Docket No. 19-17088

In the

United States Court of Appeals

For the

Ninth Circuit

NAVAJO NATION,

Plaintiff and Appellant,

v.

U.S. DEPARTMENT OF THE INTERIOR, et al.,

Defendants and Appellees,

STATE OF ARIZONA, et al.,

Intervenors, Defendants and Appellees.

Appeal from a Decision of the United States District Court for the District of Arizona, No. 3:03-cv-00507-GMS · Honorable G. Murray Snow

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

The Navajo Nation is a federally recognized Indian tribe and sovereign government, so a corporate disclosure statement is not required pursuant to Federal Rule of Appellate Procedure 26.1.

Dated: February 26, 2020

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INTRODUCTION

The Indian Trust Doctrine, encompassing the expansive fiduciary duties the United States undertook in its dealings with Indian tribes, remains a vital force in the law. The Indian Trust Doctrine has as its "guiding compass the purest moral foundation of the trust: the sacred promise, made to induce massive land cessions, that the retained homelands would be protected to support tribal lifeways and generations into the future."[1] Emerging from some of the earliest decisions of the United States Supreme Court, the Indian Trust Doctrine confirms the duty of the United States to secure and protect Indian trust resources such as lands and waters to provide Indian people a permanent home, and wild game and fish to allow Native people the ability to continue their traditional lifeways. The Indian Trust Doctrine is grounded in the vast land cessions made by Indian tribes of their aboriginal territories that allowed this country to grow and prosper, and the concomitant responsibility of the United States to ensure the same for Indians, who would in time become American citizens. The Indian Trust Doctrine led Congress

[1] Mary C. Wood, *Indian Trust Responsibility: Protecting Tribal Lands and Resources Through Claims of Injunctive Relief Against Federal Agencies*, 39 TULSA L. REV. 355, 368 (2003); *see id.* at 358 n.20 (citing Report on Trust Responsibilities and the Federal Indian Relationship, Final Report to the American Indian Policy Review Commission at 51 (1976) (trust obligation was a "significant part of the consideration" for the native cessions of land to the United States (internal quotations omitted))).

to adopt legislation to accommodate the claims of Indian tribes to enforce those responsibilities, and the courts have adopted the Indian canons of construction to ensure that United States treaties, legislation, and regulations intended to benefit tribes are construed in a light most favorable to Native people and tribes, the beneficiaries of the trust. In many instances, the Indian Trust Doctrine has compelled the courts to imply tribal rights and federal duties to protect them. And Congress has codified aspects of the Indian Trust Doctrine to give additional force to long-recognized obligations of the United States.

None of the foregoing suggests that the fiduciary obligations of the United States, and a remedy historically available by a common law action for breach of trust, are now cabined by express obligations undertaken by the United States in treaties, statutes and regulations, or that laws of general application alone suffice to enforce these unique obligations. The Navajo Nation's complaint states a claim for common law breach of trust against the United States for failure to secure and protect the Nation's trust resources, the lands and waters essential to fulfill the promise of the Treaties and Executive Orders setting aside the Navajo Reservation out of its immense aboriginal territory, and ensure the Navajo people a viable permanent homeland.

The Nation has stated a claim premised on the Federal Defendants' failure to honor their Treaty obligations, and it also meets the requirements to bring a breach

of trust action under current Circuit precedent as enunciated by the District Court. It is the Nation's position that the continued viability of the Indian Trust Doctrine is essential, and in this action for equitable relief, the Court must again require that the District Court consider the Nation's complaint on its merits. Moreover, this Circuit's decisions that would vitiate the Doctrine, are inapplicable here, and in any event are so fundamentally flawed, that should the Court turn to this alternate ground, and in view of the Law of the Circuit, consideration by the Court *en banc* is warranted.

JURISDICTIONAL STATEMENT

Plaintiff-Appellant the Navajo Nation sued the Department of the Interior ("Department"), its Secretary ("Secretary"), the Bureau of Reclamation and Bureau of Indian Affairs (collectively "Federal Defendants"). The United States District Court for the District of Arizona had federal question jurisdiction over the action pursuant to 28 U.S.C. §§ 1331 and 1362 because the action arises under federal law and the Nation is an Indian tribe.

The Nation appeals the District Court's final order denying leave to amend its complaint and dismissing the action. *Order* (Aug. 23, 2019) ("Final Order") (ER 2-13); *see Judgment of Dismissal in a Civil Case* (Aug. 23, 2019) (ER 1). The Nation timely filed its notice of appeal pursuant to Fed. R. App. P. 4(a)(1)(B)(i),

Notice of Appeal (Oct. 18, 2019) (ER 14-17), so this Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES PRESENTED

(1) Whether the District Court committed legal error in finding it lacked subject matter jurisdiction, when as alleged the Nation's complaint the breach of trust claim did not require a determination of whether the Nation has water rights in the Colorado River in the Lower Basin in Arizona ("Colorado River") and did not implicate the Supreme Court's retained jurisdiction in *Arizona v. California*.

(2) Whether the District Court committed legal error in finding no enforceable trust obligation to preserve and protect the Nation's trust lands and waters, to address the Nation's water rights and needs, and to manage the Colorado River in a manner compatible with those duties arises from either:

(a) the common law Indian Trust Doctrine grounded in the long course of dealings between Indian tribes and the United States, the Nation's cession by Treaty of much of its aboriginal territory, and retention, together with its retained lands, of rights to water to fulfill its Reservation's purpose as a permanent homeland; or

(b) in the alternative, in addition to the Treaties and Executive Orders creating the Navajo Reservation, the 1922 Colorado River Compact and other statutes, regulations and enforceable policy statements identified in the

Nation's complaint that expressly or impliedly imposed such duties on the Federal Defendants.

REPRODUCTION OF LEGAL AUTHORITIES

Pursuant to Fed. R. App. P. 28(f) and Circuit Rule 28-2.7, all pertinent treaties, statutes, and regulations are set forth verbatim in the attached addendum.

STATEMENT OF THE CASE

This case is about the Navajo Nation's need for water and its efforts to meet those needs from the Colorado River. The Colorado River defines the Navajo Reservation's western boundary from Arizona's northern border to its confluence with the Little Colorado River. Third Amended Complaint for Declaratory and Injunctive Relief ¶¶ 14, 18 (Jan. 10, 2019) ("TAC2") (ER 32-33). Despite the Supreme Court's decisions in *United States v. Winans*, 198 U.S. 371 (1905) and *Winters v. United States*, 207 U.S. 564 (1908), determining that lands reserved for and by Native people in treaties, impliedly reserved the water necessary to make those reservations viable permanent homelands, no water rights were adjudicated to any Indian tribe from the Colorado River until Arizona sued California over their respective rights to the Colorado River.

The Navajo Nation began its formal quest to secure water from the Colorado River in 1956, when it first attempted to intervene in *Arizona v California*. TAC2 ¶ 51 (ER 46). The United States had intervened previously, asserting claims on

behalf of the Nation and 24 other tribes. TAC2 ¶ 50 (ER 45). As the Supreme Court acknowledged, "[m]ost of the land in these reservations is and always has been arid. If the water necessary to sustain life is to be had, it must come from the Colorado River or its tributaries." *Arizona v. California*, 373 U.S. 546, 598 (1963) ("*Arizona I*").

The Court in *Arizona I* denied the Nation the opportunity to intervene on its own behalf to assert and protect its reserved water rights. TAC2 ¶ 58 (ER 48). The Nation's rights to the Colorado River were not adjudicated in *Arizona I* because the Supreme Court disagreed with the Special Master regarding the scope of the suit, and as a result tribal claims including those of the Nation above Lake Mead and below Lee Ferry were not addressed.[2] TAC2 ¶¶ 59-60 (ER 49). This action continues the Nation's effort to obtain a water supply from the Colorado River vital to its people.

[2] In *Navajo Nation v. Dep't of Interior*, the Court referenced only the omission of *tributary* uses above Lake Mead. 876 F.3d 1144, 1156 n.13 (9th Cir. 2017) ("*Navajo Nation I*"). The Nation sought to intervene in *Arizona I* in 1961, because, *inter alia*, the Special Master proposed to exclude *both* the mainstream of the Colorado and its tributaries above Lake Mead. While the United States had only asserted claims to the tributary Little Colorado River, the Nation maintained that it had rights to the Colorado, as set forth in its intervention petition. As the Court opined, "[w]e disagree, however, with the Master's holding that the Secretary is powerless to charge States for diversions from the mainstream above Lake Mead." *Arizona I*, 373 U.S. at 590-91.

To be clear, the Nation's complaint does not ask the District Court to quantify its rights to the Colorado River, nor could it – the Supreme Court retained jurisdiction over rights to water in the Colorado River. Rather, to remedy the Federal Defendants' violation of the Nation's Treaties and resultant breaches of trust, the Nation seeks injunctive relief, asking the Court to direct the Federal Defendants to investigate the Nation's needs for water from the Colorado River, to develop a plan to meet those needs, and to manage the Colorado River consistent with that plan. TAC2 at 51-52 (ER 76-77).

The Navajo Nation's claims here are grounded in the establishment of its Reservation by Treaties with, and Executive Orders issued by, the United States. TAC2 ¶¶ 123-26 (ER 74-75). The aboriginal lands of the Diné (the Navajo people), extended into Utah, Colorado, New Mexico and Arizona. TAC2 ¶ 13 (ER 31). In 1849, the Navajo entered into a Treaty of peace, which included the promise of a future reservation, shortly after the United States gained sovereignty over Navajo lands. TAC2 ¶¶ 15, 21 (ER 32, 34). The promised reservation was set aside for the exclusive use of the Navajo in the Treaty of 1868. TAC2 ¶ 22 (ER 34). The 1868 Reservation included only a fraction of the Nation's aboriginal territory, and in exchange for cession of the bulk of its aboriginal lands, the United States promised to assist the Nation in developing those remaining reserved lands into a permanent homeland. TAC2 ¶ 16 (ER 32). The Navajo Reservation was

expanded to reach the south bank of the Colorado River by subsequent Executive Orders. TAC2 ¶¶ 17-18 (ER 32-33).

In *Arizona I* the Supreme Court also confirmed that Congress, in the Boulder Canyon Project Act ("BCPA"), delegated to the Secretary authority to act as water master of the Colorado River, with sole authority and broad discretion to address water needs in the lands of the Lower Basin, including Arizona, California, Nevada, New Mexico, and Utah. TAC2 ¶¶ 77-78 (ER 54-55). The Secretary authorized contracts for delivery of Colorado water, not only to the states, but to several tribes in Arizona with unquantified water rights. TAC2 ¶¶ 79, 82 (ER 55-56). However, despite repeated requests, the Secretary has not granted the Nation a contract. *See* TAC2 ¶¶ 63-65 (ER 49-51).

Alternatively, to meet the jurisdictional requirements for a breach of trust claim stated in this Court's decision in *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006), and adopted by the District Court, the Nation bases its breach of trust claim (in addition to the Treaties and Executive Orders establishing its reservation) on the 1922 Colorado River Compact, statutes, regulations, Federal Defendants' policy documents and guidance made enforceable through their treatment as binding in environmental impact statements and records of decision concerning management of the Colorado River. TAC2 ¶¶ 122-30 (ER 73-76).

Water is a necessity of life, and also necessary for development of a vibrant, thriving homeland. Despite the express obligations undertaken by the United States in the Nation's Treaties, as well as the reserved rights to water and the concomitant duties of protection implied in treaties by the Supreme Court over a century ago, today the Navajo Nation has more in common with third world countries than its neighboring communities. TAC2 ¶¶ 38-43 (ER 42-43). It is estimated that between 30 and 40 percent of Navajo people lack complete plumbing facilities in their homes and must haul water for drinking, bathing, culinary and other domestic uses. TAC2 ¶ 38 (ER 42). The human, social and financial costs associated with inadequate water supplies are well documented. TAC2 ¶¶ 39-40 (ER 42-43). The State of Arizona found the wherewithal, including the political might and the necessary funds, to build the Central Arizona Project ("CAP") to carry Colorado River water hundreds of miles to the metropolises of Phoenix and Tucson. TAC2 ¶ 81 (ER 56). Yet there is no support for such infrastructure to provide members of the Nation, who are citizens of Arizona and whose Reservation boundary is defined by the Colorado River, with even a modest equivalent of the amenities enjoyed in other parts of the State.

While the record is replete with evidence of the Federal Defendants' failure to carry out their trust responsibilities, the performance of the Department of Justice is equally shameful. "The Common Law is the Will of Mankind Issuing

from the Life of the People" is emblazoned across the Robert F. Kennedy Building, the home of the Department of Justice in Washington. Apparently this ideal has been rendered aspirational or abandoned, as Justice Department attorneys have argued here, and before other courts, that the common law will not afford Indian tribes any protection, and a claim for breach of trust must be located in express obligation imposed by treaty, statute or regulation. This is not the law, and the Nation invokes the Indian Trust Doctrine and unabashedly asserts that violation of its Treaties, and the rights and duties both expressly stated and implied therein, are enforceable by a common law action for breach of trust.

The Nation filed this suit in 2003 alleging violations of the National Environmental Policy Act ("NEPA") and a related breach of trust by the Federal Defendants in managing the Colorado River without considering the Nation's unquantified federal reserved water rights and unmet water needs. *Memorandum Supporting Nation's Renewed Motion* at 2 (Jan. 10, 2019) (ER 25). The District Court dismissed the suit in 2014, finding that the Nation lacked standing to bring its NEPA claims, *Order* at 11-12 (July 22, 2014) (ER 101-102), and that sovereign immunity barred the Nation's breach of trust claim. *Id.* at 15 (ER 103).

The Nation appealed, and in December 2017 this Court affirmed the dismissal of the NEPA claims but reversed the dismissal of the breach of trust claim, *Navajo Nation I*, 876 F.3d at 1174, and remanded to the District Court with

instructions to "fully" consider the breach of trust claim "on its merits, after entertaining any request to amend it." *Id.* at 1173, 1174; *see Mandate* (Jan. 26, 2018) (ER 99).

On remand the Nation made two attempts to amend its complaint. In the first Proposed Third Amended Complaint ("TAC1"), the Nation included additional allegation to address this Court's concern that "the tribe offers no actual support for this conjecture [that 'the United States will shirk its trust duties for fear of upsetting the water rights apple-cart' or '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'] — no statements by any government officials, for example, and no pattern of such behavior in the past." *Navajo Nation I*, 876 F.3d at 1163.

While this Court opined in the Nation's first appeal that "interests in water less concrete than unquantified *Winters* rights have formed the basis for standing in the past," *id.* at 1162, on remand the District Court again found the Nation's TAC1 failed to demonstrate the court had jurisdiction because in its view a breach of trust claim premised on failure to protect the Nation's unquantified rights to the waters of the mainstream of the Colorado River required that it determine if the Nation

had federal reserved rights in the first instance.[3] Finding the Nation's first effort to amend its complaint futile, the District Court provided the Nation "one last chance" to amend its complaint. *Order* at 9 (Dec. 11, 2018) (ER 90).

In the Nation's second Proposed Third Amended Complaint, the TAC2,[4] the Nation scrupulously attempted to focus the District Court's attention on the Nation's request for equitable relief to address the Nation's water *needs*, including amending the Prayer for Relief. TAC2 at 51-52 (ER 76-77). Yet, once again, the District Court found that "to the extent that the Nation would have this Court determine that the United States has violated its trust responsibility by failing to appropriate sufficient appurtenant water from the mainstream of the lower Colorado River, that determination cannot be made by this Court in light of the Supreme Court's reservation of the question." Final Order at 6 (ER 7). The Nation did not seek such relief.

However, the District Court determined that the Nation's motion to amend was futile on another ground, holding that none of the Treaties, statutes, regulations, directives and other policy memoranda relied upon in the TAC2

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[3] Astonishingly, counsel for the Federal Defendants asserted that the Nation had failed to state a breach of trust claim because unquantified water rights could not constitute the trust corpus. Tr. at 27, ln. 13-14 (Nov. 14, 2018) ("November 2018 Transcript") (ER 93) ("there is no trust property here").

[4] The Nation's two proposed third amended complaints, TAC1 and TAC2, are referred to collectively as the "Proposed Complaint."

imposed an enforceable duty on the United States that could form the basis of a common law action for breach of trust. *Id.* at 12 (ER 13) (citing *Gros Ventre*, 469 F.3d at 810).[5] The Navajo Nation now appeals the Final Order.

SUMMARY OF THE ARGUMENT

The Nation challenges the District Court's decision, contrary to this Court's mandate, to deny the Nation the opportunity to amend its complaint and dismiss the action for lack of jurisdiction and failure to state a claim on three grounds.

[5] Despite this Court's holding that interests less concrete than unquantified *Winters* rights had been found sufficient to establish standing, counsel for the Federal Defendants informed the District Court that, "[h]ere without identification of a recognized water right, plaintiff has not pled a legally protected interest that can satisfy the first prong of the standing test." Tr. at 30, ln. 20-22 (Aug. 16, 2019) ("August 2019 Transcript") (ER 19). Like every federal agency, the Department of Justice owes fiduciary obligations to the Nation. *United States v. Eberhardt*, 789 F.2d 1354, 1363 (9th Cir. 1986) (Beezer, J., concurring). Nevertheless, the "Executive Branch has repeatedly sought to avoid, reduce, and repudiate the federal trust responsibility to Indians . . . by misrepresenting relevant facts and law in Indian trust litigation in an effort to limit federal liability . . . [as] part of a broader effort to protect the public fisc and prevail in litigation." Daniel I.S.J. Rey-Bear and Matthew L.M. Fletcher, "*We Need Protection from Our Protectors": The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 MICH. J. ENVTL. & ADMIN. L. 397, 425 (2017). *See also, id.* at 431 and n.209 ("federal courts have either imposed sanctions for or strongly rejected unfounded federal assertions in Indian breach of trust cases") (citations omitted). Such misrepresentations are particularly egregious given the courts' expectations of federal attorneys. *See*, *e.g.*, *Nat'l Immigration Project of the Nat'l Lawyers Guild v. U.S. Dep't of Homeland Sec.*, 842 F.Supp.2d 720, 722 (S.D.N.Y. 2012) ("[w]hen the Solicitor General of the United States makes a representation to the Supreme Court, trustworthiness is presumed.").

First, the District Court erred when it held that the Supreme Court's retained jurisdiction in *Arizona I* precluded it from considering the Nation's breach of trust claims, because it would require the court to determine whether the Nation holds reserved rights to the Colorado River. As the District Court held in its first order denying the Nation's motion to amend its complaint:

> The Nation's Proposed TAC thus requires a determination that the Nation has rights to the River. At the very least it would require that this Court determine that the Nation *may* have rights to the river, and thus the United States *may* have breached its trust duties. But a request for a determination that the United States may have breached its trust to the Nation does not constitute a case or controversy under the Constitution.

Order at 5 (Dec. 11, 2018) (ER 86). The District Court restated this holding somewhat differently in its second order holding that "the enforceable trust duties the Nation asserts are not inferable from the mere existence of implied water rights. The undisputed existence of the Nation's implied, as-yet-unquantified rights to some as-yet-undetermined appurtenant water does not create those duties." Final Order at 8 (ER 9). The District Court's reasoning turns the Supreme Court's decision in *Winters* on its head. *Winters* held that reservations of lands for Indian tribes impliedly reserved rights to water to make those lands productive. *Winters* did not hold that tribes "may" have rights; it held they do, and tribes are not precluded from putting their unquantified reserved rights to use. The Supreme Court and this Court have held that the federal government has a trust obligation to

preserve and protect unquantified reserved rights, and the District Court's holding was error.

Second, the District Court determined that the Nation failed to state a claim for breach of trust and amendment of the complaint would be futile because, in its opinion, neither the Nation's Treaties, nor any of the multitude of authorities relied on by the Nation imposed an *express* fiduciary duty on the Federal Defendants. *Id.* (ER 9) ("the Nation cannot bring a breach of trust claim wholly separate from any statutorily granted right") (internal quotations and citations omitted). The District Court relied upon this Court's decisions in *Morongo Band of Mission Indians v. Fed. Aviation Admin*., 161 F.3d 569 (9th Cir. 1998), and *Gros Ventre*, importing the requirements to state a claim for money damages under the Tucker Act[6] to the assessment of a common law claim for breach trust.

In response, the Nation relies on Supreme Court and Circuit precedent recognizing a common law claim for breach of a tribe's treaty reserved rights, including rights reserved by implication. Thus, this Court need not apply the rationale of *Morongo* and *Gros Ventre* or consider whether those cases are controlling precedent. The Supreme Court's decisions in *United States v. Mitchell*, 445 U.S. 535 (1980) ("*Mitchell I*") and *United States v. Mitchell*, 463 U.S. 206

[6] Tucker Act, 28 U.S.C. § 1491, and the Indian Tucker Act, 28 U.S.C. § 1505 (hereinafter "Tucker Act").

(1983) ("*Mitchell II*") have been described as "the pathmarking precedents on the question whether a statute or regulation (or combination thereof) can fairly be interpreted as mandating compensation by the Federal Government." *United States v. Navajo Nation*, 537 U.S. 488, 489 (2003) ("*Navajo I*") (internal quotations and citation omitted). "To state a claim cognizable under the Indian Tucker Act, *Mitchell I* and *Mitchell II* instruct, a tribe must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties." *Id.* at 490. But the *Mitchell* decisions *are not* pathmarking precedents on the question of whether an Indian tribe has stated a claim for breach of trust, and they have no application to the Nation's claim. To the extent that the Supreme Court suggested otherwise in *United States v. Jicarilla Apache Nation*, 564 U.S. 162 (2011), it elides quotations from prior Supreme Court decisions rendering them misleading, and its statements beyond the context of the Tucker Act were *dicta*.

