SJ-17
Navajo Settlem

STATE OF NEW MEXICO
SAN JUAN COUNTY
THE ELEVENTH JUDICIAL DISTRICT COURT

STATE OF NEW MEXICO, *ex rel.* STATE ENGINEER,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, *et al.*,

Defendants,

THE JICARILLA APACHE TRIBE AND THE NAVAJO NATION,

Defendant-Intervenors.

CV-75-184

JAMES J. WECHSLER
Presiding Judge

SAN JUAN RIVER GENERAL STREAM ADJUDICATION

Before Special Master
Stephen E. Snyder

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

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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

Pursuant to the Special Master's Order Establishing Procedure for the Submission of Proposed Revisions to Navajo Settlement Court Papers filed November 20, 2009 ("November 20 Order"), the Settling Parties[1] provide the following Suggestions regarding 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 ("Proposed Order").

The Settling Parties have revised the Exhibits filed with their Joint Motion consistent with their understanding of the Special Master's directions at the hearing held on November 17, 2009 (*See* the Settling Parties' Notice of Settling Parties' Revisions to Previously Submitted Exhibits filed simultaneously with these Suggestions). For reasons discussed more fully below, the Settling Parties have concerns about procedures described in the Special Master's Proposed Order that are in conflict with the procedures outlined in those Exhibits. The Settling Parties continue to believe that the procedures proposed in their Joint Motion will allow the Court to determine if the Navajo Settlement is a full and fair resolution of the Nation's water rights claims in the San Juan River Basin in New Mexico. Accordingly, the Settling Parties urge the Special Master to adopt the Exhibits as revised and filed contemporaneously with these Suggestions.

SUGGESTIONS

1. **The Proposed Order's requirement that complaints be filed in the *inter se* proceeding is inconsistent with the procedural history of this case.**

[1] The Settling Parties have adopted the defined terms used by the Special Master in the November 20 Order for use in these Suggestions.

The instant proceeding was commenced with the filing of a Complaint by the State of New Mexico in March of 1975 ("1975 Complaint"). See 1975 Complaint attached hereto as Exhibit A. In January of 1976, the United States filed a Supplemental Answer making water rights claims, *inter alia*, on behalf of the Navajo Nation. See Supplemental Answer ("U.S. Suppl. Ans.") attached hereto as Exhibit B. The Supplemental Answer asserts a reserved right to sufficient water from the San Juan River stream system, from both surface and groundwater sources, to meet the reasonable present and future needs of the Nation with a time immemorial priority. U.S. Suppl. Ans., Aff. Claims ¶ 3. The Supplemental Answer also claims a right to divert 508,000 afy of water for the Navajo Indian Irrigation Project ("NIIP"), and state-based water rights for lands purchased by the Navajo Nation in fee and then taken into trust. *Id.*

The Navajo Nation intervened in this action and filed its Answer pursuant to the Court's Order dated December 14, 1977. See Order attached hereto as Exhibit C and Answer of Intervening Defendant, Navajo Nation ("NN Ans.") attached as Exhibit D. The water rights claims the Navajo Nation asserts in its Answer largely mirror those made by the United States, including a reserved right to use, divert, and impound sufficient ground and surface water to satisfy the present and future needs of the Navajo people for irrigation, domestic, industrial, aesthetic, recreational, streamflow, and any and all other purposes with a time immemorial priority. NN Ans. §III, ¶¶ 4-5. Like the United States, the Nation's also asserts water rights claims for NIIP and state-based rights. *Id.* §III, ¶¶ 6-7. Based on the forgoing, the Settling Parties suggest that the water rights claims of the Navajo Nation have been sufficiently pled. [2]

In the adjudication, claimants are required to file a Notice of Claim for their water rights. It is this filing that serves as the answer to the Complaint filed in 1975 with which they are

[2] The United States and the Navajo Nation reserve the right to amend these claims at an appropriate time.

served. *See* Scheduling Order Governing Adjudication of Irrigation Water Rights in the La Plata River Section, Section II(A)("The NOC . . . shall constitute your answer to the complaint.") The Navajo Nation filed a proper answer in the matter in 1977 which set forth generally the water rights they claim and which initiated the Nation's subfile. The only difference between the Navajo Nation's subfile and any other claimant's subfile is the size of their claim. Procedurally, however, they are identical; the Navajo Nation and the claimants were all served with the 1975 Complaint and all made claim to their water rights in their answers. For this reason, there is absolutely no reason for the Court to require the Navajo Nation to now file a complaint; in fact, it would not serve any purpose since the nation has already articulated its claims in its answer.

The purpose of this *inter se* proceeding on the proposed settlement of the Navajo Nation's claims is to provide the opportunity for *inter se* objections on a consent order on the Navajo Nation's subfile. The purpose is <u>not</u> to provide the opportunity to participate in the litigation of those claims. This *inter se* proceeding is not a subproceeding, as in the Santa Cruz / Truchas or Zuni adjudications, where participants are allowed the opportunity to intervene in the initial litigation of the claims. Only in those subproceedings, where the claimants are required to intervene "up front," are a subproceeding complaint and supplemental complaint filed, to which the other parties are required to file an answer and actively participate in the litigation of the claims. *See* the July 30, 2007, Preliminary Procedural and Scheduling Order Subproceeding 1: The Adjudication of Zuni Indian Water Rights Claims (No. 1188), in *United States v. A & R Productions*, 01cv00072-BB, 07cv006810-BB; January 3, 2008 Initial Scheduling and Planning Order, (No. 151), 07cv00681-BB, ¶ 3.4, Answers. This *inter se* proceeding is not to litigate the Navajo Nation's claims with all the parties, but to allow objections to a settlement, as in any other subfile consent order submitted to the court. The expedited nature of this proceeding only

expedites the *inter se* process on this consent order, prior to the entry of all the subfile orders in this adjudication.

In summary, requiring the filing of additional complaints in the proposed *inter se* proceeding is unnecessary, is without procedural basis, and will result in prejudicial delay while offering little if any explication of the issues before the Court.

2. **The Notice has been revised to address concerns about the adequacy of the description of the water rights to be adjudicated in the Partial Final obviating the need for a hydrographic survey of the Navajo Nation's main stem rights.**

In the Settling Parties view, the November 20 Order accurately reflects the agreement made at the November 17 hearing to revise the form of Notice to provide additional information about the Nation's water rights recognized in the Settlement. The Notice as revised delineates those main stem water rights that are based on past and present uses, as well as those predicated on projected future use of water. The Notice identifies federal reserved water rights, acknowledging that the Settlement also provides for a small quantity of state-based rights.

