

ELEVENTH JUDICIAL DISTRICT
COUNTY OF SAN JUAN
STATE OF NEW MEXICO

DISTRICT COURT
SAN JUAN COUNTY NM
FILED
2013 APR 15 AM 10:14

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 MOTION FOR A DETERMINATION THAT FEDERAL LAW,
PERMITS, OR CONTRACTS DO NOT DEFINE THE EXTENT OF THE WATER
RIGHTS FOR THE NAVAJO NATION**

SUMMARY

1. Name of party filing the present document: **Gary L. Horner**
2. Title of the present document: **GARY L. HORNER'S MOTION FOR A DETERMINATION THAT FEDERAL LAW, PERMITS, OR CONTRACTS DO NOT DEFINE THE EXTENT OF THE WATER RIGHTS FOR THE NAVAJO NATION**
3. Descriptive summary of the relief sought: **Mr. Horner seeks the Court's determination that federal law, permits, or contracts do not define the extent of the water rights for the Navajo Nation.**
- 4: Number of pages of the present document: **12**

COMES NOW Gary L. Horner, Esq., *In Propria Persona* (hereinafter referred to in the first person), in 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,

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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”), and hereby submits for the Court’s consideration a common issue of fact or law in the present matter.

Specifically, said Scheduling Orders provide 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; 11/6/12 Scheduling Order, ¶ 2.

Pursuant to said Scheduling Orders, on November 8, 2012, I filed in the present matter, 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”). Horner’s Motion re Reserved Rights presented a purely legal question for the Court’s consideration. Then, on December 18, 2012, the Court entered the ORDER CONCERNING RESPONSES TO GARY HORNER’S NOVEMBER 8, 2012 MOTION (“12/18/12 Order”). Pursuant to said 12/18/12 Order, the Court determined that Horner’s Motion re Reserved Rights was a dispositive motion (apparently, as opposed to a motion regarding common issues of fact or law). The subject Scheduling Orders had provided a different schedule with respect to the consideration of dispositive motions. Specifically, regarding dispositive motions, the 11/6/12 Scheduling Order provided:

“**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.

Accordingly, the 12/18/12 Order provided that:

“responses to Horner’s Motion are due April 10, 2013; replies must be filed no later than April 24, 2013.”

It is difficult to comprehend how any motion could present a more purely legal question than Horner’s Motion re Reserved Rights. However, it appears that pursuant to the 12/18/12 Order, the Court will not require the filing of responses to *any* motion I file, regarding common issues of fact or law, until April 10, 2013. Therefore, filing such motions earlier rather than later would only result in the Settling Parties being allowed months to respond to such motions (until April 10, 2013), while I would be limited to only two weeks to reply to such responses (April 24, 2013). The practical result of the 12/18/12 Order, is that I will file no more motions, regarding common issues of fact or law, until the deadline for the filing of dispositive motions.

Then, at a hearing held by telephone on March 8, 2013, regarding DEFENDANTS B SQUARE RANCH, LLC ET AL.’s MOTION FOR EXTENSION OF TIME TO CLOSE DISCOVERY AND EXTEND DEADLINES (which was filed in the present matter on March 6, 2013), the Court ordered that the deadlines, associated with the close of discovery and dispositive motions, were extended by 30 days. Pursuant to the THIRD AMENDED ORDER GRANTING MOTIONS TO EXTEND DEADLINES IN PART AND SETTING SCHEDULE GOVERNING DISCOVERY AND REMAINING PROCEEDINGS, entered on March 15, 2013, following said March 8, 2013 hearing, the Court ordered that the deadline for filing the non-settling parties’ dispositive motions was extended to April 15, 2013. So, the present Motion re Permits and Contracts, will be filed on April 15, 2013.

Accordingly, I hereby respectfully move the Court for an order establishing that: federal law; permits issued to federal agencies by the State Engineer with respect to the waters of the San Juan River Basin in New Mexico; or contracts between the United States and the Navajo Nation with respect to the delivery of water from federal storage or delivery facilities within the San Juan River Basin in New Mexico - do not define the extent of the water rights with respect to which the Navajo Nation may be entitled in the present matter.

