

ELEVENTH JUDICIAL DISTRICT
COUNTY OF SAN JUAN
STATE OF NEW MEXICO

11 DISTRICT COURT
SAN JUAN COUNTY NM
FILED
2012 DEC 21 PM 2:56

STATE OF NEW MEXICO ex rel.
State Engineer,
Plaintiff,

v.
UNITED STATES OF AMERICA, et al.,
Defendants.

No. CV 75-184
SAN JUAN RIVER
ADJUDICATION SUIT

v.
THE JICARILLA APACHE TRIBE and the
NAVAJO NATION,
Defendant-Intervenors.

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

**GARY L. HORNER'S RESPONSES TO THE UNITED STATES' DISCOVERY
REQUESTS OF GARY L. HORNER**

SUMMARY

1. Name of party filing the present document: **Gary L. Horner**
2. Title of the present document: **GARY L. HORNER'S RESPONSES TO THE UNITED STATES' DISCOVERY REQUESTS OF GARY L. HORNER**
3. Descriptive summary of the relief sought: **This document represents Mr. Horner's responses to the U.S. Discovery Requests.**
- 4: Number of pages of the present document: **15**

COMES NOW Gary L. Horner, Esq., *In Propria Persona* (hereinafter referred to in the first person), in accordance with the ORDER CONCERNING THE RESPONSES AND OBJECTIONS OF THE NON-SETTLING PARTIES TO DISCOVERY REQUESTS, entered in the present matter on November 30, 2012 (hereinafter referred to as the "11/30/12 Discovery Order"), and hereby submits my responses to the UNITED STATES' DISCOVERY REQUESTS OF GARY L. HORNER, which were propounded upon me by the United States ("U.S.") on

*Horner's Responses to
U.S. Discovery Requests*

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October 5, 2012 (“U.S. Discovery Requests to Horner”).

On November 5, 2012, I submitted GARY L. HORNER’S OBJECTIONS TO THE UNITED STATES’ DISCOVERY REQUESTS OF GARY L. HORNER (“Horner’s Objections to U.S. Discovery Requests”). Pursuant to Horner’s Objections to U.S. Discovery Requests, I submitted objections to each of the discovery requests propounded upon me by the United States pursuant to the above referenced U.S. Discovery Requests to Horner. The responses herein are made to the same U.S. Discovery Requests to Horner. All of Horner’s Objections to U.S. Discovery Requests are hereby incorporated herein by reference, and the responses to such discovery requests provided herein are made subject to, and without waiving said Horner’s Objections to U.S. Discovery Requests.

Said U.S. Discovery Requests to Horner, Horner’s Objections to U.S. Discovery Requests, as well as all of the other discovery requests propounded by the Settling Parties upon the Non-Settling Parties and the Non-Settling Parties objections to such Settling Parties’ discovery requests, were all considered by the Court at a hearing on November 28, 2012. Following said November 28, 2012 hearing, the Court entered the 11/30/12 Discovery Order. Pursuant to the 11/30/12 Discovery Order, the Court overruled my objections to Interrogatories No.s 3, 5 and 6, as well as Requests for Production No.s 5, and 6 of the U.S. Discovery Requests to Horner.

Further, pursuant to said 11/30/12 Discovery Order, the Court ordered that responses to said discovery requests were due by December 21, 2012. At the November 28, 2012 hearing (11:22 a.m.), the Court explained that it wanted all of the Parties’ cards on the table by December 21, 2012, so that the Parties could proceed with depositions. As set forth herein, my cards have

been face up on the table for years.

Accordingly, I hereby respond to said specific Interrogatories and Requests for Production. Additionally, I hereby respond to Interrogatory No. 1 and Request for Production No. 1.

Interrogatories

Interrogatory No. 1: Unless your response to Request for Admission No. 1 was an unqualified admission, describe completely and in all detail every basis for your denial that the Settlement Agreement was the product of good faith, arms-length negotiations.

