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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

The Navajo Nation, Plaintiff, v. United States Department of the Interior, et al., Defendants.	**No. 03-CV-00507-PCT-GMS** **FEDERAL DEFENDANTS' RESPONSE IN PARTIAL OPPOSITION TO PLAINTIFF'S MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT (ECF NO. 335)**

Federal Defendants hereby submit their Response in Partial Opposition to Plaintiff's Motion for Leave to File Third Amended Complaint (the "Motion") (ECF No. 335).

INTRODUCTION

Plaintiff asserts that "the Navajo Nation desires to pursue its breach of trust claim against the Federal Defendants and to have a decision based on the merits, not on pleading technicalities, and the proposed amendments simply refine and sharpen the focus of that claim." Pl.'s Mem. of Points & Auths. in Supp. of Mot. for Leave to File 3d Am. Compl. ("Pl. Memo.") at 13 (ECF No. 335-1). However, a review of the Proposed Third Amended Complaint ("Proposed TAC"), ECF No. 335-2, reveals that Plaintiff is doing far more than simply seeking to "refine and sharpen the focus" of its breach of trust claim. Specifically, Plaintiff seeks to re-litigate its prior challenges to the administrative decisions of the Secretary of the Interior that pertain to the

management of the Colorado River (the "Guidelines")[1] and to bring two new claims that exceed the narrow scope of the remand. The Court should deny the Motion as to both requests.

The Ninth Circuit affirmed this Court's dismissal of Plaintiff's challenges to the Guidelines under the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706, deeming Plaintiff's claims of injury from the Guidelines too speculative to confer standing. The Ninth Circuit also affirmed the denial of leave to file a third amended complaint as to these claims. The Court should therefore reject Plaintiff's request to amend to challenge the Guidelines under a different theory, as this challenge suffers from this same jurisdictional defect, would result in re-litigation of the issue of Plaintiff's standing, and is barred as futile under the law of the case doctrine.

Likewise, the Court should deny Plaintiff's request to add two new causes of action—the proposed "First Cause of Action: Breach of 1849 Peace Treaty and 1868 Treaty" and the proposed "Third Cause of Action: Failure to Consult with the Navajo Nation." The Ninth Circuit remanded this case for the narrow purpose of "consider[ing] fully the Nation's breach of trust claim in the first instance, after entertaining any request to amend the claim more fully to flesh it out." Navajo Nation v. Dep't of the Interior, 876 F.3d 1144, 1173 (9th Cir. 2017) (emphasis added). The Ninth Circuit did not authorize further amendment to bring two entirely new claims. The two new claims proposed by Plaintiff are outside the scope of the limited remand, untimely, redundant with the breach of trust claim, and prejudicial. Federal Defendants therefore oppose the Motion as to those portions of the Proposed TAC that seek to challenge the Guidelines and add two new claims for relief. Federal Defendants do not otherwise oppose the Motion as to the portions of the Proposed TAC that seek to add factual allegations in support of the remanded breach of trust claim. However, Federal Defendants reserve all defenses concerning that claim, including defenses that they may raise by way of a motion to dismiss.

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[1] As discussed below, the Guidelines include the "Surplus" and "Shortage" Guidelines, published in 2001 and 2008, clarifying how the Secretary would make determinations from year to year that affect the amount of water allocated to each state in the Colorado River Basin during times of "surplus" and "shortage," or so-called "wet" and "dry" conditions.

PROCEDURAL BACKGROUND

I. Prior Litigation Before the District Court.

A. Early Case History and Plaintiff's Filing of Two Amended Complaints.

Plaintiff Navajo Nation filed this action in March 2003 against the Department of the Interior, the Secretary of the Interior, the Bureau of Reclamation, and the Bureau of Indian Affairs, bringing claims under NEPA and the APA in connection with the Secretary's management of the Lower Colorado River. In particular, Plaintiff alleged in its original complaint that the Secretary violated NEPA by failing to adequately "consider and protect the Nation's rights to, and interest in, water" in issuing certain 2001 Colorado River Surplus Guidelines. Navajo Nation, 876 F.3d at 1159. The Surplus Guidelines "would 'determine the conditions under which the Secretary would declare the availability of surplus water for use within' the Lower Basin states every year," consistent with the Supreme Court's 1964 Decree in Arizona v. California, 376 U.S. 340 (1964), "the Colorado River Basin Project Act, and the Operating Criteria adopted pursuant to that Act." Id. at 1157. In addition, Plaintiff "further alleged that the United States had breached its trust obligations to the Nation by failing to consider or protect the Nation's water rights while managing the Colorado River." Id. at 1159.

