TABLE OF CONTENTS

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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.

No. 19-17088

D.C. No.
3:03-cv-00507-GMS

ORDER AND
AMENDED
OPINION

App. 2

Appeal from the United States District Court
for the District of Arizona
G. Murray Snow, Chief District Judge, Presiding

Argued and Submitted October 16, 2020
Pasadena, California

Filed April 28, 2021
Amended February 17, 2022

Before: Ronald M. Gould, Marsha S. Berzon, and
Kenneth K. Lee, Circuit Judges.

Order;
Opinion by Judge Gould;
Concurrence by Judge Lee

COUNSEL

M. Kathryn Hoover (argued), Sacks Tierney P.A., Scotsdale, Arizona; Stanley M. Pollack, Navajo Nation Department of Justice, Window Rock, Arizona; Alice E. Walker and Gregg H. DeBie, Meyer Walker Condon & Walker P.C., Boulder, Colorado; for Plaintiff-Appellant.

John L. Smeltzer (argued), Mary Gabrielle Sprague, and Thomas Snodgrass, Attorneys; Todd Kim, Assistant Attorney General; Environment and Natural Resources Division, United States Department of Justice, Washington, D.C.; Robert Snow and Sarah Foley, Attorneys, Solicitor's Office, United States Department of the Interior, Washington, D.C.; for Defendants-Appellees.

Rita P. Maguire (argued), Rita P. Maguire PLLC, Phoenix, Arizona; Steven B. Abbott, Redwine and Sherrill LLP, Riverside, California; Kenneth C. Slowinski and Jennifer Heim, Arizona Department of Water Resources,

Phoenix, Arizona; Marcia Scully and Catherine M. Stites, Metropolitan Water District of Southern California, Los Angeles, California; Charles T. DuMars, Law & Resource Planning Associates P.C., Albuquerque, New Mexico; John B. Weldon Jr. and Lisa M. McKnight, Salmon Lewis & Weldon P.L.C., Phoenix, Arizona; Stuart L. Somach and Robert B. Hoffman, Somach Simmons & Dunn APC, Sacramento, California; Jay M. Johnson, Central Arizona Water Conservation District, Phoenix, Arizona; Aaron Ford, Attorney General; Christine Guerci-Nyhus, Special Counsel to the Colorado River Commission of Nevada; State of Nevada and Colorado River Commission of Nevada, Las Vegas, Nevada; Gregory J. Walch, General Counsel, Southern Nevada Water Authority, Las Vegas, Nevada; Lauren J. Caster and Bradley J. Pew, Fennemore Craig P.C., Phoenix, Arizona; Philip J. Weiser, Attorney General; A. Lain Leoniak, First Assistant Attorney General; Office of the Attorney General, Denver, Colorado; for Intervenor-Defendants-Appellees.

Monte Tyler Mills, Associate Professor and Director, Margery Hunter Brown Indian Law Clinic, Alexander Blewett III School of Law, University of Montana, Missoula, Montana, for Amici Curiae Law Professors.

David L. Gover, Joe M. Tenorio, and Matthew Campbell, Native American Rights Fund, Boulder, Colorado; Daniel D. Lewerenz, Native American Rights Fund, Washington, D.C.; Derrick Beetso, National Congress of American Indians, Washington, D.C.; for Amicus Curiae NCAI Fund.

ORDER

The opinion in the above-captioned matter filed on April 28, 2021, and published at 996 F.3d 623, is amended as follows:

At 996 F.3d at 629, delete <The BCPA also authorized construction of the Central Arizona Project (CAP), which consists of an extensive canal system that diverts water from Lake Havasu to municipalities, irrigation districts, and Indian tribes in central Arizona. *See* 43 U.S.C. § 1521.>

At 996 F.3d at 641, replace <The BCPA requires the United States and all Colorado River users to "observe and be subject to and controlled by" the 1922 Compact, which apportioned the Colorado River's waters among the Lower Basin states.> with <The BCPA, which requires the United States and all Colorado River users to "observe and be subject to and controlled by" the 1922 Compact, apportioned the Colorado River's waters among the Lower Basin states.>

The panel has voted to deny Intervenor-Appellees' petition for rehearing en banc (Dkt. 61), and to deny Defendant-Appellees' petition for 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.

OPINION

GOULD, Circuit Judge:

In 2003, the Navajo Nation (the Nation) sued the Department of the Interior (Interior), the Secretary of the Interior (the Secretary), the Bureau of Reclamation, and the Bureau of Indian Affairs (collectively, the Federal Appellees), bringing claims under the National Environmental Policy Act (NEPA) and a breach of trust claim for failure to consider the Nation's as-yet-undetermined water rights in managing the Colorado River. Several parties, including Arizona, Nevada, and various state water, irrigation, and agricultural districts and authorities (collectively, the Intervenors), intervened to protect their interests in the Colorado's waters. In a prior appeal, we held that while the Nation lacked Article III standing to bring its NEPA claims, its breach of trust claim was not barred by sovereign immunity, and we remanded to the district court. *Navajo Nation v. Dep't of Interior* (*Navajo I*), 876 F.3d 1144, 1174 (9th Cir. 2017). After re-considering the breach of trust claim, the district court dismissed the Nation's complaint because of its view that any attempt to amend the complaint was futile. The district court held that it lacked jurisdiction to decide the claim because the Supreme Court reserved jurisdiction over allocation of rights to the Colorado River in *Arizona v. California* (*Arizona I*), 373 U.S. 546 (1963) (opinion); *accord Arizona v. California* (*1964 Decree*), 376 U.S. 340, 353 (1964) (decree). The district court also held that the Nation did not identify a specific treaty, statute, or regulation that imposed an enforceable trust

duty on the federal government that could be vindicated in federal court. The Nation appealed.

We conclude that the district court erred in dismissing the complaint because, in contrast to the district court's determination, the amendment was not futile. Although the Supreme Court retained original jurisdiction over water rights claims to the Colorado River in *Arizona I*, the Nation's complaint does not seek a judicial quantification of rights to the River, so we need not decide whether the Supreme Court's retained jurisdiction is exclusive. And contrary to the Intervenors' arguments on appeal, the Nation's claim is not barred by *res judicata*, despite the federal government's representation of the Nation in *Arizona I*. Finally, the district court erred in denying the Nation's motion to amend and in dismissing the Nation's complaint, because the complaint properly stated a breach of trust claim premised on the Nation's treaties with the United States and the Nation's federally reserved *Winters* rights, especially when considered along with the Federal Appellees' pervasive control over the Colorado River. We remand to the district court with instructions to permit the Nation to amend its complaint.

I

The Nation is a federally recognized Indian tribe that has signed two treaties with the United States. In ratifying the first treaty in 1849, the United States placed the Navajo people "under the exclusive

jurisdiction and protection of the . . . United States," providing "that they are now, and will forever remain, under the aforesaid jurisdiction and protection." Treaty with the Navaho, 1849 art. I (Sep. 9, 1849), 9 Stat. 974. The Navajo Reservation (the "Reservation") was established as the "permanent home" of the Nation by the 1868 Treaty between the United States of America and the Navajo Tribe of Indians, 1868 art. XIII (June 1, 1868), 15 Stat. 667 (1868 Treaty). The Reservation was later expanded by executive orders and acts of Congress.

The Reservation sprawls across Arizona, New Mexico, and Utah, and lies almost entirely within the drainage basin of the Colorado River. The Colorado River flows along and defines a significant part of the Reservation's western border. Because much of the land in the Colorado River drainage basin is arid, competition for water from the Colorado River and its tributaries is fierce.

To resolve disputes arising from water scarcity, rights to the Colorado River's waters are allocated through a series of federal treaties, statutes, regulations, and common law rulings; Supreme Court decrees; and interstate compacts. Collectively, this legal regime is known as the "Law of the River."

A

The Law of the River begins with the 1922 Colorado River Compact (1922 Compact), which split the Colorado River water equally between two groups of

states: the "Upper Basin" states, consisting of Colorado, New Mexico, Utah, and Wyoming, and the "Lower Basin" states: Arizona, California, and Nevada. 1922 Compact art. II, *reprinted in* 70 Cong. Rec. 324 (Dec. 10, 1928). Each group collectively received 7.5 million acre-feet per year (mafy) of water. *Id*. art. III. The 1922 Compact did not, however, apportion the 7.5 mafy *among* the individual states in either the Upper or Lower Basin. *See id*. art. VIII. Nor did it "affect[] the obligations of the United States of America to Indian tribes." *Id*. art. VII.

Six years later, Congress conditionally approved the 1922 Compact through the Boulder Canyon Project Act (BCPA). 43 U.S.C. § 617 *et seq*. The BCPA allowed Interior to construct the Hoover Dam and a reservoir at Lake Mead. *See id*. § 617. It empowered the Secretary to contract for the storage and delivery of water in Lake Mead. *See id*. Finally, it authorized the Lower Basin States to negotiate a second compact dividing their 7.5 mafy share: 4.4 mafy to California, 2.8 to Arizona, and 0.3 to Nevada. *See* 43 U.S.C. § 617c(a).

The 1922 Compact—including the second compact apportionment—was to take effect once all three Lower Basin states ratified it. *See id*. But Arizona, displeased with the Compact's terms, failed to ratify it. So the issue of how to share the Lower Basin States'

apportionment went unresolved. *See Arizona I*, 373 U.S. at 561-62. Nonetheless, because six of the seven Basin states ratified the BCPA, the Secretary began contracting for water with the Lower Basin states.[1] *Id*. at 562.

In 1952, still dissatisfied with its allotment, Arizona sued California in the Supreme Court, invoking the Court's original jurisdiction. *Id*. at 550-51. Nevada and other Basin States intervened, as did the United States. *Id*. at 551.

In proceedings before a Special Master, the United States asserted claims to various water sources in the Colorado River Basin on behalf of twenty-five tribes. But the United States only asserted claims to the Colorado River *mainstream* on behalf of five tribes, and the Nation was not among them. Instead, the United States at that time limited the Nation's claim to the Little Colorado River, one of the tributaries in the Colorado River system. *Navajo I*, 876 F.3d at 1156 n.13. The Nation, along with other tribes, sought the appointment of a Special Assistant Attorney General to represent their interests, but their request was denied. The Nation also sought to intervene in proceedings before the Special Master, but its motion to intervene was denied at the United States' urging. *See* Response of the United States to the Motion on Behalf of the

---

[1] The BCPA lowered the 1922 Compact's ratification threshold: six states would suffice for ratification as long as California was among them and committed to a ceiling on its apportionment. *See* 43 U.S.C. § 617c(a).

Navajo Tribe of Indians for Leave to Intervene, *Arizona I*, 373 U.S. 546 (No. 8, Original).

The Supreme Court issued its decree in 1964. *See 1964 Decree*, 376 U.S. 340. The Court excluded the Little Colorado River—and therefore the Nation's claim—from the adjudication, along with other tributaries in the river system. *See id*. art. VIII(B), 376 U.S. at 352-53. It also affirmed the apportionment of the first 7.5 mafy among the Lower Basin States as specified in the BCPA and the accompanying second compact. *Id*. art. II(B), 376 U.S. at 341-42. The Decree stated that in years where there is less than 7.5 million acre-feet available in the Lower Basin, Interior must first "provide[ ] for satisfaction of present perfected rights in the order of their priority dates without regard to state lines." *Id*. art. II(B)(3), 376 U.S. at 342. Then, "after consultation with the parties to major delivery contracts and such representatives as the respective States may designate, [the Secretary] may apportion the amount remaining available for consumptive use in such manner as is consistent with" the BCPA, the 1964 Decree, and other applicable federal statutes. *Id*.

The 1964 Decree also determined the *Winters* rights of the five tribes for whom the federal government asserted federally reserved rights. *See id*. at 344-45. Under the *Winters* doctrine, "when the Federal Government withdraws its land from the public domain" for the purpose of establishing an Indian reservation, "the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation."

Cappaert v. United States, 426 U.S. 128, 138 (1976); *see Winters v. United States*, 207 U.S. 564, 576 (1908).

Water is essential to life on earth, *see* Sandra Alters, *Biology: Understanding Life* 39 (3d ed. 2000), and it is particularly essential for healthy human societies.[2] Further, beyond the general import of water for societies, in the specific case of the Navajo Nation, news reports have indicated that the Nation's shortage of water have in part caused exacerbation of the risks from COVID-19. Many homes on the Reservation lack running water, making it difficult for tribal members to wash their hands regularly. *See* Ian Lovett et. al, *Covid-19 Stalks Large Families in Rural America*, Wall St. J. (June 7, 2020), https://www.wsj.com/articles/covid-19-households-spread-coronavirus-families-navajo-california-second-wave-11591553896. The Nation has as a result been particularly affected by the current

[2] It is by no accident that many of the world's ancient civilizations were born in places such as the Tigris-Euphrates delta, and the valleys of the Nile, Indus, and Yellow Rivers. Pierre-Louis Viollet, *Water Engineering in Ancient Civilizations* 9 (Forrest M. Holly trans., 2017). The engineers of classical Rome built a vast network of aqueducts that, at its peak, spanned over 250 miles in length. During the Last Gothic War, King Vitiges led an army of Ostrogoths to the gates of Rome itself. The invaders encircled the city and blocked off the aqueducts, keenly aware that the Romans could not survive a prolonged siege without access to water. *See* Peter J. Aicher, *Guide to the Aqueducts of Ancient Rome* 6 (1995). In more recent times, Israel, faced with a paucity of water, has developed techniques for managing wastewater and pioneered desalinization techniques. In 2011, Israel desalinated 296 million cubic meters (MCM) of water out of sea water, and forty-five MCM out of brackish water. *Water Policy in Israel* 5 (Nir Becker ed., 2013).

pandemic, with a death rate significantly higher than that of many other parts of the country. *See id.*[3]

In *Winters*, the United States, acting as trustee of the Fort Belknap Tribe, sought to enjoin upstream diversions on Montana's Milk River from interfering with the Fort Belknap Reservation's downstream diversions. *See Winters*, 207 U.S. at 565. Although the 1888 treaty that established the Reservation made no express provision for tribal water rights to the Milk River, the United States maintained that the water had been impliedly reserved to fulfill the purpose of the reservation as a "permanent home and abiding place" for the Fort Belknap Tribe. *Id*. The Court agreed, noting that the Reservation lands "were arid, and, without irrigation, were practically valueless." *Id*. at 576. The Court applied the Indian canons of construction, under which ambiguities in agreements and treaties with tribes "will be resolved from the standpoint of the Indians," and held that the Tribe was entitled to federally reserved rights to the Milk River. *Id*.; *see id.* at 576-77.

