fact that would preclude the consideration of Horner's Motion re Reserved Rights. In fact, Movants do not even identify any specific factual issues that need to be explored during discovery before Horner's Motion re reserved Rights should be considered and decided.

Moreover, Movants do not assert that they require additional time to research the legal issues presented in Horner's Motion re Reserved Rights. Only as an alternative afterthought do Movants even request an extension of time of "twenty days from the date of an order denying this motion within which to respond to the Horner Motion." (CP/EPNG Motion to Stay, p. 4.) None of Movants' arguments were made in support of such request for extension of time.

It should also be considered that I addressed the same issues in 2004 pursuant to my Motion to Enjoin, and again when I filed Horner's Objection to Settlement in September 2012. On October 27, 2012, I specifically informed Movants (and the other Objectors) of my intention to file Horner's Motion re Reserved Rights. Then, when asked for concurrence with respect to Horner's Motion re Reserved Rights before it was filed, all of the responding Movants replied simply that they took "no position" with respect to said Motion. Therefore, it is still not clear that any of the Movants actually intend to file a response, one way or the other, to Horner's Motion re Reserved Rights, even if/after said Motion is stayed for more than four months.

In fact, the CP/EPNG Motion to Stay, filed 18 days after Horner's Motion re Reserved Rights was filed, appears to be entirely an afterthought in and of itself.

Therefore, the Court's consideration of Horner's Motion re Reserved Rights should not be stayed as requested by Movants, where it appears that Movants cannot realistically be

expected to take advantage of such stay and contribute significantly to the consideration of the issues presented in said Horner's Motion re Reserved Rights.

VII. The Court's ruling that Horner's Motion re Reserved Rights will not be considered at this point is fundamentally unfair and violates due process.

At the November 28, 2012, hearing in the present matter, the Court ruled that Horner's Motion re Reserved Rights would not be considered at this point, and should essentially be considered along with dispositive motions to be filed in March 2013. The only reasoning given by the Court for such ruling was that, in essence, it would not be efficient to consider said Motion now due to the extensive discovery efforts that are ongoing, and the compressed schedule for discovery.

A. The Court has consistently demonstrated bias in favor of the Settling Parties by refusing to consider motions such as Horner's Motion re Reserved Rights.

As demonstrated above, Horner's Motion re Reserved Rights, seeks the determination of a question of law. The New Mexico Rules of Civil Procedure do not specifically address motions regarding questions of law. Conversely, the Rules of Civil Procedure generally do not impose any restrictions on the time for filing motions regarding questions of law. In fact, NMRA 1-012 (B) allows motions regarding certain defenses to be filed even before an answer to a complaint is filed (See also Rule 1-012 (E) and (F)). Then, Rule 1-012 (C) allows motions for judgment on the pleadings at any time after the pleadings are closed. Further, Rule 1-056 (D) does not impose any restrictions on the time to file motions for summary judgment.

As indicated herein above (Procedural History), in the present matter, the Court has consistently refused to consider motions regarding questions of law since 1998. The first

opportunity the Court allowed for the filing of motions regarding questions of law was on or after October 5, 2012. In that regard, the 11/6/12 Scheduling 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." See also, 2/3/12 Scheduling Order, p. 4, ¶ 5; and the 8/7/12 Scheduling Order, p. 2, ¶ 4.

As demonstrated in the immediately preceding paragraphs, there is simply no basis in the Rules of Civil Procedure for the Court to have refused to consider questions of law until October 5, 2012.

However, pursuant to said Scheduling Orders, the permitted time for filing Horner's Motion re Reserved Rights was anytime on or after October 5, 2012. In accordance with said Scheduling Orders, Horner's Motion re Reserved Rights was filed on November 8, 2012.[5]

The refusal to allow the filing of motions regarding questions of law until October 5, 2012, and then to refuse to consider Horner's Motion re Reserved Rights, when said Motion represents a question of law that should assist the Court and the Parties by narrowing the issues need for discovery and for trial, until March or April of 2013, in direct violation of the Court's Orders to allow such motions on or after October 5, 2012, demonstrates a strong bias in favor of the Settling Parties and a denial of at least my due process rights.