Both the November 20 Order and the Proposed Order address concerns expressed by the Objectors that there is insufficient information to evaluate the proposed water rights in the Settlement against water rights claims that could be asserted by the United States or the Navajo Nation. The revised Notice provides additional information describing the basis for the main stem water rights of the Navajo Nation recognized in the Settlement and ratified by Congress. Furthermore, the Settling Parties have agreed to make available existing information sufficient to describe and determine the elements of the rights to be adjudicated by the proposed Navajo Decree. Such information shall include: (1) existing records, reports, surveys and maps of the Navajo Indian Irrigation Project, the Hogback-Cudei Irrigation Project and the Fruitland-Cambridge Irrigation Project; (2) existing planning documents, permits and authorizations,

including federal legislation, environmental impact statements and records of decision, for the Animas-La Plata Project and the Navajo Gallup Water Supply Project; and (3) existing records of use, plans, permits and authorizations for Navajo municipal and industrial uses, which shall be made available for inspection at the document repositories identified in the Notice. The information to be provided satisfies the requirements of state adjudication statutes. NMSA §§ 72-4-13 through 72-4-17 (1978). Accordingly, there is no need for a hydrographic survey of the Nation's main stem water rights that the Settling Parties seek to have confirmed in the Partial Final Decree.

To further aid the Objecting Parties in evaluating the Settlement as a whole, the Notice has been revised to include an estimate of the non-mainstem water rights that will be the subject of a later proceeding to enter a Supplemental Final Decree. This revision to the Notice is in lieu of the requirement in the Proposed Order that the hydrographic survey of the Nation's main stem rights include an estimate of the non-main stem rights. Proposed Order ¶ 2 (Attached as Exhibit D to the Settling Parties' Notice of Settling Parties' Revisions to Previously Submitted Exhibits filed simultaneously with these Suggestions). The Notice has also been revised to include an affirmative statement that the non-main stem claims, which will be further described by a hydrographic survey, are limited to past and present uses. (Attached as Exhibit E to the Settling Parties' Notice of Settling Parties' Revisions to Previously Submitted Exhibits filed simultaneously with these Suggestions)

The requirement in the Proposed Order that a hydrographic survey of the Nation's existing main stem uses be completed prior to the commencement of the *inter se* proceeding, like the complaint requirement, will result in undue delay in the adjudication of the Nation's main stem rights while offering little in the way of additional information on the nature of those rights.

A hydrographic survey, which by definition is a survey of uses of water which have already been made, cannot project future water uses.

CONCLUSION

Requiring the United States and Navajo Nation to file additional complaints and to complete a hydrographic survey deprives the United States and the Navajo Nation of one of the significant benefits of its Settlement – avoidance of litigation over the claims. The adjudication of the Navajo Nation's water rights through the settlement process should not be more onerous than litigation without a settlement. Accordingly, the Settling Parties urge the Special Master to adopt their proposed expedited *inter se* process as reflected in the revised Exhibits.

Respectfully submitted this 15th day of December 2009.

NAVAJO NATION

Approved December 14, 2009

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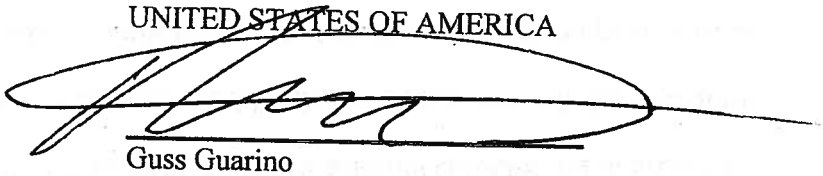
UNITED STATES OF AMERICA



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STATE OF NEW MEXICO

Approved December 14, 2009

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CERTIFICATE OF SERVICE

I hereby certify that, on December 15, 2009, a true and accurate copy of 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, along with a copy of this Certificate of Service, were mailed by U.S. mail, postage prepaid to the parties listed on the Court website lists entitled Attorney Mailing List and Pro Se Mailing List. I further certify that that 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, along with a copy of this Certificate of Service, were sent via email (but not sent via regular mail) to wrattorney@11thjdc.com, wrsubpro@11thjdc.com, and wrlaplata@11thjdc.com, to the parties and counsel of record listed

on the Court website lists entitled Attorney Electronic Service List, Section Wide Issue Subproceeding Electronic Service List, and La Plata Distribution List Electronic Service List.

Respectfully submitted,

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Counsel for the United States

IN THE DISTRICT COURT
IN AND FOR THE COUNTY OF SAN JUAN
STATE OF NEW MEXICO

STATE OF NEW MEXICO, in the relation of S. E. REYNOLDS, State Engineer,

Plaintiff,

v.

UNITED STATES OF AMERICA, CITY OF FARMINGTON, THE ECHO DITCH COMPANY, UTAH INTERNATIONAL, INC. BLOOMFIELD IRRIGATION DISTRICT F. F. MONTOYA, et al.

Defendants.

No. 75-184

COMPLAINT

COMES NOW the State of New Mexico, on the relation of S. E. Reynolds, State Engineer, and for its cause of action states:

1. That S. E. Reynolds is the duly appointed State Engineer of the State of New Mexico, charged by statute with the administration and supervision of the public waters of the State.

2. That this action is brought pursuant to Sections 75-4-4 through -8, NMSA, 1953 Comp., and 43 U.S.C. 666(a).

3. That the defendant United States of America and all other defendants herein are claimants to the right to impound, divert and/or use public waters of the San Juan River and its tributaries in the State of New Mexico.

4. That the subject matter of this suit is a statutory adjudication of all known claims, of whatever character, to the right to impound, divert and/or use public waters of the San Juan River Stream System in the State of New Mexico.

5. That the waters of the San Juan River Stream System in the State of New Mexico are public waters of the State of New Mexico and subject to appropriation and adjudication as provided by law, and that the San Juan River Stream System, and the uses therefore in the State of New Mexico, lie principally within San Juan County, New Mexico.

