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11 *Attorneys for the Navajo Nation*

12 IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

13		)	
14		)	
15	Navajo Nation,	)	
16		)	
17	Plaintiff,	)	No. CV-03-507-PCT-GMS
18		)	
19	v.	)	<b>NAVAJO NATION'S</b>
20		)	<b>CONSOLIDATED REPLY IN</b>
21	United States Department of the Interior, et al.,	)	<b>SUPPORT OF MOTION FOR</b>
22		)	<b>LEAVE TO FILE THIRD</b>
	Defendants, and	)	<b>AMENDED COMPLAINT</b>
		)	
	State of Arizona, et al.,	)	
		)	
	Defendant-Intervenors.	)	
		)	
	_____	)	

1 The Plaintiff Navajo Nation replies herein to the two responses to its motion for  
2 leave to file an amended complaint. *Federal Defendants' Response in Partial Opposition*  
3 *to Plaintiff's Motion for Leave to File Third Amended Complaint (ECF No. 335)* (May  
4 25, 2018) (Doc. 339) ("Federal Response"); *Opposition of the Intervenor-Defendants the*  
5 *Metropolitan Water District of Southern California, Coachella Valley Water District,*  
6 *Imperial Irrigation District, and State of Arizona to Plaintiff's Motion for Leave to File*  
7 *Third Amended Complaint* (May 25, 2018) (Doc. 340) ("Intervenor Response").<sup>1</sup>

### 8 I. BACKGROUND

9 On April 13, 2018, the Navajo Nation sought leave to file an amended complaint  
10 pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure, Rule 15.1(a) of the  
11 Local Rules of Civil Procedure, and the remand order in *Navajo Nation v. Dep't of*  
12 *Interior*, 876 F.3d 1144 (9th Cir. 2017). *Motion for Leave to File Third Amended*  
13 *Complaint* (Apr. 13, 2018) (Doc. 335); *Third Amended Complaint for Declaratory and*  
14 *Injunctive Relief* (Apr. 13, 2018) (Doc. 335-2) ("Proposed Complaint").

15 The Federal Defendants responded that they do not oppose the proposed  
16 amendments to the extent they concern the breach of trust claim. Federal Response at 2,  
17 9. They object, however, to what they describe as the Navajo Nation's attempt to re-  
18 litigate its challenges to various Colorado River management programs (referred to  
19 generally herein as "Guidelines") and to assert two "new" claims. *Id.* at 1-2, 9, 12-17.  
20 Arguing that such amendments exceed the scope of the Ninth Circuit's remand order,

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21  
22 <sup>1</sup> Other Defendant-Intervenors joined in all or parts of the Intervenor Response and/or  
Federal Response. (Docs. 341, 342, 344).

1 conflict with the law of the case, and are futile, redundant, and prejudicial, they ask the  
2 Court to strike certain allegations, causes of action, and prayers for relief before allowing  
3 the breach of trust claim to move forward. *Id.* at 12-17 & n.4.

4 The Defendant-Intervenors oppose leave to amend on jurisdictional grounds,  
5 relying on the familiar but misplaced argument that the Supreme Court retained  
6 continuing jurisdiction in *Arizona v. California* to decide whether the Navajo Nation has  
7 a right to Lower Colorado River water and that, as a result, this Court lacks jurisdiction  
8 over the breach of trust claim. Intervenor Response at 9-14. They thus oppose the  
9 Proposed Complaint in its entirety.