B. At the November 6, 2012 Discovery Conference the Court ruled that motions regarding questions of law could be filed and would be considered on or after October 5, 2012.

Also at the November 6, 2012 Discovery Conference, the appropriateness of the timing of

[5] I would have filed Horner's Motion re Reserved Rights closer to the October 5th date except for the fact that the Cities and the SJWC had filed motions to extend all deadlines (including the October 5th date) by as much as six months. The Cities' and the SJWC motions for extension of time were denied by the Court by Order entered on November 6, 2012.

dispositive motion, or motions regarding common issues of fact and law was discussed. At said hearing, the following discussion ensued:

> **Mr. Pollack:** "My reading of the original scheduling order is that the Parties have dispositive motions they can raise them and notice them up for various motions or hearings. If Parties truly have motions that are dispositive of issues in this case, I think we are all well served to dispose of issues in this case. Particularly if disposing of them may make discovery simpler or make the ultimate briefing of the issues in this case simpler. So, I would urge that any Party ... if any Party has a dispositive issue, that we simply file a motion for dispositive issue, if we think it would assist the Court in streamlining the process. So, that was my ... that was my initial response. The other ... well one of the other questions ..."
> **Judge:** "Well, while we are still on ... wait ... just by way of clarification ... I mean, I think its still there. That no later than ... or no sooner than October 5th language ... is ... is in the Order, will continue to be in the Order ... and maybe what we're doing by amending it is ... by ... is by saying no sooner than October 5th ... October 5th and no later than March 15th. But, if you have an issue that is ripe and you've got ... you don't need discovery on it, then, nothing's stopping any Party from doing it."
> **Mr. Marshall:** "Your Honor, I think its important not to conflate this common issue identification, which is in one part, with dispositive motions which is another part. As we did in the main case, Parties could propose common issues to put forward. But, that's different from filing a ... a Rule 56 motion, or a ... a Rule 12 motion. So, I think people can sort of ... I don't think we should confuse the two."
> **Judge:** "But, I ... it ... there may be an overlap there, and I ... fine, if you're talking about ... I mean I understand if you're talking about a Rule 56 motion and you want to complete discovery ... the point Mr. Pollack is raising, is the point I want to underscore as well, because I ... I'd ... I don't know what you have in mind. But, if there are issues, any Party may do that under the Order as it stands right now. And I will amend the Order to put in the language for March 15th as well. But, let's ... let's understand that that is the case. And again, I don't know what you have in mind. So ... Mr. Pollack." November 6, 2012 Discovery Conference (beginning at 3:18 p.m.).

Accordingly, at the November 6, 2012 Discovery Conference, the Court made it abundantly clear, that motions such as Horner's Motion re Reserved Rights were appropriate for filing and consideration at any time after October 5, 2012. Apparently, the Court held firm to that conviction until I actually filed Horner's Motion re Reserved Rights on November 8, 2012.

C. The Court's ruling on the SP Motion for Extension and the CP/EPNG Motion to Stay at the November 28, 2012 Discovery Conference was an abuse of discretion and demonstrates bias in favor of the Settling Parties.

The SP Motion for Extension was filed on November 21, 2012. The CP/EPNG Motion to Stay was filed on November 26, 2012. Pursuant to Rule 1-007.1, my response to the SP Motion for Extension was not due until December 6, 2012, and my response to the CP/ENG

Motion to Stay was not due until December 11, 2012. Neither the SP Motion for Extension, nor the CP/EPNG Motion to Stay were on the agenda for consideration pursuant to the Notice of Hearing filed with respect to the November 28, 2012 Discovery Conference. Regardless, the Court proceeded to hear the SP Motion for Extension and the CP/EPNG Motion to Stay at said November 28, 2012 Discovery Conference.

Accordingly, I was not allowed the time provided by Rule 1-007.1 to respond to the SP Motion for Extension or the CP/EPNG Motion to Stay, and I had no notice whatsoever, that the Court intended to hear said Motions on November 28, 2012. "Failure to allow a party to respond within the allotted time constitutes an abuse of discretion." *Union Ins. Co. V. Hottenstein*, 83 P.3d 1196, 1199 (Colo.Ct.App. 2003).