Exhibit A

6. That all known claims to the right to use waters of the said stream system in New Mexico were adjudicated in the final decree of the District Court in and for San Juan County, New Mexico in Cause No. 01690, the Echo Ditch Co., et al., v. The McDermott Ditch Co., et al., with the exception of the claims of the United States of America on its own behalf and on behalf of its wards, which claims have never been determined and decreed by any court.

7. That the United States of America is known to claim various and substantial rights to impound and/or divert and use public waters of the San Juan River Stream System on its own behalf and on behalf of its wards, to wit, the Jicarilla Apache Tribe of Indians, the Navajo Tribe of Indians and the Ute Mountain Tribe of Indians, under the Constitution and laws of the United States as well as under the Constitution and laws of the State of New Mexico.

8. That unless the claims of the United States of America on its own behalf and on behalf of its wards to rights in and to the waters of the San Juan River Stream System in New Mexico are determined and decreed as against the State of New Mexico and as against all other claimants of right to use the waters of the said stream system in New Mexico, the State Engineer will be unable to discharge his statutory duty to administer and supervise the waters of the San Juan River Stream System in New Mexico in accordance with law.

9. That the adjudication of all rights to the use of the waters of the San Juan River Stream System in the State of New Mexico, including those previously decreed in the said Cause No. 01690 as they may now exist, relative to the State of New Mexico, to the United States of America, and inter sese,

is necessary in order to make possible the lawful and orderly administration of all of the public waters of the said stream system in New Mexico.

10. That this Court has jurisdiction over the claims of the United States of America on its own behalf and on behalf of its Indian wards, in and to the waters of the said stream system whether such claims arise under the Constitution and laws of the United States or under the Constitution and laws of the State of New Mexico, and over the United States of America as a party defendant in this action, pursuant to 43 U.S.C. 666(a), known as the McCarran Amendment.

11. That a hydrographic survey describing all known uses of the waters of the said stream system, except those of the defendants United States of America and its wards, has heretofore been prepared by the State Engineer of the State of New Mexico and submitted to the Court in the said Cause No. 01690, a copy of which hydrographic survey and report has been filed in this cause; when and as supplemental hydrographic survey reports may be required they will be prepared and filed herein by the Plaintiff.

12. That the defendant, United States of America should be required to specify to the Court in writing, within a reasonable time, all and several of its claims to the right to impound, divert and/or use the waters of the said stream system in New Mexico for any purpose.

13. That all claimants to the right to impound, divert and/or use public waters of the said stream system in the State of New Mexico will be made known to the Court by the Plaintiff as soon as their names can be discovered, and the said claimants should thereafter be ordered joined as additional parties defendant herein.

WHEREFORE, Plaintiff respectfully prays:

1. That this honorable Court appoint its master to take evidence and make his report on all questions of fact and law,

which report shall determine all general and specific issues of fact properly arising in this action, and make such findings of fact and conclusions of law as may appear necessary and proper to him.

2. That the Defendants, and each of them, be required to appear before the court and describe fully and in detail what rights, if any, they claim to the use of the water in the said San Juan River Stream System, and more specifically state:

a. When said water right was initiated.

b. If a water right for irrigation is claimed, the lands to which it is appurtenant.

c. Source of water.

d. Purpose for which it is used.

e. The amount of water necessary for the beneficial use for which it was appropriated.

f. Such other matters as may be necessary to define a particular right and its priority.

3. That the court determine and define the water rights of each of the several defendants and enter its decree stating:

a. The water rights adjudged each party.

b. The source, priority, amount, purpose, periods, and place of use of each right.

c. The specific tracts of land to which the water right for irrigation is appurtenant.

d. Such other matters as may be necessary to define a particular right and its priority.

4. That the Court enter its order enjoining all illegal use of surface and underground waters of the San Juan River Stream System and where necessary require measuring devices at points of diversion in this stream system.

5. That the Court name additional parties from time to time as it appears necessary to determine and adjudicate all the water rights of the San Juan River Stream System in New Mexico.

6. That the court enter such preliminary, interlocutory, and final orders as are necessary to a final determination and adjudication of all water rights of the San Juan River Stream System in New Mexico.

Paul L. Bloom

PAUL L. BLOOM
Special Assistant Attorney General
for Plaintiff State of New Mexico

FILE

IN THE DISTRICT COURT OF THE ELEVENTH JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF SAN JUAN, STATE OF NEW MEXICO

STATE OF NEW MEXICO ex rel. S. E. REYNOLDS, State Engineer, Plaintiffs, v. UNITED STATES OF AMERICA, et al., Defendants.	)	CASE NO. 75-184

SUPPLEMENTAL ANSWER

The United States of America, defendant in this action, filed an answer in this proceeding on July 7, 1975, following its removal to the United States District Court for the District of New Mexico. That answer was expressly limited to claims to water rights in the San Juan River stream system made by the United States on its own behalf. The allegations of that answer are hereby incorporated herein.

On behalf of the Jicarilla Apache, Ute Mountain Ute, and Navajo Tribes of Indians, the United States asserts the following additional defenses and claims:

AFFIRMATIVE DEFENSE

This Court is without jurisdiction over the subject matter of this action insofar as it relates to the water rights of the three Indian tribes for whom the United States is Trustee. The immunity from suit enjoyed by the United States and the three Indian tribes has not been waived by 43 U.S.C. 666 (the

Exhibit B

"McCarran Amendment") with respect to water rights held in trust for such tribes.

AFFIRMATIVE CLAIMS

Should this action not be dismissed, the United States asserts the following affirmative claims on behalf of the three Indian tribes.

1. The Jicarilla Apache Reservation was established by Executive Orders dated February 11, 1887, November 11, 1907, and January 28, 1908. Large portions of the lands reserved in these Executive Orders for Indian use lie within the watershed of the San Juan River stream system. When such lands were withdrawn from the public domain sufficient water was reserved from the San Juan River stream system, from both surface and underground sources, to satisfy the reasonable present and future needs of the Indians residing on and utilizing such lands. The priorities of the rights so reserved date from the respective Executive Orders reserving the lands for Indian use.

2. The Ute Mountain Ute Indian Reservation was created by Act of Congress dated February 20, 1895, 28 Stat. 677. The portion of the lands so reserved which lies within the State of New Mexico is located entirely within the watershed of the San Juan River stream system. When such lands were withdrawn from the public domain sufficient water was reserved from the San Juan River stream system, from both surface and underground sources, to satisfy the reasonable present and future needs of

the Indians residing on and utilizing such lands. The priority of the rights so reserved dates from the Act of Congress reserving such lands for Indian use, February 20, 1895.