Winters set a "solid foundation" for later decisions that reaffirmed the scope of Indian reserved water rights. Robert T. Anderson, *Indian Water Rights and*

---

[3] The vast majority of deaths on the Reservation due to COVID-19 are among people aged sixty and older, including the hataałii, traditional medicine men and women entrusted with preserving the Nation's cultural heritage. Jack Healy, *Tribal Elders Are Dying From the Pandemic, Causing a Cultural Crisis for American Indians*, N.Y. Times (Jan. 12, 2021), https://www.nytimes.com/2021/01/12/us/tribal-elders-native-americans-coronavirus.html.

the Federal Trust Responsibility, 46 Nat. Res. J. 399, 414 (2006). Subsequent decisions have established that these rights are determined by federal, not state law. *See* 1 Cohen's Handbook of Federal Indian Law § 19.03 (Nell Jessup Newton ed., 2019) (Cohen's Handbook). Moreover, tribal water rights may trump water rights of state users, even when those users have been drawing from the water source for a longer time. *See id*.

In awarding five tribes federally reserved water rights, the *Arizona* Court reaffirmed the *Winters* doctrine, noting that "most of the [reservation] lands were of the desert kind—hot, scorching sands—and . . . water from the [Colorado] river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised." *Arizona I*, 373 U.S. at 599. These five tribes received rights to water commensurate with the "practically irrigable acreage" within each tribe's reservation. *Id*. at 600; *see 1964 Decree* art. II(D), 376 U.S. at 343-45. However, the Supreme Court declined to adjudicate the claims of the twenty other tribes for whom the United States asserted claims—including the Nation's. *Arizona I*, 373 U.S. at 595 ("While the [Special] Master passed upon some of these claims, he declined to reach others, particularly those relating to tributaries. We approve his decision as to which claims required adjudication. . . .").

B

Federal Appellees, through Interior and its Secretary, exercise pervasive control over the Colorado River pursuant to the BCPA, the 1964 Decree, and other components of the Law of the River. *See id*. at 593. The Secretary has discretion to apportion shortfalls in years of shortage, *see id*. at 593-94, and also has the authority to determine whether there is a surplus or shortage of water each year, *see 1964 Decree*, art. II(B)(2)-(3), 376 U.S. at 342.

In 1968, Congress enacted the Colorado River Basin Project Act (the "Basin Act"), which requires Interior to manage Lake Mead, Lake Powell, and related facilities in coordination and under long-range operating criteria. 43 U.S.C. § 1552(a). Each year, Interior must determine whether there will be enough water to satisfy the 7.5 mafy budgeted among the Lower Basin states, and whether and how much "surplus" water will be available. *See* 73 Fed. Reg. 19,873, 19,875 (Apr. 11, 2008). In 2001 and 2007, Interior adopted "surplus" and "shortage" guidelines to clarify how it determines whether a particular year was a "shortage" or "surplus" year. *See* 66 Fed. Reg. 7772 (Jan. 25, 2001); 73 Fed. Reg. 19,873 (Apr. 11, 2008).

Before adopting the shortage guidelines, the Secretary published a draft environmental impact statement (EIS) discussing Indian Trust Assets, which are defined as legal interests in assets held in trust by the federal government for federally recognized tribes. *See Final Environmental Impact Statement, Colorado*

River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead (*Shortage Guidelines FEIS*) 3-87 (Oct. 2007). The EIS acknowledges that under the *Winters* doctrine, the federal government impliedly "reserved water in an amount necessary to fulfill the purposes of an Indian reservation" for the Navajo Reservation. *Id*. at 3-96. The EIS also states that while "[t]he existence of a federally reserved right for the Navajo Nation to mainstream Colorado River has not been judicially determined at this time[, u]nquantified water rights of the Navajo Nation are considered an [Indian Trust Asset]." *Id*.

II

The Nation filed a complaint against Federal Appellees under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, challenging the 2001 Surplus Guidelines. *Navajo I*, 876 F.3d at 1159. The Nation alleged that Federal Appellees violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, and breached its trust obligations based on the Federal Appellees' management of the Colorado River without considering or meeting the Nation's unquantified federal reserved water rights and unmet water needs, *Navajo I*, 876 F.3d at 1159. Several parties—Arizona, Nevada, and various state water, irrigation, and agricultural districts and authorities (collectively, "Intervenors")—intervened to protect their interests in the Colorado's waters. *Id*. The district court dismissed the complaint, holding that the Nation lacked standing

to bring its NEPA claims and that its breach of trust claim was barred by sovereign immunity.

On appeal, we agreed with the district court that the Nation lacked standing to bring its NEPA claims but reversed and remanded on the breach of trust claim. *Id.* at 1174. We held that the waiver of sovereign immunity in § 702 of the APA "applie[d] squarely to the Nation's breach of trust claim." *Id*. at 1173. Because the breach of trust claim was not barred by sovereign immunity, we instructed the district court to fully consider the claim on its merits, "after entertaining any request to amend the claim more fully to flesh it out." *Id*.

On remand, the Nation twice moved for leave to file an amended complaint. The Proposed Third Amended Complaint (TAC) alleged that the Federal Appellees have failed to (1) "determine the quantities and sources of water required to make the Navajo Nation a permanent homeland for the Navajo People," and (2) "protect the sovereign interests of the Navajo Nation by securing an adequate water supply to meet those homeland purposes." The Intervenors opposed both motions to amend, arguing that because the United States could have asserted the Nation's claim to the mainstream of the Colorado River in the *Arizona v. California* litigation and the rights to the River were fully adjudicated in that action, the Nation's claim was barred by *res judicata*.

The district court denied both motions to amend and dismissed the Nation's complaint with prejudice.

The district court held that although a general trust relationship exists between the United States and the tribes, the Nation failed to identify a specific trust-creating statute, regulation, or other form of positive law that the federal government violated. And though the Nation argued that such a specific trust obligation is created under the *Winters* doctrine, the district court held that a determination of whether *Winters* rights attached to the mainstream of the Colorado River was jurisdictionally barred by the Supreme Court's reservation of jurisdiction in *Arizona v. California*. We conclude that the Nation's claim does not implicate the Court's reservation of jurisdiction, and that it therefore was error for the district court not to grapple with the scope of *Winters* rights available to the Nation in connection with its current requests.

The district court further reasoned that even if it could decide the breach of trust claim, *Winters* rights alone do not give rise to specific and enforceable trust duties on the federal government. The district court also held that none of the treaties, statutes, and regulations that the Nation cited in support of its trust claim were "specific . . . trust-creating statute[s] or regulation[s] that the Government violated." Finally, the district court held that the Nation could not allege a common law cause of action for breach of trust that is "wholly separate from any statutorily granted right."

We disagree with the district court as to the role of *Winters* rights in establishing enforceable trust duties. *Winters* rights are necessarily implied in each treaty in which the government took land from Native

Americans and established reservations that were to be permanent homes for them. That was the case with the Nation's reservation. Federal Appellees have an irreversible and dramatically important trust duty requiring them to ensure adequate water for the health and safety of the Navajo Nation's inhabitants in their permanent home reservation.

Because the district court concluded that the Nation's attempts to amend its complaint were futile, the district court denied the motion to amend and dismissed the complaint. The Nation timely appealed. Although the district court did not decide the *res judicata* issue in dismissing the Nation's complaint, Intervenors assert that *res judicata* defense on appeal.

This appeal presents three issues. First, we determine whether the Nation's breach of trust claim falls within the Supreme Court's reserved jurisdiction in *Arizona v. California*. If it does, we decide whether that jurisdiction is not only reserved, but also *exclusive*. Second, we determine whether the Nation's claim is barred by *res judicata*. Third, we decide whether the Nation could properly state a claim for breach of trust such that amendment was not futile.

III

We review a district court's denial of a motion to amend a complaint for abuse of discretion. *Wheeler v. City of Santa Clara*, 894 F.3d 1046, 1051 (9th Cir. 2018). "A district court's exercise of discretion based on an erroneous interpretation of the law constitutes an

abuse of discretion." *Ahlmeyer v. Nev. Sys. of Higher Educ.*, 555 F.3d 1051, 1055 (9th Cir. 2009). Moreover, "[d]ismissal without leave to amend is improper unless it is clear, upon *de novo* review, that the complaint could not be saved by any amendment." *Polich v. Burlington N., Inc.*, 942 F.2d 1467, 1472 (9th Cir. 1991). Finally, we review a district court's decision to dismiss for lack of subject matter jurisdiction *de novo*. *DaVinci Aircraft, Inc. v. United States*, 926 F.3d 1117, 1122 (9th Cir. 2019).

IV

A

We begin with the jurisdictional question. The district court determined it could not decide the Nation's breach of trust claim because it falls within the Supreme Court's reserved jurisdiction under Article IX of the 1964 Decree. Article IX provides that:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

1964 Decree, art. IX, 376 U.S. at 353. The parties and the district court assumed that this provision reserves the Supreme Court's *exclusive* jurisdiction over—and strips lower courts of jurisdiction to determine—

whether the Nation has water rights to a specific allocation from the mainstream of the Colorado River. But in attempting to avoid Article IX's jurisdictional bar, the Nation represents that it does not seek a judicial determination of its rights to the Colorado. The Nation argues that it merely seeks an injunction ordering the Federal Appellees to investigate the Nation's needs for water, to develop a plan to meet those needs, and to exercise its authority over the management of the Colorado River consistent with that plan. Under this reading of the Nation's claim, the district court only had to consider whether the Nation needs water to fulfill the promise of establishing the Navajo Reservation as a homeland for the Nation's people.

We agree with the Nation's characterization of its claim. A plain reading of the Nation's complaint makes clear that it does not seek a quantification of its rights in the Colorado River. The Nation seeks an injunction "[r]equiring the Federal Appellees . . . (1) to determine the extent to which the Navajo Nation requires water . . . (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 . . . and (4) to require the Federal Appellees to analyze their actions . . . and adopt appropriate mitigation measures to offset any adverse effects from those actions." Granting this scope of relief would not require a judicial quantification of the Nation's rights to water from the River. Nor would it require any modification of the *Arizona* Decree. Furthermore, Article

VIII(C) of the Decree provides that the Decree does not affect "[t]he rights or priorities, except as specific provision is made herein, of any Indian Reservation." *1964 Decree*, 376 U.S. at 353. As discussed *infra*, the Nation's claim is not determined by any specific provision in the 1964 Decree, as none addresses the Navajo Nation's water rights. The Nation's breach of trust claim thus falls outside the scope of the Decree, and our jurisdiction is proper.

Because the Nation does not seek a judicial determination of its rights to the waters of the Colorado River, we need not resolve the scope of the Supreme Court's reserved jurisdiction under Article IX. But we note that the Supreme Court's own interpretation of the Decree does not expressly state whether Article IX's reserved jurisdiction is exclusive. In the sequel to *Arizona I*, the federal government sought to increase the water allotments for the five tribes that were awarded federally reserved water rights in the original litigation, arguing that the earlier calculations of the practicably irrigable acreage within the reservations were inaccurate. *Arizona v. California* (*Arizona II*), 460 U.S. 605, 608 (1983). The Court denied the request, and stated that if not for Article IX, the Court would have been barred by *res judicata* from re-opening the matter. *Id*. at 617-18. The Court explained that Article IX was "mainly a safety net added to retain jurisdiction and to ensure that we had not, by virtue of res judicata, precluded ourselves from adjusting the Decree in light of unforeseeable changes in circumstances." *Id*. at 622. Because the Supreme Court is best positioned to

interpret its own Decree, we defer to the interpretation it laid out in *Arizona II* and understand Article IX primarily as an authorization of jurisdiction, rather than a limitation on it.

Because the Nation neither seeks modification of the Decree nor seeks to relitigate any issues resolved in the *Arizona* cases, *see infra*, however, we need not resolve the scope of the Supreme Court's jurisdiction under Article IX. We have jurisdiction to consider the Nation's claim, and the district court erred in holding otherwise.

B

Having established that we have jurisdiction, we turn to the Intervenors' argument that *res judicata* bars the Nation's claim. Intervenors argue that the Nation's breach of trust claim is barred by *res judicata* because the Nation effectively seeks a judicial determination of its rights to the Colorado River, which is a claim that the federal government could have asserted on the Nation's behalf in *Arizona I*, but did not. We reject the Intervenors' argument because the Nation's claim is not barred by *res judicata*.

In *Nevada v. United States*, 463 U.S. 110 [(1983)], the Supreme Court held that *res judicata* barred the federal government from seeking additional water rights for the Pyramid Lake Tribe beyond the rights the tribe obtained in previous water rights litigation, *id.* at 113, 145. The *Nevada* Court considered "first if the cause of action which the Government now seeks

to assert is the same cause of action that was asserted" in previous litigation, and then "whether the parties in the instant proceeding are identical to or in privity with" the parties in the previous litigation. *Id.* at 130 (internal quotation marks omitted). The Court held that the federal government, in a decades-long adjudication that began in 1913, sought to "assert . . . the Reservation's full water rights." *Id.* at 132. Because *Nevada* involved the same parties "asserting the same reserved right" as that adjudicated by the previous litigation, *id.* at 134, the later claim was barred.

In this case, by contrast, the Nation asserts a different claim than the water rights claim the federal government could have asserted on the Nation's behalf in *Arizona I*. The Nation's claim, properly understood, is an action for breach of trust—not a claim seeking judicial quantification of its water rights. The federal government's fiduciary duty to the Navajo Nation was never at issue in *Arizona v. California*, and no final judgment was ever entered on the merits of any question concerning that subject. *Cf. Nevada*, 463 U.S. at 129-30. As the Decree does not affect "[t]he rights or priorities" of Indian Reservation beyond those specifically enumerated, *1964 Decree*, 376 U.S. at 353, the federal government's fiduciary duty to the Nation remains unaltered by the *Arizona* litigation.

The Nation's breach of trust claim is not barred by *res judicata*.

C

1

Finally, we address whether the Nation's attempts to amend its complaint to plead their substantive breach of trust claim were futile. The Federal Appellees and the Intervenors argue that the district court correctly denied the Nation's motion for leave to amend its complaint, because it could not point to any specific treaty provision, statute, or regulation that imposed a trust obligation on the Federal Appellees. We disagree and hold that the district court should have allowed the Nation to amend its complaint.

This circuit first considered the requirements a tribe must meet to bring a breach of trust action for non-monetary relief in *Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d 569 (9th Cir. 1998). There, the Morongo Tribe challenged a Federal Aviation Administration (FAA) proposal that would have increased air traffic over reservation lands. *Id*. at 572-73. The Tribe sought non-monetary relief under the APA, alleging violations of various statutes and FAA regulations. *Id*. at 572. We held that "unless there is a specific duty that has been placed on the government with respect to Indians, this responsibility is discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." *Id*. at 574.

