

DISTRICT COURT  
SAN JUAN COUNTY NM  
FILED

2013 MAY 24 PM 4: 54

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 REPLY TO THE  
ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY AND  
CITY OF ESPANOLA'S RESPONSE IN OPPOSITION TO COMMUNITY DITCH  
DEFENDANTS' MOTION AND MEMO FOR PARTIAL SUMMARY JUDGMENT AND  
GARY HORNER'S MOTION FOR SUMMARY JUDGMENT AND  
MEMORANDUM IN SUPPORT**

SUMMARY

1. Name of party filing the present document: **Gary L. Horner**
2. Title of the present document: **GARY L. HORNER'S REPLY TO THE ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY AND CITY OF ESPANOLA'S RESPONSE IN OPPOSITION TO COMMUNITY DITCH DEFENDANTS' MOTION AND MEMO FOR PARTIAL SUMMARY JUDGMENT AND GARY HORNER'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT.**
3. Descriptive summary of the relief sought: **This document represents Mr. Horner's reply to the ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY AND CITY OF ESPANOLA'S RESPONSE IN OPPOSITION TO COMMUNITY DITCH DEFENDANTS' MOTION AND MEMO FOR PARTIAL SUMMARY JUDGMENT AND GARY HORNER'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT.**
- 4: Number of pages of the present document: **9**

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COMES NOW Gary L. Horner, Esq., *In Propria Persona* (hereinafter referred to in the first person), and respectfully replies to the ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY AND CITY OF ESPANOLA'S RESPONSE IN OPPOSITION TO COMMUNITY DITCH DEFENDANTS' MOTION AND MEMO FOR PARTIAL SUMMARY JUDGMENT AND GARY HORNER'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT, which was filed in the present matter on May 10, 2013 ("ABCWUA Response to Motions for Sum Judgment").<sup>1</sup>

As and for good cause for said Reply I state:

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<sup>1</sup> Albuquerque Bernalillo County Water Utility Authority and City of Espanola are hereinafter referred to as "ABCWUA".

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**I. All of Horner's asserted material facts are "material," and Horner's Motions should be granted.**

Pursuant to ABCWUA Response to Motions for Sum Judgment, ABCWUA argues that:

"Under Rule 1-056 (D), NMRA, ABCWUA and the City contend that fact nos. 1-5 identified by the Community Ditch Defendants and fact nos. 108, 109, 110, 111, 114, 154, 239, 266, 267, and 268 by Gary Horner, with respect to Permit No. 2847, are immaterial. The Movants' 'facts' are immaterial because published notice of the United States' intent to utilize unappropriated water is not required and the United States filed plans for its project to utilize such water within three (3) years in accordance with Section 72-5-33. Accordingly, summary judgment cannot be entered. Summary judgment is only 'appropriate where there are no genuine issues of *material* fact and the movant is entitled to judgment as a matter of law' and '[a]ll reasonable inferences are construed in favor of the non-moving party.' *Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, 116, 141 N.M. 21, 150 P.3d 971 (emphasis added). New Mexico law requires that the alleged undisputed facts be material to obtain summary judgment. *See Romero v. Philip Morris, Inc.*, 2010-NMSC-035, 111, 148 N.M. 713, 242 P.3d 280. In order to determine which facts are material, the court must 'look to the substantive law governing the dispute.' *See Farmington Police Officers Ass'n v. City of Farmington*, 2006-NMCA-077, 117, 139 N.M. 750, 137 P.3d 1204.

"The Movants' Motions for Summary Judgment do not contain a single fact upon which summary judgment can be granted. First, the Community Ditch Defendants cite to a series of inapplicable statutes, NMSA 1978, §§ 72-5-1, 3, 4, 5, 6, 7, 21, and 31, as the basis for their Motion for Summary Judgment. As further set forth below, the United States' Permit No. 2847 is governed solely by Section 72-5-33, *i.e.*, the 'substantive law' governing this issue. *See* 2006-NMCA-077, ¶17. Second, Mr. Horner's claims that the 'Notices of Intention with respect to File No.s 2847 (San Juan-Chama Project)' were not submitted in accordance with New Mexico law 'because the Notices of Intention were submitted by the State Engineer himself' and that '[n]o permits were ever issued' for said Notice are not only immaterial but incorrect. *See* Horner Memo at 1108. Section 72-5-33 requires that United States notify the State Engineer of its intent to 'utilize certain specified waters' and that the United States file plans 'for the proposed works' for such specified waters within three years of the United States notice to the State Engineer. Such notice by the United States was made by the filing of June 17, 1955, and the required plans 'for the proposed works' were filed by the United States with the State Engineer on March 6, 1958. The facts raised by the Movants are not only immaterial but unsupported by Section 72-5-33, the 'substantive law' governing this issue, and cannot be the basis for summary judgment." ABCWUA Response to Motions for Sum Judgment, pp 5-6.