Should the Court decide, however, that *Morongo* and *Gros Ventre* are controlling precedent that it must apply, the Nation has met the requirement to identify an enforceable duty imposed by treaty, statute or regulation. In addition to the Nation's treaties, the "Law of the River," including the 1922 Colorado River Compact, which expressly preserved the federal government's obligations to tribes, and the BCPA, authorizing the Secretary to manage the Colorado River as water

master, undergird the Nation's breach of trust claim. The Nation relies as well on the Federal Defendants' own understanding of the Indian Trust Doctrine and their fiduciary duties to tribes as expressed in assorted policy statements, administrative orders, manuals, and environmental compliance documents.

ARGUMENT

I. *ARIZONA V. CALIFORNIA* DOES NOT DEPRIVE THE COURT OF SUBJECT MATTER JURISDICTION OVER THE NATION'S BREACH OF TRUST CLAIM.

A. This Court Reviews Dismissal for Lack of Subject Matter Jurisdiction *De Novo*.

This Court reviews *de novo* a District Court decision dismissing a case for lack of subject matter jurisdiction. *Bishop Paiute Tribe v. Inyo Cty.*, 863 F.3d 1144, 1151 (9th Cir. 2017). In its review, this Court takes all allegations of material fact in the Proposed Complaint as true and construes them in the light most favorable to the Nation. *Gordon v. City of Oakland*, 627 F.3d 1092, 1095 (9th Cir. 2010).

B. The District Court Need Not Quantify the Nation's Reserved Water Rights to Consider the Breach of Trust Claim.

The District Court violated this Court's mandate and erroneously concluded that the Nation's breach of trust claim infringed on the Supreme Court's retained jurisdiction in *Arizona I*. As set forth in the Proposed Complaint, the claim did not require, and the prayers for relief did not request, the District Court to determine the Nation's reserved water rights in the Colorado River.

As a preliminary matter, this Court's mandate to reach the merits of the breach of trust claim impliedly confirmed that the District Court had jurisdiction and foreclosed further consideration of this issue. *See Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1080 (9th Cir. 2010) (district courts must act consistent with letter and spirit of mandate and refrain from deciding matters expressly or impliedly disposed of on appeal). The question of a court's jurisdiction does not go to the merits of a claim. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95 (1998).

The Supreme Court's retained jurisdiction in *Arizona I* does not deprive other courts of subject matter jurisdiction over every case that might affect Colorado River water. In *Klamath Water Users Protective Ass'n v. Patterson*, this Court held that the pending state stream adjudication in the Klamath River Basin did not preclude the lower court from "concluding that Reclamation has the authority to direct operation of the Dam to comply with Tribal water requirements." 204 F.3d 1206, 1213-14 (9th Cir. 2000) ("Because Reclamation maintains control of the Dam, it has a responsibility to divert the water and resources needed to fulfill the Tribes' rights . . . that take precedence over any alleged rights of the Irrigators."); *see also Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 763 F.2d 1032, 1034-35 (9th Cir. 1985). Accordingly, the

District Court may consider declaratory and injunctive relief related to the Nation's unmet water needs without trenching on the Supreme Court's jurisdiction.

The District Court ignored the distinction between "the Nation's potential reserved water rights under *Winters* . . . [and] a freestanding interest in an adequate water supply for the Navajo that exists notwithstanding the lack of a decreed right to water." *Navajo Nation I*, 876 F.3d at 1161. The TAC2 did not ask the District Court to order the Federal Defendants to secure mainstream Colorado River water for the Nation's benefit, but requested declaratory and injunctive relief requiring the Federal Defendants to (1) identify the Nation's water needs; (2) develop a plan to secure the needed water; and (3) manage the Colorado River consistent with that plan. TAC2 at 51-52 (ER 76-77). To grant this relief, the District Court only had to consider whether the Navajo Nation needs water to fulfill the permanent homeland purpose of the Navajo Reservation. *See id.* (ER 76-77). The Federal Defendants would evaluate the nature and scope of those needs, develop a plan to secure water in satisfaction of such needs, and refrain from taking actions to manage the Colorado River in derogation of the plan.

The District Court also ignored the fact that the Secretary enjoys exclusive contracting authority on the Colorado River under the BCPA, 43 U.S.C. § 617d, and has exclusive power "to decide which users within each State would get water." *Arizona I*, 373 U.S. at 580. The Secretary may ignore state law and the

doctrine of prior appropriation in contracting for and distributing Colorado River water. *Id.* at 580-88. Pursuant to this authority, the Federal Defendants have contracted to deliver water to several Arizona Indian tribes lacking decreed water rights, and likewise have the power to contract with the Nation for any remaining Colorado River water that might be used to satisfy its critical water needs, regardless of whether its rights in the Colorado River are quantified. November 2018 Transcript at 14. ln. 9-16 (ER 92); TAC2 ¶ 82 (ER 56). The Nation alleged significant water needs on the Navajo Reservation that the Federal Defendants are empowered to address, TAC2 at ¶¶ 38-43, 77-78 (ER 42-43, 54-55), and the District Court committed legal error and abused its discretion in finding it lacked jurisdiction.

II. THE NATION'S COMPLAINT STATES A BREACH OF TRUST CLAIM AGAINST THE FEDERAL DEFENDANTS.

A. Review of the District Court's Grounds for Dismissing the Proposed Complaint is *De Novo*.

As was set forth in Argument I, *supra*, and pursuant to the authorities identified therein, review of the District Court's decision that the Nation could not state a claim for breach of trust and amendment of its complaint would be futile is *de novo*, taking all allegations of material fact in the Proposed Complaint as true, construed in the light most favorable to the Nation. This Court also reviews the District Court's interpretation of treaties, statutes and executive orders *de novo*.

United States v. Confederated Tribes of Colville Indian Reservation, 606 F.3d 698, 708 (9th Cir. 2010). The District Court's findings of historical fact, or lack thereof, including "'findings regarding the treaty negotiators' intentions, are reviewed for clear error,'" and this Court "'then review[s] *de novo* whether the district court reached the proper conclusion as to the meaning of the [treaties] given those findings.'" *Id.* at 708 (quoting *United States v. Idaho*, 210 F.3d 1067, 1072 (9th Cir. 2000); *United States v. Washington*, 157 F.3d 630, 642 (9th Cir. 1998)). The *Treaty with the Navaho, 1849*, art. XI, Sept. 9, 1849, 9 Stat. 974 ("1849 Treaty") expressly declared that the Treaty would "receive a liberal construction, at all times and in all places, to the end that the . . . United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians." This Court, as a matter of federal common law, has "long construed treaties between the United States and Indian tribes in favor of the Indians," and if particular treaty provisions "'are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense.'" *United States v. Washington*, 853 F.3d 946, 963 (9th Cir. 2017), *aff'd by an equally divided court*, 138 S. Ct. 1832 (2018) (per curiam) (quoting *Worcester v. Georgia*, 31 U.S. 515, 582 (1832)).

B. The Treaties and Executive Orders Establishing the Navajo Reservation Require the Federal Defendants to Identify, Preserve and Protect Water Supplies for the Nation.

The District Court found the Navajo Nation's "strongest argument" to be "that the United States has trust duties arising from the treaties signed between the two parties and the Nation's implied water rights under *Winters* . . . ." Final Order at 4 (ER 5). Yet, the District Court ultimately determined that "enforceable trust duties . . . are not inferable from the mere existence of implied water rights." *Id.* at 8 (ER 9). The District Court ignored extensive and long-standing Supreme Court and Ninth Circuit precedent confirming that treaties are an independent and enforceable source of law and that reserved rights, regardless of whether they are quantified, include an attendant duty of protection.

1. Treaties Create Enforceable Rights and Duties and are Subject to the Indian Canons of Construction.

When the United States ratified the 1849 Treaty, it placed Navajo people "under the exclusive jurisdiction and protection of the . . . United States," providing "that they are now, and will forever remain, under the aforesaid jurisdiction and protection." TAC2 ¶ 21 (ER 34). Among other things, the 1849 Treaty (1) applied the various Indian non-intercourse acts to the Navajo Nation's property "as if said laws had been passed for [its] sole benefit and protection"; and (2) promised to establish a reservation and enact laws "as may be deemed conducive to the prosperity and happiness of said Indians." *Id.*

In 1868, a congressionally appointed Peace Commission and Navajo leaders entered into formal treaty negotiations − translated multiple times from English to Spanish and then Navajo, and from Navajo to Spanish and then back to English − before reaching an agreement to establish the Navajo Reservation as a "permanent home . . . for the exclusive use and occupation of the [Navajos.]" *Treaty with the Navaho, 1868*, art. XIII, June 1, 1868, 15 Stat. 667 ("1868 Treaty") (ER 104-110). In exchange for the "benefits" of the Treaty, the Navajos "relinquish[ed] all right to occupy any territory outside their reservation." *Id.* art. IX. (ER 108). To fulfill the Navajo Reservation's purpose, the 1868 Treaty encouraged individual Navajos to farm reservation lands, promising agricultural education, seeds and farming implements, and monetary rewards. *Id.* arts. V-VIII (ER 106-108).

The 1868 Treaty does not mention water. Regardless, the Supreme Court recognized in *Winans* and *Winters* that Indian tribes could not have intended to cede by treaty the waters necessary to sustain traditional lifeways on their reservations, and the Court has implied water rights despite the absence of express treaty language retaining rights to water. This Court has repeatedly recognized that tribal reserved rights, whether to hunt and fish, or to access and use water are accompanied by a federal duty to protect those rights. As the court observed in *Cobell v. Norton*, "[t]he fiduciary nature of the government's duty was made explicit in *Seminole*," where the Supreme Court held that the federal government

has "charged itself with moral obligations of the highest responsibility and trust" in its relationships with Indians, and its conduct should be "judged by the most exacting fiduciary standards." 240 F.3d 1081, 1099 (D.C. Cir. 2001) (quoting *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942)).

In *Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n*, the Supreme Court invoked the *Winters* doctrine to support its holding that treaty fishing rights include a right of access to water. 443 U.S. 658, 684-86 (1979). Analogizing treaty fishing and water rights, the Court noted that even though water rights are "implicitly secured to the Indians by treaties reserving land," the Supreme Court enforced treaty reserved rights "by ordering an apportionment to the Indians of enough water to meet their subsistence and cultivation needs." *Id.* at 684; *see id.* at 673 n.20 ("treaties confer enforceable special benefits on signatory Indian tribes").

In reaching this holding, the Court stated that a treaty between an Indian tribe and the United States "is essentially a contract between two sovereign nations," so "the intention of the parties" during negotiations "must control any attempt to interpret" treaty terms. *Id.* at 675. Consideration must be given to what was given up, whether land or other resources, in the bargained for exchange. *Id.*

at 678 (construing "the 'right of *taking* fish"' in light of the "obvious significance to the tribes relinquishing a portion of their pre-existing rights"). The Court applied the Indian canons of construction to interpret the treaty and considered historical evidence including contemporaneous documents, the use of interpreters during the negotiations, and the parties' primary concerns at that time. *Id.* at 666-69, 675-78; *see also Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1011-12 (2019) (applying Indian canons of construction to require courts to focus on the historical context of the treaty) (citing *Winans*, 198 U.S. at 381); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) (Court "look[ed] beyond the written words to the larger context that frames the [t]reaty, including 'the practical construction adopted by the parties.'" (quoting *Choctaw Nation v. United States*, 318 U.S. 423, 432 (1943))). The District Court erroneously dismissed the Nation's action before allowing development of the record to address the history, negotiations, and the Navajos' understanding of the Treaties.

Similarly, in *United States v. Washington*, this Court relied on the *Winters* doctrine to hold that the tribes' treaty fishing rights included a guaranteed right of access to and protection of the fishery. 853 F.3d at 964-66 (citing *United States v.*

Adair, 723 F.2d 1394 (9th Cir. 1983)).[7] The Court held that the obligations undertaken by the United States in the treaty to preserve and protect the fishery were not limited to the contracting parties, were binding on the State, *id.* at 965, and equity favored requiring the State "to keep the promises upon which the Tribes relied when they ceded huge tracts of land by way of the Treaties." *Id.* at 977. Since the blocking of fish runs by barrier culverts violated the treaties, *id.* at 966, this Court affirmed a permanent injunction against the State requiring the removal or modification of barrier culverts pursuant to a judicially crafted plan. *Id.* at 979-80. This Court also agreed with the State that its holding "necessarily means that the United States has also violated the Treaties in building and maintaining its own barrier culverts." *Id.* at 969. Like the Supreme Court in *Fishing Vessel*, this Court applied the Indian canons of construction and looked to the historical

[7] In *Skokomish Indian Tribe v. United States*, 410 F.3d 506 (9th Cir. 2005), this Court transferred the Tribe's claims against the United States for damages to the Claims Court, analogizing them to Tucker Act claims. In a forceful dissent, Judge Berzon, with Judges Pregerson, Paez, and Rawlins joining, described the federal courts' history of engagement in treaty claims, stating that the majority's "assertions largely ignore two centuries of understandings concerning the federal protection of Indian aboriginal and treaty-based rights—in particular, the understanding that Indian treaties in large part simply *preserve* some pre-existing aboriginal rights in exchange for cession of a portion of Indian land." *Id.* at 522 (citing *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985), as authority "permitting suits for damages under federal common law for violation of aboriginal rights reserved by treaty.").

circumstances surrounding the treaty negotiations to determine the scope of Washington's duties. *Id.* at 963-66.

The United States must protect all rights and resources guaranteed by treaties with Indian tribes, including unquantified reserved water rights. As this Court observed in the Nation's first appeal, "[t]he precise scope and status of the Nation's possible *Winters* rights do not concern us," because "interests in water less concrete than unquantified *Winters* rights have formed the basis for standing in the past." *Navajo Nation I*, 876 F.3d at 1162 (citing *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1086 (9th Cir. 2003) ("loss of affordable irrigation water" sufficient to confer standing)).[8] The Nation's Proposed Complaint states a cause of action against the Federal Defendants for breach of their fiduciary duties.

2. Federal Court Jurisdiction Encompasses a Common Law Cause of Action for Breach of Trust.

The Nation's breach of trust claim invokes the District Court's federal question jurisdiction and relies on the APA for a waiver of the United States'

[8] *See Klamath*, 204 F.3d at 1213 ("the United States, as a trustee for the Tribes, has a responsibility to protect their rights and resources"); *see also Parravano v. Babbitt*, 70 F.3d 539, 547 (9th Cir. 1995) (federally reserved fishing rights); *Kittitas*, 763 F.2d at 1034-35 & n.5 (unquantified reserved water rights,); *Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F.Supp. 252, 256 (D.D.C. 1972) (unquantified water rights); *Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 425 (1991) (unquantified reserved water rights reserved by statute and executive order).

sovereign immunity. *Id.* at 1173. Federal question jurisdiction may be premised on federal common law claims. "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331. Sections 1331 and 1362[9] encompass the Nation's claim for breach of trust. "Given the nature and source of the possessory rights of Indian tribes to their aboriginal lands, particularly when confirmed by treaty, it is plain that the complaint asserted a controversy arising under the Constitution, laws, or treaties of the United States within the meaning of both § 1331 and § 1362." *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 667 (1974).

"It is well settled that [§ 1331's] statutory grant of 'jurisdiction will support claims founded upon federal common law as well as those of a statutory origin.'" *National Farmers Union Ins. Co's v. Crow Tribe of Indians*, 471 U.S. 845, 850 (1985) (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 100 (1972)). "Federal common law as articulated in rules that are fashioned by court decisions are 'laws' as that term is used in § 1331." *Id.* Further, this Court has held that Indian treaties, and the rights recognized in them are law to apply. *Washington State Charterboat Ass'n v. Baldridge*, 702 F.2d 820, 823 (9th Cir. 1983) (treaties are "other applicable

[9] "Congress intended by § 1362 to authorize an Indian tribe to bring suit in federal court to protect its federally derived property rights in those situations where the United States declines to act." *Fort Mojave Tribe v. Lafollette*, 478 F.2d 1016, 1018 (9th Cir. 1973).

law" under Magnuson Fishery Conservation and Management Act); *Parravano*, 70 F.3d at 547 (executive orders creating reservation and vesting tribes with reserved fishing rights are "other applicable law" under Magnuson Act). The Proposed Complaint states a claim for breach of trust cognizable in this Court.

3. Requiring an Indian Tribe to Identify Other Positive Law to Assert a Breach of Trust Claim Against the United States Would Eviscerate the Indian Trust Doctrine.

The United States Supreme Court has never held that an Indian tribe bringing a claim under sections 1331 or 1362 for violation of the government's federal common law trust obligations can only secure prospective relief by pointing to a federal statute or regulation imposing a fiduciary duty on the government.[10] Further, as the court observed in *Jicarilla Apache Nation v. United States*, the United States "never quite comes to grip with the fact that if the government's fiduciary duties are limited to the plain dictates of the statutes themselves, such duties are not really 'fiduciary' duties at all." 100 Fed. Cl. 726, 738 (2011); *see also Varity Corp. v. Howe*, 516 U.S. 489, 504 (1996):

[10] "We have never held that all of the Government's trust responsibilities to Indians must be set forth expressly in a specific statute or regulation." *Jicarilla*, 564 U.S. at 202 (Sotomayor, J., dissenting). Observing that the Court's decision in *Jicarilla* should be of limited application because it "pertains only to a narrow evidentiary issue," 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." *Id.* at 188-89.

> [T]he primary function of the fiduciary duty is to constrain the exercise of *discretionary* powers which are controlled by no other specific duty imposed by the trust instrument or the legal regime. If the fiduciary duty applied to nothing more than activities already controlled by other specific legal duties, it would serve no purpose.

(holding that Employee Retirement Income Security Act of 1974 does not preclude individuals from seeking relief for breach of plan administrators' fiduciary duties).

This case is distinguishable from suits where a tribe seeks money damages from the United States under the Tucker Act. The Indian Trust Doctrine cannot be equated with the requirements for bringing an action under the Tucker Act, because the Doctrine emanates from this Nation's founding, and the fiduciary responsibility the United States undertook in its relationship with Indian tribes. The Tucker Act is simply a jurisdictional statute permitting monetary claims to be brought against the United States. The Indian Trust Doctrine has been described as "sacred." *See*, *e.g.*, *Mitchell II*, 463 U.S. at 221 (citing Representative Howard "[r]eferring to the relationship between the Indians and the Government as a 'sacred trust,'" 78 Cong. Rec. at 11726). The Tucker Act has no such attributes.

C. *Gros Ventre* Improperly Applied the Tucker Act's Jurisdictional Requirements to a Common Law Breach of Trust Claim Against the United States.

The requirements to state a breach of trust claim set forth in *Gros Ventre* do not apply to the Nation's claim as alleged in the Proposed Complaint because controlling Supreme Court and Circuit authority make clear that an Indian tribe can

bring a common law action for violation of its treaties. Accordingly, the District Court's reliance on *Gros Ventre* was misplaced, and its dismissal of the Nation's complaint because "the Nation 'cannot allege a common law cause of action for breach of trust that is wholly separate from any statutorily granted right,'" Final Order at 12 (ER 13) (citing *Gros Ventre*, 469 F.3d at 810), was error.

However, should this Court find the Nation's primary argument insufficient, and find instead that *Gros Ventre*, and its holding that "in this circuit, then, tribes must point to a specific treaty, agreement, executive order, statute, or regulation that the government violated in order to bring a breach of trust claim, even one for injunctive relief rather than money damages," Final Order at 4 (ER 5), is controlling precedent, the Nation meets those requirements as well. *See infra*, Section D. A host of legal authorities, together with the Nation's Treaties, give rise to fiduciary duties imposed on the Federal Defendants that meet the requirements of *Gros Ventre*. However, the Nation will explain here that the decisions in *Gros Ventre,* and its predecessor *Morongo,* are built on an unsound foundation and should not stand.

Covelo Indian Community v. Fed. Energy Regulatory Comm'n, 895 F.2d 581 (9th Cir. 1990), the earliest case relied on by *Morongo*, 161 F.3d at 574, was an action under the Federal Power Act ("FPA") where the Court considered whether the Community had been wrongly denied party status in a Federal Energy

Regulatory Commission ("FERC") licensing proceeding. The Court observed that "[t]he same trust principles that govern private fiduciaries determine the scope of FERC's obligations to the Community," *id.* at 586 (citing *Assiniboine & Sioux Tribes v. Bd. of Oil & Gas Conservation*, 792 F.2d 782, 794 (9th Cir.1986)), but held, nonetheless, that the United States had no obligation to provide the Community with actual notice of that proceeding, which was more than the FPA required. *Id.* *See also Skokomish Indian Tribe v. Fed. Energy Regulatory Comm'n*, 121 F.3d 1303, 1309 (9th Cir. 1997) (the Tribe's permit application that conflicted with a pending relicensing application was "barred by FERC's regulations, and the federal trust responsibility does not compel its acceptance") (citing *Covelo*, 895 F.2d at 586). *Covelo* and *Skokomish* stand for the unremarkable proposition that in actions under the FPA, FERC was not compelled by its trust obligation to the tribes to alter its administrative procedures. They do not hold either that the United States meets its fiduciary obligations solely by compliance with laws of general application, or that a claim for breach of trust must identify a treaty, statute or regulation imposing a duty on the United States.