We addressed this issue again in *Gros Ventre Tribe v. United States*, 469 F.3d 801 (9th Cir. 2006). There, the Gros Ventre Tribe alleged that the federal

government breached its trust obligations "by approving, permitting, and failing to reclaim" two cyanide heap-leach gold mines upriver from the Tribe's reservation. *Id*. at 806. The panel explained that "an Indian tribe cannot force the government to take a specific action *unless a treaty, statute or agreement imposes, expressly or by implication, that duty*." *Id*. at 810 (emphasis added) (quoting *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995)). In holding that the Tribe failed to identify a treaty, statute, or regulation that would create an enforceable trust duty, we observed that the Tribe's treaties with the federal government "at most . . . merely recognize[d] a general or limited trust obligation to protect the Indians against depredations *on Reservation lands*." *Id*. at 812 (emphasis added). Because the Tribe sought an injunction requiring the federal government to "manage resources that exist *off of the Reservation*," we held that no treaty provision imposed an enforceable trust duty that could be vindicated through injunctive relief. *Id*. at 812-13 (emphasis added).

Morongo and *Gros Ventre* establish the governing standard here. Although Federal Appellees rely on another strain of cases concerning the need to identify specific statutory bases for obtaining monetary relief under the Tucker Act, 28 U.S.C. § 1491, those cases are not apposite.

The fiduciary claim in this case is one for injunctive relief under § 702 of the APA. In *United States v. Mitchell* (*Mitchell I*), 445 U.S. 535 (1980), individual members of the Quinault Tribe sued the federal

government through the Tucker Act, 28 U.S.C. § 1491, over alleged mismanagement of timber resources on their allotted reservation lands, 445 U.S. at 537, 539. The timber was managed by the Secretary of Interior under the General Allotment Act (GAA). *Id*. at 537. The Supreme Court rejected the tribal allottees' argument that the GAA imposed enforceable trust duties on the federal government to manage tribal timber resources in a fiduciary capacity. *Id*. at 546. The Court explained that when Congress enacted the GAA, it intended that the federal government hold the land in trust "not because it wished the Government to control use of the land and be subject to money damages for breaches of fiduciary duty, but simply because it wished to prevent alienation of the land and to ensure that allottees would be immune from the state taxation." *Id*. at 544. The Court remanded the case to the Court of Claims to consider whether the federal government could be held liable for breach of trust based on any other statutes. *Id*. at 546.

On remand, the Court of Claims held that the government was subject to suit for money damages based on various statutes and regulations detailing the federal government's responsibilities in managing the tribal timber resources. *United States v. Mitchell* (*Mitchell II*), 463 U.S. 206, 211 (1983). The Supreme Court affirmed, holding that the regulations and statutes created an enforceable trust obligation because they accorded the Secretary a "pervasive role in the sales of timber from Indian lands." *Id*. at 219. The Court observed that a substantive right to sue under

the Tucker Act "must be found in some other source of law, such as 'the Constitution, or any Act of Congress, or any regulation of an executive department.'" *Id*. at 216 (quoting 28 U.S.C. § 1491). "[T]he claimant must demonstrate that the source of substantive law he relies upon 'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.'" *Id*. at 216-17 (quoting *United States v. Testan*, 424 U.S. 392, 400 (1976)).

These Supreme Court decisions concerned suits brought for money damages under the Tucker Act, 28 U.S.C. § 1491, and the Indian Tucker Act, 28 U.S.C. § 1505. But this case involves a claim for injunctive relief brought under § 702 of the APA, so we are not bound by those decisions.

A more recent decision, *United States v. Jicarilla*, 564 U.S. 162 (2011), concerned a breach of trust claim in a discovery context and imported requirements similar to those stated in the Tucker Act and Indian Tucker Act cases. In *Jicarilla*, the Court decided whether the Jicarilla Apache Nation (the "Tribe") could assert the "fiduciary exception" to the attorney-client privilege in a suit against the federal government, *id.* at 165. At first, the Tribe sued the government for breach of trust, seeking monetary damages for alleged mismanagement of tribal funds. *Id.* at 166. Then the parties participated in alternative dispute resolution, wherein the government refused to produce certain documents, claiming the attorney-client privilege. *Id*. So the Tribe moved to compel production of those documents. *Id*. at 167. It asserted the "fiduciary

exception" to the attorney-client privilege, which states that a trustee cannot assert the privilege against a beneficiary after obtaining legal advice on how to execute its fiduciary obligations. *Id*.

The Court held that the Tribe could not compel the federal government to produce privileged documents in discovery based on the fiduciary exception, because it failed to "point to a right conferred by statute or regulation in order to obtain otherwise privileged information from the Government against its wishes." *Id*. at 178. In doing so, the Court observed that it had previously "found that particular 'statutes and regulations . . . clearly establish fiduciary obligations of the Government' in some areas." *Id*. at 177 (ellipsis in original) (quoting *Mitchell II*, 463 U.S. at 226). But the Court also explained that "[o]nce federal law imposes such duties, the common law 'could play a role'" in defining the scope of those duties. *Id*. (quoting *United States v. Navajo Nation*, 556 U.S. 287, 301 (2009)). Again, *Jicarilla* was at bottom a suit for monetary relief. Its ruling must be understood against that background.

2

Federal Appellees contend that under these precedents, the Nation has failed to state a breach of trust claim because it cannot point to any treaty, statute, or regulation that imposes an affirmative trust duty on the federal government to ensure that the Nation has an adequate water supply. We disagree.

Here, the injunctive relief the Nation seeks would not require the federal government to manage off-reservation resources. Instead, the Nation seeks an injunction compelling the Secretary to determine the extent to which the Reservation requires water from sources other than the Little Colorado River to fulfill the Reservation's purpose of establishing a permanent homeland for the Nation. The mainstream of the Colorado River is appurtenant to the Nation and defines a significant segment of the Reservation's western boundary.

Moreover, neither *Morongo* nor *Gros Ventre* nor *Jicarilla* involved claims to vindicate *Winters* rights, which provide the foundation of the Nation's claim here. Unlike the plaintiffs in those cases, the Nation, in pointing to its reserved water rights, has identified specific treaty, statutory, and regulatory provisions that impose fiduciary obligations on Federal Appellees—namely, those provisions of the Nation's various treaties and related statutes and executive orders that establish the Navajo Reservation and, under the long-established *Winters* doctrine, give rise to implied water rights to make the reservation viable.

Under *Winters*, the federal government "reserve[d] appurtenant water then unappropriated to the extent needed to accomplish" the purpose of establishing the Reservation as a permanent homeland for the Navajo people. *Navajo I*, 876 F.3d at 1155 (quoting *Cappaert*, 426 U.S. at 138). In *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), we noted that while "[t]he specific purposes of an Indian reservation . . .

were often unarticulated," "[t]he general purpose, to provide a home for the Indians, is a broad one and must be liberally construed," *id.* at 47. It is clear that the Reservation cannot exist as a viable homeland for the Nation without an adequate water supply. As the Court observed in *Arizona I*:

> Most of the land in [the reservations appurtenant to the Colorado River] is and always has been arid. If the water necessary to sustain life is to be had, it must come from the Colorado River or its tributaries. It can be said without overstatement that when the Indians were put on these reservations they were not considered to be located in the most desirable area of the Nation. It is impossible to believe that when Congress created the great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind—hot, scorching sands—and that water from the river would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.

373 U.S. at 598-99.

We stress that *Winters* rights are long-established and clearly qualify as rights "by implication" under a treaty. *Gros Ventre*, 469 F.3d at 810 (quoting *Shoshone-Bannock*, 56 F.3d at 1482). Those necessarily implied rights are just as important as express ones. It is not our province to modify the Supreme Court's definitive law establishing water rights as contained in treaties

establishing Native American reservations, whether express or not. None of the twists and turns in the responsible federal agencies' and courts' historical treatment of Indian law has brought the *Winters* declaration of necessarily implied water rights into question.

We hold in particular that, under *Winters*, Federal Appellees have a duty to protect the Nation's water supply that arises, in part, from specific provisions in the 1868 Treaty that contemplated farming by the members of the Reservation. The Treaty provides that individual members of the Nation may select plots of land if they "desire to commence farming." 1868 Treaty, art. V. Tribal members who took up farming would be entitled to "seeds and agricultural implements" to help make this transition. *Id*. art. VII. The Treaty's farming-related provisions, which sought to encourage the Nation's transition to an agrarian lifestyle, would have been meaningless unless the Nation had sufficient access to water.[4] Indeed, in *Winters* itself, the Court explained that at the time the Fort Belknap Tribe signed its treaty with the federal government, it was the government's policy to change the Tribe's "habits and wants" to those of "a pastoral and civilized people." *Winters*, 207 U.S. at 576. We do not pass judgment on

[4] In the Nation's first motion for leave to file a third amended complaint, the Nation sought to add, in addition to its breach of fiduciary duty claim, a claim for breach of the 1849 and 1868 Treaties, but later omitted that claim from its renewed motion. On remand, the district court is instructed that the Nation should be permitted to amend its complaint in this respect if it seeks to do so.

the wisdom of such a policy, nor on the merits of particular allegations that may be offered relating to agrarian rights, but it is clear that the *Winters* Court based its holding in large part on the fact that without water, the reservation lands could not support an agrarian lifestyle in accordance with government policy. *See id*. ("The lands were arid, and, without irrigation, were practically valueless.").

That the farming provisions in the 1868 Treaty may serve as the "specific statute" that satisfies *Jicarilla*, *Morongo*, and *Gros Ventre* is consistent with more general principles concerning the interpretation of treaties between the United States and Indian tribes. The Supreme Court has explained: "A treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations." *Washington v. Wash. State Com. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675, *modified sub nom. Washington v. United States*, 444 U.S. 816 (1979) (citing *Lone Wolf v. Hitchcock*, 187 U.S. 553 [(1903)]). We have inferred a promise of water rights into treaties that contained no explicit reservation of those rights. *See*, *e.g.*, *Arizona I*, 373 U.S. at 599; *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1268 (9th Cir. 2017).

We did so in *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), for example, where the Klamath Tribe's treaty with the United States merely preserved the right to "hunt, fish, and gather on their reservation," *Id.* at 1398. We recognized that a main purpose of the treaty was to "secure to the Tribe a continuation of its

traditional hunting and fishing lifestyle." *Id*. at 1409. We reasoned that this purpose would have been defeated unless the Klamath Tribe had the right to enjoy and use water sufficient to ensure an adequate supply of game and fish. *See id*. at 1411. Although the claimed water rights at issue in that case were "essentially nonconsumptive in nature," *id*. at 1418, *Adair* stands for the broader proposition that we may read water rights into a treaty where those rights are necessary to fulfill the treaty's primary purpose. *See United States v. Washington*, 853 F.3d 946, 965 (9th Cir. 2017) ("Thus, even if Governor Stevens had made no explicit promise, we would infer, as in *Winters* and *Adair*, a promise to 'support the purpose' of the Treaties.").

Interior's documents also demonstrate that the Federal Appellees have acknowledged their trust responsibilities to protect the Nation's *Winters* rights. For example, the final EIS relating to Interior's shortage guidelines acknowledges that the federal government impliedly "reserved water in an amount necessary to fulfill the purposes of" the Navajo Reservation. *Shortage Guidelines FEIS*, 3-96. The EIS also states that the Nation's unquantified water rights are considered an Indian Trust Asset, which Interior recognizes as interests that the federal government holds in trust for recognized Indian tribes, and that the federal government must protect. *Id*.

The Nation's breach of trust claim is also strengthened and reinforced by the Secretary's pervasive control over the Colorado River. The BCPA, which requires the United States and all Colorado River users to

"observe and be subject to and controlled by" the 1922 Compact, apportioned the Colorado River's waters among the Lower Basin states. 43 U.S.C. § 617g(a). But within the general allocation of water that the 1922 Compact entails, the Secretary has pervasive authority "both to carry out the allocation of the waters of the main Colorado River among the Lower Basin States and to decide which users within each State would get water." *Arizona I*, 373 U.S. at 580.

In this respect, the Supreme Court's reasoning in *Mitchell II* is pertinent: just as the statutes and regulations in that case gave the Secretary a "pervasive role in the sales of timber from Indian lands," 463 U.S. at 219, so too do the BCPA and other components of the Law of the River confer broad authority upon the Secretary to manage and contract for Colorado River water, *see*, *e.g.*, BCPA, 43 U.S.C. § 617d ("No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated."). This pervasive control over the Colorado River, coupled with the Nation's *Winters* rights, outlines the scope of Federal Appellees' trust duties.

Our holding is consistent with the Supreme Court's decision in *United States v. Navajo Nation*. Although the Court there held that "[t]he Federal Government's liability cannot be premised on control alone," 556 U.S. at 301, the Court also explained that once a plaintiff identifies a specific duty-imposing treaty, statute, or regulation, "*then* trust principles (including any such principles premised on 'control') could play a role in 'inferring that the trust obligation [is]

enforceable by damages.'" *Id*. (quoting *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 473 (2003)). The Nation—which in any case does not here seek money damages—has identified a specific duty-imposing treaty, as we have explained.

To summarize: We hold that the Nation has successfully identified specific treaty, statutory, and regulatory provisions that, taken together, anchor its breach of trust claim. First, we have the implied treaty rights recognized in *Winters*, which in itself gives the Tribe the right to proceed on a breach of trust claim here; second, the 1868 Treaty, which recognizes the Nation's right to farm Reservation lands and, under *Adair*, gives rise to an implied right to the water necessary to do so; third, the BCPA and other statutes that grant the Secretary authority to exercise pervasive control over the Colorado River; and fourth and finally, the Nation has pointed to Interior regulations and documents in which Federal Appellees have undertaken to protect Indian Trust Assets, including the Nation's as-yet-unquantified *Winters* rights.

Having established that a fiduciary duty exists, we hold that common-law sources of the trust doctrine and the control the Secretary exercises over the Colorado River firmly establish the Federal Appellees' duty to protect and preserve the Nation's right to water. Under *Winters*, when the federal government took the Reservation into trust, it "reserve[d] appurtenant water then unappropriated to the extent needed to accomplish" that purpose. *Navajo I*, 876 F.3d at 1155 (quoting *Cappaert*, 426 U.S. at 138). These rights are recognized

as reserved by treaty, applying the canon that in "agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians." *Winters*, 207 U.S. at 576; *see Washington*, 853 F.3d at 965. Though water rights are not expressly stated in the Nation's treaties with the United States, the *Winters* rights that attach to the Reservation are sufficiently well-established to create an implied fiduciary obligation on the Federal Appellees. *See Gros Ventre*, 469 F.3d at 810 (noting that a specific duty can be imposed by "a treaty, statute or agreement . . . expressly or by implication.") (quoting *Shoshone-Bannock*, 56 F.3d at 1482).