Following the intervention of the states of Arizona, Nevada, and Colorado and local government entities from those states and the State of California as defendants, the Court stayed the case for nearly a decade to facilitate water rights settlement discussions. Id. at 1159–60. However, those negotiations ultimately did not result in a final, approved water rights settlement, and the Court lifted the stay in 2013. Id. at 1160. Plaintiff subsequently amended its complaint twice. The First Amended Complaint added "a claim to challenge the Colorado River shortage guidelines that the Secretary had approved and implemented during the stay." Pl. Memo. at 2. The Second Amended Complaint, filed after Federal Defendants and Defendant-Intervenors filed motions to dismiss the First Amended Complaint, removed the Nation's "claim against certain contracts for the delivery of Colorado River water." Id. at 4. The parties subsequently completed briefing and argument on their motions to dismiss.

B. The District Court's Dismissal of All Claims and Denial of Leave to File a Fourth Complaint.

On July 22, 2014, the Court granted Federal Defendants' motion and dismissed all of Plaintiff's claims without prejudice on the grounds that Plaintiff lacked standing for its NEPA and APA claims and that there was no waiver of sovereign immunity for Plaintiff's breach of trust claim. See Navajo Nation v. U.S. Dep't of the Interior, 34 F. Supp. 3d 1019, 1030 (D. Ariz. 2014). The Court determined that Plaintiff lacked standing to bring its NEPA and APA claims because it had failed to establish that it was reasonably probable that the Guidelines "will create a system of reliance that will somehow make it harder for the Nation to satisfy its water rights." Id. at 1027. The Court dismissed Plaintiff's breach of trust claim on the grounds that Plaintiff did not challenge any final agency action under that claim, which is a jurisdictional prerequisite to the applicability of the waiver of sovereign immunity under Section 702 of the APA. Id. at 1030. In addition, the Court pointed to deficiencies in the breach of trust claim on its merits, noting Plaintiff's failure to identify any specific duty that Federal Defendants had breached. See id. at 1028 ("The Nation has not identified a relevant, specific duty that pre-existed the Compact and that was owed to it by the Federal Defendants that would either support its general breach of trust claim or its claim that the Federal Defendants have breached a specific duty to the Nation in undertaking any of the challenged management activities in the Lower Basin."). Finally, the Court also appeared to question Plaintiff's standing for the breach of trust claim. Id. at 1029 ("the Nation's claim to Lower Basin water would be wholly unimpaired by any third-party claim that post-dated the time from which the Nation could base its claim . . . . This only highlights the non-existence of a breach of trust claim against the United States for actions taken with third parties that post-date the time from which the Nation bases its claims.").

Plaintiff subsequently filed a motion for post-judgment relief under Fed. R. Civ. P. 60(b)(6), requesting "that the Court, rather than dismissing its action without prejudice, dismiss the action with leave to amend" several of its NEPA claims. Navajo Nation v. U.S. Dep't of the Interior, No. CV-03-00507-PCT-GMS, 2014 WL 12796200, at *1 (D. Ariz. Oct. 1, 2014). However, the Court denied that motion based, among other reasons, on Plaintiff's failure in its

two previous amended complaints to correct deficiencies in its claims and its failure to identify the specific amendments it would make if granted leave to file a fourth complaint:

> The Nation does not explain why it opted not to make any such changes [to address the issues identified in the motions to dismiss], or why it was unable to file an additional Motion to Amend prior to the dismissal of this action. The Nation asserts that it may be time-barred from refiling this case, making the dismissal without prejudice effectively one with prejudice, but it does not explain what statute of limitations might bar either its National Environmental Policy Act ("NEPA") or general breach of trust claims.
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> Further, the Nation has failed to identify any specific amendments it would make in a Third Amended Complaint if granted leave to amend. It generally asserts that it would bolster its NEPA claims with additional facts and that it will "allege additional facts, statutory and other legal bases" for its breach of trust claim. (Doc. 11 at 9–10.) However, the Nation does not specify what these additions will be or how they will overcome the lack of standing and an applicable sovereign immunity waiver identified in the Court's Order dismissing the Second Amended Complaint. Without this information the Court and Defendants are unable to evaluate whether any such additions would be futile. Thus, given the Nation's previous opportunities to amend and the unclear futility of further amendments, the Court finds that justice does not require granting the Nation a fourth opportunity to draft its Complaint.

Id. at *2.

II. Appeal to the Ninth Circuit.

A. The Ninth Circuit Affirmed the Dismissal of Plaintiff's NEPA and APA Challenges to the Guidelines for Lack of Standing and the Denial of Further Leave to Amend as to those Claims.