Actually, the Settling Parties, argued pursuant to the SP Motion for Extension, and at the November 28, 2012 Discovery Conference the Court agreed, that pursuant to the 9/28/11 Order, and the 11/19/12 Order that the Settling Parties had 18 days from the date Horner's Motion re Reserved Rights first appeared in a Bi-Weekly Report to respond to Horner's Motion re Reserved Rights. Pursuant to those rules, the SP Motion for Extension first appeared in the November 26, 2012 Bi-Weekly Report, so I should have until December 14, 2012 to respond to said SP Motion for Extension. Then, the CP/EPNG Motion to Stay first appeared in the December 11, 2012 Bi-Weekly Report, so I should have until December 31, 2012 to respond to said CP/EPNG Motion to Stay. Regardless, the Court ruled on the SP Motion for Extension and the CP/EPNG Motion to Stay on November 28, 2012.

So beyond the abuse of discretion issue, caused by the Court's failure to allow me to respond to the SP Motion for Extension and the CP/EPNG Motion to Stay within the allotted

time, it becomes vividly apparent from my perspective that the Court is allowing the Settling Parties to play by rules, that change with the whims of the Settling Parties, and that I am being required to play by different rules, that similarly change with the whims of the Settling Parties. That is, from my perspective the Court appears to be exhibiting a very substantial bias in the present matter in favor of the Settling Parties.

VIII. The time for filing responses to Horner's Motion re Reserved Rights.

Generally, the time for filing responses to motions is governed by NMRA Rule 1-007.1. Regarding responses to motions, Rule 1-007.1 (D) 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."

Since Horner's Motion re Reserved Rights was filed on November 8, 2012, according to Rule 1-007.1, responses to said Motion would have been due by November 23, 2012. However, November 23, 2012 was the Friday after Thanksgiving (the Court was closed), so such responses would have been due by Monday, November 26, 2012.

On September 28, 2011, the Court entered an ORDER MANDATING ALTERNATIVE METHOD FOR SERVICE OF ORDERS, MOTIONS, NOTICES AND OTHER COURT PAPERS ("9/28/11 Order"). Due to the large number of participants in the present matter, the 9/28/11 Order provided that service of court papers could be provided by email to an email list server maintained by the Court (9/28/11 Order, p. 2, ¶ 1(a).) For those participants without email access, the 9/28/11 Order provided for a Bi-Weekly *Inter Se* Report ("Bi-Weekly Report") that would be prepared by Court staff, and that participants without email could subscribe to such Bi-

Weekly Report for a fee. Such Bi-Weekly Report would provide a summary of all of the activity in the present matter for the previous two weeks. (9/28/11 Order, pp. 3- 5, ¶ 2.) Since participants without email access could not be expected to receive notice of the filing of a document with the Court until after they received a copy of the Bi-Weekly Report, said 9/28/11 Order also provided:

> "Unless otherwise ordered by the Court, whenever the Rules of Civil Procedure, or a notice given pursuant to those Rules, requires that an act be done, or paper filed, within a specified time, the time period shall (a) commence on the date the Court Paper pertaining thereto first appears in the *Inter Se* Report and (b) three days shall be added to the prescribed period, to allow for service of the *Inter Se* Report by first class mail." 9/28/11 Order, p. 5, ¶ 3.

An indication that Horner's Motion re Reserved Rights had been filed, appeared for the first time in the November 9, 2012 Bi-Weekly Report. (Apparently said November 9, 2012 Bi-Weekly Report was not filed with the Court until November 13, 2012.) Accordingly, in reliance upon said 9/28/11 Order, pursuant to the SP Motion for Extension (11/21/12), the Settling Parties asserted that responses to Horner's Motion were due by December 3, 2012 (18 days after Horner's Motion re Reserved Rights first appeared in a Bi-Weekly Report).

