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10 *Attorneys for the Navajo Nation*

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

Navajo Nation,)	No. CV-03-507-PCT-GMS
)	
Plaintiff,)	NAVAJO NATION’S
)	CONSOLIDATED REPLY
v.)	IN SUPPORT OF
)	RENEWED MOTION FOR
United States Department of the Interior, et al.,)	LEAVE TO FILE THIRD
)	AMENDED COMPLAINT
Defendants.)	
_____)	

18 The Navajo Nation files this consolidated reply in support of its renewed motion
19 for leave to file a third amended complaint addressing the responses of the Federal
20 Defendants and the Defendant-Intervenors.¹ The Navajo Nation did not file this action to

21 _____
22 ¹ The Navajo Nation replies to the arguments advanced in the *Federal Defendants’ Response in Partial Opposition to Navajo Nation’s Renewed Motion for Leave to File Third Amended Complaint (ECF No. 360)* (Jan. 24, 2019) (ECF No. 370) (“US Response”); and *Opposition of Intervenor-Defendants to Navajo Nation’s Renewed*

1 quantify its reserved rights to the Colorado River. To the extent that the Nation's
2 complaint has been construed to seek such a quantification, the Nation has made
3 amendments to clarify its position. Regardless of the extent of its quantified and inchoate
4 rights to water from various sources, including any rights that may be adjudicated in the
5 Little Colorado River Basin, the Nation needs additional water supplies for its Arizona
6 Reservation trust lands. The Nation has resolutely maintained this position before the
7 Court. The United States holds the lands of the Navajo Nation in trust and the Federal
8 Defendants owe a fiduciary duty to the Nation which includes the critical requirement of
9 securing the water supply necessary to make the Navajo Reservation a permanent
10 homeland for the Navajo Nation, its members, and others living there, as promised in the
11 *Treaty with the Navaho, 1868* (June 1, 1868), 15 Stat. 667 ("1868 Treaty").

12 **I. THE PROPOSED TAC DOES NOT ATTEMPT TO RELITIGATE THE**
13 **DISMISSAL OF THE NATION'S NEPA AND APA CLAIMS**²

14 The Federal Defendants, though not opposing the Navajo Nation's motion to
15 amend in its entirety, object to the continued reliance on allegations concerning the
16 Secretary's management decisions on the Colorado River. These allegations remain and
17 are necessary to demonstrate the Federal Defendants' failure to meet the water supply
18 needs of the Navajo Reservation. Moreover, they are simply factual allegations, *not*

19 _____
20 *Motion for Leave to File Third Amended Complaint* (Jan. 24, 2019) (ECF No. 369)
21 ("Intervenors' Response") filed jointly by the Metropolitan Water District of Southern
22 California, Coachella Valley Water District, Imperial Irrigation District and State of
Arizona; and joinders therein (ECF Nos. 371-74).

² Claims previously asserted by the Nation under the National Environmental Policy Act
of 1969, 42 U.S.C. §§ 4321 to 70m-12 ("NEPA") and the Administrative Procedure Act,
5 U.S.C. §§ 701-06 ("APA").

1 *claims*, that the Federal Defendants are free to deny, so the Court should allow them. *See*
 2 *Torres v. Goddard*, No. CV-06-2482-PHX-SMM, 2008 WL 418015, at *2 (D. Ariz.
 3 2008). These, as well as new allegations expanding the scope of the Proposed TAC, were
 4 included to address the concerns expressed by this Court and the United States Court of
 5 Appeals for the Ninth Circuit (“Ninth Circuit”) that the complaint failed to demonstrate
 6 the Federal Defendants’ pattern of behavior shirking their trust responsibilities, *inter alia*,
 7 in deference to the concerns of others. *See, e.g., Navajo Nation v. Dep’t of Interior*, 876
 8 F.3d 1144, 1163 (9th Cir. 2017).³