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

1. On January 3, 2011, the State of New Mexico ("State"), the Navajo Nation ("Navajo"), and the United States of America ("U.S.") (collectively referred to as the "Settling Parties") filed in the present matter their SETTLEMENT MOTION OF UNITED STATES, NAVAJO NATION AND STATE OF NEW MEXICO FOR ENTRY OF PARTIAL FINAL DECREES ("Settlement Motion"). Attached to said Settlement Motion was the SAN JUAN RIVER BASIN IN NEW MEXICO NAVAJO NATION WATER RIGHTS AGREEMENT, which was executed December 10-17, 2010 (hereinafter referred to as the "Settlement Agreement" or the "Navajo Settlement"). Attached to said Settlement Motion as Appendix 1 was the Settling Parties' PROPOSED PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION ("Proposed Decree"), and as Appendix 2 was the Settling Parties' PROPOSED SUPPLEMENTAL PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION ("Proposed Supplemental Decree") (collectively referred to as the "Proposed Decrees").

2. The Settling Parties generally refer to the water rights associated with the Proposed

Decree as water rights for diversions from the mainstem of the San Juan (and Animas) River, and to the water rights associated with the Revised Proposed Supplemental Decree as water rights for tributary uses (not directly diverted from the San Juan or Animas Rivers).

3. Pursuant to the Proposed Decree, the Settling Parties seek the Court's determination that the Navajo Nation is entitled to water rights in the San Juan River Basin in New Mexico of more than 600,000 acre-feet per year ("afy"), broken down as follows:

	Diversion Amount (afy)	Rate (cfs)	Depletion Amount (afy)	Decree Reference (¶)
Navajo Indian Irrigation Project ("NIIP")	508,000	1,800	270,000	3(a)
Navajo-Gallup Water Supply Project ("NGWSP")	22,650	41	20,780	3(b)
NGWSP use in Arizona (Window Rock)	6,411	12	6,411	6
Animas-La Plata Project ("ALP")	4,680	12.9	2,340	3(c)
Municipal and Domestic Uses ("DCMI")	2,600	5	1,300	3(d)
Hogback-Cudei Irrigation Project ("Hogback")	48,550	221	21,280	3(e)
Fruitland-Cambridge Irrigation Project ("Fruitland")	18,180	100	7,970	3(f)
Supplemental Carriage Water	?	?	0	4
Groundwater	<u>2,000</u>	<u>?</u>	<u>2,000</u>	7(a)
SUBTOTAL Proposed Decree	<u>613,071</u>	<u>2,191.9</u>	<u>332,081</u>	

4. The Proposed Supplemental Decree attached as Appendix 2 to the Navajo Settlement did not specify a quantity of water rights to be acquired thereby, apparently because the Settling Parties had not yet reached an agreement on such quantity. However, on April 2, 2012, the Settling Parties filed the SETTLING PARTIES' NOTICE OF FILING REVISED PROPOSED SUPPLEMENTAL PARTIAL FINAL DECREE. Attached to said Notice was a revised Appendix 2 (Settling Parties' revised proposed SUPPLEMENTAL PARTIAL FINAL DECREE OF THE WATER RIGHTS OF THE NAVAJO NATION) ("Revised Appendix 2 Decree" or "Revised Proposed Supplemental Decree"). Pursuant to said Revised Proposed Supplemental Decree, the Settling Parties proposed that the Navajo Nation be awarded (in addition to the

quantities of the Proposed Decree) additional water rights of 26,872 afy diversion, or 11,061 afy depletion, plus an additional 11,309 afy (depletion) for evaporation from stock ponds and irrigation reservoirs. (Revised Proposed Supplemental Decree, ¶ 3.)