Answer: Without waiving the General and Specific Objections to the subject Interrogatory I previously made, pursuant to Horner's Objections to U.S. Discovery Requests, I hereby answer said Interrogatory by stating:

I hereby incorporate by reference: 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"), in its entirety; 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"), in its entirety; THE BID AND GARY L. HORNER'S RESPONSE TO THE JOINT MOTION FOR ORDER GOVERNING INITIAL PROCEDURES FOR ENTRY OF A PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION, which was filed in the present matter on October 6, 2009 ("Horner's Response re

Initial Procedures”), in its entirety; THE BID AND GARY L. HORNER’S COMMENTS AND OBJECTIONS REGARDING: THE SETTLING PARTIES’ REVISIONS TO PREVIOUSLY SUBMITTED EXHIBITS; the [SPECIAL MASTER’S PROPOSED] ORDER MANDATING THE COMMENCEMENT OF AN EXPEDITED *INTER SE* PROCEEDING FOR THE RESOLUTION OF ALL WATER RIGHTS CLAIMS OF THE NAVAJO NATION; and the SETTLING PARTIES’ SUGGESTIONS CONCERNING SPECIAL MASTER’S PROPOSED ORDER MANDATING THE COMMENCEMENT OF AN EXPEDITED *INTER SE* PROCEEDING FOR THE RESOLUTION OF ALL WATER RIGHTS CLAIMS OF THE NAVAJO NATION, which was filed in the present matter on January 4, 2010 (“Horner’s Comments re Proposed Order Mandating Expedited *Inter Se* Proceeding”), in its entirety; THE BID AND GARY L. HORNER’S SUGGESTIONS REGARDING: the SPECIAL MASTER’S REPORT CONCERNING JOINT MOTION FOR ORDER GOVERNING INITIAL PROCEDURES FOR ENTRY OF PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION; and the [SPECIAL MASTER’S PROPOSED] ORDER DIRECTING THE COMMENCEMENT OF AN EXPEDITED *INTER SE* PROCEEDING FOR THE RESOLUTION OF ALL WATER RIGHTS CLAIMS OF THE NAVAJO NATION, which was filed in the present matter on March 8, 2010 (“Horner’s Suggestions re Special Master’s Report re Initial Procedures”), in its entirety; THE BID AND GARY L. HORNER’S COMMENTS AND OBJECTIONS REGARDING: the [SETTLING PARTIES’ REVISED] NOTICE OF EXPEDITED *INTER SE* PROCEEDING TO ADJUDICATE THE WATER RIGHTS OF THE NAVAJO NATION AND DEADLINE FOR FILING OBJECTIONS; and the [SPECIAL MASTER’S PROPOSED] ORDER DIRECTING

THE COMMENCEMENT OF AN EXPEDITED *INTER SE* PROCEEDING FOR THE RESOLUTION OF ALL WATER RIGHTS CLAIMS OF THE NAVAJO NATION, filed in the present matter on April 8, 2010 (“Horner’s Comments re Revised Notice”), in its entirety; THE BID AND GARY L. HORNER’S OBJECTIONS TO: the [FINAL] SPECIAL MASTER’S REPORT CONCERNING JOINT MOTION FOR ORDER GOVERNING INITIAL PROCEDURES FOR ENTRY OF PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION; COMMENTS AND OBJECTIONS REGARDING: the [SPECIAL MASTER’S PROPOSED] ORDER DIRECTING THE COMMENCEMENT OF AN EXPEDITED *INTER SE* PROCEEDING FOR THE RESOLUTION OF ALL WATER RIGHTS CLAIMS OF THE NAVAJO NATION; and the [Special Master’s Proposed] NOTICE OF EXPEDITED *INTER SE* PROCEEDING TO ADJUDICATE THE WATER RIGHTS OF THE NAVAJO NATION AND DEADLINE FOR FILING NOTICES OF INTENT TO PARTICIPATE, which was filed in the present matter on April 29, 2010 (“Horner’s Objections to Special Master’s Report”), in its entirety; THE BID AND GARY L. HORNER’S SUPPLEMENTAL BRIEF REGARDING QUESTIONS RELATING TO DUE PROCESS ISSUES, which was filed in the present matter on July 2, 2010 (“Horner’s Brief re Due Process Issues”), in its entirety; GARY L. HORNER’S COMMENTS AND OBJECTIONS REGARDING THE [SETTLING PARTIES’ PROPOSED] SCHEDULING ORDER, which was filed in the present matter on September 30, 2011 (“Horner’s Comments re SP Proposed Scheduling Order”), in its entirety; GARY L. HORNER’S COMMENTS AND OBJECTIONS REGARDING THE SCHEDULING ORDER GOVERNING PRETRIAL ACTIVITIES, which was filed in the present matter on October 14, 2011 (“Horner’s Comments