9 **II. THE FEDERAL DEFENDANTS OWE THE NAVAJO NATION A**
 10 **FIDUCIARY DUTY TO SECURE AN ADEQUATE WATER SUPPLY TO**
 11 **MEET ITS NEEDS**

11 At the hearing on the Nation’s motion to file a third amended complaint following
 12 remand from the Ninth Circuit, the Court asked counsel for the Federal Defendants the
 13 following question: if the Navajo Nation could establish a need for water, “would the
 14 United States have a legal obligation to meet that need?” *Reporter’s Transcript of*
 15 *Proceedings: Motion Hearing* at 27:2-27:11 (Nov. 14, 2018) (“Transcript”). That is the
 16 crux of this case as presented in the Proposed TAC, and the answer to that question is

17
 18 ³ In response to that question, counsel for the Federal Defendants denied that the United
 19 States owed the Nation any such duty because “there is no trust property here.”
 20 Transcript at 27:12-27:18. The Federal Defendants’ efforts to deflect the position taken
 21 before the Court are belied by the Transcript. US Response at 2 n.3. While the section of
 22 the Transcript relied upon by the Federal Defendants does in fact address the question of
 Navajo Nation trust resources in the context of unquantified rights to the Colorado River,
 Transcript at 25:11–26:23, the statement quoted above occurred in the broader context of
needs of the Navajo Nation for water to make its Reservation lands in Arizona
 productive.

1 “yes.”

2 The lands of the Navajo Reservation are held in trust by the United States and are
3 trust resources that provide the foundation for the Nation’s claim of breach of trust. The
4 Proposed TAC lists a host of federal authorities in which the Nation grounds its breach of
5 trust claim. The United States undertook obligations of trust to Indian people even before
6 ratifying the United States Constitution, and has expanded and reaffirmed those duties in
7 numerous statutes, regulations, and policy documents. The United States entered into a
8 unique relationship with the Navajo people upon securing jurisdiction over their
9 aboriginal lands through the *Treaty of Guadalupe Hidalgo*, Mex.-U.S., Feb. 2, 1848, 9
10 Stat. 922, first in the *Treaty with the Navaho, 1849* (Sept. 9, 1849), 9 Stat. 974, and
11 subsequently in the 1868 Treaty establishing the original Navajo Reservation.

12 The United States Supreme Court has repeatedly described as unthinkable the
13 proposition that the parties to Indian treaties, or the United States acting by Executive
14 Order, could have ignored the need for water to make Indian reservation lands
15 productive. *See, e.g., Winters v. United States*, 207 U.S. 564, 576 (1908) (asking
16 rhetorically, “Did [the Indians] give up all this? Did they reduce the area of their
17 occupation and give up the waters which made it valuable or adequate?”); *see also*
18 *Arizona v. California (“Arizona I”)*, 373 U.S. 546, 598-99 (1963) (finding it “impossible
19 to believe” that Congress was not aware of the need for water to make tribal lands
20 productive). Accordingly, the *Winters*, or federal reserved rights, doctrine recognizes
21 that Indian tribes have an implied *right* to water to make their reservation lands
22 productive even when the treaty or executive order establishing the reservation makes no

1 reference to such rights. *See Arizona I*, 373 U.S. at 600 (“the United States did reserve
2 the water rights for the Indians effective as of the time the Reservations were created”).
3 Thus the United States’ trust obligations to Indian tribes necessarily include the
4 obligation to ascertain tribal water needs and secure water to meet those needs.

