

Nos. 21-1484 and 22-51

In the Supreme Court of the United States

STATE OF ARIZONA, ET AL., PETITIONERS

v.

NAVAJO NATION, ET AL.

DEPARTMENT OF THE INTERIOR, ET AL., PETITIONERS

v.

NAVAJO NATION, ET AL.

*ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

JOINT APPENDIX

ELIZABETH B. PRELOGAR
*Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217
Counsel of Record
for Petitioners in No. 22-51*

RITA P. MAGUIRE
*Rita P. Maguire,
Attorney at Law, PLLC
P.O. Box 60702
Phoenix, AZ 85082
rmaguire@azwaterlaw.com
(602) 277-2197
Counsel of Record
for Petitioners in
No. 21-1484*

SHAY DVORETZKY
*Skadden, Arps, Slate, Meagher
& Flom LLP
1440 New York Ave. N.W.
Washington, D.C. 20005
shay.dvoretzky@skadden.com
(202) 371-7000
Counsel of Record
for Respondent Navajo
Nation*

PETITIONS FOR WRITS OF CERTIORARI FILED: MAY 17 and JULY 15, 2022
CERTIORARI GRANTED: NOV. 4, 2022

TABLE OF CONTENTS

	Page
Court of appeals docket entries (19-17088)	1
District court docket entries (3-cv-507)	11
Navajo Nation third amended complaint (D. Ct. Doc. 335-2) (Apr. 13, 2018)	28
Navajo Nation modified third amended complaint (D. Ct. Doc. 360-2) (Jan. 10, 2019)	85

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Case No. 19-17088

NAVAJO NATION, PLAINTIFF-APPELLANT

v.

U.S. DEPARTMENT OF THE INTERIOR;
DEB HAALAND, SECRETARY OF THE INTERIOR;
UNITED STATES BUREAU OF RECLAMATION;
BUREAU OF INDIAN AFFAIRS, DEFENDANTS-APPELLEES

STATE OF ARIZONA; CENTRAL ARIZONA WATER
CONSERVATION DISTRICT; ARIZONA POWER
AUTHORITY; SALT RIVER PROJECT AGRICULTURAL
IMPROVEMENT AND POWER DISTRICT; SALT RIVER
VALLEY WATER USERS' ASSOCIATION; IMPERIAL
IRRIGATION DISTRICT; METROPOLITAN WATER
DISTRICT OF SOUTHERN CALIFORNIA; COACHELLA
VALLEY WATER DISTRICT; STATE OF NEVADA;
COLORADO RIVER COMMISSION OF NEVADA; SOUTHERN
NEVADA WATER AUTHORITY; STATE OF COLORADO,
INTERVENOR-DEFENDANTS-APPELLEES

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
10/22/19	<u>1</u>	DOCKETED CAUSE AND EN- TERED APPEARANCES OF COUNSEL. SEND MQ: Yes. The schedule is set as follows: Appellant Navajo Nation Media- tion Questionnaire due on 10/29/2019. Transcript ordered

DATE	DOCKET NUMBER	PROCEEDINGS
		<p>by 11/18/2019. Transcript due 12/17/2019. Appellant Navajo Nation opening brief due 01/27/2020. Appellees Arizona Power Authority, David Bernhardt, Bureau of Indian Affairs, Central Arizona Water Conservation District, Coachella Valley Water District, Colorado River Commission of Nevada, Imperial Irrigation District, Metropolitan Water District of Southern California, Salt River Project Agricultural Improvement and Power District, Salt River Valley Water Users' Association, Southern Nevada Water Authority, State of Arizona, State of Colorado, State of Nevada, U.S. Department of the Interior and United States Bureau of Reclamation answering brief due 02/26/2020. Appellant's optional reply brief is due 21 days after service of the answering brief. [11472564] (JBS) [Entered: 10/22/2019 10:06 AM]</p> <p>* * * * *</p>
2/26/20	<u>12</u>	Submitted (ECF) Opening Brief for review. Submitted by Appel-

DATE	DOCKET NUMBER	PROCEEDINGS
		lant Navajo Nation. Date of service: 02/26/2020. [11610261] [19-17088] (Hoover, M. Kathryn) [Entered: 02/26/2020 04:12 PM] 02/26/2020
2/26/20	<u>13</u>	Submitted (ECF) excerpts of record. Submitted by Appellant Navajo Nation. Date of service: 02/26/2020. [11610268] [19-17088] (Hoover, M. Kathryn) [Entered: 02/26/2020 04:14 PM] 02/27/2020
2/26/20	<u>14</u>	Filed clerk order: The opening brief [<u>12</u>] and excerpts of record [<u>13</u>] submitted by Navajo Nation are filed. No paper copies are required at this time. [11610598] (KWG) [Entered: 02/27/2020 08:44 AM]
		* * * * *
4/27/20	<u>26</u>	Submitted (ECF) Answering Brief for review. Submitted by Appellees Coachella Valley Water District, State of Arizona, Metropolitan Water District of Southern California, Imperial Irrigation District, Salt River Project Agricultural Improvement and Power District, Salt River Valley Water Users' Association,

DATE	DOCKET NUMBER	PROCEEDINGS
		CAWCD, State of Nevada, Colorado River Commission of Nevada and Southern Nevada Water Authority. Date of service: 04/27/2020. [11672582] [19-17088] (Stites, Catherine) [Entered: 04/27/2020 12:23 PM]
4/27/20	<u>27</u>	Submitted (ECF) supplemental excerpts of record. Submitted by Appellees Coachella Valley Water District, State of Arizona, Metropolitan Water District of Southern California, Imperial Irrigation District, Salt River Valley Water Users' Association, Salt River Project Agricultural Improvement and Power District, CAWCD, State of Nevada, Colorado River Commission of Nevada and Southern Nevada Water Authority. Date of service: 04/27/2020. [11672606] [19-17088] (Stites, Catherine) [Entered: 04/27/2020 12:42 PM]
4/27/20	<u>28</u>	Filed clerk order: The joint answering brief [<u>26</u>] and supplemental excerpts of record [<u>27</u>] submitted by appellees are filed. No paper copies are required at

DATE	DOCKET NUMBER	PROCEEDINGS
		this time. [11672978] (KT) [Entered: 04/27/2020 02:57 PM]
4/27/20	<u>29</u>	Submitted (ECF) Answering Brief for review. Submitted by Appellees David Bernhardt, Bureau of Indian Affairs, United States Bureau of Reclamation and USDOJ. Date of service: 04/27/2020. [11673495] [19-17088] (Smeltzer, John) [Entered: 04/27/2020 06:25 PM]
4/27/20	<u>30</u>	Submitted (ECF) supplemental excerpts of record. Submitted by Appellees USDOJ, United States Bureau of Reclamation, David Bernhardt and Bureau of Indian Affairs. Date of service: 04/27/2020. [11673496] [19-17088] (Smeltzer, John) [Entered: 04/27/2020 06:30 PM]
4/28/20	<u>31</u>	Filed clerk order: The answering brief [<u>29</u>] and supplemental excerpts of record [<u>30</u>] submitted by David Bernhardt, et al. are filed. No paper copies are required at this time. [11673818] (KT) [Entered: 04/28/2020

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
7/1/20	<u>36</u>	Submitted (ECF) Reply Brief for review. Submitted by Appellant Navajo Nation. Date of service: 07/01/2020. [11740347] [19-17088] (Hoover, M. Kathryn) [Entered: 07/01/2020 05:25 PM]
		* * * * *
7/7/20	<u>38</u>	Filed clerk order: The reply brief [<u>36</u>] submitted by Navajo Nation is filed. Within 7 days of the filing of this order, filer is ordered to file 6 copies of the brief in paper format, accompanied by certification (attached to the end of each copy of the brief) that the brief is identical to the version submitted electronically. Cover color: gray. The paper copies shall be submitted to the principal office of the Clerk. [11744018] (KT) [Entered: 07/07/2020 10:05 AM]
		* * * * *
10/16/20	<u>48</u>	ARGUED AND SUBMITTED TO RONALD M. GOULD, MARSHA S. BERZON and KENNETH K. LEE. [11862121]

DATE	DOCKET NUMBER	PROCEEDINGS
		(BG) [Entered: 10/16/2020 02:52 PM]
		* * * * *
4/28/21	<u>51</u>	FILED OPINION (RONALD M. GOULD, MARSHA S. BERZON and KENNETH K. LEE) REVERSED AND REMANDED. Judge: RMG Authoring, Judge: KKL Concurring. FILED AND ENTERED JUDGMENT. 12089323] (AKM) [Entered: 04/28/2021 08:44 AM]
		* * * * *
7/29/21	<u>61</u>	Filed (ECF) Appellee Metropolitan Water District of Southern California petition for rehearing en banc (from 04/28/2021 opinion). Date of service: 07/29/2021. [12187069] [19-17088] (Stites, Catherine) [Entered: 07/29/2021 03:04 PM]
7/29/21	<u>62</u>	Filed (ECF) Appellees Bureau of Indian Affairs, Deb Haaland, United States Bureau of Reclamation and USDOJ petition for rehearing en banc (from 04/28/2021 opinion). Date of service: 07/29/2021. [12187261]

DATE	DOCKET NUMBER	PROCEEDINGS
		[19-17088] (Smeltzer, John) [Entered: 07/29/2021 04:25 PM]
		* * * * *
8/10/21	<u>65</u>	Filed order (RONALD M. GOULD, MARSHA S. BERZON and KENNETH K. LEE) Plaintiff-Appellant is ordered to file a response to Defendant-Appellees and Intervenor-Appellees' petitions for rehearing en banc (Dkts. [61], [62]). The response is not to exceed 15 pages, and must be filed no later than 21 days from the date of this order. [12197418] (OC) [Entered: 08/10/2021 02:38 PM]
		* * * * *
9/23/21	<u>68</u>	Filed (ECF) Appellees Metropolitan Water District of Southern California, State of Arizona, Coachella Valley Water District, Imperial Irrigation District, Salt River Valley Water Users' Association, Salt River Project Agricultural Improvement and Power District, CAWCD, State of Colorado, State of Nevada, Colorado River Commission of Nevada and

DATE	DOCKET NUMBER	PROCEEDINGS
		Southern Nevada Water Authority citation of supplemental authorities. Date of service: 09/23/2021. [12237574] [19-17088] (Stites, Catherine) [Entered: 09/23/2021 03:50 PM]
9/30/21	<u>69</u>	Filed (ECF) Appellant Navajo Nation response to Petition for Rehearing En Banc (ECF Filing), Petition for Rehearing En Banc (ECF Filing), Petition for Rehearing En Banc (ECF Filing), Petition for Rehearing En Banc (ECF Filing). Date of service: 09/30/2021. [12244563]. [19-17088] (Hoover, M. Kathryn) [Entered: 09/30/2021 08:56 PM]
2/17/22	<u>70</u>	Filed order and amended opinion (RONALD M. GOULD, MARSHA S. BERZON and KENNETH K. LEE). The opinion in the above-captioned matter filed on April 28, 2021, and published at 996 F.3d 623, is amended as follows: (SEE ORDER FOR FULL TEXT). The panel has voted to deny Intervenor-Appellees' petition for rehearing en banc (Dkt. [61]), and to deny Defendant-Appellees' petition for

DATE	DOCKET NUMBER	PROCEEDINGS
		rehearing en banc (Dkt. [62]). The full court has been advised of the petitions for rehearing en banc and no judge has requested a vote on whether to rehear either matter en banc. Fed. R. App. P. 35. The petitions for rehearing en banc are DENIED. No future petitions will be entertained. REVERSED AND REMANDED. [12372960] (MM) [Entered: 02/17/2022 08:28 AM]
2/25/22	<u>71</u>	MANDATE ISSUED. (RMG, MSB and KKL) [12379754] (NAC) [Entered: 02/25/2022 07:21 AM]

* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
(PRESCOTT DIVISION)

Case No. 3:03-cv-00507-GMS

NAVAJO NATION, PLAINTIFF

v.

SALLY JEWELL, SECRETARY OF THE INTERIOR,
ET AL.

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
3/14/03	1	COMPLAINT FILED (LSP) (Entered: 03/14/2003)
		* * * * *
3/31/04	<u>105</u>	ORDER by Judge Paul G. Rosenblatt that the State of Arizona's Motion to Intervene [28-1] is granted pursuant to Fed. R. Civ. P. 24(a) and that the Clerk of the Court shall file and docket the State of Arizona's answer lodged on 5/1/03; vacating [0-0] lodged document Answer; FURTHER ORDERED that the Ex Parte Application of Colorado River Commission of Nevada and

DATE	DOCKET NUMBER	PROCEEDINGS
------	------------------	-------------

Southern Nevada Water Authority for Leave to File Surreply Brief [91-1] the Motion of Imperial Irrigation District for Leave to File Surreply Brief [98-1], Central Arizona Water Conservation District's Request for Leave to File Surreply in Support of CAWCD's Opposition to Stipulation and Joint Motion for Approval of Stipulation [99-1], and the Motion of Applicant Intervenor, Arizona Power Authority, for Leave to File Surreply Memorandum [100-1] are all granted and all such surreplies shall be filed no later than 4/19/04 and shall not exceed eight pages in length; FURTHER ORDERED that Imperial Irrigation District's Request for Oral Argument [71-1] is granted to the extent that oral argument on all remaining motions to intervene (docs 32, 44, 58, 62 ad 76) and on the original parties' Stipulation and Joint Motion for Approval of Stipulation [69-1] shall be held on 5/24/04 at 1:30 p.m.; setting Motion for Leave to Intervene as Defendants (Fed. R. Civ. P. 24) by

DATE	DOCKET NUMBER	PROCEEDINGS
		<p>Nevada, State of, Southern Nevada Water [32-1] (lodged answer “filed left” pending ruling of this motion) at 1:30 5/24/04, setting Motion to Intervene by Central AZ Water Con [44-1] at 1:30 5/24/04, setting Motion to Intervene by Imperial Irrigation [58-1] and Memorandum of Points and Authorities in Support Thereof (lodged Answer on left side of file) at 1:30 5/24/04, setting Motion to intervene by Metropolitan Water, Coachella Valley Water [62-1] at 1:30 5/24/04, setting Motion for approval of stipulation and by dfts DOI, Gale Norton, John W Keys III, Robert W Johnson, Bennett W Raley, BUREC, BIA, Aurene Martin, pla Navajo Nation [69-1] at 1:30 5/24/04, setting Motion to Intervene by AZ Power Authority [76-1] and Memorandum of Points and Authorities at 1:30 5/24/04; FURTHER ORDERED that the Clerk of the Court shall provide a copy of this order to all proposed intervenors (cc: all counsel) (SAT) (ADICMS,). (Entered: 03/31/2004)</p>

DATE	DOCKET NUMBER	PROCEEDINGS
------	------------------	-------------

* * * * *

10/13/04	<u>133</u>	<p>THIS ORDER UPDATED PER ORDER 173 OF 4/15/10—ORDER by Judge Paul G. Rosenblatt granting stipulation (Joint) Requesting Granting of Motions to Intervene and Motion to Stay Proceedings by pla, dfts, movant, intervenor, intervenor-defendant. IT IS FURTHER ORDERED granting motion for Leave to Intervene as Defendants (Fed. R. Civ. P. 24) by Nevada, State of, Southern Nevada Wate [32-1]. IT IS FURTHER ORDERED granting motion to Intervene by Central AZ Water Con [44-1]. IT IS FURTHER ORDERED granting motion to Intervene by Imperial Irrigation [58-1] and Memorandum of Points and Authorities in Support Thereof. IT IS FURTHER ORDERED granting motion to intervene by Metropolitan Water, Coachella Valley Wat [62-1]. IT IS FURTHER ORDERED granting motion for approval of stipulation and by dfts DOI, Gale Norton, John W Keys III, Robert W</p>
----------	------------	--

DATE	DOCKET NUMBER	PROCEEDINGS
		<p>Johnson, Bennett W Raley, BU-REC, BIA, Aurene Martin, pla Navajo Nation [69-1]. IT IS FURTHER ORDERED granting motion to Intervene by AZ Power Authority [76-1] and Memorandum of Points and Authorities. IT IS FURTHER ORDERED granting motion to Intervene by SRP Agricultural and Salt River Valley Wa [102-1]. IT IS FURTHER ORDERED this litigation is hereby stayed to allow negotiations among the Navajo Nation, Federa Dfts, State of AZ, CAWCD, and SRP (“Negotiating Parties”), and any other entity who is invited to participate by consensus of the Negotiating Parties and who files a pleading with this Court agreeing to abide by the terms of the Stipulation, including the confidentiality provisions therein and this Order. The stay and negotiations shall be subject to the following terms and conditions: a. the stay entered in this matter shall remain in effect for a period of two years from the date this Order is entered; stay deadline set for</p>

DATE	DOCKET NUMBER	PROCEEDINGS
		<p>10/13/06, b. case stayed as to all proceedings, any party may move to lift the stay upon a showing of good cause, but must first provide 60 days notice to the other parties of its intention to do so in order for the parties to attempt to resolve their respective concerns. If a motion to lift the stay is filed but denied by this Court, the period of the stay shall be extended by 90 days.. c. discussions and writings that are part of the negotiation process shall remain confidential and shall not be admissible in this or any other proceeding for any purpose whatsoever, and no party to this litigation shall make a request or cause a request to be made for such materials under the Freedom of Information Act, 5 U.S.C 552 (“FOIA”) or any similar state public records law. The Negotiating Parties may communicate among themselves, and with their respective clients, concerning the protected materials and the negotiation discussions, but shall not otherwise disclose such information. Protected negotiation</p>

DATE	DOCKET NUMBER	PROCEEDINGS
------	------------------	-------------

materials include discussions and writings between any two or more participants in the negotiation process. In addition, all discussions between any party to the negotiation process and congressional members or their staff, while permissible, shall remain confidential and shall not be admissible in this or any other proceeding. Notwithstanding any other provision of this paragraph 2.c., evidence that is otherwise admissible or discoverable shall not be rendered confidential, inadmissible, or not discoverable in this or any other proceeding solely as result of its use in the negotiations.

d. The DOI shall expeditiously appoint an Indian water rights settlement team to participate in the negotiations.

e. Subject to the provisions of paragraph 2.c. herein, in addition to the Negotiating Parties, one representative of the intervenors from the State of CA and one representative of the intervenors from the State of NV shall be allowed to attend all meetings to

DATE	DOCKET NUMBER	PROCEEDINGS
------	------------------	-------------

which all of the Negotiating Parties are invited. The CA and NV representatives shall be observers only, and shall be invited, but their attendance shall not be required for any meeting to proceed. f. No entity invited to participate in the negotiations by consensus of the Negotiating Parties may participate until it has filed a stipulation with this Court agreeing to be bound by the terms of the Stipulation and this Order. g. The Negotiating Parties shall provide a written report every six months to this Court and the other parties regarding the status of the discussions. IT IS FURTHER ORDERED the parties shall promptly inform this Court if agreement is reached among them on how to resolve the pending action. (cc: all counsel) (LSP) Modified on 4/15/2010 (DMT). (ADI-ICMS). (Entered: 10/13/2004)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
4/29/13	<u>199</u>	MOTION for Adoption of Schedule to Govern Future Proceedings by Navajo Nation. (Attachments: # <u>1</u> Memorandum in Support of Motion, # <u>2</u> Text of Proposed Order) (McElroy, Scott) (Entered: 04/29/2013)
		* * * * *
5/30/13	<u>215</u>	ORDER granting <u>199</u> Motion for Adoption of Schedule to Govern Future Proceedings. The Schedule (including its page limitations) is hereby adopted; the parties shall comply with it. Signed by Judge John W Sedwick on 5/30/13. (LAD) (Entered: 05/30/2013)
		* * * * *
6/3/13	<u>218</u>	MOTION to Amend/Correct Motion to File Amended Complaint by Navajo Nation. (Attachments: # <u>1</u> Memorandum in Support, # <u>2</u> Redline-Strikeout version of First Amended Complaint, # <u>3</u> Text of Proposed Order) (McElroy, Scott) (Entered: 06/03/2013)

DATE	DOCKET NUMBER	PROCEEDINGS
------	------------------	-------------

* * * * *

6/27/13	<u>225</u>	ORDER that the <u>218</u> Motion to Amend is granted. ORDERED that Plaintiff is directed to file its amended complaint on or before July 24, 2013. Federal Defendants and Defendant-Intervenors shall file answers or other responsive pleadings within 60 days from the date of this Order. Signed by Judge G Murray Snow on 6/27/2013. (See Order for details.) (LFIG) (Entered: 06/27/2013)
---------	------------	--

7/10/13	<u>226</u>	*AMENDED COMPLAINT against Indian Affairs, Bureau of, Robert W Johnson, John W Keys, III, Aurene Martin, Sally Jewell, Bennett W Raley, United States Bureau of Reclamation, United States Department of the Interior, filed by Navajo Nation. (Attachments: # <u>1</u> Certificate of Service) (McElroy, Scott) *Modified to reflect change from Defendant Norton to Defendant Jewell on 7/11/2013 (LAD). (Entered: 07/10/2013)
---------	------------	--

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
11/7/13	<u>277</u>	Second MOTION to Amend/ Correct Complaint and for Approval of Stipulated Conditions by Navajo Nation. (Attachments: # <u>1</u> Exhibit, # <u>2</u> Text of Proposed Order) (Walker, Alice) (Entered: 11/07/2013)
		* * * * *
11/13/13	<u>280</u>	ORDER granting the <u>277</u> Motion. ORDERED that Plaintiff shall file the Second Amended Complaint on or before November 14, 2013. Plaintiff's voluntary dismissal of its sixth claim for relief and related prayers for relief shall be without prejudice. Each party shall bear its own costs and attorney fees with respect to the dismissal of Plaintiff's sixth claim. The motions to dismiss filed by Federal Defendants and Defendant-Intervenors shall remain in effect and apply with equal force to the remaining claims in the Second Amended Complaint. The deadlines set forth in the Court's <u>234</u> Order remain unchanged. Signed by Judge G Murray Snow on

