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9
10 IN THE UNITED STATES DISTRICT COURT
11 FOR THE DISTRICT OF ARIZONA

12 The Navajo Nation,
13 Plaintiff,
14 v.
15 United States Department of the Interior,
16 et al.
17 Defendants.
18 State of Arizona, et al.,
19 Defendant-Intervenors.

Case No. CIV-03-0507-PCT-GMS

**OPPOSITION OF INTERVENOR
DEFENDANTS TO NAVAJO
NATION'S RENEWED MOTION
FOR LEAVE TO FILE THIRD
AMENDED COMPLAINT**

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1 Intervenor-Defendants, The Metropolitan Water District of Southern California,
2 Coachella Valley Water District, Imperial Irrigation District and State of Arizona,
3 respectfully submit this opposition to Plaintiff Navajo Nation’s Renewed Motion for
4 Leave to File Third Amended Complaint (ECF No. 360).

5 I. INTRODUCTION AND SUMMARY OF ARGUMENT

6 The Court granted Navajo Nation “one last chance to file an amended complaint
7 asserting a breach of trust claim consistent with this Order.” (ECF No. 359, p. 9) In that
8 Order, the Court held that “[i]f the Nation wishes to assert rights to the River, it is clear
9 from the latest decree in *Arizona v. California* that such a determination is off-limits to
10 any lower court. In its 2006 Decree, the Supreme Court ‘retained[ed] jurisdiction of this
11 suit for the purpose of *any* order, direction, or modification of the decree, or *any*
12 supplementary decree, that may *at any time* be deemed proper *in relation to the subject*
13 *matter in controversy.*’... And it deprives this court of jurisdiction over any claim that
14 requires any determination of rights to the River.” (ECF No. 359, pp. 3-4, emphasis in
15 Order, citation omitted)

16 In the proposed amended complaint (ECF No. 361), the Navajo Nation alleges that
17 it has a reservation with lands in the Lower Basin of the Colorado River, (¶¶ 13-18), that
18 those lands lack water (¶¶ 38-43), that numerous actions taken or not taken by the Federal
19 Defendants relating to management of the Colorado River in the Lower Basin have failed
20 to provide the Reservation lands with water from the river (¶¶ 48-82, 90-106), that the
21 actions or inactions have induced reliance by others on water from the river (¶¶ 107-121),
22 that various statutes and regulations created a trust duty on the part of the Federal
23 Defendants (¶¶ 20-37, 127) which they have violated by inaction (¶ 128) and
24 administrative actions relating to the management of the Colorado River in the Lower
25 Basin (¶¶ 129-130).

26 The Nation seeks declaratory relief and injunctive relief requiring “the Federal
27 Defendants, in consultation with the Navajo Nation, to: (1) determine the extent to which
28 the Nation requires water from sources other than the Little Colorado River to enable its

1 Reservation in Arizona to serve as a permanent homeland for the Navajo Nation and its
2 members; (2) develop a plan to secure the needed water; and (3) utilize their authorities,
3 *including those related to the management of the Colorado River*, in a manner that does
4 not interfere with the plan to secure the water needed by the Navajo Nation” (First
5 Prayer, emphasis added) and also seeks injunctive relief “(4) to require the Federal
6 Defendants to analyze their actions in adopting the Shortage and Surplus Guidelines, and
7 other management decisions identified herein, in the light of any plan to secure the water
8 from the Colorado River and adopt appropriate mitigation measures to offset any adverse
9 effects from those actions.” (Second Prayer)

10 The renewed motion to amend should be denied. The amendment is futile
11 because: (1) the proposed complaint, which contains numerous allegations about the
12 federal administration of the Lower Basin of the Colorado River and prays for relief
13 directing how the federal defendants are to administer the river, is contrary to the Court’s
14 Order denying the prior motion to amend (ECF No. 359); (2) no statute or other law
15 imposes the specific duties relating to the Colorado River that the Navajo Nation asks the
16 Court to declare and compel the Federal Defendants to perform; and (3) the challenges to
17 the Surplus and Shortage Guidelines are beyond the scope of the remand.

18 II. ARGUMENT

19 A court may deny a motion to amend when amendment is futile. *Foman v. Davis*,
20 371 U.S. 178, 182 (1962); *Carrico v. City and Cty of San Francisco*, 656 F.3d 1002,
21 1008 (9th Cir. 2011).

22 A. The Relief Sought Is Precluded by the Supreme Court’s Reserved 23 Jurisdiction

24 In their opposition to the prior motion to amend, which is incorporated here by
25 reference (ECF No. 340, pp. 2-14.), the intervenor-defendants recounted the 54-year saga
26 of *Arizona v. California* and argued that the Supreme Court’s retention of jurisdiction in
27 Article IX of the Consolidated Decree in *Arizona v. California*, 547 U.S. 150, 166-167
28 (2006), precluded this Court from determining whether the Navajo Nation has a water

1 right in the Lower Basin of the Colorado River. This Court agreed. (ECF No. 359, pp. 3-
2 4.)¹ But the relief sought in the Proposed Third Amended Complaint would require the
3 Court to make such a determination.