re Scheduling Order re Pretrial Activities”), in its entirety; GARY L. HORNER’S OPTIONAL SUPPLEMENTAL BRIEF REGARDING WHAT LEGAL STANDARDS GOVERN THE COURT’S DECISION FOR APPROVAL OF THE PROPOSED DECREES, which was filed in the present matter on January 3, 2012 (“Horner’s Brief re Legal Standards”), in its entirety; GARY L. HORNER’S OBJECTIONS: TO 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 in the present matter on September 24, 2012 (“Horner’s Objection to Settlement Motion”), in its entirety; GARY L. HORNER’S MOTION FOR THE DETERMINATION OF THE APPLICABLE STANDARD FOR THE DETERMINATION OF FEDERAL RESERVED WATER RIGHTS, which was filed in the present matter on November 8, 2012 (“Horner’s Motion re Reserved Rights”), in its entirety; 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, which was filed in the present matter on November 8, 2012 (“Horner’s Brief re Reserved Rights”), in its entirety; GARY L. HORNER’S 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 28, 2012 (“Horner’s Response to SP Motion for Extension”), in its entirety; and 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, which was filed in the present matter on December 11, 2012 (“Horner’s Response to CP/EPNG Motion to Stay”), in its entirety.

Interrogatory No. 3: Unless your response to Request for Admission No. 3 was an unqualified admission, describe completely and in all detail every basis for your denial that the provisions of the Settlement Agreement will reduce impacts on junior water rights.

Answer: Without waiving the General and Specific Objections to the subject Interrogatory I previously made, pursuant to Horner’s Objections to U.S. Discovery Requests, I hereby answer said Interrogatory by stating:

I hereby incorporate by reference: my Motion to Enjoin, in its entirety; Brief re Motion to Enjoin, in its entirety; and Horner’s Objection to Settlement Motion, in its entirety.

Interrogatory No. 5: Unless your response to Request for Admission No. 5 was an unqualified admission, describe completely and in all detail every basis for your denial that the provisions of the Settlement Agreement describe Navajo Nation water rights that are less than those that could be secured on behalf of the Navajo Nation at trial.

Answer: Without waiving the General and Specific Objections to the subject Interrogatory I previously made, pursuant to Horner’s Objections to U.S. Discovery Requests, I hereby answer said Interrogatory by stating:

I hereby incorporate by reference: my Motion to Enjoin, in its entirety; Brief re Motion to Enjoin, in its entirety; and Horner’s Objection to Settlement Motion, in its entirety.

Interrogatory No. 6: Unless your response to Request for Admission No. 6 was an unqualified admission, describe completely and in all detail every basis for your denial that the Settlement Agreement is consistent with public policy and applicable law.

Answer: Without waiving the General and Specific Objections to the subject Interrogatory I previously made, pursuant to Horner's Objections to U.S. Discovery Requests, I hereby answer said Interrogatory by stating:

I hereby incorporate by reference: my Motion to Enjoin, in its entirety; Brief re Motion to Enjoin, in its entirety; Horner's Response re Initial Procedures in its entirety; Horner's Comments re Proposed Order Mandating Expedited *Inter Se* Proceeding in its entirety; Horner's Suggestions re Special Master's Report re Initial Procedures, in its entirety; Horner's Comments re Revised Notice, in its entirety; Horner's Objections to Special Master's Report, in its entirety; Horner's Brief re Due Process Issues, in its entirety; Horner's Comments re SP Proposed Scheduling Order, in its entirety; Horner's Comments re Scheduling Order re Pretrial Activities, in its entirety; Horner's Brief re Legal Standards, in its entirety; Horner's Objection to Settlement Motion, in its entirety; Horner's Motion re Reserved Rights, in its entirety; Horner's Brief re Reserved Rights, in its entirety; Horner's Response to SP Motion for Extension, in its entirety; and Horner's Response to CP/EPNG Motion to Stay, in its entirety.

Request for Production of Documents

RFP No. 1: Unless your response to Request for Admission No. 1 was an unqualified admission, provide every document on which you rely to deny (in whole or in part) Request for

Admission No. 1.

