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 JICARILLA APACHE NATION RESPONSE BRIEF TO THE MOTION AND BRIEF FILED BY GARY L. HORNER ON 8 NOVEMBER 2012 FOR THE DETERMINATION OF THE APPLICABLE STANDARD FOR THE 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 REPLY TO THE JICARILLA APACHE NATION RESPONSE BRIEF TO THE MOTION AND BRIEF FILED BY GARY L. HORNER ON 8 NOVEMBER 2012 FOR THE DETERMINATION OF THE APPLICABLE STANDARD FOR THE DETERMINATION OF FEDERAL RESERVED WATER RIGHTS.**

3. Descriptive summary of the relief sought: **This document represents Mr. Horner's reply to the Jicarilla Apache Nation response brief to the Motion and Brief filed by Gary L. Horner on 8 November 2012 for the determination of the applicable standard for the determination of federal reserved water rights.**

4: Number of pages of the present document: **13**

COMES NOW Gary L. Horner, Esq., *In Propria Persona* (hereinafter referred to in the first person), and respectfully replies to the Jicarilla Apache Nation response brief to the Motion and Brief filed by Gary L. Horner on 8 November 2012 for the determination of the applicable

standard for the determination of federal reserved water rights (said document had no specific title), which was filed in the present matter on May 10, 2013 ("JAN Response to Horner's Motion re Reserved Rights").[1]

As and for good cause for said Reply I state:

[1] Hereinafter, the Jicarilla Apache Nation is referred to as "JAN".

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New Mexico Cases:

PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE JICARILLA APACHE TRIBE, entered in the present matter on February 24, 1999. . . . 5

I. I disagree with the JAN's argument that "federal law, not state law, is to be followed in determining the Navajo Nation's water rights."

Pursuant to the JAN Response to Horner's Motion re Reserved Rights, the JAN argues that:

> "the law is settled in this area, federal law, not state law, is to be followed in determining the Navajo Nation's water rights." JAN Response to Horner's Motion re Reserved Rights, p. 3.

As set forth in considerable detail pursuant to Horner's Brief re Reserved Rights,[2] I acknowledge the Navajo Nation is entitled to certain federal reserved water rights. I further acknowledge that federal law is to be followed with respect to the determination of the Navajo Nation's federal reserved rights.

However, I assert that federal reserved rights for Indian Tribes are limited to the minimal needs of the Tribe to fulfill the original primary purposes for which the reservation was created; 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.

I also assert that federal reserved rights for Indian Tribes should be quantified based upon the water uses of the Indian Tribe at the time the reservation was created, or a reasonable time thereafter. The concept of federal reserved water rights is based upon the notion that when the reservation was created, water rights were impliedly reserved to meet the minimal needs of such

[2] GARY L. HORNER'S MOTION FOR THE DETERMINATION OF THE APPLICABLE STANDARD FOR THE DETERMINATION OF FEDERAL RESERVED WATER RIGHTS ("Horner's Motion re Federal Reserved Rights"), and GARY L. HORNER'S BRIEF IN SUPPORT OF GARY L. HORNER'S MOTION FOR THE DETERMINATION OF THE APPLICABLE STANDARD FOR THE DETERMINATION OF FEDERAL RESERVED WATER RIGHTS ("Horner's Brief re Reserved Rights"), were both filed in the present matter on November 8, 2013, and both are hereby incorporated herein by reference.

reservation. Therefore, the quantity of the water rights so reserved must necessarily be based upon the needs of such reservation at the time it was created.

That is not to say that an Indian Tribe's water rights must be limited for all time to such quantified federal reserved rights. I assert that an Indian Tribe may acquire additional water rights as its needs increase, but that such additional water rights are not federal reserved water rights, and therefore, must be acquired pursuant to state law.

Therefore, I disagree with the JAN's argument that "federal law, not state law, is to be followed in determining the Navajo Nation's water rights."

II. The *Winters* Court did not hold that all water rights for all Indian Tribes were forever exempted from state laws.

Pursuant to the JAN Response to Horner's Motion re Reserved Rights, the JAN argues that:

> "the Supreme Court in *Winters v. United States*, 207 U.S. 564, 565 (1908) held that the agreement and federal statute creating the Fort Belknap Reservation exempted the Indians from state law principles of 'prior appropriation' in reserving water rights for the Indians to use on the reservation. *Id.*, at 575-577." JAN Response to Horner's Motion re Reserved Rights, pp. 2-3.