Inter Tribal Council of Arizona, Inc. v. Babbitt, 51 F.3d 199 (9th Cir. 1994), cited by both *Morongo*, 161 F.3d at 574, and *Gros Ventre*, 469 F.3d at 810, is also distinguishable. In considering the Arizona tribes' common law breach of trust claim, the Court again acknowledged that the United States owes a broad fiduciary

responsibility to tribes, and that the common law elements of a trust must be met, including a trustee (the United States), trust beneficiary (the tribes) and trust corpus (alleged by the tribes to be lands owned by the United States and used by the Inter Tribal Council of Arizona ("ITCA")). *ITCA*, 51 F.3d at 203 (citing *Mitchell II*, 463 U.S. at 226). The Court did not deny the tribes' common law claim for lack of a statute imposing a duty on the United States, but rather for lack of a trust corpus, holding that the "off-reservation school was not part of Indian lands, but was merely allocated by the BIA for use by the Tribes." *Id.*[11] *ITCA* supports the availability of a common law remedy for breach of trust, although it did not find one, not the positions espoused in *Morongo* and *Gros Ventre*.

Morongo was the first Ninth Circuit decision to hold that "although the United States does owe a general trust responsibility to Indian tribes, unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." 161 F.3d at 574. This statement failed to recite any Ninth Circuit or Supreme Court authority. Instead, the *Morongo* Court based its holding on its view that "the main

[11] In fact, the Court had already determined that in the Arizona-Florida Land Exchange Act, Congress had expressly foreclosed a right of action by any non-party to the exchange agreement, and separately considered the common law breach of trust claim. *Id.* at 202-03.

reasons for [the *Mitchell II* Court's] conclusion were the specific obligations placed on the government by statutes and regulations, and the fact that the government 'assume[d] such elaborate control over forests and property belonging to Indians.'" *Id.* This was an appropriate consideration in *Mitchell II*, where the Court was reviewing a claim under the Tucker Act requiring an additional source of law, but of little relevance here where the Nation asserts a common law breach of trust claim premised on the District Court's federal question jurisdiction.

The rationale for the *Morongo* Court's decision is flawed in two ways. First, the Court failed to distinguish between a claim for money damages brought under the Tucker Act and a common law breach of trust action. Second, in reliance on the earlier cases holding that in certain instances procedural protections in a given statutory or regulatory scheme are sufficient to protect tribal interests even when viewed through the lens of the trust responsibility, the Court in *Morongo* opined that the converse of those decisions must also be the law. Under this faulty paradigm, the absence of any statute, regulation or treaty spelling out a fiduciary duty dooms any tribal claim for breach of trust. *See id.* (the trust "responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes."). However, the second proposition is not a necessary corollary of the first, and the *Morongo* Court's analysis is fatally deficient.

Further, from a precedential standpoint, it is not clear why the Court's discussion of the trust responsibility was necessary to its decision, where the Court concluded that the FAA had not violated NEPA, NHPA, or the Transportation Act, and so the Tribe could not state a claim under the APA. *Id.* at 583. The Court's trust analysis is limited to the Tribe's argument that the Court was obligated to apply the Indian canons of construction to these laws. *Id.* at 574. Nevertheless, *Morongo* is inappropriately cited by *Gros Ventre* as the law of this Circuit.

In *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468 (9th Cir. 2000), the Court further convolutes the misunderstanding that undergirds the *Morongo* decision, by opining that *Morongo* involved a challenge "under the APA, [of] an agency's submission of a ROD as violating the trust responsibility owed to a Native American tribe." *Id.* at 471. But as discussed above, *Morongo* did not evaluate the trust responsibility in the context of an APA challenge, nor could it.[12] The Court in *Morongo* engaged in a typical APA analysis of the FAA ROD, and

[12] *See Jicarilla*, 100 Fed. Cl. at 739 n.18 (rejecting the Department's argument that trust management decision was subject to "traditional arbitrary and capricious" review, citing numerous case recognizing "that the duty of care owed by the United States is not mere reasonableness, but the highest fiduciary standards.") (internal quotations and citations omitted); *see also Jicarilla Apache Tribe v. Supron Energy Corp.*, 728 F.2d 1555, 1563 (10th Cir. 1984) (Seymour, J., concurring in part and dissenting in part), *adopted as majority opinion,* 782 F.2d 855 (10th Cir. 1986) (en banc) (Secretary's "actions must not merely meet the minimal requirements of administrative law, but must also pass scrutiny under the more stringent standards demanded of a fiduciary.").

found the decision not arbitrary, capricious or an abuse of discretion. However, as the Court correctly observed, "the Colville's arguments are procedural in nature" and "Colville does not argue that any of the substantive rights guaranteed in the Agreement have been violated." *Id.* at 479. Such procedural violations are appropriately reviewed under the APA.

Finally, the Court's decision in *Gros Ventre* is in error on at least two grounds. First, as this Court held in the instant case on its first review, the Nation can rely on the APA's waiver of the federal government's sovereign immunity without stating a cause of action under the APA or pointing to some final agency action. *Navajo Nation I*, 876 F.3d at 1172-73. Second, a common law breach of trust action remains viable in the federal courts. *See supra*, Section II (B)(2); *cf. Gros Ventre*, 469 F.3d at 809-10.[13]

[13] The Court's reliance on *Starck v. Wickard*, 321 U.S. 288, 312 (1944) (Frankfurter, J. dissenting), stating that "there is no such thing as a common law of judicial review in the federal courts" is also error. *Gros Ventre*, 469 F.3d at 810. There is no question, as demonstrated above, that the District Court's federal question jurisdiction encompasses the Nation's common law breach of trust claims against the Federal Defendants. Justice Frankfurter was voicing his concern that there was no authority for the federal court's assumption of jurisdiction in that matter, not that a common law cause of action cannot be brought in the federal courts. His statement does not support the determination in *Gros Ventre,* that an Indian tribe "cannot allege a common law cause of action for breach of trust that is wholly separate from any statutorily granted right." *Id*.

Gros Ventre's rendition of the "current state of Ninth Circuit caselaw," *Gros Ventre*, 469 F.3d at 810,[14] would eviscerate the Indian Trust Doctrine, rendering it hollow and meaningless. The trust responsibility of the United States requires more than mere "compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." *Id*. As the Supreme Court wrote in *Varity*, "[i]f the fiduciary duty applied to nothing more than activities already controlled by other specific legal duties, it would serve no purpose." 516 U.S. at 504. The Court in *Gros Ventre* largely reiterated the analysis of *Morongo*, and relies on the same cases. No case in this Circuit before *Morongo* had held that to state a breach of trust claim against the United States, an Indian tribe is required to identify a duty imposed by a statute, regulation or treaty. These two decisions wrongly foreclose a common law breach of trust claim, in contravention of valid, applicable Supreme Court precedent. As demonstrated above, the Court reached those conclusions by compounding errors in logic and misconstruing, and treating as synonymous, distinct jurisdictional requirements.

This Court continued to conflate the requirements for bringing a common law breach of trust action with the decisions in *Mitchell I* and *Mitchell II*, in *Marceau v. Blackfeet Housing Auth.*, 540 F.3d 916 (9th Cir. 2008), replacing in

[14] Citing *Morongo*, 161 F.3d at 574; *Okanogan Highlands*, 236 F.3d at 479; *Skokomish*, 121 F.3d at 1308-09; *ITCA*, 51 F.3d at 203.

part its 2006 decision predating and cited in *Gros Ventre*. The Court described the "*Mitchell* Doctrine" as providing that: "[t]o create an actionable fiduciary duty of the federal government toward Indian tribes, a statute must give the government pervasive control over the resource at issue." *Marceau*, 540 F.3d at 922. Again, the *Mitchell* decisions stand for the proposition that "the Tucker Act does not create any substantive right enforceable against the United States for money damages. A substantive right must be found in some other source of law, such as the Constitution, or any Act of Congress, or any regulation of an executive department." *Mitchell II*, 463 U.S. at 216 (internal quotations and citations omitted). They were not common law breach of trust actions, but claims brought under the Tucker Act seeking money damages from the United States. And while the *Marceau* Court accurately reproduced the language from the Supreme Court's opinion in *White Mountain*, that "a trust relationship alone is not enough to imply a *remedy in damages*; 'a further source of law [is] needed to provide focus for the trust relationship,'" *Marceau,* 540 F.3d at 924 (quoting *United States v. White Mountain Apache Tribe,* 537 U.S. 465, 477 (2003) (emphasis added)), it failed to acknowledge that a further source of law is required to support *a claim for damages* under the Tucker Act, not a common law action for breach of trust.

As should be clear from the foregoing, the *Morongo* Court had no legal basis for importing the requirements to state a cause of action for money damages under

the Tucker Act to common law breach of trust claims, and it cited none. A separate line of authority, recognized by the Supreme Court and this Circuit, supports the continued validity of the Indian Trust Doctrine, and a remedy available in the common law.

D. In the Alternative, the Federal Defendants' Legal Obligations to Address the Nation's Unquantified Water Rights and Critical Water Needs and Their Pervasive Control of the Colorado River Give Rise to Enforceable Trust Duties.

The Nation meets the requirement in *Gros Ventre* adopted by the District Court that the Nation must point to specific federal laws giving rise to enforceable trust duties. Final Order at 3-4, 8-9 (ER 4-5, 9-10). The jurisdictional requirements to bring a Tucker Act claim for money damages against the United States should not apply to breach of trust claims seeking only declaratory and injunctive relief. However, the Nation met that standard. The District Court ignored much of the authority cited by the Nation and gave short shrift to statutes, regulations, policy guidance imposing duties of trust on the Federal Defendants, and their own departmental statements acknowledging their obligations under the Indian Trust Doctrine, concluding that "none of these substantive sources of law create the trust duties the Nation seeks to enforce . . . [so] its breach of trust claim must fail, and amendment would be futile." Final Order at 12 (ER 13).

1. *Gros Ventre* Requires Tribes to Identify Specific Legal Mandates Related to Trust Resources and Demonstrate Pervasive Federal Control over Those Resources.

In the *Mitchell* cases on which *Gros Ventre* relies, individual tribal allottees alleged federal mismanagement of timber on trust allotments and twice brought a breach of trust claim for money damages under the Tucker Act. The allottees first based their claim solely on the General Allotment Act ("GAA"), but the Supreme Court found that the United States had not "undertaken full fiduciary responsibilities as to the management of allotted lands" under the GAA because the allottees, not the United States, occupied and used the subject lands. *Mitchell I*, 445 U.S. at 542.

In *Mitchell II*, the allottees redirected their claims to focus on the Indian timber management statutes and regulations giving the Secretary a "pervasive role in the sales of timber from Indian lands," 463 U.S. at 219; *see id.* at 219-23, and requiring sustained-yield timber management. *Id.* at 221. The Court found that the statutes and regulations "establish the 'comprehensive' responsibilities of the Federal Government in managing the harvesting of Indian timber. The Department . . . 'exercises literally daily supervision over the harvesting and management of tribal timber.' Virtually every stage of the process is under federal control." *Id.* at 222 (citations omitted). Thus, despite an absence of explicit trust language, the

Court interpreted the statutes and regulations as creating enforceable trust obligations:

> In contrast to the bare trust created by the [GAA], the statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians. They thereby establish a fiduciary relationship and define the contours of the United States' fiduciary responsibilities.

Id. at 224. Relevant here, the United States sought to avoid money damages by conceding the availability of declaratory and injunctive relief against the Secretary. *Id.* at 227.

Similarly, in *White Mountain*, the Supreme Court upheld a breach of trust claim brought under the Tucker Act stemming from the government's failure to preserve and maintain a historic fort within the Tribe's reservation that the government occupied and used for federal purposes but held in trust for the Tribe. 537 U.S. at 474-76. Because the government exercised daily supervision and occupation of the fort and "obtained control at least as plenary as its authority over the timber in *Mitchell II*," *id.* at 475, the Court held that a single statute lacking express duties of management and conservation, but authorizing the Secretary to make direct use of the land and improvements, went beyond a bare trust and created an enforceable fiduciary obligation to preserve and maintain the fort. *Id.* at 474-76.

In contrast, in *Navajo I*, the Nation sued the United States for breach of trust related to the Secretary's approval of coal lease amendments under the Indian Mineral Leasing Act of 1938 ("IMLA"). 537 U.S. at 493. The Court rejected the claim, however, finding that the IMLA and its implementing regulations gave the tribes, not the government, the lead role in negotiating coal leases, and gave the Secretary mere approval authority over tribal resources. *Id.* at 506-08.

Subsequently, the Nation sought the same relief based on the Navajo-Hopi Rehabilitation Act of 1950 ("Rehabilitation Act") and Surface Mining Control and Rehabilitation Act of 1977 ("SMCRA"). *United States v. Navajo Nation*, 556 U.S. 287, 296-302 (2009). Once again the Supreme Court rejected the Nation's claim finding that the Secretary approved the coal lease amendments under the IMLA, not the Rehabilitation Act, and the Secretary's lease approval occurred prior to SMCRA's enactment. *Id.* at 296-300. Concluding that the Nation could not "identify a specific, applicable, trust-creating statute or regulation that the Government violated," the Court dismissed the claim. *Id.* at 302.

In *Hopi Tribe v. United States*, the tribe brought a Tucker Act claim alleging that the United States breached a trust duty to manage drinking water quality on tribal lands grounded in the 1882 executive order and 1958 act establishing the Hopi Reservation, the *Winters* doctrine, and other statutes related to tribal drinking water. 782 F.3d 662, 668 (Fed. Cir. 2015). The Federal Circuit held that the 1958

act (incorporating the 1882 executive order) resembled the GAA in *Mitchell I* and created nothing more than a bare trust relationship. *Id.* at 669. Although it agreed with the Tribe that reserved water rights impose a fiduciary obligation on the United States "to exercise those rights and exclude others from diverting or contaminating water that feeds the reservation," the court held that "absent third-party interference" the United States was not required to eliminate naturally occurring drinking water contaminants. *Id.* In reviewing the statutes related to drinking water on Indian reservations, *id.* at 669-70, the court found that unlike in *White Mountain* and *Mitchell II*, here the statutes "only require the United States to assist in the provision of safe drinking water, and do not restrict the Hopi Tribe from managing the resource itself." *Id.* at 671. The court refused to infer a trust obligation to manage drinking water quality on the Hopi Reservation, enforceable by money damages under the Tucker Act. *Id.*

2. The District Court Ignored and Misconstrued Critical Legal Authorities Imposing Enforceable Duties of Trust.

In its Proposed Complaint the Nation identified enforceable trust duties in Treaties, laws, regulations and policy documents. The District Court ignored and misconstrued these legal authorities relied on by the Nation to meet the requirements of *Gros Ventre* and establish the Nation's breach of trust claim.

First, the District Court did not examine the complex network of legal authorities known as the Law of the River, *see* Final Order at 8-12 (ER 9-13),

which together grant and recognize the Secretary's role as water master of the Colorado River and require the Secretary to administer the River consistent with the United States' treaty obligations and the Indian Trust Doctrine. The Law of the River begins with the *Colorado River Compact, 1922* (Nov. 24, 1922) (ER 133-37), which at Article VII states that "[n]othing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes." (ER 136).

Also part of the Law of the River, the BCPA, *see* Final Order at 8-12 (ER 9-13), that invests the Secretary with exclusive control over the management and allocation of Colorado River water and requires the United States and all Colorado River water users to "observe and be subject to and controlled by" the 1922 Compact. 43 U.S.C. § 617g(a). The BCPA also broadly empowers the Secretary to contract for the storage and delivery of Colorado River water. Indeed, "[n]o person shall have or be entitled to" such water "except by" contract with the Secretary. *Id.* § 617d. The Nation's breach of trust claim stems in large part from the authority exercised by the Secretary as water master for the Colorado River.

Pursuant to that authority, the Secretary contracted to provide Colorado River water to numerous Arizona Indian tribes that lacked decreed water rights but required water for their reservations' homeland purpose. *See* November 2018 Transcript at 14 (ER 92). Despite the Federal Defendants' treaty obligations

preserved by the 1922 Compact and the Secretary's broad contracting authority on the Colorado River, the District Court ignored the BCPA and did not consider that the Federal Defendants have never agreed to the Navajo Nation's repeated requests for a water contract. *See Navajo Nation I*, 876 F.3d at 1156 n.14; Final Order at 8-12 (ER 9-13).

The decree in *Arizona I* is another component of the Law of the River. The District Court did not address the United States' role in *Arizona I*, where the United States intervened and assumed "complete control" and "full authority" over the representation of tribal interests in the litigation. *U.S. Response to Motion to Intervene* at 5-6 (Nov. 6, 1961) ("AZ v. CA Response") (ER 121-32); *see Fort Mojave Indian Tribe*, 23 Cl. Ct at 427 (United States undertook "full and exclusive authority to control the presentation of the Indian's interests" and "not only made the decision to represent [the tribes'] interests in *Arizona I* but also chose to exercise control over [the] defense of their water rights") (internal quotations and citation omitted). The Nation sought to intervene on its own behalf twice, the second time after growing dissatisfied with the United States' representation and the Special Master's report that had the effect of excluding the Navajo Reservation from the adjudication, *Navajo Motion for Leave to Intervene* (Sept. 25, 1961), TAC ¶¶ 52-54 (ER 46-48), but the United States vigorously objected. AZ v. CA Response at 4 (ER 123).

The United States assured the Nation that its water rights claims were unaffected by the Special Master's report because it excluded the area above Lake Mead from the adjudication, including the Navajo Reservation, *id.* at 2, 11-12 (ER 122, 129-30), and that as a result "[n]othing has been taken from the Navajo Indians." *Id.* at 2 (ER 122). Further, in the event the Supreme Court rejected the Special Master's determination that the BCPA only applied to mainstream water below Lake Mead, the United States conceded that a supplemental action pursuant to the Court's retained jurisdiction would be necessary to address the Nation's mainstream claims above Lake Mead. *Id.* at 14-15 & n.9 (ER 131-132). The United States prevented the Nation's intervention. TAC2 ¶ 58 (ER 48).

The Supreme Court's 1963 opinion rejected the Special Master's recommendation concerning uses above Lake Mead holding that the BCPA requires the Secretary to account for all mainstream diversions above Lake Mead, *Arizona I*, 373 U.S. at 591; TAC2 ¶ 59 (ER 49), where any Navajo uses would occur. But rather than order further proceedings to determine the scope of the Nation's unresolved mainstream claims, the Court provided that its decree "shall not affect . . . [t]he rights or priorities . . . of any Indian Reservation" not included in the adjudication. *Decree* art. VIII(C) ("1964 Decree"), *Arizona v. California*, 376 U.S. 340, 352-53 (1964). The Court also retained jurisdiction "for the purpose of any order, direction, or modification of the decree, or any supplementary decree,

that may at any time be deemed proper in relation to the subject matter in controversy," i*d*. art. IX, but over half a century later, the Navajo Nation's mainstream water rights claims in the Colorado River remain unresolved, and its desperate water needs go unaddressed.

The Supreme Court in *Arizona I* confirmed that Congress in the BCPA empowered the Secretary both to allocate "the waters of the main Colorado River among the Lower Basin States and to decide which users within each State would get water." 373 U.S. at 580 (BCPA "emphasize[d] that water could be obtained from the Secretary alone"). Unlike most federal water projects, this contracting power is so broad that the Secretary may ignore the state law doctrine of prior appropriation in contracting for and distributing Colorado River water among the people and communities in the Lower Basin states. *Id.* at 580-88.

The United States' conduct in *Arizona I* established a clear fiduciary relationship with Indian tribes with reservations appurtenant to the Colorado River, *see Fort Mojave Indian Tribe*, 23 Cl. Ct at 427, including the Nation. As the court observed in *Supron, "*[w]hen the Secretary is acting in his fiduciary role rather than solely as a regulator and is faced with a decision for which there is more than one 'reasonable' choice as that term is used in administrative law, he must choose the alternative that is in the best interests of the Indian tribe. In short, he cannot

escape his role as trustee by donning the mantle of administrator . . . ." 728 F.2d. at 1567.

Second, the District Court ignored the Department's *Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims* ("Criteria & Procedures") that confirmed "Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians." 55 Fed. Reg. 9,223 (Mar. 12, 1990); TAC2 ¶ 87 (ER 57-58); *see* Final Order at 8-12 (ER 9-13). The Criteria & Procedures ensure the Department's participation in Indian water rights settlement negotiations "consistent with the Federal Government's responsibilities as trustee to Indians." 55 Fed. Reg. at 9,223; TAC2 ¶87 (ER 57-58). Although the Department expressly assumed a fiduciary duty to work to settle outstanding tribal water rights claims and promised tribes it would act consistent with that duty, the District Court failed to consider the Criteria & Procedures in its breach of trust analysis. *See* Final Order at 8-12 (ER 9-13).

Third, the District Court did not consider the Federal Defendants' repeated statements in environmental documents that they have a trust responsibility to identify, protect, and maintain reserved water rights, including the Navajo Nation's unadjudicated and unquantified water rights in the mainstream Colorado River.

See Final Order at 8-12 (ER 9-13). In analyzing the environmental effects of the Colorado River Interim Surplus Guidelines ("Surplus Guidelines"), which guide the Secretary in determining when to declare a water surplus in the Lower Colorado River Basin, the Department acknowledged its trust obligation to protect, maintain, and inventory Indian Trust Assets ("ITAs") such as reserved water rights. Surplus Guidelines FEIS vol. I at 3.14-1 (Dec. 2000) (ER 114); TAC2 ¶ 92 (ER 59-60).