On appeal, the Ninth Circuit affirmed the dismissal of the NEPA and APA claims, deeming the Nation's claims of injury due to the Guidelines—both as to "the Nation's unadjudicated water rights [and] its practical water needs"—too speculative to confer standing. Navajo Nation, 876 F.3d at 1167. As to the Nation's unadjudicated water rights, the Court rejected the Nation's assertions that "the Secretary's actions will create a complex and difficult-to-reverse combination of third-party reliance and political inertia that will frustrate future

attempts by the Nation to secure and enjoy its *Winters* rights."[2] Id. at 1162. As the Court explained:

> [T]he posited injury to the Nation's unquantified *Winters* rights due to the Guidelines is too speculative to confer standing. The string of contingencies connecting the Guidelines to the frustration of the Nation's rights is not only long—not disqualifying in itself—but spindly, too. The Nation's allegations about the future development of reliance interests, and the government's intransigence in upsetting these interests in pursuit of the Nation's unadjudicated water rights, are supported by "no facts, figures, or data." *See* [*Bell v. Bonneville Power Admin.*, 340 F.3d 945, 951 (9th Cir. 2003)].
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> For example, the Nation offers no support for its allegation that the United States will shirk its trust duties for fear of upsetting the water rights apple-cart. From the Secretary's stated attempt to avoid "destabilizing litigation," and to gain consensus among the Basin States for the challenged Guidelines, the Nation predicts that the United States would no longer be inclined to pursue water rights for the Nation if such actions necessitated a reallocation of rights or potentially upset the multi-state consensus underlying the Guidelines. But the tribe offers no actual support for this conjecture—no statements by any government officials, for example, and no pattern of such behavior in the past.

Id. at 1163 (footnote omitted).

Likewise, as to the Nation's more generalized interest in securing water for the Navajo Reservation, the Court rejected Plaintiff's claims of injury from the Guidelines for two principal reasons. First, for the same reasons as discussed above, the Court rejected as overly speculative "the Nation's reiterated argument that the Guidelines impair the Nation's interests in, and need

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[2] As an initial matter, the Court noted that Plaintiff did not contend that the Guidelines operated to directly impair the Nation's unquantified water rights, given that it is commonly understood that the Nation's federal reserved water rights (a/k/a "*Winters*" rights), if established, would be superior to all claims in the Colorado River Basin with a junior priority. See Navajo Nation, 876 F.3d at 1162–63 ("Critically, the Nation does not contend that the Guidelines *legally* impair any unquantified rights it has in Lower Basin water. It is common ground among all affected that *if* the Nation obtained decreed rights in the Lower Colorado Basin, that entitlement would trump all claims with a later priority date, 'regardless of whether that water has been developed or relied upon by third parties with junior priority dates.'"). Rather, the Court determined that Plaintiff alleged injury by claiming "that the Guidelines threaten to solidify a web of reliance interests and incentives that, as a *practical* matter, may prevent the Nation (or disincline the United States, as its trustee) from enjoying or pursuing those decreed rights." Id. at 1163.

for, Lower Basin water by establishing a system of third-party reliance that will make it harder to satisfy this need." Id. at 1165. Plaintiff had simply failed to allege "a 'reasonably probable' threat from the Guidelines to its interest in accessing Lower Basin water." Id. at 1165–66.

Second, the Court found that it was the previous allocations of water to Arizona under the Law of the River that potentially limited the amount of water available to the Nation, not the subsequently adopted Guidelines implementing those allocations. Id. The Court specifically pointed to Arizona's allocation under the Supreme Court's 1964 decree in Arizona v. California and the statutory requirements of applicable federal law, including the Colorado River Basin Project Act, which limited Arizona's allotment of and priority to Colorado River water:

> [W]e conclude that the Nation has not plausibly alleged that the Guidelines themselves—independently of the pre-existing water allotments—will impair the tribe's interest in the availability of Lower Basin water. Construed as liberally as possible in the Nation's favor, the complaint does not explain why or how the Secretary's decisions on surplus and shortage declarations, or the Shortage Guidelines' rules on the banking of [Intentionally Created Surplus] water, threaten to reduce the amount of water available to the Nation.
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> Arizona's relative allotment of surplus water is fixed by the *1964 Decree*. *See* [*1964 Decree* art. II(B)(2), 376 U.S. at 342]. The Guidelines do not make any allotments during times of surplus or shortage; they only ascertain the parameters for declaring whether there is a surplus or shortage. And it is another statutory provision, not the Guidelines, that triggers a statutory prioritization scheme that disadvantages Arizona. *See* 43 U.S.C. § 1521(b).