4 The Proposed Third Amended Complaint alleges that “[a]lthough the Colorado
5 River forms a significant segment of the boundary of the Navajo Reservation and that
6 water supply is the most obvious source of water to meet the needs of the Navajo Nation
7 for water that cannot be met by the supplies available from the Little Colorado River, the
8 Federal Defendants have failed to address the extent to which the Navajo Nation needs
9 water from the Colorado River to make its Arizona lands productive.” (ECF No. 361, p.
10 20, ¶ 48.)² This statement corresponds to the concession by the Navajo Nation’s counsel
11 at the November 14, 2018 hearing that there is no other source available than the
12 Colorado River.³ While the Nation states that it is not seeking a quantification of a water
13 right, the proposed amended complaint is premised on an underlying assumption that the
14 Reservation has some sort of unquantified water right to the Colorado River in the Lower
15 Basin. Otherwise, without a reserved right in the river, there is no trust asset that can

16
17 ¹ The Court of Appeals’ reversal of the sovereign immunity dismissal did not preclude
18 the Court, in considering the merits of the prior motion to amend, from holding that there
19 are other jurisdictional bars to the proposed pleading. The Court of Appeals cannot and
20 did not erase the Supreme Court’s explicit reservation of its exclusive jurisdiction, which
21 the Court correctly held precludes it from making a determination that the Navajo
22 Reservation has water rights in the Colorado River in the Lower Basin. Nor can the
23 Secretary be compelled to bypass the Supreme Court’s jurisdiction to unilaterally make
24 that determination. (*Arizona v. California*, 460 U.S. 605, 637-638 (1983) – Secretary of
25 the Interior cannot by Secretarial determinations regarding Indian reservations adversely
26 affect the water rights of the States and their subdivisions.)

27 ² Opposing parties do not admit that the Colorado River is in fact the boundary of the
28 reservation.

29 ³ In response to the Court’s inquiry at the November 14, 2018 hearing on the prior motion
30 to amend, counsel for the Navajo Nation candidly acknowledged that there was no other
31 supply that could be used: “Mr. Pollack: Your Honor has thrown a -- an interesting twist
32 into this as to whether or not the water could be met from some supply other than the
33 Colorado River. We do not believe there is a supply of water that could be used.” (ECF
34 No. 357 – Transcript 16:17-22.) Whether there is sufficient water available from a source
35 other than the Colorado River in the Lower Basin to satisfy the purpose of the Navajo
36 Reservation is intertwined with a determination of how much water is required to satisfy
37 that purpose, an issue that is before the state court in *In re the General Adjudication of All
38 Rights to Use Water in The Little Colorado River System & Source, In re Navajo Nation*,
39 Contested Case No. CV 6417-300, Superior Court of Ariz., Apache County. The federal
40 courts should not prejudice the outcome of that proceeding. See *Arizona v. San Carlos
41 Apache Tribe*, 463 U.S. 545, 570 (1983).

1 give rise to a breach of trust duty. *Hopi Tribe v. United States*, 782 F.3d 662, 669 (Fed,
2 Cir, 2015). If the Navajo Nation has no water right in the Colorado River in the Lower
3 Basin, the Federal Defendants invade no right of the Nation by managing an
4 oversubscribed river to meet the needs of those who do have rights in the basin. The
5 alleged action or inaction of the Federal Defendants can only give rise to a legal injury if
6 the Navajo Nation has a water right for its lands in the first instance, a predicate that this
7 Court has already held it is without jurisdiction to decide. The proposed amended
8 complaint with its focus on the Colorado River in the Lower Basin is contrary to the
9 Court's Order and the renewed motion should be denied on that basis.

10 B. No Actionable Breach of Trust Is Alleged

11 The mere existence of a trust relationship between the United States and the
12 Navajo Nation is, by itself, an insufficient basis for an actionable claim. Instead, there
13 must be a separate, specific right creating a duty founded in federal law. *United States v.*
14 *Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011) – when a tribe cannot identify a
15 specific, applicable trust creating statute or regulation, neither the Government's control
16 nor common law trust principles matter; *see also United States v. Navajo Nation*, 556
17 U.S. 287, 302 (2009); *United States v. Navajo Nation*, 537 U.S. 488, 506 (2003); *United*
18 *States v. Mitchell*, 445 U.S. 535, 545 (1980); *Marceau v. Blackfeet Hous. Auth.*, 540 F.3d
19 916, 921 (9th Cir. 2008); *Hopi Tribe v. United States*, 782 F.3d 662, 667-669 (Fed. Cir.
20 2015).