DATE	DOCKET NUMBER	PROCEEDINGS
		11/13/2013. (LFIG) (Entered: 11/13/2013)
11/14/13	<u>281</u>	SECOND AMENDED COMPLAINT against All Parties filed by Navajo Nation. (McElroy, Scott) (Entered: 11/14/2013)
		* * * * *
7/1/14	<u>297</u>	ORDER granting State of Colorado's <u>255</u> Motion to Intervene. Signed by Judge G Murray Snow on 7/1/2014. (See Order for details.) (LFIG) (Entered: 07/01/2014)
		* * * * *
7/22/14	<u>305</u>	ORDER that Defendants' <u>240</u> Motion to Dismiss is granted. ORDERED Defendant-Intervenors' <u>242</u> , <u>243</u> , <u>249</u> , <u>250</u> , <u>251</u> , <u>254</u> Motions to Dismiss are denied as moot; Intervenor's <u>252</u> Motion to Intervene and <u>253</u> Motion to Dismiss are denied as moot. Plaintiff's Second Amended Complaint is dismissed without prejudice. The Clerk of Court is directed to terminate this action and enter judgment accordingly. Signed by Judge G Murray Snow on

DATE	DOCKET NUMBER	PROCEEDINGS
7/22/14	<u>306</u>	<p>7/22/2014. (LFIG) (Entered: 07/22/2014)</p> <p>CLERK'S JUDGMENT—IT IS ORDERED AND ADJUDGED that pursuant to the Court's Order filed July 22, 2014, judgment of dismissal is entered. Plaintiff to take nothing and this action is hereby terminated. (LFIG) (Entered: 07/22/2014)</p> <p>* * * * *</p>
9/19/14	<u>316</u>	<p>*NOTICE OF APPEAL to 9th Circuit Court of Appeals re: <u>305</u> Order, <u>306</u> Clerk's Judgment by Navajo Nation. Filing fee received: \$ 505.00, receipt number 0970-10885728. (McElroy, Scott) *Modified linkage on 9/19/2014 (LFIG). (Entered: 09/19/2014)</p> <p>* * * * *</p>
10/1/14	<u>319</u>	<p>ORDER that Plaintiff's <u>310</u> Motion for Specific Relief from the <u>305</u> Order Pursuant to Rule 60(b)(6) is denied. Signed by Judge G Murray Snow on 10/1/2014. (LFIG) (Entered: 10/01/2014)</p>

DATE	DOCKET NUMBER	PROCEEDINGS
10/10/14	<u>320</u>	*AMENDED NOTICE OF APPEAL to 9th Circuit Court of Appeals re: <u>319</u> Order, to <u>316</u> Notice of Appeal re: <u>305</u> Order and 306 Clerk's Judgment by Navajo Nation. (Walker, Alice) *Modified to add document numbers on 10/10/2014 (LSP). (Entered: 10/10/2014)
		* * * * *
1/26/18	<u>329</u>	MANDATE of USCA affirming in part, reversing in part and remanding re: <u>316</u> Notice of Appeal filed by Navajo Nation, <u>320</u> Notice of Appeal—Amended filed by Navajo Nation. (Attachments: # <u>1</u> Order, # <u>2</u> Opinion, # <u>3</u> NDA) (LAD) (Entered: 01/26/2018)
		* * * * *
4/13/18	<u>335</u>	*MOTION to amend/correct re: <u>281</u> Second Amended Complaint by Navajo Nation. (Attachments: # <u>1</u> Supplement MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF NAVAJO NATIONS MOTION FOR LEAVE TO FILE

DATE	DOCKET NUMBER	PROCEEDINGS
		<p>THIRD AMENDED COMPLAINT, # <u>2</u> Exhibit 1—Proposed Third Amended Complaint, # <u>3</u> Exhibit 2—Third Amended Complaint) (McElroy, Scott) *Modified to correct motion type and add document link on 4/16/2018 (REK). (Entered: 04/13/2018)</p>
		<p>* * * * *</p>
12/11/18	<u>359</u>	<p>ORDER—IT IS THEREFORE ORDERED that Plaintiff Navajo Nation’s Motion for Leave to File Third Amended Complaint (Doc. <u>335</u>) is DENIED. IT IS FURTHER ORDERED that Plaintiff Navajo Nation will be given one last chance to file an amended complaint asserting a breach of trust claim consistent with this Order. It shall file such amendment, if any, within thirty (30) days of the date of this Order. (See document for further details). Signed by Chief Judge G Murray Snow on 12/11/18. (LAD) (Entered: 12/11/2018)</p>
1/10/19	<u>360</u>	<p>*MOTION to Amend/Correct re: <u>281</u> Second Amended Complaint</p>

DATE	DOCKET NUMBER	PROCEEDINGS
		<p>by Navajo Nation. (Attachments: # <u>1</u> Supplement Memorandum of Points and Authorities in Support of Navajo Nation's Renewed Motion for Leave File Third Amended Complaint, # <u>2</u> 1—Proposed Third Amended Complaint, # <u>3</u> Exhibit 2—Redline Compare) (Walker, Alice) *Modified to correct motion type and add document link on 1/11/2019 (REK). (Entered: 01/10/2019)</p>
		<p>* * * * *</p>
8/23/19	<u>385</u>	<p>ORDER that Plaintiff Navajo Nation's Renewed Motion for Leave to File Third Amended Complaint, (Doc. 360), is DENIED. IT IS FURTHER ORDERED directing the Clerk of Court to terminate this action and enter judgment accordingly. Signed by Chief Judge G Murray Snow on 8/23/2019. (REK) (Entered: 08/23/2019)</p>
8/23/19	<u>386</u>	<p>CLERK'S JUDGMENT— Pursuant to the Court's order filed August 23, 2019, Plaintiff to</p>

DATE	DOCKET NUMBER	PROCEEDINGS
		take nothing, and the complaint and action are dismissed. (REK) (Entered: 08/23/2019)
		* * * * *
10/18/19	<u>394</u>	*NOTICE OF APPEAL to 9th Circuit Court of Appeals re: <u>385</u> Order and <u>386</u> Clerks Judgment by Navajo Nation. (Walker, Alice) *Document not in compliance with LRCiv 7.1(a)(3). Attorney noticed on 10/21/2019 (RMV). (Entered: 10/21/2019)
		* * * * *
2/25/22	<u>401</u>	MANDATE of USCA re: <u>394</u> Notice of Appeal filed by Navajo Nation. REVERSED AND REMANDED. (Attachments: # <u>1</u> Opinion, # <u>2</u> Amended Opinion) (BAC) (Entered: 03/01/2022)
		* * * * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-03-507 PCT-GMS
NAVAJO NATION, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
RYAN ZINKE, SECRETARY OF THE INTERIOR; BUREAU
OF RECLAMATION; AND BUREAU OF INDIAN AFFAIRS,
DEFENDANTS

STATE OF ARIZONA; CENTRAL ARIZONA WATER
CONSERVATION DISTRICT; ARIZONA POWER AUTHORITY;
SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT
AND POWER DISTRICT; SALT RIVER VALLEY WATER
USERS' ASSOCIATION; IMPERIAL IRRIGATION DISTRICT;
METROPOLITAN WATER DISTRICT OF SOUTHERN
CALIFORNIA; COACHELLA VALLEY WATER DISTRICT;
STATE OF NEVADA; COLORADO RIVER COMMISSION OF
NEVADA; SOUTHERN NEVADA WATER AUTHORITY;
AND STATE OF COLORADO, INTERVENOR-DEFENDANTS

Filed: Apr. 13, 2018

**THIRD AMENDED COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Plaintiff, the Navajo Nation, complains and alleges as follows:

I. INTRODUCTION

1. This action is brought by the Navajo Nation (sometimes "Nation") against the United States Department of the Interior ("Department"), the Secretary of

the Interior (“Secretary”), the Bureau of Reclamation (“Reclamation”), and the Bureau of Indian Affairs (“BIA”) (collectively referred to as “Federal Defendants”), for violation of the treaties between the Nation and the United States and the duty of protection the United States assumed therein, for breach of the fiduciary duty owed to the Nation by the United States, and for failure to consult with the Nation on decisions that affect its trust resources. The lands and waters of the Navajo Nation are held in trust by the United States, and the Federal Defendants are charged with preserving and protecting those trust resources for the Navajo Nation, the trust beneficiary. In addition to serving as trustee for the Nation’s lands and waters, the Secretary is the water master for the Lower Basin of the Colorado River pursuant to the Boulder Canyon Project Act and the Decree in *Arizona v. California*. Despite indisputable evidence that the Navajo Nation will require water from the Lower Basin of the Colorado River to make the Navajo Reservation a viable permanent homeland—an express promise in the Nation’s 1868 Treaty with the United States—and ignoring repeated entreaties from the Navajo Nation, the Federal Defendants have refused to take action to protect the Nation’s interests in, or assist the Nation in the acquisition of, a water supply from the Lower Basin of the Colorado River. The Nation challenges the Federal Defendants’ actions and failures to act in derogation of their trust responsibility, including: failure to determine the water required from the Lower Basin of the Colorado River to make the Navajo Reservation a permanent homeland for Navajo people; failure to protect the sovereign interests of the Navajo Nation by securing an adequate water supply from the Lower Basin of the Colorado River to meet those

homeland purposes; failing to consult with Navajo Nation prior to making management decisions that affect Navajo trust resources; and managing the Colorado River through decisions that inure to the benefit of others, including the Intervenor-Defendants, while compromising the interests of the Navajo Nation.

II. PARTIES

2. The Navajo Nation is a federally recognized Indian tribe and the lands of the Navajo Reservation are located in the states of Arizona, New Mexico, and Utah. The Nation is a sovereign with proprietary interests in its lands and waters and governmental interests in the management of its natural resources, including providing adequate water supplies to its Reservation lands to meet the needs of the people residing thereon so that those lands may serve as a permanent homeland for Navajo people.

3. The Department is a federal agency that includes Reclamation and the BIA and is charged by Congress with responsibility for managing Indian affairs. 25 U.S.C. § 2. The Department has a fiduciary responsibility to the Navajo Nation to preserve, protect, and make productive the Nation's trust resources so that the Navajo Reservation is a viable permanent homeland.

4. Ryan Zinke is Secretary of the Interior and is sued in his official capacity. As Secretary, he holds the lands and waters of the Navajo Nation in trust for the benefit of the Nation and the Navajo people. *Id.* § 5108. The Secretary is principally responsible for carrying out the trust responsibility owed by the United States to Indian tribes. *Id.* In his capacity as trustee of the Nation's lands and waters, the Secretary owes the Nation

all the obligations of a fiduciary undertaken by the United States to Indian tribes, including duties of protection and loyalty. The Secretary has a variety of responsibilities over the waters of the Colorado River pursuant to federal law, including, but not limited to, the Boulder Canyon Project Act, 43 U.S.C. §§ 617-617u, the Colorado River Basin Project Act, *id.* §§ 1501-56, and the Decree in *Arizona v. California*, 376 U.S. 340 (1964) (“1964 Arizona Decree”).

5. Reclamation is the principal agency charged with implementing the obligations of the Secretary to manage the waters of the Colorado River in the Lower Basin. Reclamation has a fiduciary responsibility to the Navajo Nation to protect tribal trust resources in carrying out its legal responsibilities related to the Colorado River.

6. The BIA is the agency charged with providing services to Indian tribes, including the extension, improvement, operation, maintenance, and development of water supplies, and carrying out the federal trust responsibilities of the United States.

7. Intervenor-Defendants are the states of Arizona and Nevada, each with an apportionment from the mainstream of the Colorado River in the Lower Basin; the state of Colorado, with an apportionment of the Colorado River in the Upper Basin; and state water and power authorities and agencies with contracts for the delivery of mainstream Colorado River water from the Lower Basin.

III. JURISDICTION

8. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question) and 28

U.S.C. § 1362 (tribal federal question). The Navajo Nation, a federally recognized Indian tribe, asserts claims arising under its treaties entered into between the Navajo Nation and the United States, laws enacted by the United States Congress, the Federal Defendants' regulations, policies, executive orders, secretarial orders, handbooks, and manuals, and federal common law.

9. The Navajo Nation seeks relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02.

10. Section 702 of the Administrative Procedure Act, 5 U.S.C. § 702, waived the sovereign immunity of the United States for the Nation's claims for breach of its treaties with the United States, claims for breach of the fiduciary duties of the United States to secure, preserve, and protect the Nation's trust assets, and failure of the United States to consult with the Navajo Nation in furtherance of its trust obligations regarding management decisions concerning the Colorado River that affect the Nation's trust resources.

11. Venue is proper in the United States District Court for the District of Arizona pursuant to 28 U.S.C. § 1391(e). The Nation's Reservation lands in the Lower Basin of the Colorado River in Arizona are located in the District.

IV. FACTUAL AND LEGAL ALLEGATIONS

A. THE NAVAJO NATION AND NAVAJO RESERVATION.

12. The Navajo people have occupied lands within the Lower Basin of the Colorado River since time immemorial. The Navajo Nation is a federally recognized Indian tribe in the United States with over 300,000 members.

13. The Navajo Reservation is the largest Indian reservation in the United States with over 17 million acres of reservation lands located in Arizona, New Mexico, and Utah. The Reservation is located almost entirely within the Colorado River Basin.

14. In the *Treaty with the Navaho, 1849* (Sep. 9, 1849), 9 Stat. 974 (“1849 Peace Treaty”), the Navajo Nation and United States agreed that the Nation “was lawfully placed under the exclusive jurisdiction and protection of the Government,” *id.* art. I, and further, that the United States “[r]elying confidently upon the justice and the liberality of the aforesaid Government,” promised to set aside lands for the use of the Navajo Nation and to promulgate such laws “as will be conducive to the prosperity” of the Navajo Nation. *Id.* art. IX.

15. The Navajo Reservation was established initially by the *Treaty with the Navaho, 1868* (June 1, 1868), 15 Stat. 667 (“1868 Treaty”), as the “permanent home” of the Navajo Nation, *id.* art. XIII, “set apart for the use and occupation of the Navajo tribe of Indians” *Id.* art. II.

16. The Navajo Reservation was expanded by executive orders and acts of Congress from 1868 through the present. The United States holds the lands of the Navajo Reservation in trust for the Navajo Nation. The Navajo Reservation lands are adjacent to the Colorado River both above and below Lee Ferry and are located in the Upper and Lower Basins of the Colorado River Basin. This lawsuit pertains to Navajo Reservation lands located in the Lower Basin in Arizona.

17. The Act of June 14, 1934, 48 Stat. 960-62, confirmed the boundary of the Navajo Reservation in Arizona, and described the Colorado River as the western boundary of the Navajo Reservation from the Arizona border with Utah south to its confluence with the Little Colorado River.

18. In the 1868 Treaty and the acts of Congress and executive orders expanding the boundaries of the Navajo Reservation, a sufficient amount of water was reserved for the benefit of the Navajo Nation to carry out the purposes for which the Reservation was created, specifically to make the Reservation a livable homeland for the Nation's present and future generations. *Winters v. United States*, 207 U.S. 564 (1908); *United States v. Winans*, 198 U.S. 371 (1905). The Navajo Nation's beneficial rights to water to make its Reservation lands livable vested *at least as early* as the date of the 1868 Treaty and each congressional act or executive order setting aside the Reservation lands. The Nation's water resources, even those that remain unquantified, are a trust resource that the Federal Defendants have a fiduciary duty to secure, preserve, and protect.

B. WATER NEEDS OF THE NAVAJO NATION AND NAVAJO RESERVATION.

19. The Navajo Reservation suffers from poor living conditions, with a poverty level three times higher than that of the United States generally. Reclamation, *North Central Arizona Water Supply Study, Report of Findings* at 13 (Oct. 2006) (Doc. 282-6) ("North Central Arizona Study"). The lack of water in the Arizona portion of the Navajo Reservation contributes to poor living conditions. The percentage of Navajo homes without

plumbing facilities in this part of the Navajo Reservation is significantly greater than for the rest of the State of Arizona. *Id.* Over 30% of Navajo tribal members live without plumbing, and in some areas of the Navajo Reservation the percentage is much higher. *Id.* at 14.

20. Navajo tribal members who do not have plumbing must haul water substantial distances in order to obtain water for their household uses. *Id.* at 14, 82. This practice is not only expensive, but is a risk to human health because many Navajo people rely on non-potable water sources and the containers used for hauling water are not sanitary. *Id.* Navajo water haulers also consume much less water per day than does the average Arizona resident. *Id.* at 14.

21. Hauled water is, on average, much more expensive than municipal or domestic well supplied water, costing approximately \$37,000 per acre-foot. *Id.* In 2003 hauled water averaged \$32 per 1,000 gallons but was as high as \$250 for 1,000 gallons. This compares with a cost in 2006 of \$2.93 per 1,000 gallons of water delivered by the Navajo Tribal Utility Authority. *Id.* at 135.

22. The majority of Navajo tribal members in the western portion of the Navajo Reservation are water haulers. *Id.* at 58-59. 91% of Navajo households in the Coppermine region of the Reservation lack access to water, 53% of Navajo households in the Cameron region of the Reservation lack access to water, and 44% of Navajo households in the Bodaway Gap region of the Reservation lack access to water. *Id.* at 59. The western portion of the Navajo Reservation in Arizona experiences severe drought, which exacerbates the lack of water. *Id.* at 82.

23. Improvement in the living conditions on the Navajo Reservation will not occur without improvements in water supply and water delivery infrastructure. *Id.* at 15. Without such improvements the current water-short conditions will persist, and the Navajo Nation is expected to see a shortfall of water to meet its needs in the western portion of the Navajo Reservation in the amount of 8,263 acre-feet per year by 2050. *Id.* at 79-80. Water from the Colorado River is required to meet these needs.

24. The lack of water, which is pervasive in the Arizona portion of the Navajo Reservation, constitutes injury to the Navajo Nation and tribal members who live thereon.

C. THE NAVAJO NATION'S EFFORTS TO SECURE WATER FROM THE MAINSTREAM OF THE COLORADO RIVER IN THE LOWER BASIN.

25. Although the Navajo Reservation is adjacent to the Colorado River, the Navajo Nation's rights to use water from the Colorado River in the Lower Basin of the River were not adjudicated in *Arizona v. California*, 373 U.S. 546 (1963), or elsewhere.

26. In 1952, Arizona initiated an original action in the United States Supreme Court against California seeking a division of the waters of the mainstream of the Colorado River in the Lower Basin, despite the fact that Congress in the Boulder Canyon Project Act made such an apportionment. *Motion for Leave to File Bill of Complaint and Bill of Complaint, Arizona v. California*, Original No. 8 (Aug. 8, 1952). The United States entered the litigation alleging the need to protect federal interests, including the rights of twenty-five Indian

tribes in the Lower Basin. *Response of the United States to the Motion on Behalf of the Navajo Tribe of Indians for Leave to Intervene* at 6 n.3 (Nov. 6, 1961) (“US Response”).

27. In 1956, the Navajo Nation and six other Indian tribes moved for leave to file a “representation of interest,” seeking to define the scope of the representation of the tribes by the United States Department of Justice (“USDOJ”) and alleging lack of effective representation and conflict of interest. *Motion for Leave to File Representation of Interest and Representation of Interest*. (Jun. 27, 1956). The motion was denied on the now rejected premise that the trusteeship of the United States was a creation of the plenary power of Congress and disqualification of the trustee was “beyond the power of the Courts.” *See Brief of the Navajo Indian Tribe in Support of Motion to Intervene* at 22 (Sept. 25, 1961) (“Intervention Brief”).

28. The Supreme Court referred the matter to a special master, and in 1960 Special Master Rifkind issued his Report (“Rifkind Report”) (Doc. 240-8), which set the stage for the omission of the rights of the Navajo Nation in the 1964 Arizona Decree. The Special Master determined that both the tributaries and the mainstream of the River above Lake Mead were excluded from the adjudication. The lands of the Navajo Nation are upstream of Lake Mead and were, as a consequence, omitted from the Rifkind Report, and no evidence concerning those rights was offered.

29. After the issuance of the Rifkind Report, the Navajo Nation wrote to the Attorney General requesting that the United States take exception to the Report.

US Response, Appendix B (Letter from Norman M. Littell, General Counsel, Navajo Tribe, to Attorney General Robert F. Kennedy (Feb. 2, 1961)). Although the United States did not respond to the Navajo Nation's request for exceptions, it filed exceptions to the Rifkind Report. Dissatisfied with the position taken by the United States in the case, on September 25, 1961, the Navajo Nation moved to intervene. *Motion on Behalf of the Navajo Tribe of Indians of the Navajo Reservation, Arizona, New Mexico and Utah, for Leave to Intervene* (Sep. 25, 1961) ("Motion to Intervene"); see *Intervention Brief*; *Exceptions of the Navajo Indian Tribe to the Report of the Special Master* (Sept. 25, 1961); *Brief in Support of Exceptions of Navajo Indian Tribe to the Report of the Special Master* (Sept. 25, 1961).

30. In its Motion to Intervene, the Navajo Nation argued that the United States had failed to vigorously assert the Navajo Nation's interests. The Navajo Nation's principal concern was that by failing to assert the justiciability of issues pertaining to "the determination of water rights in the Lower Basin and tributaries between Lee Ferry and Lake Mead," *Intervention Brief* at 25, the United States "abandoned the case so far as the adjudication of the rights of the Navajo Indians is concerned." *Motion to Intervene* at 4; see *Intervention Brief* at 25-30. In addition, the Navajo Nation argued that the United States should have opposed the quantification standard of practicably irrigable acreage and asserted a standard that "is co-extensive with the future needs of the Navajo [Nation] for all of its beneficial uses, whether for hunting, grazing, agriculture, or for other arts of civilization." *Motion to Intervene* at 6. The Navajo Nation also argued that the United States should have asserted that the Navajo Nation's water

rights are aboriginal in nature and not “subject . . . to the priority of appropriative rights established before [the] Reservation was created” *Id.* at 4 (quoting Rifkind Report at 254) (alterations in original). Finally, the Navajo Nation contended that the United States should have asserted that the Indian users have a right to an apportionment separate and apart from the apportionment to the states within which the reservations lie. *Id.* at 5. Most relevant here, and prescient, was the Navajo Nation’s conclusion that this failure put the Nation in “perpetual political conflict” with Arizona, New Mexico, and Utah. *Id.*

31. The United States opposed the Navajo Nation’s attempt to intervene, representing to the Court that it “has undertaken representation of the interests of several Indian tribes” and that the United States would “be governed by . . . considerations of justice” in its representation of the Navajo Nation. US Response at 6-7 (quoting *Mo., Kan. & Tex. Ry. Co. v. Roberts*, 152 U.S. 114, 117 (1894)).