("RFA No. 1: Admit the Settlement Agreement was the product of good faith, arms-length negotiations between the Navajo Nation, the United States, and the State of New Mexico.")

Response: Without waiving the General and Specific Objections to the subject RFP I previously made, pursuant to Horner's Objections to U.S. Discovery Requests, I hereby respond to said RFP by stating:

Pursuant to the 11/30/12 Discovery Order, ¶ 5, p. 3, the Court stated that:

"Parties are permitted to respond to a request for production of documents by adopting a response of another party to the same request if the other party has properly responded to the same request."

Here, the Settling Parties have peculiar knowledge and control of critical evidence - such evidence includes, but is not limited to: the nature and extent of existing Navajo water uses, Navajo diversions from the San Juan River, available water supply, total water use in the Basin, available unappropriated water supply, and the nature and extent of all other water uses in the Basin. Accordingly, pursuant to *Duke City Lumber Co. v. N.M. Environmental Improvement Board*, 95 N.M. 401, 405-406, 622 P.2d 709, 713-14 (1980 NMCA), the burden falls on the Settling Parties to produce such evidence. Please see Horner's Response re Initial Procedures, pp. 39-49.

Accordingly, I will rely extensively upon documents already in the possession, custody and control of the Settling Parties. More specifically, I hereby respond to the subject RFP by incorporating herein all of the discovery responses of the Settling Parties to the discovery requests by the Non-Settling Parties. Beyond that, I will rely on other documents filed in the present matter by the Settling Parties, or otherwise obtained from the Settling Parties, that similarly are already in the possession, custody and control of the Settling Parties. Further, I will rely on documents produced by other Parties to the present matter.

Specific documents are not listed here because it is not fair, not practical, and nearly impossible to do so at this point. It makes little sense to cull through the information provided by the Settling Parties, and provide back to the Settling Parties (pursuant to the present RFP) lists of the documents the Settling Parties have already produced. Further, the United States has already identified broad subject matter categories for each of the PDF documents it produced.

For instance, the United States alone has produced nearly 39,000 separate documents consisting of more than 400,000 pages of information in the form of electronic (digital) files in PDF format. These numbers do not include vast quantities of information (electronic digital files) the United States has also provided such as maps and Geographic Information System ("GIS") data. The United States produced all of such information on a portable hard drive (the hard drive was provided at my expense). Such information required approximately 170 GB of storage space on said hard drive, with the PDF portion of such data requiring only approximately 49 GB of storage space. Each of the documents provided in PDF format by the United States was only identified by Bates numbers and by broad category. That is, none of such information was identified by a title or date, or by reference to any specific discovery request. Further, the maps and GIS data was provided in formats that could only be opened and read by highly sophisticated GIS software, and I am not aware of any of the Non-Settling Parties who have been able to open and view said maps and GIS data to date.

The State of New Mexico and the Navajo Nation have also produced large quantities of information in the form of electronic files. The State of New Mexico produced their discovery responses by posting individual documents on the Office of the State Engineer's website. The Navajo Nation produced their discovery responses by providing a thumb drive with such

information to the Utton Center (I was required to go to the Utton Center to digitally copy said thumb drive). While the information provided by the State of New Mexico and the Navajo Nation is somewhat better in terms of descriptive file names, neither the State nor the Navajo Nation have referenced such information to specific discovery requests.

The result is that, to date, I have been unable to review the vast majority of the information produced by the Settling Parties, and I have not been able to specifically and completely identify all of the documents that I will use to support my positions. However, much of the information I have reviewed to date is highly relevant in the present matter, and will be useful at trial.

The only documents that I can currently think of that are not currently in the possession, custody and control of the Settling Parties would be summaries (prepared by me) of information obtained from the Settling Parties, prepared for the purpose of making such information easier to understand. Further, such summaries are either already in the possession of the Settling Parties (by virtue of filings previously made in the present matter), or they have not been prepared or completed to date.

RFP No. 5: Unless your response to Request for Admission No. 5 was an unqualified admission, provide every document on which you rely to deny (in whole or in part) Request for Admission No. 5.

(“**RFA No. 5:** Admit that the provisions of the Settlement Agreement describe Navajo Nation water rights that are less than those that could be secured on behalf of the Navajo Nation at trial.”)