## 10 II. ARGUMENT

11 Although the Federal Defendants concede that this Court should allow the Navajo  
12 Nation to amend its breach of trust claim with additional factual and legal allegations,  
13 they mischaracterize some amendments as a renewed attack on the Guidelines. Every  
14 allegation in the Proposed Complaint supports the breach of trust claim in some capacity,  
15 and the Navajo Nation nowhere asks the Court to invalidate any of the Guidelines.<sup>2</sup> Also,  
16 the claims against the Federal Defendants for its treaty violations and failure to consult,  
17 while listed separately, derive from the original breach of trust claim and do not exceed  
18

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19 <sup>2</sup> The Proposed Complaint contains a typographical error in paragraph (d) of the Second  
20 Prayer for Relief where the final portion of the prayer was inadvertently omitted. That  
21 paragraph should include the following underlined language so that it states: “to require  
22 the Federal Defendants to analyze their actions in adopting the Shortage and Surplus  
Guidelines, and other management decisions identified herein, in light of the plan to  
secure the water from the Colorado River and adopt appropriate mitigation measures to  
offset any adverse effects from those actions.”

1 the scope of the Ninth Circuit’s mandate.

2 The Defendant-Intervenors effectively seek dismissal of the breach of trust claim  
3 but fail to grasp the nature of this suit and the relief sought. The Navajo Nation does not  
4 ask the Court to decide the existence or scope of the Navajo Nation’s right to Lower  
5 Colorado River water but only to compel the Federal Defendants to develop and  
6 implement a plan to secure the water needed to make the Navajo Reservation a  
7 permanent home for its members. As a result, the Supreme Court’s retained jurisdiction  
8 in *Arizona v. California* is not invoked.

9 **A. THE NAVAJO NATION IS NOT ATTEMPTING TO RE-LITIGATE ITS  
10 CLAIMS CHALLENGING THE GUIDELINES.**

11 The Federal Defendants argue that all references to the National Environmental  
12 Policy Act (“NEPA”), 42 U.S.C. §§ 4321 to 70m-12, and the Guidelines in the Proposed  
13 Complaint, even in the context of the breach of trust claim, constitute a renewed attack on  
14 the Guidelines that is futile, barred by the law of the case, and inconsistent with the  
15 remand order. Federal Response at 9, 12-14, 17. In doing so, they fail to grasp the  
16 purpose of those allegations, ignore the requested relief, and misapply the law of the case  
17 doctrine.

18 While the Ninth Circuit upheld the dismissal of the NEPA challenges to the  
19 Guidelines, it did not decide the substance of the breach of trust claim. Instead, it  
20 directed this Court to entertain leave to amend the claim to “more fully” flesh it out,  
21 *Navajo Nation*, 876 F.3d at 1173, and “consider the claim on its merits.” *Id.* at 1174.  
22 Accordingly, the Navajo Nation proposed amendments for the purpose of fleshing out the

1 breach of trust claim, not to re-litigate its prior challenges to the Guidelines.

2 In describing the Federal Defendants’ duty to protect trust resources, the Navajo  
3 Nation cites numerous treaties, statutes, regulations, court decisions, executive orders,  
4 policy statements, and agency handbooks, among other authorities, Proposed Complaint  
5 ¶¶ 54-74, 81-90, at 20-29, 31-34, including references to NEPA and its implementing  
6 regulations. *Id.* ¶¶ 67-71, at 25. The Federal Defendants ask the Court to strike any  
7 mention of NEPA, Federal Response at 14 n.4, but the Navajo Nation is not reasserting  
8 those claims or asking the Court to order new environmental reviews, as it did before.  
9 *Compare* Proposed Complaint at 53-54, with *Second Amended Complaint for*  
10 *Declaratory and Injunctive Relief* ¶¶ A-J, at 33-35 (Nov. 14, 2013) (Doc. 281) (“Second  
11 Amended Complaint”). The Navajo Nation simply asserts, as part of its breach of trust  
12 claim, that the trust relationship requires the Federal Defendants, at a minimum, to  
13 comply with the requirements of federal law, including NEPA. *Pit River Tribe v. U.S.*  
14 *Forest Service*, 469 F.3d 768, 788 (9th Cir. 2006).