Id. at 1166. Based on these findings, the Court ruled that Plaintiff lacked standing, as Plaintiff's alleged injury is attributable to the previous allocations of water to Arizona under the Law of the River rather than any system of third-party reliance on the waters of the Colorado River attributable to the Guidelines. As summarized by the Court, "the challenged Guidelines do not, as far as the Nation has alleged, present a reasonable probability of threat to either the Nation's unadjudicated water rights or its practical water needs." Id. at 1167.

Finally, the Court affirmed the denial of Plaintiff's request to amend its prior complaints to attempt to remedy these defects in its standing to challenge the Guidelines. Although the Court noted that "the Nation sufficiently explained why the district court's dismissal of claims

was effectively with prejudice," id. at 1173, it nonetheless determined that denial of leave to amend was appropriate:

> The Nation amended its complaint twice before the court dismissed its claims. Although the Nation argues that it amended its complaint each time for other reasons, it had ample opportunity at those junctures to address the deficiencies in its pleading—deficiencies which, at least at the time the Second Amended Complaint was filed, the defendants had identified in their motions to dismiss. *See Premo v. Martin*, 119 F.3d 764, 772 (9th Cir. 1997); *Weeks v. Bayer*, 246 F.3d 1231, 1236 (9th Cir. 2001). The Nation also had time after filing its Second Amended Complaint, but before the court dismissed its claims, to seek further leave to amend. *See Premo*, 119 F.3d at 772 (noting the plaintiff's "ample opportunity to file an amended complaint with new allegations before the court issued its final judgment"). Based on the Nation's past failures to amend its complaints and its present failure specifically to identify how it would amend its pleading to overcome its standing problems, the district court reasonably concluded that the Nation had not negated futility.

Navajo Nation at 1174 (footnote omitted). Thus, the Ninth Circuit Court affirmed this Court's denial of further leave to amend, both because the Nation had already had ample opportunity to amend (and, in fact, had already amended its complaint on two prior occasions) and because further amendment would be futile.

B. The Ninth Circuit Remanded the Case for the Limited Purpose of Considering Plaintiff's Breach of Trust Claim.

The Ninth Circuit did reverse the ruling that Section 702 of the APA does not provide a waiver of sovereign immunity as to Plaintiff's breach of trust claim. Under that claim, Plaintiff alleged a breach of trust obligations based upon "Interior's failure 'to determine the extent and quantity of water rights . . . or otherwise determine the amount of water which the [Nation] requires from the Lower Basin to meet the needs of the [Nation].'" Id. at 1167. According to the Court, "the waiver of sovereign immunity in § 702"—which provides a waiver for an action that "seeks 'relief other than money damages' for claims 'that an agency or an officer or employee thereof acted or failed to act in an official capacity'"—"applies squarely to the Nation's breach of trust claim." Id. at 1173 (quoting 5 U.S.C. § 702). The Court did not otherwise reach the issue of whether the breach of trust claim should be dismissed for failure to state a claim, finding that "[t]he district court expressed some tentative views on the merits of this claim but ultimately

rested its dismissal squarely on the bar of sovereign immunity." Id. at 1173. The Court accordingly remanded the claim for the narrow purpose of "consider[ing] fully the Nation's breach of trust claim in the first instance, after entertaining any request to amend the claim more fully to flesh it out." Id. (emphasis added). The mandate of the Court, issued January 26, 2018, stated simply: "The judgment of this Court, entered December 04, 2017, takes effect this date. This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure."

III. The Current Motion.

Against this backdrop, Plaintiff filed the Motion on April 13, 2018. However, rather than limiting the Proposed TAC to additional allegations in support of the remanded breach of trust claim to "more fully flesh it out," Plaintiff seeks to significantly expand its complaint to again challenge the Guidelines and include two new claims—captioned as breach of treaty and failure to consult claims. The Court should deny both aspects of the Motion. Plaintiff's new allegations and requests for relief concerning the Guidelines should be disallowed as futile, inconsistent with the Ninth Circuit's ruling, and barred by the law of the case doctrine. The Ninth Circuit unambiguously ruled that Plaintiff lacks standing to challenge the Guidelines and affirmed denial of further leave to amend as to these challenges. These same rulings apply whether Plaintiff challenges the Guidelines under NEPA, a breach of trust claim, or any other cause of action. Likewise, the two new claims proposed by Plaintiff are outside the narrow scope of the remand proceedings, untimely, prejudicial, and redundant with the breach of trust claim. Federal Defendants do not otherwise object to the Motion as to those portions of the Proposed TAC that seek to add factual allegations in support of the breach of trust claim, but reserve all defenses concerning that claim, including defenses that may be raised by a motion to dismiss.