3. Portions of the Navajo Indian Reservation lie within the States of New Mexico, Arizona and Utah. The major portion of the reservation in New Mexico was reserved by Treaty between the Navajo Tribe and the United States of America, ratified June 1, 1868, 15 Stat. 667. Most of this original reservation area in New Mexico lies within the watershed of the San Juan River. These lands are a portion of the territory occupied and farmed by members of the Navajo Tribe since before Spanish exploration of New Mexico.

When these lands were reserved by Treaty for tribal use the Tribe retained the right to use sufficient water from the San Juan River stream system, from both surface and underground sources, to meet the reasonable present and future needs of the Indians residing thereon. The priority of the Tribe's water rights in connection with this portion of the reservation is immemorial.

Additional lands have been added to the Navajo Reservation within the New Mexico portion of the San Juan River watershed by Executive Orders dated January 6, 1880 and April 24, 1886. Certain lands outside the boundaries of the reservation as so enlarged have been reserved for the use of individual Navajo Indians and their families under the terms of the General Allot-

ment Act of 1887, 25 U.S.C. 334, the Act of July 4, 1884, 23 Stat. 96, extending the homestead laws to Indians, and the following Executive Orders: November 9, 1907 (as amended by the Executive Orders of January 28, 1908, December 30, 1908, and January 16, 1911), May 24, 1911, February 10, 1913, May 6, 1913, December 1, 1913, and January 15, 1917.

When these lands were reserved from the public domain for Indian use by executive order, allotment, or Indian homestead, sufficient water was reserved from the San Juan River stream system, from both surface and underground sources, to satisfy the reasonable present and future needs of the Indians residing on and utilizing such lands.

The United States also holds in trust for Navajo Indians certain lands in the New Mexico portion of the San Juan River drainage which were acquired by purchase from private owners. As to these lands the United States claims such rights as may have been enjoyed by their prior owners.

By the terms of the Act of June 13, 1962, 76 Stat. 96, 43 U.S.C. 615ii, et seq., the Secretary of the Interior was authorized to construct, operate, and maintain the Navajo Indian Irrigation Project, located entirely within the New Mexico portion of the San Juan River drainage. The principal purpose of the project is to provide irrigation water to approximately 110,630 acres of land, with an average annual diversion of 508,000 acre feet. In addition to such other rights as the Navajo Tribe may enjoy, the United States claims the right, in

connection with this project, to sufficient water to irrigate the 110,630 acres of project lands, with an average annual diversion not to exceed 508,000 acre feet of water, under the conditions specified in the Act. The priority of such right is June 13, 1962.

WHEREFORE, defendant prays:

1. For an order dismissing this action insofar as it relates to the water rights of the Jicarilla Apache, Ute Mountain Ute, and Navajo Tribes of Indians;

2. Should this Court retain jurisdiction to determine the water rights of the three Indian tribes, for an order declaring that the United States holds in trust for each tribe water rights sufficient to meet its present and future needs in connection with the lands reserved for its benefit in the New Mexico portion of the watershed of the San Juan River stream system and that the United States similarly holds in trust for the beneficial owners of Indian allotments and homesteads located outside the boundaries of these reservations water rights sufficient to meet the Indians' present and future needs in connection with such lands, all with the priorities indicated above;

3. For an order that the United States also holds in trust for the Navajo Tribe water rights with a priority of June 13, 1962 sufficient for the requirements of the Navajo

Indian Irrigation Project, under the conditions specified in the Act authorizing construction and operation of such project.

Respectfully submitted,

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United States Attorney

JAMES B. GRANT
Assistant United States Attorney

Charles N. Estes

CHARLES N. ESTES
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Washington, D.C. 20530

Attorneys for Defendant.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the United States' Supplemental Answer in this case was mailed this day to the following counsel of record:

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Dated: January 8, 1976

12-14-77

SAN JUAN COUNTY, N. M.
FILED
DEC 14 1977
COUNTY OF SAN JUAN
CLERK

STATE OF NEW MEXICO

IN THE DISTRICT COURT

STATE OF NEW MEXICO on the relation of S. E. REYNOLDS, State Engineer,

Plaintiff,

vs.

UNITED STATES OF AMERICA, et al,

Defendants.

No. 75-184

ORDER

This matter came before the Court upon the report and recommendations of the Special Master, Irwin S. Moise and the various objections filed herein, and the Court having considered the report and the briefs filed and being otherwise fully advised in the premises finds the report and recommendations of the Special Master should be adopted.

IT IS THEREFORE ORDERED:

1. That the Navajo, Ute Mountain Ute and Jicarilla Apache tribes are hereby granted leave to intervene as parties defendant;

2. That the respective answers and motions to dismiss of the tribes be filed as their responsive pleadings;

3. That the motions to dismiss are hereby denied.

Dated this 14th day of December, 1977.

James W. Musgrove

JAMES W. MUSGROVE
District Judge

7

Exhibit C

32

DISTRICT COURT
SAN JUAN COUNTY, N.

IN THE DISTRICT COURT OF THE ELEVENTH JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF SAN JUAN

FILED
JUN 22 1977
CLERK

STATE OF NEW MEXICO on the relation of S. E. REYNOLDS, State Engineer,

Plaintiff,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

NO. 75-184

MOTION FOR LEAVE TO INTERVENE, FILE ANSWER AND DISMISS

Proposed Intervening Defendant, the NAVAJO NATION (also known as the Navajo Tribe of Indians), by and through its undersigned attorneys, and for the reasons set forth in the attached Memorandum hereby moves this Court as follows:

A. Pursuant to Rule 24(a) of the New Mexico Rules of Civil Procedure for leave to intervene as a party defendant in this action since the Navajo Nation claims an interest relating to the property which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest and its interest is not adequately represented by any of the existing parties.

B. Pursuant to Rule 24(c) of the New Mexico Rules of Civil Procedure (and Rule 15(a) of the New Mexico Rules of Civil Procedure, if the Court deems that Rule applicable) for leave to file the attached "ANSWER OF INTERVENING DEFENDANT, THE NAVAJO NATION."