15 Similarly, the Navajo Nation describes the Guidelines and alleges they conflict  
16 with the Federal Defendants’ trust responsibilities, Proposed Complaint ¶¶ 92-107, at 35-  
17 43, but notes these are just some “examples,” out of many, of how the Federal  
18 Defendants continue to ignore the Navajo Nation’s need for Colorado River water. *Id.* ¶  
19 106, at 41. The Navajo Nation also describes the other ways that the Federal Defendants  
20 have violated their trust responsibilities. *E.g., id.* ¶¶ 25-50, 106(a)-(b), 121-36, at 9-19,  
21 41-42, 49-53.

22 Most importantly, the Navajo Nation is no longer asking this Court to invalidate

1 the Guidelines, *id.* at 53-54, but only to offset any adverse effects from the Guidelines on  
2 the Federal Defendants’ obligations to secure the water needed to make the Navajo  
3 Reservation a permanent, livable homeland. *Id.*; *see also supra* n.2. No court has  
4 examined the Federal Defendants’ actions regarding the Guidelines in the context of the  
5 breach of trust claim. Whether the Federal Defendants shirked their trust responsibilities  
6 while developing and implementing the Guidelines for the benefit of the Defendant-  
7 Intervenors and others is an entirely different question.

8         In *Hall v. City of Los Angeles*, the primary case relied on by the Federal  
9 Defendants in arguing that the law of the case doctrine precludes some of the  
10 amendments, the Ninth Circuit found that the district court did not violate the law of the  
11 case on remand because the issue it decided had not “been considered or decided by any  
12 court.” 697 F.3d 1059, 1067 (9th Cir. 2012). Since the Ninth Circuit “did not impose  
13 clear limits on the scope of the remand,” the district court in that case “was free to decide  
14 anything not foreclosed by the mandate.” *Id.* The Ninth Circuit also found that the  
15 district court wrongfully denied leave to amend the complaint to assert a new claim. *Id.*  
16 at 1072-73. Here, as in *Hall*, no court has examined the merits of the breach of trust  
17 claim or the extent to which the Federal Defendants’ actions in relation to the Guidelines  
18 and other management decisions support that claim, so neither the law of the case  
19 doctrine nor the related rule of mandate apply.

20 **B. THE AMENDED CAUSES OF ACTION COMPLY WITH THE REMAND**  
21 **ORDER AND DO NOT PREJUDICE THE FEDERAL DEFENDANTS.**

22         The Federal Defendants also argue that the treaty violation and failure to consult

1 claims exceed the scope of the Ninth Circuit’s remand order and are untimely, redundant,  
2 and prejudicial. Federal Response at 9, 15-17. The Federal Defendants cite inapposite  
3 case law, read the remand order too narrowly, ignore the prayers for relief, and  
4 exaggerate the financial burden they will bear in defending against the claims.

5 Again, the Ninth Circuit ordered this Court to entertain leave to amend the breach  
6 of trust claim to “more fully” flesh it out, *Navajo Nation*, 876 F.3d at 1173, and thereafter  
7 “consider the claim on its merits.” *Id.* at 1174. Nothing in this mandate expressly or  
8 impliedly forecloses the amendments set forth in the Proposed Complaint.

9 The Federal Defendants cherry-pick quotes from *United States v. Thrasher*  
10 (“*Thrasher II*”), 483 F.3d 977 (9th Cir. 2007), and *In re Beverly Hills Bancorp*, 752 F.2d  
11 1334 (9th Cir. 1984), to argue that the remand order somehow bars the Court from  
12 considering two claims that factually and legally overlap with the breach of trust claim  
13 and do not require separate relief. Federal Response at 11-12, 16. Their attempt to  
14 selectively apply those decisions to this case does not hold water.

15 In *Thrasher II*, a convicted felon appealed the denial of his ineffective assistance  
16 of counsel claim and argued that his attorney did not properly investigate a witness prior  
17 to trial. 483 F.3d at 979-80. The Ninth Circuit found that the district court had rejected  
18 this argument, *id.* at 980, but determined that an evidentiary hearing was required to  
19 resolve a disputed fact about the prior attorney’s credibility. *Id.* On remand, the  
20 convicted felon sought to repeat the argument, based on new evidence, that his prior  
21 attorney’s witness investigation was insufficient, but the district court limited the hearing  
22 to the single credibility issue and denied the ineffective assistance claim once again. *Id.*

1 at 980-81. On appeal for the second time, the Ninth Circuit found that its prior remand  
2 order expressly rejected any argument about the pretrial witness investigation, *id.* at 980,  
3 and not surprisingly held that this “plain language” precluded any reconsideration of the  
4 same argument on remand. *Id.* at 983.