5 Nothing in *Winters* or its progeny limits the fiduciary duty of the United States to
6 quantifying water rights for Indian tribes. To the contrary, the need for secure water
7 supplies has motivated the United States to undertake infrastructure projects to deliver
8 water to needy communities in Indian country, even where tribal water rights have yet to
9 be quantified. *See* 43 U.S.C. § 1524 (authorizing the Secretary to enter into contracts
10 with Indian tribes in Arizona for the delivery of water from the Central Arizona Project
11 without regard to whether those tribes have quantified water rights); 42 U.S.C. § 2004a
12 (authorizing the Surgeon General “to construct, improve, extend, or otherwise provide
13 and maintain, by contract or otherwise, essential sanitation facilities, including domestic
14 and community water supplies . . . together with necessary appurtenances and fixtures,
15 for Indian homes, communities, and lands”). Many water supply projects on the Navajo
16 Nation were constructed by the United States before quantified water rights were
17 decreed, as is the case in the Little Colorado River Basin, where a water rights
18 adjudication remains pending, *In re Gen. Adjudication of All Rights to Use Water in the*
19 *Little Colorado River Sys. & Source*, No. CV 6417 (Ariz. Super. Ct. Apache Cty.). *See,*
20 *e.g.*, NAVAJO NATION DEP’T. OF WATER RES., DRAFT WATER RESOURCE DEVELOPMENT
21 STRATEGY FOR THE NAVAJO NATION V.12.1 at 2 (May 2012),
22 http://www.frontiernet.net/~nndwr_wmb/ (total municipal consumption is approximately

1 12,000 acre-feet per year); *see also id.* at 32, 49-52, 56-57.

2 As set forth in the Proposed TAC, all of the elements of an enforceable trust
3 relationship are present: the Nation’s Reservation lands are the trust *res*, the United
4 States holds title to the Nation’s Reservation lands as trustee, and the Nation as trust
5 beneficiary seeks to hold its trustee accountable for failure to make its trust resources
6 productive.

7 **III. THE NAVAJO NATION HAS ASSERTED A VIABLE CLAIM FOR**
8 **BREACH OF TRUST**

9 The Defendant-Intervenors suggest that amendment is futile because the Proposed
10 TAC does not state an actionable breach of trust claim. “An amendment is futile when
11 ‘no set of facts can be proved under the amendment to the pleadings that would constitute
12 a valid and sufficient claim or defense.’” *Missouri ex rel. Koster v. Harris*, 847 F.3d 646,
13 656 (9th Cir. 2017) (quoting *Miller v. Rykoff-Sexton, Inc.*, 845 F.2d 209 (9th Cir. 1988)).
14 The Nation asserts facts in the Proposed TAC that constitute a valid breach of trust claim.

15 Breach of trust actions by Indian tribes against the United States have typically
16 proceeded in two discrete ways: (1) actions for *specific relief* brought pursuant to the
17 district courts’ federal question jurisdiction or the APA; and (2) actions for *monetary*
18 *damages* brought pursuant to 28 U.S.C. § 1505 (“Indian Tucker Act”) and other statutes
19 by which the Congress waived the United States’ immunity for claims for monetary
20 relief. The Proposed TAC contains only claims for specific relief, placing this action into
21 the first category. Nevertheless, both the Federal Defendants and Defendant-Intervenors
22 cite the standard for claims seeking monetary relief. *See* Intervenors’ Response at 4

1 (“there must be a separate, specific right creating duty founded in federal law” (citing
2 four Supreme Court cases discussing claims for monetary relief that started in the Court
3 of Claims)).

4 The United States Supreme Court has never held that an Indian tribe asserting a
5 violation of the government’s federal common law trust obligations can bring a claim for
6 specific relief only by pointing to a federal statute or regulation imposing a fiduciary duty
7 on the government.⁴ In fact, courts have asserted that the common law trust relationship
8 alone is sufficient for an actionable claim for specific relief. *See Nw. Sea Farms Inc., v.*
9 *U.S. Army Corps of Eng’rs*, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996) (general trust
10 relationship imposed duty on Corps to ensure treaty rights not violated); *Edwardsen v.*
11 *Morton*, 369 F. Supp. 1359, 1375-76 (D.D.C. 1973) (United States has duty to protect
12 aboriginal Indian tribal land from trespass); *Pyramid Lake Paiute Tribe of Indians v.*
13 *Morton*, 354 F. Supp. 252, 257 (D.D.C. 1972) (general trust relationship imposes duty to
14 exercise greater care in allocating water rights).⁵