Moreover, in approving the Surplus Guidelines over the objections of Colorado River Basin Indian tribes, the Secretary noted it is "important for the tribes to develop and utilize their water rights," and specifically directed Reclamation to provide technical and financial assistance "to each of the relevant tribes to establish a water use plan for on-reservation development." Surplus Guidelines ROD at 9 (Jan. 16, 2001) (ER 153); TAC2 ¶¶ 91-97 (ER 59-62).

Similarly, in analyzing the environmental effects of the Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead ("Shortage Guidelines"), which assist the Department in managing the Colorado River under drought conditions, the Department expressly acknowledged its trust obligation to protect and maintain ITAs such as reserved water rights. Shortage Guidelines FEIS vol. I at 3-87 (Oct. 2007) (ER 116); TAC2 ¶ 99 (ER 62). The Department also acknowledged that the Navajo

Nation's unquantified water rights to Colorado River water "are considered an ITA," *id.* at 3-96 (ER 117); TAC2 ¶ 103 (ER 63-64), and in approving the Shortage Guidelines, the Secretary stated that "protecting" tribal land and water rights is a component of the Federal Defendants' trust responsibility to Colorado River Basin Indian tribes. Shortage Guidelines ROD at 3 (Dec. 2007) (ER 156); TAC2 ¶¶ 98-104 (ER 62-65). The Secretary continues to initiate programs to manage the Colorado River that impair the Nation's trust resources. TAC2 ¶¶ 105-106 (ER 65-66).

Further, the Department incorporated its ITA policies into the environmental impact statements and records of decision for both the Surplus Guidelines and Shortage Guidelines and treated them as binding. TAC1 ¶ 72 & TAC2 ¶ 35 (ER 98, 38-40). Federal Defendants may not violate the incorporated guidance. *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 660 (9th Cir. 2009) ("where an otherwise advisory document has been clearly incorporated into [another] binding document, its requirements become mandatory."); *Rocky Mountain Wild v. Vilsack*, 843 F.Supp.2d 1188, 1196 (D. Colo. 2012) (incorporation of Forest Service Handbook in EA with mandatory language binding on agency); *see also Morton v. Ruiz,* 415 U.S. 199, 235 (1974) ("it is incumbent upon agencies to follow their own procedures" even where the "internal procedures are possibly more rigorous than otherwise would be required").

The Department's repeated acknowledgment of its trust obligation to identify, protect, and maintain the Nation's water rights, affirmed in binding environmental documents, creates enforceable fiduciary duties. However, the District Court ignored the Federal Defendants' express assumption of such trust responsibilities.

Fourth, the District Court failed to consider the 2004 Arizona Water Settlements Act ("AWSA"), *see* Final Order at 8-12 (ER 9-13), that "provide[s] important benefits to . . . Arizona Indian Tribes," Pub. L. No. 108-451, § 102(2), 118 Stat. 3478, 3487 (2004), and imposes specific obligations on the Federal Defendants to address the Navajo Nation's unresolved water rights claims and critical water needs. The AWSA directed the Secretary to reallocate 67,300 acre-feet of non-Indian agricultural priority CAP Colorado River water "to resolve Indian water claims in Arizona." *Id.* § 104(a)(1)(B)(i); TAC2 ¶ 115 (ER 70). Congress singled out the unique claims and needs of the Navajo Nation directing the Secretary to "retain 6,411 acre-feet of water for use for a future water rights settlement agreement" that resolves the "Nation's claims to water in Arizona." *Id.* § 104(a)(1)(B)(ii); Navajo Nation's Response to Motions to Dismiss at 11 (Nov. 14, 2013) (ER 112). The retention for the benefit of the Nation is of limited duration, however, and will expire December 31, 2030, if a congressionally

approved settlement is not secured; pursuant to the Criteria & Procedures, *supra,* the Federal Defendants are charged with facilitating such a settlement.

The AWSA also directed the Secretary to consult with Arizona Indian tribes and report to Congress by December 31, 2016, on whether (1) tribes were benefiting from the reallocation of CAP Colorado River water; (2) active negotiations were occurring for tribes without settled water rights claims; and (3) "any critical water needs" existed on reservations without settled water rights claims. *Id.* § 104(a)(1)(C); TAC2 ¶ 115 (ER 70). The Secretary never filed the statutorily mandated report, and failed to inform Congress that the Nation has yet to benefit from the reallocation of CAP Colorado River water, that the Nation's overtures of settlement to the United States routinely go unanswered or are affirmatively rebuffed, or that the Nation's substantial water needs from the Colorado River continue to be unmet. The AWSA establishes clear fiduciary duties that the Federal Defendants have so far disregarded. The District Court's Final Order was silent on these statutory duties.

Finally, the District Court gave only cursory attention to Interior documents reflecting the Department's understanding of its federal trust responsibility. In 2014, the Secretary issued Secretarial Order No. 3335, *Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries* (Aug. 20, 2014); TAC2 ¶¶ 19, 35 (ER 33-34, 38). The order

states that the Secretary's Indian Water Rights Office was "created for and ha[s] specific duties with respect to fulfilling the trust responsibility" to Indian tribes, *id.* § 3(d); TAC2 ¶¶ 19, 35 (ER 33-34, 38), and reaffirmed "that '[t]he trust responsibility doctrine imposes fiduciary standards on the conduct of the executive. The government has fiduciary duties of care and loyalty, to make trust property income productive, to enforce reasonable claims on behalf of Indians, and to take affirmative action to preserve trust property.'" *Id.* (quoting Letter from Leo. M. Krulitz, Department Solicitor, to James W. Moorman, Assistant Attorney Gen., at 2 (Nov. 21, 1978) ("Krulitz Memo")); TAC2 ¶ 19 (ER 33-34). Accordingly, the Secretary directed the Department "to abide by" several "guiding principles," including duties to (1) "[e]nsure to the maximum extent possible that trust and restricted fee lands, trust resources, and treaty and similarly recognized rights are protected"; and (2) "[w]ork collaboratively with Indian tribes . . . when evaluating requests to take affirmative action to protect trust and restricted fee lands, trust resources, and treaty and similarly recognized rights." Secretarial Order No. 3335 § 5. Both Secretarial Order No. 3335 and the Krulitz Memo remain in effect. TAC2 ¶ 19 (ER 33-34).

Although the District Court briefly looked at Secretarial Order No. 3335, it found that by the order's own terms it "does not create enforceable duties." Final Order at 11 (ER 12). The Navajo Nation does not rely on Secretarial Order No. 3335 for its cause of action, but to demonstrate the Department's own understanding of its affirmative obligations and trust duties to protect tribal treaty rights and trust resources. The same is true of the Krulitz Memo.

If the Court finds that the District Court correctly relied on *Gros Ventre,* the facts alleged in the Nation's Proposed Complaint demonstrate far more than a bare trust. Here the Federal Defendants assumed exclusive and comprehensive control of the Colorado River pursuant to explicit legal requirements to manage the resource for the benefit of Indian tribes. *See Gros Ventre*, 469 F.3d at 810; *White Mountain*, 537 U.S. at 473-76; *Mitchell II*, 463 U.S. at 224-28.

The Nation's Proposed Complaint states a claim for breach of trust because the Federal Defendants failed to perform their fiduciary duties to identify the water needs of the Nation, to take action to meet those needs, and take those needs into account in managing the Colorado River.

CONCLUSION

For the foregoing reasons, the Navajo Nation respectfully requests that this Court reverse the order of dismissal and remand to the District Court with instructions to accept the Proposed Complaint and decide the breach of trust claim on its merits, after giving the Navajo Nation the opportunity to develop a complete historical record to allow for the consideration its Treaties require.

Dated: February 26, 2020

M. Kathryn Hoover, Principal Attorney
Stanley M. Pollack, Contract Attorney
NAVAJO NATION DEPARTMENT OF JUSTICE

Alice E. Walker
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/s/ M. Kathryn Hoover
Attorneys for Appellant Navajo Nation

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,391 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word 2016 Times New Roman 14-point font.

Dated: February 26, 2020

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/s/ M. Kathryn Hoover
Attorneys for Appellant Navajo Nation

STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

Dated: February 26, 2020

M. Kathryn Hoover, Principal Attorney
Stanley M. Pollack, Contract Attorney
NAVAJO NATION DEPARTMENT OF JUSTICE

Alice E. Walker
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/s/ M. Kathryn Hoover
Attorneys for Appellant Navajo Nation

ADDENDUM

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[ADDENDUM]

9 Stat 974 (U.S. Treaty), 1850 WL 6686 (U.S. Treaty)

UNITED STATES OF AMERICA

Native American

Treaty Between the United States of America and the Navajo Tribe of Indians.

September 9, 1849.
Consent of Senate Sept. 9, 1850.
Proclamation made Sept. 24, 1850.

***1** THE following acknowledgements, declarations, and stipulations, have been duly considered, and are now solemnly adopted and proclaimed by the undersigned: that is to say, John M. Washington, Governor of New Mexico, and Lieutenant-Colonel commanding the troops of the United States in New Mexico, and James S. Calhoun, Indian agent, residing at Santa Fé, in New Mexico, representing the United States of America, and Mariano Martinez, Head Chief, and Chapitone, second Chief, on the part of the Navajo tribe of Indians.

I. The said Indians do hereby acknowledge that, by virtue of a treaty entered into by the United States of America and the United Mexican States, signed on the second day of February, in the year of our Lord eighteen hundred and forty-eight, at the city of Guadalupe Hidalgo, by N. P. Trist, of the first part, and Luis G. Cuevas, Bernardo Couto, and Mgl Atristain, of the second part, the said tribe was lawfully placed under the exclusive jurisdiction and protection of the government of the said United States, and that they are now, and will forever remain, under the aforesaid jurisdiction and protection.

II. That from and after the signing of this treaty, hostilities between the contracing parties shall cease, and perpetual peace and friendship shall exist; the said tribe hereby solemnly covenanting that they will not associate with, or give countenance or aid to, any tribe or band of Indians, or other persons or powers, who may be at any time at enmity with the people of the said United States; that they will remain at peace, and treat honestly and humanely all persons and powers at peace with the said States; and all cases of aggression against said Navajoes by citizens or others of the United States, or by other persons or powers in amity with the said States, shall be referred to the government of said States for adjustment and settlement.

III. The government of the said States having the sole and exclusive right of regulating the trade and intercourse with the said Navajoes, it is agreed that the laws now in force regulating the trade and intercourse, and for the preservation of peace with the various tribes of Indians under the protection and guardianship of the aforesaid government, shall have the same force and efficiency, and shall be as binding and as obligatory upon the said Navajoes, and executed in the same manner, as if said laws had been passed for their sole benefit and protection; and to this end, and for all other useful purposes, the government of New Mexico, as now organized, or as it may be by the government of the United States, or by the legally constituted authorities of the people of New Mexico, is recognized and acknowledged by the said Navajoes; and for the due enforcement of the aforesaid laws, until the government of the United States shall otherwise order, the territory of the Navajoes is hereby annexed to New Mexico.

IV. The Navajo Indians hereby bind themselves to deliver to the military authority of the United States in New Mexico, at Santa Fe, New Mexico, as soon as he or they can be apprehended, the murderer or murderers of Micente Garcia, that said fugitive or fugitives from justice may be dealt with as justice may decree.

***2** V. All American and Mexican captives, and all stolen property taken from Americans or Mexicans, or other persons or powers in amity with the United States, shall be delivered by the Navajo Indians to the aforesaid military authority at Jemez, New Mexico, on or before the 9th day of October next ensuing, that justice may be meted out to all whom it may concern; and also all Indian captives and stolen property of such tribe or tribes of Indians as shall enter into a similar reciprocal treaty, shall, in like manner, and for the same purposes, be turned over to an authorized officer or agent of the said States by the aforesaid Navajoes.

VI. Should any citizen of the United States, or other person or persons subject to the laws of the United States, murder, rob, or otherwise maltreat any Navajo Indian or Indians, he or they shall be arrested and tried and, upon conviction, shall be

subjected to all the penalties provided by law for the protection of the persons and property of the people of the said States.

VII. The people of the United States of America shall have free and safe passage through the territory of the aforesaid Indians, under such rules and regulations as may be adopted by authority of the said States.

VIII. In order to preserve tranquility, and to afford protection to all the people and interests of the contracting parties, the government of the United States of America will establish such military posts and agencies, and authorize such trading-houses, at such time and in such places as the said government may designate.

IX. Relying confidently upon the justice and the liberality of the aforesaid government, and anxious to remove every possible cause that might disturb their peace and quiet, it is agreed by the aforesaid Navajoes that the government of the United States shall, at its earliest convenience, designate, settle, and adjust their territorial boundaries, and pass and execute in their territory such laws as may be deemed conducive to the prosperity and happiness of said Indians.

X. For and in consideration of the faithful performance of all the stipulations herein contained, by the said Navajo Indians, the government of the United States will grant to said Indians such donations, presents, and implements, and adopt such other liberal and humane measures, as said government may deem meet and proper.

XI. This treaty shall be binding upon the contracting parties from and after the signing of the same, subject only to such modifications and amendments as may be adopted by the government of the United States; and, finally, this treaty is to receive a liberal construction, at all times and in all places, to the end that the said Navajo Indians shall not be held responsible for the conduct of others, and that the government of the United States shall so legislate and act as to secure the permanent prosperity and happiness of said Indians.

In faith whereof, we, the undersigned, have signed this treaty, and affixed thereunto our seals, in the valley of Cheille, this the ninth day of September, in the year of our Lord one thousand eight hundred and forty-nine.

J. M. WASHINGTON,
Brevet Lieutenant-Colonel Commanding.
[L. S.]
JAMES S. CALHOUN,
Indian Agent, residing at Santa Fe.
[L. S.]

Mariano Martinez, his x mark, [L. S.]

Head Chief.

Chapitone, his x mark, [L. S.]

Second Chief.

J. L. Collins.

James Conklin.

Lorenzo Force.

Antonio Sandoval, his x mark.

Francisco Josto, his x mark.

Governor of Jemez.

Witnesses-

H. L. Kendrick, *Brevet Major U. S. A.*

J. N. Ward, *Brevet* 1*st Lieut*. 3*d Inf'ry*.

John Peck, *Brevet Major U. S. A.*

J. F. Hammond, *Assistant Surg'n U. S. A.*

H. L. Dodge, *Capt. comd'g Eut. Rg's*.

Richard H. Kern.

J. H. Nones, *Second Lieut*. 2*d Artillery*.

Cyrus Choice.

John H. Dickerson, *Second Lieut*. 1*st Art*.

W. E. Love.

John G. Jones.

J. H. Simpson, *First Lieut. Corps Top. Engrs*.

9 Stat 974

15 Stat 667 (U.S. Treaty), 1868 WL 10240 (U.S. Treaty)

UNITED STATES OF AMERICA

Native American

Treaty between the United States of America and the Navajo Tribe of Indians;

Concluded June 1, 1868;
Ratification advised July 25, 1868;
Proclaimed August 12, 1868.

ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES OF AMERICA, TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

Council

ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES OF AMERICA, TO ALL AND SINGULAR TO WHOM THESE PRESENTS SHALL COME, GREETING:

***1** WHEREAS a treaty was made and concluded at Fort Sumner, in the Territory of New Mexico, on the first day of June, in the year of our Lord one thousand eight hundred and sixty-eight, by and between Lieutenant-General W. T. Sherman and Samuel F. Tappan, commissioners, on the part of the United States, and Barboncito, Armijo, and other chiefs and headmen of the Navajo tribe of Indians, on the part of said Indians, and duly authorized thereto by them, which treaty is in the words and figures following, to wit:-

Articles of a treaty and agreement made and entered into at Fort Sumner, New Mexico, on the first day of June, one thousand eight hundred and sixty-eight, by and between the United States, represented by its commissioners, Lieutenant-General W. T. Sherman and Colonel Samuel F. Tappan, of the one part, and the Navajo nation or tribe of

Indians, represented by their chiefs and headmen, duly authorized and empowered to act for the whole people of said nation or tribe, (the names of said chiefs and headmen being hereto subscribed,) of the other part, witness:-

ARTICLE I.

From this day forward all war between the parties to this agreement shall forever cease. The government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to keep it.

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington city, proceed at once to cause the offender to be arrested and punished according to the laws of the United States, and also to reimburse the injured persons for the loss sustained.

If bad men among the Indians shall commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States and at peace therewith, the Navajo tribe agree that they will, on proof made to their agent, and on notice by him, deliver up the wrongdoer to the United States, to be tried and punished according to its laws; and in case they wilfully refuse so to do, the person injured shall be reimbursed for his loss from the annuities or other moneys due or to become due to them under this treaty, or any others that may be made with the United States. And the President may prescribe such rules and regulations for ascertaining damages under this article as in his judgment may be proper; but no such damage shall be adjusted and paid until examined and passed upon by the Commissioner of Indian Affairs, and no one sustaining loss whilst violating, or because of his violating, the provisions of this treaty or the laws of the United States, shall be reimbursed therefor.

ARTICLE II.

The United States agrees that the following district of country, to wit: bounded on the north by the 37th degree of north latitude, south by an east and west line passing through the site of old Fort Defiance, in Cañon Bonito, east by the parallel of longitude which, if prolonged south, would pass through old Fort Lyon, or the Ojo-de-oso, Bear Spring, and west by a parallel of longitude about 109° 30′ west of Greenwich, provided it embraces the outlet of the Cañon-de-Chilly, which cañon is to be all included in this reservation, shall be, and the same is hereby, set apart for the use and occupation of the Navajo tribe of Indians, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit among them; and the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents, and employés of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.

ARTICLE III.

***2** The United States agrees to cause to be built, at some point within said reservation, where timber and water may be convenient, the following buildings: a warehouse, to cost not exceeding twenty-five hundred dollars; an agency building for the residence of the agent, not to cost exceeding three thousand dollars; a carpenter shop and blacksmith shop, not to cost exceeding one thousand dollars each; and a school-house and chapel, so soon as a sufficient number of children can be induced to attend school, which shall not cost to exceed five thousand dollars.

ARTICLE IV.

The United States agrees that the agent for the Navajos shall make his home at the agency building; that he shall reside among them, and shall keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by or against the Indians as may be presented for investigation, as also for the faithful discharge of other duties enjoined by law. In all cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty.

ARTICLE V.

If any individual belonging to said tribe, or legally incorporated with it, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding one hundred and sixty acres in extent, which tract, when so selected, certified, and recorded in the "land book" as herein described, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it.

Any person over eighteen years of age, not being the head of a family, may in like manner select, and cause to be certified to him or her for purposes of cultivation, a quantity of land, not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above directed.

For each tract of land so selected a certificate containing a description thereof, and the name of the person selecting it, with a certificate endorsed thereon, that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office, subject to inspection, which said book shall be known as the "Navajo Land Book."

The President may at any time order a survey of the reservation, and when so surveyed, Congress shall provide for protecting the rights of said settlers in their improvements, and may fix the character of the title held by each.

The United States may pass such laws on the subject of alienation and descent of property between the Indians and their descendants as may be thought proper.

ARTICLE VI.

***3** In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher.

The provisions of this article to continue for not less than ten years.

ARTICLE VII.

When the head of a family shall have selected lands and received his certificate as above directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of two years, he shall be entitled to receive seeds and implements to the value of twenty-five dollars.

ARTICLE VIII.

In lieu of all sums of money or other annuities provided to be paid to the Indians herein named under any treaty or treaties heretofore made, the United States agrees to deliver at the agency house on the reservation herein named, on the first day of September of each year for ten years, the following articles, to wit:

Such articles of clothing, goods, or raw materials in lieu thereof, as the agent may make his estimate for, not exceeding in value five dollars per Indian - each Indian being encouraged to manufacture their own clothing, blankets, &c.; to be furnished with no article which they can manufacture themselves. And, in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based.

And in addition to the articles herein named, the sum of ten dollars for each person entitled to the beneficial effects of this treaty shall be annually appropriated for a period of ten years, for each person who engages in farming or mechanical pursuits, to be used by the Commissioner of Indian Affairs in the purchase of such articles as from time to time the condition and necessities of the Indians may indicate to be proper; and if within the ten years at any time it shall appear that the amount of money needed for clothing, under the article, can be appropriated to better uses for the Indians named herein, the Commissioner of Indian Affairs may change the appropriation to other purposes, but in no event shall the amount of this appropriation be withdrawn or discontinued for the period named, provided they remain at peace. And the President shall annually detail an officer of the army to be present and attest the delivery of all the goods herein named to the Indians, and he shall inspect and report on the quantity and quality of the goods and the manner of their delivery.

ARTICLE IX.

***4** In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy any territory outside their reservation, as herein defined, but retain the right to hunt on any unoccupied lands contiguous to their reservation, so long as the large game may range thereon in such numbers as to justify the chase; and they, the said Indians, further expressly agree:

1st. That they will make no opposition to the construction of railroads now being built or hereafter to be built across the continent.

2nd. That they will not interfere with the peaceful construction of any railroad not passing over their reservation as herein defined.

3rd. That they will not attack any persons at home or travelling, nor molest or disturb any wagon trains, coaches, mules or cattle belonging to the people of the United States, or to persons friendly therewith.

4th. That they will never capture or carry off from the settlements women or children.