32. The United States argued further, that because the Special Master had determined that mainstream and tributary uses above Lake Mead were not chargeable against each state’s allocation, there was no need to adjudicate the Navajo Nation’s rights to use water from the tributaries above Lake Mead and the extent to which those rights might conflict with mainstream uses below Lake Mead. US Response at 14-15. The United States recognized that no evidence had been submitted on behalf of the Navajo Nation for uses from the mainstream and that such evidence would have had to be submitted in order for the Court to consider the issue of the Navajo Nation’s rights to the mainstream above Lake

Mead. *Id.* The United States expressly stated that if the Court rejected the Special Master's recommendation that the Boulder Canyon Project Act applied only to uses below Lake Mead, it would then be necessary to address the Navajo mainstream rights above Lake Mead. *Id.*

33. Again, the request of the Navajo Nation to represent its own interests was denied.

34. The Supreme Court ultimately rejected the Special Master's view that the Boulder Canyon Project Act allocated only the supply of the Colorado River below Lake Mead among California, Arizona, and Nevada (collectively "Lower Basin States"), determining that "[t]he Lower Basin, with which Congress was dealing, begins at Lee Ferry, and it was all the water in the mainstream below Lee Ferry that Congress intended to divide among the [Lower Basin] States." *Arizona v. California*, 373 U.S. at 591. This holding left the claims of the Navajo Nation unresolved.

35. Article VIII(c) of the 1964 Arizona Decree expressly left open the question of the Navajo Nation's beneficial rights to the waters of the Colorado River. 376 U.S. at 353.

36. Clearly, it has long been understood by the United States that the Navajo Nation's water rights to the Colorado River have not been addressed and require additional work to attain resolution. However, the Federal Defendants have failed to undertake the work necessary to resolve the Nation's mainstream rights. The United States' trust responsibility to protect the Navajo Nation's beneficial rights to, and interests in the

waters of the Colorado River remain unaffected by the 1964 Arizona Decree.

37. Prior to initiating the instant litigation in 2003, the Navajo Nation repeatedly asked the Department, consistent with its trust responsibility to the Navajo Nation, to address the extent of the Nation's rights to use, its interest in, and needs for water from the mainstream of the Colorado River in the Lower Basin to make the lands of the Navajo Reservation a permanent homeland. Salient examples include:

a. A letter dated April 4, 2000, from Stanley Pollock, Navajo Nation Department of Justice, to Interior Deputy Secretary David Hayes, requesting resolution of the Nation's Colorado mainstream claims in the context of the development of the Surplus Guidelines, settlement of the Central Arizona Project's ("CAP") repayment obligations, and reallocation of CAP supplies, addressed at ¶¶ 79-80, 92-98, 114, *infra*;

b. A letter dated August 1, 2000, from Navajo Nation President Kelsey A. Begaye, to Interior Secretary Bruce Babbitt, requesting a contract for uncommitted water apportioned to Arizona from the mainstream of the Colorado River in the context of the issues outlined in the letter referenced in subparagraph 37(a), *supra*;

c. A letter dated August 8, 2001, from Navajo Nation President Kelsey A. Begaye, to Interior Secretary Gale A. Norton, renewing his request that the Navajo Nation receive a contract for uncommitted mainstream Colorado River water.

38. By letter dated November 7, 2001, Interior Solicitor William G. Meyers III, responded on behalf of the Secretary to President Begaye as follows:

Aside from CAP supplies, there is a very limited quantity of Colorado River water allocated for use within Arizona and there are numerous competing uses for that water. Before any decisions are made with respect to the remaining water, careful consideration must be given to the needs of the competing entities, the views of non-Indians parties and the other tribes that may have an interest in the water. This process is yet to be initiated and we would expect it to be a somewhat lengthy process.

.

While the Department appreciates the Navajo Nation's need for additional water supplies, for the reasons discussed above, we believe that it is inappropriate at this time to grant your request for all the remaining uncommitted Colorado River water allocated for use within Arizona.

39. To the knowledge of the Navajo Nation, the Federal Defendants never initiated the process the Solicitor alleged would be necessary to grant the Nation a contract for uncommitted Colorado River water. To date, the Secretary has refused to enter into such a contract with the Navajo Nation.

40. This litigation was stayed from October 2004 to May 2013 to allow for settlement negotiations. During the pendency of the stay, the Navajo Nation continued to seek the assistance of the Department, consistent with its trust responsibility to the Navajo Nation, to address the extent of the Nation's rights to use, its interest in, and needs for water from the mainstream of the Colorado River in the Lower Basin:

a. By a letter dated October 5, 2005, from counsel for the Navajo Nation to Vanessa Willard, USDOJ, and the federal negotiation team for the instant litigation seeking, *inter alia*, to “develop a process for the Navajo Nation and the United States to jointly pursue the quantification” of the Nation’s Colorado River mainstream claims;

b. By a letter dated April 28, 2006, from Louis Denetsosie, Navajo Nation Attorney General, to Sue Ellen Woolridge, Assistant Attorney General, USDOJ, and David Bernhard, Interior Office of the Solicitor, seeking a meeting to discuss resolution of the instant litigation in the context of, *inter alia*, the Department’s development of shortage guidelines (addressed at ¶¶ 99-105, *infra*), through re-alignment of the Federal Defendants as plaintiffs with the Navajo Nation.

41. A meeting was held on May 5, 2006 between representatives of the Navajo Nation and the United States in response to the Nation’s requests, but the Federal Defendants took no further action after the meeting.

42. After the failure of settlement negotiations in 2012, and prior to the time established for filing the Navajo Nation’s First Amended Complaint, the Nation again sought the assistance of the Department, consistent with its trust responsibility to the Navajo Nation, to address the extent of the Nation’s rights to use, its interest in, and needs for water from the mainstream of the Colorado River in the Lower Basin by a joint letter dated February 7, 2013, from Navajo Nation President Ben Shelly and Navajo Nation Council Speaker Johnny Naize, requesting a meeting with Interior Secretary Kenneth L. Salazar.

43. A meeting was held on March 5, 2013, between President Shelly and Deputy Secretary Hayes, BIA Assistant Secretary Kevin Washburn, Commissioner of Reclamation Michael Connor, and their staff, but the outcome was limited to a commitment by the Federal Defendants to engage in further discussions with Navajo leadership. No such discussions ever occurred.

44. After the filing of the Nation's First Amended Complaint, the Nation through email communications between counsel, continued to seek the assistance of the Department, consistent with its trust responsibility to the Navajo Nation, to address the extent of the Nation's rights to use, its interest in, and needs for water from the mainstream of the Colorado River in the Lower Basin to no avail.

45. In a letter dated March 21, 2014, to Deputy Secretary Michael Connor, Navajo Nation President Shelly wrote to confirm the Nation's understanding of the position of the Department including: the need of the Navajo Nation for water from the mainstream of the Colorado River to make the Navajo Reservation a permanent homeland; the unwillingness of the United States to realign as a plaintiff in the instant litigation or otherwise pursue the Nation's claims and needs to water from the mainstream; the unwillingness of the Federal Defendants to engage in further discussions concerning the needs of the Navajo Nation for water from the mainstream and how to meet those needs because of the pendency of the litigation. While expressing disappointment with the various positions of the Department, and observing that such positions were inconsistent with the trust responsibility owed to the Navajo Nation by the

United States, President Shelly asked the Department to reconsider and meet with the Navajo Nation.

46. Subsequently, after yet another request from Navajo Nation President Russell Begaye to meet with the Federal Defendants, consistent with their trust responsibility to the Navajo Nation, to address the extent of the Nation's rights to use, its interest in, and needs for water from the mainstream of the Colorado River in the Lower Basin, a meeting was held on January 20, 2016, with Deputy Secretary Michael Connor, Pamela Williams, director of the Secretary's Indian Water Rights Office, and their staff. However, the requests for assistance again went unheeded.

47. Efforts by the Navajo Nation to secure the assistance of the United States, consistent with its trust responsibility to the Navajo Nation, to address the extent of the Nation's rights to use, its interest in, and needs for water from the mainstream of the Colorado River in the Lower Basin since the remand of this matter from the Ninth Circuit have been similarly unavailing.

48. The Federal Defendants have never sought, through judicial or administrative means, to quantify or otherwise determine the Navajo Nation's rights or needs to water from the mainstream of the Colorado River in the Lower Basin.

49. The failure to confirm, estimate, or otherwise quantify the Navajo Nation's needs for and rights to Colorado River water creates a great degree of uncertainty for all Colorado River water users because the water that these users now rely on under the programs

challenged herein likely will not be available in the future if Navajo Nation rights are recognized. *See, e.g.*, US Response at 7-8 (“The controversy respecting allocation of the waters of the Lower Colorado River has plagued the . . . entire region for nearly half a century” and has “impeded full development of the water resources of the southwestern region of the United States, and hence the full development of the other resources of the region . . .”). This uncertainty will only be resolved when the rights of the Navajo Nation to the mainstream of the Colorado River in the Lower Basin are quantified.

50. The allocation of water from the Colorado River without regard to the Navajo Nation’s rights to or the needs of the Navajo Nation and its members for such waters establishes a system of reliance upon the Colorado River that ensures that entities other than the Navajo Nation will continue to depend on water supplies claimed by, reserved for, needed by, and potentially belonging to the Navajo Nation. Such reliance will operate to make allocation of Colorado River water to the Navajo Nation to satisfy its water rights or meet the needs of the Navajo Nation and its members increasingly difficult.

D. OTHER WATER SUPPLIES CANNOT MEET THE NAVAJO NATION’S NEEDS.

51. The Navajo Nation lacks adequate water supplies to meet the needs of its members now and in the future to make the Navajo Reservation a viable and permanent homeland.

52. Although the ongoing general stream adjudication in *In re General Adjudication of All Rights to Use*

Water in the Little Colorado River System and Source, No. CV 6417 (Ariz. Super. Ct., Apache County), may result in a declaration of water rights to serve some lands of the Navajo Reservation in the Lower Basin, because the quality and quantity of the water sources in the Little Colorado River Basin are inadequate, the Little Colorado River adjudication will not address the totality of those water needs.

53. The Navajo Nation possesses quantified rights to the use of water from the Upper Colorado River Basin in New Mexico by virtue of a settlement between the Navajo Nation, the United States, and the State of New Mexico, ratified by Congress in the Northwestern New Mexico Rural Water Projects Act, Pub. L. No. 111-11, §§ 1301-05, 123 Stat. 1367, but the water secured by those rights cannot be used in Arizona.

E. THE DUTY OF THE FEDERAL DEFENDANTS TO PROTECT THE NAVAJO NATION’S TRUST RESOURCES.

54. That the United States owes a fiduciary duty to the Navajo Nation is beyond dispute. Further:

a. This “legally enforceable trust obligation . . . originated in the course of dealings between the government and the Indians and is reflected in the treaties, agreements, and statutes pertaining to Indians”;

b. “The trust responsibility doctrine imposes fiduciary standards on the conduct of the executive” and “[t]he 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”; and

c. The fiduciary standards imposed on the executive “operate to limit the discretion not only of the Secretary of the Interior but also of the Attorney General and other executive branch officials.”

Letter from Leo M. Krulitz, Department Solicitor, to James W. Moorman, Assistant Attorney General (Nov. 21, 1978) (“Krulitz Memo”), attached as an appendix to *Brief for Respondents, United States v. Mitchell*, 445 U.S. 535 (1979) (No. 78-1756), 1979 WL 199447. The Krulitz Memo remains in effect. Secretarial Order No. 3335, *Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries* § 3(d) (Aug. 20, 2014) (“Secretarial Order No. 3335”).

55. As a consequence of the federal trust responsibility, treaties and statutes affecting Indian tribes and enacted for their benefit must be construed in a manner favorable to the Indians and, in the case of treaties, in the manner the Indians would have understood them, and any ambiguity must be resolved in their favor. Rights of Indian tribes cannot be abrogated or diminished by implication, rather the intent must be clear and susceptible of only that interpretation.

56. The United States undertook a formal trust relationship with the Navajo Nation in the 1849 Peace Treaty, which provides that by virtue of the Treaty of Guadalupe Hidalgo the Nation “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.” 1849 Peace Treaty art. I. Thus, the Federal Defendants’ duty of protection, while evident in the course of dealings between the United

States and Indian tribes, was expressly stated in the 1849 Peace Treaty.

57. The United States, in the exercise of its fiduciary obligations, entered into the 1868 Treaty with the Navajo Nation, and thereby established the Navajo Reservation as its permanent homeland as promised in the 1849 Peace Treaty. 1868 Treaty arts. II, XIII; *see* 1849 Peace Treaty art. IX (“the United States shall, at its earliest convenience, designate, settle, and adjust [the Navajo Nation’s] territorial boundaries”).

58. The treaties, together with the executive orders and acts of Congress establishing the Navajo Reservation, provide the legal basis for the Navajo Nation’s claim to a reserved right to water from the mainstream of the Colorado River in the Lower Basin to make the Navajo Reservation a viable and permanent home for Navajo people.

59. The Federal Defendants hold the Nation’s lands and waters in trust and owe a fiduciary duty to the Nation. All the elements of a trust are present: the United States is the trustee; the Navajo Nation is the beneficiary; and the Navajo Nation’s beneficial interest in its Reservation lands and the waters of the Colorado River necessary to make its Reservation a livable homeland constitute the trust corpus. The United States has an obligation to make those trust resources productive so that the Reservation may serve as permanent homeland for Navajo people.

60. The trust relationship between the United States and Indian tribes, including the Navajo Nation, encompasses the obligation of Federal Defendants to protect Indian trust resources, to secure the resources needed,

and to take the steps necessary to make those trust resources productive. In addition to the 1849 Peace Treaty and federal actions creating the Navajo Reservation, those obligations have been repeatedly confirmed by Congress.

61. The Non-Intercourse Act, 25 U.S.C. § 177, first enacted in 1730 and reauthorized repeatedly, provides that tribal lands and waters, as tribal trust resources, cannot be transferred without the approval of the United States. *See* Act of July 22, 1790, § 4, 1 Stat. 137, 138; Act of March 1, 1793, § 8, 1 Stat. 329, 330; Act of May 19, 1796, § 12, 1 Stat. 469, 472; Act of March 3, 1799, § 12, 1 Stat. 743, 746; Act of March 30, 1802, § 12, 2 Stat. 139, 143; Act of June 30, 1834, § 12, 4 Stat. 729, 730. The Non-Intercourse Act pre-dates the United States Constitution and is reflective of the course of dealings between the United States and Indian Tribes, including the duty of protection. The Non-Intercourse Act was expressly made applicable to the Navajo Nation in the 1849 Peace Treaty, providing that the United “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 . . . with the various tribes of Indians under the protection and guardianship of the aforesaid Government, shall have the same force and efficiency” as if those “laws had been passed for their sole benefit and protection.” 1849 Peace Treaty art. III.

62. The Northwest Ordinance of 1787, 1 Stat. 50, also pre-dates the ratification of the United States Constitution, recognizes the federal duty of protection to Indian tribes, and provides that “[t]he utmost good faith shall always be observed towards the Indians; their land

and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.” *Id.* art. 3, 1 Stat. at 52.

63. The Snyder Act, 25 U.S.C. § 13, provides that the BIA shall direct, supervise, and expend funds that Congress appropriates for the benefit of the Indians. The BIA has express authority over the “extension, improvement, operation, and maintenance of . . . development of water supplies.” *Id.*

64. In the Indian Health Care Amendments of 1988, Pub. L. No. 100-713, § 302, 102 Stat. 4784 (amending 25 U.S.C. § 1632), Congress declared “the policy of the United States, that all Indian communities and Indian homes . . . be provided with safe and adequate water supply systems and sanitary sewage waste disposal systems as soon as possible.” 25 U.S.C. § 1632(a)(5); *see* North Central Arizona Study at 84-85. This policy cannot be effectuated on the Navajo Reservation without water from the mainstream of the Colorado River in the Lower Basin.

65. The American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, § 101, 108 Stat. 4329, amended the Act of June 24, 1938, 25 U.S.C. § 162a, to recognize eight “trust responsibilities of the United States,” including “[a]ppropriately managing the natural resources located within the boundaries of Indian reservations and trust lands,” and specifically states that the Secretary’s “proper discharge of the

trust responsibilities of the United States shall include (but are not limited to)” those specified duties. 25 U.S.C. § 162a(d).

66. In the Indian Trust Asset Reform Act, *id.* §§ 5601-36, Congress reaffirmed that “the fiduciary responsibilities of the United States to Indians also are founded in part on specific commitments made through written treaties and agreements securing peace, in exchange for which Indians have surrendered claims to vast tracts of land, which provided legal consideration for permanent, ongoing performance of Federal trust duties” and “have established enduring and *enforceable Federal obligations* to which the national honor has been committed.” *Id.* § 5601(4)-(5) (emphasis added).

67. The Federal Defendants’ management actions on the Colorado River affect the environment and must also comply with the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-70h (“NEPA”). Further, in carrying out its trust responsibilities, Federal Defendants are required, at a minimum, to comply with the requirements of generally applicable federal laws, such as NEPA.

68. Acknowledging the application of NEPA, Reclamation prepared environmental impact statements for each of the management decisions challenged herein, purporting to consider impacts of the proposed actions and alternatives on Indian trust assets, but finding that their management decisions would not affect Navajo Nation trust resources.

69. NEPA obligates a federal agency to consider every significant aspect of the environmental impact of a proposed action and to ensure that the federal agency

informs the public that it has indeed considered environmental concerns in its decision making process.

70. NEPA establishes action-forcing procedures that require agencies to take a hard look at a project's potential environmental consequences.

71. Both the Department and the Council on Environmental Quality, an agency within the Executive Office of the President, have promulgated regulations implementing NEPA's procedural requirements. 43 C.F.R. pt. 46; 40 C.F.R. pt. 1500.

72. The Federal Defendants have implemented their trust obligations and fiduciary duties imposed by Congress to protect Indian trust resources through the promulgation of Secretarial Orders, agency policies, departmental manual provisions, and handbooks, which together with the implementing regulations are binding and legally enforceable, including:

a. Secretarial Order No. 3335, reciting that the "trust responsibility consists of the highest moral obligations that the United States must meet to ensure the protection of tribal and individual Indian lands, assets, resources, and treaty and similarly recognized rights," and that "[o]ne of the fundamental common-law duties of a trustee is to preserve and maintain trust assets." § 3(a) (internal quotation marks omitted).

b. Secretarial Order No. 3215, *Principles for the Discharge of the Secretary's Trust Responsibility* (Apr. 28, 2000), superseded by incorporation in the Interior Departmental Manual at 303 DM Chapter 2: Principles for Managing Indian Trust Assets (Oct. 31, 2000);

c. Secretarial Order No. 3175 *Departmental Responsibilities for Indian Trust Resources* (Nov. 8,

1993), superseded by incorporation in the Interior Departmental Manual at 512 DM Chapter 2: Departmental Responsibilities for Indian Trust Resources (Dec. 1, 1995);

d. Reclamation's *Indian Policy* (Jul. 7, 2014), which acknowledges and affirms Reclamation's "Federal trust responsibility and government-to-government relationship" with Indian tribes, including the Navajo Nation, and by which Reclamation commits to "actively support and participate in the Department's Indian water rights negotiation and implementation activities, as it works to resolve the water rights claims of Indian tribes . . ." *Id.* ¶¶ 1, 5(C)(2) (The 2014 Policy supersedes the earlier policy of the same name dated February 25, 1998.);

e. *Reclamation's NEPA Handbook* (Feb. 2012) (Doc. 283-6), superseding Reclamation's *National Environmental Policy Act Handbook* (Oct. 1990);

f. Reclamation's *Environmental Compliance Memorandum No. ECM97-2* (May 8, 1997) signed by the Director, Office of Environmental Policy and Compliance;

g. *The Bureau of Reclamation Indian Trust Asset Policy and NEPA Implementing Procedures: Questions and Answers about the Policy and Procedures* (Aug. 31, 1994) (Doc. 283-7) ("Reclamation's ITA Policy Questions and Answers"), distributed by Memorandum from the Commissioner dated October 21, 1994);

h. Reclamation's *National Environmental Policy Act Handbook Procedures to Implement Indian Trust Asset Policy (NEPA)* (distributed by Memorandum D-5120 from the Assistant Commissioner-Resources Management dated December 15, 1993); and

i. Reclamation's *Indian Trust Asset Policy* (distributed by Memorandum W-6100 from the Commissioner dated July 2, 1993).

73. The President of the United States has also repeatedly confirmed the obligation of Federal Defendants to preserve and protect Indian trust resources, and the necessity for dealing with Indian tribes on a government-to-government basis. Important to the instant action are:

a. President Richard M. Nixon, Public Papers of the Presidents: *Special Message to the Congress on Indian Affairs* (July 8, 1970) (recognizing that the trust relationship "continues to carry immense moral and legal force" (emphasis added)); see President George H.W. Bush, Public Papers of the Presidents: *Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments* (June 14, 1991);

b. Executive Order No. 13,175, *Consultation and Coordination with Indian Tribes* (Nov. 6, 2000), recognizes as a "Fundamental Principle" the unique trust relationship between the United States and Indian tribes and the federal duty of protection. *Id.* § 2(a). Executive Order 13,175 requires that the Federal Defendants act to strengthen the government-to-government relationship with Indian tribes by engaging in "meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications." *Id.* at Preamble. "Policies that have tribal implications" are defined as "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes." *Id.* § 1(a). Government-

to-government consultation concerning “tribal trust resources, and Indian tribal treaty and other rights” is another Fundamental Principle. *Id.* § 2(b).

c. Executive Order No. 13,647, *Establishing the White House Council on Native American Affairs* (June 26, 2013), “to ensure that the Federal Government engages in a true and lasting government-to-government relationship with federally recognized tribes” to better carry out its trust responsibilities.

74. The United States’ trust relationship with the Navajo Nation requires the Federal Defendants to act affirmatively to protect the Navajo Nation’s trust resources, which include the Nation’s Reservation lands and the water necessary to make those lands livable as a permanent homeland for the Navajo people. The Federal Defendants’ trust obligations include determining the extent of the Nation’s requirement for water from the Colorado River to meet the needs of the Navajo Nation and its members, determining how to meet those requirements after consultation with the Navajo Nation, and taking actions to protect those interests and secure the needed water.

F. THE SECRETARY’S ROLE AS WATER MASTER OF THE COLORADO RIVER IN THE LOWER BASIN.

75. Pursuant to the Boulder Canyon Project Act and Article II of the 1964 Arizona Decree, 376 U.S. at 341-46, the Secretary is responsible for the allocation of the waters of the mainstream of the Colorado River in the Lower Basin among the Lower Basin States and to decide which users within each State will be delivered water as provided in the Act.