We recognize that no court has yet quantified the Nation's *Winters* rights. But the fault for the exceedingly long delay in that respect, if any, lies with Federal Appellees. As trustee, the federal government has the power to not only bring water rights claims on behalf of the tribes, but also to bind them in litigation. *See Nevada*, 463 U.S. at 135. When the Nation tried to intervene in *Arizona v. California*, the federal government opposed the Nation's motion. And in the more than half of a century since the Supreme Court issued its 1964 Decree, the Nation has never had its *Winters* rights adjudicated or quantified by any court.[5] This result is but one example of what a commentator has described as the federal government's failure "to secure, protect, and develop adequate water supplies for many Indian tribes." Cohen's Handbook § 19.06. Indeed, "[i]n

[5] The Nation is actively seeking water from various sources in other litigation. *See generally Navajo I*, 876 F.3d at 1156 n.14.

the history of the United States Government's treatment of Indian tribes, its failure to protect Indian water rights for use on the reservations it set aside for them is one of the sorrier chapters."[6] *Id*. (citing National Water Comm'n, Water Policies for the Future: Final Report to the President and to the Congress of the United States, 474-75 (1973)); *see also* Anderson, *supra*, at 400.

The Supreme Court could not have intended to hamstring the *Winters* doctrine—which has remained good law for more than one hundred years—by preventing tribes from seeking vindication of their water rights by the federal government when the government has failed to discharge its duties as trustee. Such a perverse reading of the Court's precedents would render ineffectual the federal government's promise to "charge[] itself with moral obligations of the highest responsibility and trust," *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942), by ensuring that the tribes of this country can make their reservation lands livable. This principle takes on even more importance in an era in which the COVID-19 pandemic renders reservation lands more dangerous to tribal members—

---

[6] Perhaps recognizing this failure, some members of Congress have proposed legislation that would empower the Administrator of the Environmental Protection Agency to "give priority to projects that respond to emergency situations where a lack of access to clean drinking water threatens the health of Tribal populations" in the Columbia River Basin. S. 421, 117th Cong. § 2 (2021).

particularly when they lack adequate water for health and safety purposes.

The Nation's attempts to amend its complaint were not futile. The Nation can state a cognizable claim for breach of trust because it has identified specific regulations and treaty provisions that can "fairly be interpreted," *Mitchell II*, 463 U.S. at 218, as establishing Federal Appellees' fiduciary obligations to ensure that the Nation's Reservation has the water it needs to exist as a viable homeland for the Navajo people.

At this early stage of litigation, we decline to address whether the Nation's *Winters* rights include rights to the mainstream of the Colorado River or to any other specific water sources. We hold only that the Nation may properly base its breach of trust claim on water rights derived from its treaties with the United States under *Winters*, and so may amend its complaint to so allege.

V

Because the district court's denial of the Nation's motion for leave to amend and subsequent dismissal of the Nation's complaint were based on legal errors, the court abused its discretion. Applying the correct legal principles, we hold that the Nation's attempts to amend its complaint were not futile. We reverse the district court's dismissal of the Nation's complaint and remand to the district court with instructions to permit

amendment to the complaint consistent with this opinion.[7]

REVERSED AND REMANDED.

LEE, Circuit Judge, concurring:

I write separately to emphasize that the Nation's proposed injunctive relief should not and does not implicate the Supreme Court's retained jurisdiction in *Arizona v. California* (*1964 Decree*), 376 U.S. 340, 353 (1964).

When the Supreme Court first adjudicated the rights to the Colorado River, it issued a Decree listing the Indian tribes and other entities holding present perfected rights to the mainstream. *Id.* at 344-46. Article IX of the Decree "retain[ed] jurisdiction . . . for the purpose of any order, direction, or modification of the decree, or any supplementary decree . . . " *Id.* at 353. Since then, there have been several iterations of the *Arizona v. California* litigation, but none has explicitly addressed whether Article IX reserves exclusive jurisdiction for adjudication of rights to the mainstream.

---

[7] As the concurrence recognizes, we need not and do not decide whether the Supreme Court's retained jurisdiction in the 1964 Decree is exclusive. That is because the Nation's claim does not seek a quantification of any rights it may have to the Colorado River mainstream. If, however, Federal Appellees later determine that they cannot meet their trust obligation to provide adequate water for the Nation unless the jurisdictional question is resolved, then they can petition the Supreme Court for modification of the 1964 Decree.

See, *e.g.*, *Arizona v. California* (*Arizona II*), 460 U.S. 605, 622 (1983).

In this case, the Nation seeks additional water for its Reservation, and both the parties and the district court considered whether the Supreme Court's retained jurisdiction applied. But our decision does not answer that question, as the Nation's Proposed Third Amended Complaint ("TAC") does not, on its face, actually seek rights to the mainstream.

The Nation's TAC seeks injunctive relief requiring, in part, that the Federal Defendants "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" and "develop a plan to secure the water needed." The Nation asserts, and our decision affirms, that this proposed injunction does not ask the district court to quantify any rights that the Nation may have to the Colorado River mainstream. This narrow construction of the proposed relief is imperative, as it allows the Nation to pursue its claims without raising the separate and more complex issue of the Supreme Court's retained jurisdiction.

Thus, on remand and in all future proceedings, the TAC's proposed injunctive relief should not be construed as implicitly authorizing a reassessment of the rights to the Colorado River mainstream. In other words, the requested relief that the Federal Defendants develop a plan to meet the Nation's water needs cannot be used as a backdoor attempt to allocate the

rights to the mainstream. If such rights are to be reassessed, that action may be taken only after resolving the jurisdictional question raised by Article IX of the 1964 Decree.

Covid-19 Stalks Large Families in Rural America

WSJ wsj.com/articles/covid-19-households-spread-coronavirus-families-navajo-california-second-wave-11591553896

June 7, 2020

June 7, 2020 2:22 pm ET

By Ian Lovett, Dan Frosch and Paul Overberg

The Woods family did everything together at the house on Paden Road in Gadsden, Ala. They gathered there before going to high-school football games on Friday nights. They ate there after church on Sundays, when the family matriarch, Barbara Woods, would make chicken and dressing for her children and grandchildren.

And this spring, they grew sick there together. For weeks in early April, seven family members staying in the three-bedroom home were stricken by the new coronavirus, several of them recounted. Five ended up in the hospital. Two died.

"I was just wishing that we had extra rooms, so we could have separated," said Ms. Woods, 71, who for years owned a barbecue restaurant in Gadsden, a rural town 60 miles northeast of Birmingham. "It has been devastating."

Communities are reopening after months-long lockdown orders managed to slow the spread of Covid-19 in some places. But the lockdowns have done little to

thwart the virus's transmission within packed households. Outside of institutional settings like assisted-living facilities, large, multigenerational homes have emerged as one of the most dangerous places to be during the outbreak—a weak spot in the country's public health response especially in the event of another wave of infections in the fall, as some experts fear.

A Wall Street Journal analysis found that, across the country, the virus has spread more widely in places with the most crowded households, not necessarily places with the largest or densest populations. Remote, rural hamlets where extended families live under the same roof have turned deadlier than some of the densest blocks of Manhattan or Chicago, the analysis found. In both contexts, the virus has zeroed in on crowded homes, sometimes wiping out generations in a matter of days.

Housing analysts and some government agencies consider a home with more than one resident per room to be crowded. Nationwide—4 million homes, or about 3%—fall into this category, according to census data.

Barbara Woods, center, and her daughters Kyra Porter, left, and Johnjalene Woods all had Covid-19.

Photo: Lynsey Weatherspoon
for The Wall Street Journal

The Journal analyzed all 1,487 U.S. counties with at least 50 Covid-19 cases, as of June 7. The 10% with the highest rates of crowding accounted for 28% of the coronavirus cases among those 1,487 counties, according to census and Johns Hopkins University data.

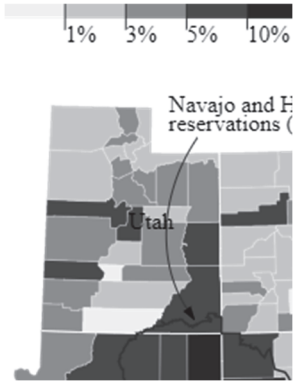
The Journal also found that in selected areas—including Cook County, Ill., New York City and Wayne County, Mich.—ZIP Codes with the largest share of households of at least five people have disproportionate shares of their counties' Covid-19 infections. The problem is particularly acute in poorer and minority communities, according to data from some cities, where

extended families often live together and lack space and resources to isolate anyone who falls ill.

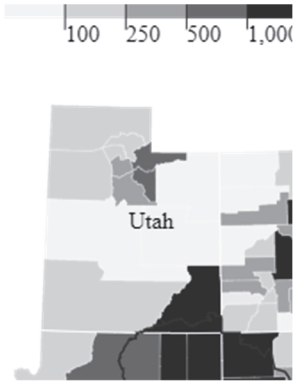
Crowded Homes

Families that live on Indian reservations often live in crowded homes, which the census defines as more than one occupant per room. These areas have also seen some of the highest infection rates in the nation.

Percentage of households that are crowded



Covid-19 cases per 100,000 as of June 5



Sources: U.S. Census Bureau; Johns Hopkins Center for Systems Science and Engineering

As states reopen, stopping transmission of the virus within households will be key to preventing a second wave of infections, said Dr. Ashish Jha, a health-policy professor at the Harvard T.H. Chan School of Public Health.

San Francisco, Kansas and the Navajo Nation in the Southwest are among the places that have encouraged sick people to leave their homes and stay in alternative housing sites and hotels that have been converted into quarantine facilities. Yet, persuading people to do so has been difficult, health workers say, and there is little appetite among public officials to make the sick leave their families.

"I'm 110% opposed to anything forcible on this," said Dr. Jha. But if the U.S. can't find a way to control intra-household infections, he said, "that will lead to more community transmission."

'Big Cough-19'

On the Navajo Nation, where roughly 175,000 people are scattered across a three-state swath of the Southwest, household crowding has contributed to one of the country's worst outbreaks. Some 18% of homes have five or more people and 14% are classified as crowded, among the highest rates in the country, according to census data.

The Navajo Nation's coronavirus death rate was 154 per 100,000 people as of June 5—compared with 123 in New York state, 136 in New Jersey and 33 for the U.S. overall.

Tina Harvey lives with her extended family in a cluster of several small houses in the tiny Navajo village of Tes Nez Iah, Ariz. None of the structures have running water, not uncommon on the reservation, making it difficult to wash hands regularly. Ms. Harvey, a 55- year-old home health-care worker, has watched with horror as "Big Cough-19" or "Invisible Parasite-19," as the coronavirus is known in Navajo, struck family member after family member.

First, she said, it was her brother, Amos Tso, 71, who fell ill in April after returning from New Mexico, where he had gone to have toes amputated due to an infection. On April 4, his niece, one of numerous family members caring for Mr. Tso, drove him to an Indian Health Service clinic after he began experiencing body aches and breathing problems. Seven days later, he was dead from Covid-19.

In one trailer, four of the six family members who stayed there began running fevers, coughing and suffering body aches, Ms. Harvey said. They all tested positive for the coronavirus and were sent home with Tylenol and cough syrup, she said.

In a second trailer, another sister and her husband, in their 60s, fell ill. Their grandson, who lived with them and was sick too, drove them to an IHS hospital in Shiprock, N.M. The couple died days later.

The IHS didn't respond to a request for comment on Ms. Harvey's family's case.

In all, 11 family members got sick, including Ms. Harvey, who was hospitalized for nearly two weeks. "It has been very hard—what has happened to us," she said. "Right now, people are scared to turn up the road to our house. 'Those people over there. They all have coronavirus. They're dying.' That's what we've been hearing."

Tribal leaders and health officials said it has been difficult to keep the virus from ricocheting through crowded homes on the reservation.

Tina Harvey in Tes Nez Iah, Ariz., holds a portrait of her sister Jane and brother-in-law Richard Mustache, who both died of Covid-19.

Photographs by Sharon Chischilly for The Wall Street Journal

Eric Pelt, grandson of Jane and Richard, tends to his late grandparents' sheep in May. He tested positive for Covid-19.

Nine of Ms. Harvey's family members who stayed on the family land, and two more who came there to help, became ill with Covid-19.

Martha and Clifford Yazzie, members of Ms. Harvey's family, at home in Tes Nez Iah. Both were sick with Covid-19.

"It is physically impossible to practice social distancing in these homes," said Dr. Loretta Christensen, chief medical officer for the IHS's Navajo area. "We have discovered people living in their cars to avoid exposing their families to Covid-19."

Adding to their struggles: a lack of resources and issues with poor care at the IHS before the pandemic struck.

Hoping to get sick people out of their households, the IHS and tribal health officials have set up quarantine sites where more than 165 people were staying as of Friday, mostly in converted hotel rooms. Health officials were also deploying isolation tents for those who want to remain on their land.

The infections on the reservation have spilled into surrounding communities. McKinley County, part of which lies on the reservation, comprises about 3.4% of New Mexico's population but has nearly a third of its Covid-19 cases, according to state data. About 14% of the county's homes are crowded, compared with 3.5% statewide, according to census data.

Share Your Thoughts

What should the government and health authorities do—if anything—about the spread of Covid-19 in large households? Join the conversation below.

Household crowding is also helping fuel the outbreak in urban areas.

A study from New York University's Furman Center found that in New York City, the areas hit hardest by the disease weren't those with the densest population; they were the ones with the greatest household crowding among renters.

The Journal analysis found that in Chicago, ZIP Codes where crowded households are most common accounted for a disproportionate share of the city's coronavirus cases. The Humboldt Park neighborhood on Chicago's West Side, for example, has a household crowding rate more than eight times as high as the Evergreen Park area, on the city's outskirts. Its infection rate is twice as high.

Household crowding frequently overlaps with other risk factors, studies show. It is more common in poorer

neighborhoods, where residents are more likely to have underlying health conditions and to still be working outside the house during the outbreak.

Covid-19 has disproportionately hit African-Americans and Latinos, several studies have shown. Black and Latino households are almost twice as likely to be multigenerational as white households, according to the Pew Research Center.

Essential worker

In California, the three counties with the highest coronavirus rates—Kings County, Imperial County and Los Angeles County—are majority Latino and Black and have among the highest rates of household crowding in the country.

In Azusa, Calif., a working-class, mostly Latino city in eastern Los Angeles County, the Ramirez family took strict precautions to avoid spreading the coronavirus. By mid-March, no one was working outside the home except Guillermo Ramirez, said his wife, Luciana Ramirez. His job driving trucks for an asphalt company was among work Gov. Gavin Newsom deemed essential.

A study from the Public Policy Institute of California found that essential workers are at higher risk of contracting Covid-19—and more likely to live in crowded homes.

Mr. Ramirez, 47, wore a mask and gloves on the job, and he would spray off his shoes before coming into the five-bedroom house. Only he and Guillermo Jr., his

25-year-old eldest son, shopped for food, and they washed the groceries off before bringing them inside, Ms. Ramirez said. Still, after spending Easter Sunday watching movies and playing games with her children and grandchildren, Ms. Ramirez began to feel feverish.