LEGAL BACKGROUND

Under Federal Rule of Civil Procedure 15(a)(2), a "court should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2). Consistent with this language, "[i]n the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously

allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given.'" Foman v. Davis, 371 U.S. 178, 182 (1962). Although "the grant or denial of an opportunity to amend is within the discretion of the District Court," the court should indicate which of these factors supports denial of leave to amend, as "the outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion." Id.

"The district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint." Allen v. City of Beverly Hills, 911 F.2d 367, 373 (9th Cir. 1990) (citation omitted). As this Court ruled in Garzon v. City of Bullhead, No. CV-10-8151-PHX-GMS, 2011 WL 3471215, at *3 (D. Ariz. Aug. 8, 2011):

> As Plaintiff has had three opportunities to properly bring a § 1983 claim, this Court, in its discretion, dismisses Count I of Plaintiff's Second Amended Complaint with prejudice and denies Plaintiff leave to amend or re-plead. *See* [*Foman*, 371 U.S. at 182] (finding that "repeated failure to cure deficiencies by amendments previously allowed" is grounds for denying leave for a Plaintiff to amend his complaint).

Likewise, "[l]ate amendments to assert new theories are not reviewed favorably when the facts and the theory have been known to the party seeking amendment since the inception of the cause of action." Sanders v. Energy Nw., 812 F.3d 1193, 1198 (9th Cir. 2016) (quoting Royal Ins. Co. of Am. v. Sw. Marine, 194 F.3d 1009, 1016–17 (9th Cir. 1999) (internal quotation marks omitted)). Additional factors supporting denial of leave to amend include where the new claims would be similar to existing claims or where amendment would clearly be futile. See Sisseton-Wahpeton Sioux Tribe v. United States, 90 F.3d 351, 355–56 (9th Cir. 1996).

In applying the factors set forth above, courts have authority to narrow rather than entirely disallow amendment, if some but not all of the requested amendments are objectionable. See 6 Charles Alan Wright, Arthur R. Miller, Mary Kay Kane, A. Benjamin Spencer & Adam N. Steinman, Fed. Prac. & Proc. Civ. § 1486 (3d ed. 2018) ("The court also may narrow the scope of the amendment if it considers the request too broad. Thus, in one suit a party's right to amend was conditioned on the removal of thirty-four paragraphs from the proposed amendment because it dealt with matter that already had been subject to a final adjudication.") (citing Spampinato v.

M. Breger & Co., 176 F. Supp. 149 (E.D.N.Y. 1958), aff'd on other grounds, 270 F.2d 46 (2d Cir. 1959), cert. denied, 361 U.S. 944, 80 S. Ct. 409, 4 L. Ed. 2d 363 (1960)).

Where a case has been fully litigated through appeal, the district courts must further ensure that any amendments do not result in re-litigation of issues resolved on appeal or exceed the scope of the remand. The law of the case doctrine "generally precludes a court from reconsidering an issue decided previously by the same court or by a higher court in the identical case." Hall v. City of Los Angeles, 697 F.3d 1059, 1067 (9th Cir. 2012) (citation omitted). "The issue in question must have been decided explicitly or by necessary implication in the previous disposition." Id. This doctrine is "a rule of practice, based upon [the] sound policy that when an issue is once litigated and decided, that should be the end of the matter." United States v. U.S. Smelting Ref. & Mining Co., 339 U.S. 186, 198 (1950).

In addition, district court proceedings on remand may not address issues that conflict with the remand instructions. See Mendez-Gutierrez v. Gonzales, 444 F.3d 1168, 1172 (9th Cir. 2006) ("we have repeatedly held, in both civil and criminal cases, that a district court is limited by this court's remand in situations where the scope of the remand is clear."); Twentieth Century Fox Film Corp. v. Entm't Distrib., 429 F.3d 869, 883 (9th Cir. 2005) ("There is nothing in our prior decision that indicates that we issued an open remand. Rather, in remanding to the district court, our opinion contemplates a trial to resolve the only remaining genuine issue of material fact"); United States v. Pimentel, 34 F.3d 799, 800 (9th Cir. 1994) ("In light of this clear evidence that the scope of our remand was limited to the single sentencing issue raised in Pimentel's prior appeal, the district court was without authority to reexamine any other sentencing issues on remand"). In the motion to amend context, this principle mandates the denial of requests to amend that would add issues and claims exceeding the scope of the remand.