In fact, the *Winters* Court specifically stated that:

> "The power of the government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be. United States v. Rio Grande Dam & Irrig. Co. 174 U. S. 702, 43 L. ed. 1141, 19 Sup. Ct. Rep. 770; United States v. Winans, 198 U. S. 371, 49 L. ed. 1089, 25 Sup. Ct. Rep. 662. That the government did reserve them we have decided, and for a use which would be necessarily continued through years." *Winters v. United States*, 207 U.S. 564, 577, 28 S.Ct. 207, 212, 52 L.Ed. 340 (1908).

Therefore, the *Winters* Court did not hold that all water rights for all Indian Tribes were forever exempted from state laws. Rather, the *Winters* Court specifically held that the government had reserved certain water rights when the subject reservation was created, and that those specific water rights were exempt from appropriation under state law. The *Winters* case

certainly does not state that such water rights, so reserved, were the only water rights the Tribe could ever own, or that any additional water rights later acquired by said Tribe would be, or could be, exempt from state law.

III. The JAN intends that the "homeland standard" means the Indian Tribes get it all.

Pursuant to the JAN Response to Horner's Motion re Reserved Rights, the JAN expends considerable effort arguing that:

> "Water sufficient to provide a permanent homeland for the Navajo people is the standard to be applied in this case".

The JAN further states that:

> "This standard entitles them to water for historic, existing and future uses of water for multiple purposes including recreation, agriculture, domestic, stock, commercial, industrial, wildlife and other uses." JAN Response to Horner's Motion re Reserved Rights, p. 4.

Accordingly, the JAN intends that such "homeland standard" encompasses vast quantities of water rights for "future" uses, far in excess of an Indian Tribe's reasonably foreseeable needs, and all with a priority date of when the reservation was created. Therefore, the JAN intends that the "homeland standard" means the Indian Tribes get it all - non-Indians get nothing, not even the right to the water they have been using for more than 100 years. In that regard, the "homeland standard" represents a serious potential problem.

IV. Federal reserved water rights can be lost by non-use.

The JAN argues that:

> "At page 31 of his brief, Mr. Horner asserts that the Navajo's federal reserved water rights can be lost by non-use. Not only does the court not have jurisdiction over this issue, but, more importantly, Mr. Horner's assertion is incorrect. Part IV-Navajo Water Rights, Section 10701(c) (2)(4) [sic] of the Northwestern New Mexico Rural Water Project Act, Title X, Subtitle B of the Omnibus Public Lands Management Act of 30 March 2009, P. L, 111-11, 123 Stat 991, prescribes that the water supply of the Nation cannot be lost by non-use and that non-use shall not result in forfeiture, abandonment,

relinquishment, or other loss of any part of a right decreed to the Nation." JAN Response to Horner's Motion re Reserved Rights, p. 8.

Said § 10701(c)(4) actually provides:

> "FORFEITURE.—The nonuse of the water supply secured by a subcontractor of the Nation under this subsection shall not result in forfeiture, abandonment, relinquishment, or other loss of any part of a right decreed to the Nation under the Contract or this section."

Therefore, said § 10701 (c)(4) does not provide that "that the water supply of the Nation cannot be lost by non-use and that non-use shall not result in forfeiture, abandonment, relinquishment, or other loss of any part of a right decreed to the Nation." Rather, said Section only provides that *nonuse by a subcontractor* of the Navajo Nation shall not result in forfeiture, abandonment, relinquishment, or other loss of any part of a right decreed to the Nation under the Contract".

Further, Pursuant to Horner's Brief re Federal Reserved Rights, I demonstrate that federal reserved water rights can be lost by non-use.

V. Leasing a Tribe's federal reserved water rights to others for the revenue such leases will produce, is not one of the original, primary purposes of an Indian Reservation.