She isolated herself in the bedroom, and Mr. Ramirez moved to the living room. But within days, the virus had swept through the household. Ultimately, all 10 people living there—Mr. and Ms. Ramirez; four of their children; three grandchildren and Ms. Ramirez's mother, who was staying with them at the time—tested positive for Covid-19.

Guillermo Ramirez and his wife, Luciana, celebrate Christmas Eve 2019 with their family at home in Azusa, Calif.

Photo: Ramirez family

By late April, the entire family had isolated from one another in their rooms and wore masks. Their 26-year-old daughter, who lives down the street, dropped groceries outside the front door. Their 12-year-old son, who was asymptomatic, slept on the couch and left food and water outside his relatives' rooms.

First, Guillermo Jr. went to the hospital. Then Mr. Ramirez himself. Then Ms. Ramirez's mother. On April 28, Mr. Ramirez called his wife from the Emanate Health Inter-Community Hospital in West Covina at 3 a.m., telling her he was frightened and she needed to pick him up. By 8 a.m., she said, he was dead.

Ms. Ramirez, 46, said the family tried desperately to keep from spreading the virus to one another—even after the funeral, they continued to wear masks at home—but it was impossible once the disease was in the house.

"It is a big house, but you have to pass each other through the hallways," Ms. Ramirez said. "We took it serious. We got hand sanitizer. We got masks. We got our gloves. We got Lysol. We sprayed our shoes. We did everything right and we still got it, and it affected us this way."

Recognizing that simply staying at home won't stop transmission of the virus, countries in Asia have adopted more drastic measures. Singapore and South Korea required all people who test positive for Covid-19 to move into isolation or medical facilities; Vietnam and Hong Kong extended mandatory out-of-home quarantining to contacts of the sick as well.

In Italy, where multigenerational households are common and most people with Covid-19 remain at home, the country's National Health Institute found that one in five people who have tested positive in April and early May were likely infected by family members, the second-highest source of infection after nursing homes.

A study from the London School of Hygiene & Tropical Medicine found that in a city of four million people, home-based isolation would result in a 20% reduction in coronavirus cases, while isolation in quarantine centers would cut cases by 59%.

In the U.S., quarantine centers have been used sparingly. Because testing hasn't been as widespread as in some other countries, many people have passed the virus to loved ones before even realizing they are sick.

Kansas officials have set up quarantine centers in six counties across the state, including Ford County, where outbreaks at two meatpacking plants have sickened workers and their family members. The county of 33,600 people has more than 1,800 confirmed cases, the highest total in the state. According to census data, 18% of households in Ford County have five or more people and 7.1% are crowded, both well above the national average.

As of Saturday, only 8 Covid-positive people were checked into the quarantine center in Ford County, state health officials said. Statewide, just 12 of more than 300 available rooms for infected residents were occupied. Public-health officials and immigrant advocates said some workers in the county, who may be

undocumented, are wary of using the facilities. A Ford County official said the quarantine centers were working well.

San Francisco has contracted with hotels to provide more than 1,000 rooms where people who get sick can isolate and are provided with three meals a day. But convincing the sick to leave their families can be difficult, said Trent Rhorer, director of San Francisco's Human Services Agency.

"Often, the family bond is strong—you have multigenerational households and they all rely on each other for income, or to cook, or to clean," Mr. Rhorer said.

The Woods Family

Even in places that have escaped the worst of the outbreak, crowded households have proven vulnerable. In Gadsden, a working-class town of 35,000 along Alabama's Coosa River, the Woods family was decimated by the very closeness that had for so long been their bedrock.

When Ms. Woods's 24-year-old grandson got sick in late March, he didn't realize it was Covid-19 and came to her house so his grandmother and mother, who also lived there, could take care of him, family members said. When Ms. Woods' youngest daughter, Kyra Porter, 48, grew ill, she too came to the house on Paden Road. Seven people were now staying in three bedrooms—Ms. Woods and her husband, all three of her daughters, her son-in-law and her grandson.

Ms. Woods' oldest daughter died April 13. Ms. Woods' husband, age 70, died five days after. A nephew who lived nearby died the same day.

Barbara Woods, foreground, and members of her family who survived Covid-19.

Photos by: Lynsey Weatherspoon for The Wall Street Journal

A photo collage of Billy Ray Woods, Phacethia Posey and Michael Todd Woods, who died of Covid-19. The family held all three funerals on April 22.

Barbara Woods's home in Gadsden, Ala., where seven family members were sick with the virus.

Johnjalene Woods, left, and Kyra Porter wear earrings with pictures of their sister who died of Covid-19.

Etowah County, in which Gadsden lies, is among the U.S. counties with more than 50 Covid- 19 cases and is near the national average for crowded homes. A dozen people have died of Covid-19 in the county of 102,000. Of those 12 deaths, three were in the Woods family.

The family held all three funerals April 22, each with no more than 10 people.

"Everything happened so fast," said Ms. Porter. "Walking into the house after the funeral and them not being there, it just seemed like a dream. It was almost like, 'Are you guys hiding from us? Are you going to come back?' "

Write to Ian Lovett at ian.lovett@wsj.com, Dan Frosch at dan.frosch@wsj.com and PaulOverberg at paul.overberg@wsj.com

Appeared in the June 8, 2020, print edition as '.'

Tribal Elders Are Dying From the Pandemic, Causing a Cultural Crisis for American Indians

---

[LOGO] nytimes.com/2021/01/12/us/tribal-elders-native-americans-coronavirus.html

By Jack Healy
Photographs by Victor J. Blue
Published Jan. 12, 2021
Updated Jan. 19, 2021

Pall bearers with the coffin of Jesse Taken Alive, a Lakota member of the Standing Rock Tribe, who died from Covid-19, at Kesling Funeral Home in Mobridge, S.D., last month. Credit . . .

Listen to This Article

Listen 10:46

To hear more audio stories from publishers like The New York Times, download Audm for iPhone or Android.

STANDING ROCK RESERVATION, N.D.—The virus took Grandma Delores first, silencing an 86-year-old voice that rang with Lakota songs and stories. Then it came for Uncle Ralph, a stoic Vietnam veteran. And just after Christmas, two more elders of the Taken Alive family were buried on the frozen North Dakota prairie: Jesse and Cheryl, husband and wife, who died a month apart.

"It takes your breath away," said Ira Taken Alive, the couple's oldest son. "The amount of knowledge they held, and connection to our past."

One by one, those connections are being severed as the coronavirus tears through ranks of Native American elders, inflicting an incalculable toll on bonds of language and tradition that flow from older generations to the young.

"It's like we're having a cultural book-burning," said Jason Salsman, a spokesman for the Muscogee (Creek) Nation in eastern Oklahoma, whose grandparents contracted the virus but survived. "We're losing a historical record, encyclopedias. One day soon, there won't be anybody to pass this knowledge down."

The loss of tribal elders has swelled into a cultural crisis as the pandemic has killed American Indians and Alaska Natives at nearly twice the rate of white people, deepening what critics call the deadly toll of a

tattered health system and generations of harm and broken promises by the U.S. government.

Jessie Taken Alive-Rencountre, left, with her sister Nola Taken Alive on Christmas morning. Their parents died a month apart, both from the coronavirus.

This sisters placed a bundle of sage in their mother's coffin.

The deaths of Muscogee elders strained the tribe's burial program. They were grandparents and *mikos*, traditional leaders who knew how to prepare for annual green-corn ceremonies and how to stoke sacred fires their ancestors had carried to Oklahoma on the Trail of Tears. One tiny Methodist church on the reservation recently lost three cherished great-aunts who would sneak candy and smiles to restless children during Sunday services.

"We'll never be able to get that back," Mr. Salsman said.

Tribal nations and volunteer groups are now trying to protect their elders as a mission of cultural survival.

Your Coronavirus Tracker: We'll send you the latest data for places you care about each day. Navajo women started a campaign to deliver meals and sanitizer to high-desert trailers and remote homes without running water, where elders have been left stranded by quarantines and lockdowns of community centers. Some now post colored cardboard in their windows: green for "OK," red for "Help."

In western Montana, volunteers led by a grocery-store worker put together turkey dinners and hygiene packets to deliver to Blackfeet Nation elders. In Arizona, the White Mountain Apache sent out thermometers and pulse oximeters and taught young people to monitor their grandparents' vital signs.

Across the country, tribes are now putting elders and fluent Indigenous language speakers at the head of the

line for vaccinations. But the effort faces huge obstacles. Elders who live in remote locations often have no means to get to the clinics and hospitals where vaccinations are administered. And there is deep mistrust of the government in a generation that was subjected without consent to medical testing, shipped off to boarding schools and punished for speaking their own language in a decades-long campaign of forced assimilation.

Ira Taken Alive at the burial of his parents. “It takes your breath away,” he said. “The amount of knowledge they held, and connection to our past.”

Mourners paid their respects at the burial service.

About a year into the pandemic, activists say there is still is no reliable death toll of Native elders. They say their deaths are overlooked or miscounted, especially off reservations and in urban areas, where some 70 percent of Indigenous people live.

Adding to the problem, tribal health officials say their sickest members can essentially vanish once they are transferred out of small reservation health systems to larger hospitals with intensive-care units.

The Coronavirus Outbreak

"We don't know what happens to them until we see a funeral announcement," said Abigail Echo-Hawk, director of the Urban Indian Health Institute.

The virus claimed fluent Choctaw speakers and dressmakers from the Mississippi Band of Choctaw Indians.

It took a Tulalip family matriarch in Washington State, then her sister and brother-in-law. It killed a former chairman of the Yocha Dehe Wintun Nation in California who spent decades fighting to preserve Native arts and culture. It has killed members of the American Indian Movement, a group founded in 1968 that became the country's most radical and prominent civil rights organization for American Indian rights.

On the Navajo Nation, where 565 of the reservation's 869 deaths are among people 60 and older, the pandemic has devastated the ranks of hataałii, traditional medicine men and women.

When the virus exploded across the Navajo Nation, traditional healers who use prayer, songs and herbs as treatments tried to protect themselves with masks and gloves. They wrapped ceremonial objects in plastic. They set hand sanitizer outside traditional hogan dwellings.

A funeral procession for
Jesse and Cheryl Taken Alive.

But people came, seeking help with their grief or prayers for ailing relatives. And the healers got sick.

Now, remote meetings of the Diné Hataałii Association, a group of Navajo medicine men and women, include updates on who has died, members said. The roster of loss now includes Avery Denny's 75-year-old grandfather and 78-year-old aunt, who both died of the virus.

"When they pass on, all that knowledge is gone forever, never to be retained," said Mr. Denny, a member of the association and professor at Diné College. "It's just lost."

Cemeteries are filling up on the rolling plains of the Standing Rock Sioux in western North Dakota, where families like the Taken Alives have buried multiple

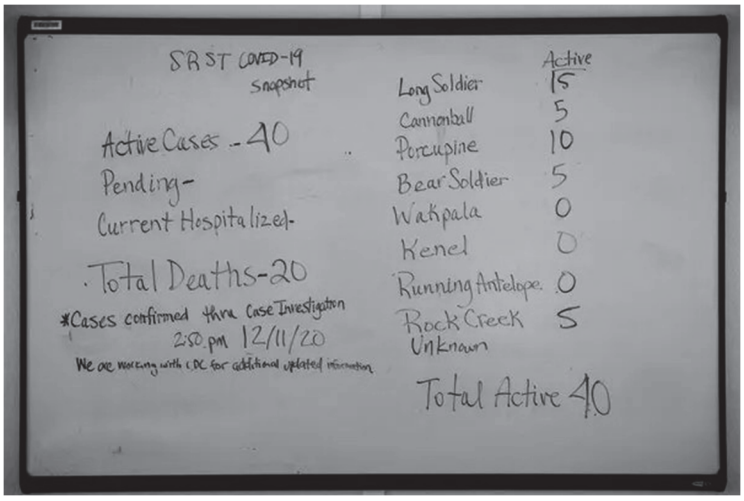
grandparents, matriarchs and patriarchs. Standing Rock has recorded 24 deaths during the pandemic.

In 2016, the tribe's fight to block an oil pipeline propelled Standing Rock to international fame, drawing thousands of activists to protest camps that sprawled along the Missouri River. This winter, Standing Rock's families are waging a lonelier battle as the virus rages through crowded multigenerational homes where elders raise children and pass along their language—a crucial role that has made them incredibly vulnerable.

Diane Gates, 75, one of Standing Rock's first elders to die of the virus, lived with multiple family members, relatives said. Her 75-year-old sister-in-law, Reva, who recently had open- heart surgery, also lives with several grandchildren in an isolated corner of the reservation. They see few visitors and have a lock on their gate, and they try to protect themselves with herbs and steam treatments. But there is always the risk of what a granddaughter could bring home from work.

Tribal health workers say they are also tired and overwhelmed, the strains of fighting Covid compounded by isolation, distance and a lack of resources.

The Fort Yates Indian Health Service Hospital on the Standing Rock Reservation. The pandemic has challenged the health care system for American Indian tribes.



Statistics on Covid-19 cases were written on a white board for contact tracers in their offices on the Standing Rock Reservation.

The Standing Rock Sioux had to create their own contact-tracing team after tribal officials said governments in North Dakota and South Dakota failed to track the virus. Over the summer, bureaucratic conflicts scuttled an effort to set up a testing site on the southern end of the reservation, forcing people without cars to hitchhike or walk for miles to get swabbed. Those who do recover from the virus often find themselves stranded at hospitals hundreds of miles from the reservation, and have to call a tiny team of drivers to shuttle them home.

In October, as an outbreak of coronavirus swarmed across North Dakota, Rita Hunte, 66, woke one morning gasping for breath in her riverside community of Cannon Ball. She called her daughter and said: My girl, I don't know what to do.