15 _____
16 ⁴ “We have never held that all of the Government’s trust responsibilities to Indians must
17 be set forth expressly in a specific statute or regulation.” *United States v. Jicarilla*
18 *Apache Nation*, 564 U.S. 162, 202 (2011) (Sotomayor, J. dissenting). While the Federal
19 Defendants and Defendant-Intervenors both rely on *Jicarilla*, US Response at 4;
20 Intervenors’ Response at 4, Justice Sotomayor cautioned that the majority opinion should
21 be of limited application because it “pertains only to a narrow evidentiary issue.” Further,
22 Justice Sotomayor described as troubling “the majority’s disregard of our settled
precedent that looks to common-law trust principles to define the scope of the
Government’s fiduciary obligations to Indian tribes.” *Jicarilla*, 564 U.S. at 188-89. Like
the other cases cited by the Defendant-Intervenors, in *Jicarilla*, unlike here, the tribe
brought suit in the Court of Claims pursuant to the Tucker Act and Indian Tucker Act.

⁵ In contrast, each of the Supreme Court cases addressing claims for breach of the federal
government’s trust responsibility under the Indian Tucker Act, and seeking money
damages for such breach, makes clear that the requirement for an additional source of law

1 The Proposed TAC states that the Federal Defendants breached their trust
2 obligation by failing to assess the Nation’s water needs and secure water to meet those
3 needs, and recites the disparities between living conditions on the Navajo Reservation
4 and in non-Indian communities in Arizona and throughout the United States. The
5 Proposed TAC documents the Navajo Nation’s efforts to enlist the support of the Federal
6 Defendants to address the need for additional water supplies, and remedy its attendant
7 consequences, including increased risks of disease, increased costs of daily living, and
8 lack of economic development. Finally, the Proposed TAC identifies repeated instances
9 where the Federal Defendants have elevated the interests and concerns of non-Indians,
10 including the interests of the Defendant-Intervenors, over those of the Nation and its
11 members. The Federal Defendants’ efforts to obligate water supplies that could
12 otherwise satisfy the Nation’s water needs to address competing state and federal
13 interests violates their fiduciary duty to the Navajo Nation.

14
15

16 imposing a fiduciary duty stems from the Tucker Act’s grant of jurisdiction in cases
17 founded upon “the Constitution, or any Act of Congress or any regulation of an executive
18 department,” 28 U.S.C. § 1491(a)(1), and is not an element of the trust responsibility.
19 *See United States v. Navajo Nation*, 556 U.S. 287, 290 (2009) (“[B]efore a tribe can
20 invoke jurisdiction under the Indian Tucker Act . . . the tribe ‘must identify a substantive
21 source of law that establishes specific fiduciary or other duties, and allege that the
22 Government has failed faithfully to perform those duties.’” (quoting *United States v.*
Navajo Nation (“*Navajo Nation I*”), 537 U.S. 488, 506 (2003)); *United States v. White*
Mountain Apache Tribe, 537 U.S. 465, 469-70 (2003) (same); *United States v. Mitchell*
(“Mitchell II”), 463 U.S. 206, 216-17 (1983) (same); *United States v. Mitchell (Mitchell*
I), 445 U.S. 535, 538 (1980) (same); *see also* Mary C. Wood, *The Indian Trust*
Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive
Relief Against Federal Agencies, 39 TULSA L. REV. 355, 366-68 (2003).