5th. They will never kill or scalp white men, nor attempt to do them harm.

6th. They will not in future oppose the construction of railroads, wagon roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States; but should such roads or other works be constructed on the lands of their reservation, the government will pay the tribe whatever amount of damage may be assessed by three disinterested commissioners to be appointed by the President for that purpose, one of said commissioners to be a chief or head man of the tribe.

7th. They will make no opposition to the military posts or roads now established, or that may be established, not in violation of treaties heretofore made or hereafter to be made with any of the Indian tribes.

ARTICLE X.

No future treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force against said Indians unless agreed to and executed by at least three fourths of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his rights to any tract of land selected by him as provided in article ------ of this treaty.

ARTICLE XI.

The Navajos also hereby agree that at any time after the signing of these presents they will proceed in such manner as may be required of them by the agent, or by the officer charged with their removal, to the reservation herein provided for, the United States paying for their subsistence en route, and providing a reasonable amount of transportation for the sick and feeble.

ARTICLE XII.

It is further agreed by and between the parties to this agreement that the sum of one hundred and fifty thousand dollars appropriated or to be appropriated shall be disbursed as follows, subject to any conditions provided in the law, to wit:

***5** 1st. The actual cost of the removal of the tribe from the Bosque Redondo reservation to the reservation, say fifty thousand dollars.

2nd. The purchase of fifteen thousand sheep and goats, at a cost not to exceed thirty thousand dollars.

3rd. The purchase of five hundred beef cattle and a million pounds of corn, to be collected and held at the military post nearest the reservation, subject to the orders of the agent, for the relief of the needy during the coming winter.

4th. The balance, if any, of the appropriation to be invested for the maintenance of the Indians pending their removal, in such manner as the agent who is with them may determine.

5th. The removal of this tribe to be made under the supreme control and direction of the military commander of the Territory of New Mexico, and when completed, the management of the tribe to revert to the proper agent.

ARTICLE XIII.

The tribe herein named, by their representatives, parties to this treaty, agree to make the reservation herein described their permanent home, and they will not as a tribe make any permanent settlement elsewhere, reserving the right to hunt on the lands adjoining the said reservation formerly called theirs, subject to the modifications named in this treaty and the orders of the commander of the department in which said reservation may be for the time being; and it is further agreed and understood by the parties to this treaty, that if any Navajo Indian or Indians shall leave the reservation herein described to settle elsewhere, he or they shall forfeit all the rights, privileges, and annuities conferred by the terms of this treaty; and it is further agreed by the parties to this treaty, that they will do all they can to induce Indians now away from reservations set apart for the exclusive use and occupation of the Indians, leading a nomadic life, or engaged in war against the people of the United States, to abandon such a life and settle permanently in one of the territorial reservations set apart for the exclusive use and occupation of the Indians.

In testimony of all which the said parties have hereunto, on this the first day of June, one thousand eight hundred and sixty-eight, at Fort Sumner, in the Territory of New Mexico, set their hands and seals.

W. T. SHERMAN,
Lt. Gen'l, Indian Peace Commissioner.
S. F. TAPPAN,
Indian Peace Commissioner.

BARBONCITO, Chief. his x mark.

ARMIJO. his x mark.

DELGADO.

MANUELITO. his x mark.

LARGO. his x mark.

HERRERO. his x mark.

CHIQUETO. his x mark.

MUERTO DE HOMBRE. his x mark.

HOMBRO. his x mark.

NARBONO. his x mark.

NARBONO SEGUNDO. his x mark.

GAÑADO MUCHO. his x mark.

Council.

RIQUO. his x mark.

JUAN MARTIN. his x mark.

SERGINTO. his x mark.

GRANDE. his x mark.

INOETENITO. his x mark.

MUCHACHOS MUCHO. his x mark.

CHIQUETO SEGUNDO: his x mark.

CABELLO AMARILLO. his x mark.

FRANCISCO. his x mark.

TORIVIO. his x mark.

DESDENDADO. his x mark.

JUAN. his x mark.

GUERO. his x mark.

GUGADORE. his x mark.

CABASON. his x mark.

BARBON SEGUNDO. his x mark.

CABARES COLORADOS. his x mark.

Attest:

GEO. W. G. GETTY,
Col. 37th Inf'y, Bt. Maj. Gen'l U. S. A.
B. S. ROBERTS,
Bt. Brg. Gen'l U. S. A., Lt. Col. 3d Cav'y.
J. COOPER McKEE,

Bt. Lt. Col. Surgeon U. S. A.
THEO. H. DODD,
U. S. Indian Ag't for Navajos.
CHAS. McCLURE,
Bt. Maj. and C. S. U. S. A.
JAMES F. WEEDS,
Bt. Maj. and Asst. Surg. U. S. A.
J. C. SUTHERLAND,
Interpreter.
WILLIAM VAUX,
Chaplain U. S. A.

And whereas, the said treaty having been submitted to the Senate of the United States for its constitutional action thereon, the Senate did, on the twenty-fifth day of July, one thousand eight hundred and sixty-eight, advise and consent to the ratification of the same, by a resolution in the words and figures following, to wit:-

IN EXECUTIVE SESSION, SENATE OF THE UNITED STATES, July 25, 1868.

Resolved, (two-thirds of the senators present concurring,) That the Senate advise and consent to the ratification of the treaty between the United States and the Navajo Indians, concluded at Fort Sumner, New Mexico, on the first day of June, 1868.

Attest:
GEO. C. GORHAM,
Secretary,
By W. J. McDONALD,
Chief Clerk.

Now, therefore, be it known that I, ANDREW JOHNSON, President of the United States of America, do, in pursuance of the advice and consent of the Senate, as expressed in its resolution of the twenty-fifth of July, one thousand eight hundred and sixty-eight, accept, ratify, and confirm the said treaty.

In testimony whereof, I have hereto signed my name, and caused the seal of the United States to be affixed.
Done at the City of Washington, this twelfth day of August, in the year of our Lord one thousand eight hundred and sixty-eight, and of the Independence of the United States of America the ninety-third.

ANDREW JOHNSON.
[SEAL.]

By the President:
W. HUNTER,
Acting Secretary of State.

15 Stat 667

[CHAPTER 521.]

AN ACT

June 14, 1934.
[H. R. 8927.]
[Public, No. 352.]

To define the exterior boundaries of the Navajo Indian Reservation in Arizona, and for other purposes.

Navajo Indian Reservation, Ariz.
Exterior boundaries defined.
Vol. 15, p. 667.
Post, pp. 985, 1033.
Description.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the exterior boundaries of the Navajo Indian Reservation, in Arizona, be, and they are hereby, defined as follows: Beginning at a point common to the States of Arizona, New Mexico, Colorado, and Utah, thence west along the boundary line between the States of Arizona and Utah to a point where said boundary line intersects the Colorado River; thence down the south bank of that stream to its confluence with the Little Colorado River; thence following the north bank of the Little Colorado River to a point opposite the east boundary of the Grand Canyon National Park; thence south along said east boundary to the southeast corner of section 5, township 30 north, range 6 east, Gila and Salt River base and meridian, Arizona; thence east to the southeast corner of section 4; thence south to the southwest corner of section 10; thence east to the southeast corner of section 10; thence south to the southwest corner of section 14; thence east to the northwest corner of the northeast quarter section 23; thence south two miles to the southeast corner of the southwest quarter section 26; thence west one half mile to the southeast corner of section 27, township 30 north, range 6 east, Gila and Salt River base and meridian, Arizona; thence south seven miles to the southwest corner of section 35, township 29 north, range 6 east; thence east one mile; thence south one and one half miles to the southwest corner of the northwest quarter section 12, township 28 north, range 6 east; thence east through the center of section 12 to the range line between ranges 6 and 7 east; thence south along said range line five and one half miles to the southeast corner of section 1, township 27 north, range 6 east; thence west three miles to the southwest corner of section 3, township 27 north, range 6 east; thence south five miles to the southeast corner of section 33, township 27 north, range 6 east; thence east along township line between townships 26 and 27, six and one half miles, to the northeast corner of the northwest quarter section 3, township 26 north, range 7 east; thence south two miles to the southeast corner of the southwest quarter section 10, township 26 north, range 7 east; thence east four and one half miles to the southeast corner of section 8, township 26 north, range 8 east; thence north four miles to the northwest corner of section 28, township 27 north, range 8 east, Gila and Salt River base and meridian; thence east one mile to the southeast corner of section 21; thence north four miles to the northeast corner of section 4, township 27 north, range 8 east, thence east along township line between townships 27 and 28 north to its intersection with the Little Colorado River; thence up the middle of that stream to the intersection of the present west boundary of the Leupp Extension Reservation created by Executive order of November 14, 1901; thence south along the present western boundary of said extension to where it intersects the fifth standard parallel north; thence east along said standard parallel to the southwest corner of township 21 north, range 26 east, Gila and Salt River base and meridian; thence north six miles to the northwest corner of township 21 north, range 26 east; thence east twelve miles to the northeast corner of township 21 north, range 27 east; thence south two miles; thence east twelve miles; thence south four miles; thence east along the township line between townships 20 and 21 north to the boundary line between the States of New Mexico and Arizona; thence north along said boundary

Executive order.

line to the point of beginning. All vacant, unreserved, and unappropriated public lands, including all temporary withdrawals of public lands in Arizona heretofore made for Indian purposes by Executive order or otherwise within the boundaries defined by this Act, are hereby permanently withdrawn from all forms of entry or disposal for the benefit of the Navajo and such other Indians as may already be located thereon; however, nothing herein contained shall affect the existing status of the Moqui (Hopi) Indian Reservation created by Executive order of December 16, 1882. There are hereby excluded from the reservation as above defined all lands heretofore designated by the Secretary of the Interior pursuant to section 28 of the Arizona Enabling Act of June 20, 1910 (36 Stat.L. 575), as being valuable for water-power purposes and all lands withdrawn or classified as power-site lands, saving to the Indians, nevertheless, the exclusive right to occupy and use such designated and classified lands until they shall be required for power purposes or other uses under the authority of the United States: *Provided*, That nothing in this Act contained shall be construed as authorizing the payment of proceeds or royalties to the Navajo Indians from water power developed within the areas added to the Navajo Reservation pursuant to section 1 of this Act; and the Federal Water Power Act of June 10, 1920 (41 Stat.L. 1063), and amendments thereto, shall operate for the benefit of the State of Arizona as if such lands were vacant, unreserved, and unappropriated public lands. All valid rights and claims initiated under the public land laws prior to approval hereof involving any lands within the areas so defined, shall not be affected by this Act.

Moqui Indian Reservation, not affected.

Lands suitable for power sites excluded. Vol. 36, p. 575.

Proviso. Payment of royalties to Indians, not authorized.

Vol. 41, p. 1063.

Prior legal rights protected.

SEC. 2. The Secretary of the Interior is hereby authorized in his discretion, under rules and regulations to be prescribed by him, to accept relinquishments and reconveyances to the United States of such privately owned lands, as in his opinion are desirable for and should be reserved for the use and benefit of the Navajo Tribe of Indians, including patented and nonpatented Indian allotments and selections, within the counties of Apache, Navajo, and Coconino, Arizona; and any Indian so relinquishing his or her right shall be entitled to make lieu selections within the areas consolidated for Indian purposes by this Act. Upon conveyance to the United States of a good and sufficient title to any such privately owned land, except Indian allotments and selections, the owners thereof, or their assigns, are hereby authorized, under regulations of the Secretary of the Interior, to select from the unappropriated, unreserved, and nonmineral public lands of the United States within said counties in the State of Arizona lands approximately equal in value to the lands thus conveyed, and where surrendered lands contain springs or living waters, selection of other lands taken in lieu thereof may be of like character or quality, such values to be determined by the Secretary of the Interior, who is hereby authorized to issue patents for the lieu lands so selected. In all selections of lieu lands under section 2 of this Act notice to any interested party shall be by publication. Any privately owned lands relinquished to the United States under section 2 of this Act shall be held in trust for the Navajo Tribe of Indians; and relinquishments in Navajo County, Arizona, excluding Indian allotments and selections, shall not extend south of the township line between townships 20 and 21 north, Gila and Salt River base and meridian. The State of Arizona may relinquish such tracts of school land within the boundary of the Navajo Reservation, as defined by section 1 of this Act, as it may see fit in favor of said Indians, and shall have the right to select other unreserved and nonmineral public lands contiguous or noncontiguous, located within

Landowners within, may relinquish holdings and select lieu lands from public domain.

Indian allotments excepted.

Notice of selections to be by publication.

Relinquished lands to be held in trust for Navajos.

Area limited.

Exchanges permitted Arizona. Vol. 36, p. 558.

the three counties involved equal in value to that relinquished, said lieu selections to be made in the same manner as is provided for in the Arizona Enabling Act of June 20, 1910 (36 Stat.L. 558), except as to the payment of fees or commissions which are hereby waived. Pending the completion of exchanges and consolidations authorized by section 2 of this Act, no further allotments of public lands to Navajo Indians shall be made in the counties of Apache, Navajo, and Coconino, Arizona, nor shall further Indian homesteads be initiated or allowed in said counties to Navajo Indians under the Act of July 4, 1884 (23 Stat.L. 96); and thereafter should allotments to Navajo Indians be made within the above-named counties, they shall be confined to land within the boundaries defined by section 1 of this Act.

Payment of fees waived.

No further allotments to Navajos in designated counties.

Vol. 23, p. 96.

Arizona may select its school lands in area, after completing exchanges, etc.

SEC. 3. Upon the completion of exchanges and consolidations authorized by section 2 of this Act, the State of Arizona may, under rules and regulations to be prescribed by the Secretary of the Interior, relinquish to the United States such of its remaining school lands in Coconino, Navajo, and Apache Counties as it may see fit; and shall have the right to select from the vacant, unreserved, and nonmineral public lands in said counties lieu lands equal in value to those relinquished without the payment of fees or commissions.

Acquisition, through purchase of certain property within.

Sum authorized; reimbursable.

Provisos.
Title may be for surface only.
Use of funds for improvements.

SEC. 4. For the purpose of purchasing privately owned lands, together with the improvements thereon, within the boundaries above defined, there is hereby authorized to be appropriated, from any funds in the Treasury not otherwise appropriated, the sum of $481,879.38, which sum shall be reimbursable from funds accruing to the Navajo tribal funds as and when such funds accrue and shall remain available until expended: *Provided*, That title to the land so purchased may, in the discretion of the Secretary of the Interior, be taken for the surface only: *Provided further*, That said funds may be used in purchasing improvements on any land within said boundaries or on leased State school land within the boundaries above defined, provided the State of Arizona agrees to the assignment of said leases to the Navajo Tribe of Indians on a renewable and preferential basis, and provided the Legislature of said State enacts such laws as may be necessary to avail itself of the exchange provisions contained in section 2 of this Act, and disclaim any right, title, or interest in and to any improvements on said lands.

Approved, June 14, 1934.

[CHAPTER 522.]

June 14, 1934.
[H.R. 9392.]
[Public, No. 353.]

AN ACT

To reclassify terminal railway post offices.

Postal service.
Terminal railway post offices.
Vol. 43, p. 1083; U.S.C., p. 1272.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the terminal railway post office system shall be maintained for the purpose of handling and distributing mail not handled or distributed in railway post office lines or post offices, and the clerks in said terminal railway post offices shall be classified as railway postal clerks and progress successively to grade 4. Clerks in charge of terminals, tours, or crews consisting of less than twenty employees shall be of grade 5. Clerks in charge of terminals, tours, or crews consisting of twenty or more employees shall be of grade 6. When a terminal railway post office is operated in three tours there shall be a relief clerk in charge: *Provided*, That the clerk in charge of terminals having seventy-five or more employees shall be of grade 7: *Provided further*, That no employee in the Postal Service shall be reduced in rank or salary as a result of the provisions of this Act.

Classifications of clerks in charge.

Relief clerks.

Provisos.
Rating of clerks in charge of large terminals.
No reduction in pay.

Approved, June 14, 1934.

PL 108–451, December 10, 2004, 118 Stat 3478

UNITED STATES PUBLIC LAWS

108th Congress - Second Session

Convening January 7, 2004

Additions and Deletions are not identified in this database.

Vetoed provisions within tabular material are not displayed

PL 108–451 (S 437)

December 10, 2004

ARIZONA WATER SETTLEMENTS ACT

An Act To provide for adjustments to the Central Arizona Project in Arizona, to authorize the Gila River Indian Community water rights settlement, to reauthorize and amend the Southern Arizona Water Rights Settlement Act of 1982, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

<< 43 USCA § 1501 NOTE >>

(a) SHORT TITLE.—This Act may be cited as the “Arizona Water Settlements Act”.
(b) TABLE OF CONTENTS.—The table of contents of this Act is as follows:

SEC. 2. DEFINITIONS.

In titles I and II:

(1) ACRE–FEET.—The term "acre-feet" means acre-feet per year.

(2) AFTER–ACQUIRED TRUST LAND.—The term "after-acquired trust land" means land that—

(A) is located—

(i) within the State; but

(ii) outside the exterior boundaries of the Reservation; and

(B) is taken into trust by the United States for the benefit of the Community after the enforceability date.

(3) AGRICULTURAL PRIORITY WATER.—The term "agricultural priority water" means Central Arizona Project non-Indian agricultural priority water, as defined in the Gila River agreement.

(4) ALLOTTEE.—The term "allottee" means a person who holds a beneficial real property interest in an Indian allotment that is—

(A) located within the Reservation; and

(B) held in trust by the United States.

(5) ARIZONA INDIAN TRIBE.—The term "Arizona Indian tribe" means an Indian tribe (as defined in section 4 of the Indian Self–Determination and Education Assistance Act (25 U.S.C. 450b)) that is located in the State.

(6) ASARCO.—The term "Asarco" means Asarco Incorporated, a New Jersey corporation of that name, and its subsidiaries operating mining operations in the State.

(7) CAP CONTRACTOR.—The term "CAP contractor" means a person or entity that has entered into a long-term contract (as that term is used in the repayment stipulation) with the United States for delivery of water through the CAP system.

(8) CAP OPERATING AGENCY.—The term "CAP operating agency" means the entity or entities authorized to assume responsibility for the care, operation, maintenance, and replacement of the CAP system.

(9) CAP REPAYMENT CONTRACT.—

(A) IN GENERAL.—The term "CAP repayment contract" means the contract dated December 1, 1988 (Contract No. 14–0906–09W–09245, Amendment No. 1) between the United States and the Central Arizona Water Conservation District for the delivery of water and the repayment of costs of the Central Arizona Project.

(B) INCLUSIONS.—The term "CAP repayment contract" includes all amendments to and revisions of that contract.

(10) CAP SUBCONTRACTOR.—The term "CAP subcontractor" means a person or entity that has entered into a long-term subcontract (as that term is used in the repayment stipulation) with the United States and the Central Arizona Water Conservation District for the delivery of water through the CAP system.

(11) CAP SYSTEM.—The term "CAP system" means—

(A) the Mark Wilmer Pumping Plant;

(B) the Hayden–Rhodes Aqueduct;

(C) the Fannin–McFarland Aqueduct;

(D) the Tucson Aqueduct;

(E) the pumping plants and appurtenant works of the Central Arizona Project aqueduct system that are associated with the features described in subparagraphs (A) through (D); and

(F) any extensions of, additions to, or replacements for the features described in subparagraphs (A) through (E).

(12) CENTRAL ARIZONA PROJECT.—The term "Central Arizona Project" means the reclamation project authorized and constructed by the United States in accordance with title III of the Colorado River Basin Project Act (43 U.S.C. 1521 et seq.).

(13) CENTRAL ARIZONA WATER CONSERVATION DISTRICT.—The term "Central Arizona Water Conservation District" means the political subdivision of the State that is the contractor under the CAP repayment contract.

(14) CITIES.—The term "Cities" means the cities of Chandler, Glendale, Goodyear, Mesa, Peoria, Phoenix, and Scottsdale, Arizona.

(15) COMMUNITY.—The term "Community" means the Gila River Indian Community, a government composed of members of the Pima Tribe and the Maricopa Tribe and organized under section 16 of the Act of June 18, 1934 (25 U.S.C. 476).

(16) COMMUNITY CAP WATER.—The term "Community CAP water" means water to which the Community is entitled under the Community water delivery contract.

(17) COMMUNITY REPAYMENT CONTRACT.—

(A) IN GENERAL.—The term "Community repayment contract" means Contract No. 6–0907–0903–09W0345 between the United States and the Community dated July 20, 1998, providing for the construction of water delivery facilities on the Reservation.

(B) INCLUSIONS.—The term "Community repayment contract" includes any amendments to the contract described in

subparagraph (A).

(18) COMMUNITY WATER DELIVERY CONTRACT.—

(A) IN GENERAL.—The term "Community water delivery contract" means Contract No. 3–0907–0930–09W0284 between the Community and the United States dated October 22, 1992.

(B) INCLUSIONS.—The term "Community water delivery contract" includes any amendments to the contract described in subparagraph (A).

(19) CRR PROJECT WORKS.—

(A) IN GENERAL.—The term "CRR project works" means the portions of the San Carlos Irrigation Project located on the Reservation.

(B) INCLUSION.—The term "CRR Project works" includes the portion of the San Carlos Irrigation Project known as the "Southside Canal", from the point at which the Southside Canal connects with the Pima Canal to the boundary of the Reservation.

(20) DIRECTOR.—The term "Director" means—

(A) the Director of the Arizona Department of Water Resources; or

(B) with respect to an action to be carried out under this title, a State official or agency designated by the Governor or the State legislature.

