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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 NAVAJO NATION'S RENEWED MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT (ECF NO. 360)

Federal Defendants[1] hereby submit their Response in Partial Opposition to Navajo Nation's Renewed Motion for Leave to File Third Amended Complaint (the "Renewed Motion") (ECF No. 360).

INTRODUCTION

Plaintiff Navajo Nation previously moved for leave to file a third amended complaint. See ECF No. 335 ("Original Motion"). Federal Defendants partially opposed

[1] Pursuant to Fed. R. Civ. P. 25(d), David Bernhardt, Acting Secretary of the Interior, is automatically substituted for his predecessor, former Secretary Ryan Zinke.

that motion on the grounds that Plaintiff sought 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"),[2] which the Ninth Circuit had expressly rejected on appeal for lack of standing, and to bring two new claims that exceeded the narrow scope of the remand. See ECF No. 339. Several of the Defendant-Intervenors opposed the motion on the basis that the relief sought would require a determination of whether Navajo holds water rights on the mainstream of the Lower Colorado River, which determination would interfere with the retained jurisdiction of the U.S. Supreme Court in Arizona v. California, 547 U.S. 150, 166-67 (2006). See ECF No. 340.

Following a hearing on the Original Motion,[3] the Court issued an order on December 11, 2018 denying the motion on the grounds advanced by the Defendant-Intervenors—namely, that the relief sought in the proposed complaint "would require this Court to determine the Nation's rights to water from the [Colorado] River" and the Court lacks jurisdiction to make such a determination because "[j]urisdiction over that issue has

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[2] As discussed in the United States' prior response, 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. See ECF No. 339 at 2 n.1.

[3] Navajo suggests that Federal Defendants at the hearing argued that the United States holds no trust property for the Navajo Nation. See Memo. in Support of Renewed Motion (ECF No. 360-1) at 4 and 4 n.2. Navajo is incorrect. Federal Defendants' position at hearing was that, to the extent that the Supreme Court has exclusive jurisdiction over a determination of Navajo's alleged mainstream rights, a necessary condition to consideration of Navajo's claim—a determination that the Navajo holds a water right on the mainstream held in trust—is currently lacking. See Reporter's Transcript of Proceedings: Motion Hearing (Nov. 14, 2018) at 25:11–26:23. The United States, of course, recognizes that it holds Navajo reservation lands and associated water rights in trust for the Nation. However, there is no determined right that could provide the "trust corpus" for a breach of trust claim that specifically pertains to an alleged right on the mainstream of the Lower Colorado River. See, e.g., Inter Tribal Council of Arizona, Inc. v. Babbitt, 51 F.3d 199, 203 (9th Cir. 1995).

been reserved by the Supreme Court in *Arizona v. California*." Order, ECF No. 359 at 2. The Court nonetheless gave Plaintiff "one last chance to file an amended complaint [within 30 days] asserting a breach of trust claim consistent with this Order." Id. at 9. On January 10, 2019, Plaintiff filed the Renewed Motion and attached a revised Third Amended Complaint for Declaratory and Injunctive Relief ("Revised TAC"). See ECF No. 360-2.

Federal Defendants partially oppose the Renewed Motion for much the same reasons as they partially opposed the Original Motion. Although Plaintiff has now dropped its prior request in the Original Motion to add two new claims, captioned as breach of treaty and failure to consult claims, Plaintiff still devotes a substantial portion of the Revised TAC to the Guidelines and the alleged injury that they cause the Navajo Nation by purportedly encouraging third party reliance on the waters of the mainstream of the Lower Colorado River. For the reasons previously explained in the United States' response to the Original Motion,[4] these portions of the Revised TAC are all foreclosed by the Ninth Circuit's ruling in this case on appeal. See ECF No. 339 at 12–14.

The Ninth Circuit specifically 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

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[4] For the sake of brevity, the Federal Defendants incorporate by reference the more extensive discussion of their opposition to Plaintiff's renewed challenges to the Guidelines set forth in their response to the Original Motion rather than repeating at length that discussion in the present response. See ECF No. 339.

standing, and is barred as futile under the law of the case doctrine. Federal Defendants otherwise reserve all defenses, including defenses that they may raise by way of a motion to dismiss, as to any portions of the Revised TAC that the Court may grant Plaintiff leave to file.[5]

ARGUMENT

This case has been fully litigated through appeal, subject only to a limited remand for one, narrow purpose—further consideration of the Navajo Nation's breach of trust claim. The remand instructions state simply that the case is remanded for the 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.