5 Similarly, in *Beverly Hills Bancorp*, the Ninth Circuit reversed and remanded a  
6 bankruptcy court’s findings on a single issue but denied a trustee’s request for a remand  
7 order to allow leave to amend to assert new claims. 752 F.2d at 1336. Notwithstanding  
8 this denial, on remand the trustee again requested leave to amend and the bankruptcy  
9 court granted such relief. *Id.* After judgment, the case returned to the Ninth Circuit,  
10 which reversed because the bankruptcy court did not follow its clear mandate. *Id.* at  
11 1337-38, 1341. The court stated that “the Trustee specifically requested that we direct  
12 the bankruptcy court to allow him to amend his pleadings and we denied the petition.  
13 With our intent so clear, the Trustee was not entitled to amend his pleadings.” *Id.* at  
14 1337.

15 Both *Thrasher II* and *Beverly Hills Bancorp* stand for the unremarkable  
16 proposition that a party may not re-litigate issues that a remanding court expressly rejects.  
17 Here, the Ninth Circuit simply directed this Court to entertain amendments to the breach  
18 of trust claim, and nothing foreclosed the assertion of the treaty violation and failure to  
19 consult claims. Indeed, the three claims for relief are fully integrated in the First Prayer  
20 for Relief. Proposed Complaint at 53. In *Nguyen v. United States*, for example, although  
21 the Ninth Circuit issued a remand order directing entry of summary judgment, a party  
22 nevertheless was allowed to amend its pleadings on remand to assert new claims since



1 “[a]bsent a mandate which explicitly directs to the contrary, a district court upon remand  
2 can permit the plaintiff to ‘file additional pleadings, vary or expand the issues . . . .’” 792  
3 F.2d 1500, 1502 (9th Cir. 1986) (quoting *Rogers v. Hill*, 289 U.S. 582, 587-88 (1933)).  
4 *See also id.* at 1503; *see Sierra Club v. Penfold*, 857 F.2d 1307, 1312 (9th Cir. 1988).

5 In any event, the treaty violation and failure to consult claims factually and legally  
6 intertwine with the breach of trust claim, so the Ninth Circuit’s mandate expressly  
7 providing for the possibility of amending the breach of trust claim should also allow for  
8 related claims. The Navajo Nation has always alleged as part of its breach of trust claim  
9 that the 1868 Treaty established a trust relationship between the United States and the  
10 Navajo Nation that the Federal Defendants have violated repeatedly. *See, e.g.*, Second  
11 Amended Complaint ¶¶ 14-18, at 8-10. It is also well-established that meaningful  
12 consultation is a key component of this trust relationship. *See Proposed Complaint ¶*  
13 *73(b)*, at 28 (describing Executive Order No. 13,175); *see also Ctr. for Biological*  
14 *Diversity v. Salazar*, No. 10-2130-PHX-DGC, 2011 WL 6000497, at \*11-12 (D. Ariz.  
15 Nov. 30, 2011) (listing cases where duty to consult derived “from the federal  
16 government’s role as trustee over treaty-protected tribal lands or resources”).

17 The Navajo Nation’s allegations regarding the treaties and the duty to consult all  
18 relate to and support the breach of trust claim, Proposed Complaint ¶¶ 56-60, 73(b), 122-  
19 23, 126, at 21-22, 28, 49-50, and each cause of action incorporates by reference all prior  
20 allegations and both of the treaty violation and duty to consult claims. *Id.* ¶¶ 120, 124,  
21 133, at 48, 49, 52. Although the Federal Defendants correctly point out that the treaty  
22 violation and failure to consult claims are part and parcel of the breach of the trust claim,

1 Federal Response at 15-16, they fail to recognize that, as such, the claims are not  
2 untimely and do not exceed the scope of the Ninth Circuit's remand order.