ABCWUA's argument here is that certain of the "material facts" set forth in Horner's Memo re Summary Judgment,<sup>2</sup> are "immaterial." It must be noted that ABCWUA does not actually dispute any of said material facts. ABCWUA, only argues that certain of such facts are

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<sup>2</sup> GARY L. HORNER'S MOTION FOR SUMMARY JUDGMENT: THAT IS, THE "SETTLEMENT MOTION OF THE UNITED STATES, NAVAJO NATION AND THE STATE OF NEW MEXICO FOR ENTRY OF PARTIAL FINAL DECREES" SHOULD BE DENIED ("Horner's Motion for Summary Judgment"), and GARY L. HORNER'S MEMORANDUM IN SUPPORT OF GARY L. HORNER'S MOTION FOR SUMMARY JUDGMENT: THAT IS, THE "SETTLEMENT MOTION OF THE UNITED STATES, NAVAJO NATION AND THE STATE OF NEW MEXICO FOR ENTRY OF PARTIAL FINAL DECREES" SHOULD BE DENIED ("Horner's Memo re Summary Judgment"), were both filed in the present matter on April 15, 2013, and are both hereby incorporated herein by reference.

“immaterial.”

Black’s Law Dictionary, Fifth Edition, defines “Material” as:

“Important; more or less necessary; having influence or effect; going to the merits; having to do with matter, as distinguished from form. Representation relating to matter which is so substantial and important as to influence party to whom made is ‘material.’ ”

Black’s Law Dictionary, Fifth Edition, defines “Material fact” with respect to “Summary judgment” as:

“In determining what constitutes a genuine issue as to any material fact for purposes of summary judgment, an issue is ‘material’ if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action. *Austin v. Wilder*, 26 N.C.App. 229, 215 S.E.2d 794, 796. See Fed.R.Civ.P. 56(c).

“A fact is ‘material’ and precludes grant of summary judgment if proof of that fact would have effect of establishing or refuting one of essential elements of a cause of action or defense asserted by the parties, and would necessarily affect application of appropriate principle of law to the rights and obligations of the parties. *Johnson v. Soulis*, Wyo., 542 P.2d 867, 872.”

ABCWUA’s first (typical) argument that such facts are immaterial is that:

“The Movants’ ‘facts’ are immaterial because published notice of the United States’ intent to utilize unappropriated water is not required and the United States filed plans for its project to utilize such water within three (3) years in accordance with Section 72-5-33. Accordingly, summary judgment cannot be entered.”

Therefore, ABCWUA’s argument is actually a legal argument with respect to the application and effect of § 72-5-33.<sup>3</sup> I assert that said § 72-5-33, does not abrogate state law with respect to the United States’ requirements to follow the statutory appropriation procedures. Apparently, the ABCWUA argues that said § 72-5-33 does abrogate such procedures. I have supported my position in significant detail pursuant to Horner’s Motion re Federal Law, Permits and Contracts.<sup>4</sup> Certainly, if my position is correct, the subject asserted material facts are

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<sup>3</sup> Actually, the entire ABCWUA Response to Motions for Sum Judgment is based upon this one single legal argument.

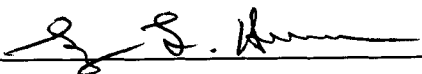
<sup>4</sup> GARY L. HORNER’S MOTION FOR A DETERMINATION THAT FEDERAL LAW, PERMITS, OR CONTRACTS DO NOT DEFINE THE EXTENT OF THE WATER RIGHTS FOR THE NAVAJO NATION (“Horner’s Motion re Federal Law, Permits and Contracts”), and GARY L. HORNER’S BRIEF IN SUPPORT OF GARY L. HORNER’S MOTION FOR A DETERMINATION THAT FEDERAL LAW, PERMITS, OR CONTRACTS DO NOT DEFINE THE EXTENT OF THE WATER RIGHTS FOR THE NAVAJO NATION

“material” to the issue that said statutory procedures were not followed with respect to the filings made by, or on behalf of, the United States regarding the federal reclamation projects in the San Juan Basin.

Pursuant to the ABCWUA Response to Motions for Summary Judgment, ABCWUA simply does not address the points and authorities of Horner’s Brief re Federal Law, Permits and Contracts. Rather, the ABCWUA simply argues that the subject material facts are “immaterial” and therefore, somehow, Horner’s Motion for Summary Judgment should be denied. If in fact said material facts were “immaterial,” they would have no bearing on the issues and could simply be ignored. Thus, any “immaterial” facts would not have any bearing on the ultimate issue of whether Horner’s Motion for Summary Judgment should be either granted or denied.

Regarding the legal issue as to whether § 72-5-33 abrogates state law with respect to the United States’ requirements to follow the statutory appropriation procedures, said issue is now before the Court to decide pursuant to Horner’s Motion re Federal Law, Permits and Contracts, and Horner’s Motion for Summary Judgment. Apparently, the ABCWUA believes its position to be so weak, that rather than arguing the merits of the issue, it tries to argue that Horner’s Motions should be denied because the facts supporting said Motions are “immaterial.”

Respectfully, submitted by:

  
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May 24, 2013

(“Horner’s Brief re Federal Law, Permits and Contracts”), were both filed in the present matter on April 15, 2013, and are both hereby incorporated herein by reference.

GARY L. HORNER, Esq.,  
*In Propria Persona*  
Post Office Box 2497  
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Date

**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 24<sup>th</sup> day of May, 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 24<sup>th</sup> day of May, 2013.

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