1 The Federal Defendants’ actions constitute a breach of the trust obligation that is
2 rooted in federal law. The Proposed TAC identifies the following sources for the Federal
3 Defendants’ trust obligation to make the Nation’s reservation lands productive: a federal
4 common law trust obligation founded on the 1868 Treaty and subsequent executive
5 orders establishing the Navajo Reservation and protecting tribal lands; the Non-
6 Intercourse Act, 25 U.S.C. § 177,⁶ where Congress confirmed the guarantee of protection
7 for tribal lands; section 7 of the Colorado River Compact (Nov. 24, 1922), *reprinted at* 70
8 Cong. Rec. 324 (1928) (Doc. 240-2), which requires the Secretary to take no action in the
9 management of the Colorado River in derogation of the water supply needs of the Navajo
10 Nation; section 101 of the American Indian Trust Management Reform Act of 1994, Pub.
11 L. 103-412 (1994) (codified at 25 U.S.C. 162a(d)(8)), and other executive policies that
12 enshrine the Federal Defendants’ obligation to make Indian trust property productive.
13 *See* Letter from Leo M. Krulitz, Department Solicitor, to James W. Moorman, Assistant
14 Attorney General (Nov. 21, 1978), attached as an appendix to Brief for Respondents,
15 *Mitchell I*, 1979 WL 199447 (“The government has fiduciary duties of care and loyalty,
16 to make trust property income productive, to enforce reasonable claims on behalf of
17 Indians, and to take affirmative action to preserve trust property.”).

18

19

20 ⁶ *See, e.g., Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379
21 (1st Cir. 1975) (holding that in the Non-Intercourse Act Congress established an
22 enforceable fiduciary relationship with all tribes, even absent federal recognition). For
treaty tribes, the Supreme Court has held that the Non-Intercourse Act manifests “a
continuing solicitude for the rights of the Indians in their land.” *Oneida Indian Nation v.*
County of Oneida, 414 U.S. 661, 684 (1974) (Rehnquist, J. concurring).

1 The Navajo Nation asserts that the federal common law trust responsibility
2 undertaken by the United States when Congress ratified the 1868 Treaty alone is
3 sufficient to support a claim for non-monetary relief. Long-standing federal precedent
4 confirms that treaties between the United States and Indian tribes give rise to implied,
5 and enforceable fiduciary duties. There is a “distinctive obligation of trust incumbent
6 upon the Government in its dealings with [Indian tribes].” *Mitchell II*, 463 U.S. at 225
7 (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296 (1942)). In *Seminole*
8 *Nation v. United States*, 102 Ct. Cl. 565 (1944), in response to similar attempts by the
9 federal government to avoid its trust obligations, the Court of Claims held that:

10 The defendant [federal government] . . . says a claim arising out of a breach
11 of fiduciary duty is not one arising out of a treaty or an act of Congress.
12 We do not think this defense is good. If the defendant has ever owed
13 plaintiff the duty of a fiduciary it owed it this duty when treaties were
signed and the Acts were passed on which plaintiff sues. Implicit in those
agreements and the Acts was the obligation to carry out their terms with the
fidelity a fiduciary owes his [beneficiary].

14 *Id.* at 602; *see also Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir.
15 1995) (trust obligations imposed in a treaty by implication are enforceable).

16 The Nation asserts that various sources of federal law obligate the Federal
17 Defendants to faithfully manage the Nation’s trust resources and that the Federal
18 Defendants, by failing to assess the Nation’s water needs and secure water to meet those
19 needs, have breached their fiduciary duty. The Navajo Nation should have an
20 opportunity to establish its breach of trust claim on the merits, as the Ninth Circuit
21 directed. *Navajo Nation*, 876 F.3d at 1173 (ordering this court “to consider fully the
22

1 Nation's breach of trust claim in the first instance, after entertaining any request to amend
2 he claim to more fully flesh it out").

3 **IV. CONCLUSION**

4 For the reasons set forth in this consolidated reply and as more fully set forth in
5 the memorandum supporting its motion, the Navajo Nation should be permitted to
6 amend its complaint so that the Court may fully consider its breach of trust claim. The
7 Navajo Nation respectfully requests the Court to grant it leave to file the Proposed TAC.

8
9 Respectfully submitted this 31st day of January, 2019.

10 By: /s/Alice E. Walker
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CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2019, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CE/ECF registrants:

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