21 None of the cited statutes or other “authorities” cited by the Navajo Nation in
22 paragraphs 24-36 imposes a specific, right-creating duty on the part of the Federal
23 Defendants to manage the Colorado River in the Lower Basin in the manner requested by
24 the Navajo Nation and therefore cannot serve as a predicate for the relief sought relating
25 to the Colorado River.

26 This Court has already held, and the Ninth Circuit has affirmed, that the Navajo
27 Nation does not have an actionable claim under NEPA and its implementing regulations.
28

1 *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1160-1172 (9th Cir. 2017); *Navajo*
2 *Nation v. Dep't of the Interior*, 34 F. Supp. 3d 1019, 1026-1027 (D.Ariz. 2014).

3 Nothing in the general language of 1849 Peace Treaty, the Northwest Ordinance
4 and the various Non-Intercourse acts impose the specific water development and river
5 management duties sought in the Prayers.

6 The duties of the Bureau of Indian Affairs under the Snyder Act, 25 U.S.C. § 13,
7 are expressly limited to “such moneys as Congress may from time to time appropriate”
8 for those purposes, and lack the required specificity to create an actionable judicial
9 remedy. *Lincoln v. Vigil*, 508 U.S. 182, 185 (1993), *see also Samish Indian Nation v.*
10 *United States*, 419 F.3d 1355, 1366, 1368 (Fed. Cir. 2005).

11 The Federal Circuit has held that the remaining statutes, though they may
12 authorize specific programs, do not have the specificity required to give rise an actionable
13 trust duty. *Hopi Tribe v. United States*, 782 F.3d 662, 669-671 (Fed. Cir. 2015). The
14 provisions of 25 U.S.C. § 162a(d)(8) -- “Appropriately managing the natural resources
15 located within the boundaries of Indian reservations and trust lands” -- do not contain the
16 requisite specificity to find an actionable duty. In any event, such an action cannot be
17 heard by this Court because it would require a predicate determination that the Navajo
18 Reservation has a water right in the Colorado River. Without such a right, there is no
19 natural resource to manage. The “Congressional findings” of “policy” in 25 U.S.C. §
20 1632(a)(5) do not evidence an intent to create an actionable duty for commanding
21 management actions regarding the Colorado River. Similarly, the “findings” of 25
22 U.S.C. § 5601(5) do not define a specific actionable duty, and the specific programs
23 authorized by Indian Trust Reform Act impose no duties relating to management of the
24 Colorado River.

25 This Court has already noted that Executive Order 13,175 creates no judicially
26 enforceable rights by its express terms. (Doc. 359, p. 8.) Executive Order 13,647,
27 *Establishing the White House Council on Native American Affairs*, is no different. 78
28 Fed. Reg. 39, 539 (July 1, 2013), Section 5(f) of the Order states: “This order is not

1 intended to, and does not, create any right or benefit, substantive or procedural,
2 enforceable at law or in equity by any party against the United States, its departments,
3 agencies, or entities, its officers, employees, or agents, or any other person.”

4 The Departmental authorities cited in Paragraph 35 amount to nothing more than a
5 general reaffirmation of the Department’s commitment to meet federal trust obligations
6 and none specifically requires the federal government to acquire water for Indian tribes.⁴
7 Notably, Secretary of the Interior Order No 3335, section 6(f) states it is not intended to
8 “create any right to administrative or judicial review or any legal right or benefit,
9 substantive or procedural, enforceable by a party against the United States”

10 C. The Challenge to the Surplus and Shortage Guidelines is Beyond the Scope
11 of the Remand

12 The Nation seeks an order requiring the Federal Defendants to revisit the Surplus
13 and Shortage Guidelines under a purported breach of trust theory. (Second Prayer, ¶ 4.)
14 Such an attack upon the Surplus and Shortage guidelines is beyond the scope of the
15 remand from the Ninth Circuit, as previously explained by the Federal Defendants in
16 their Response in Partial Opposition to Plaintiff’s Motion for Leave to File Third
17 Amended Complaint (Doc. 339, pp. 12-14), which argument Intervenor-Defendants
18 joined. (Doc. 340, p.1.) Intervener-Defendants hereby incorporate that argument by
19 reference as an additional ground for opposing this motion.

20 III. CONCLUSION

21 The Navajo Nation’s motion should be denied, without further leave to amend,
22 and this action should accordingly be terminated.

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26 _____
27 ⁴ The Navajo Nation, in Paragraph 35(d), omits an important qualification of policy P10
28 quoted from the referenced Policy Manual. The complete quote is “actively support and
participate in the Department’s Indian water rights negotiation and implementation
activities, as it works to resolve the water rights claims of Indian tribes *through
negotiated settlement, if feasible, rather than litigation.*” (Emphasis added.)

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Dated: January 24, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2019, 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/ Maureen Boucher
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