C. Pursuant to Rules 12(b) , 19(a) and (b) of the New Mexico Rules of Civil Procedure for an Order dismissing the complaint herein on the following grounds:

Exhibit D

(1) This Court lacks jurisdiction to adjudicate the water rights of the NAVAJO NATION, in view of the sovereign immunity of the NAVAJO NATION, the provisions of Section 2 of New Mexico's Enabling Act, 36 Stat. 557, 558-559, and Article XXI, Section 2 of the New Mexico Constitution.

Because of the nature and extent of the water rights of the NAVAJO NATION, as set forth in the ANSWER OF INTERVENING DEFENDANT, THE NAVAJO NATION, the NAVAJO NATION is an entity in whose absence complete relief cannot be accorded those already parties and since it claims an interest relating to the subject matter of the action and is so situated that the disposition of the action in its absence may as a practical matter impair or impede its ability to protect that interest, the action should be dismissed, the NAVAJO NATION being indispensable; and or

(2) Plaintiffs have failed to follow the applicabl state law regarding stream adjudications, §§ 75-4-4, et seq. N.M.S.A. (1953); and/or

(3) Even if an adjudication of water rights were permissible under applicable law, the inability of this Court or the State of New Mexico to effectuate the decree makes the entry of a decree a brutum fulmen, and as a matter of sound judicial discretion, the action should not proceed.

DATED: June 20, 1977

Respectfully submitted,

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By _____
George P. Vlassis

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The Navajo Nation

IN THE DISTRICT COURT OF THE ELEVENTH JUDICIAL DISTRICT COURT
SAN JUAN COUNTY, N.
IN AND FOR THE COUNTY OF SAN JUAN

JUN 22 1977

CLERK

STATE OF NEW MEXICO on the relation of S. E. REYNOLDS, State Engineer,

Plaintiff,

v.

UNITED STATES OF AMERICA, et al.,

Defendants.

NO. 75-184

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE, FILE ANSWER AND DISMISS

A. The Navajo Nation Should Be Permitted to Intervene.

It is not expected that any party will oppose the Motion to Intervene, accordingly, the Navajo Nation will be brief on this point.

The Complaint herein, and specifically paragraphs 7, 8 and 10 make it clear that Plaintiffs seeks to adjudicate the water rights of the Navajo Nation in this proceeding.

Since Plaintiffs have not moved to join the Navajo Nation as a party, it must be assumed that Plaintiffs looked to some other party to represent the interests of the Navajo Nation. Since the private parties to this litigation could hardly represent the interests of the Navajo Nation, the only two possibilities would be the United States or the State of New Mexico.

In its Memorandum in Support of Motion to Dismiss, filed on August 20, 1976 the attorney for the United States wrote:

"the United States has determined that it cannot fully represent the interests of the three Indian tribes whose water rights the state seeks to determine

in this litigation." At 1.

"the United States as trustee cannot adequately represent their [the three Indian tribes] interests." At 10.

An undated Memorandum in Support of Motion for Enlargement of Time apparently filed by the United States in April, 1977, makes the point explicit:

> "The Federal Government advised the Tribes to intervene in the litigation on their own behalf. Thus for the record, it is the position of the United States that it will not object to such intervention." At 2.

Thus, the United States has taken the position that it cannot represent the interests of the Navajo Nation and it has formally informed the Court (as it has privately informed the Navajo Nation) that the tribes should intervene.

Former counsel for Plaintiffs has also indicated that separate representation of Indian interests is appropriate, See Memorandum in Support of the Plaintiff and Certain Defendants, etc. dated October 5, 1977 at 16-23.

In fact, given the decision of the Court of Appeals for the 10th Circuit in State of New Mexico v. Aamodt, 537 F.2d 1102 (1976), cert. denied, ____ U.S. _____, 97 S.Ct. 1157 (1977 it could hardly do otherwise.

In Aamodt there were three basic questions: The right of Pueblos to appear through their own counsel; the duty, if any, of the State of New Mexico to avoid taking sides in the litigation (that is, act as parens patriae); and the basis for the water rights of the Pueblos.

In dealing with the first issue, the Court wrote:

> "Government counsel are competent and able but they concede that a conflict of interest exists between the proprietary interests of the United States and of the Pueblos. In such a situation, adequate representation

of both interests by the same counsel is impossible. The Pueblos had a right under Rule 24(a) to intervene and the denial of that right is appealable." 537 F.2d at 1106.

On the parens patriae issue, the Court held that under the New Mexico stream adjudication statutes §§ 75-4-4 -- 75-4-8 N.M.S.A. (1953), the state does not act parens patriae. 537 F.2d at 1107.

Rule 25(a) of the New Mexico Rules of Civil Procedure reads exactly like Rule 24(a) of the Federal Rules of Civil Procedure except that the New Mexico Rule leaves out the words "of the United States" after the words "when a statute". Similarly, in this action, like Aamodt, the State appears purportedly pursuant to §§ 75-4-4 -- 75-4-8 N.M.S.A. (1953).

Thus, under the ruling in Aamodt, since the Navajo Nation cannot look to any existing party to protect its interests, it has a right to intervene.

B. The Navajo Nation Should be Permitted to File its "Answer of Intervening Defendant, the Navajo Nation."

Similarly, it is not expected that any opposition will arise to the motion for leave to file the "ANSWER OF INTERVENING DEFENDANT, THE NAVAJO NATION."

While the United States has filed a Supplemental Answer dated January 8, 1976, given the United States' subsequent admission of its conflict of interest, it hardly seems appropriate to ask that the Navajo Nation be bound by the filing of a party which has admitted that a conflict of interest existed -- and presumably existed at the time the Supplemental Answer was filed.

Three additional considerations militate in favor of permitting the Navajo Nation's Answer to be filed:

First, Rule 24(c) of the New Mexico Rules of Civil

Procedure states that:

"The motion [for intervention] shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought."

The Navajo Nation's Answer is that pleading required by Rule 24(c).

Second, to the extent that the Navajo Nation's Answer is looked upon as an amendment to the Answer previously filed by the United States, Rule 15(a) of the New Mexico Rules of Civil Procedure specifically provides that "leave [to amend] shall be freely given when justice so requires." Under the circumstances, it is respectfully submitted that no party would be damaged and justice does so require.