Pursuant to the 2/3/12 Scheduling Order and the 8/7/12 Scheduling Order, the Court 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) ("Cities Motion to Extend Deadlines"). 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 ("SJWC Motion to Extend Deadlines"). Apparently relying on said motions for extension of time to toll the time for filing objections to the Navajo Settlement and Proposed Decrees, several Participants

did not file such objections by the September 21st 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 Participants who had not filed objections to the Navajo Settlement and Proposed Decree by the September 21, 2012 deadline.

The Cities Motion to Extend Deadlines, the SJWC Motion to Extend Deadlines and the Navajo Nation's Motion to Dismiss were heard by the Court at a hearing held on October 25, 2012. The Court ultimately extended certain deadlines slightly but denied the Cities' and the SJWC's requests to extend all deadlines by 120 or 180 days.[6] The Court also denied the Navajo Nation's Motion to Dismiss pursuant to the Court's ORDER DENYING THE NAVAJO NATION'S MOTION TO DISMISS AND ADDRESSING THE PARTICIPATION OF CERTAIN NON-SETTLING PARTIES, entered on November 6, 2012 ("Order Denying Motion to Dismiss").

Pursuant to said Order Denying Motion to Dismiss, the Court ruled that:

> "Non-Settling Parties who have not filed objections or responses by October 25, 2012 must receive permission from the Court to participate in future proceedings, and (2) any Non-Settling Party who wishes to file or modify an objection or response to the Proposed Decrees after October 25, 2012 must receive permission from the Court to do so." Order Denying Motion to Dismiss, pp. 1-2.

Then, at the November 6, 2012 Discovery Conference in the present matter (3:22 p.m.), Stanley Pollack, attorney for the Navajo Nation suggested that, the 9/28/11 Order regarding the

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[6] See the ORDER DENYING IN PART AND GRANTING IN PART THE MOTIONS TO EXTEND DEADLINES and the SECOND AMENDED ORDER SETTING SCHEDULE GOVERNING DISCOVERY ON THE NON-SETTLING PARTIES AND REMAINING PROCEEDINGS, both filed in the present matter on November 6, 2012.

time for filing responses to motions (based upon the appearance of particular motions in the Bi-Weekly Reports) be amended to reflect the Rules of Civil Procedure, since pursuant to the Court's Order Denying Motion to Dismiss, there were no longer any Participants in the present matter that needed to rely on the Bi-Weekly Report with respect to the notice of the filing of motions.

In accordance with Mr. Pollack's suggestion at the November 6, 2012 Discovery Conference, the Court entered the 11/19/12 Order. The 11/19/12 Order provided 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. . . ." 11/19/12 Order, ¶ 6, p. 2.

In the meantime, on November 8, 2012, I filed Horner's Motion re Reserved Rights.

Then, on November 21, 2012, the Settling Parties filed their SP Motion for Extension, and on November 26, 2012, Movants filed the subject CP/EPNG Motion to Stay, regarding Horner's Motion re Reserved Rights.

Then, the SP Motion for Extension, and the CP/EPNG Motion to Stay were heard at the November 28, 2012 Discovery Conference. At said Discovery Conference, I argued that in accordance with Rule 1-007.1, responses to Horner's Motion re Reserved Rights were due by November 26, 2012, and that no one had filed responses to such Motion by such time. In response to my argument, the Court ruled that, pursuant to the 11/19/12 Order, the time for responses to motions in accordance to Rule 1-007.1, only applied to motions filed after the 11/19/12 Order. Therefore, the deadline for responding to Horner's Motion re Reserved Rights was not November 26, 2012.

IX. The manner in which the Court dealt with the Cities Motion for Extension and the SJWC Motion for Extension, as compared to the manner in which the Court dealt with the SP Motion for Extension and the CP/EPNG Motion to Stay was fundamentally unfair and violates due process.

Pursuant to Horner's Response to SP Motion for Extension, I argued that pursuant to Rule 1-007.1, responses to Horner's Motion re Federal Reserved Rights were due by November 23, 2012.

I argued that, 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 21st 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 21st, 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 encountered was the obligation to file a response to Horner's Motion re Reserved Rights. And what do they do? They filed the subject SP Motion for Extension the last business day before their responses were due, and then simply ignored their obligation to timely file their response.

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 requested 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.