(21) ENFORCEABILITY DATE.—The term "enforceability date" means the date on which the Secretary publishes in the Federal Register the statement of findings described in section 207(c).

(22) FEE LAND.—The term "fee land" means land, other than off-Reservation trust land, owned by the Community outside the exterior boundaries of the Reservation as of December 31, 2002.

(23) FIXED OM&R CHARGE—The term "fixed OM&R charge" has the meaning given the term in the repayment stipulation.

(24) FRANKLIN IRRIGATION DISTRICT.—The term "Franklin Irrigation District" means the entity of that name that is a political subdivision of the State and organized under the laws of the State.

(25) GILA RIVER ADJUDICATION PROCEEDINGS.—The term "Gila River adjudication proceedings" means the action pending in the Superior Court of the State of Arizona in and for the County of Maricopa styled "In Re the General Adjudication of All Rights To Use Water In The Gila River System and Source" W–091 (Salt), W–092 (Verde), W–093 (Upper Gila), W–094 (San Pedro) (Consolidated).

(26) GILA RIVER AGREEMENT.—

(A) IN GENERAL.—The term "Gila River agreement" means the agreement entitled the "Gila River Indian Community Water Rights Settlement Agreement", dated February 4, 2003.

(B) INCLUSIONS.—The term "Gila River agreement" includes—

(i) all exhibits to that agreement (including the New Mexico Risk Allocation Agreement, which is also an exhibit to the UVD Agreement); and

(ii) any amendment to that agreement or to an exhibit to that agreement made or added pursuant to that agreement consistent with section 203(a) or as approved by the Secretary.

(27) GILA VALLEY IRRIGATION DISTRICT.—The term "Gila Valley Irrigation District" means the entity of that name that is a political subdivision of the State and organized under the laws of the State.

(28) GLOBE EQUITY DECREE.—

(A) IN GENERAL.—The term "Globe Equity Decree" means the decree dated June 29, 1935, entered in United States of America v. Gila Valley Irrigation District, Globe Equity No. 59, et al., by the United States District Court for the District of Arizona.

(B) INCLUSIONS.—The term "Globe Equity Decree" includes all court orders and decisions supplemental to that decree.

(29) HAGGARD DECREE.—

(A) IN GENERAL.—The term "Haggard Decree" means the decree dated June 11, 1903, entered in United States of America, as guardian of Chief Charley Juan Saul and Cyrus Sam, Maricopa Indians and 400 other Maricopa Indians similarly situated v. Haggard, et al., Cause No. 19, in the District Court for the Third Judicial District of the Territory of Arizona, in and for the County of Maricopa.

(B) INCLUSIONS.—The term "Haggard Decree" includes all court orders and decisions supplemental to that decree.

(30) INCLUDING.—The term "including" has the same meaning as the term "including, but not limited to".

(31) INJURY TO WATER QUALITY.—The term "injury to water quality" means any contamination, diminution, or deprivation of water quality under Federal, State, or other law.

(32) INJURY TO WATER RIGHTS.—

(A) IN GENERAL.—The term "injury to water rights" means an interference with, diminution of, or deprivation of water

rights under Federal, State, or other law.

(B) INCLUSION.—The term "injury to water rights" includes a change in the underground water table and any effect of such a change.

(C) EXCLUSION.—The term "injury to water rights" does not include subsidence damage or injury to water quality.

(33) LOWER COLORADO RIVER BASIN DEVELOPMENT FUND.—The term "Lower Colorado River Basin Development Fund" means the fund established by section 403 of the Colorado River Basin Project Act (43 U.S.C. 1543).

(34) MASTER AGREEMENT.—The term "master agreement" means the agreement entitled "Arizona Water Settlement Agreement" among the Director, the Central Arizona Water Conservation District, and the Secretary, dated August 16, 2004.

(35) NM CAP ENTITY.—The term "NM CAP entity" means the entity or entities that the State of New Mexico may authorize to assume responsibility for the design, construction, operation, maintenance, and replacement of the New Mexico Unit.

(36) NEW MEXICO CONSUMPTIVE USE AND FORBEARANCE AGREEMENT.—

(A) IN GENERAL.—The term "New Mexico Consumptive Use and Forbearance Agreement" means that agreement entitled the "New Mexico Consumptive Use and Forbearance Agreement," entered into by and among the United States, the Community, the San Carlos Irrigation and Drainage District, and all of the signatories to the UVD Agreement, and approved by the State of New Mexico, and authorized, ratified, and approved by section 212(b).

(B) INCLUSIONS.—The "New Mexico Consumptive Use and Forbearance Agreement" includes—

(i) all exhibits to that agreement (including the New Mexico Risk Allocation agreement, which is also an exhibit to the UVD agreement); and

(ii) any amendment to that agreement made or added pursuant to that agreement.

(37) NEW MEXICO UNIT.—The term "New Mexico Unit" means that unit or units of the Central Arizona Project authorized by sections 301(a)(4) and 304 of the Colorado River Basin Project Act (43 U.S.C. 1521(a)(4), 1524) (as amended by section 212).

(38) NEW MEXICO UNIT AGREEMENT.—

(A) IN GENERAL.—The term "New Mexico Unit Agreement" means that agreement entitled the "New Mexico Unit Agreement," to be entered into by and between the United States and the NM CAP entity upon notice to the Secretary from the State of New Mexico that the State of New Mexico intends to have the New Mexico Unit constructed or developed.

(B) INCLUSIONS.—The "New Mexico Unit Agreement" includes—

(i) all exhibits to that agreement; and

(ii) any amendment to that agreement made or added pursuant to that agreement.

(39) OFF–RESERVATION TRUST LAND.—The term "off-Reservation trust land" means land outside the exterior boundaries of the Reservation that is held in trust by the United States for the benefit of the Community as of the enforceability date.

(40) PHELPS DODGE.—The term "Phelps Dodge" means the Phelps Dodge Corporation, a New York corporation of that name, and Phelps Dodge's subsidiaries (including Phelps Dodge Morenci, Inc., a Delaware corporation of that name), and Phelps Dodge's successors or assigns.

(41) REPAYMENT STIPULATION.—The term "repayment stipulation" means the Revised Stipulation Regarding a Stay of Litigation, Resolution of Issues During the Stay, and for Ultimate Judgment Upon the Satisfaction of Conditions, filed with the United States District Court for the District of Arizona in Central Arizona Water Conservation District v. United States, et al., No. CIV 95–09625–09TUC–09WDB(EHC), No. CIV 95–091720–09PHX–09EHC (Consolidated Action), and that court's order dated April 28, 2003, and any amendments or revisions thereto.

(42) RESERVATION.—

(A) IN GENERAL.—Except as provided in sections 207(d) and 210(d), the term "Reservation" means the land located within the exterior boundaries of the reservation created under sections 3 and 4 of the Act of February 28, 1859 (11 Stat. 401, chapter LXVI) and Executive Orders of August 31, 1876, June 14, 1879, May 5, 1882, November 15, 1883, July 31, 1911, June 2, 1913, August 27, 1914, and July 19, 1915.

(B) EXCLUSION.—The term "Reservation" does not include the land located in sections 16 and 36, Township 4 South, Range 4 East, Salt and Gila River Base and Meridian.

(43) ROOSEVELT HABITAT CONSERVATION PLAN.—The term "Roosevelt Habitat Conservation Plan" means the habitat conservation plan approved by the United States Fish and Wildlife Service under section 10(a)(1)(B) of the Endangered Species Act of 1973 (16 U.S.C. 1539(a)(1)(B)) for the incidental taking of endangered, threatened, and candidate species resulting from the continued operation by the Salt River Project of Roosevelt Dam and Lake, near Phoenix, Arizona.

(44) ROOSEVELT WATER CONSERVATION DISTRICT.—The term "Roosevelt Water Conservation District" means the entity of that name that is a political subdivision of the State and an irrigation district organized under the law of the State.

(45) SAFFORD.—The term "Safford" means the city of Safford, Arizona.
(46) SALT RIVER PROJECT.—The term "Salt River Project" means the Salt River Project Agricultural Improvement and Power District, a political subdivision of the State, and the Salt River Valley Water Users' Association, an Arizona Territorial corporation.
(47) SAN CARLOS APACHE TRIBE.—The term "San Carlos Apache Tribe" means the San Carlos Apache Tribe, a tribe of Apache Indians organized under Section 16 of the Indian Reorganization Act of June 18, 1934, 48 Stat. 987 (25 U.S.C. 476).
(48) SAN CARLOS IRRIGATION AND DRAINAGE DISTRICT.—The term "San Carlos Irrigation and Drainage District" means the entity of that name that is a political subdivision of the State and an irrigation and drainage district organized under the laws of the State.
(49) SAN CARLOS IRRIGATION PROJECT.—
(A) IN GENERAL.—The term "San Carlos Irrigation Project" means the San Carlos irrigation project authorized under the Act of June 7, 1924 (43 Stat. 475).
(B) INCLUSIONS.—The term "San Carlos Irrigation Project" includes any amendments and supplements to the Act described in subparagraph (A).
(50) SECRETARY.—The term "Secretary" means the Secretary of the Interior.
(51) SPECIAL HOT LANDS.—The term "special hot lands" has the meaning given the term in subparagraph 2.34 of the UVD agreement.
(52) STATE.—The term "State" means the State of Arizona.
(53) SUBCONTRACT.—
(A) IN GENERAL.—The term "subcontract" means a Central Arizona Project water delivery subcontract.
(B) INCLUSION.—The term "subcontract" includes an amendment to a subcontract.
(54) SUBSIDENCE DAMAGE.—The term "subsidence damage" means injury to land, water, or other real property resulting from the settling of geologic strata or cracking in the surface of the Earth of any length or depth, which settling or cracking is caused by the pumping of underground water.
(55) TBI ELIGIBLE ACRES.—The term "TBI eligible acres" has the meaning given the term in subparagraph 2.37 of the UVD agreement.
(56) UNCONTRACTED MUNICIPAL AND INDUSTRIAL WATER.—The term "uncontracted municipal and industrial water" means Central Arizona Project municipal and industrial priority water that is not subject to subcontract on the date of enactment of this Act.
(57) UV DECREED ACRES.—
(A) IN GENERAL.—The term "UV decreed acres" means the land located upstream and to the east of the Coolidge Dam for which water may be diverted pursuant to the Globe Equity Decree.
(B) EXCLUSION.—The term "UV decreed acres" does not include the reservation of the San Carlos Apache Tribe.

(58) UV DECREED WATER RIGHTS.—The term "UV decreed water rights" means the right to divert water for use on UV decreed acres in accordance with the Globe Equity Decree.
(59) UV IMPACT ZONE.—The term "UV impact zone" has the meaning given the term in subparagraph 2.47 of the UVD agreement.
(60) UV SUBJUGATED LAND.—The term "UV subjugated land" has the meaning given the term in subparagraph 2.50 of the UVD agreement.
(61) UVD AGREEMENT.—The term "UVD agreement" means the agreement among the Community, the United States, the San Carlos Irrigation and Drainage District, the Franklin Irrigation District, the Gila Valley Irrigation District, Phelps Dodge, and other parties located in the upper valley of the Gila River, dated September 2, 2004.
(62) UV SIGNATORIES PARTIES.—The term "UV signatories" means the parties to the UVD agreement other than the United States, the San Carlos Irrigation and Drainage District, and the Community.
(63) WATER OM&R FUND—The term "Water OM&R Fund" means the Gila River Indian Community Water OM&R Trust Fund established by section 208.
(64) WATER RIGHT.—The term "water right" means any right in or to groundwater, surface water, or effluent under Federal, State, or other law.
(65) WATER RIGHTS APPURTENANT TO NEW MEXICO 381 ACRES.—The term "water rights appurtenant to New

Mexico 381 acres" means the water rights—

(A) appurtenant to the 380.81 acres described in the decree in Arizona v. California, 376 U.S. 340, 349 (1964); and

(B) appurtenant to other land, or for other uses, for which the water rights described in subparagraph (A) may be modified or used in accordance with that decree.

(66) WATER RIGHTS FOR NEW MEXICO DOMESTIC PURPOSES.—The term "water rights for New Mexico domestic purposes" means the water rights for domestic purposes of not more than 265 acre-feet of water for consumptive use described in paragraph IV(D)(2) of the decree in Arizona v. California, 376 U.S. 340, 350 (1964).

(67) 1994 BIOLOGICAL OPINION.—The term "1994 biological opinion" means the biological opinion, numbered 2–21–90–F–119, and dated April 15, 1994, relating to the transportation and delivery of Central Arizona Project water to the Gila River basin.

(68) 1996 BIOLOGICAL OPINION.—The term "1996 biological opinion" means the biological opinion, numbered 2–21–95–F–462 and dated July 23, 1996, relating to the impacts of modifying Roosevelt Dam on the southwestern willow flycatcher.

(69) 1999 BIOLOGICAL OPINION.—The term "1999 biological opinion" means the draft biological opinion numbered 2–21–91–F–706, and dated May 1999, relating to the impacts of the Central Arizona Project on Gila Topminnow in the Santa Cruz River basin through the introduction and spread of nonnative aquatic species.

SEC. 3. ARBITRATION.

(a) NO PARTICIPATION BY THE UNITED STATES.—

(1) IN GENERAL.—No arbitration decision rendered pursuant to subparagraph 12.1 of the UVD agreement or exhibit 20.1 of the Gila River agreement (including the joint control board agreement attached to exhibit 20.1) shall be considered invalid solely because the United States failed or refused to participate in such arbitration proceedings that resulted in such arbitration decision, so long as the matters in arbitration under subparagraph 12.1 of the UVD agreement or exhibit 20.1 of the Gila River Agreement concern aspects of the water rights of the Community, the San Carlos Irrigation Project, or the Miscellaneous Flow Lands (as defined in subparagraph 2.18A of the UVD agreement) and not the water rights of the United States in its own right, any other rights of the United States, or the water rights or any other rights of the United States acting on behalf of or for the benefit of another tribe.

(2) ARBITRATION INEFFECTIVE.—If an issue otherwise subject to arbitration under subparagraph 12.1 of the UVD agreement or exhibit 20.1 of the Gila River Agreement cannot be arbitrated or if an arbitration decision will not be effective because the United States cannot or will not participate in the arbitration, then the issue shall be submitted for decision to a court of competent jurisdiction, but not a court of the Community.

(b) PARTICIPATION BY THE SECRETARY.—Notwithstanding any provision of any agreement, exhibit, attachment, or other document ratified by this Act, if the Secretary is required to enter arbitration pursuant to this Act or any such document, the Secretary shall follow the procedures for arbitration established by chapter 5 of title 5, United States Code.

SEC. 4. ANTIDEFICIENCY.

The United States shall not be liable for failure to carry out any obligation or activity required by this Act, including all titles and all agreements or exhibits ratified or confirmed by this Act, funded by—

(1) the Lower Basin Development Fund established by section 403 of the Colorado River Basin Project Act (43 U.S.C. 1543), if there are not enough monies in that fund to fulfill those obligations or carry out those activities; or

(2) appropriations, if appropriations are not provided by Congress.

TITLE I—CENTRAL ARIZONA PROJECT SETTLEMENT

<< 43 USCA § 1501 NOTE >>

SEC. 101. SHORT TITLE.

This title may be cited as the "Central Arizona Project Settlement Act of 2004".

SEC. 102. FINDINGS.

Congress finds that—

(1) the water provided by the Central Arizona Project to Maricopa, Pinal, and Pima Counties in the State of Arizona, is vital to citizens of the State; and
(2) an agreement on the allocation of Central Arizona Project water among interested persons, including Federal and State interests, would provide important benefits to the Federal Government, the State of Arizona, Arizona Indian Tribes, and the citizens of the State.

SEC. 103. GENERAL PERMISSIBLE USES OF THE CENTRAL ARIZONA PROJECT.

In accordance with the CAP repayment contract, the Central Arizona Project may be used to transport nonproject water for—
(1) domestic, municipal, fish and wildlife, and industrial purposes; and
(2) any purpose authorized under the Colorado River Basin Project Act (43 U.S.C. 1501 et seq.).

SEC. 104. ALLOCATION OF CENTRAL ARIZONA PROJECT WATER.

(a) NON–INDIAN AGRICULTURAL PRIORITY WATER.—
(1) REALLOCATION TO ARIZONA INDIAN TRIBES.—
(A) IN GENERAL.—The Secretary shall reallocate 197,500 acre-feet of agricultural priority water made available pursuant to the master agreement for use by Arizona Indian tribes, of which—
(i) 102,000 acre-feet shall be reallocated to the Gila River Indian Community;
(ii) 28,200 acre-feet shall be reallocated to the Tohono O'odham Nation; and
(iii) subject to the conditions specified in subparagraph (B), 67,300 acre-feet shall be reallocated to Arizona Indian tribes.
(B) CONDITIONS.—The reallocation of agricultural priority water under subparagraph (A)(iii) shall be subject to the conditions that—
(i) such water shall be used to resolve Indian water claims in Arizona, and may be allocated by the Secretary to Arizona Indian Tribes in fulfillment of future Arizona Indian water rights settlement agreements approved by an Act of Congress. In the absence of an Arizona Indian water rights settlement that is approved by an Act of Congress after the date of enactment of this Act, the Secretary shall not allocate any such water until December 31, 2030. Any allocations made by the Secretary after such date shall be accompanied by a certification that the Secretary is making the allocation in order to assist in the resolution of an Arizona Indian water right claim. Any such water allocated to an Arizona Indian Tribe pursuant to a water delivery contract with the Secretary under this clause shall be counted on an acre-foot per acre-foot basis against any claim to water for that Tribe's reservation;
(ii) notwithstanding clause (i), the Secretary shall retain 6,411 acre-feet of water for use for a future water rights settlement agreement approved by an Act of Congress that settles the Navajo Nation's claims to water in Arizona. If Congress does not approve this settlement before December 31, 2030, the 6,411 acre-feet of CAP water shall be available to the Secretary under clause (i); and
(iii) the agricultural priority water shall not, without specific authorization by Act of Congress, be leased, exchanged, forborne, or otherwise transferred by an Arizona Indian tribe for any direct or indirect use outside the reservation of the Arizona Indian tribe.
(C) REPORT.—The Secretary, in consultation with Arizona Indian tribes and the State, shall prepare a report for Congress by December 31, 2016, that assesses whether the potential benefits of subparagraph (A) are being conveyed to Arizona Indian tribes pursuant to water rights settlements enacted subsequent to this Act. For those Arizona Indian tribes that have not yet settled water rights claims, the Secretary shall describe whether any active negotiations are taking place, and identify any critical water needs that exist on the reservation of each such Arizona Indian tribe. The Secretary shall also identify and report on the use of unused quantities of agricultural priority water made available to Arizona Indian tribes under subparagraph (A).
(2) REALLOCATION TO THE ARIZONA DEPARTMENT OF WATER RESOURCES.—
(A) IN GENERAL.—Subject to subparagraph (B) and subparagraph 9.3 of the master agreement, the Secretary shall reallocate up to 96,295 acre-feet of agricultural priority water made available pursuant to the master agreement to the Arizona Department of Water Resources, to be held under contract in trust for further allocation under subparagraph (C).
(B) REQUIRED DOCUMENTATION.—The reallocation of agricultural priority water under subparagraph (A) is subject to the condition that the Secretary execute any appropriate documents to memorialize the reallocation, including—
(i) an allocation decision; and
(ii) a contract that prohibits the direct use of the agricultural priority water by the Arizona Department of Water

Resources.

(C) FURTHER ALLOCATION.—With respect to the allocation of agricultural priority water under subparagraph (A)—

(i) before that water may be further allocated—

(I) the Director shall submit to the Secretary, and the Secretary shall receive, a recommendation for reallocation;

(II) as soon as practicable after receiving the recommendation, the Secretary shall carry out all necessary reviews of the proposed reallocation, in accordance with applicable Federal law; and

(III) if the recommendation is rejected by the Secretary, the Secretary shall—

(aa) request a revised recommendation from the Director; and

(bb) proceed with any reviews required under subclause (II); and

(ii) as soon as practicable after the date on which agricultural priority water is further allocated, the Secretary shall offer to enter into a subcontract for that water in accordance with paragraphs (1) and (2) of subsection (d).

(D) MASTER AGREEMENT.—The reallocation of agricultural priority water under subparagraphs (A) and (C) is subject to the master agreement, including certain rights provided by the master agreement to water users in Pinal County, Arizona.

(3) PRIORITY.—The agricultural priority water reallocated under paragraphs (1) and (2) shall be subject to the condition that the water retain its non-Indian agricultural delivery priority.