Response: Without waiving the General and Specific Objections to the subject RFP I previously made, pursuant to Horner’s Objections to U.S. Discovery Requests, I hereby respond

to said RFP by stating:

Please see my response to RFP No. 1.

RFP No. 6: Unless your response to Request for Admission No. 6 was an unqualified admission, provide every document on which you rely to deny (in whole or in part) Request for Admission No. 6.

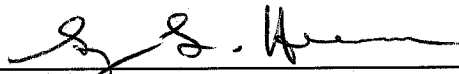
(“**RFA No. 6:** Admit that the Settlement Agreement is consistent with public policy and applicable law.”)

Response: Without waiving the General and Specific Objections to the subject RFP I previously made, pursuant to Horner’s Objections to U.S. Discovery Requests, I hereby respond to said RFP by stating:

Please see my response to RFP No. 1.

I reserve the right to supplement these responses in the future as necessary.

Respectfully, submitted by:



GARY L. HORNER, Esq.,
In Propria Persona
Post Office Box 2497
Farmington, New Mexico 87499
(505) 326-2378

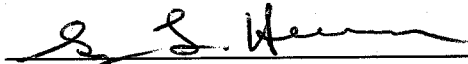
December 21, 2012

Date

VERIFICATION


STATE OF NEW MEXICO)
)
COUNTY OF SAN JUAN) ss.

I, GARY L. HORNER, after being first duly sworn on oath, do hereby state that I am a named Party in the present matter, and that the included/attached answers and/or documents are submitted in response to the foregoing interrogatories and/or requests for production of documents and that to the best of my knowledge, information and belief they are true and correct.



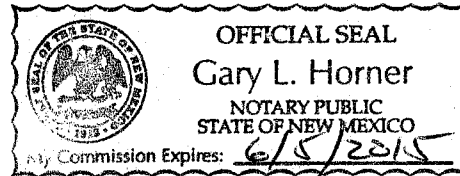
GARY L. HORNER

SUBSCRIBED, SWORN TO, AND ACKNOWLEDGED before me this 21st day of December, 2012 by GARY L. HORNER.



NOTARY PUBLIC

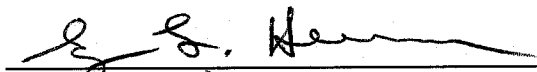
My Commission Expires: June 5, 2015



CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was emailed and mailed by first-class postage, or delivered, to the following individuals this 21st day of December, 2012:

Attorney for the U.S. Department of Justice
Andrew J. "Guss" Guarino, Esq.
Environment & Natural Resources Div.
999 18th Street, South Terrace, #370
Denver, Colorado 80202
(303) 844-1343 (Office)
(303) 229-7256 (Cell)
(303) 844-1350 (Fax)
guss.guarino@usdoj.gov



GARY L. HORNER, Esq.

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 21st day of December:

wrvajointerse@nmcourts.gov

Further, in accordance with the Court's February 3, 2012 ORDER (1) GRANTING SETTling PARTIES' MOTION TO EXTEND CERTAIN DEADLINES AND (2) SETTING SCHEDULE GOVERNING DISCOVERY AND REMAINING PROCEDURES, ¶2(a)(i), p. 2, that a true copy of the foregoing was emailed to the Discovery Document E-Repository regarding the water rights claims of the Navajo Nation, c/o Darcy Bushnell, the Stell Water Ombudsman Program of the Utton Center at the University of New Mexico School of Law, this 21st day of December, 2012, at:

bushnell@law.unm.edu

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 21st day of December, 2012.

| <u>Name</u> | <u>Representing</u> | <u>Email Address</u> |
|-----------------------------|---------------------------------|---|
| Richard Tully | B-Square Ranch | <u>tullylawfirm@qwestoffice.net</u> |
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| Andrew J. "Guss" Guarino | United States | <u>guss.guarino@usdoj.gov</u> |
| David W. Gehlert | United States | <u>david.gehlert@usdoj.gov</u> |
| Stanley Pollack | Navajo Nation | <u>smpollack@nndoj.org</u> |
| Kathryn Hoover | Navajo Nation | <u>khoover@nndoj.org</u> |
| Samuel Gollis | Navajo Nation | <u>sgollis@hotmail.com</u> |
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| Adam Rankin | ConocoPhillips & | <u>agrarkin@hollandhart.com</u> |

| | | |
|-------------------|--|--|
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 GARY L. HORNER