Third, both the Special Master and the Court (in its Order dated March 22, 1977) have indicated that a more detailed statement of Indian claims is needed. It is submitted that the Navajo Nation Answer provides more detail than the Supplemental Answer previously filed by the United States and will thus serve to advance this action.

C. The Action Should be Dismissed, or in the Alternative the Court Should Not Adjudicate the Interests of the Navajo Nation.

Rather than burden the record by setting out at length the previous arguments advanced in this litigation in support of dismissing Indian claims from this action, the Navajo Nation asks that it be permitted to adopt by reference all the motions and memoranda and arguments previously filed and made by the United States on this point.

In addition to those arguments earlier advanced by the

United States with respect to dismissing the adjudication of Navajo water rights from this action, three alternate grounds for dismissal should be considered:

1. The Decision of the New Mexico Supreme Court in Chino v. Chino, N.M. , 561 P.2d 476 (1977) Precludes a Determination of Navajo Water Rights.

Chino involved the applicability of New Mexico law to fee land located within the Mescalero Apache Indian Reservation. That water rights are considered property rights and thus fall within the Chino holding is clear from Colorado River Conservation District v. United States, 424 U.S. 800, 819 (1976) (holding that Federal water rights including Indian water rights may be adjudicated in State courts) where the court observed that:

> "[W]e have recognized that actions seeking the allocation of water essentially involve the disposition of property . . ."

Thus, when we are talking about water rights adjudications, we are talking about adjudicating property rights, rights akin to real property. The Navajo water rights are located within the Navajo Nation and thus any adjudication of those rights is seeking to adjudicate rights of the Navajo Nation within the Navajo Nation.

The New Mexico Supreme Court, just three months ago, wrote in Chino that:

> "An action for forcible entry and detainer deals directly with the question of occupancy and ownership of land. When land lies within a reservation, enforcement of the owner's rights to such property by the state court would infringe upon the governmental powers of the tribe, whether those owners are Indians or non-Indians. Civil jurisdiction of lands within the reservation remains with the tribe."

* * * *

"For a state to move into areas where Indian law and procedure have not achieved the degree of certainty of state law and procedure would deny the Indians the opportunity of developing their own system." 561 P.2d at 479.

On March 17, 1977, the Secretary of the Interior published notice of intent to issue a new part 260 of Title 25 of the Code of Federal Regulations. (42 F.R. 14885-14887) This new part would provide for the establishment of water codes by Indian Tribes to regulate their use of reserved water. While it is arguable that no federal sanction is necessary for an Indian Tribe to regulate water use within its lands, the action by the Department of the Interior shows a clear statement of federal policy to provide "the Indians the opportunity of developing their own system" recognized and approved in Chino.

Nor does Chino stand alone. In Eastern Navajo Industries, Inc. v. Bureau of Revenue, 89 N.M. 369, 552 P.2d 805 (Court of Appeals 1976), cert. denied, 45 U.S.L.W. 3667 (#76-576, April 5, 1977), the Court of Appeals struck down the attempt of the Bureau of Revenue to tax a corporation 51% Navajo owned on its gross receipts from construction activity on the Navajo Reservation. Finding the tax to be an interference with Indian self-government, the Court of Appeals held it improper. 552 P.2d at 810.

Both Chino and Eastern Navajo Industries rely in part on McClanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973). McClanahan invalidated an Arizona State Income Tax levied on a Navajo residing on the Navajo Reservation and deriving her income from on-Reservation sources. The Supreme Court in McClanahan relied heavily on the Arizona Enabling Act

which is identical on the question of jurisdiction to the New Mexico Enabling Act. 411 U.S. 175-176.

The antecedent for Chino, Eastern Navajo Industries and McClanahan is Williams v. Lee, 358 U.S. 217 (1959). In that case, the Supreme Court held that the State Courts of Arizona had no subject matter jurisdiction over an action involving a Navajo which arose within the Navajo Reservation. Mr. Justice Black, in writing for the Court said:

> "There can be no doubt that to allow the exercise of state jurisdiction here would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves." 358 U.S. at 223.

The progress to Chino is clear. Williams v. Lee barred state action that infringed on Indian self-government and looked at a Court system being developed at that time by the Department of the Interior as needing protection. 358 U.S. at 222.

McClanahan looked at the disclaimer clause in the Enabling Act. Eastern Navajo Industries recognized that taxation amounts to infringement, and finally, in Chino the New Mexico Supreme Court recognized that property within Indian reservations is not to be subject to state courts, even when the Indian Tribe lacks a comparable procedure.

State ex rel Reynolds v. Lewis, 88 N.M. 636, 545 P.2d 1014 (1976) cannot withstand the impact of Chino when considered together with the action of the Secretary of the Interior to provide for Indian regulation of Indian water rights.

2. The Action Should Be Dismissed Because Plaintiffs Have Failed to Comply with Applicable State Law.

Paragraph 2 of the Complaint alleges that this action

is being brought pursuant to §§ 75-4-4 -- 75-4-8 N.M.S.A. (1953). Section 75-4-4 N.M.S.A. (1953) provides:

> "Upon the completion of the hydrographic survey of any stream system, the state engineer shall deliver a copy . . . to the attorney general of the state who shall, at the request of the state engineer, enter suit on behalf of the state for the determination of all rights to the use of such water . . ." (Emphasis added)

Paragraph 11 of the Complaint concedes that no hydrographic survey affecting the Navajo Nation has been completed, yet Plaintiffs want to adjudicate the water rights of the Navajo Nation.

While it is true that the leading case interpreting the New Mexico water adjudication process has approved a two-stage approach (See State v. Sharp, 66 N.M. 192,344 P.2d 943 (1959)), the assumption in State v. Sharp was that the state would proceed case-by-case in a stream system with an eventual overall hearing at which all parties would participate. 344 P.2d at 945.

In State v. Sharp, the State Engineer had completed several surveys of Mr. Sharp's lands. (344 P.2d at 946) This is not the case here. Plaintiffs wish to proceed to determine Navajo rights before any survey of Navajo lands has been made.

Moreover, the New Mexico stream adjudication procedure looks to the state to make the initial determination, and not the claimant. In this case, the Plaintiffs have turned things around and are demanding that the United States (and now presumably the Indian Tribes) set forth its claims. This action was not brought by the United States of the Navajo Tribe.