76. The Boulder Canyon Project Act authorizes the Secretary to enter into permanent water delivery contracts with users in the Lower Basin of the Colorado River, up to the limit of each State's apportionment.

77. Pursuant to the Boulder Canyon Project Act and other federal legislation, on February 9, 1944, the United States and the State of Arizona entered into a contract for the delivery of water stored in Lake Mead ("Arizona Contract") (Doc. 240-6). Under the Arizona Contract, the United States is required to deliver to Arizona, its agencies, or water users, 2.8 million acre-feet of water per year "from storage in Lake Mead," *id.* art. 7(a), for irrigation and domestic uses in Arizona, consistent with the provisions of the Colorado River Compact (Nov. 24, 1922) ("1922 Colorado River Compact"), *reprinted at* 70 CONG. REC. 324 (1928) (Doc. 240-2), and the Boulder Canyon Project Act. The Arizona Contract further provides that "nothing in this contract shall be construed as affecting the obligations of the United States to Indian tribes." Arizona Contract art. 5.

78. The delivery obligations are to "be diminished to the extent that consumptive uses now or hereafter existing in Arizona above Lake Mead diminish the flow into Lake Mead . . ." *Id.* art. 7(d). Therefore, the provision of water to the Navajo Nation from the mainstream of the Colorado River for any of the Navajo Reservation lands within Arizona and within the Lower Basin, must be charged against Arizona's entitlement to 2.8 million acre-feet per year of water from the Colorado River as established under the Boulder Canyon Project Act. *Arizona v. California*, 373 U.S. at 601 ("all uses of

mainstream water within a State are to be charged against that State's apportionment").

79. Under the Colorado River Basin Project Act, Congress authorized the construction of the CAP. 43 U.S.C. §§ 1521(a). Reclamation funded and constructed the Project. CAP diverts water from the Colorado River at Lake Havasu on Arizona's western boundary and transports part of Arizona's allocation of Colorado River water to the central and southern regions of the state.

80. The Colorado River Basin Project Act authorizes the Secretary to enter into contracts with Indian tribes in Arizona for the delivery of water from CAP. *Id.* § 1524. To date, the Secretary has entered into contracts with numerous Arizona Indian tribes, with a total contract water delivery obligation of approximately in excess of 500,000 acre-feet. In addition, settlements with Arizona tribes create entitlements to an additional 614,806 acre-feet. The water delivered to Arizona tribes is charged against Arizona's total Colorado River entitlement of 2.8 million acre-feet.

G. CONFLICTING OBLIGATIONS OF THE SECRETARY DO NOT VITIATE THE TRUST RESPONSIBILITY.

81. The United States exercises pervasive control over the Colorado River pursuant to the Boulder Canyon Project Act and the 1964 Arizona Decree, and simultaneously is charged with the assertion and protection of the Navajo Nation's rights to and interests in the Colorado River.

82. Article VII of the 1922 Colorado River Compact states that even though the Navajo Nation's water

rights were not considered in the Compact negotiations or the Compact itself, “[n]othing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.” Article 5 of the Arizona Contract is virtually identical to Article VII of the 1922 Colorado River Compact: “nothing in this contract shall be construed as affecting the obligations of the United States to Indian tribes.” By including this language, the United States demonstrated that it was well-aware at the time of negotiations that the 1922 Colorado River Compact would play a major role in the future development of the waters of the Colorado River, and that the protection of unaddressed Indian water needs and the recognition of the federal obligation to secure water for the benefit of the affected tribes required express language. The same concern drove the inclusion of the nearly identical language in Article 5 of the Arizona Contract.

83. As discussed above, the trust relationship between the United States and the Navajo Nation encompasses the corresponding duty of the United States to ensure that the Navajo Reservation lands have sufficient water to make them livable.

84. The United States preserved its obligations to the Navajo Nation regarding the Nation’s use of water from the Colorado River in Article VII of the 1922 Colorado River Compact, in Article 5 of the Arizona Contract, and elsewhere. Thus, the United States’ trust obligations to the Navajo Nation are undiminished by the 1922 Colorado River Compact.

85. The affirmative obligations of the Federal Defendants to assert water rights claims and protect water rights on its beneficiaries’ behalf are confirmed by well-

established federal jurisprudence, beginning with the United States Supreme Court's decisions in *Winans*, 198 U.S. 371, and *Winters*, 207 U.S. 564. The USDOJ is specifically authorized to represent Indians in all suits at law and in equity. 25 U.S.C. § 175; *see* 28 U.S.C. §§ 516, 519 (the conduct of litigation in which the United States is a party is reserved to USDOJ). The discretion of the USDOJ to initiate litigation on behalf of Indian tribes is circumscribed by the fiduciary duty of the United States, including the duty of protection and loyalty.

86. The McCarran Amendment, 43 U.S.C. § 666, waives the sovereign immunity of the United States in comprehensive state court proceedings to adjudicate water rights claims. This waiver of immunity extends to the United States in its capacity as trustee for Indian water rights, and establishes the policy of the United States as trustee to pursue the determination of the nature and extent of tribal water rights.

87. The *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*, 55 Fed. Reg. 9,223-01 (Mar. 12, 1990) ("Criteria and Procedures"), reaffirms that "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" and states that "[i]t is the policy of this Administration . . . that disputes regarding Indian water rights should be resolved through negotiated settlements rather than litigation." *Id.* at Preamble.

88. Communications between the Department and Indian tribes are replete with representations by the Department of the significance of Indian trust resource and the Department’s obligation of trust and duty of protection. For example, a letter directed to tribal leaders concerning consultation on the Criteria and Procedures recognizes that “[w]ater rights are some of the most important trust resources held by federally recognized Indian tribes . . . and the United States as trustee.” Letter from Lawrence S. Roberts, Principal Deputy Assistant Secretary—Indian Affairs, to Tribal Leader (Dec. 9, 2016). The letter continues, “[t]he trust responsibility owed by the United States Government to tribes . . . is a well-established legal principle that has its origins in the formation of the United States Government,” and recites that among the “guiding principles for honoring the trust responsibility for the benefit of current and future generations . . . is to ensure trust resources, such as water rights, are recognized and protected to the maximum extent possible.” *Id.*

89. The Federal Defendants are obligated to uphold the United States’ trust responsibility to the Navajo Nation even while Congress charges them with other responsibilities, such as those in the 1922 Colorado River Compact, the Boulder Canyon Project Act, the 1964 Arizona Decree, and NEPA, and they may not compromise the United States’ trust responsibility to the Navajo Nation in the performance of other statutory obligations.

90. The Federal Defendants “may not reject or postpone the assertion of a claim on behalf of [the Navajo Nation] on the ground that it would be inimical to some

other governmental or private interest” Krulitz Memo.

H. ACTIONS OF THE SECRETARY IN DEROGATION OF THE TRUST RESPONSIBILITY.

91. Despite the fact that the Department has failed to (1) determine the extent and quantity of the water rights of the Navajo Nation to the waters of the Colorado River; (2) determine the amount of water that the Navajo Nation requires from the mainstream of the Colorado River in the Lower Basin to meet the needs of the Navajo Nation and its members and make its Reservation lands productive; or (3) develop a plan or course of action to secure the needed water, the Secretary, pursuant to the authority to manage the waters of the Colorado River recognized in the Boulder Canyon Project Act and the 1964 Arizona Decree, has repeatedly taken action to manage the waters of the Colorado River that threaten the availability of Colorado River water to satisfy the Navajo Nation’s rights and needs.

Surplus Guidelines

92. On January 16, 2001, Secretary Bruce Babbitt issued a record of decision adopting specific interim surplus guidelines for the Colorado River used to determine the conditions under which the Secretary would declare the availability of surplus water for use within the Lower Basin States. *Record of Decision, Colorado Interim Surplus Criteria; Final Environmental Impact Statement* (“Surplus Guidelines ROD”), reprinted at 66 Fed. Reg. 7,772-02 (Jan. 25, 2001) (Doc. 240-12); see *Colorado River Interim Surplus Criteria Final Environmental Impact Statement* (Dec. 2000) (Doc. 282-2) (“Surplus Guidelines FEIS”); *Criteria for Coordinated*

Long-Range Operation of the Colorado River Reservoirs Pursuant to the Colorado River Basin Project Act of September 30, 1968 (P.L. 90-537) art. III(3)(b) (June 8, 1970) (“LROC”). Among other things, the LROC require the Secretary to determine the extent to which the water requirements of mainstream water users in the Lower Basin States can be met in any year.

93. In the Surplus Guidelines FEIS, Federal Defendants acknowledge that:

Indian Trust Assets (“ITAs”) are legal assets associated with rights or property held in trust by the United States for the benefit of federally recognized Indian tribes or individuals. The United States, as trustee, is responsible for protecting and maintaining rights reserved by, or granted to, Indian tribes or individuals by treaties, statutes and executive orders. All Federal bureaus and agencies share a duty to act responsibly to protect and maintain ITAs. Reclamation policy, which satisfies the requirement of Interior’s Departmental Manual at 512 DM 2, is to protect ITAs from adverse impacts resulting from its programs and activities whenever possible.

Surplus Guidelines FEIS at 3.14-1. That duty includes an obligation to protect the utility of Reservation lands by securing the water needed to make such lands productive and capable of serving their intended purpose as a permanent homeland.

94. The Surplus Guidelines ROD recites that “[t]he FEIS was prepared pursuant to the National Environmental Policy Act of 1969 (NEPA), as amended, the Council on Environmental Quality’s (CEQ) Regulations for Implementing the Procedural Provisions of NEPA

(40 Code of Federal Regulations [CFR] Parts 1500 through 1508, Department of Interior Policies, and Reclamation's [1990] NEPA Handbook." Surplus Guidelines ROD at 1. Accordingly, the Surplus Guidelines FEIS and ROD incorporate and make mandatory the Federal Defendants' policies, manuals, handbooks, and directives, and the Navajo Nation was entitled to rely upon the procedural requirements included in those documents.

95. The Surplus Guidelines FEIS analyzed five alternatives for interim surplus guidelines and a No Action Alternative/Baseline Condition. Surplus Guidelines FEIS ch. 2; Surplus Guidelines ROD at 4-7. None of the alternatives sought to account for the unquantified water rights or unmet needs of the Navajo Nation in the Lower Basin above Lake Mead. Although the Surplus Guidelines FEIS included the results of extensive modeling of the hydrology of the Colorado River, including discrete representation of the demand schedules through demand nodes for each of the ten tribes in the Colorado River Basin, including the Navajo Nation, no information was included for the water rights or water needs of the Navajo Nation and its members in the Lower Basin.

96. The Surplus Guidelines ROD and Surplus Guidelines FEIS also failed to account for the fact that neither the Navajo Nation's water rights nor its needs for water in the Lower Basin have been determined, despite the Surplus Guidelines ROD's assertion that "Reclamation fully identified and analyzed Tribal water rights in the FEIS" Surplus Guidelines ROD at 9. The Surplus Guidelines ROD further acknowledged that Recla-

mation had “identified a significant quantity of confirmed but unused water rights belonging to several Indian tribes in the Colorado River basin.” *Id.* Like the Nation’s unquantified rights, these undeveloped tribal rights are factored into the available water supply and managed as surplus. *Id.*

97. The Surplus Guidelines FEIS acknowledges that the Navajo Nation’s rights to the waters of the Colorado River are unquantified, but fails to include any provision for such rights in the allocation of surplus water or to institute a process to determine and protect the water supply required to satisfy the unmet needs of the Navajo Nation and its members. Surplus Guidelines FEIS at 3.14-4 to -5. As a result, the Surplus Guidelines FEIS does not account for the Navajo Nation’s unquantified rights to or its needs for the waters of the Lower Basin of the Colorado River.

98. The Surplus Guidelines FEIS requires the allocation each year of any surplus water of the Colorado River among the Lower Basin States. *Id.* at 2-10 to -14. Thus, the Surplus Guidelines FEIS establishes a system of reliance upon the surplus water in the Colorado River among the Lower Basin States, to the exclusion of the Navajo Nation and other Indian tribes. As surplus water is allocated each year pursuant to the Surplus Guidelines, Reclamation will manage the Colorado River in a manner that ensures that entities other than the Navajo Nation will continue to rely on water supplies claimed by, reserved for, needed by, and potentially belonging to the Navajo Nation, which reliance will operate to make allocation of Colorado River water to the Navajo Nation to satisfy its water rights or meet

the needs of the Navajo Nation and its members increasingly difficult.

Shortage Guidelines

99. On December 13, 2007, then Secretary Dirk Kempthorne issued a record of decision adopting specific interim shortage guidelines for the Colorado River to manage Lake Powell and Lake Mead under low reservoir and drought conditions, for the express purpose of providing greater predictability of Colorado River water supplies. *Record of Decision, Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead* (“Shortage Guidelines ROD”), reprinted at 73 Fed. Reg. 19,873-01 (Apr. 11, 2008); see *Final Environmental Impact Statement, Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead* (Oct. 2007) (Docs. 287-4, 283-5) (“Shortage Guidelines FEIS”).

100. Chapter 3 of the Shortage Guidelines FEIS discusses the ITAs that may be affected by the proposed federal action:

ITAs are “. . . ‘legal interests’ in ‘assets’ held in ‘trust’ by the federal government for federally recognized Indian tribes or individual Indians” [Reclamation’s ITA Policy Questions and Answers]. The United States, as trustee, is responsible for protecting rights reserved by, or granted to, Indian tribes or individual Indians by treaties, statutes, executive and secretarial orders, and other federal actions. The Department’s policy is that when a proposed federal action appears likely to adversely affect an ITA, the action

agency should seek ways to minimize or avoid the adverse effect; if adverse effects cannot be avoided, then the action agency should provide appropriate mitigation or compensation.

Shortage Guidelines FEIS at 3-87 (alterations in original).

101. The Shortage Guidelines ROD recites that the Shortage Guidelines FEIS “was prepared pursuant to the National Environmental Policy Act of 1969 (NEPA), as amended, the Council on Environmental Quality’s (CEQ) Regulations for Implementing the Procedural Provisions of NEPA (40 Code of Federal Regulations [CFR] Parts 1500 through 1508), Department of the Interior Policies, and Reclamation’s [1990] NEPA Handbook.” Shortage Guidelines ROD at 2. Accordingly, the Shortage Guidelines ROD incorporates and makes mandatory the Federal Defendants’ policies, manuals, handbooks, and directives, and the Navajo Nation was entitled to rely upon the procedural requirements included in those documents.

102. The Shortage Guidelines FEIS analyzed five alternatives for interim shortage guidelines and a No Action Alternative. Shortage Guidelines FEIS at ch. 2; Shortage Guidelines ROD at 7-11. None of the alternatives sought to account for the unquantified water rights or unmet needs of the Navajo Nation in the Lower Basin above Lake Mead, and no information was included for the water rights or water needs of the Navajo Nation and its members in the Lower Basin.

103. The Shortage Guidelines ROD also failed to account for the fact that the Navajo Nation’s water rights and needs for water to make Reservation lands in the

Lower Basin productive have not been determined, despite the assertion in the Shortage Guidelines ROD that it considered the effects on Indian trust assets. Shortage Guidelines ROD at 16.

104. The Shortage Guidelines FEIS acknowledges that the Navajo Nation's rights to the waters of the Colorado River are unquantified, Shortage Guidelines FEIS at 1-13 and 3-96 to -97, and states that such "[u]nquantified water rights of the Navajo Nation are considered an ITA." *Id.* at 3-96. While the Shortage Guidelines FEIS purports to consider the adverse effects of the proposed action on all ITAs, *id.* at 3-87, the Navajo Nation's unquantified water rights are not included in the list of the ITAs "that might potentially be impacted as a result of implementing the proposed federal action" *Id.* Despite acknowledging that the Navajo Nation's unquantified rights to waters of the Colorado River constitute an ITA, the Shortage Guidelines FEIS only addresses the effects of the proposed action on the ITAs of the five tribes specifically awarded water in *Arizona v. California* and on the "Colorado River water Tribal delivery contracts where such contracts are part of a congressionally approved water rights settlement"; the effects of the proposed action on other water rights ITAs or on Reservation lands that require water to be productive are not considered. *Id.* As a result, the Shortage Guidelines FEIS does not account for the unquantified rights of the Navajo Nation to the waters of the Lower Basin of the Colorado River. It also does not account for the unmet needs of the Navajo Nation and tribal members for water from the Lower Basin of the Colorado River to make Reservation lands productive.

105. The Shortage Guidelines FEIS provides for a system of allocation of Colorado River water in times of shortage and drought, and provides mechanisms to create surplus water and conservation to ease the severity of any shortages. *See, e.g., id.* at ES-2. Thus, the Shortage Guidelines FEIS establishes a system of reliance upon the flows in the Colorado River among the Lower Basin States, to the exclusion of the Navajo Nation and other Indian tribes. As shortages are allocated in any year pursuant to the Shortages Guidelines, Reclamation will manage the Colorado River in a manner that ensures that entities other than the Navajo Nation will continue to rely on water supplies claimed by, reserved for, needed by, and potentially belonging to the Navajo Nation. Such reliance will operate to make allocation of Colorado River water to the Navajo Nation to satisfy its water rights or meet the needs of the Navajo Nation and its members increasingly difficult.

The Federal Defendants' On-going Management Efforts Continue to Ignore the Needs of the Navajo Nation for Water from the Colorado River in the Lower Basin

106. The Surplus Guidelines and Shortage Guidelines are just two examples of the Federal Defendants' decisions and actions to manage the Colorado River in the Lower Basin that ignore the needs of the Navajo Nation for a supply of that water to make the Navajo Reservation a permanent home. Other such actions include:

- a. Entering into Minute No. 323, *Extension of Cooperative Measures and Adoption of a Binational Water Scarcity Contingency Plan in the Colorado River Basin* (Sep. 21, 2017), with Mexico (creating a Binational Water Scarcity Contingency Plan permitting the United

States to “save” quantities of water at specified low reservoir elevations for recovery at a later date; providing for conditions under which the United States will deliver to Mexico quantities of Colorado River water in excess of its 1944 Water Treaty obligations; establishing a “revolving account” to permit Mexico to defer delivery of a portion of its Colorado River water and store such water in the United States; and allowing Mexico to generate intentionally created surplus);

b. Issuing a *Notice of Proposed Rulemaking: Regulating the Use of Lower Colorado River Water Without an Entitlement*, 73 Fed. Reg. 40,916 (July 16, 2008) (proposing to address the unlawful use of Colorado River water via pumping underground water located in the floodplain in the estimated amount of 9,000 to 15,000 acre-feet per year by, *inter alia*, providing “various options” to groundwater pumpers to bring the uses of water from the Colorado River in the Lower Basin into compliance with Federal law, by such mechanisms as a contract for delivery of water through ADWR);

c. Preparing the *Final Environmental Impact Statement, Implementation Agreement, Inadvertent Overrun and Payback Policy, and Related Federal Actions* (Oct. 2002) (Doc. 283-8) (inadvertent overruns could have a significant impact on the Navajo Nation’s ability to satisfy its claims to and needs from the Colorado River in the Lower Basin; the FEIS contains no analysis of such claims or needs despite purporting to analyze the impacts on all tribal resources); and

d. Preparing the *Final Environmental Assessment and Finding of No Significant Impact* (Jun. 19, 2002) and entering into the *Storage and Interstate Release*

Agreement (Dec. 18, 2002) (creating a program of interstate water banking of Arizona and Nevada entitlements in underground aquifers in Arizona, which fails to account for the unquantified rights of the Navajo Nation to, or the unmet needs of the Navajo Nation and from, the Colorado River in the Lower Basin).

107. Like the Surplus Guidelines and Shortage Guidelines, these actions demonstrate a pattern of conduct by which Reclamation manages the Lower Basin of the Colorado River in a manner that ensures that entities other than the Navajo Nation will continue to rely on water supplies claimed by, reserved for, needed by, and potentially belonging to the Navajo Nation. Such reliance will operate to make allocation of Lower Basin of Colorado River water to the Navajo Nation to satisfy its water rights and to meet the needs of the Navajo Nation and its members increasingly difficult and thereby harm the Navajo Nation and its members.

I. FEDERAL DEFENDANTS MANAGEMENT DECISIONS INDUCING RELIANCE BY THE LOWER BASIN STATES ON WATERS RESERVED FOR THE NAVAJO NATION GIVE RISE TO REDRESSABLE HARM.

108. The reserved water rights of the Navajo Nation to the mainstream of the Colorado River in the Lower Basin are impaired by the management decisions of the Secretary that artificially enhance Colorado River water supplies and induce users of this water to rely on those supplies.

109. The Federal Defendants attempt to use the unique attribute of federal reserved rights—that such rights cannot be lost through non-use, forfeiture or

abandonment—against the Navajo Nation as a sword, arguing that the Nation’s inchoate rights cannot be impaired and so the United States has no obligation to ascertain the extent to which the Navajo Nation requires water from the Colorado River, to determine the scope of such rights, or to examine the impact of its management actions on those rights or other Colorado River water supplies available to meet the needs of the Navajo Nation. However, when the Supreme Court held that treaties and executive orders establishing Indian reservations impliedly reserved sufficient water to make those reservations permanent homelands for tribal people, it recognized that without an exemption from the prior appropriation doctrine of “use it or lose it,” the benefit of implying such a reservation of rights would be defeated. Providing that federal reserved rights could not be lost through non-use was intended to shield those unquantified rights to compensate for historic failures of the United States to carry out its duty to determine, protect, and make Indian water rights productive. The Federal Defendants’ use of this unique attribute of reserved water rights crafted to protect tribal water rights as justification for their failure to address the rights of the Navajo Nation further abrogates their fiduciary duty to the Navajo Nation.

110. As discussed above, in 1952, Arizona sued California alleging that the award of contracts for Colorado River water to California in excess of 4.4 million acre-feet per year would cause Arizona harm. *See* ¶ 26, *supra*. Although the Secretary was authorized under the Boulder Canyon Project Act to contract with Arizona for 2.8 million acre-feet per year of Lower Basin Colorado River water, Arizona was unable to use this water and was concerned that should California become reliant on

supplies in excess of its 4.4 million acre-feet per year allocation, Arizona would be unable to recover such waters, despite its rights under the Act. The 1964 Arizona Decree confirmed the rights of the respective states under the Boulder Canyon Project Act, however, Arizona has been attempting to claw back its full allocation ever since.

111. Article IX of the 1964 Arizona Decree provides that “[a]ny of the parties may apply at the foot of this decree for its amendment or for further relief.” 376 U.S. at 353.