(b) UNCONTRACTED CENTRAL ARIZONA PROJECT MUNICIPAL AND INDUSTRIAL PRIORITY WATER.—

(1) REALLOCATION.—The Secretary shall, on the recommendation of the Director, reallocate 65,647 acre-feet of uncontracted municipal and industrial water, of which—

(A) 285 acre-feet shall be reallocated to the town of Superior, Arizona;

(B) 806 acre-feet shall be reallocated to the Cave Creek Water Company;

(C) 1,931 acre-feet shall be reallocated to the Chaparral Water Company;

(D) 508 acre-feet shall be reallocated to the town of El Mirage, Arizona;

(E) 7,211 acre-feet shall be reallocated to the city of Goodyear, Arizona;

(F) 147 acre-feet shall be reallocated to the H2O Water Company;

(G) 7,115 acre-feet shall be reallocated to the city of Mesa, Arizona;

(H) 5,527 acre-feet shall be reallocated to the city of Peoria, Arizona;

(I) 2,981 acre-feet shall be reallocated to the city of Scottsdale, Arizona;

(J) 808 acre-feet shall be reallocated to the AVRA Cooperative;

(K) 4,986 acre-feet shall be reallocated to the city of Chandler, Arizona;

(L) 1,071 acre-feet shall be reallocated to the Del Lago (Vail) Water Company;

(M) 3,053 acre-feet shall be reallocated to the city of Glendale, Arizona;

(N) 1,521 acre-feet shall be reallocated to the Community Water Company of Green Valley, Arizona;

(O) 4,602 acre-feet shall be reallocated to the Metropolitan Domestic Water Improvement District;

(P) 3,557 acre-feet shall be reallocated to the town of Oro Valley, Arizona;

(Q) 8,206 acre-feet shall be reallocated to the city of Phoenix, Arizona;

(R) 2,876 acre-feet shall be reallocated to the city of Surprise, Arizona;

(S) 8,206 acre-feet shall be reallocated to the city of Tucson, Arizona; and

(T) 250 acre-feet shall be reallocated to the Valley Utilities Water Company.

(2) SUBCONTRACTS.—

(A) IN GENERAL.—As soon as practicable after the date of enactment of this Act, and in accordance with paragraphs (1) and (2) of subsection (d) and any other applicable Federal laws, the Secretary shall offer to enter into subcontracts for the delivery of the uncontracted municipal and industrial water reallocated under paragraph (1).

(B) REVISED RECOMMENDATION.—If the Secretary is precluded under applicable Federal law from entering into a subcontract with an entity identified in paragraph (1), the Secretary shall—

(i) request a revised recommendation from the Director; and

(ii) on receipt of a recommendation under clause (i), reallocate and enter into a subcontract for the delivery of the water in accordance with subparagraph (A).

(c) LIMITATIONS.—

(1) AMOUNT.—

(A) IN GENERAL.—The total amount of entitlements under long-term contracts (as defined in the repayment stipulation) for the delivery of Central Arizona Project water in the State shall not exceed 1,415,000 acre-feet, of which—

(i) 650,724 acre-feet shall be—

(I) under contract to Arizona Indian tribes; or
(II) available to the Secretary for allocation to Arizona Indian tribes; and
(ii) 764,276 acre-feet shall be under contract or available for allocation to—
(I) non–Indian municipal and industrial entities;
(II) the Arizona Department of Water Resources; and
(III) non–Indian agricultural entities.
(B) EXCEPTION.—Subparagraph (A) shall not apply to Central Arizona Project water delivered to water users in Arizona in exchange for Gila River water used in New Mexico as provided in section 304 of the Colorado River Basin Project Act (43 U.S.C. 1524) (as amended by section 212).
(2) TRANSFER.—
(A) IN GENERAL.—Except pursuant to the master agreement, Central Arizona Project water may not be transferred from—
(i) a use authorized under paragraph (1)(A)(i) to a use authorized under paragraph (1)(A)(ii); or
(ii) a use authorized under paragraph (1)(A)(ii) to a use authorized under paragraph (1)(A)(i).
(B) EXCEPTIONS.—
(i) LEASES.—A lease of Central Arizona Project water by an Arizona Indian tribe to an entity described in paragraph (1)(A)(ii) under an Indian water rights settlement approved by an Act of Congress shall not be considered to be a transfer for purposes of subparagraph (A).
(ii) EXCHANGES.—An exchange of Central Arizona Project water by an Arizona Indian tribe to an entity described in paragraph (1)(A)(ii) shall not be considered to be a transfer for purposes of subparagraph (A).
(iii) Notwithstanding subparagraph (A), up to 17,000 acre-feet of CAP municipal and industrial water under the subcontract among the United States, the Central Arizona Water Conservation District, and Asarco, subcontract No. 3–07–30–W0307, dated November 7, 1993, may be reallocated to the Community on execution of an exchange and lease agreement among the Community, the United States, and Asarco.
(d) CENTRAL ARIZONA PROJECT CONTRACTS AND SUBCONTRACTS.—
(1) IN GENERAL.—Notwithstanding section 6 of the Reclamation Project Act of 1939 (43 U.S.C. 485e), and paragraphs (2) and (3) of section 304(b) of the Colorado River Basin Project Act (43 U.S.C. 1524(b)), as soon as practicable after the date of enactment of this Act, the Secretary shall offer to enter into subcontracts or to amend all Central Arizona Project contracts and subcontracts in effect as of that date in accordance with paragraph (2).
(2) REQUIREMENTS.—All subcontracts and amendments to Central Arizona Project contracts and subcontracts under paragraph (1)—
(A) shall be for permanent service (within the meaning of section 5 of the Boulder Canyon Project Act of 1928 (43 U.S.C. 617d));
(B) shall have an initial delivery term that is the greater of—
(i) 100 years; or
(ii) a term—
(I) authorized by Congress; or
(II) provided under the appropriate Central Arizona Project contract or subcontract in existence on the date of enactment of this Act;
(C) shall conform to the shortage sharing criteria described in paragraph 5.3 of the Tohono O'odham settlement agreement;
(D) shall include the prohibition and exception described in subsection (e); and
(E) shall not require—
(i) that any Central Arizona Project water received in exchange for effluent be deducted from the contractual entitlement of the CAP contractor or CAP subcontractor; or
(ii) that any additional modification of the Central Arizona Project contracts or subcontracts be made as a condition of acceptance of the subcontract or amendments.
(3) APPLICABILITY.—This subsection does not apply to—
(A) a subcontract for non-Indian agricultural use; or
(B) a contract executed under paragraph 5(d) of the repayment stipulation.
(e) PROHIBITION ON TRANSFER.—

(1) IN GENERAL.—Except as provided in paragraph (2), no Central Arizona Project water shall be leased, exchanged, forborne, or otherwise transferred in any way for use directly or indirectly outside the State.
(2) EXCEPTIONS.—Central Arizona Project water may be—
(A) leased, exchanged, forborne, or otherwise transferred under an agreement with the Arizona Water Banking Authority

that is in accordance with part 414 of title 43, Code of Federal Regulations; and
(B) delivered to users in Arizona in exchange for Gila River water used in New Mexico as provided in section 304 of the Colorado River Basin Project Act (43 U.S.C. 1524) (as amended by section 212).
(3) EFFECT OF SUBSECTION.—Nothing in this subsection prohibits any entity from entering into a contract with the Arizona Water Banking Authority or a successor of the Authority under State law.

SEC. 105. FIRMING OF CENTRAL ARIZONA PROJECT INDIAN WATER.

(a) FIRMING PROGRAM.—The Secretary and the State shall develop a firming program to ensure that 60,648 acre-feet of the agricultural priority water made available pursuant to the master agreement and reallocated to Arizona Indian tribes under section 104(a)(1), shall, for a 100–year period, be delivered during water shortages in the same manner as water with a municipal and industrial delivery priority in the Central Arizona Project system is delivered during water shortages.
(b) DUTIES.—
(1) SECRETARY.—The Secretary shall—
(A) firm 28,200 acre-feet of agricultural priority water reallocated to the Tohono O'odham Nation under section 104(a)(1)(A)(ii); and
(B) firm 8,724 acre-feet of agricultural priority water reallocated to Arizona Indian tribes under section 104(a)(1)(A)(iii).
(2) STATE.—The State shall—
(A) firm 15,000 acre-feet of agricultural priority water reallocated to the Community under section 104(a)(1)(A)(i);
(B) firm 8,724 acre-feet of agricultural priority water reallocated to Arizona Indian tribes under section 104(a)(1)(A)(iii); and
(C) assist the Secretary in carrying out obligations of the Secretary under paragraph (1)(A) in accordance with section 306 of the Southern Arizona Water Rights Settlement Amendments Act (as added by section 301).
(c) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the Secretary such sums as are necessary to carry out the duties of the Secretary under subsection (b)(1).

SEC. 106. ACQUISITION OF AGRICULTURAL PRIORITY WATER.

(a) APPROVAL OF AGREEMENT.—
(1) IN GENERAL.—Except to the extent that any provision of the master agreement conflicts with any provision of this title, the master agreement is authorized, ratified, and confirmed. To the extent that amendments are executed to make the master agreement consistent with this title, such amendments are also authorized, ratified, and confirmed.

(2) EXHIBITS.—The Secretary is directed to and shall execute the master agreement and any of the exhibits to the master agreement that have not been executed as of the date of enactment of this Act.
(3) DEBT COLLECTION.—For any agricultural priority water that is not relinquished under the master agreement, the subcontractor shall continue to pay, consistent with the master agreement, the portion of the debt associated with any retained water under section 9(d) of the Reclamation Project Act of 1939 (43 U.S.C. 485h(d)), and the Secretary shall apply such revenues toward the reimbursable section 9(d) debt of that subcontractor.
(4) EFFECTIVE DATE.—The provisions of subsections (b) and (c) shall take effect on the date of enactment of this Act.
(b) NONREIMBURSABLE DEBT.—
(1) IN GENERAL.—In accordance with the master agreement, the portion of debt incurred under section 9(d) of the Reclamation Project Act of 1939 (43 U.S.C. 485h(d)), and identified in the master agreement as nonreimbursable to the United States, shall be nonreimbursable and nonreturnable to the United States in an amount not to exceed $73,561,337.
(2) EXTENSION.—In accordance with the master agreement, the Secretary may extend, on an annual basis, the repayment schedule of debt incurred under section 9(d) of the Reclamation Project Act of 1939 (43 U.S.C. 485h(d)) by CAP subcontractors.
(c) EXEMPTION.—The Reclamation Reform Act of 1982 (43 U.S.C. 390aa et seq.) and any other acreage limitation or full cost pricing provisions of Federal law shall not apply to—
(1) land within the exterior boundaries of the Central Arizona Water Conservation District or served by Central Arizona Project water;
(2) land within the exterior boundaries of the Salt River Reservoir District;
(3) land held in trust by the United States for an Arizona Indian tribe that is—
(A) within the exterior boundaries of the Central Arizona Water Conservation District; or
(B) served by Central Arizona Project water; or

(4) any person, entity, or land, solely on the basis of—
(A) receipt of any benefits under this Act;
(B) execution or performance of the Gila River agreement; or
(C) the use, storage, delivery, lease, or exchange of Central Arizona Project water.

SEC. 107. LOWER COLORADO RIVER BASIN DEVELOPMENT FUND.

<< 43 USCA § 1543 >>

(a) IN GENERAL.—Section 403 of the Colorado River Basin Project Act (43 U.S.C. 1543) is amended by striking subsection (f) and inserting the following:
"(f) ADDITIONAL USES OF REVENUE FUNDS.—
"(1) CREDITING AGAINST CENTRAL ARIZONA WATER CONSERVATION DISTRICT PAYMENTS.—Funds credited to the development fund pursuant to subsection (b) and paragraphs (1) and (3) of subsection (c), the portion of revenues derived from the sale of power and energy for use in the State of Arizona pursuant to subsection (c)(2) in excess of the amount necessary to meet the requirements of paragraphs (1) and (2) of subsection (d), and any annual payment by the Central Arizona Water Conservation District to effect repayment of reimbursable Central Arizona Project construction costs, shall be credited annually against the annual payment owed by the Central Arizona Water Conservation District to the United States for the Central Arizona Project.
"(2) FURTHER USE OF REVENUE FUNDS CREDITED AGAINST PAYMENTS OF CENTRAL ARIZONA WATER CONSERVATION DISTRICT.—After being credited in accordance with paragraph (1), the funds and portion of revenues described in that paragraph shall be available annually, without further appropriation, in order of priority—
"(A) to pay annually the fixed operation, maintenance, and replacement charges associated with the delivery of Central Arizona Project water held under long-term contracts for use by Arizona Indian tribes (as defined in section 2 of the Arizona Water Settlements Act) in accordance with clause 8(d)(i)(1)(i) of the Repayment Stipulation (as defined in section 2 of the Arizona Water Settlements Act);
"(B) to make deposits, totaling $53,000,000 in the aggregate, in the Gila River Indian Community Water OM&R Trust Fund established by section 208 of the Arizona Water Settlements Act;
"(C) to pay $147,000,000 for the rehabilitation of the San Carlos Irrigation Project, of which not more than $25,000,000 shall be available annually consistent with attachment 6.5.1 of exhibit 20.1 of the Gila River agreement, except that the total amount of $147,000,000 shall be increased or decreased, as appropriate, based on ordinary fluctuations since January 1, 2000, in construction cost indices applicable to the types of construction involved in the rehabilitation;
"(D) in addition to amounts made available for the purpose through annual appropriations, as reasonably allocated by the Secretary without regard to any trust obligation on the part of the Secretary to allocate the funding under any particular priority and without regard to priority (except that payments required by clause (i) shall be made first)—
"(i) to make deposits totaling $66,000,000, adjusted to reflect changes since January 1, 2004, in the construction cost indices applicable to the types of construction involved in construction of the New Mexico Unit, into the New Mexico Unit Fund as provided by section 212(i) of the Arizona Water Settlements Act in 10 equal annual payments beginning in 2012;
"(ii) upon satisfaction of the conditions set forth in subsections (j) and (k) of section 212, to pay certain of the costs associated with construction of the New Mexico Unit, in addition to any amounts that may be expended from the New Mexico Unit Fund, in a minimum amount of $34,000,000 and a maximum amount of $62,000,000, as provided in section 212 of the Arizona Water Settlements Act, as adjusted to reflect changes since January 1, 2004, in the construction cost indices applicable to the types of construction involved in construction of the New Mexico Unit;
"(iii) to pay the costs associated with the construction of distribution systems required to implement the provisions of—
"(I) the contract entered into between the United States and the Gila River Indian Community, numbered 6–07–03–W0345, and dated July 20, 1998;
"(II) section 3707(a)(1) of the San Carlos Apache Tribe Water Rights Settlement Act of 1992 (106 Stat. 4747); and
"(III) section 304 of the Southern Arizona Water Rights Settlement Amendments Act of 2004;
"(iv) to pay $52,396,000 for the rehabilitation of the San Carlos Irrigation Project as provided in section 203(d)(4) of the Arizona Water Settlements Act, of which not more than $9,000,000 shall be available annually, except that the total amount of $52,396,000 shall be increased or decreased, as appropriate, based on ordinary fluctuations since January 1, 2000, in construction cost indices applicable to the types of construction involved in the rehabilitation;
"(v) to pay other costs specifically identified under—

"(I) sections 213(g)(1) and 214 of the Arizona Water Settlements Act; and

"(II) the Southern Arizona Water Rights Settlement Amendments Act of 2004;

"(vi) to pay a total of not more than $250,000,000 to the credit of the Future Indian Water Settlement Subaccount of the Lower Colorado Basin Development Fund, for use for Indian water rights settlements in Arizona approved by Congress after the date of enactment of this Act, subject to the requirement that, notwithstanding any other provision of this Act, any funds credited to the Future Indian Water Settlement Subaccount that are not used in furtherance of a congressionally approved Indian water rights settlement in Arizona by December 31, 2030, shall be returned to the main Lower Colorado Basin Development Fund for expenditure on authorized uses pursuant to this Act, provided that any interest earned on funds held in the Future Indian Water Settlement Subaccount shall remain in such subaccount until disbursed or returned in accordance with this section;

"(vii) to pay costs associated with the installation of gages on the Gila River and its tributaries to measure the water level of the Gila River and its tributaries for purposes of the New Mexico Consumptive Use and Forbearance Agreement in an amount not to exceed $500,000; and

"(viii) to pay the Secretary's costs of implementing the Central Arizona Project Settlement Act of 2004;

"(E) in addition to amounts made available for the purpose through annual appropriations—

"(i) to pay the costs associated with the construction of on-reservation Central Arizona Project distribution systems for the Yavapai Apache (Camp Verde), Tohono O'odham Nation (Sif Oidak District), Pascua Yaqui, and Tonto Apache tribes; and

"(ii) to make payments to those tribes in accordance with paragraph 8(d)(i)(1)(iv) of the repayment stipulation (as defined in section 2 of the Arizona Water Settlements Act), except that if a water rights settlement Act of Congress authorizes such construction, payments to those tribes shall be made from funds in the Future Indian Water Settlement Subaccount; and

"(F) if any amounts remain in the development fund at the end of a fiscal year, to be carried over to the following fiscal year for use for the purposes described in subparagraphs (A) through (E).

"(3) REVENUE FUNDS IN EXCESS OF REVENUE FUNDS CREDITED AGAINST CENTRAL ARIZONA WATER CONSERVATION DISTRICT PAYMENTS.—The funds and portion of revenues described in paragraph (1) that are in excess of amounts credited under paragraph (1) shall be available, on an annual basis, without further appropriation, in order of priority—

"(A) to pay annually the fixed operation, maintenance and replacement charges associated with the delivery of Central Arizona Project water under long-term contracts held by Arizona Indian tribes (as defined in section 2 of the Arizona Water Settlements Act);

"(B) to make the final outstanding annual payment for the costs of each unit of the projects authorized under title III that are to be repaid by the Central Arizona Water Conservation District;

"(C) to reimburse the general fund of the Treasury for fixed operation, maintenance, and replacement charges previously paid under paragraph (2)(A);

"(D) to reimburse the general fund of the Treasury for costs previously paid under subparagraphs (B) through (E) of paragraph (2);

"(E) to pay to the general fund of the Treasury the annual installment on any debt relating to the Central Arizona Project under section 9(d) of the Reclamation Project Act of 1939 (43 U.S.C. 485h(d)), made nonreimbursable under section 106(b) of the Arizona Water Settlements Act;

"(F) to pay to the general fund of the Treasury the difference between—

"(i) the costs of each unit of the projects authorized under title III that are repayable by the Central Arizona Water Conservation District; and

"(ii) any costs allocated to reimbursable functions under any Central Arizona Project cost allocation undertaken by the United States; and

"(G) for deposit in the general fund of the Treasury.

"(4) INVESTMENT OF AMOUNTS.—

"(A) IN GENERAL.—The Secretary of the Treasury shall invest such portion of the development fund as is not, in the judgment of the Secretary of the Interior, required to meet current needs of the development fund.

"(B) PERMITTED INVESTMENTS.—

"(i) IN GENERAL.—Notwithstanding any other provision of law, including any provision requiring the consent or concurrence of any party, the investments referred to in subparagraph (A) shall include 1 or more of the following:

"(I) Any investments referred to in the Act of June 24, 1938 (25 U.S.C. 162a).

"(II) Investments in obligations of government corporations and government-sponsored entities whose charter statutes

provide that their obligations are lawful investments for federally managed funds.

"(III) The obligations referred to in section 201 of the Social Security Act (42 U.S.C. 401).

"(ii) LAWFUL INVESTMENTS.—For purposes of clause (i), obligations of government corporations and government-sponsored entities whose charter statutes provide that their obligations are lawful investments for federally managed funds includes any of the following securities or securities with comparable language concerning the investment of federally managed funds:

"(I) Obligations of the United States Postal Service as authorized by section 2005 of title 39, United States Code.

"(II) Bonds and other obligations of the Tennessee Valley Authority as authorized by section 15d of the Tennessee Valley Authority Act of 1933 (16 U.S.C. 831n–4).

"(III) Mortgages, obligations, or other securities of the Federal Home Loan Mortgage Corporation as authorized by section 303 of the Federal Home Loan Mortgage Corporation Act (12 U.S.C. 1452).

"(IV) Bonds, notes, or debentures of the Commodity Credit Corporation as authorized by section 4 of the Act of March 4, 1939 (15 U.S.C. 713a–4).

"(C) ACQUISITION OF OBLIGATIONS.—For the purpose of investments under subparagraph (A), obligations may be acquired—

"(i) on original issue at the issue price; or

"(ii) by purchase of outstanding obligations at the market price.

"(D) SALE OF OBLIGATIONS.—Any obligation acquired by the development fund may be sold by the Secretary of the Treasury at the market price.

"(E) CREDITS TO FUND.—The interest on, and the proceeds from the sale or redemption of, any obligations held in the development fund shall be credited to and form a part of the development fund.

"(5) AMOUNTS NOT AVAILABLE FOR CERTAIN FEDERAL OBLIGATIONS.—None of the provisions of this section, including paragraphs (2)(A) and (3)(A), shall be construed to make any of the funds referred to in this section available for the fulfillment of any Federal obligation relating to the payment of OM&R charges if such obligation is undertaken pursuant to Public Law 95–328, Public Law 98–530, or any settlement agreement with the United States (or amendments thereto) approved by or pursuant to either of those acts.".

<< 43 USCA § 1543 NOTE >>

(b) LIMITATION.—Amounts made available under the amendment made by subsection (a)—

(1) shall be identified and retained in the Lower Colorado River Basin Development Fund established by section 403 of the Colorado River Basin Project Act (43 U.S.C. 1543); and

(2) shall not be expended or withdrawn from that fund until the later of—

(A) the date on which the findings described in section 207(c) are published in the Federal Register; or

(B) January 1, 2010.

(c) TECHNICAL AMENDMENTS.—The Colorado River Basin Project Act (43 U.S.C.1501 et seq.) is amended—

<< 43 USCA § 1543 >>

(1) in section 403(g), by striking "clause (c)(2)" and inserting "subsection (c)(2)"; and

<< 43 USCA § 1543 >>

(2) in section 403(e), by deleting the first word and inserting "Except as provided in subsection (f), revenues".