The JAN argues that:

> "Lastly, at page 37 of his brief Mr. Horner's argument that 'there is simply no authority for allowing the Navajo Nation to lease federal reserved water rights off the reservation' is erroneous. Although, this is another issue that this Court does not have jurisdiction over and cannot rule on, suffice it to say that Part IV-Navajo Water Rights, Section 10701(c) (1)(A) and (d)(1)(A) of the Northwestern New Mexico Rural Water Project Act, Title X, Subtitle B of the Omnibus Public Lands Management Act of 30 March 2009, P. L, 111-11, 123 Stat 991 provides express Congressional authority for the Navajo Nation to lease its federally reserved water rights." JAN Response to Horner's Motion re Reserved Rights, p. 8.

My statement that "There is simply no authority for allowing the Navajo Nation to lease federal reserved water rights off the reservation" is not erroneous. As I previously stated: federal reserved rights for Indian Tribes are limited to the minimal needs of the Tribe to fulfill the original primary purposes for which the reservation was created; 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. Therefore, the vast majority of the water rights of the Navajo Settlement and Proposed Decrees cannot be regarded as federal reserved rights. Certainly, leasing a Tribe's federal reserved water rights to others for the revenue such leases will produce, is not one of the original, primary purposes of an Indian Reservation.

However, I do acknowledge that the stated provisions of the Settlement Act provide for the leasing of the Navajo Nation's water rights, to be acquired pursuant to the Navajo Settlement and Proposed Decrees, to others off of the Reservation. That is one the significant problems with the Settlement Act, Navajo Settlement and Proposed Decrees, and one of the significant reasons why this Court should not approve the Navajo Settlement and Proposed Decrees.

I further acknowledge that the JAN has been leasing the water rights it obtained, pursuant to the PARTIAL FINAL JUDGMENT AND DECREE OF THE WATER RIGHTS OF THE JICARILLA APACHE TRIBE, entered in the present matter on February 24, 1999, to others off of its Reservation for several years now. I also have a serious problem with that.

VI. Conclusion.

Based upon a misconception of the notion of federal reserved water rights, the Proposed Partial Final (Appendix 1) Decree would grant to the Navajo Nation the right to divert and use more than 600,000 afy from the Animas and San Juan Rivers in New Mexico. The Proposed Supplemental Partial Final Decree would grant to the Navajo Nation the right to use an additional nearly 27,000 afy from the San Juan Basin in New Mexico. All of such water rights

would carry a priority date of June 1, 1868, which would predate the priority dates of all other water uses in the Basin. Further, pursuant to said Proposed Decrees, such water rights would not be subject to abandonment, forfeiture or loss for non-use.

The Appendix 1 Decree itself represents an award of water rights to the Navajo Nation of as much as 400,000 afy more than the Navajo Nation has ever previously used. Obviously, these factors are potentially devastating on existing water users in the Basin.

The Navajo Settlement is largely based on the erroneous premise that the Navajo Nation is entitled to enormous amounts of water for future uses, with priority dates for all of such water as of the date the Navajo Reservation was created (June 1, 1868), pursuant to the *Winters* doctrine. Such premise is completely erroneous, with no foundation in the law. Instead, the Navajo Nation should receive water rights in this adjudication suit, which are based on their actual, current beneficial uses.

The Navajo Nation's legitimate water needs have increased since their Reservation was created, and they will need additional water for future growth and economic development, just as will everyone else. We all occupy the same corner of the world, we all need water for current and future needs, and we all share the same limited water supply. Such water supply must be allocated fairly between all water users. The state law doctrine of prior appropriation provides such a fair method of allocating limited water resources.

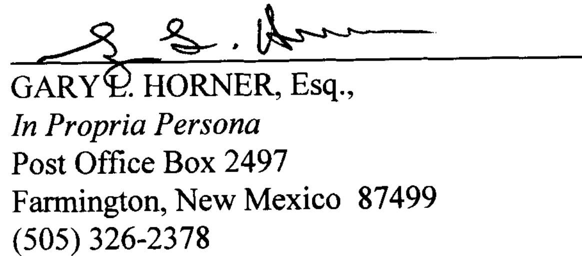
In that regard, the water rights of the Navajo Nation should be determined in the present matter by hydrographic survey, with priority dates that relate to when such water was first put to beneficial use, just like everyone else. Such a method for determining the water rights of the Navajo Nation is not only fair, it is the law.