112. On January 9, 1979, the Supreme Court entered a supplemental decree identifying the present perfected rights to the use of the mainstream water in each State, including the rights of the Colorado River Indian Tribes, Fort Mojave Indian Tribe, Chemehuevi Indian Tribe, Cocopah Indian Tribe, and Fort Yuma (Quechan) Indian Tribe. 439 U.S. 419 (1979). The five tribes intervened in the action and together with the United States alleged that certain practicably irrigable acreage was “omitted” in the 1964 Arizona Decree and from the calculation of their water rights.

113. Despite assurances from the Supreme Court that it would retain jurisdiction for purposes of modifying the Decree, the Court declined to entertain the claims for the “omitted” acreage because “[r]ecalculating the amount of practicably irrigable acreage runs directly counter to the strong interest in finality” *Arizona v. California II*, 460 U.S. 605, 620 (1983).

114. In *Arizona v. California II*, the Court recognized that:

If there is no surplus of water in the Colorado River, an increase in federal reserved water rights will require a “gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators.” [*United States v. New Mexico*, 438 U.S. 696, 699 (1978)]. As Special Master Tuttle recognized, “not a great deal of evidence is really needed to convince anyone that western states would rely upon water adjudications.” [Report of Special Master Tuttle (Feb. 22, 1982)] at 46. Not only did the Metropolitan Water District in California and the Central Arizona Project predicate their plans on the basis of the 1964 allocations, but, due to the high priority of Indian water claims, an enlargement of the Tribes’ allocation cannot help but exacerbate potential water shortage problems for these projects and their States.

Id. at 621.

115. In the Arizona Water Settlements Act, Pub. L. No. 108-451, 118 Stat. 3478 (2004) (“AWSA”), Congress directed the Secretary to reallocate 67,300 acre-feet of non-Indian agricultural priority CAP water for future Indian tribal water rights settlements. *Id.* §§ 104(a)(1)(A)(iii) and (a)(1)(B)(i). The AWSA, while settling some Indian water rights claims, also resolved litigation between the Department and the Intervenor-Defendant Central Arizona Water Conservation District (“CAWCD”), the entity that operates CAP, over repayment of CAP construction costs. While fully settling its financial dispute with CAWCD, the Department agreed to the reallocation of CAP NIA supplies that they conceded before Congress were inadequate to address the unquantified claims of Indian tribes in the

Lower Basin. The testimony presented by the Department's Assistant Secretary for Water and Science was as follows:

Senator MURKOWSKI. So under this settlement agreement there is going to be approximately 67,300 acre-feet of CAP water available for these future Indian water rights settlements. Is this going to be sufficient water to settle those claims that you have just identified?

Mr. RALEY. Senator, I believe that if you aggregate the claims in existence now, it is about 3.3 million acre-feet. If you subtract the claims that would be addressed within this legislation, it leaves the claims outstanding at something like 1.7 million acre-feet. Suffice it the [*sic*] say that, just to make a point, even if the entire Central Arizona Project were dedicated to those claims, which is not being contemplated by anyone, that would not provide adequate water by itself.

We believe that resolution of these future claims, first of all, would not be precluded by this existing legislation, this proposal, and that it is obvious that for settlement of those other claims water from other than CAP sources would have to be included. Otherwise it is simply impossible to even enter into the ball park of what those claims are. And the quantities and sources are something that would have to be addressed in claim-specific negotiations.

To Provide for Adjustments to the Central Arizona Project in Arizona, to Authorize the Gila River Indian Community Water Rights Settlement, to Authorize and Amend the Southern Arizona Water Rights Settlement

Act of 1982, and for Other Purposes: Joint Hearing on S. 437 before the Subcomm. on Water and Power of the Senate Comm. on Energy and Natural Resources and the Comm. on Indian Affairs, 108th Cong., 1st Sess. (2003) at 16-17 (testimony of Bennett W. Raley, Assistant Secretary, Water and Science, Dep't. of the Interior) (Doc. 250-6).

116. The Federal Defendants' management decisions on the mainstream of the Colorado River that induce water users to "predicate their plans" in reliance on such decisions harm the Navajo Nation and its trust resources by making it less likely that a court would subsequently "exacerbate potential water shortage problems for [existing] projects and their States. *Arizona v. California*, 460 U.S. at 621. Whether in litigation or settlement, the ability of an Indian tribe to secure recognition and development of water rights to water supplies relied upon by others—even despite their knowledge of a tribe's water rights claims to those waters and the cloud those claims place on those uses—has proven to be virtually impossible.

117. The Federal Defendants' actions that foster reliance on unquantified or unused tribal water rights create an incentive for parties who have put that water to use with the encouragement of the Federal Defendants to use their political influence to prevent the use or development of tribal rights. Again, *Arizona v. California*, is instructive. While Arizona won its court battle to confirm its right to use 2.8 million acre-feet per year from the mainstream of the Colorado River in the Lower Basin, ultimately California, with its unequalled political might in Congress, required Arizona to subordinate the majority of its water rights to secure funding for the

CAP—the only way Arizona could put its mainstream water to use to benefit its population centers distant from the River. Colorado River Basin Project Act, 43 U.S.C. § 1521(b).

118. The right to use water is a usufruct, and water not put to use by the holder of the right may lawfully be used by others. However, when the Federal Defendants induce reliance on these supplies through management practices such as those complained of herein, and an Indian tribe subsequently seeks quantification and development of its reserved rights, neither the United States, Congress, nor any court are likely to require water users to abandon beneficial uses to which that water is being put.

119. In conclusion, as one Arizona commentator has observed:

Many non-Indian appropriators are strongly opposed to the idea of having to pay for water that they have used freely for generations, particularly where, absent federal funding, the tribes will be unable to build the water storage and delivery systems that would allow them to fully utilize their water rights. Rather than participating in water marketing arrangements with the tribes, many non-Indian appropriators would prefer to use political clout in Congress to prevent the tribes from obtaining the funds necessary to exercise their reserved rights.

JOHN B. WELDON, JR., *Non-Indian Users' Goals: More is Better, All Is Best*, in *INDIAN WATER IN THE NEW WEST* 83 (McGuire, Lord & Wallace eds. 1993) (Doc. 283-4).

V. CAUSES OF ACTION

First Cause of Action: Breach of 1849 Peace Treaty and 1868 Treaty

120. Paragraphs 1-119 are incorporated herein by reference.

121. The Navajo Nation requires water from the Colorado River in order to make Navajo lands productive and to fulfill the purpose of the Navajo Reservation as a permanent homeland for the Navajo people.

122. In the 1849 Peace Treaty, the United States undertook an enforceable duty of protection to the Navajo Nation. Pursuant to the 1868 Treaty establishing the Navajo Reservation, the United States holds the Nation's lands and waters in trust for the benefit of the Navajo Nation. As promised in the treaties, the United States owes to the Navajo Nation all the obligations of a fiduciary, including a duty of loyalty, and a duty to preserve, protect, and make productive the Nation's lands and implied rights to water.

123. The Federal Defendants have breached the duty of protection expressly undertaken in the treaties between the United States and the Navajo Nation by failing to determine the extent and quantity of the rights of the Navajo Nation to use the waters of the Colorado River. Having failed to quantify the rights of the Navajo Nation to use water from the Colorado River, the only way for the Federal Defendants to adequately protect the land and water resources held in trust by the United States for the benefit of the Navajo Nation is for the Federal Defendants to (1) consult with the Navajo Nation; (2) determine the amount of water which the Navajo Nation requires from the Lower Basin of the

Colorado River to meet the needs of the Nation and its members; and (3) develop a plan to secure that water.

Second Cause of Action: Breach of Trust

124. Paragraphs 1-123 are incorporated herein by reference.

125. The Federal Defendants owe fiduciary duties to the Navajo Nation as trustees of the Nation's lands and waters. The trust obligation of the United States to Indian tribes has its origins in the course of dealings between the United States and the sovereign tribal governments occupying the North American continent before the arrival of the British and other European colonists, and is enshrined in the Indian Commerce clause of the United States Constitution. U.S. CONST. art. I, § 8, cl. 3. The common law duties of trust owed by the United States are independent of duties imposed by statutes subsequently enacted by Congress, and are legally enforceable.

126. In both the 1849 Peace Treaty, in which the United States took the Navajo Nation under its jurisdiction and protection and promised to establish a reservation for the Nation, and the 1868 Treaty setting aside the original Navajo Reservation, the United States undertook specific obligations to protect Navajo people and their resources from depredations. The United States holds Navajo lands and waters in trust and is bound by the common law duties of a trustee to determine the extent of the trust res, to protect the trust corpus, and to make the trust assets productive.

127. The United States Congress has enacted numerous statutes for the benefit of Indian tribes, charg-

ing the Federal Defendants with providing for their welfare, and imposing duties on the Federal Defendants to protect trust assets, as set forth in ¶¶ 61-70, *supra*. The Executive has issued regulations, executive orders, secretarial orders, policies, handbooks, manuals, and other directives that implement federal statutes, including NEPA. *See* ¶¶ 71-73, *supra*. The Federal Defendants are required to comply with duties and obligations to Indian tribes imposed therein.

128. In its capacity as trustee for the Navajo Nation, the United States not only appeared in the litigation in *Arizona v. California* on behalf of twenty-five tribes with lands in the Lower Basin of the Colorado River, but affirmatively and successfully opposed efforts by the Nation to intervene to protect its own interests, when concerns arose over the adequacy of the USDOJ's representation. Whether characterized as an oversight or error, the rights of the Navajo Nation were not determined in *Arizona v. California*. The United States has never acted to correct this omission despite repeated requests from the Navajo Nation to do so.

129. Having failed to quantify the Nation's water rights in *Arizona v. California*, the United States has also, despite repeated requests documented herein, refused to join with the Nation to bring an independent action in this Court seeking to quantify the Nation's mainstream Colorado River claims. Counsel for Arizona stated here, in open court, that the state would assert its immunity from suit as a defense to such an action initiated by the Navajo Nation alone.

130. For over six decades the Navajo Nation has actively sought the determination of its rights to the main-

stream of the Colorado River. The Federal Defendants, when not affirmatively obstructing such efforts by asserting that the United States alone could adequately represent the Nation, have refused to assist the Nation in determining the extent of its needs from the Colorado River to make the Navajo Reservation a permanent homeland, and to develop a plan to meet those needs.

131. Further, the Federal Defendants have breached the United States' fiduciary obligation to the Navajo Nation by taking administrative actions to manage the waters of the Lower Basin of the Colorado River without engaging in the required analysis of the impacts of those actions on the Nation's trust assets and, if mandated by that analysis, taking action to protect and preserve the Navajo Nation's trust resources.

132. The management decisions made by the Federal Defendants have breached the fiduciary obligations of the United States to the Navajo Nation by elevating the interests of the United States and other entities, including the Intervenor-Defendants, over the interests of the Navajo Nation in securing its rights to the mainstream of the Colorado River in the Lower Basin. The management decisions challenged herein as breaches of the fiduciary duty of the Federal Defendants encourage reliance on the limited water supplies of the Colorado River, thereby impairing the rights of the Navajo Nation and the ability of the United States to secure the water needed to make the Navajo Reservation a permanent homeland and causing the Nation harm.

**Third Cause of Action: Failure to Consult
with the Navajo Nation**

133. Paragraphs 1-132 are incorporated herein by reference.

134. Executive Order No. 13,175 requires the Federal Defendants to meaningfully consult with the Navajo Nation in implementing any regulation or policy that has tribal implications.

135. The Federal Defendants failed to consult with the Navajo Nation prior to making the administrative decisions complained of, as required by Executive Order No. 13,175.

136. Executive Order No. 13,175 requires the Federal Defendants to honor tribal treaty rights, *id.* § 3(a), and work on a government-to-government basis to protect tribal trust resources and tribal treaty rights. The Nation requires water from the mainstream of the Colorado River in the Lower Basin to make the Navajo Reservation a permanent homeland. The Federal Defendants have failed to meaningfully consult with the Navajo Nation to determine the needs of the Navajo Nation for water from the Colorado River and to devise a plan for securing the water necessary to meet those needs.

FIRST PRAYER FOR RELIEF

Plaintiff, the Navajo Nation, respectfully requests that the Court declare that the obligations undertaken by the United States through its course of dealings with Indian tribes, in the 1849 Peace Treaty and the 1868 Treaty between the United States and the Navajo Nation, and in statutes, regulations, executive orders, regulations, and policies enacted or promulgated for the

protection and benefit of Indian tribes requires the Federal Defendants, in consultation with the Navajo Nation, to (1) determine the extent to which the Nation requires water from the mainstream of the Colorado River in the Lower Basin to enable its Reservation to serve as a permanent homeland for the Navajo Nation and its members; (2) develop a plan to secure the water needed; and (3) manage the Colorado River in a manner that does not interfere with the plan to secure the water from the Colorado River needed by the Navajo Nation

SECOND PRAYER FOR RELIEF

Plaintiff, the Navajo Nation, respectfully requests the Court to issue an Order enjoining further breaches of the 1849 Peace Treaty, the 1868 Treaty, and the United States' trust responsibility, or providing such other relief as the Court deems appropriate and in consultation with the Navajo Nation:

(a) to determine the extent to which the Navajo Nation requires water from the mainstream of the Colorado River in the Lower Basin to enable its Reservation to serve as a permanent homeland for the Navajo Nation and its members;

(b) to develop a plan to secure the water needed;

(c) to manage the Colorado River in a manner that does not interfere with the plan to secure the water from the Colorado River needed by the Navajo Nation; and

(d) to require the Federal Defendants to analyze their actions in adopting the Shortage and Surplus Guidelines, and other management decisions identified herein, in the light of the plan to secure the water from the Colorado River and adopt appropriate

Respectfully submitted this 13th day of April, 2018.

M. Kathryn Hoover, SBA 013266
Stanley M. Pollack, SBA 011046
NAVAJO NATION DEPARTMENT
OF JUSTICE

Post Office Drawer 2010
Window Rock, Arizona 86515
Telephone: (928) 871-7510
Fax: (928) 871-7570
khoover@nndoj.org
smpollack@nndoj.org

Scott B. McElroy, Pro Hac Vice
Alice E. Walker, Pro Hac Vice
McELROY, MEYER, WALKER
& CONDON, P.C.

1007 Pearl Street, Suite 220
Boulder, Colorado 80302
Telephone: (303) 442-2021
Fax: (303) 444-3490
smcelroy@mmwclaw.com
awalker@mmwclaw.com

By: /s/ Scott B. McElroy
Scott B. McElroy
Attorneys for the Navajo Nation

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CV-03-507 PCT-GMS
NAVAJO NATION, PLAINTIFF

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,
DAVID BERNHARDT, ACTING SECRETARY OF THE
INTERIOR; BUREAU OF RECLAMATION; AND BUREAU OF
INDIAN AFFAIRS, DEFENDANTS

STATE OF ARIZONA; CENTRAL ARIZONA WATER
CONSERVATION DISTRICT; ARIZONA POWER AUTHORITY;
SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT
AND POWER DISTRICT; SALT RIVER VALLEY WATER
USERS' ASSOCIATION; IMPERIAL IRRIGATION DISTRICT;
METROPOLITAN WATER DISTRICT OF SOUTHERN
CALIFORNIA; COACHELLA VALLEY WATER DISTRICT;
STATE OF NEVADA; COLORADO RIVER COMMISSION OF
NEVADA; SOUTHERN NEVADA WATER AUTHORITY;
AND STATE OF COLORADO, INTERVENOR-DEFENDANTS

Filed: Jan. 10, 2019

**THIRD AMENDED COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

Plaintiff, the Navajo Nation (sometimes "Nation"),
complains and alleges as follows:

I. INTRODUCTION

1. This action is brought by the Navajo Nation
against the United States Department of the Interior

(“Department”), the Secretary of the Interior (“Secretary”), the Bureau of Reclamation (“Reclamation”), and the Bureau of Indian Affairs (“BIA”) (collectively referred to as “Federal Defendants”), for violation of the treaties between the Nation and the United States and the duty of protection the United States assumed therein, and for breach of the fiduciary duty owed to the Nation by the United States. This action seeks injunctive and declaratory relief to compel the Federal Defendants to determine the water required to meet the needs of the Nation’s lands in Arizona and devise a plan to meet those needs to fulfill the promise of the United States to make the Nation’s Reservation lands a permanent homeland for the Navajo people.

The lands of the Navajo Nation are held in trust by the United States, and the Federal Defendants are charged with preserving and protecting those trust resources for the Navajo Nation, the trust beneficiary. In the arid Southwest, the Federal Defendants must utilize their authorities to the fullest extent possible to secure the water supplies needed to make the Reservation lands productive in order that the Reservation may serve its intended purpose as a permanent homeland for the Nation and its members. Despite its own studies showing that the Navajo Nation will require water from sources other than the Little Colorado River and on-reservation groundwater supplies to make the Navajo Reservation a viable permanent homeland—an express promise in the Nation’s 1868 Treaty with the United States—and ignoring repeated entreaties from the Navajo Nation, the Federal Defendants have refused to take action to determine the Nation’s need for water supplies from sources other than the Little Colorado River. The Nation challenges the Federal Defendants’ actions and

failures to act in derogation of their trust responsibility, including: failure to determine the quantities and sources of water required to make the Navajo Reservation a permanent homeland for the Navajo people; and failure to protect the sovereign interests of the Navajo Nation by securing an adequate water supply to meet those homeland purposes.

The Colorado River is appurtenant to the Navajo Nation, defines a significant segment of the western boundary of the Navajo Reservation, and is the most likely source to supply the Nation's water needs in Arizona. In addition to serving as trustee for the Nation's lands, the Secretary is the water master for the Lower Basin of the Colorado River pursuant to the Boulder Canyon Project Act and the Decree in *Arizona v. California*. The United States expressly undertook the responsibility to protect the Navajo Nation's interests in the Lower Basin of the Colorado River in *Arizona v. California* when it opposed the intervention of the Nation in that litigation. The United States also promised in the 1922 Colorado River Compact that in taking actions to manage the Colorado River it would not adversely affect its trust obligations to Indian tribes, including the Navajo Nation. Despite having failed to determine the needs of the Navajo Nation for water for its lands in Arizona from sources other than the Little Colorado River, including whether any such water is needed from the Lower Basin of the Colorado River, the Secretary continues to manage the Colorado River through actions that inure to the benefit of others, including the Intervenor-Defendants. Those actions adversely affect the Federal Defendants' ability to secure water needed for the benefit of the Navajo Nation and breach

the fiduciary duty owed by the United States to the Navajo Nation.

II. PARTIES

2. The Navajo Nation is a federally recognized Indian tribe and the lands of the Navajo Reservation are located in the states of Arizona, New Mexico, and Utah. The Nation is a sovereign with proprietary interests in its lands and waters and governmental interests in the management of its natural resources, including providing adequate water supplies to its Reservation lands to meet the needs of the people residing thereon so that those lands may serve as a permanent homeland for Navajo people.

3. The Department is a federal agency that includes Reclamation and the BIA and is charged by Congress with responsibility for managing Indian affairs. 25 U.S.C. § 2.

4. The Department has a fiduciary responsibility to the Navajo Nation to preserve, protect, and make productive the Nation's trust resources so that the Navajo Reservation is a viable permanent homeland.

5. David Bernhardt is Acting Secretary of the Interior and is sued in his official capacity. As Secretary, he is ultimately responsible for carrying out the Department's fiduciary responsibility with respect to Navajo trust resources. *Id.* In his capacity as trustee of the Nation's lands and waters, the Secretary owes the Nation all the obligations of a fiduciary undertaken by the United States to Indian tribes, including duties of protection and loyalty. Among other things, the Secretary has a variety of responsibilities over the waters of the Colorado River pursuant to federal law, including, but

not limited to, the Boulder Canyon Project Act, 43 U.S.C. §§ 617-617u, the Colorado River Basin Project Act, *id.* §§ 1501-56, and the Decree in *Arizona v. California*, 376 U.S. 340 (1964) (“1964 Arizona Decree”).

6. Reclamation is the principal agency charged with implementing the obligations of the Secretary to manage the waters of the Colorado River in the Lower Basin. Reclamation has a fiduciary responsibility to the Navajo Nation to protect tribal trust resources.

7. The BIA is the agency charged with providing services to Indian tribes, including the development of water supplies, and carrying out the federal trust responsibilities of the United States.

8. Intervenor-Defendants are the states of Arizona and Nevada, each with an apportionment from the mainstream of the Colorado River in the Lower Basin; the state of Colorado, with an apportionment of the Colorado River in the Upper Basin; and state water and power authorities and agencies with contracts for the delivery of mainstream Colorado River water from the Lower Basin.

III. JURISDICTION

9. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question) and 28 U.S.C. § 1362 (tribal federal question). The Navajo Nation, a federally recognized Indian tribe, asserts claims arising under its treaties entered into between the Navajo Nation and the United States, laws enacted by the United States Congress, the Federal Defendants’ regulations, policies, executive orders, secretarial orders, handbooks, and manuals, and federal common law.

10. The Navajo Nation seeks relief under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02.

11. Section 702 of the Administrative Procedure Act, 5 U.S.C. § 702, waived the sovereign immunity of the United States for the Nation's claims for breach of its treaties with the United States and claims for breach of the fiduciary duties of the United States to secure, preserve, and protect the Nation's trust resources.

12. Venue is proper in the United States District Court for the District of Arizona pursuant to 28 U.S.C. § 1391(e). Certain of the Nation's Reservation lands are located in the District.

IV. FACTUAL AND LEGAL ALLEGATIONS

A. THE NAVAJO NATION AND NAVAJO RESERVATION.

13. The Navajo people have occupied lands within Arizona since time immemorial. The Navajo Nation is a federally recognized Indian tribe in the United States with over 300,000 members.

14. The Navajo Reservation is the largest Indian reservation in the United States with over 17 million acres of reservation lands located in Arizona, New Mexico, and Utah. The Reservation is located almost entirely within the Colorado River Basin.

15. In the *Treaty with the Navaho, 1849* (Sep. 9, 1849), 9 Stat. 974 ("1849 Peace Treaty"), the Navajo Nation and United States agreed that the Nation "was lawfully placed under the exclusive jurisdiction and protection of the Government," *id.* art. I, and further, that the United States "[r]elying confidently upon the justice

and the liberality of the aforesaid Government,” promised to set aside lands for the use of the Navajo Nation and to promulgate such laws “as will be conducive to the prosperity” of the Navajo Nation. *Id.* art. IX.