Applying this principle, the Ninth Circuit in United States v. Thrasher, 483 F.3d 977 (9th Cir. 2007), ruled that a limited remand for a single purpose bars consideration of other issues:

> *Thrasher I* remanded for a single purpose: "a hearing to resolve *a* critical disputed fact: whether Scarlett told Storkel that she was going to testify unfavorably to Thrasher." (Emphasis added.) The plain language of the disposition precluded the district court from considering any other arguments concerning Storkel's

> effectiveness. We therefore affirm *Thrasher II* as well as the district court's denial of Thrasher's motion for reconsideration.

Id. at 983. To similar effect, the Ninth Circuit in In re. Beverly Hills Bancorp, 752 F.2d 1334 (9th Cir. 1984), denied amendment following appeal to assert "an entirely new theory of recovery" that exceeded the scope of the mandate:

> The only issue remaining on remand was our direction to interpret "interest earned," as used in section 5(c)(iii) of the Settlement Agreement. By necessary implication, this foreclosed a trial on an entirely new theory of recovery. Notwithstanding this specific direction to interpret "interest earned," however, the bankruptcy court failed to make any findings on this issue.
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> Even if our mandate and denial of the Trustee's petition for rehearing or clarification were sufficiently ambiguous to permit the bankruptcy court to entertain a motion to amend the pleadings, the amendment sought in this case would be inappropriate. The general rule that leave to amend under rule 15 should be freely granted, *see* [*Foman*, 371 U.S. 178], will not be extended without limit when a rule 15 motion is brought after a claim has been fully litigated on the merits through appeal. At some point, there must be finality. Permitting amendment in this case would not enhance finality, but instead would encourage seriatim judgments in the same basic dispute, as a plaintiff continues to put forth new theories of recovery. *See Zenith Radio Corp. v. Hazeltine Research, Inc.,* 401 U.S. 321, 332–33, 91 S.Ct. 795, 803–04, 28 L.Ed.2d 77 (1971).

Id. at 1337–38. Thus, any amendment on remand shall not exceed the scope of the mandate, and a limited remand for a single purpose precludes amendment to raise other issues.

ANALYSIS

I. Plaintiff's Request to Include Allegations and Requests for Relief in the Proposed TAC Concerning the Guidelines is Futile, is Inconsistent with the Ninth's Circuit's Order, and Violates the Law of the Case Doctrine.

The Court should disallow Plaintiff's efforts to dramatically expand the scope of the remand to include extensive allegations and requests for relief in the Proposed TAC concerning the very Guidelines that the Ninth Circuit ruled Plaintiff lacks standing to challenge. Under the law of the case doctrine, Plaintiff may not re-litigate issues decided expressly or impliedly by the Ninth Circuit on appeal. See Hall, 697 F.3d at 1067. However, that is exactly what Plaintiff seeks to do here. The Proposed TAC includes extensive allegations concerning the Guidelines and other related Colorado River management actions and how their adoption allegedly violates

the Federal Defendants' trust responsibility. See Proposed TAC ¶ 1 at 3:12–15; id. ¶ 10 at 5:21–22 and 6:1–2; id. at ¶¶ 68, 91–106. The Proposed TAC also discusses at length how the Guidelines purportedly induced reliance by the Lower Basin States on the waters of the Colorado River to the alleged injury of the Navajo Nation. See id. ¶¶ 49–50, 107–108, 116–118. Finally, Plaintiff's proposed causes of action and requests for relief include specific challenges to the Guidelines, see Proposed TAC ¶¶ 131–132, 135, as well as requests that directly or indirectly seek to set aside the Guidelines. See First Prayer For Relief (requesting a declaration that Federal Defendants must "(3) manage the Colorado River in a manner that does not interfere with the plan to secure water from the Colorado River needed by the Navajo Nation"); Second Prayer for Relief at subparagraphs (c) (same) and (d) (requesting the Court to "require the Federal Defendants to analyze their actions in adopting the Shortage and Surplus Guidelines, and other management decisions identified herein, in the light of the plan to secure the water from the Colorado River . . . .").

A sampling of the language in Plaintiff's Second Cause of Action only underscores the point that a significant portion of the Proposed TAC challenges the Guidelines based upon the theory that they injure the Navajo Nation by causing third-party reliance on the waters of the Lower Basin. For instance, Plaintiff alleges that "the Federal Defendants have breached the United States' fiduciary obligation to the Navajo Nation by taking administrative actions to manage the waters of the Lower Basin of the Colorado River without engaging in the required analysis of the actions on the Nation's trust assets and, if mandated by that analysis, taking action to protect and preserve the Navajo Nation's trust resources." Proposed TAC at ¶ 131. Plaintiff further complains that:

> The management decisions made by the Federal Defendants have breached the fiduciary obligations of the United States to the Navajo Nation by elevating the interests of the United States and other entities, including the Intervenor-Defendants, over the interests of the Navajo Nation in securing its rights to the mainstream of the Colorado River in the Lower Basin. The management decisions challenged herein as breaches of the fiduciary duty of the Federal Defendants encourage reliance on the limited water supplies of the Colorado River, thereby impairing the rights of the Navajo Nation and the ability

> of the United States to secure the water needed to make the Navajo Reservation a permanent homeland and causing the Nation harm.