SEC. 108. EFFECT.

Except for provisions relating to the allocation of Central Arizona Project water and the Reclamation Reform Act of 1982 (43 U.S.C. 390aa et seq.), nothing in this title affects—

(1) any treaty, law, or agreement governing the use of water from the Colorado River; or

(2) any rights to use Colorado River water existing on the date of enactment of this Act.

SEC. 109. REPEAL.

Section 11(h) of the Salt River Pima–Maricopa Indian Community Water Rights Settlement Act of 1988 (102 Stat. 2559) is repealed.

SEC. 110. AUTHORIZATION OF APPROPRIATIONS.

(a) IN GENERAL.—There are authorized to be appropriated such sums as are necessary to comply with—
(1) the 1994 biological opinion, including any funding transfers required by the opinion;
(2) the 1996 biological opinion, including any funding transfers required by the opinion; and
(3) any final biological opinion resulting from the 1999 biological opinion, including any funding transfers required by the opinion.
(b) CONSTRUCTION COSTS.—Amounts made available under subsection (a) shall be treated as Central Arizona Project construction costs.
(c) AGREEMENTS.—
(1) IN GENERAL.—Any amounts made available under subsection (a) may be used to carry out agreements to permanently fund long-term reasonable and prudent alternatives in accepted biological opinions relating to the Central Arizona Project.
(2) REQUIREMENTS.—To ensure that long-term environmental compliance may be met without further appropriations, an agreement under paragraph (1) shall include a provision requiring that the contractor manage the funds through interest-bearing investments.

<< 43 USCA § 1501 NOTE >>

SEC. 111. REPEAL ON FAILURE OF ENFORCEABILITY DATE UNDER TITLE II.

(a) IN GENERAL.—Except as provided in subsection (b), if the Secretary does not publish a statement of findings under section 207(c) by December 31, 2007—

<< 43 USCA § 1543 NOTE >>

(1) this title is repealed effective January 1, 2008, and any action taken by the Secretary and any contract entered under any provision of this title shall be void; and
(2) any amounts appropriated under section 110 that remain unexpended shall immediately revert to the general fund of the Treasury.
(b) EXCEPTION.—No subcontract amendment executed by the Secretary under the notice of June 18, 2003 (67 Fed. Reg. 36578), shall be considered to be a contract entered into by the Secretary for purposes of subsection (a)(1).

TITLE II—GILA RIVER INDIAN COMMUNITY WATER RIGHTS SETTLEMENT

<< 43 USCA § 1501 NOTE >>

SEC. 201. SHORT TITLE.

This title may be cited as the "Gila River Indian Community Water Rights Settlement Act of 2004".

SEC. 202. PURPOSES.

The purposes of this title are—
(1) to resolve permanently certain damage claims and all water rights claims among the United States on behalf of the Community, its members, and allottees, and the Community and its neighbors;
(2) to authorize, ratify, and confirm the Gila River agreement;
(3) to authorize and direct the Secretary to execute and perform all obligations of the Secretary under the Gila River agreement;
(4) to authorize the actions and appropriations necessary for the United States to meet obligations of the United States under the Gila River agreement and this title; and
(5) to authorize and direct the Secretary to execute the New Mexico Consumptive Use and Forbearance Agreement to allow the Secretary to exercise the rights authorized by subsections (d) and (f) of section 304 of the Colorado River Basin Project Act (43 U.S.C. 1524).

55 FR 9223-01, 1990 WL 325541(F.R.)
NOTICES
DEPARTMENT OF THE INTERIOR

Working Group in Indian Water Settlements; Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims

Monday, March 12, 1990

AGENCY: Department of the Interior.

ACTION: Policy Statement.

SUMMARY: It is the policy of this Administration, as set forth by President Bush on June 21, 1989, in his statement signing into law H.R. 932, the 1989 Puyallup Tribe of Indians Settlement Act, that disputes regarding Indian water rights should be resolved through negotiated settlements rather than litigation. Accordingly, the Department of the Interior adopts the following criteria and procedures to establish the basis for negotiation and settlement of claims concerning Indian water resources.
EFFECTIVE DATE: March 12, 1990.

ADDRESSES: Comments may be addressed to: Mr. Tim Glidden, Department of the Interior, MS 6217-MIB, 18th and C Streets, NW., Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT:Mr. Tim Glidden, Chairman, Working Group on Indian, Water Settlements, 202-343-7351.

SUPPLEMENTARY INFORMATION: These criteria and procedures were developed by the Working Group on Indian Water Settlements from the Department of the Interior.
These criteria and procedures supersede all prior Departmental policy regarding Indian water settlement negotiations. The criteria provide a framework for negotiating settlements so that (1) The United States will be able to participate in water settlements consistent with the Federal Government's responsibilities as trustee to Indians; (2) Indians receive equivalent benefits for rights which they, and the United States as trustee, may release as part of a settlement; (3) Indians obtain the ability as part of each settlement to realize value from confirmed water rights resulting from settlement; and (4) The settlement contains appropriate cost-sharing by all parties benefiting from the settlement.

Dated: March 6, 1990.

Timonthy Glidden,

Chairman, Working Group on Indian Water Settlements.

Criteria and Procedures for Indian Water Rights Settlements

Preamble
Indian water rights are vested property rights for which the United States has a trust responsibility, with the United States holding legal title to such water in trust for the benefit of the Indians.

It is the policy of this Administration, as set forth by President Bush on June 21, 1989, in his statement signing into law H.R. 932, the 1989 Puyallup Tribe of Indians Settlement Act, that disputes regarding Indian water rights should be resolved

through negotiated settlements rather than litigation.

Accordingly, the Department of the Interior adopts the following criteria and procedures to establish the basis for negotiation and settlements of claims concerning Indian water resources. These criteria and procedures supersede all prior Departmental policy regarding Indian water settlement negotiations. The criteria provide a framework for negotiating settlements so that (1) The United States will be able to participate in water settlements consistent with the Federal Government's responsibilities as trustee to Indians; (2) Indians receive equivalent benefits for rights which they, and the United States as trustee, may release as part of a settlement; (3) Indians obtain the ability as part of each settlement to realize value from confirmed water rights resulting from settlement; and (4) The settlement contains appropriate cost-sharing by all parties benefiting from the settlement.

Criteria

1. These criteria are applicable to all negotiations involving Indian water rights claims settlements in which the Federal Government participates. Claims to be settled through negotiation may include, but are not limited to, claims:

(a) By tribes and U.S. Government to quantify reserved Indian water rights.

(b) By tribes against the U.S. Government.

(c) By tribes and the U.S. Government against third parties.

2. The Department of the Interior will support legislation authorizing those agreements to which is is a signatory party.

3. Settlements should be completed in such a way that all outstanding water claims are resolved and finality is achieved.

4. The total cost of a settlement to all parties should not exceed the value of the existing claims as calculated by the Federal Government.

5. Federal contributions to a settlement should not exceed the sum of the following two elements:

a. First, calculable legal exposure—litigation cost and judgment obligations if the case is lost; Federal and non-Federal exposure should be calculated on a present value basis taking into account the size of the claim, value of the water, timing of the award, likelihood of loss.

b. Second, additional costs related to Federal trust or programmatic responsibilities (assuming the U.S. obligation as trustee can be compared to existing precedence.)—Federal contributions relating to programmatic responsibilities should be justified as to why such contributions cannot be funded through the normal budget process.

6. Settlements should include non-Federal cost-sharing proportionate to the benefits received by the non-Federal parties.

7. Settlements should be structured to promote economic efficiency on reservations and tribal self-sufficiency.

8. Operating capabilities and various resources of the Federal and non-Federal parties to the claims negotiations should be considered in structuring a settlement (e.g. operating criteria and water conservation in Federal and non-Federal projects).

9. If Federal cash contributions are part of a settlement and once such contributions are certified as deposited in the appropriate tribal treasury, the U.S. shall not bear any obligation or liability regarding the investment, management, or use of such funds.

10. Federal participation in Indian water rights negotiations should be conducive to long-term harmony and cooperation among all interested parties through respect for the sovereignty of the States and tribes in their respective jurisdictions.

11. Settlements should generally not include:

a. Local contributions derived from issuing bonds backed by or guaranteed by the Federal Government.

b. Crediting to the non-Federal share normal project revenues that would be received in absence of a cost share agreement.

c. Crediting non-Federal operation, maintenance, and rehabilitation (OM&R) payments to non-Federal construction cost obligations.

d. Imposition by the Federal Government of fees or charges requiring ***9224** authorization in order to finance the non-Federal share.

e. Federal subsidy of OM&R costs of Indian and non-Indian parties.

f. U.S. participation in an economically unjustified irrigation investment; however investments for delivery of water for households, gardens, or domestic livestock may be exempted from this criterion.

g. Per-Capita distribution of trust funds.

h. Crediting to the Federal share existing annual program funding to tribes.

i. Penalties for failure to meet a construction schedule. Interest should not accrue unless the settlement does not get budgeted for as specified in item 15 below.

j. Exemptions from Reclamation law.

12. All tangible and intangible costs to the Federal Government and to non-Federal parties, including the forgiveness of non-Federal reimbursement requirements to the Federal Government and items contributed per item 8 above, should be included in calculating their respective contributions to the settlement.

13. All financial calculations shall use a discount rate equivalent to the current water resources planning discount rate as published annually in the Federal Register.

14. All contractual and statutory responsibilities of the Secretary that affect or could be affected by a specific negotiation will be reviewed.

15. Settlement agreements should include the following standard language: Federal financial contributions to a settlement will normally be budgeted for, subject to the availability of funds, by October 1 of the year following the year of enactment of the authorizing legislation (e.g., for a settlement enacted into law in August 1990, funding to implement it would normally be contained in the FY 1992 Budget request and, if appropriated, be available for obligation on October 1, 1991).

16. Settlements requiring the payment of a substantial Federal contribution should include standard language providing for the costs to be spread-out over more than one year.

Procedures

Phase I—Fact Finding

1. The Department of the Interior (Department) will consider initiation of formal claims settlement negotiations when the Indian tribe and non-Federal parties involved have formally requested negotiations of the Secretary of the Interior (Secretary).

2. The Department will consult with the Department of Justice (Justice) concerning the legal considerations in forming a negotiating team.

If Department decides to establish a team, the Office of Management and Budget (OMB) and Justice shall be notified, in writing. Justice should generally be a member of any negotiating team.

a. The Department's notification should include the rationale for potential negotiations, i.e., pending litigation and other background information about the claim already available, makeup of the team (reason that Justice is not a member of a team, if applicable), and non-Federal participants in the settlement process.

b. The date of the notification marks the beginning of the fact-finding period.

3. Not later than nine months after notification, a fact-finding report outlining the current status of litigation and other pertinent matters will be submitted by the team to the Department, OMB, and Justice. The fact-finding report should contain information that profiles the claim and potential negotiations. The report should include:

a. A listing of all involved parties and their positions.

b. The legal history, if any, of the claim, including such relevant matters as prior or potential litigation or court decisions, or rulings by the Indian Claims Commission.

c. A summary and evaluation of the claims asserted for the Indians.

d. Relevant information on the non-Federal parties and their positions to the claim.

e. A geographical description of the reservation and drainage basin involved, including maps and diagrams.

f. A review and analysis of pertinent existing contracts, statutes, regulations, and legal precedent that may have an impact on the settlement.

g. A description and analysis of the history of the United States' trust activities on the Indian reservation.

4. During Phases I, II, and III, the Government (through the negotiating team or otherwise) will not concede or make representatives on likely U.S. positions or considerations.

Phase II—Assessment and Recommendations

1. As soon as possible, the negotiating team, in concert with Justice, will conduct and present to the Department an assessment of the positions of all parties, and a recommended negotiating position. The purpose of the assessment is to (1) measure all costs presuming no settlement, and (2) measure complete settlement costs to all of the parties. The assessment should include:

a. Costs presuming no settlement—Estimates for quantifying costs associated with all pending or potential litigation in question, including claims against the United States and claims against other non-Federal parties together with an assessment of the risk to all parties from any aspect of the claim and all pending litigation without a settlement. A best/worst/most likely probability analysis of the litigation outcome should be developed.

b. An analysis of the value of the water claim for the Indians.

c. Costs Presuming Settlement—quantification of alternative settlement costs to all parties. This includes an analysis showing how contributions, other than those strictly associated with litigation, could lead to settlement (e.g., facilities to use water, alternative uses of water, and alternative financial considerations).

2. All analysis in the assessment should be presented in present value terms using the planning rate used for evaluating Federal water resource projects.

Phase III—Briefings and Negotiating Position

1. The Working Group on Indian Water Settlements will present to the Secretary a recommended negotiating position. It should contain:

a. The recommended negotiating position and contribution by the Federal Government.

b. A strategy for funding the Federal contribution to the settlement.

c. Any legal or financial views of Justice or OMB.

d. Tentative position on major issues expected to arise.

2. Following the Secretary's approval of the Government's negotiating position, Justice and OMB will be notified before negotiations commence.

Phase IV—Negotiations Towards Settlement
1. OMB and Justice will be updated periodically on the status of negotiations.

2. If the propsoed cost to the U.S. of settlement increases beyond the amount decided in Phase III, if the negotiations are going to exceed the estimated time (or break down), or if Interior proposes to make signficiant changes in the Government negotiating position or in the U.S. contribution to the settlement, the original recommendation and negotiating position will be revised using the procedures identified above.

***9225** 3. Briefings may be given to the Congressional delegations and the Committees consistent with the Government's negotiating position.

[FR Doc. 90-5532 Filed 3-9-90; 8:45 am]

BILLING CODE 4310-RP-M

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 83. Courts of Appeals (Refs & Annos)

28 U.S.C.A. § 1291

§ 1291. Final decisions of district courts

Currentness

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; Pub.L. 85-508, § 12(e), July 7, 1958, 72 Stat. 348; Pub.L. 97-164, Title I, § 124, Apr. 2, 1982, 96 Stat. 36.)

28 U.S.C.A. § 1291, 28 USCA § 1291
Current through P.L. 116-91. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 85. District Courts; Jurisdiction (Refs & Annos)

28 U.S.C.A. § 1331

§ 1331. Federal question

Currentness

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 930; Pub.L. 85-554, § 1, July 25, 1958, 72 Stat. 415; Pub.L. 94-574, § 2, Oct. 21, 1976, 90 Stat. 2721; Pub.L. 96-486, § 2(a), Dec. 1, 1980, 94 Stat. 2369.)

28 U.S.C.A. § 1331, 28 USCA § 1331
Current through P.L. 116-91. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part IV. Jurisdiction and Venue (Refs & Annos)
Chapter 85. District Courts; Jurisdiction (Refs & Annos)

28 U.S.C.A. § 1362

§ 1362. Indian tribes

Currentness

The district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.

CREDIT(S)

(Added Pub.L. 89-635, § 1, Oct. 10, 1966, 80 Stat. 880.)

28 U.S.C.A. § 1362, 28 USCA § 1362
Current through P.L. 116-91. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 43. Public Lands (Refs & Annos)
Chapter 12A. Boulder Canyon Project (Refs & Annos)
Subchapter I. Boulder Canyon Project Act (Refs & Annos)

43 U.S.C.A. § 617d

§ 617d. Contracts for storage and use of waters for irrigation and domestic purposes; generation and sale of electrical energy

Currentness

The Secretary of the Interior is authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this subchapter, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this subchapter and the payments to the United States under subsection (b) of section 617c of this title. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to subsection (a) of section 617c of this title. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.

After the repayments to the United States of all money advanced with interest, charges shall be on such basis and the revenues derived therefrom shall be kept in a separate fund to be expended within the Colorado River Basin as may hereafter be prescribed by the Congress.

General and uniform regulations shall be prescribed by the said Secretary for the awarding of contracts for the sale and delivery of electrical energy, and for renewals under subsection (b) of this section, and in making such contracts the following shall govern:

(a) Duration of contracts for electrical energy; price of water and electrical energy to yield reasonable returns; readjustments of prices

No contract for electrical energy or for generation of electrical energy shall be of longer duration than fifty years from the date at which such energy is ready for delivery.

Contracts made pursuant to subsection (a) of this section shall be made with a view to obtaining reasonable returns and shall contain provisions whereby at the end of fifteen years from the date of their execution and every ten years thereafter, there shall be readjustment of the contract, upon the demand of either party thereto, either upward or downward as to price, as the Secretary of the Interior may find to be justified by competitive conditions at distributing points or competitive centers, and with provisions under which disputes or disagreements as to interpretation or performance of such contract shall be determined either by arbitration or court proceedings, the Secretary of the Interior being authorized to act for the United

States in such readjustments or proceedings.

(b) Renewal of contracts for electrical energy

The holder of any contract for electrical energy not in default thereunder shall be entitled to a renewal thereof upon such terms and conditions as may be authorized or required under the then existing laws and regulations, unless the property of such holder dependent for its usefulness on a continuation of the contract be purchased or acquired and such holder be compensated for damages to its property, used and useful in the transmission and distribution of such electrical energy and not taken, resulting from the termination of the supply.

(c) Applicants for purchase of water and electrical energy; preferences

Contracts for the use of water and necessary privileges for the generation and distribution of hydroelectric energy or for the sale and delivery of electrical energy shall be made with responsible applicants therefor who will pay the price fixed by the said Secretary with a view to meeting the revenue requirements herein provided for. In case of conflicting applications, if any, such conflicts shall be resolved by the said Secretary, after hearing, with due regard to the public interest, and in conformity with the policy expressed in the Federal Power Act [16 U.S.C.A. § 791a et seq.] as to conflicting applications for permits and licenses, except that preference to applicants for the use of water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy, or for delivery at the switchboard of a hydroelectric plant, shall be given, first, to a State for the generation or purchase of electric energy for use in the State, and the States of Arizona, California, and Nevada shall be given equal opportunity as such applicants.

The rights covered by such preference shall be contracted for by such State within six months after notice by the Secretary of the Interior and to be paid for on the same terms and conditions as may be provided in other similar contracts made by said Secretary: *Provided, however*, That no application of a State or a political subdivision for an allocation of water for power purposes or of electrical energy shall be denied or another application in conflict therewith be granted on the ground that the bond issue of such State or political subdivision necessary to enable the applicant to utilize such water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy or the electrical energy applied for, has not been authorized or marketed, until after a reasonable time, to be determined by the said Secretary, has been given to such applicant to have such bond issue authorized and marketed.

(d) Transmission lines for electrical energy; use; rights of way over public and reserved lands

Any agency receiving a contract for electrical energy equivalent to one hundred thousand firm horsepower, or more, may, when deemed feasible by the said Secretary, from engineering and economic considerations and under general regulations prescribed by him, be required to permit any other agency having contracts hereunder for less than the equivalent of twenty-five thousand firm horsepower, upon application to the Secretary of the Interior made within sixty days from the execution of the contract of the agency the use of whose transmission line is applied for, to participate in the benefits and use of any main transmission line constructed or to be constructed by the former for carrying such energy (not exceeding, however, one-fourth the capacity of such line), upon payment by such other agencies of a reasonable share of the cost of construction, operation, and maintenance thereof.

The use is authorized of such public and reserved lands of the United States as may be necessary or convenient for the construction, operation, and maintenance of main transmission lines to transmit said electrical energy.

CREDIT(S)

(Dec. 21, 1928, ch. 42, § 5, 45 Stat. 1060.)

43 U.S.C.A. § 617d, 43 USCA § 617d
Current through P.L. 116-91. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Title 43. Public Lands (Refs & Annos)
Chapter 12A. Boulder Canyon Project (Refs & Annos)
Subchapter I. Boulder Canyon Project Act (Refs & Annos)

43 U.S.C.A. § 617g

§ 617g. Colorado River compact as controlling authority in construction and maintenance of dam, reservoir, canals, and other works

Currentness

(a) The United States, its permittees, licensees, and contractees, and all users and appropriators of water stored, diverted, carried, and/or distributed by the reservoir, canals, and other works herein authorized, shall observe and be subject to and controlled by said Colorado River compact in the construction, management, and operation of said reservoir, canals, and other works and the storage, diversion, delivery, and use of water for the generation of power, irrigation, and other purposes, anything in this subchapter to the contrary notwithstanding, and all permits, licenses, and contracts shall so provide.

(b) Also the United States, in constructing, managing, and operating the dam, reservoir, canals, and other works herein authorized, including the appropriation, delivery, and use of water for the generation of power, irrigation, or other uses, and all users of water thus delivered and all users and appropriators of waters stored by said reservoir and/or carried by said canal, including all permittees and licensees of the United States or any of its agencies, shall observe and be subject to and controlled, anything to the contrary herein notwithstanding, by the terms of such compact, if any, between the States of Arizona, California, and Nevada, or any two thereof, for the equitable division of the benefits, including power, arising from the use of water accruing to said States, subsidiary to and consistent with said Colorado River compact, which may have been negotiated and approved by said States and to which Congress shall have given its consent and approval on or before January 1, 1929; and the terms of any such compact concluded between said States and approved and consented to by Congress after said date: *Provided*, That in the latter case such compact shall be subject to all contracts, if any, made by the Secretary of the Interior under section 617d of this title prior to the date of such approval and consent by Congress.

CREDIT(S)

(Dec. 21, 1928, c. 42, § 8, 45 Stat. 1062.)

43 U.S.C.A. § 617g, 43 USCA § 617g
Current through P.L. 116-91. Some statute sections may be more current, see credits for details.

End of Document

CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2020, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: February 26, 2020

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