16. The Navajo Reservation was established initially by the *Treaty with the Navaho, 1868* (June 1, 1868), 15 Stat. 667 (“1868 Treaty”), as the “permanent home” of the Navajo Nation, *id.* art. XIII, “set apart for the use and occupation of the Navajo tribe of Indians” *Id.* art. II.

17. The Navajo Reservation was expanded by executive orders and acts of Congress from 1868 through the present. The United States holds the lands of the Navajo Reservation in trust for the Navajo Nation. The Navajo Reservation lands are adjacent to the Colorado River both above and below Lee Ferry and are located in the Upper and Lower Basins of the Colorado River Basin. This lawsuit pertains to Navajo Reservation lands located in the Lower Basin in Arizona and water needed to make those lands a viable permanent homeland for the Navajo people.

18. The Act of June 14, 1934, 48 Stat. 960-62, confirmed the boundary of the Navajo Reservation in Arizona, and described the Colorado River as the western boundary of the Navajo Reservation from the Arizona border with Utah south to its confluence with the Little Colorado River.

B. THE DUTY OF THE FEDERAL DEFENDANTS TO PROTECT THE NAVAJO NATION’S TRUST RESOURCES.

19. That the United States owes a fiduciary duty to the Navajo Nation is beyond dispute. Further:

a. This “legally enforceable trust obligation . . . originated in the course of dealings between the government and the Indians and is reflected in the treaties, agreements, and statutes pertaining to Indians”;

b. “The trust responsibility doctrine imposes fiduciary standards on the conduct of the executive” and “[t]he 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”; and

c. The fiduciary standards imposed on the executive “operate to limit the discretion not only of the Secretary of the Interior but also of the Attorney General and other executive branch officials.” Letter from Leo M. Krulitz, Department Solicitor, to James W. Moorman, Assistant Attorney General (Nov. 21, 1978) (“Krulitz Memo”), attached as an appendix to *Brief for Respondents, United States v. Mitchell*, 445 U.S. 535 (1979) (No. 78-1756), 1979 WL 199447. The Krulitz Memo remains in effect. U.S. Dep’t. of Interior, Secretarial Order No. 3335, *Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries* § 3(d) (Aug. 20, 2014) (“Secretarial Order No. 3335”).

20. As a consequence of the federal trust responsibility, treaties and statutes affecting Indian tribes and enacted for their benefit must be construed in a manner favorable to the Indians and, in the case of treaties, in the manner the Indians would have understood them, and any ambiguity must be resolved in their favor, *see Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157, 1163 (9th Cir. 2017). Rights of Indian tribes cannot be abrogated or diminished by implication, rather

the intent must be clear and susceptible of only that interpretation. *Id.* at 1166-7.

21. The United States undertook a formal trust relationship with the Navajo Nation in the 1849 Peace Treaty, which provides that by virtue of the Treaty of Guadalupe Hidalgo the Nation “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.” 1849 Peace Treaty art. I. Thus, the Federal Defendants’ duty of protection, while evident in the course of dealings between the United States and Indian tribes, was expressly stated in the 1849 Peace Treaty.

22. The United States, in the exercise of its fiduciary obligations, entered into the 1868 Treaty with the Navajo Nation, and thereby established the Navajo Reservation as its permanent homeland as promised in the 1849 Peace Treaty. 1868 Treaty arts. II, XIII; *see* 1849 Peace Treaty art. IX (“the United States shall, at its earliest convenience, designate, settle, and adjust [the Navajo Nation’s] territorial boundaries”).

23. The Federal Defendants hold the Nation’s lands and waters in trust and owe a fiduciary duty to the Nation. All the elements of a trust are present: the United States is the trustee; the Navajo Nation is the beneficiary; and the Navajo Nation’s beneficial interest in its Reservation lands and appurtenant waters constitute the trust corpus. The United States has an obligation to make those trust resources productive so that the Reservation may serve as permanent homeland for Navajo people.

24. The trust relationship between the United States and Indian tribes, including the Navajo Nation, encompasses the obligation of Federal Defendants to secure and protect Indian trust resources and to take the steps necessary to make those trust resources productive. In addition to the 1849 Peace Treaty and federal actions creating the Navajo Reservation, those obligations have been repeatedly confirmed by Congress.

25. The Non-Intercourse Act, 25 U.S.C. § 177, first enacted in 1730 and reauthorized repeatedly, provides that tribal lands and waters, as tribal trust resources, cannot be transferred without the approval of the United States. *See* Act of July 22, 1790, § 4, 1 Stat. 137, 138; Act of March 1, 1793, § 8, 1 Stat. 329, 330; Act of May 19, 1796, § 12, 1 Stat. 469, 472; Act of March 3, 1799, § 12, 1 Stat. 743, 746; Act of March 30, 1802, § 12, 2 Stat. 139, 143; Act of June 30, 1834, ch. 161, § 12, 4 Stat. 729, 730. The Non-Intercourse Act pre-dates the United States Constitution and is reflective of the course of dealings between the United States and Indian tribes, including the duty of protection. The Non-Intercourse Act was expressly made applicable to the Navajo Nation in the 1849 Peace Treaty, providing that the “[United] 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 . . . with the various tribes of Indians under the protection and guardianship of the aforesaid Government, shall have the same force and efficiency” as if those “laws had been passed for their sole benefit and protection.” 1849 Peace Treaty art. III.

26. The Northwest Ordinance of 1787, 1 Stat. 50, which also pre-dates the ratification of the United States

Constitution, recognizes the federal duty of protection to Indian tribes, and provides that “[t]he utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.” *Id.* at 52, art. 3.

27. The Snyder Act, 25 U.S.C. § 13, provides that the BIA shall direct, supervise, and expend funds that Congress appropriates for the benefit of the Indians. The BIA has express authority over the “development of water supplies.” *Id.*

28. In the Indian Health Care Amendments of 1988, Pub. L. No. 100-713, § 302, 102 Stat. 4784 (amending 25 U.S.C. § 1632), Congress declared “the policy of the United States, that all Indian communities and Indian homes . . . be provided with safe and adequate water supply systems and sanitary sewage waste disposal systems as soon as possible.” 25 U.S.C. § 1632(a)(5); *see* BUREAU OF RECLAMATION, NORTH CENTRAL ARIZONA WATER SUPPLY STUDY, REPORT OF FINDINGS at 84-85 (2006) (Doc. 282-6) (“NORTH CENTRAL ARIZONA STUDY”). This policy cannot be effectuated on the Navajo Reservation without water in addition to that available from the Little Colorado River.

29. The American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, § 101, 108 Stat. 4239, amended the Act of June 24, 1938, 25 U.S.C. § 162a, to recognize eight “trust responsibilities of the

United States,” including “[a]ppropriately managing the natural resources located within the boundaries of Indian reservations and trust lands,” and specifically states that the Secretary’s “proper discharge of the trust responsibilities of the United States shall include (but are not limited to)” those specified duties. 25 U.S.C. § 162a(d).

30. In the Indian Trust Asset Reform Act, 25 U.S.C. §§ 5601-36, Congress reaffirmed that “the fiduciary responsibilities of the United States to Indians also are founded in part on specific commitments made through written treaties and agreements securing peace, in exchange for which Indians have surrendered claims to vast tracts of land, which provided legal consideration for permanent, ongoing performance of Federal trust duties” and “have established enduring and *enforceable Federal obligations* to which the national honor has been committed.” *Id.* § 5601(4)-(5) (emphasis added).

31. The Federal Defendants must also comply with the National Environmental Policy Act of 1969 (“NEPA”), 42 U.S.C. §§ 4321 to 70m-12. In carrying out its trust responsibilities, Federal Defendants are required, at a minimum, to comply with the requirements of generally applicable federal laws, such as NEPA.

32. NEPA obligates a federal agency to consider every significant aspect of the environmental impact of a proposed action and to ensure that the federal agency informs the public that it has indeed considered environmental concerns in its decision making process.

33. NEPA establishes action-forcing procedures that require agencies to take a hard look at a project’s potential environmental consequences.

34. Both the Department and the Council on Environmental Quality, an agency within the Executive Office of the President, have promulgated regulations implementing NEPA's procedural requirements. 43 C.F.R. pt. 46; 40 C.F.R. pt. 1500.

35. The Federal Defendants have implemented their trust obligations and fiduciary duties imposed by Congress to protect Indian trust resources through the promulgation of Secretarial Orders, agency policies, Departmental Manual provisions, and handbooks, which, when incorporated in and relied upon in departmental decisional documents, are binding and legally enforceable, including:

a. Secretarial Order No. 3335, reciting that the "trust responsibility consists of the highest moral obligations that the United States must meet to ensure the protection of tribal and individual Indian lands, assets, resources, and treaty and similarly recognized rights," and that "[o]ne of the fundamental common-law duties of a trustee is to preserve and maintain trust assets." § 3(a) (internal quotation marks omitted);

b. U.S. Dep't. of Interior, Secretarial Order No. 3215, *Principles for the Discharge of the Secretary's Trust Responsibility* (Apr. 28, 2000), superseded by incorporation in the DEPARTMENTAL MANUAL, pt. 303, ch. 2: Principles for Managing Indian Trust Assets (Oct. 31, 2000);

c. U.S. Dep't. of Interior, Secretarial Order No. 3175, *Departmental Responsibilities for Indian Trust Resources* (Nov. 8, 1993), superseded by incorporation in the DEPARTMENTAL MANUAL, pt. 512, ch. 2: DEPARTMENTAL RESPONSIBILITIES FOR INDIAN TRUST

RESOURCES (1995); *see also id.*, pt. 303, ch. 2: PRINCIPLES FOR MANAGING INDIAN TRUST ASSETS (2000); pt. 512, ch. 5, CONSULTATION WITH INDIAN TRIBES (2015);

d. BUREAU OF RECLAMATION, RECLAMATION MANUAL, INDIAN POLICY at P10 (2014), which acknowledges and affirms Reclamation’s “Federal trust responsibility and government-to-government relationship” with Indian tribes, including the Navajo Nation, and by which Reclamation commits to “actively support and participate in the Department’s Indian water rights negotiation and implementation activities, as it works to resolve the water rights claims of Indian tribes” *Id.* ¶¶ 1, 5(C)(2) (the 2014 Policy supersedes the earlier policy of the same name dated February 25, 1998);

e. BUREAU OF RECLAMATION, RECLAMATION’S NEPA HANDBOOK (2012) (Doc. 283-6), superseding BUREAU OF RECLAMATION, NATIONAL ENVIRONMENTAL POLICY ACT HANDBOOK (Oct. 1990);

f. U.S. Dep’t. of Interior, *Environmental Compliance Memorandum No. ECM97-2* (May 8, 1997) signed by the Director, Office of Environmental Policy and Compliance, rescinded as superseded by the DEPARTMENTAL MANUAL (2018);

g. BUREAU OF RECLAMATION, INDIAN TRUST ASSET POLICY AND NEPA IMPLEMENTING PROCEDURES: QUESTIONS AND ANSWERS ABOUT THE POLICY AND PROCEDURES (1994) (Doc. 283-7) (“RECLAMATION’S ITA POLICY QUESTIONS AND ANSWERS”) (distributed by Memorandum from the Commissioner dated October 21, 1994);

h. BUREAU OF RECLAMATION, NATIONAL ENVIRONMENTAL POLICY ACT HANDBOOK PROCEDURES TO

IMPLEMENT INDIAN TRUST ASSET POLICY (1993) (distributed by Memorandum D-5120 from the Assistant Commissioner-Resources Management dated December 15, 1993); and

i. BUREAU OF RECLAMATION, INDIAN TRUST ASSET POLICY (1993) (distributed by Memorandum W-6100 from the Commissioner dated July 2, 1993).

36. The President of the United States has also repeatedly confirmed the obligation of Federal Defendants to preserve and protect Indian trust resources, and the necessity for dealing with Indian tribes on a government-to-government basis. Important to the instant action are:

a. President Richard M. Nixon's Special Message to the Congress on Indian Affairs, 1970 PUB. PAPERS 564, 566 (July 8, 1970) (recognizing that the trust relationship "continues to carry immense moral and *legal* force" (emphasis added)); *see also* President George H.W. Bush's Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments, 1 PUB. PAPERS 662 (June 14, 1991);

b. Executive Order No. 13,175, *Consultation and Coordination with Indian Tribes* (Nov. 6, 2000), recognizes as a "Fundamental Principle" the unique trust relationship between the United States and Indian tribes and the federal duty of protection. *Id.* § 2(a). Executive Order 13,175 requires that the Federal Defendants act to strengthen the government-to-government relationship with Indian tribes by engaging in "meaningful consultation and collaboration with tribal officials in the

development of Federal policies that have tribal implications.” *Id.* at Preamble. “Policies that have tribal implications” are defined as “regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes.” *Id.* § 1(a). Government-to-government consultation concerning “tribal trust resources, and Indian tribal treaty and other rights” is another Fundamental Principle. *Id.* § 2(b); and

c. Executive Order No. 13,647, *Establishing the White House Council on Native American Affairs* (June 26, 2013), “to ensure that the Federal Government engages in a true and lasting government-to-government relationship with federally recognized tribes . . . by better carrying out its trust responsibilities.”

37. The United States’ trust relationship with the Navajo Nation requires the Federal Defendants to act affirmatively to protect the Navajo Nation’s trust resources, including its Reservation lands, such as planning for and securing the water needed to make those lands livable as a permanent homeland for the Navajo people. The Federal Defendants’ trust obligations also include determining the extent of the Nation’s requirement for water from sources other than the Little Colorado River, including the Colorado River, to meet the needs of the Navajo Nation and its members, determining how to meet those requirements after consultation with the Navajo Nation, and taking actions to protect those interests and secure the needed water.

C. WATER NEEDS OF THE NAVAJO NATION AND NAVAJO RESERVATION.

38. The Navajo Reservation suffers from poor living conditions, with a poverty level nearly three times higher than that of the United States generally. NORTH CENTRAL ARIZONA STUDY at 13. The lack of water in the Arizona portion of the Navajo Reservation contributes to poor living conditions. The percentage of Navajo homes without plumbing facilities in this part of the Navajo Reservation is significantly greater than for the rest of the State of Arizona. *Id.* Over 30% of Navajo tribal members live without plumbing, and in some areas of the Navajo Reservation the percentage is much higher. *Id.* at 14.

39. Navajo tribal members who do not have plumbing must haul water substantial distances in order to obtain water for their household uses. *Id.* at 14, 82. This practice is not only expensive, but is a risk to human health because many Navajo people rely on non-potable water sources and the containers used for hauling water are not sanitary. *Id.*; see DEMOCRATIC STAFF OF THE COMM. ON NAT. RES., WATER DELAYED IS WATER DENIED: HOW CONGRESS HAS BLOCKED WATER FOR NATIVE FAMILIES at 4-5 (2016) (“WATER DENIED”). Further, hauling water can take hours each week, time that could be spent working or going to school. Members of the Navajo Nation use around 7 gallons of water per day for all of their household needs, from cooking to cleaning to sanitation. WATER DENIED at 5. Navajo water haulers also consume much less water per day than does the average Arizona resident. NORTH CENTRAL ARIZONA STUDY at 14. The average American uses 80-100 gallons of water per day. WATER DENIED at 5.

40. Hauled water is, on average, much more expensive than municipal or domestic well supplied water, costing approximately \$37,000 per acre-foot. NORTH CENTRAL ARIZONA STUDY at 14. In 2003 hauled water averaged \$32 per 1,000 gallons but was as high as \$250 for 1,000 gallons. *Id.* at 70. This compares with a cost in 2006 of \$2.93 per 1,000 gallons of water delivered by the Navajo Tribal Utility Authority. *Id.*

41. The majority of Navajo tribal members in the western region of the Navajo Reservation adjacent to the Colorado River are water haulers. *Id.* at 58-59. 91% of Navajo households in the Coppermine Chapter lack access to water, 53% of Navajo households in the Cameron Chapter lack access to water, and 44% of Navajo households in the Bodaway/Gap Chapter lack access to water. *Id.* at 59. The western region of the Navajo Reservation in Arizona experiences severe drought, which exacerbates the lack of water. *Id.* at 82.

42. Improvement in the living conditions on the Navajo Reservation will not occur without improvements in water supply and water delivery infrastructure. *Id.* at 15. Without such improvements the current water-short conditions will persist, and the Navajo Nation is expected to see a shortfall of water to meet its needs in the western region of the Navajo Reservation in the amount of 8,263 acre-feet per year by 2050. *Id.* at 79-80.

43. The lack of water, which is pervasive in the Arizona portion of the Navajo Reservation, constitutes injury to the Navajo Nation and tribal members who live thereon.

D. THE FEDERAL DEFENDANTS HAVE NOT SOUGHT TO DETERMINE THE QUANTITY AND SOURCES OF WATER REQUIRED TO MEET THE NAVAJO NATION'S NEEDS.

44. The Navajo Nation lacks adequate water supplies to meet the needs of its members now and in the future to make the Navajo Reservation in Arizona a viable and permanent homeland.

45. Water supplies from the Little Colorado River—a tributary of the Colorado River—will not be sufficient to meet the Nation's needs for its lands in Arizona. The ongoing general stream adjudication *In re General Adjudication of All Rights to Use Water in the Little Colorado River System and Source*, No. CV 6417 (Ariz. Super. Ct., Apache County) may result in a declaration of water rights to serve some lands of the Navajo Reservation in Arizona. However, because the quality and quantity of the water sources in the Little Colorado River Basin are inadequate, *see* NORTH CENTRAL ARIZONA STUDY at 55, the Little Colorado River adjudication will not secure the full water supplies necessary to meet the Navajo Nation's needs.

46. The Navajo Nation possesses quantified rights to the use of water from the Upper Colorado River Basin in New Mexico by virtue of a settlement between the Navajo Nation, the United States, and the State of New Mexico, ratified by Congress in the Northwestern New Mexico Rural Water Projects Act, Pub. L. No. 111-11, §§ 1301-05, 123 Stat. 1367 (2009), but the water secured by those rights cannot be used in Arizona.

47. The Federal Defendants have not sought to determine the full scope of the Navajo Nation's need for

water in Arizona. Further, the Federal Defendants have not sought to identify or secure water from any sources other than the Little Colorado River that could meet the needs of Navajo Nation in Arizona.

E. THE UNITED STATES' HAS FAILED TO ADDRESS THE NAVAJO NATION'S NEED FOR WATER FROM THE MAINSTREAM OF THE COLORADO RIVER IN THE LOWER BASIN.

48. Although the Colorado River forms a significant segment of the boundary of the Navajo Reservation and that water supply is the most obvious source of water to meet the needs of the Navajo Nation for water that cannot be met by the supplies available from the Little Colorado River, the Federal Defendants have failed to address the extent to which the Navajo Nation needs water from the Colorado River to make its Arizona lands productive.

49. The Navajo Nation's rights to use water from the Colorado River in the Lower Basin were not adjudicated in *Arizona v. California*, 373 U.S. 546 (1963), or elsewhere.

50. In 1952, Arizona initiated an original action in the United States Supreme Court against California seeking a division of the waters of the mainstream of the Colorado River in the Lower Basin, despite the fact that Congress in the Boulder Canyon Project Act made such an apportionment. *Motion for Leave to File Bill of Complaint and Bill of Complaint, Arizona v. California*, Original No. 8 (Aug. 8, 1952). The United States entered the litigation alleging the need to protect federal interests, including the rights of the Navajo Nation and twenty-four other Indian tribes in the Lower Basin.

Response of the United States to the Motion on Behalf of the Navajo Tribe of Indians for Leave to Intervene at 6 n.3 (Nov. 6, 1961) (“US Response”) (Doc. 257-1).

51. In 1956, the Navajo Nation and six other Indian tribes moved for leave to file a “representation of interest,” seeking to define the scope of the representation of the tribes by the United States Department of Justice (“USDOJ”) and alleging lack of effective representation and conflict of interest. *Motion for Leave to File Representation of Interest and Representation of Interest*. (Jun. 27, 1956). The motion was denied on the now rejected premise that the trusteeship of the United States was a creation of the plenary power of Congress and disqualification of the trustee was “beyond the power of the Courts.” See *Brief of the Navajo Indian Tribe in Support of Motion to Intervene* at 22 (Sept. 25, 1961) (“Intervention Brief”).

52. The Supreme Court referred the matter to a special master, and in 1960 Special Master Rifkind issued his Report. Simon H. Rifkind, *Special Master Report* (Dec. 5, 1960) (“Rifkind Report”) (Doc. 240-8). The Special Master determined that both the tributaries and the mainstream of the Colorado River above Lake Mead were excluded from the adjudication. The lands of the Navajo Nation are upstream of Lake Mead and were, as a consequence, omitted from the Rifkind Report, and no evidence concerning those rights was offered.

53. After the issuance of the Rifkind Report, the Navajo Nation wrote to the Attorney General requesting that the United States take exception to the Report. US Response, Appendix B (Letter from Norman M. Lit-

tell, General Counsel, Navajo Tribe, to Attorney General Robert F. Kennedy (Feb. 2, 1961)). Although the United States did not respond to the Navajo Nation's request for exceptions, it filed exceptions to the Rifkind Report. Dissatisfied with the position taken by the United States in the case, on September 25, 1961, the Navajo Nation moved to intervene. *Motion on Behalf of the Navajo Tribe of Indians of the Navajo Reservation, Arizona, New Mexico and Utah, for Leave to Intervene* (Sep. 25, 1961) ("Motion to Intervene"); see *Intervention Brief; Exceptions of the Navajo Indian Tribe to the Report of the Special Master* (Sept. 25, 1961); *Brief in Support of Exceptions of Navajo Indian Tribe to the Report of the Special Master* (Sept. 25, 1961).

54. In its Motion to Intervene, the Navajo Nation argued that the United States had failed to vigorously assert the Navajo Nation's interests. The Navajo Nation's principal concern was that by failing to assert the justiciability of issues pertaining to "the determination of water rights in the Lower Basin and tributaries between Lee Ferry and Lake Mead," *Intervention Brief* at 25, the United States "abandoned the case so far as the adjudication of the rights of the Navajo Indians is concerned." *Motion to Intervene* at 4; see *Intervention Brief* at 25-30. In addition, the Navajo Nation argued that the United States should have opposed the quantification standard of practicably irrigable acreage and asserted a standard that "is co-extensive with the future needs of the Navajo [Nation] for all of its beneficial uses, whether for hunting, grazing, agriculture, or for other arts of civilization." *Motion to Intervene* at 6. The Navajo Nation also argued that the United States should have asserted that the Navajo Nation's water rights are aboriginal in nature and not "subject . . .

to the priority of appropriative rights established before [the] Reservation was created” *Id.* at 4 (quoting Rifkind Report at 254) (alterations in original). Finally, the Navajo Nation contended that the United States should have asserted that the Indian users have a right to an apportionment separate and apart from the apportionment to the states within which the reservations lie. *Id.* at 5. Most relevant here, and prescient, was the Navajo Nation’s conclusion that this failure put the Nation in “perpetual political conflict” with Arizona, New Mexico, and Utah. *Id.* at 5-6.