5. Thus, the total water rights the Settling Parties propose to be awarded to the Navajo Nation pursuant to the two Proposed Decrees are as follows:

	Diversion Amount (afy)	Rate (cfs)	Depletion Amount (afy)
Proposed Decree (Appendix 1)	613,071	2,191.9	332,081
Revised Proposed Supplemental Decree (Appendix 2)	26,872	?	11,061
(Appendix 2 Evaporation)	<u>0</u>	<u>?</u>	<u>11,309</u>
TOTAL Both Proposed Decrees	<u>639,943</u>	<u>2,191.9</u>	<u>354,451</u>

6. I understand that the Navajo Nation currently diverts not much more than 200,000 afy from the San Juan and Animas Rivers. Therefore, the Proposed Decree would grant to the Navajo Nation as much as 400,000 afy water rights more than the Navajo Nation has ever used before, with a priority date that would be senior to all other water users in the Basin. I assume that the water rights of the Revised Proposed Supplemental Decree are similarly inflated or overstated.

7. The Settling Parties propose that all of said water rights be considered to be federal reserved water rights, and that all of such water rights be given a priority date of June 1, 1868 (with the exception of the supplemental carriage water, and possibly the NGWSP uses in Arizona). (See Proposed Decree, ¶¶ 2, 3, 7(a), 8, 10, and 11, and the Revised Proposed Supplemental Decree, ¶ 3.)¹

¹ Please refer to GARY L. HORNER'S MOTION FOR THE DETERMINATION OF THE APPLICABLE STANDARD FOR THE DETERMINATION OF FEDERAL RESERVED WATER 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, which were both filed in the present matter on November 8, 2012.

8. 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.)

9. Notwithstanding the above mentioned references in the Navajo Settlement and Proposed Decrees that all of the water rights of the Proposed Decrees are federal reserved water rights, pursuant to Revised Statement re Bases, the State in essence disavows the idea that the Navajo Settlement and Proposed Decrees are based upon the notion of federal reserved rights. Rather, the State asserts that the water rights of the Navajo Settlement and Proposed Decrees are based upon the notion that such water rights relate only to historic, existing or "authorized" water uses. Specifically, the Revised Statement re Bases provides:

"With the settlement, the Navajo Nation accepts essentially the quantity that it currently has a right or authorization to use or develop." Revised Statement re Bases, p. 3;

"To protect existing water right owners, the State negotiated a settlement that limits the Navajo Nation's water rights to the amount of their already existing water projects and uses and that requires use of water from federal projects, with a 1955 or 1956 priority, to satisfy the Navajo Nation's future use claims. As discussed in more detail below, the amount of water proposed to be adjudicated to the Navajo Nation is based only on existing and authorized irrigation projects and on existing or authorized municipal and domestic projects." Revised Statement re Bases, p. 3; and

"As described in the Technical Assessment, the State quantified the Navajo Nation's "Current Right" based on historic and existing Navajo Nation water uses and existing authorizations for additional uses of water. It does not include additional water for future use that could be asserted as necessary for a permanent homeland under the *Winters* Doctrine. As Table 1 shows, the total amount proposed by the settlement is slightly less than the total quantity of the Navajo Nation's current right." Revised Statement re

Bases, p. 4.

Therefore, at least the State of New Mexico asserts that the water rights to be awarded the Navajo Nation pursuant to the Navajo Settlement and Proposed Decrees are based upon the notion that such water rights relate only to currently "authorized" water uses pursuant to federal law, permits and/or contracts, as opposed to federal reserved water rights.

10. I assert that: federal law; filings made by, or on behalf of, the United States with the State Engineer with respect to the waters of the San Juan River Basin in New Mexico; or contracts between the United States and the Navajo Nation with respect to the delivery of water from federal storage or delivery facilities within the San Juan River Basin in New Mexico - do not define the extent of the water rights with respect to which the Navajo Nation may be entitled in the present matter. In that regard, please refer to GARY L. HORNER'S BRIEF IN SUPPORT OF GARY L. HORNER'S MOTION FOR A DETERMINATION THAT FEDERAL LAW, PERMITS, OR CONTRACTS DO NOT DEFINE THE EXTENT OF THE WATER RIGHTS FOR THE NAVAJO NATION, which is filed concurrently herewith and incorporated herein by reference in its entirety.

11. New Mexico water law is based upon the concept of beneficial use and the doctrine of prior appropriation. The proposed award to the Navajo Nation of water rights of as much as 400,000 cfs more than the Navajo Nation has ever previously used, with a priority date that predates the priority dates of all other water users in the Basin, clearly violates the constitutional doctrines of beneficial use and prior appropriation.