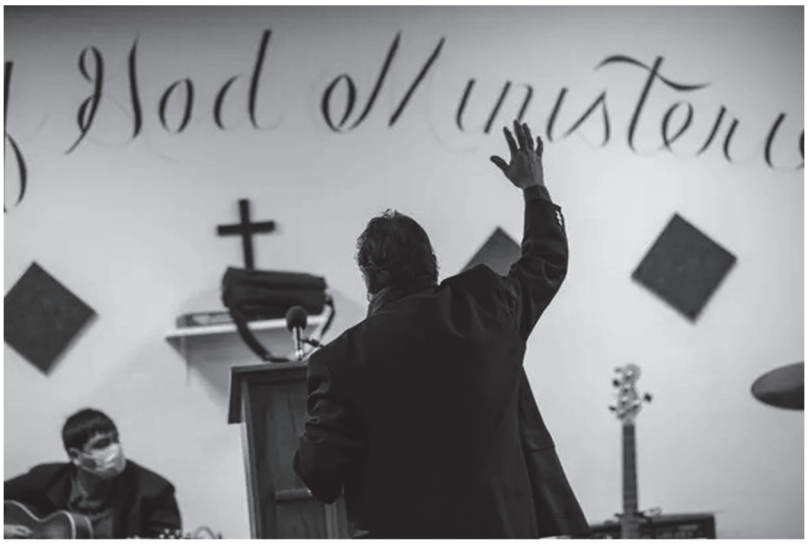
She spent two days in the 12-bed Indian Health Service hospital on the reservation, begging to be transferred out, her daughter, Marlo, said. She was taken to a hospital in Fargo where she lingered for weeks, mostly unconscious and on a breathing machine, as her daughter washed her hair and tried to move her arms and legs to reduce the swelling. She died on Nov. 29.

Ms. Hunte was one of just 290 people who still spoke fluent Dakota, and in her work with a tribal cancer program, she would often pray with patients before they traveled to Bismarck or the Mayo Clinic for treatment.

Since her death, her widower, Marlon, has been trying to stay busy with church services where he plays

acoustic guitar and lays hands on people as they testify to the goodness of the Lord. But his daughter said that Mr. Hunte's role as a respected elder has paradoxically isolated him even further. Some neighbors now keep their distance because they are uneasy about asking whether he is doing OK, Marlo Hunte said.

"I feel a little lost there every now and then," Mr. Hunte said.



Marlon Hunte, whose wife Rita died of Covid-19, preaching at an evening service at Word of God Ministries church in Fort Yates, N.D.

Mr. Hunte prayed with Helen Flood, 76, of Gering, Neb., an Oglala Lakota woman whose husband was hospitalized with the coronavirus.

Many of the elders now perishing are dying after months of monastic precautions. When the pandemic first erupted, Jesse Taken Alive helped record public-service messages in Lakota urging fellow elders to protect themselves. He set up a computer in the tepee beside his home where he taught remote language classes.

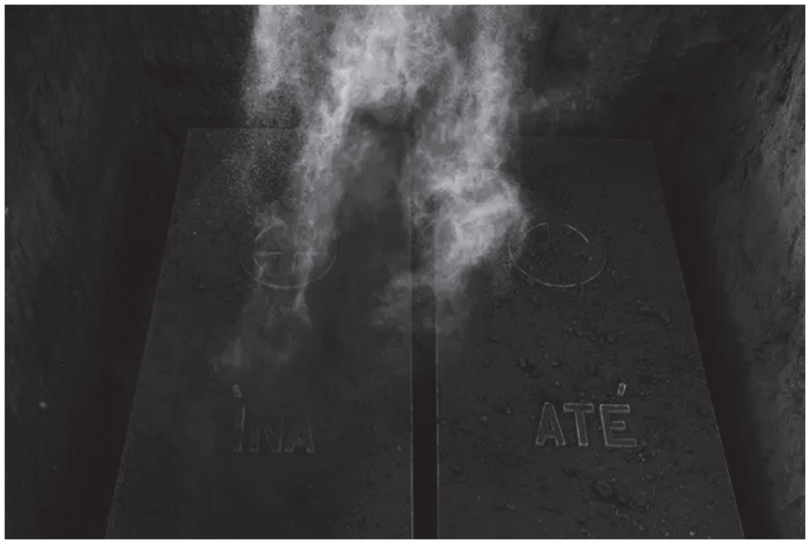
But as the pandemic grew worse, requests from his community piled up: Help with funeral prayers. Help with a ceremony. He had been a tribal chairman, and he and his wife, Cheryl, had spent their lives trying to help people on Standing Rock, whether it was fighting for tribal land and sovereignty or addressing a rash of suicides.

"We tried our best to keep everyone away," their daughter Nola Taken Alive said. "But my Dad had a hard time saying no when people needed him."

The couple ended up on separate floors of the same hospital in Fargo. When Cheryl died in November, the fight began to fade in Jesse, said his son, Ira, who is also vice-chairman of the Standing Rock Sioux Tribe. Jesse Taken Alive died on Dec. 14. The family has been reflecting on the loss—Delores, the walking dictionary of Lakota linguistics. Ralph's quiet dignity.

Jesse and Cheryl's deep faith and love for each other and their people.

"We'll still be here," Nola Taken Alive said. "But it's going to be a struggle. How do I fill their shoes?"



The coffins of Jesse and Cheryl Taken Alive,
who died one month apart.

Jack Healy is a Colorado-based national correspondent who focuses on rural places and life outside America's "City Limits" signs. He has worked in Iraq and Afghanistan and is a graduate of the University of Missouri's journalism school. @jackhealynyt • Facebook

A version of this article appears in print on Jan. 13, 2021, Section A, Page 6 of the New York edition with the headline: Cultural Crisis for American Indians as Elders Die. Order Reprints | Today's Paper | Subscribe

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Navajo Nation, Plaintiff, v. United States Department of the Interior, et al., Defendants.	No. CV-03-00507-PCT-GMS **ORDER** (Filed Aug. 23, 2019)

Pending before the Court is Plaintiff Navajo Nation's Renewed Motion for Leave to File Third Amended Complaint (Doc. 360). Intervenor-Defendants the Metropolitan Water District of Southern California, Coachella Valley Water District, Imperial Irrigation District, and State of Arizona oppose the Motion, (Doc. 369), and Defendant United States Department of the Interior opposes the Motion in part. (Doc. 370). All other Intervenor-Defendants join the brief filed by the Intervenor-Defendants named above. For the reasons outlined below, the Motion is denied.

BACKGROUND

This motion continues a long-lived dispute between the Navajo Nation ("the Nation") and the United States Department of the Interior ("Interior"). Various other entities have intervened in this case as defendants ("Intervenor-Defendants"). Because the relevant history of this case was summarized in the Court's

order on the Nation's previous motion for leave to amend, the Court will not recite that history again here. *See Navajo Nation v. Dep't of Interior*, No. CV-03-00507-PCT-GMS, 2018 WL 6506957 (D. Ariz. Dec. 11, 2018). The Court held argument on this motion on August 16, 2019.

DISCUSSION

I. Legal Standards

Leave for permissive amendments should be granted "when justice so requires." Fed. R. Civ. P. 15(a)(2). While the policy favoring amendments is generally "applied with extreme liberality," *Eldridge v. Block*, 832 F.2d 1132, 1135 (9th Cir. 1987), leave to amend is not automatic. If there has been a showing of (1) undue delay; (2) bad faith or dilatory motives on the part of the movant; (3) repeated failure to cure deficiencies by previous amendments; (4) undue prejudice to the opposing party; or (5) futility of the proposed amendment, the court should deny the motion. *Foman v. Davis*, 371 U.S. 178, 182 (1962). District courts have particularly broad discretion to deny leave to amend if the plaintiff has previously amended its complaint. *Sisseton-Wahpeton Sioux Tribe of Lake Traverse Indian Reservation, North Dakota and South Dakota v. United States*, 90 F.3d 351, 355 (9th Cir. 1996) (quoting *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990)).

"An amendment is futile when no set of facts can be proved under the amendment to the pleadings that

would constitute a valid and sufficient claim or defense." *Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 656 (9th Cir. 2017) (cleaned up).[1]

II. Analysis

A. Standards

The Nation's Proposed Third Amended Complaint ("TAC") alleges that the Federal Defendants have breached their trust responsibilities in two ways: (1) by failing "to determine the quantities and sources of water required to make the Navajo Reservation a permanent homeland for the Navajo people," and (2) by failing "to protect the sovereign interests of the Navajo Nation by securing an adequate water supply to meet those homeland purposes." (Doc. 360-2 at 3.) Intervenor-Defendants contend that leave to amend should be denied as futile because the "[t]he mere existence of a trust relationship between the United States and the Navajo Nation is, by itself, an insufficient basis for an actionable claim." (Doc. 369 at 4).

A general trust relationship exists between the United States and Indian nations. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). But "[t]he *general*

---

[1] "Cleaned up" is a new parenthetical used to eliminate excessive, unnecessary explanation of non-substantive prior alterations. *See* Jack Metzler, *Cleaning Up Quotations*, 18 J. App. Prac. & Process 143 (2018). This parenthetical can be used when extraneous, residual, non-substantive information has been removed—in this case, citations and quotation marks. *See United States v. Steward*, 880 F.3d 983, 986 n.3 (8th Cir. 2018); *United States v. Reyes*, 866 F.3d 316, 321 (5th Cir. 2017).

relationship between the United States and the Indian tribes is not comparable to a private trust relationship." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 173 (2011) (quoting *Cherokee Nation of Okla. v. United States*, 21 Cl. Ct. 565, 573 (1990)) (emphasis in original). To state a cognizable claim of breach of trust against the government, a tribe must "identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed to perform those duties." *Navajo I*, 537 U.S. at 506. If the tribe does so, common law trust principles "could play a role" in the court's analysis of the trust duties undertaken by the government. *Jicarilla*, 564 U.S. at 177 (quoting *United States v. Navajo Nation*, 556 U.S. 287, 301 (2009) ("*Navajo II*")).

But "[w]hen [a] Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, neither the Government's control over Indian assets nor common-law trust principles matter. . . . The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *Id. See also Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995) ("While it is true that the United States acts in a fiduciary capacity in its dealings with Indian tribal property, it is also true that the government's fiduciary responsibilities necessarily depend on the substantive laws creating those obligations."). Put another way, "unless there is a specific duty that has been placed on the government with respect to Indians, the government's general trust obligation is discharged by

the government's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." *Gros Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006) (quoting *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998)) (cleaned up). Thus, the Nation must allege a substantive source of law that creates the specific duty that it alleges the government has violated, or that at least "permit[s] a fair inference that the Government is subject to duties as a trustee." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 474 (2003).

The Nation contends that *Jicarilla* is the wrong standard to apply in actions for injunctive relief. But even though *Jicarilla* and many of the cases cited were actions brought by tribes for money damages under the Indian Tucker Act, 28 U.S.C. § 1505, the Ninth Circuit has applied the standard in cases brought for injunctive or declaratory relief. *See Gros Ventre Tribe*, 469 F.3d at 812; *Morongo Band*, 161 F.3d at 573-74. In *Gros Ventre Tribe*, for example, the tribe argued that the *Mitchell* standard (*i.e.*, the standard the Supreme Court applied in *Jicarilla*) only applied to claims for money damages. *Gros Ventre Tribe*, 469 F.3d at 812. The tribe argued instead that the general trust relationship between the federal government and the tribe "imposes duties on the federal government even in the absence of a specific treaty, agreement, executive order, or statute." *Id.* The Ninth Circuit disagreed. The court instead concluded that "unless there is a specific duty that has been placed on the government with respect to Indians, [the general trust responsibility] is

discharged by the agency's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." *Id.* In this circuit, then, tribes must point to a specific treaty, agreement, executive order, statute, or regulation that the government violated in order to bring a breach of trust claim, even one for injunctive relief rather than money damages.

B. *Winters* and Treaties

The Nation's strongest argument is that the United States has trust duties arising from the treaties signed between the two parties and the Nation's implied water rights under *Winters v. United States*, 207 U.S. 564 (1908). *Winters* was a suit brought by the United States on behalf of various tribes to prevent other parties from diverting water from the Milk River upstream of the Fort Belknap Indian Reservation. *Id.* at 565. The tribes had previously entered treaties with the United States by which the lands of the reservation had been set aside for the tribes. *Id.* The Milk River formed one of the boundaries of the reservation, and the tribes needed water from the river to irrigate reservation land that was otherwise unsuited for cultivation. *Id.* at 566. The defendants—other landowners in the area—began constructing dams, reservoirs, and canal systems by which they diverted the river water. *Id.* at 567. Since they had begun to divert river water before the tribes had done so (but after the reservation had been created), the defendants contended, their water rights were superior to those of the tribes. *Id.* at 568–69.

The Court disagreed. In its view, the treaties entered by the tribes had the aim of transforming the tribes' previous lifestyle to one of settled farming. *Id.* at 576. But the lands reserved for the tribes were "arid, and without irrigation, were practically valueless." *Id.* Applying a canon of construction which requires that "ambiguities occurring [in agreements and treaties with tribes] will be resolved from the standpoint of the Indians," the Court concluded that the tribes had not given up their rights to the water, without which their reservation would not be suitable for its intended purpose. *Id.* at 576. Yet, while approving the government's actions in protecting the water rights at issue, the Court said nothing about any trust duty imposed on the government to secure the tribes' water rights.

Later decisions distilled *Winters* into a black-letter rule of law: "[W]hen the United States withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, 849 F.3d 1262, 1268 (9th Cir. 2017) (citing *Cappaert v. United States*, 426 U.S. 128, 138 (1976)).

Like many tribes, the Navajo Nation signed various treaties with the federal government, resulting in the creation of the Navajo Reservation, the largest tribal reservation in the United States. Through the *Treaty with the Navaho, 1849*, Sept. 9, 1849, 9 Stat. 974 ("1849 Treaty"), and the *Treaty with the Navaho, 1868*,

June 1, 1868, 15 Stat. 667 ("1868 Treaty"), the United States placed the Nation under its "exclusive jurisdiction and protection" and declared that the Nation "would forever remain" so. *1849 Treaty*, at ¶ I. The Nation agreed to make the Navajo Reservation its "permanent home," and to "not as a tribe make any permanent settlement elsewhere." *1868 Treaty*, Art. 13. Thus under *Winters*' federal reserved rights doctrine, the creation of the Navajo Reservation also impliedly set aside rights to enough appurtenant water to allow the Reservation to function as the permanent home of the Navajo people. *Navajo Nation v. Dep't of Interior*, 876 F.3d 1144, 1156 (9th Cir. 2017) (citing *Arizona v. California*, 373 U.S. 546, 600 (1963)).

The Nation contends that because *Winters* recognized implied, reserved water rights, the Federal Defendants, under the treaties with the Nation, have fiduciary duties to (1) "determine the quantities and sources of water required to make the Navajo Reservation a permanent homeland for the Navajo people," and (2) "protect the sovereign interests of the Navajo Nation by securing an adequate water supply to meet those homeland purposes." (Doc. 360-2 at 3.) This assertion runs into several problems.

The first is that to the extent that the Nation would have this Court determine that the United States has violated its trust responsibility by failing to appropriate sufficient appurtenant water from the mainstream of the lower Colorado River, that determination cannot be made by this Court in light of the Supreme Court's reservation of the question. (*See* Doc.

359 at 2-4) (concluding that the broad language of the Supreme Court's reservation of jurisdiction in *Arizona v. California*, 547 U.S. 150, 166–67 (2006),[2] deprives this Court of jurisdiction "over any claim that requires any determination of rights to the [lower Colorado] River."). To the extent, then, that the Nation bases its claim on any *Winters* rights in the mainstream of the Lower Colorado, those rights cannot support the claim in this Court. Such a claim would have to be filed with the Supreme Court.