55. The United States opposed the Navajo Nation’s attempt to intervene, representing to the Court that it “has undertaken representation of the interests of several Indian tribes” and that the United States would “be governed by . . . considerations of justice” in its representation of the Navajo Nation. US Response at 6-7 (quoting *Mo., Kan. & Tex. Ry. Co. v. Roberts*, 152 U.S. 114, 117 (1894)).

56. The United States argued further that because the Special Master had determined that mainstream and tributary uses above Lake Mead were not chargeable against each state’s allocation, there was no need to adjudicate the Navajo Nation’s rights to use water from the tributaries above Lake Mead and the extent to which those rights might conflict with mainstream uses below Lake Mead. *Id.* at 14-15.

57. The United States recognized that no evidence had been submitted on behalf of the Navajo Nation for uses from the mainstream and that such evidence would have had to be submitted in order for the Court to consider the issue of the Navajo Nation’s rights to the mainstream above Lake Mead. *Id.* n.9. The United States

expressly stated that if the Court rejected the Special Master's recommendation that the Boulder Canyon Project Act applied only to uses below Lake Mead, it would then be necessary to address the Navajo mainstream rights above Lake Mead. *Id.*

58. Again, the request of the Navajo Nation to represent its own interests was denied.

59. The Supreme Court ultimately rejected the Special Master's view that the Boulder Canyon Project Act allocated only the supply of the Colorado River below Lake Mead among California, Arizona, and Nevada (collectively "Lower Basin States"), determining that "[t]he Lower Basin, with which Congress was dealing, begins at Lee Ferry, and it was all the water in the mainstream below Lee Ferry that Congress intended to divide among the [Lower Basin] States." *Arizona v. California*, 373 U.S. at 591.

60. The Supreme Court's decision to diverge from the recommendations of the Special Master left the claims of the Navajo Nation unresolved.

61. Article VIII(c) of the 1964 Arizona Decree expressly left open the question of the Navajo Nation's beneficial rights to the waters of the Colorado River. 1964 Arizona Decree, 376 U.S. at 353.

62. Clearly, it has long been understood by the United States that the Navajo Nation's need for water from the Colorado River has not been addressed and requires additional work to determine the extent of that need. However, the Federal Defendants have failed to undertake the necessary work. The United States'

trust responsibility to protect the Navajo Nation's beneficial interests in the waters of the Colorado River remains unaffected by the 1964 Arizona Decree.

63. Prior to initiating the instant litigation in 2003, the Navajo Nation repeatedly asked the Department, consistent with its trust responsibility to the Navajo Nation, to address the extent of the Nation's need for water from the mainstream of the Colorado River in the Lower Basin to make the lands of the Navajo Reservation a permanent homeland. Salient examples include:

a. A letter dated April 4, 2000, from Stanley Pollock, Navajo Nation Department of Justice, to Interior Deputy Secretary David Hayes, requesting resolution of the Nation's Colorado mainstream claims in the context of the development of the Surplus Guidelines, settlement of the Central Arizona Project's ("CAP") repayment obligations, and reallocation of CAP supplies, addressed at ¶¶ 81-82, 91-97, *infra*;

b. A letter dated August 1, 2000, from Navajo Nation President Kelsey A. Begaye, to Interior Secretary Bruce Babbitt, requesting a contract for uncommitted water apportioned to Arizona from the mainstream of the Colorado River in the context of the issues outlined in the letter referenced in ¶ 63(a), *supra*; and

c. A letter dated August 8, 2001, from Navajo Nation President Kelsey A. Begaye, to Interior Secretary Gale A. Norton, renewing his request that the Navajo Nation receive a contract for uncommitted mainstream Colorado River water.

64. By letter dated November 7, 2001, Interior Solicitor William G. Meyers III, responded on behalf of the Secretary to President Begaye as follows:

Aside from CAP supplies, there is a very limited quantity of Colorado River water allocated for use within Arizona and there are numerous competing uses for that water. Before any decisions are made with respect to the remaining water, *careful consideration must be given to the needs of the competing entities, the views of non-Indians parties* and the other tribes that may have an interest in the water. This process is yet to be initiated and we would expect it to be a somewhat lengthy process.

. . . .

While the Department appreciates the Navajo Nation's need for additional water supplies, for the reasons discussed above, we believe that it is inappropriate at this time to grant your request for all the remaining uncommitted Colorado River water allocated for use within Arizona.

Id. (emphasis added).

65. To the knowledge of the Navajo Nation, the Federal Defendants never initiated the process the Solicitor alleged would be necessary to grant the Nation a contract for uncommitted Colorado River water. The Solicitor's letter is an express recognition of the Department's deference to state interests to avoid its trust obligations to the Nation. *See* ¶ 89, *infra*. To date, the Secretary has refused to enter into such a contract with the Navajo Nation.

66. This litigation was stayed from October 2004 to May 2013 to allow for settlement negotiations. During the pendency of the stay, the Navajo Nation continued to seek the assistance of the Department, consistent

with its trust responsibility to the Navajo Nation, to address the extent of the Nation's need for water from the mainstream of the Colorado River in the Lower Basin:

a. By a letter dated October 5, 2005, from counsel for the Navajo Nation to Vanessa Willard, USDOJ, and the federal negotiation team for the instant litigation seeking, *inter alia*, to “develop a process for the Navajo Nation and the United States to jointly pursue the quantification” of the Nation's Colorado River mainstream claims; and

b. By a letter dated April 28, 2006, from Louis Denetsosie, Navajo Nation Attorney General, to Sue Ellen Woolridge, Assistant Attorney General, USDOJ, and David Bernhardt, Interior Office of the Solicitor, seeking a meeting to discuss resolution of the instant litigation in the context of, *inter alia*, the Department's development of shortage guidelines, addressed at ¶¶ 98-104, *infra*, through re-alignment of the Federal Defendants as plaintiffs with the Navajo Nation.

67. A meeting was held on May 5, 2006 between representatives of the Navajo Nation and the United States in response to the Nation's requests, but the Federal Defendants took no further action after the meeting.

68. After the failure of settlement negotiations in 2012, and prior to the time established for filing the Navajo Nation's First Amended Complaint, the Nation again sought the assistance of the Department, consistent with its trust responsibility to the Navajo Nation, to address the extent of the Nation's need for water from the mainstream of the Colorado River in the Lower Basin by a joint letter dated February 7, 2013, from Navajo Nation President Ben Shelly and Navajo Nation

Council Speaker Johnny Naize, requesting a meeting with Interior Secretary Kenneth L. Salazar.

69. A meeting was held on March 5, 2013, between President Shelly and Deputy Secretary Hayes, BIA Assistant Secretary Kevin Washburn, Commissioner of Reclamation Michael Connor, and their staff, but the outcome was limited to a commitment by the Federal Defendants to engage in further discussions with Navajo leadership. No such discussions ever occurred.

70. After the filing of the Nation's First Amended Complaint, the Nation through email communications between counsel, continued to seek the assistance of the Department, consistent with its trust responsibility to the Navajo Nation, to address the extent of the Nation's need for water from the mainstream of the Colorado River in the Lower Basin to no avail.

71. In a letter dated March 21, 2014, to Deputy Secretary Michael Connor, Navajo Nation President Shelly wrote to confirm the Nation's understanding of the position of the Department including: the need of the Navajo Nation for water from the mainstream of the Colorado River to make the Navajo Reservation a permanent homeland; the unwillingness of the United States to realign as a plaintiff in the instant litigation or otherwise pursue the Nation's claims and needs to water from the mainstream; the unwillingness of the Federal Defendants to engage in further discussions concerning the needs of the Navajo Nation for water from the mainstream and how to meet those needs because of the pendency of the litigation. While expressing disappointment with the various positions of the Department, and observing that such positions were inconsistent with the trust responsibility owed to the Navajo Nation by the

United States, President Shelly asked the Department to reconsider and meet with the Navajo Nation.

72. Subsequently, after yet another request from Navajo Nation President Russell Begaye to meet with the Federal Defendants, consistent with their trust responsibility to the Navajo Nation, to address the extent of the Nation's need for water from the mainstream of the Colorado River in the Lower Basin, a meeting was held on January 20, 2016, with Deputy Secretary Michael Connor, Pamela Williams, director of the Secretary's Indian Water Rights Office, and their staff. However, the requests for assistance again went unheeded.

73. Efforts by the Navajo Nation to secure the assistance of the United States, consistent with its trust responsibility to the Navajo Nation, to address the extent of the Nation's need for water from the mainstream of the Colorado River in the Lower Basin since the remand of this matter from the Ninth Circuit have been similarly unavailing.

74. The Federal Defendants have never determined the Navajo Nation's needs to water from the mainstream of the Colorado River in the Lower Basin.

75. The failure of the Federal Defendants to determine the Navajo Nation's need for Colorado River water creates a great degree of uncertainty for all Colorado River water users. *See, e.g.*, US Response at 7-8 ("The controversy respecting allocation of the waters of the Lower Colorado River has plagued the . . . entire region for nearly half a century" and has "impeded full development of the water resources of the southwestern region of the United States, and hence the full development of the other resources of the region . . .").

76. Federal Defendant's management of the Colorado River without regard to the needs of the Navajo Nation and its members for such waters establishes a system of reliance upon the Colorado River that ensures that entities other than the Navajo Nation will continue to depend on those water supplies. Such reliance makes it more difficult for the Federal Defendants to meet the water supply needs of the Navajo Nation and its members.

F. THE SECRETARY'S ROLE AS WATER MASTER OF THE COLORADO RIVER IN THE LOWER BASIN.

77. Pursuant to the Boulder Canyon Project Act and Article II of the 1964 Arizona Decree, 376 U.S. at 341-46, the Secretary is responsible for the allocation of the waters of the mainstream of the Colorado River in the Lower Basin among the Lower Basin States and to decide which users within each State will be delivered water as provided in the Act.

78. The Boulder Canyon Project Act authorizes the Secretary to enter into permanent water delivery contracts with users in the Lower Basin of the Colorado River, up to the limit of each State's apportionment.

79. Pursuant to the Boulder Canyon Project Act and other federal legislation, on February 9, 1944, the United States and the State of Arizona entered into a contract for the delivery of water stored in Lake Mead ("Arizona Contract") (Doc. 240-6). Under the Arizona Contract, the United States is required to deliver to Arizona, its agencies, or water users, 2.8 million acre-feet of water per year "from storage in Lake Mead," *id.* art. 7(a), for irrigation and domestic uses in Arizona, consistent with

the provisions of the Colorado River Compact (Nov. 24, 1922) (“1922 Colorado River Compact”), *reprinted at* 70 CONG. REC. 324 (1928) (Doc. 240-2), and the Boulder Canyon Project Act. The Arizona Contract further provides that “nothing in this contract shall be construed as affecting the obligations of the United States to Indian tribes.” Arizona Contract art. 5.

80. The delivery obligations are to “be diminished to the extent that consumptive uses now or hereafter existing in Arizona above Lake Mead diminish the flow into Lake Mead” *Id.* art. 7(d). Therefore, the provision of water to the Navajo Nation from the mainstream of the Colorado River for any of the Navajo Reservation lands within Arizona and within the Lower Basin, must be charged against Arizona’s entitlement to 2.8 million acre-feet per year of water from the Colorado River as established under the Boulder Canyon Project Act. *Arizona v. California*, 373 U.S. at 601 (“all uses of mainstream water within a State are to be charged against that State’s apportionment”).

81. Under the Colorado River Basin Project Act, Congress authorized the construction of CAP. 43 U.S.C. §§ 1521(a). Reclamation funded and constructed the Project, subject to repayment of construction costs. CAP diverts water from the Colorado River at Lake Havasu on Arizona’s western boundary and transports part of Arizona’s allocation of Colorado River water to the central and southern regions of the state.

82. The Colorado River Basin Project Act authorizes the Secretary to enter into contracts with Indian tribes in Arizona for the delivery of water from CAP. *Id.* § 1524. To date, the Secretary has entered into contracts with numerous Arizona Indian tribes, with a total

contract water delivery obligation of approximately in excess of 500,000 acre-feet. In addition, settlements with Arizona tribes create entitlements to an additional 614,806 acre-feet. The water delivered to Arizona tribes is charged against Arizona's total Colorado River entitlement of 2.8 million acre-feet.

G. CONFLICTING OBLIGATIONS OF THE SECRETARY DO NOT VITIATE THE TRUST RESPONSIBILITY.

83. The United States exercises pervasive control over the Colorado River pursuant to the Boulder Canyon Project Act and the 1964 Arizona Decree, and simultaneously is charged with protecting the Navajo Nation's interests in the Colorado River.

84. Article VII of the 1922 Colorado River Compact states that “[n]othing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.” Article 5 of the Arizona Contract is virtually identical to Article VII of the 1922 Colorado River Compact: “nothing in this contract shall be construed as affecting the obligations of the United States to Indian tribes.” By including this language, the United States demonstrated that it was well-aware at the time of compact negotiations that the 1922 Colorado River Compact would play a major role in the future development of the waters of the Colorado River, and that the protection of unaddressed Indian water needs and the recognition of the federal obligation to secure water for the benefit of the affected tribes required express language. The same concern drove the inclusion of the nearly identical language in Article 5 of the Arizona Contract.

85. As discussed above, the trust relationship between the United States and the Navajo Nation encompasses the corresponding duty of the United States to ensure that the Navajo Reservation lands have sufficient water to make them livable.

86. The United States preserved its obligations to the Navajo Nation regarding the Nation's use of water from the Colorado River in Article VII of the 1922 Colorado River Compact, in Article 5 of the Arizona Contract, and elsewhere. Thus, the United States' trust obligations to the Navajo Nation are undiminished by the 1922 Colorado River Compact.

87. Communications between the Department and Indian tribes are replete with representations by the Department of the significance of Indian trust resources and the Department's obligation of trust and duty of protection. For example, a letter directed to tribal leaders concerning consultation on the *Criteria and Procedures for the Participation of the Federal Government in Negotiations for the Settlement of Indian Water Rights Claims*, 55 Fed. Reg. 9,223 (Mar. 12, 1990), recognizes that "[t]he trust responsibility owed by the United States Government to tribes . . . is a well-established legal principle that has its origins in the formation of the United States Government," and recites that among the "guiding principles for honoring the trust responsibility for the benefit of current and future generations . . . is to ensure trust resources . . . are recognized and protected to the maximum extent possible." Letter from Lawrence S. Roberts, Principal Deputy Assistant Secretary – Indian Affairs, to Tribal Leader (Dec. 9, 2016).

88. The Federal Defendants are obligated to uphold the United States' trust responsibility to the Navajo Nation even while Congress charges them with other responsibilities, such as those in the 1922 Colorado River Compact, the Boulder Canyon Project Act, the 1964 Arizona Decree, and NEPA, and they may not compromise the United States' trust responsibility to the Navajo Nation in the performance of other statutory obligations.

89. The Federal Defendants may not avoid their trust obligation to the Nation "on the ground that it would be inimical to some other governmental or private interest" Krulitz Memo at 12.

H. ACTIONS OF THE SECRETARY IN DEROGATION OF THE TRUST RESPONSIBILITY.

90. The Secretary, pursuant to the authority to manage the waters of the Colorado River recognized in the Boulder Canyon Project Act and the 1964 Arizona Decree, has repeatedly taken actions that threaten the availability of a water supply to satisfy the Navajo Nation's needs for its Arizona Reservation lands. At the same time, the Department has failed to (1) determine the amount of water that the Navajo Nation requires from sources other than the Little Colorado River, including any need for water from the mainstream of the Colorado River in the Lower Basin, to meet the needs of the Navajo Nation and its members and make its Reservation lands productive; or (2) develop a plan or course of action to secure the needed water.

Surplus Guidelines

91. On January 16, 2001, Secretary Bruce Babbitt issued a record of decision adopting specific interim sur-

plus guidelines for the Colorado River used to determine the conditions under which the Secretary would declare the availability of surplus water for use within the Lower Basin States. *Record of Decision, Colorado Interim Surplus Criteria; Final Environmental Impact Statement* (“Surplus Guidelines ROD”), reprinted at 66 Fed. Reg. 7,772 (Jan. 25, 2001) (Doc. 240-12); see *Colorado River Interim Surplus Criteria Final Environmental Impact Statement* (Dec. 2000) (Doc. 282-2) (“Surplus Guidelines FEIS”); *Criteria for Coordinated Long-Range Operation of the Colorado River Reservoirs Pursuant to the Colorado River Basin Project Act of September 30, 1968 (P.L. 90-537)*, art. III(3)(b) (June 8, 1970) (“LROC”). Among other things, the LROC require the Secretary to determine the extent to which the water requirements of mainstream water users in the Lower Basin States can be met in any year.

92. In the Surplus Guidelines FEIS, Federal Defendants acknowledge that:

Indian Trust Assets (“ITAs”) are legal assets associated with rights or property held in trust by the United States for the benefit of federally recognized Indian tribes or individuals. The United States, as trustee, is responsible for protecting and maintaining rights reserved by, or granted to, Indian tribes or individuals by treaties, statutes and executive orders. All Federal bureaus and agencies share a duty to act responsibly to protect and maintain ITAs. Reclamation policy, which satisfies the requirement of Interior’s Departmental Manual at 512 DM 2, is to protect ITAs from adverse impacts resulting from its programs and activities whenever possible.

Surplus Guidelines FEIS at 3.14-1. That duty includes an obligation to protect the utility of Reservation lands by securing the water needed to make such lands productive and capable of serving their intended purpose as a permanent homeland.

93. The Surplus Guidelines ROD recites that “[t]he FEIS was prepared pursuant to the National Environmental Policy Act of 1969 (NEPA), as amended, the Council on Environmental Quality’s (CEQ) Regulations for Implementing the Procedural Provisions of NEPA (40 Code of Federal Regulations [CFR] Parts 1500 through 1508), Department of Interior Policies, and Reclamation’s [1990] NEPA Handbook.” Surplus Guidelines ROD, 66 Fed. Reg. at 7,772. Accordingly, the Surplus Guidelines FEIS and ROD incorporate and make mandatory the Federal Defendants’ policies, manuals, handbooks, and directives, and the Navajo Nation was entitled to rely upon the procedural requirements included in those documents.

94. The Surplus Guidelines FEIS analyzed five alternatives for interim surplus guidelines and a No Action Alternative/Baseline Condition. Surplus Guidelines FEIS ch. 2; Surplus Guidelines ROD, 66 Fed. Reg. at 7,774-5. None of the alternatives sought to account for the unmet needs of the Navajo Nation that could be satisfied from water from the Lower Basin above Lake Mead. Although the Surplus Guidelines FEIS included the results of extensive modeling of the hydrology of the Colorado River, including discrete representation of the demand schedules through demand nodes for each of the ten tribes in the Colorado River Basin, Surplus Guidelines FIES at 3.14-2, including the Navajo Nation, no in-

formation was included for the water needs of the Navajo Nation and its members from the Colorado River in the Lower Basin.

95. The Surplus Guidelines ROD and Surplus Guidelines FEIS also failed to account for the fact that the Navajo Nation's need for water in the Lower Basin has not been determined. The Surplus Guidelines ROD further acknowledged that Reclamation had "identified a significant quantity of confirmed but unused water rights belonging to several Indian tribes in the Colorado River basin." *Id.* at 7,776. Like waters that may be required from the Colorado River to meet the Nation's needs, these undeveloped tribal rights are factored into the available water supply and managed as surplus. *Id.*

96. The Surplus Guidelines FEIS acknowledges that the Navajo Nation's rights to the waters of the Colorado River are unquantified, but fails to institute a process to determine and protect the water supply that may be required to satisfy the unmet needs of the Navajo Nation and its members. Surplus Guidelines FEIS at 3.14-4 to -5. As a result, the Surplus Guidelines FEIS does not account for the Navajo Nation's need for the waters of the Lower Basin of the Colorado River.

97. The Surplus Guidelines FEIS requires the allocation each year of any surplus water of the Colorado River among the Lower Basin States. *Id.* at 2-10 to -14. Thus, the Surplus Guidelines FEIS establishes a system of reliance upon the surplus water in the Colorado River among the Lower Basin States, to the exclusion of the Navajo Nation and other Indian tribes. As surplus water is allocated each year pursuant to the Surplus Guidelines, Reclamation will manage the Colorado River in a manner that ensures that entities other than the Navajo

Nation will continue to rely on water supplies needed by the Navajo Nation, which reliance will operate to make it more difficult to meet the needs of the Navajo Nation and its members.

Shortage Guidelines

98. On December 13, 2007, then Secretary Dirk Kempthorne issued a record of decision adopting specific interim shortage guidelines for the Colorado River to manage Lake Powell and Lake Mead under low reservoir and drought conditions for the express purpose of providing greater predictability of Colorado River water supplies. *Record of Decision, Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Powell and Lake Mead* (“Shortage Guidelines ROD”), reprinted at 73 Fed. Reg. 19,873 (Apr. 11, 2008); see *Final Environmental Impact Statement, Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead* (Oct. 2007) (Docs. 287-4, 283-5) (“Shortage Guidelines FEIS”).

99. Chapter 3 of the Shortage Guidelines FEIS discusses the Indian trust assets (“ITA”) that may be affected by the proposed federal action:

ITAs are “. . . ‘legal interests’ in ‘assets’ held in ‘trust’ by the federal government for federally recognized Indian tribes or individual Indians” [RECLAMATION’S ITA POLICY QUESTIONS AND ANSWERS]. The United States, as trustee, is responsible for protecting rights reserved by, or granted to, Indian tribes or individual Indians by treaties, statutes, executive and secretarial orders, and other federal actions. The Department’s policy is that when a proposed federal

action appears likely to adversely affect an ITA, the action agency should seek ways to minimize or avoid the adverse effect; if adverse effects cannot be avoided, then the action agency should provide appropriate mitigation or compensation.

Shortage Guidelines FEIS at 3-87 (alterations in original).

