

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FILED
UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

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UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF NEW MEXICO, *ex rel.*,
STATE ENGINEER, A & R Productions,
et al.,

Defendants.

01-CV-00072-BDB/ACB

ZUNI RIVER BASIN

[Handwritten Signature]
CLERK OF DISTRICT COURT

**NAVAJO NATION'S
MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE**

The Navajo Nation, by and through its counsel the Navajo Nation Department of Justice, states the following in support of its Motion to Intervene:

Intervention as a Matter of Right

The Navajo Nation is a federally-recognized Indian tribe whose New Mexico lands include lands within the Zuni River drainage. Such lands are (1) lands beneficially owned by the Navajo Nation and held in trust by the United States; (2) lands owned by the Navajo Nation in fee simple; (3) lands congressionally conveyed to the Ramah Band of Navajo Indians by the Act of 1979, 94 Stat. 1060; and (4) allotted lands held in trust by the United States government for the benefit of individual members of the Navajo Nation.

The surface and underground water rights associated with these various Navajo lands will be adjudicated in this proceeding. The Navajo Nation claims aboriginal and reserved rights on its own behalf and on behalf of its members, pursuant to *Winters v. United States*, 207 U.S. 562 (1908) and *United States v. Powers*, 305 U.S. 527 (1938). The Navajo Nation should be allowed

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to intervene as a matter of right under Fed.R.Civ.P. 24(a) to assert such rights and to otherwise fully protect its interests in this adjudication. The Navajo Nation's ability to protect its interests will be significantly impaired or impeded if this action is litigated absent the Navajo Nation's participation as a party.

Although the United States of America has filed claims on behalf of the Navajo Nation and states that it represents the interests of both Navajo Nation, the Zuni tribe and individual Indian allottees in this proceeding, the Navajo Nation wishes to intervene in its own right in this matter to assert positions of its various constituents which may not be identical to those positions and claims asserted on its behalf by the United States.

In addition, the United States not only represents the various Indian interests, both tribal and individual, described above but it also represents the interests of various federal agencies claiming water rights for the Cibola National Forest, the El Morro National Monument, the El Malpais National Monument, the El Malpais National Conservation Area, and other federally-owned lands within the Zuni River basin in New Mexico. Considering the multiplicity of interests under the United States representation, the potential for conflicts of interests, and the complicated nature of the various Navajo Nation interests, the Nation believes its interests may not be adequately represented or protected unless it is allowed to intervene as a party in its own right to fairly and fully assert its interests.

The Tenth Circuit has recognized the right of an Indian tribe to intervene as a matter of right to represent its interests, even though tribal interests are also being represented by the United States. They court said when tribal interests are the subject of and will be affected by disposition of a case, and the United States is appearing in capacities that may be adverse to the tribe, adequate representation of both the tribal and United State's interests by the same counsel is impossible. *State of New Mexico v. Aamodt*, 537 F.2d 1102, 1106 (10th Cir. 1976). Since virtually identical circumstances exist in this case, the Navajo Nation also should be allowed to intervene as a matter of right under Fed.R.Civ.P. 24(a).

The Navajo Nation also owns state-based water rights associated with its fee lands in the Zuni River basin, including those water rights identified by File Nos. 1916 and 1916A. The Navajo Nation has an unquestionable right to intervene under Fed.R.Civ.P. 24(a) to defend such rights.

Permissive Intervention

The Navajo Nation asserts claims for surface and ground water rights within the Zuni River watershed attached to tribal trust lands, tribal fee lands and individual allotments held by the United States government in trust for Navajo Nation members. The assertion of these claims raises factual and legal issues that are common to the claims of the other parties: the nature and extent and priority date of the water rights of each party in the Zuni River basin adjudication.

The U.S. Supreme Court in *Arizona v. California II* permitted the five Indian tribes whose water rights were to be determined in that litigation to intervene in hearings on the merits. *Arizona v. California*, 460 U.S. 605 (1983). The Supreme Court stated:

Indian Tribes, at a minimum, satisfy the standards for permissive intervention set forth in the Federal Rules. The Tribes' interests in the water of the Colorado basin have been and will continue to be determined in this litigation since the United States' action as their representative will bind the Tribes to any judgment. . . . Moreover, the Indians are entitled "to take their place as independent qualified members of the modern body politic." . . . Accordingly, the Indians' participation in litigation critical to their welfare should not be discouraged.

460 U.S. at 612-14 [Citations Omitted.]

Conclusion

Therefore, the Navajo Nation satisfies the requirements for both intervention as of right under Fed.R.Civ.P. 24(a) and permissive intervention under the provisions of Fed.R.Civ.P. 24(b).

Respectfully submitted this 7th day of September 2001.

NAVAJO NATION DEPARTMENT OF JUSTICE
LEVON B. HENRY
Attorney General



Stanley M. Pollack, Attorney
Beverly Ohline, Attorney
P.O. Drawer 2010
Window Rock, Arizona 86515
(928) 871-6931 (phone)
(928) 871-6177 (fax)

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of September 2001, a true and correct copy of the foregoing NAVAJO NATION'S MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE was served by United States Postal Service first class, postage pre-paid mail to those on the LIST OF PERSONS RECEIVING SERVICE which is incorporated here by reference.

By: Pat 587
Legal Secretary

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