This Court has already so ruled. Yet, in its proposed Third Amended Complaint, the Nation sets forth considerable allegations about the government's regulation of the Colorado River to support its breach of trust claim. Not only do these allegations go beyond the scope of the remand in this case, *see Navajo Nation*, 876 F.3d at 1173, but they run headlong into the Supreme Court's reservation of jurisdiction in *Arizona v. California*. In order to determine that the United States breached its trust duties by taking the actions complained of, the Court would have to determine that the Nation in fact has rights to the water in the mainstream of the Lower Colorado River. To the extent the Nation wishes to use the government's regulation of

---

[2] In *Arizona v. California*, the Supreme Court "retain[ed] jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy." 547 U.S. at 166–67. The "subject matter in controversy" in *Arizona v. California* was the allocation of water rights to the mainstream of the lower Colorado River. *See Arizona v. California*, 376 U.S. 340 (1964); *Navajo Nation*, 876 F.3d at 1154.

the Colorado River as a basis for its breach of trust claim, it asks this Court to assume facts that are beyond its jurisdiction.

Further, despite the earlier uninformed musings of this Court at previous oral argument, *Winters* rights can only apply to water appurtenant to the reservation. *See Agua Caliente Band*, 849 F.3d at 1268 ("[T]he *Winters* doctrine only applies in certain situations: it only reserves water to the extent it is necessary to accomplish the purpose of the reservation, and it only reserves water if it is appurtenant to the withdrawn land.") (citing *Winters*, 207 U.S. at 575–78; *Cappaert*, 426 U.S. at 138).[3] For the reasons above stated, this Court cannot decide matters pertaining to the allocation of the mainstream of the lower Colorado River. And the TAC specifically states that the Nation is not basing its breach of trust claim on the government's failure to secure rights to the water of the Little Colorado River because litigation over its rights in that water is still ongoing. (*See* Doc. 361 at 20–21) ("[T]he 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 [the] Navajo

[3] At oral argument, the United States took the position that "appurtenant" is a legal concept and that is therefore not necessarily limited to only water geographically appurtenant to the Navajo Reservation. The government points to a Ninth Circuit decision, *Katie John v. United States*, 720 F.3d 1214 (9th Cir. 2013). However, as noted, the Ninth Circuit's more recent statement of the limitation on *Winters* suggests that appurtency is in fact a geographic limitation. *See Agua Caliente Band*, 849 F.3d at 1268.

Nation in Arizona."); (*id.* at 19) (noting ongoing Little Colorado River rights adjudication in Arizona state court). Since the Nation does not base its claim on identified and appurtenant water, it obtains no help from *Winters*. And to the extent it bases its claim on the appurtenant rights to water in the mainstream of the Colorado River, this Court has no jurisdiction to hear that claim.

And in any event, the enforceable trust duties the Nation asserts are not inferable from the mere existence of implied water rights. The undisputed existence of the Nation's implied, as-yet-unquantified rights to some as-yet-undetermined appurtenant water does not create those duties. "The Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute." *Jicarilla*, 564 U.S. at 177. The Nation's *Winters* rights do not expressly create those responsibilities. So the Nation must point to some other source that creates them.

C. Other potential sources of trust duties

The Nation disagreed with this conclusion at oral argument. The Nation instead maintained that its claim need not be based on any statutory enumeration of duties because it is bringing a common law claim for injunctive relief rather than a damages claim. The TAC sets forth a host of sources which the Nation claims illustrate the ways in which the Federal Defendants have breached their common law trustee

duties. The Nation asserts that the authorities cited in the TAC are illustrative of the duties, but do not necessarily give rise to the duties. But the Nation cannot bring a breach of trust claim "wholly separate from any statutorily granted right." *Gros Ventre Tribe*, 469 F.3d at 812. So if the Nation's claim is to survive, the duties must arise from some source. The authorities the Nation cites, particularly in ¶¶ 24–36 of the TAC, might give rise to those duties. However, upon examination, none of the sources are "specific, applicable, trust-creating statute[s] or regulation[s] that the Government violated." *See Jicarilla*, 564 U.S. at 177. Allowing the amendments to the Nation's complaint would thus be futile because "no set of facts can be proved under [it] that would constitute a valid and sufficient claim." *Koster*, 847 F.3d at 656.

A brief review of the two Supreme Court cases establishing the standard discussed in *Jicarilla* is helpful here. In *United States v. Mitchell*, 445 U.S. 535 (1980) ("*Mitchell I*"), the Court held that the General Allotment Act of 1887 did not create a fiduciary duty on the part of the federal government to manage the timber resources of the Quinault Indian Reservation. 445 U.S. 535, 542 (1980). The Act, which required the United States to hold land "in trust" for Indian allottees, was not specific enough to create enforceable fiduciary duties regarding the management of timber resources on tribal land. *Id.* The Act established only a "limited" relationship and therefore imposed no specific duty to manage timber resources. *Id.* The Court

remanded the case for consideration of whether other statutes might impose the duty alleged by the Tribe.

In the case's return trip, *United States v. Mitchell* ("*Mitchell II*"), the Court held that several timber management statutes enacted after the General Allotment Act did create enforceable trust duties regarding the management of tribal timber resources. 463 U.S. 206, 224–25 (1983). For example, one statute required the Secretary of the Interior to consider "the needs and bests interests of the Indian owner [of the land] and his heirs" before selling timber from Indian trust lands. *Id.* at 222 (citing 25 U.S.C. § 406(a)). The same statute required the Secretary to consider the need for "maintaining the productive capacity of the land for the benefit of the owner and his heirs," whether other uses of the land would be most beneficial to the owner and his heirs, and "the present and future financial needs of the owner and his heirs." *Id.* Statutes also required the government to manage Indian forest resources, obtain revenue through that management, and pay the proceeds to the tribal landowners. *Id.* at 219–23. The Court held that the statutes were specific enough to allow for an action against the government for mismanagement of those resources. *Id.* at 224–27.

None of the statutes or regulations the Nation points to here[4] are as specific as the statutes in *Mitchell II*—none create enforceable duties on the part of the

[4] This assumes, of course, that all the documents the Nation cites could in fact create the enforceable trust duties they assert. The parties have not briefed the issue, and for the purposes of this analysis the Court assumes that they could.

Federal Defendants to (1) determine the amount of water needed to make the Navajo Reservation a permanent homeland or (2) secure adequate water to meet those homeland purposes.

The Nation first points to the Indian Health Care Amendments of 1988, 25 U.S.C. § 1632, which state that "it is in the interest of the United States, and it is the policy of the United States, that all Indian communities and Indian homes, new and existing, be provided with safe and adequate water supply systems and sanitary sewage waste disposal systems as soon as possible." *Id.* (a)(5). But this language does not establish a specific duty—it merely sets forth a policy position. The language is insufficient to create an enforceable trust duty. *See Standing Rock Sioux Tribe v. U.S. Army Corps of Engineers*, 255 F. Supp. 3d 101, 155 (D.D.C. 2017). And even if it did, it would not be the duties the Nation alleges.

Similarly, the Bureau of Reclamation's Manual does not create enforceable duties. The Manual states that the Bureau of Reclamation "will discharge, without limitation, the Secretary's Indian trust responsibility with a high degree of skill, care, and loyalty," and that it will "actively support and participate in the Department's Indian water rights negotiation and implementation activities, as it works to resolve the water rights claims of Indian tribes through negotiated settlements, if feasible, rather than litigation." Bureau of Reclamation, *Reclamation Manual*, NIA P10 at 5 ¶ 5(C)(2). This language, while noting the existence and importance of the trust relationship and pledging

engagement in the resolution of Indian water rights negotiation and implementation activities, does not create the fiduciary duties the Nation alleges.

The other statutes, regulations, and executive actions likewise fail to show that the government expressly accepted the fiduciary duties the Nation asserts. The "Krulitz Memo" discusses at length the general trust relationship that exists between Indian tribes and the United States but does not impose a duty to analyze the Nation's need for, and secure a sufficient supply of, water. *See* Letter from Leo. M. Krulitz, Department Solicitor, to James W. Moorman, Assistant Attorney General (Nov. 21, 1978), (attached as appendix to *Brief for Respondents*, *United States v. Mitchell*, 445 U.S. 535 (1979), 1979 WL 199447). To the extent that the Memo concludes that "the government's trust responsibility to the Indian has an independent legal basis and is not limited to the specific language of the statutes, treaties and agreements," *id.* at *14A, the Supreme Court disagreed in *Mitchell I*—the very case in which the Krulitz Memo was submitted as an appendix to a brief.

Secretarial Order No. 3335 likewise does not create enforceable duties—in fact, it specifically states that the Order "does not[] create any . . . legal right or benefit, substantive or procedural." Secretarial Order No. 3335, *Reaffirmation of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual Indian Beneficiaries* at § 6 (Aug. 20, 2014). The two other Secretarial Orders the Nation points to likewise fail to expressly obligate the United States to

determine the amount of water the Nation needs or to secure rights to sufficient water. *See* Secretarial Order No. 3215, *Principles for the Discharge of the Secretary's Trust Responsibility* at § 6 (Apr. 28, 2000) ("This Order . . . is not intended to, and does not, create any right to administrative or judicial review, or any legal right or benefit, substantive or procedural, enforceable by a party against the United States, its agencies, or instrumentalities, its officers or employees, or any other person"); Secretarial Order 3175, *Departmental Responsibilities for Indian Trust Resources* (Nov. 8, 1993) ("This Order is for internal management guidance only, and shall not be construed to grant or vest any right to any party in respect to any Federal action not otherwise granted or vested by existing law or regulations.").

The Non-Intercourse Act limits the alienability of Indian lands but imposes no duty to make the Navajo Reservation productive by analyzing water needs and securing water rights. *See* 25 U.S.C. § 177. While the Nation may be correct that the 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," nothing in the Act acts as an express acceptance by the United States of the trust duties the Nation asserts. *See Jicarilla*, 564 U.S. at 177.

The Northwest Ordinance of 1787, while recognizing that the government has a duty to deal with Indian tribes in the "utmost good faith," does not impose the specific duties alleged. 1 Stat. 50, 52 (1789). The

Snyder Act, 25 U.S.C. § 13, also does not establish those trust duties—rather, it directs the Bureau of Indian Affairs to "direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States . . . for the development of water supplies." But nowhere does it require the United States to analyze the extent of the Nation's water needs and secure water rights on its behalf.

The American Indian Trust Fund Management Reform Act of 1994, 108 Stat. 4239, does not impose a specific duty to secure water resources to make the Navajo Reservation productive, but imposes only a general responsibility to "appropriately manag[e] the natural resources located within the boundaries of Indian reservations and trust lands." 25 U.S.C. § 162a(d)(8). The Indian Trust Asset Reform Act, 25 U.S.C. §§ 5601–36, likewise does not create such a duty. While the Act acknowledges that the United States has undertaken "enforceable Federal obligations to which the national honor has been committed," *id.* § 5601(5), it does not create the specific obligations the Nation seeks to enforce here.

Since none of these substantive sources of law create the trust duties the Nation seeks to enforce, and the Nation "cannot allege a common law cause of action for breach of trust that is wholly separate from any statutorily granted right," *Gros Ventre Tribe*, 469 F.3d at 810, its breach of trust claim must fail, and amendment would be futile. *Koster*, 847 F.3d at 656. "Although the [Nation] may disagree with the current

state of Ninth Circuit caselaw, as it now stands, unless there is a specific duty that has been placed on the government with respect to Indians, the government's general trust obligation is discharged by the government's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." *Id.* The general trust relationship between the Nation and the United States is insufficient to support the Nation's breach of trust claim. *See Navajo I*, 537 U.S. at 506.

IT IS THEREFORE ORDERED 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.

Dated this 23rd day of August, 2019.

/s/ G. Murray Snow
G. Murray Snow
Chief United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Navajo Nation, Plaintiff, v. United States Department of the Interior; et al., Defendants.	No. CV-03-00507-PCT-GMS **ORDER** (Filed Dec. 11, 2018)

Pending before the Court is Plaintiff Navajo Nation's Motion for Leave to File Third Amended Complaint (Doc. 335). Defendant and Defendant-Intervenors oppose the Motion. For the following reasons the Motion is denied.

BACKGROUND

The Navajo Nation sued the Department of the Interior in 2003, seeking to strike down various regulations governing the use of water from the Colorado River in its Lower Basin ("the River"). The Nation also alleged that the United States breached its duties to the Nation as trustee of the Navajo Reservation. After several entities intervened in the case, it was stayed to allow for settlement negotiations which ultimately proved unsuccessful. The litigation resumed, and this Court dismissed the Nation's claims.

The Ninth Circuit affirmed in part and reversed in part. It remanded the breach of trust claim with

instructions to "fully consider the Nation's breach of trust claim in the first instance, after entertaining any request to amend the claim more fully to flesh it out." *Navajo Nation v. Dept. of Interior*, 876 F.3d 1144, 1173 (9th Cir. 2017). The Nation now moves for leave to "flesh out" the breach of trust claim and file a Third Amended Complaint ("TAC" or "Proposed TAC").

DISCUSSION

I. Legal Standard

If a plaintiff wants to amend its complaint more than twenty-one days after the complaint is served, it needs the court's permission. Courts freely give that permission "when justice so requires." FED. R. CIV. P. 15(a)(2). This policy favoring amendments is generally "applied with extreme liberality," *Eldridge v. Block*, 832 F.2d 1132, 1135 (9th Cir. 1987), but that does not mean that leave to amend is automatically granted. If a court finds that there has been a sufficient showing of (1) undue delay; (2) bad faith or dilatory motives on the part of the movant; (3) repeated failure to cure deficiencies by previous amendments; (4) undue prejudice to the opposing party; or (5) futility of the proposed amendment, the court should deny the motion. *Foman v. Davis*, 371 U.S. 178, 182 (1962). District courts have particularly broad discretion to deny leave to amend if the plaintiff has already amended its complaint. *Sisseton-Wahpeton Sioux Tribe of Lake Traverse Indian Reservation, North Dakota and South Dakota v. United States*, 90 F.3d 351, 355 (9th Cir. 1996) (quoting *Allen*

v. City of Beverly Hills, 911 F.2d 376, 373 (9th Cir. 1990)).

II. Analysis

The Proposed Third Amended Complaint raises two main issues. First, whether the Supreme Court's retention of jurisdiction in *Arizona v. California*, 547 U.S. 150, 166–67 (2006), deprives this court of jurisdiction to entertain the breach of trust claim, and, if it does not whether the proposed amendments should be allowed. Language throughout the TAC and specifically the Nation's two prayers for relief demonstrate that the relief sought in the Proposed TAC would require this Court to determine the Nation's rights to water from the River. Jurisdiction over that issue has been reserved by the Supreme Court in *Arizona v. California*, thus this Court lacks jurisdiction to entertain the Proposed TAC.