Id. at ¶ 132.

The Court should strike all such allegations from the Proposed TAC, as they are predicated upon the exact same theory of injury as the one that the Ninth Circuit ruled Plaintiff's lacked standing to pursue and as to which the Ninth Circuit affirmed denial of further leave to amend. The Ninth Circuit expressly rejected Plaintiff's theory that the Guidelines harm the Nation by encouraging reliance by third parties on the limited waters of the Colorado River. The Ninth Circuit also expressly denied Plaintiff's request to file a third amended complaint to address this shortcoming in its prior pleadings. Finally, the Ninth Circuit remanded this case for the narrow purpose of considering the breach of trust claim on its merits, not to allow re-litigation of the Guidelines' effects. These rulings preclude Plaintiff's renewed efforts to challenge the Guidelines, and Plaintiff cannot plead around this deficiency by simply substituting a new theory of recovery for its rejected NEPA and APA causes of action.[3] Whether pled under NEPA, the APA, or as some variation of its prior breach of trust claim, Plaintiff's challenges to the Guidelines are barred for lack of standing, and Plaintiff may not now seek to re-litigate this issue on remand under a different name. Because Plaintiff's allegations and requests for relief concerning the Guidelines squarely conflict with the Ninth Circuit's ruling, the Court should strike all these allegations as futile and in violation of the law of the case doctrine.[4]

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[3] Given the limited scope of the remand and the dismissal of Plaintiff's five NEPA and APA claims, Federal Defendants had anticipated that the Proposed TAC would be significantly shorter than Plaintiff's prior pleadings. However, the Proposed TAC actually expands the Second Amended Complaint by seventeen pages, going from 37 to 54 pages, with a significant portion of the Proposed TAC directed at the Guidelines. This increase in length further affirms that Plaintiff has "dropped" its rejected NEPA and APA challenges to the Guidelines in name only.

[4] The paragraphs pertaining to the Guidelines and other related Colorado River management actions that should be stricken are identified in the first paragraph in this Section I. In addition, the Court should strike the allegations pertaining to NEPA, see Proposed TAC at ¶¶ 67-71, given the Ninth Circuit's dismissal of all of Plaintiff's NEPA claims.

II. The Two New Causes of Action Proposed by Plaintiff are Untimely and Redundant with the Breach of Trust Claim, Prejudicial to Federal Defendants, and Outside the Narrow Scope of the Remand.

The Court should also deny Plaintiff's request to add two new claims to the Proposed TAC. On its face, the Proposed TAC includes two new claims—"First Cause of Action: Breach of 1849 Peace Treaty and 1868 Treaty" and "Third Cause of Action: Failure to Consult with the Navajo Nation." These two new causes of action represent an untimely attempt to expand this action to include redundant claims that exceed the scope of the remand and that Plaintiff could have pled in its three prior complaints before litigating this case through appeal.

Granted, Plaintiff correctly asserts that, under Fed. R. Civ. P. 15, "courts should 'freely give leave' to amend 'when justice so requires.'" Pl. Memo. at 8 (quoting Fed. R. Civ. P. 15(a)(2)). However, this general principle does not support leave to amend where, as here, multiple countervailing considerations are present under the factors applied in Foman v. Davis and subsequent Ninth Circuit opinions. First, Plaintiff's request to add these two new claims is untimely. Plaintiff has already filed two amended complaints and had ample opportunity on both occasions to raise the two new claims asserted in the Proposed TAC before having its second amended complaint dismissed and filing its appeal. See Foman, 371 U.S. at 182 (referring to "undue delay" and "repeated failure to cure deficiencies by amendments previously allowed"). The factual and legal bases for those proposed claims were all available to Plaintiff when Plaintiff previously amended, and its failure to include those claims then provides a compelling basis for denying Plaintiff leave to bring them now. See, e.g., Sanders, 812 F.3d at 1198.