As indicated herein above, the Court determined at the November 28, 2012 Discovery Conference that responses to Horner's Motion re Reserved Rights were not due by November 26, 2012. However, even in accordance with the 9/28/11 Order, responses to Horner's Motion re Reserved Rights should have been due by December 3, 2012, and none have been filed.

By failing to file a timely response to a motion, the nonmoving party waives its right to respond. In *Lujan v. City of Albuquerque*, 134 N.M. 207, 75 P.3d 423, (N.M.Ct.App. 2003), the Court stated:

> "By failing to file a response within the time specified by the local rule, the nonmoving party waives the right to respond or to controvert the facts asserted in the summary judgment motion. The court should accept as true all material facts asserted and properly supported in the summary judgment motion. But only if those facts entitle the moving party to judgment as a matter of law should the court grant summary judgment." *Lujan v. City of Albuquerque*, 134 N.M. 207, 213, 75 P.3d 423, 429 (N.M.Ct.App. 2003). Citations omitted.

Things brings up the issue of the manner in which the Court dealt with the Cities Motion for Extension and the SJWC Motion for Extension, as compared to the manner in which the Court dealt with the SP Motion for Extension and the CP/EPNG Motion to Stay. With regard to the Cities Motion for Extension and the SJWC Motion for Extension, the Court did not rule on such Motions until October 25, 2012, or more than one month after such Motions were filed. While such delay in ruling gave the Settling Parties much more time than was necessary to respond to such Motions, such delay resulted in the passage of the primary deadline the Non-Settling Parties were concerned with, that is the September 21, 2012 deadline for filing objections to the Navajo Settlement and Proposed Decrees. That brought to bear the issue that parties who do not comply with a deadline, do so at their peril, even when a motion for extension is filed.

By way of contrast, the Court considered the SP Motion for Extension and the CP/EPNG Motion to Stay within days (November 28, 2012 - two days after the filing of the CP/EPNG Motion to Stay). This allowed the matter to be considered (even though no notice was given that the Court was going to consider the matter) before the deadline to file responses to Horner's Motion re Reserved Rights had passed, but did not give me sufficient time to respond to either the SP Motion for Extension or the CP/EPNG Motion to Stay.

Once again, the difference in the way the Court appears to treat the various Parties is so vastly different that the issue of fundamental fairness and violation of due process arises.

X. Conclusion - Request for Relief.

Prior to October 5, 2012, the Court consistently denied any opportunity to present or consider questions of law (common issues of fact or law) in the present matter. Pursuant to the 2/3/12 Scheduling Order, the Court for the first time allowed the presentation and consideration of such common issues of fact or law (on or after October 5, 2012). Further, the Court was clearly indicating an intent to consider such issues as they were presented. There is simply no legitimate credible reading of the 11/6/12 Scheduling Order that motions regarding such common issues of fact or law could be presented on or after October 5, 2012, but that interested parties have until April 10, 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 11/6/12 Scheduling Order were to be applied as suggested by Movants, Movants 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

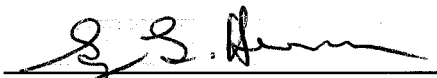
April 24, 2013) to reply to such response. I hope that such a schedule would appear as unfair to the Court as it does to me. Such a schedule would be so unfair as to represent a denial of due process.

At the November 6, 2012 Discovery Conference in the present matter, the Court emphasized that such issues could be presented, and the Court would consider such issues, at any time after October 5, 2012. Then, after Horner's Motion re Reserved Rights was filed on November 8, 2012, the Court reversed itself and ruled that such motions would not be considered until after the close of discovery (March 1, 2012).

WHEREFORE, for the reasons set forth herein above, I respectfully request of the Court an Order:

1) the Court reconsider its ruling on the matter;
2) deny the CP/EPNG Motion to Stay;
3) require that any responses to Horner's Motion re Reserved Rights be filed forthwith;
4) proceed with the consideration of the Horner's Motion re Reserved Rights; and
5) For such other and further relief as the Court deems appropriate in the premises.

Respectfully, submitted by:



December 11, 2012
Date

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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 11th day of December, 2012:

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 11th day of December, 2012.

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