It is submitted that the State of New Mexico having brought this action, under the statutory water adjudication

procedure, it must comply with that procedure. Having failed to do so, it has no right to ask the defendants to do its work for it.

3. The Action Should be Dismissed, Because No Court Should Enter a Decree it Cannot Enforce.

In the Lewis case, the New Mexico Supreme Court was troubled by the question of how it could enforce a decree against an Indian Tribe:

> "The temporary restraining orders which were entered by the court below are not before us. The trial court did not rule upon the government's motion to rescind them, but granted the greater alternative relief sought by the government in dismissing the case. The propriety of their issuance is neither briefed nor argued here. Whether the State will seek to reassert or reinstate these orders we do not know. Such a course seems somewhat unlikely, since the State Engineer and Pecos Valley have said in their reply brief:
>
> > We have not asked the trial court to declare that either the United States or the Mescalero Apache Tribe is subject to the jurisdiction of the New Mexico State Engineer in respect to the diversion and use of the surface or underground waters of the Rio Hondo Stream System.
>
> In any case we do not wish to be understood by anything we have said to infer that such orders were properly entered." 545 P.2d at 1018 (Emphasis supplied)

While a decree in a water rights adjudication is not the same as an injunction, given the prayer for relief in the Complaint, it is appropriate to briefly examine the question of enforceability.

As stated in 42 Am.Jur.2d, Injunctions § 37:

"Equity has always regarded the problem of enforcing its judgment or decree as an important factor in determining whether injunctive relief is appropriate. Such relief may be denied where, although it is otherwise appropriate, there are inherent difficulties in framing or enforcing an effective order. [Footnote omitted] Equity will not grant an injunction which would require the defendant to do something impossible, [footnote omitted] nor will it attempt to grant injunctive relief which would be inefficient or of no benefit to the person seeking it."

It is hardly overstating the matter to note that the Decree will require an immense amount of court supervision, something which courts of equity are loath to do. As noted in Comment: Developments in the Law: Injunctions, 78 Harv.L. Rev. 994, 1012 (1965);

"The rule that a 'court of equity' will not issue an unenforceable decree of injunction' [footnote omitted] comprehends two reasons for denying injunctive relief: that the court cannot discover violations of its decree, and that it does not have the means to punish disobedience once discovered."

In writing for the court in Giles v. Harris, 189 U.S. 475 (1903), Mr. Justice Holmes observed:

"In determining whether a court of equity can take jurisdiction, one of the first questions is what it can do to enforce any order it may make." 189 U.S. at 487.

Consequently, the court refused an injunction directed at the voter registration of the State of Alabama then in effect. While the particular question at issue is that case has since been remedied by other means, the basic premise of enforceability of a decree as a justification or lack of justification

for the issuance of a decree still remains very much viable. A more recent case involving an injunction sought to require Ford Motor Company to supply its dealers with automobiles ready for radio installation but lacking Ford-made radios, provided a court with an opportunity to deal once again with the problem of enforceability of its order and whether or not the problem of enforceability would go to the question of whether or not an injunction should be issued. The case, Automatic Radio Mfg. Co. v. Ford Motor Co., 272 F.Supp. 744 (D. Mass. 1967), aff'd, 390 F.2d 113 (1st Cir. 1968), cert. denied, 391 U.S. 914 (1968), involved, to quote the court, the problem that:

> "supervision of the defendant's compliance might present untold difficulties, considering the number of Ford dealers, approximately 7,200, and the many options involved in ordering a new car and accessories. Difficulty of enforcement may itself constitute a sufficient reason for denying injunctive relief." 274 F.Supp. at 749.

Consequently, the court refused the injunction sought and this refusal was sustained by the Court of Appeals for the First Circuit.

Given the serious doubts of the New Mexico Supreme Court and the State Engineer that a decree rendered by a state court can be enforced, does it make sense to spend years in seeking such a decree? The Navajo Nation respectfully submits that such a decree would be a brutum fulmen and this Court should not seek to determine Navajo rights in this action.

D. Conclusion.

For all the foregoing reasons, the Navajo Nation asks (1) that it be permitted to intervene in this action; (2) that it be permitted to file its Answer and (3) that the

action be dismissed, at least insofar as it seeks to adjudicate Navajo rights.

DATED: June 20, 1977

Respectfully submitted,

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IN THE DISTRICT COURT OF THE ELEVENTH JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF SAN JUAN

STATE OF NEW MEXICO on the relation of S. E. REYNOLDS, State Engineer,	)	
Plaintiff,	)	NO. 75-184
v.	)	
UNITED STATES OF AMERICA, et al.,	)	
Defendants.	)	

ANSWER OF INTERVENING DEFENDANT, THE NAVAJO NATION

I. Answer to Plaintiff's Complaint.

1. Intervening defendant is without information sufficient to form a belief as to the truth of the allegations contained in paragraph 1.

2. Paragraph 2 states conclusions of law to which intervening defendant is not required to respond.

3. In response to the allegations of paragraph 3, intervening defendant admits that it is a claimant of the right to impound, divert and/or use waters of the San Juan River Stream System in the State of New Mexico (as well as the states of Utah and Arizona). Intervening defendant is without information sufficient to form a belief as to whether all other defendants (or which of them) are claimants to said water. Further, the allegation that said waters are "public waters" states a conclusion of law to which intervening defendant is not required to respond.

4. In response to the allegations of paragraph 4, intervening defendant denies that this suit is a valid statutory adjudication, but alleges that plaintiffs have failed to adhere to the provisions of the statute under which this suit is purportedly brought.

5. In response to the allegations of paragraph 5, intervening defendant admits that the San Juan River System within the State of New Mexico lies principally in San Juan County, New Mexico; denies information sufficient to form a belief as to the principal location of uses of the waters of the San Juan River System; and asserts that the remaining allegations of this paragraph state conclusions of law to which intervening defendant is not required to respond.

6. In response to the allegations of paragraph 6, intervening defendant admits that its claims for reserved water rights in and to the surface and ground waters of the San Juan River System in New Mexico have never been judicially determined, but is without information sufficient to form a belief as to wheth any other water rights claimed by intervening defendant or any other party have ever been finally determined in any court.