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[5] In this regard, there are multiple other, fatal threshold defects in Plaintiff's breach of trust claim that are not remedied by the Revised TAC. For instance, as set forth in Federal Defendants' prior motion to dismiss briefing, Plaintiff's breach of trust claim is unripe because it would be premature to consider any rights Navajo may have to the mainstream while its claims in the Little Colorado River Adjudication remain pending, and the claim fails on the merits and for lack of standing because no treaty, statute, or other positive law imposes a duty upon the United States to determine and quantify the Nation's water rights, if any, on the mainstream. See ECF Nos. 240-1 at 32–37, 39–43; ECF No. 293 at 13–23. On the first point, the United States is actively pursuing claims on behalf of Navajo in the Little Colorado River Adjudication, with trial currently scheduled to begin on September 12, 2022. The United States cannot know the extent of the Navajo's need for water from the mainstream or other sources, if any, until the adjudication of those claims concludes. On the latter point, the Ninth Circuit and the Supreme Court have both foreclosed relief on a claim for breach of an alleged trust duty that has not been set out in a treaty, statute, or other positive law. See, e.g., United States v. Jicarilla Apache Nation, 564 U.S. 162, 173–74 (2011) (though statutes denominate the relationship between the Government and the Indians a "trust," that trust is defined and governed by statutes rather than the common law); Gros Ventre Tribe v. United States, 469 F.3d 801, 810 (9th Cir. 2006) ("[Trust relationship] alone, however, does not impose a duty on the government to take action beyond complying with generally applicable statutes and regulations."); see also Hopi Tribe v. United States, 782 F.3d 662 (Fed. Cir. 2015). In addition, the Federal Defendants reserve their position on whether all or portions of the Revised TAC are barred by the Supreme Court's retained jurisdiction in Arizona v. California.

U.S. Dep't of Interior, 876 F.3d 1144, 1173 (9th Cir. 2017) (emphasis added). The Ninth Circuit otherwise determined Plaintiff lacked standing to pursue its challenges to the Secretary's Guidelines and affirmed this Court's denial of Plaintiff's request for leave to amend to attempt to remedy this defect. 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. The Court specifically rejected as overly speculative "the Nation's reiterated argument that the Guidelines impair the Nation's interests in, and need for, Lower Basin water by establishing a system of third-party reliance that will make it harder to satisfy this need." Id. at 1165. The Court also 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. at 1165–66. Finally, the Court affirmed the denial of Plaintiff's request to amend its prior complaints to attempt to remedy these defects in its standing on the grounds that "[t]he Nation amended its complaint twice before the court dismissed its claims" and "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." Id. at 1174 (footnote omitted).

There is no ambiguity in this ruling and no leeway to permit re-litigation of Plaintiff's challenges to the Guidelines. Rather, the law of the case doctrine precludes reconsideration of an issue decided expressly or by necessary implication by the same court or a higher court in the same case. See Hall v. Los Angeles, 697 F.3d 1059, 1067 (9th Cir. 2012). Likewise, the rule of mandate dictates that a limited remand for a single purpose bars consideration of other issues. See United States v. Thrasher, 483 F.3d 977, 983 (9th Cir. 2007); In re Beverly Hills Bancorp, 752 F.2d 1334, 1337 (9th Cir. 1984).

Plaintiff nonetheless now seeks to do just what this Court and the Ninth Circuit ruled it could not do—seek to demonstrate injury from the Guidelines. The Court should

not permit these amendments. Granted, under Federal Rule 15(a)(2), leave to amend is to be freely given when justice so requires. See Fed. R. Civ. P. 15(a)(2); Foman v. Davis, 371 U.S. 178, 182 (1962). However, justice does not so require here, where (1) Plaintiff has already filed two amended complaints; (2) the case has already been litigated fully through appeal, subject only to a limited remand; (3) the Ninth Circuit has already ruled the Guidelines do not injure Plaintiff; and (4) the Ninth Circuit has affirmed this Court's denial of further leave to amend as to the Guidelines as futile. There is also no question that the 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)).