100. The Shortage Guidelines ROD recites that the Shortage Guidelines FEIS “was prepared pursuant to the National Environmental Policy Act of 1969 (NEPA), as amended, the Council on Environmental Quality’s (CEQ) Regulations for Implementing the Procedural Provisions of NEPA (40 Code of Federal Regulations [CFR] Parts 1500 through 1508), Department of the Interior Policies, and Reclamation’s [1990] NEPA Handbook.” Shortage Guidelines, 73 Fed. Reg. at 19,874. Accordingly, the Shortage Guidelines ROD incorporates and makes mandatory the Federal Defendants’ policies, manuals, handbooks, and directives, and the Navajo Nation was entitled to rely upon the procedural requirements included in those documents.

101. The Shortage Guidelines FEIS analyzed five alternatives for interim shortage guidelines and a No Action Alternative. Shortage Guidelines FEIS at ch. 2; Shortage Guidelines ROD, 73 Fed. Reg. at 19,876-77. None of the alternatives sought to account for the unmet needs of the Navajo Nation in the Lower Basin above Lake Mead, and no information was included for the water needs of the Navajo Nation and its members in the Lower Basin.

102. The Shortage Guidelines ROD also failed to account for the fact that the Navajo Nation's needs for water to make Reservation lands in Arizona productive have not been determined, despite the assertion in the Shortage Guidelines ROD that it considered the effects on ITAs. Shortage Guidelines ROD, 73 Fed. Reg. at 19,879.

103. The Shortage Guidelines FEIS acknowledges that the Navajo Nation's rights to the waters of the Colorado River are unquantified, Shortage Guidelines FEIS at 1-13 and 3-96 to -97, and states that such "[u]nquantified water rights of the Navajo Nation are considered an ITA." *Id.* at 3-96. While the Shortage Guidelines FEIS purports to consider the adverse effects of the proposed action on all ITAs, *id.* at 3-87, the Navajo Nation's unquantified water rights are not included in the list of the ITAs "that might potentially be impacted as a result of implementing the proposed federal action" *Id.* Despite acknowledging that the Navajo Nation's unquantified rights to waters of the Colorado River constitute an ITA, the Shortage Guidelines FEIS only addresses the effects of the proposed action on the ITAs of the five tribes specifically awarded water in *Arizona v. California* and on the "Colorado River water Tribal delivery contracts where such contracts are part of a congressionally approved water rights settlement"; *id.* the effects of the proposed action on Reservation lands that require water to be productive are not considered. As a result, the Shortage Guidelines FEIS does not account the unmet needs of the Navajo Nation and tribal members for water from the Lower Basin of the Colorado River to make Reservation lands productive.

104. The Shortage Guidelines FEIS provides for the management of Colorado River in times of shortage and drought, and provides mechanisms to create surplus water and conservation to ease the severity of any shortages. *See, e.g., id.* at ES-2. Thus, the Shortage Guidelines FEIS establishes a system of reliance upon the flows in the Colorado River among the Lower Basin States, to the exclusion of the Navajo Nation and other Indian tribes. As shortages are allocated in any year pursuant to the Shortages Guidelines, Reclamation will manage the Colorado River in a manner that ensures that entities other than the Navajo Nation will continue to rely on water supplies that may be needed by the Navajo Nation. Such reliance will make it more difficult for Navajo to meet the needs of the Navajo Nation and its members.

I. THE FEDERAL DEFENDANTS' ON-GOING MANAGEMENT EFFORTS CONTINUE TO IGNORE THE NEEDS OF THE NAVAJO NATION FOR WATER FROM THE COLORADO RIVER IN THE LOWER BASIN.

105. The Surplus Guidelines and Shortage Guidelines are just two examples of the Federal Defendants' decisions and actions to manage the Colorado River in the Lower Basin that ignore the needs of the Navajo Nation for a supply of that water to make the Navajo Reservation a permanent home. Other such actions include:

a. Entering into Minute No. 323, *Extension of Cooperative Measures and Adoption of a Binational Water Scarcity Contingency Plan in the Colorado River Basin* (Sep. 21, 2017), with Mexico (creating a Binational Water Scarcity Contingency Plan permitting the United

States to “save” quantities of water at specified low reservoir elevations for recovery at a later date; providing for conditions under which the United States will deliver to Mexico quantities of Colorado River water in excess of its 1944 Water Treaty obligations; establishing a “revolving account” to permit Mexico to defer delivery of a portion of its Colorado River water and store such water in the United States; and allowing Mexico to generate intentionally created surplus);

b. Issuing a *Notice of Proposed Rulemaking: Regulating the Use of Lower Colorado River Water Without an Entitlement*, 73 Fed. Reg. 40,916 (July 16, 2008) (proposing to address the unlawful use of Colorado River water via pumping underground water located in the floodplain in the estimated amount of 9,000 to 15,000 acre-feet per year by, *inter alia*, providing “various options” to groundwater pumpers to bring the uses of water from the Colorado River in the Lower Basin into compliance with Federal law, by such mechanisms as a contract for delivery of water through the Arizona Department of Water Resources);

c. Preparing the *Final Environmental Impact Statement, Implementation Agreement, Inadvertent Overrun and Payback Policy, and Related Federal Actions* (Oct. 2002) (Doc. 283-8) (inadvertent overruns could have a significant impact on the Navajo Nation’s ability to satisfy its water needs from the Colorado River in the Lower Basin; the FEIS contains no analysis of such needs despite purporting to analyze the impacts on all tribal trust resources); and

d. Preparing the *Final Environmental Assessment and Finding of No Significant Impact* (Jun. 19,

2002) and entering into the *Storage and Interstate Release Agreement* (Dec. 18, 2002) (creating a program of interstate water banking of Arizona and Nevada entitlements in underground aquifers in Arizona, which fails to account for the unmet needs of the Navajo Nation from the Colorado River in the Lower Basin).

106. Like the Surplus Guidelines and Shortage Guidelines, these actions demonstrate a pattern of conduct by which Reclamation manages the Lower Basin of the Colorado River in a manner that ensures that entities other than the Navajo Nation will continue to rely on water supplies needed by the Navajo Nation to develop its Reservation lands in Arizona as a permanent homeland for the Navajo people. Such reliance will make it more difficult to meet the needs of the Navajo Nation and thereby harm the Navajo Nation and its members.

J. FEDERAL DEFENDANTS' ACTIONS AND DECISIONS INDUCING RELIANCE BY THE LOWER BASIN STATES ON WATERS NECESSARY TO MEET THE NEEDS OF THE NAVAJO NATION GIVE RISE TO REDRESSABLE HARM.

107. The management decisions of the Secretary that artificially enhance Colorado River water supplies and induce water users to rely on those supplies impair the ability of the Navajo Nation to secure water necessary to meet its needs. This action seeks to compel the Federal Defendants to assess the needs of the Navajo Nation in its proprietary capacity as a beneficial owner of its Reservation lands in Arizona and a sovereign government concerned with providing water for the people living there. Among other breaches of trust, the Federal Defendants have made decisions and taken actions

that advance the interests of non-Indians while neglecting their fiduciary obligations to the Nation.

108. The prioritization of non-Indian development to the detriment of Indian tribes is well documented:

The Nation is therefore confronted . . . 100 or more years after most Indian reservations were established with this dilemma: in the water-short West, billions of dollars have been invested, much of it by the Federal Government, in water resource projects benefiting non-Indians but using water in which the Indians have a priority of right if they choose to develop water projects of their own in the future. In short, the Nation faces a conflict between the right of Indians to develop their long-neglected water resources and the impairment of enormous capital investments already made by non-Indians in the same water supply.

NAT'L WATER COMM'N, FINAL REPORT TO THE PRESIDENT AND TO THE CONGRESS OF THE UNITED STATES, at 476 (1973); *see* WATER DENIED at 7, 9-10.

109. The Federal Defendants maintain that they need not determine the water supply needs of the Navajo Nation because their failure to address those needs cannot harm the Navajo Nation. Federal Defendants conflate the issue of the Nation's need for water presented here with the unquantified reserved rights the Nation may assert to the Colorado River. Any rights the Nation may have to the Colorado River are protected by law, and the doctrine established in *Winters v. United States*, 207 U.S. 564 (1908), provides that such rights cannot be lost through non-use. However, Federal Defendants cannot avoid their obligation to secure

water to make the Nation's lands productive by pointing to unquantified water rights that may be recognized at some future date. The Navajo Nation is in dire need of water now.

110. The Federal Defendants attempt to use a unique attribute of federal reserved rights—that such rights cannot be lost through non-use, forfeiture or abandonment—against the Navajo Nation as a sword. The Supreme Court's determination that federal reserved rights could not be lost through non-use was intended to *shield* those unquantified rights to compensate for historic failures of the United States to carry out its duty to protect Indian trust lands by securing water to make them productive. The Federal Defendants' use of this attribute of reserved water rights as justification for their failure to address the water needs of the Navajo Nation perpetuates the history of neglect of the Nation's water supply needs to make its Reservation lands productive and is a further abrogation of their fiduciary duty to the Navajo Nation.

111. Tribes with water supply needs that pursued *claims* for quantification of their rights to the Colorado River have also been harmed by the reliance of others on water subject to their claims.

112. Article IX of the 1964 Arizona Decree provides that “[a]ny of the parties may apply at the foot of this decree for its amendment or for further relief.” 1964 Arizona Decree, 376 U.S. at 353. On January 9, 1979, the Supreme Court entered a supplemental decree identifying the present perfected rights to the use of the mainstream water in each State, including the rights of the Colorado River Indian Tribes, Fort Mojave Indian Tribe, Chemehuevi Indian Tribe, Cocopah Indian Tribe,

and Fort Yuma (Quechan) Indian Tribe. *Arizona v. California*, 439 U.S. 419, 428 (1979). The five tribes intervened in the action and together with the United States alleged that certain practicably irrigable acreage was “omitted” in the 1964 Arizona Decree and from the calculation of their water rights in the supplemental decree.

113. Despite assurances from the Supreme Court that it would retain jurisdiction for purposes of modifying the 1964 Arizona Decree, the Court declined to entertain the claims for the “omitted” acreage because “[r]ecalculating the amount of practicably irrigable acreage runs directly counter to the strong interest in finality” *Arizona v. California* (“*Arizona II*”), 460 U.S. 605, 620 (1983). “Finality” is just another way to describe the Court’s “strong interest in” *reliance* on those waters by State interests.

114. In *Arizona II*, the Court recognized that:

If there is no surplus of water in the Colorado River, an increase in federal reserved water rights will require a “gallon-for-gallon reduction in the amount of water available for water-needy state and private appropriators.” [*United States v. New Mexico*, 438 U.S. 696, 699 (1978)]. As Special Master Tuttle recognized, “not a great deal of evidence is really needed to convince anyone that western states would rely upon water adjudications.” [Report of Special Master Tuttle (Feb. 22, 1982)] at 46. Not only did the Metropolitan Water District in California and the Central Arizona Project predicate their plans on the basis of the 1964 allocations, but, due to the high priority of Indian water claims, an enlargement of the

Tribes' allocation cannot help but exacerbate potential water shortage problems for these projects and their States.

Id. at 621. The same is true if Federal Defendants comply with their obligation to provide a water supply from the Colorado River to make the Nation's trust lands in Arizona productive. Federal Defendants have failed to meet their trust obligations to make the Navajo Nation's lands productive out of deference to other interests to whom they owe no such duty.

115. The Arizona Water Settlements Act, Pub. L. No. 108-451, 118 Stat. 3478 (2004) ("AWSA"), while settling some Indian water rights claims also resolved litigation over repayment of CAP construction costs between the Department and Intervenor-Defendant Central Arizona Water Conservation District ("CAWCD"), the entity that operates CAP. In AWSA, Congress directed the Secretary to reallocate 67,300 acre-feet of non-Indian agricultural ("NIA") priority CAP water for future Indian tribal water rights settlements. *Id.* §§ 104(a)(1)(A)(iii) and (a)(1)(B)(i). In settling its financial dispute with CAWCD, however, the Department agreed to relinquish its statutory authority—an authority it had freely exercised prior to enactment of AWSA—to make contracts directly with Indian tribes to meet their water supply needs from the reallocated NIA supply. *Id.* § 104(a)(1)(B); *see also* ¶ 82, *supra* (addressing that authority).

116. The Department also agreed to the reallocation of CAP NIA supplies that they conceded before Congress were inadequate to address the unquantified

claims of Indian tribes in the Lower Basin. The testimony presented by the Department's Assistant Secretary for Water and Science was as follows:

Senator MURKOWSKI. So under this settlement agreement there is going to be approximately 67,300 acre-feet of CAP water available for these future Indian water rights settlements. Is this going to be sufficient water to settle those claims that you have just identified?

Mr. RALEY. Senator, I believe that if you aggregate the claims in existence now, it is about 3.3 million acre-feet. If you subtract the claims that would be addressed within this legislation, it leaves the claims outstanding at something like 1.7 million acre-feet. Suffice it the [*sic*] say that, just to make a point, even if the entire Central Arizona Project were dedicated to those claims, which is not being contemplated by anyone, that would not provide adequate water by itself.

We believe that resolution of these future claims, first of all, would not be precluded by this existing legislation, this proposal, and that it is obvious that for settlement of those other claims water from other than CAP sources would have to be included. Otherwise it is simply impossible to even enter into the ball park of what those claims are. And the quantities and sources are something that would have to be addressed in claim-specific negotiations.

To Provide for Adjustments to the Central Arizona Project in Arizona, to Authorize the Gila River Indian Community Water Rights Settlement, to Authorize and Amend the Southern Arizona Water Rights Settlement

Act of 1982, and for Other Purposes: J. Hearing on S. 437 Before the Subcomm. on Water and Power of the S. Comm. on Energy and Nat. Res. and the Comm. on Indian Affairs, 108th Cong. 16-17 (2003) (statement of Bennett W. Raley, Assistant Sec'y, Water and Science, Dep't. of the Interior) (Doc. 250-6).

117. The Federal Defendants' management decisions on the mainstream of the Colorado River that induce water users to "predicate their plans" in reliance on such decisions harm the Navajo Nation and its trust resources by making it less likely that a court would subsequently "exacerbate potential water shortage problems for [existing] projects and their States." *Arizona v. California*, 460 U.S. at 621. The ability of Indian tribes to secure water to meet their needs from water supplies relied upon by others—even when those uses were developed with knowledge of tribal water rights claims to those waters and the cloud those claims place on those uses—has proven to be virtually impossible.

118. The Arizona experience further demonstrates both the perceived harm and the resulting injury that occur when an entity lacking entitlement to water puts water to use and becomes reliant on those supplies. In 1952, Arizona sued California alleging that the award of contracts for Colorado River water to California in excess of 4.4 million acre-feet per year would cause Arizona harm. *See* ¶ 50, *supra*. Although the Secretary was authorized under the Boulder Canyon Project Act to contract with Arizona for 2.8 million acre-feet per year of Lower Basin Colorado River water, Arizona was unable to use this water and was concerned that should California become reliant on supplies in excess of its 4.4 million acre-feet per year allocation, Arizona would be

unable to recover such waters, despite its rights under the Act. The 1964 Arizona Decree confirmed the rights of the respective states under the Boulder Canyon Project Act, however, Arizona has been attempting to claw back its full allocation ever since. In addition, while Arizona won its court battle to confirm its right to use 2.8 million acre-feet per year from the mainstream of the Colorado River in the Lower Basin, ultimately California, with its unequalled political might in Congress, required Arizona to subordinate the majority of its water rights to secure funding for the CAP—the only way Arizona could put its mainstream water to use to benefit its population centers distant from the River. *See Colorado River Basin Project Act, 43 U.S.C. § 1521(b).*

119. The Federal Defendants' actions that foster reliance on unquantified or unused tribal water rights, or water required to meet a tribe's needs, create an incentive for parties who have put that water to use with the encouragement of the Federal Defendants to use their political influence to prevent tribes from securing water to meet their needs.

120. The right to use water is a usufruct, and water not put to beneficial use may lawfully be used by others. However, when the Federal Defendants induce reliance on such supplies through management practices such as those complained of herein, and an Indian tribe subsequently seeks to secure some part of that water supply to meet its needs, neither the United States, Congress, nor any court are likely to require water users to abandon beneficial uses to which that water is being put.

121. In conclusion, as one Arizona commentator has observed: "Many non-Indian appropriators are strongly opposed to the idea of having to pay for water that they

have used freely for generations” and “would prefer to use political clout in Congress” to prevent the tribes from gaining access to those water supplies. John B. Weldon, Jr., *Non-Indian Users’ Goals: More Is Better, All Is Best*, in *INDIAN WATER IN THE NEW WEST* 79, 83 (Thomas R McGuire, William B Lord, & Mary G Wallace eds., 1993) (DOC. 283-4).

V. CAUSE OF ACTION

Breach of Trust

122. Paragraphs 1-121 are incorporated herein by reference.

123. In the 1849 Peace Treaty, the United States undertook an enforceable duty of protection to the Navajo Nation. Pursuant to the 1868 Treaty establishing the Navajo Reservation, the United States holds the Nation’s lands and waters in trust for the benefit of the Navajo Nation. As promised in the treaties, the United States owes to the Navajo Nation all the obligations of a fiduciary, including a duty of loyalty, and a duty to preserve, protect, and make productive the Nation’s lands.

124. The Navajo Nation requires water in order to make Navajo trust lands productive and to fulfill the purpose of the Navajo Reservation as a permanent homeland for the Navajo people.

125. The Federal Defendants owe fiduciary duties to the Navajo Nation as trustees of the Nation’s lands. The trust obligation of the United States to Indian tribes has its origins in the course of dealings between the United States and the sovereign tribal governments occupying the North American continent before the arrival of the British and other European colonists, and is enshrined in the Indian Commerce clause of the United

States Constitution. U.S. CONST. art. I, § 8, cl. 3. The common law duties of trust owed by the United States are independent of duties imposed by statutes subsequently enacted by Congress, and are legally enforceable.

126. In both the 1849 Peace Treaty, in which the United States took the Navajo Nation under its jurisdiction and protection and promised to establish a reservation for the Nation, and the 1868 Treaty setting aside the original Navajo Reservation, the United States undertook specific obligations to protect Navajo people and their resources from depredations. The United States holds Navajo lands in trust and is bound by the common law duties of a trustee to determine the extent of the trust res, to protect the trust corpus, and to make the trust assets productive.

127. The United States Congress has enacted numerous statutes for the benefit of Indian tribes, charging the Federal Defendants with providing for their welfare, and imposing duties on the Federal Defendants to protect trust assets, as set forth in ¶¶ 24-33, *supra*. The Executive has issued regulations, executive orders, secretarial orders, policies, handbooks, manuals, and other directives that implement federal statutes, including NEPA. *See* ¶¶ 33-37, *supra*. The Federal Defendants are required to comply with duties and obligations to Indian tribes imposed therein, or made enforceable by incorporation in Federal Defendants' decisions.

128. The Federal Defendants have breached the duty of protection expressly undertaken in the treaties between the United States and the Navajo Nation by failing to determine the extent to which the Navajo Nation requires water in addition to that available from the

Little Colorado River in order to make its Arizona lands productive and capable of serving their intended purpose as a permanent homeland for the Navajo people. The only way for the Federal Defendants to adequately protect the land held in trust by the United States for the benefit of the Navajo Nation is for the Federal Defendants to (1) consult with the Navajo Nation; (2) determine the amount of water that the Navajo Nation requires from sources other than the Little Colorado River to meet the needs of the Nation and its members; and (3) develop a plan to secure that water.

129. Further, the Federal Defendants have breached the United States' fiduciary obligation to the Navajo Nation by taking administrative actions to manage the waters of the Lower Basin of the Colorado River without engaging in the required analysis of the impacts of those actions on the Nation's trust assets and, if mandated by that analysis, taking action to protect and preserve the Navajo Nation's trust resources.

130. The management decisions made by the Federal Defendants have breached the fiduciary obligations of the United States to the Navajo Nation by elevating the interests of the United States and other entities, including the Intervenor-Defendants, over the interests of the Navajo Nation. The management decisions challenged herein as breaches of the fiduciary duty of the Federal Defendants encourage reliance on the limited water supplies of the Colorado River, thereby impairing the ability of the United States to secure the water needed to make the Navajo Reservation a permanent homeland and causing the Nation harm.

FIRST PRAYER FOR RELIEF

Plaintiff, the Navajo Nation, respectfully requests that the Court declare that the obligations undertaken by the United States through its course of dealings with Indian tribes, in the 1849 Peace Treaty and the 1868 Treaty between the United States and the Navajo Nation, and in statutes, regulations, executive orders, regulations, and policies enacted or promulgated for the protection and benefit of Indian tribes, and those recognized by common law, require the Federal Defendants, in consultation with the Navajo Nation, to (1) determine the extent to which the Nation requires water from sources other than the Little Colorado River to enable its Reservation in Arizona to serve as a permanent homeland for the Navajo Nation and its members; (2) develop a plan to secure the needed water; and (3) utilize their authorities, including those related to the management of the Colorado River, in a manner that does not interfere with the plan to secure the water needed by the Navajo Nation.

SECOND PRAYER FOR RELIEF

Plaintiff, the Navajo Nation, respectfully requests the Court to issue an Order:

(a) Enjoining further breaches of the 1849 Peace Treaty, the 1868 Treaty, and the United States' trust responsibility; and

(b) Requiring the Federal Defendants, in consultation with the Navajo Nation:

(1) to determine the extent to which the Navajo Nation requires water from sources other than the Little Colorado River to enable its Reservation to

serve as a permanent homeland for the Navajo Nation and its members;

(2) to develop a plan to secure the water needed;

(3) to exercise their authorities, including those for the management of the Colorado River, in a manner that does not interfere with the plan to secure the water needed by the Navajo Nation; and

(4) to require the Federal Defendants to analyze their actions in adopting the Shortage and Surplus Guidelines, and other management decisions identified herein, in the light of any plan to secure the water from the Colorado River and adopt appropriate mitigation measures to offset any adverse effects from those actions; or provide such other relief as the Court deems appropriate.

Respectfully submitted this 10th day of January 2019.

By: /s/ *Alice E. Walker*
 Alice E. Walker
 Alice E. Walker, Pro Hac Vice
 MEYER, WALKER, CONDON &
 WALKER, P.C.

M. Kathryn Hoover, SBA 013266
Stanley M. Pollack, SBA 011046
NAVAJO NATION DEPARTMENT
OF JUSTICE
Attorneys for the Navajo Nation