12. Accordingly, to the extent that the State or the Settling Parties assert that the Navajo Settlement and Proposed Decrees are based upon the concept that such water rights are currently "authorized" water uses pursuant to federal law, permits and/or contracts, I assert that the Navajo

Settlement and Proposed Decrees are not consistent with, and have absolutely no legitimate basis in, applicable law.

13. Pursuant to the AMENDED ORDER ESTABLISHING THE LEGAL STANDARDS FOR EVALUATING THE PROPOSED DECREES AND RESPECTIVE BURDENS OF PROOF, entered in the present matter on April 19, 2012 (“Order re Legal Standards”), the Court stated with respect to such Legal Standard for Approval that:

“The Settling Parties must demonstrate that the Proposed Decrees are ‘fair, adequate, and reasonable, and consistent with the public interest and applicable law.’ Order re Legal Standards, pp. 1-2. Emphasis added.

Said Order re Legal Standards also provided, regarding the Respective Burdens of the parties, that:

“The Settling Parties shall have the burden of production and the burden of persuasion to demonstrate that (a) the Settlement Agreement is the product of good faith, arms-length negotiations, (b) the provisions contained in the Settlement Agreement and the Proposed Decrees will reduce or eliminate impacts on junior water rights, (c) there is a reasonable basis to conclude that the Settlement Agreement provides for less than the potential claims that could be secured at trial, and (d) the Settlement Agreement is consistent with public policy and applicable law. The Settling Parties must first demonstrate that the Proposed Decrees satisfy these four elements by prima facie evidence to meet their burden of production. If the Settling Parties satisfy the initial burden of production, the burden of rebutting the Settling Parties’ evidence shall shift to the Objectors. The Settling Parties, however, shall retain the burden of persuasion by a preponderance of the evidence. The Objectors need not demonstrate injury to their own water rights claims in order to state a cognizable objection.” Order re Legal Standards, p. 3. Emphasis added.

14. Therefore, it is critical for the Court to determine in the present matter just what is the applicable law with respect to federal law, permits and/or contracts, and how does such law relate to the determination of water rights in the State of New Mexico generally, and the Navajo Nation specifically.²

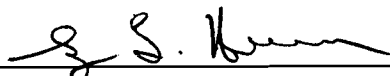
² The Navajo Settlement and Proposed Decrees are problematic in many respects. I objected to many of such problems pursuant to GARY L. HORNER’S OBJECTIONS: TO THE SETTLEMENT MOTION OF UNITED STATES, NAVAJO NATION AND STATE OF NEW MEXICO FOR ENTRY OF PARTIAL FINAL DECREES; AND THE PROPOSED DECREES ASSOCIATED WITH SAID SETTLEMENT MOTION, which was filed in the present matter on September 24, 2012 (“Horner’s Objection to Settlement Motion”). The present Motion is intended to focus only on the problems associated with the consideration of federal law, permits and/or contracts with respect to the determination of water rights for the Navajo Nation pursuant to the subject Navajo Settlement and Proposed Decrees. I reserve the right to address other problematic aspects of the Navajo Settlement and Proposed Decrees by

15 Apparently, this Motion is considered by the Court to be a dispositive motion. Therefore, concurrence of opposing counsel has not been sought, in accordance with Rule 1-007.1 NMRA, since the nature of this Motion obviates the need for such concurrence. I assume the Settling Parties oppose this Motion.

Wherefore, I respectfully pray the Court for an order:

- 1) Establishing just what is the applicable law with respect to federal law, permits and/or contracts, and how does such law relate to the determination of water rights in the State of New Mexico generally, and the Navajo Nation specifically;
- 2) That to any extent that the current water uses of the Navajo Nation have been “authorized” by federal law, permits and/or contracts, that such “authorization,” or such federal law, permits, or contracts do not define or determine the extent, or quantity, of the water rights with respect to which the Navajo Nation may be entitled in the present matter;
- 3) For such other and further relief as the Court determines appropriate in the premises.

Respectfully, submitted by:



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

April 15, 2013

Date

separate motion.

*Horner's Motion re federal
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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 15th day of April, 2013:

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 15th day of April, 2013.

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