With respect to the specific allegations in the Revised TAC pertaining to the Guidelines, there is nothing new here and nothing that has not already been resolved by the Ninth Circuit. The Revised TAC includes extensive allegations concerning the Guidelines and how their adoption allegedly violates the Federal Defendants' trust responsibility. See Revised TAC ¶ 1 at 4:1–8; ¶ 76; ¶ 90 at 33:18–21; ¶¶ 91–107, 117, 119–120, 129–130; see also Header I. at 40, Header J. at 42. The Revised TAC also repeatedly describes 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. ¶¶ 76, 97, 104, 106, 117, 119–120, 130; see also Header J. at 42. Finally, the Revised TAC concludes with specific requests for relief that directly or indirectly

seek to set aside the Guidelines.[6] See First Prayer For Relief (requesting a declaration that Federal Defendants must "(3) utilize their authorities, including those related to the management of the Colorado River, in a manner that does not interfere with the plan to secure the water needed by the Navajo Nation."); Second Prayer for Relief at subparagraphs (b)(3) (same) and (b)(4) (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 any plan to secure the water from the Colorado River and adopt appropriate mitigation measures to offset any adverse effects from those actions . . . .").

Each of these allegations and requests for relief are squarely precluded by the Ninth Circuit's ruling that Plaintiff's allegations of injury from the Guidelines are too speculative to confer standing and its specific rejection of the theory that the Guidelines injure the Nation by causing third-party reliance on the waters of the Lower Basin. Nor is Plaintiff able to avoid the Ninth Circuit's ruling by arguing, as it did in its reply in support of the Original Motion, that "the Navajo Nation is no longer asking this Court to invalidate the Guidelines, . . . but only to offset any adverse effects from the Guidelines on the Federal Defendants' obligations to secure the water needed to make the Navajo Reservation a permanent, livable homeland." See ECF No. 346 at 4–5. Whether Plaintiff seeks to invalidate the Guidelines or offset their alleged adverse impacts, the same end result is sought—modification of the Secretary's management of the Colorado River. Plaintiff itself concedes that it is again challenging the Guidelines when it states: "The

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[6] Given the limited scope of the remand and the dismissal of Plaintiff's five NEPA and APA claims, Federal Defendants had anticipated that the Revised TAC would be significantly shorter than Plaintiff's prior pleadings. However, the Revised TAC actually expands the Second Amended Complaint by seventeen pages, going from 37 to 53 pages, with a significant portion of the Revised 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.

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 . . . ." Revised TAC at ¶ 130 (emphasis added). Under the law of the case doctrine, Plaintiff cannot now mount a renewed challenge based on the Guidelines by simply applying a new label to its already rejected challenges. Because the Guidelines do not harm the Nation, the Nation lacks standing to seek any relief in connection with them, whether pled under NEPA, the APA, or as some variation of its prior breach of trust claim.

For all these reasons, as in Sisseton-Wahpeton Sioux Tribe v. United States, 90 F.3d 351 (9th Cir. 1996), the Court should deny the Nation's motion for leave to file the renewed challenges to the Guidelines set forth in the Revised TAC:

> 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.

Id. at 355–56. Given that they duplicate Plaintiff's already dismissed claims, Plaintiff's new allegations and requests for relief concerning the Guidelines should be disallowed as futile, inconsistent with the Ninth Circuit's ruling and mandate, and barred by the law of the case doctrine.[7]

CONCLUSION

The Court should reject Plaintiff's allegations and requests for relief in the Revised 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

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[7] The paragraphs pertaining to the Guidelines and other related Colorado River management actions that should be stricken are identified at pages 6–7, above. In addition, the Court should strike additional allegations in the Revised TAC that pertain specifically to NEPA, given the Ninth Circuit's dismissal of all of Plaintiff's NEPA claims. See Revised TAC ¶¶ 31–34, 35.e., 35.g., 88:10, 93, 100, 127:6–8.

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 name 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.

RESPECTFULLY SUBMITTED January 24, 2019.

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Environment and Natural Resources Division

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/ Thomas K. Snodgrass