3         The Federal Defendants' argument that the claims are redundant and prejudicial  
4 also fails. This case is unlike *Sisseton-Wahpeton Sioux Tribe v. United States*, 90 F.3d  
5 351 (9th Cir. 1996) (per curiam), upon which the Federal Defendants rely. Federal  
6 Response at 10, 15. In that case, several tribes appealed the dismissal of their claims and  
7 the Ninth Circuit mostly affirmed with the exception of one claim. *Sisseton-Wahpeton*,  
8 90 F.3d at 354. On remand the tribes sought to add new claims, but the district court  
9 denied the request and again entered judgment against the tribes. *Id.* at 354, 355. On  
10 appeal for the second time, the Ninth Circuit affirmed the denial of leave because the new  
11 claims were similar to those that were already rejected. *Id.* at 356. Here, even though the  
12 treaty violation and failure to consult claims intertwine with the breach of trust claim, the  
13 primary breach of trust claim has never been decided on the merits.

14         The Federal Defendants also say they would not have objected had the Navajo  
15 Nation "merely sought to plead the two treaties and the executive order underlying these  
16 two proposed claims as additional factual and/or legal support for its remanded breach of  
17 trust claim," Federal Response at 15, but complain that the same allegations culminating  
18 in three separate but directly related causes of action and integrated prayers for relief will  
19 somehow require the expenditure of additional federal resources. *Id.* at 16. To the extent  
20 the claims are redundant, they do not prejudice the Federal Defendants in this  
21 circumstance, where the Navajo Nation did not tie any of its requested relief to a specific  
22 cause of action. Even in the absence of the treaty violation and failure to consult claims,

1 the Federal Defendants would still have to defend against the same allegations and  
2 prayers for relief that are wholly aimed at requiring the Federal Defendants to perform  
3 their trust duties. Clearly, the challenged claims will not require the expenditure of  
4 additional federal resources.

5 **C. THE BREACH OF TRUST CLAIM DOES NOT INVOKE THE SUPREME**  
6 **COURT’S RETAINED JURISDICTION IN *ARIZONA v. CALIFORNIA*.**

7 Ignoring the Ninth Circuit’s instruction to this Court to consider the Navajo  
8 Nation’s breach of trust claim on the merits, the Defendant-Intervenors ask the Court to  
9 dismiss the claim in its entirety because, they argue, the Supreme Court retained  
10 exclusive jurisdiction over the subject matter in *Arizona v. California*. Intervenor  
11 Response at 9-14. The Defendant-Intervenors reason that the Navajo Nation’s claim is  
12 premised on a right to use Lower Colorado River water, and that this Court lacks  
13 jurisdiction to decide whether such a right exists. *Id.* at 2, 14. Their argument  
14 mischaracterizes the breach of trust claim and related prayers for relief and ignores the  
15 distinction between the Navajo Nation’s right to water and its need for water.

16 First, the Navajo Nation is not bringing any water right claims in this proceeding,  
17 and its proposed amendments are clear that it is not asking the Court to quantify or set  
18 aside any water in the Lower Colorado River. *Compare* Proposed Complaint at 53-54,  
19 *with* Second Amended Complaint ¶ L(2), at 36. The Navajo Nation simply requests an  
20 order directing the Federal Defendants to determine the extent to which the Navajo  
21 Nation needs Lower Colorado River water, develop a plan to secure the required water,  
22 and thereafter manage the Colorado River consistent with that plan. If the Court issues



1 Respectfully submitted this 18th day of June, 2018.

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### CERTIFICATE OF SERVICE

12 I hereby certify that on June 18, 2018, I electronically transmitted the attached  
13 document to the Clerk's Office using the CM/ECF System for filing and transmittal of a  
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