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, v. UNITED STATES OF AMERICA, et al., Defendants.	NO. 75-184

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. 248, 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 home-land 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.