Currently, the right to water in the west is divided between the states, and then distributed to individual users by state authority based on certain criteria such as need or time. Such state control has distributed such water rights into many hands. However, the erroneous notion of the *Winter's* Doctrine, as apparently relied upon by the Settling Parties, would simply reorder political power in the west by giving Indian tribes the right to control that greatest single element required for life on this planet (or apparently anywhere else in the universe) - WATER. The proposition that all water rights could be held by Indian tribes and that one must yield to the whims of such tribes in order to obtain such an essential of life is not only scary but unbelievably absurd.

The notion of the *Winters* Doctrine, upon which the Navajo Settlement is based, represents such a departure from any notion of fairness and justice that its basic premise must be rethought and restructured - right here and right now appears to be as good a starting place in that regard as any other.

For the foregoing reasons, I respectfully request that the Court consider and determine the appropriate applicable standard by which federal reserved water rights for Indian Tribes should be determined in the present matter, and specifically, for an order that federal reserved rights for Indian Tribes are limited to the minimal needs of the Tribe to fulfill the original primary purposes for which the reservation was created; 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.

Respectfully, submitted by:



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

May 24, 2013
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 24th 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 24th day of May, 2013.

Name	Representing	Email Address
Richard Tully	B-Square Ranch	tullylawfirm@qwestoffice.net
John Utton	State of New Mexico	jwu@sheehansheehan.com
Arianne Singer	State of New Mexico	arianne.singer@state.nm.us
Andrew J. "Guss" Guarino	United States	guss.guarino@usdoj.gov
David W. Gehlert	United States	david.gehlert@usdoj.gov
Stanley Pollack	Navajo Nation	smpollack@nndoj.org
Kathryn Hoover	Navajo Nation	khoover@nndoj.org
Samuel Gollis	Navajo Nation	sgollis@hotmail.com
Victor R. Marshall	Community Ditch Defendants	victor@vrmarshall.com
Richard Cole	Cities of Aztec & Bloomfield	rbc@keleher-law.com
Cassandra Malone	Cities of Aztec & Bloomfield	crm@keleher-law.com
Justin Breen	Cities of Aztec &	jbb@keleher-law.com

	Bloomfield	
Thomas C. Bird	Cities of Aztec & Bloomfield	tcb@keleher-law.com
Adam Rankin	ConocoPhillips & El Paso Nat. Gas	agrankin@hollandhart.com
Mark Sheridan	ConocoPhillips & El Paso Nat. Gas	msheridan@hollandhart.com
James Brockmann	City of Gallup	jcbrockmann@newmexicowaterlaw.com
Seth Fullerton	ABCWUA & City of Espanola	srfullerton@newmexicowaterlaw.com
Jay Stein	ABCWUA & City of Espanola	jfstein@newmexicowaterlaw.com
Jolene McCaleb	San Juan Water Commission	jmccaleb@taylormccaleb.com
Elizabeth Taylor	San Juan Water Commission	etaylor@taylormccaleb.com
Gary Risley	La Plata Acequia Assn.	gary@risleylaw.net
Priscilla Shannon	McCarty Trust	pshannonlaw@yahoo.com
Celene Hawkins	Ute Mountain Ute Tribe	chawkins@utemountain.org
Lee Bergen	Ute Mountain Ute Tribe	lbergen@nativeamericanlawyers.com
Peter Ortego	Ute Mountain Ute Tribe	portego@utemountain.org
Herbert Becker	Jicarilla Apache Nation	herb.becker@jaassociatesnm.com
Rebecca Dempsey	Bloomfield Schools	rdempsey@cuddymccarthy.com
Maria O'Brien	BHP Navajo Coal; Enterprise Field Services	mobrien@modrall.com
Christina Sheehan	BHP Navajo Coal; Enterprise Field Services	ccs@modrall.com
Kyle Harwood	HMC Leasing	kyle@harwood-consulting.com
Robert Oxford	Pro Se	bjoxford@yahoo.com
Gary Horner	In Propria persona	ghorner@zianet.com

GARY L. HORNER