Second, the proposed new claims would impermissibly duplicate Plaintiff's existing breach of trust claim. See Sisseton-Wahpeton Sioux Tribe, 90 F.3d at 355–56; see also Pl. Memo. at 14 (acknowledging that duplication of claims may provide basis for denying amendment). To the extent that Plaintiff had merely sought to plead the two treaties and the executive order underlying these two proposed claims as additional factual and/or legal support for its remanded breach of trust claim, Federal Defendants would not have objected to the amendment. However, Federal Defendants do object to Plaintiff's attempt to transform these allegations that appear to be part and parcel of Plaintiff's breach of trust cause of action into two

new, stand-alone causes of action. Indeed, Plaintiff refers to both the 1849 and 1868 Treaties, as well as Executive Order 13,175, in its allegations pled in support of its breach of trust claim. See Proposed TAC ¶ 126 (referring to treaties) and ¶ 127 (referring to executive orders identified in ¶ 73, which includes Executive Order 13,175). Given the similarity of the proposed claims to the existing breach of trust claim, the Court should disallow these amendments as redundant.

Third, it would prejudice Federal Defendants to require them to expend federal resources on litigating two new claims added only after the case has been litigated through appeal. At this point, principles of finality dictate that Federal Defendants should not be put to the burden and expense of litigating "seriatim judgments in the same basic dispute, as a plaintiff continues to put forth new theories of recovery" following appeal. Beverly Hills Bancorp, 752 F.2d at 1338. Accordingly, as in Sisseton–Wahpeton Sioux Tribe, 90 F.3d at 355–56, the Court should deny the Nation's motion for leave to file its Proposed TAC, given that the Nation has previously amended and amendment would be futile and result in duplicative claims:

> "The district court's discretion to deny leave to amend is particularly broad where plaintiff has previously amended the complaint." [*Allen*, 911 F.2d at 373] (quoting *Ascon Properties, Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1160 (9th Cir. 1989)).
>
> We consider "(1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment, and (5) whether plaintiff has previously amended his complaint." *Id. See also United States v. Pend Oreille Pub. Util. Dist. No. 1*, 926 F.2d 1502, 1511 (9th Cir. 1991).
>
> The fourth and fifth factors, futility and prior amendment, are dispositive in this case. The plaintiff Tribes concede the proposed claim is "similar to the claims [already] asserted in the second amended complaint." It adds nothing to the claims already at issue in this appeal. Because the proposed claim would be redundant and futile, the district court did not err in denying leave to amend. It is time for this litigation to end.

Beyond these factors, and of critical importance, denial of leave to amend to include two new causes of action is mandated by the limited scope of the remand. Under the rule of mandate, as applied by the Ninth Circuit in the motion to amend context, a limited remand for a single purpose precludes consideration of other issues. See Thrasher, 483 F.3d at 983; Beverly Hills Bancorp at 1337. Here, the Court remanded this case for the narrow purpose of "consider[ing]

fully the Nation's breach of trust claim in the first instance, after entertaining any request to amend the claim more fully to flesh it out." Navajo Nation, 876 F.3d at 1173 (emphasis added). There is no ambiguity in this ruling and no leeway to permit the consideration of additional causes of action that Plaintiff may wish it had previously pled before the Ninth Circuit disposed of all but one of Plaintiff's claims on appeal. Plaintiff simply may not now expand these proceedings to include new claims that are beyond the narrow purpose of the remand ordered by the Ninth Circuit. For all these reasons, the Court should deny Plaintiff's request for leave to add the first and third proposed causes of action and the accompanying allegations pled at paragraphs 120–123 and 133–136 in the Proposed TAC in support of these claims.

CONCLUSION

The Court should reject Plaintiff's allegations and requests for relief in the Proposed TAC that seek to re-litigate its challenges to the Guidelines as futile, inconsistent with the Ninth Circuit's order, and barred by the law of the case doctrine. The Ninth Circuit expressly rejected Plaintiff's prior challenges to the Guidelines for lack of standing. Plaintiff's attempt to amend its complaint to challenge the Guidelines under a different theory suffers from this same jurisdictional defect and conflicts with the Ninth Circuit's affirmance of the denial of further leave to amend as to these challenges. Likewise, the Court should reject Plaintiff's request to amend as to its requests to bring two new claims. The Ninth Circuit remanded this case for the narrow purpose of "consider[ing] fully the Nation's breach of trust claim in the first instance, after entertaining any request to amend the claim more fully to flesh it out." Navajo Nation, 876 F.3d at 1173. Plaintiff's attempt to bring two new claims following appeal is outside the scope of this limited remand, untimely, redundant with Plaintiff's breach of trust claim, and prejudicial.

RESPECTFULLY SUBMITTED May 25, 2018.

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/s/ Thomas K. Snodgrass
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Environment and Natural Resources Division

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 25, 2018, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. Counsel of record currently identified on the Mailing Information list to receive e-mail notices for this case are served via Notices of Electronic Filing generated by CM/ECF.

/s/ Thomas K. Snodgrass