7. In response to the allegations of paragraph 7, intervening defendant admits that the United States, for and on behalf of intervening defendant, as well as intervening defendant itself claim the right to use, impound and/or divert substantial surface and ground waters of the San Juan River Stream System under the Constitution and laws of the United States and this state. Except as revealed by the Answer and Supplemental Answer and Statement of Federal Non-Indian Claims filed by the United States, intervening defendant is without information sufficient to form a belief as to the claims of the United States, the Jicarilla Apache Tribe of Indians and the Ute Mountain Tribe of Indians.

8. Intervening defendant is not required to respond to paragraphs 8, 9 and 10 as they merely state conclusions of law.

9. In response to the allegations of paragraph 11, intervening defendant is without information sufficient to form

a belief as to the truth of the allegations.

10. Intervening defendant is not required to respond to paragraphs 12 and 13 as they merely state conclusions of law.

II. Affirmative Defenses.

1. The complaint fails to state a claim against intervening defendant upon which relief can be granted.

2. In view of the sovereign immunity of the intervening defendant, the provisions of Section 2 of New Mexico's Enabling Act (36 Stat. 557, 558-559) and Article XXI, Section 2 of the New Mexico Constitution, this Court is without jurisdiction to adjudicate intervening defendant's rights in this action.

3. Because of the extent of intervening defendant's rights, it is an entity in whose absence complete relief cannot be accorded those already parties and since it claims an interest relating to the subject matter of the action and is so situated that the disposition of the action in its absence may as a practical matter impair or impede its ability to protect that interest, the action should be dismissed, intevening defendant being indispensable.

4. Plaintiffs have failed to follow the applicable state law regarding stream adjudications, §§ 75-4-4, et seq., N.M.S.A. (1953) and in particular § 75-4-4, in that, as admitted in paragraph 11 of the complaint, the hydrographic survey of the stream system is not complete, and, in fact upon information and belief with respect to intervening defendant's lands, has not even been begun. Consequently, the condition precedent of § 75-4-4 has not been met.

5. Even if this Court were to adjudicate the water rights of intervening defendant, the inability of this Court to effectuate any decree makes the entry of a decree a brutum fulmen; consequently, as a matter of sound judicial discretion, the action

should be dismissed insofar as it seeks to adjudicate intervening defendant's rights.

III. Affirmative Claims.

Should this action not be dismissed, or not be dismissed as to intervening defendant, the Navajo Nation asserts the following claims on its own behalf:

1. The lands of the Navajo Nation in New Mexico have never been fully and finally determined.

2. Whatever the final determination of the extent of the lands of the Navajo Nation in New Mexico is, it will in all likelihood consist of only a small part of the historical homeland of the Navajo people in New Mexico, lands occupied for hundreds of years before any European exploration, let alone European settlement and use.

3. While the rights of the Navajo Nation to lands in New Mexico have not yet been finally determined, Navajo Nation lands in New Mexico include those lands reserved by the Treaty of 1868, 15 Stat. 667, those lands covered by various Executive Orders and land withdrawals, including the Executive Orders of January 6, 1880, April 24, 1886, November 9, 1907, January 28, 1908, December 30, 1908, January 16, 1911, May 24, 1911, February 17, 1912, February 10, 1913, May 6, 1913, December 1, 1913, and January 15, 1917. Navajo Nation lands also include those set forth in the Act of March 3, 1925, 43 Stat. 1114, 1115, Act of June 20, 1950, 64 Stat. 249, Act of August 9, 1955 as amended July 11, 1956, 69 Stat. 555, 556, 70 Stat. 522, Act of April 9, 1960, 74 Stat. 40, 41, Act of June 13, 1962, 76 Stat. 96, 43 U.S.C.A. §§ 615 ii et seq. as amended by the Act of September 25, 1970, 84 Stat. 867, 43 U.S.C.A. §§ 615 kk et seq., and in particular 43 U.S.C.A. § 615kk, the Act of February 14, 1968, 82 Stat. 15, and the Act of October 17, 1975, 89 Stat. 577, 25 U.S.C.A. §§ 459 et seq.,

and in particular 25 U.S.C.A. § 459a.

Because the boundaries of the Navajo Nation in New Mexico are not defined, there may be other relevant laws, Executive Orders and Secretarial withdrawals which must be interpreted.

4. With respect to the Navajo Nation lands in New Mexico within the boundaries of the San Juan River System, the Navajo Nation claims the right to use, divert, impound for any and all purposes sufficient ground and surface water to satisfy the present and future needs of the Navajo people for irrigation, domestic, industrial, aesthetic, recreational and streamflow purposes.

5. Since these lands have been the traditional homeland for the Navajo people, a priority of "time immemorial" is claimed for all such water rights.

6. The Navajo Nation, pursuant to the provisions of the Act of June 13, 1962, 76 Stat. 96, 43 U.S.C.A. §§ 615ii, et seq. as amended, claims the right to divert 508,000 acre-feet per year pursuant to the terms of the Act, with a priority date of June 17, 1955, the date the Notice of Intention was filed with the New Mexico State Engineer. This claim is separate and distinct and in addition to the other claims of the Navajo Nation.

7. The Navajo Nation has purchased various lands within the San Juan River water system with both appurtenant and other water rights arising under state law. Accordingly, the Navajo Nation claims the right to use, divert and impound said waters pursuant to the laws of the State of New Mexico, excepting only such laws as require filing or recording of such rights.

WHEREFORE, Intervening Defendant prays:

1. For an Order dismissing this Action, at least insofar as it seeks to adjudicate intervening defendant's rights.

2. Should this Court retain jurisdiction to determine intervening defendant's rights, for an Order requiring Plaintiffs to complete the hydrographic survey of intervening defendant's rights before intervening defendant is required to take further action in this proceeding.

3. Should this Court retain jurisdiction to determine intervening defendant's rights, for an Order declaring that the United States holds in trust for intervening defendant water rights sufficient to meet the present and future needs of the Navajo people for irrigation, domestic, industrial, aesthetic, recreational and streamflow maintenance purposes, said water rights to be derived from the surface and ground waters of the San Juan River Stream System and with a priority of "time immemorial".

4. For an Order that the United States also holds in trust for intervening defendant the right to divert 508,000 acre-feet annually to fulfill the purposes of the Act of June 13, 1962, with a priority of June 17, 1955.

5. For an Order that intervening defendant holds such water rights arising under state law as may appear from further proceedings in this action.

6. For such other orders as to the Court seem just and proper in the circumstances.