A. Jurisdiction

In *Arizona v. California*, the Supreme Court determined the rights of various entities to water from the River. Subsequent to its initial decree in the case, the Court declared that absent some showing of unforeseeable change in circumstances, the rights to the water that had been adjudicated would not be altered. *See Arizona v. California*, 460 U.S. 605, 619–27 (1983)[1].

[1] The Court has made minor adjustments to its 1964 Decree. But the Court has clarified that the provision of the 1964 Decree

The Nation and other tribes were represented in *Arizona v. California* by the United States as trustee. *See Navajo Nation v. Department of the Interior*, 876 F.3d 1144, 1154 (9th Cir. 2017). The United States did not however present claims to water from the River for all of the tribes, including the Nation. Rather, the United States put forward the Nation's claim to water from the Little Colorado River, a tributary of the Colorado River. *See* Findings of Fact and Conclusions of Law Proposed by the United States of America at 58, *Arizona v. California*, 373 U.S. 546 (1963). The Court narrowed the scope of the *Arizona v. California* litigation to include only claims to the mainstream of the River, so the Nation's Little Colorado River claim was not considered. *Arizona v. California*, 373 U.S. 546, 590–91 (1963). When the Nation attempted to intervene on its own behalf in the *Arizona* litigation, the Court denied the motion. *Arizona v. California*, 368 U.S. 917 (1961).

Thus the Court never addressed any rights the Nation may or may not have to the mainstream of the River because the United States did not bring that claim, nor was the Nation allowed to separately intervene to bring it. Yet the Court noted later that tribes represented by the United States in *Arizona v. California* are bound by the Court's decisions in the case, and so "the absence of the Indian Tribes in the prior

---

allowing amendment was "mainly a safety net added to retain jurisdiction and to ensure that [it] had not, by virtue of res judicata, precluded [itself] from adjusting the Decree in light of unforeseeable changes in circumstances." 460 U.S. at 622.

proceedings in this case does not dictate or authorize relitigation of their reserved rights." *Arizona*, 460 U.S. at 626–27.

If the Nation wishes to assert rights to the River, it is clear from the latest decree in *Arizona v. California* that such a determination is off-limits to any lower court. In its 2006 Decree, the Supreme Court "retain[ed] jurisdiction of this suit for the purpose of *any* order, direction, or modification of the decree, or *any* supplementary decree, that may *at any time* be deemed proper *in relation to the subject matter in controversy.*" *Arizona v. California*, 547 U.S. 150, 166–67 (2006) (emphasis added). That is broad language. And it deprives this court of jurisdiction over any claim that requires any determination of rights to the River.

1. The Nation's Proposed TAC

In its Proposed TAC, the Nation added allegations regarding its breach of trust claim. It also added two new claims: a breach of treaty claim and a failure to consult claim. All the claims require this Court to determine that the Nation has rights to the River.

a. Breach of Trust

The breach of trust claim in the Proposed TAC would require this Court to determine the Nation's rights to the River. That determination is beyond this Court's authority because of the Supreme Court's reserved jurisdiction in *Arizona v. California*.

The Proposed TAC contains a multitude of statements referring to the Nation's "interests in . . . a water supply from the Lower Basin of the Colorado River." (Doc. 335-2 at 3). For example, the Nation alleges that the United States has failed in its trust responsibilities by

> fail[ing] to determine the water required from the Lower Basin of the Colorado River to make the Navajo Reservation a permanent homeland for the Navajo people; fail[ing] 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 the 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.
>
> (*Id.*).

The Nation's two prayers for relief in the Proposed TAC confirm that the Nation seeks relief that would require a declaration of rights to water from the River. The first prayer for relief requests this Court to declare that the United States' trustee obligations require it 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 . . . ; (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.

(*Id.* at 53).

The second prayer for relief asks for an injunction from this Court ordering the United States to fulfil the same steps outlined in the first prayer for relief (plus one more). The second prayer asks this court to require the government

> (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 as 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 light of the plan to secure the water from the Colorado River and adopt appropriate

> mitigation measures to offset any adverse effects from those actions.[2]

(*Id.* at 54).

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

At oral argument, the Nation repeatedly asserted that it is in fact bringing a more general claim—a claim not requiring determination of rights to the River, but rather a claim based on the Nation's general need for water to make the Reservation inhabitable.[3] For example, the Nation alleges that "[t]he Department [of the Interior] has a fiduciary responsibility to

---

[2] The Nation apparently failed to finish writing its second prayer for relief in the Proposed TAC, and supplies the rest of the sentence in its Reply. (Doc. 346 at 2 n.2).

[3] The Ninth Circuit recognized the distinction between "the unmet *needs* of the Navajo Nation . . . for water from the Lower Basin" and "the unquantified rights of the Navajo Nation to the waters of the Lower Basin of the Colorado River." *Navajo Nation*, 876 F.3d at 1161. The unquantified rights arise under *Winters*, while the "need" is "a freestanding interest in an adequate water supply for the Nation that exists notwithstanding the lack of a decreed right to water." *Id.* The Proposed TAC and its three claims focus primarily on the unquantified rights and would require a declaration that those rights are in the River.

the Navajo Nation to preserve, protect, and make productive the Nation's trust resources so that the Navajo Reservation is a viable permanent homeland." (Doc. 335-2 at 4). The Nation also notes that by creating the Navajo Reservation, the United States also by implication reserved "a sufficient amount of water . . . for the benefit of the Navajo Nation to carry out the purposes for which the [Navajo] Reservation was created, specifically to make the Reservation a livable homeland for the Nation's present and future generations." (Doc. 335-2 at 7); *see Cappaert v. United States*, 426 U.S. 128, 138 (1976); *Winters v. United States*, 207 U.S. 564 (1908).

At this point, however, this Court need not decide whether the Nation's rights under *Winters* would give rise to a trust claim if the Tribe did not take the further step of requiring the Court to determine that the Trustee had an obligation to satisfy such rights out of the mainstream of the Colorado River. In the past, however, the United States has taken the position that *Winters* water rights can be held in trust for a Tribe. *See Fort Mojave Indian Tribe v. United States*, 23 Cl. Ct. 417, 425 (1991). The Court need not decide such matters here, however, because the TAC as written requires the Court to determine whether the Nation has rights in the Colorado River.

b. Breach of Treaty

The Nation's breach of treaty claim is futile for the same reason—the relief the Nation seeks under the

claim asks this Court to find that the Nation has rights to the River. The Nation alleges that the United States breached two treaties made with the Navajo people—the 1849 peace treaty, *Treaty with the Navaho, 1849*, Sept. 9, 1849, 9 Stat. 974, and a treaty signed in 1868, *Treaty with the Navaho, 1868*, June 1, 1868, 15 Stat. 667. (Doc. 335-2 at 49). The Nation alleges that the United States breached its duties to the Nation under those treaties by "failing to determine the extent and quantity of the rights of the Navajo Nation to use the waters of the Colorado River." (Doc. 335-2 at 49). Proving this allegation would require that the United States has a duty to secure water from the River for the Nation. And since neither of the treaties specifically mentions water from the Colorado River, the only way the United States would have that specific duty is if the Nation had rights to the water. The Nation argues that this claim would not require a determination regarding rights to the River because the crux of the claim is the United States' failure to act affirmatively regarding the Nation's interest in sufficient water. *(See* Doc. 346 at 11). But that broader claim is not what the nation alleges—the way the Proposed TAC is written, this Court would be required to determine that the Nation has rights specific to the Colorado River before it could conclude that the United States breached its treaty duties to the Nation by having failed to secure those rights.

c. Failure to Consult

The Nation's failure to consult claim fails for the same reason, and at any rate, the Nation abandoned this claim at oral argument. The Nation apparently based this claim on Executive Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000). (Doc. 335-2 at 52). That order requires "[e]ach agency [to] have an accountable process to ensure meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications." 65 Fed. Reg. at 67250. The Nation alleges that the United States did not consult with the Nation prior to taking various administrative actions regulating the River. (Doc. 335-2 at 52). This allegedly violated the United States' duty to consult with the Nation "in the development of Federal policies that have tribal implications." Executive Order 13,175 defines "policies that have tribal implications" as "regulations, legislative comments or proposed legislation, and other policy statements or actions that have *substantial direct effects* on one or more Indian tribes." 65 Fed. Reg. at 67,249 (emphasis added).

But the "administrative actions complained of" all relate to the regulation of the Colorado River. For these administrative actions to have any "substantial direct effects" on the Nation, the Court would need to determine that the Nation had rights to the River.[4] *Cf.*

[4] Each of the actions objected to has to do with actions taken by the Federal Defendants regarding the regulation and use of water from the River. (Doc. 335-2 at 41–43). Indeed the Nation acknowledges this by titling the relevant section of the Proposed TAC "The Federal Defendants' On-going Management Efforts

Navajo Nation, 876 F.3d at 1162 ("The Guidelines do not act directly upon the Nation's unquantified water rights, nor could they."). Since the Nation has never had any such rights adjudicated, the "administrative decisions complained of did not have "direct effects" on the Nation. Thus the United States did not have a duty under Executive Order 13,175 to consult with the Nation before implementing the Guidelines. To prevail on this claim—which would require the Nation to show that the actions had "direct effects" on it—the Nation would require something that is beyond this Court's jurisdiction to declare: rights to the River.

And the failure to consult claim is futile for a second reason: Executive Order 13,175 does not create judicially enforceable rights. "This order is intended only to improve the internal management of the executive branch, and is not intended to create any right, benefit, or trust responsibility, substantive or procedural, enforceable at law by a party against the United States, its agencies, or any person." 65 Fed. Reg. at 67,252. *See Dettling v. U.S.*, 948 F.Supp.2d 1116, 1125 (D. Haw. 2013) ("The Executive Orders . . . explicitly state that they create no legally enforceable right or benefit. . . . Thus, Plaintiffs had no legal right to fish in the Reserve . . . and therefore suffered no injury in fact"); *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1339 (4th Cir. 1995) ("[A]n executive order is privately enforceable only if it was intended to create a private cause of action. . . .

Continue to Ignore the Needs of the Navajo Nation for Water from the Colorado River in the Lower Basin." (Doc. 335-2 at 41).

The plain language of the Executive Order indicates that it was an internal directive.").

For all these reasons, the breach of trust, breach of treaty, and failure to consult claims as pleaded in the Proposed TAC are futile.

CONCLUSION

IT IS THEREFORE ORDERED that Plaintiff Navajo Nation's Motion for Leave to File Third Amended Complaint (Doc. 335) 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.

Dated this 11th day of December, 2018.

/s/ G. Murray Snow
G. Murray Snow
Chief United States District Judge

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NAVAJO NATION, *Plaintiff-Appellant*, v. DEPARTMENT OF THE INTERIOR; RYAN ZINKE*, 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*.	No. 14-16864 D.C. No. 3:03-cv-00507-GMS OPINION

* We substitute Ryan Zinke for predecessor Sally Jewell as a Defendant-Appellee pursuant to Fed. R. App. P. 43(c)(2).

Appeal from the United States District Court
for the District of Arizona
G. Murray Snow, District Judge, Presiding

Argued and Submitted February 14, 2017
San Francisco, California

Filed December 4, 2017

Before: Ronald M. Gould and Marsha S. Berzon,
Circuit Judges, and Marvin J. Garbis,** District Judge.

Opinion by Judge Berzon

COUNSEL

Scott B. McElroy (argued) and Alice E. Walker, McElroy Meyer Walker & Condon P.C., Boulder, Colorado; M. Kathryn Hoover and Stanley M. Pollack, Navajo Nation Department of Justice, Window Rock, Arizona; for Plaintiff-Appellant.

Elizabeth Ann Peterson (argued), Edward S. Geldermann, Ellen J. Durkee, and William B. Lazarus, Attorneys; John C. Cruden, Assistant Attorney General; United States Department of Justice, Washington, D.C.; Scott Bergstrom and Robert F. Snow, Office of the Solicitor, United States Department of the Interior, Washington, D.C.; for Defendants-Appellees.

L. William Staudenmaier III (argued), Phoenix, Arizona, for Intervenor-Defendants-Appellees.

Michael J. Pearce, Maguire Pearce & Storey PLLC, Phoenix, Arizona; Kelly Brown and Kenneth C. Slowinski,

---

** The Honorable Marvin J. Garbis, United States District Judge for the District of Maryland, sitting by designation.

Chief Counsel, Arizona Department of Water Resources, Phoenix, Arizona; for Intervenor-Defendants-Appellees State of Arizona and Arizona Power Authority.

John B. Weldon, Jr. and Lisa M. McKnight, Salmon Lewis & Weldon PLC, Phoenix, Arizona; for Intervenor-Defendants-Appellees Salt River Project Agricultural Improvement and Power District and Salt River Valley Water Users' Association.

Stuart Somach and Robert Hoffman, Somach Simmons & Dunn, Sacramento, California; for Intervenor-Defendant-Appellee Central Arizona Water Conservation District.

Lauren J. Caster, Special Deputy Counsel, and Gregory L. Adams, Fennermore Craig P.C., Phoenix, Arizona; Jennifer T. Crandell, Special Counsel Attorney General; Adam Paul Laxalt, Attorney General; Office of the Nevada Attorney General; for Intervenor-Defendant-Appellee State of Nevada; Colorado River Commission of Nevada; Southern Nevada Water Authority.

Adam C. Kear, Chief Deputy General Counsel; Joseph A. Venderhorst, Assistant General Counsel; Marcia Scully, General Counsel; The Metropolitan Water District of Southern California, Los Angeles, California; [ ] for Intervenor-Defendant-Appellee Metropolitan Water District of Southern California.

Steven B. Abbott, Redwine and Sherrill, Riverside, California, for Intervenor-Defendant-Appellee Coachella Valley Water District.

Joanna M. Smith Hoff, Assistant Counsel, Imperial Irrigation District, Imperial, California; Charles T. Dumars, Law & Resource Planning Associates P.C., Albuquerque, New Mexico; for Intervenor-Defendant-Appellee Imperial Irrigation District.

Steven G. Martin and Steven M. Anderson, Best Best & Krieger LLP, Riverside, California, for Intervenor-Defendants-Appellees Coachella Valley Water District and The Metropolitan Water District of Southern California.

Shanti Rosset, Assistant Attorney General; Karen M. Kwon, First Assistant Attorney General; Cynthia Coffman, Attorney General; Attorney General's Office, Denver, Colorado; for Intervenor-Defendant-Appellee State of Colorado.

OPINION

BERZON, Circuit Judge:

The Department of the Interior ("Interior" or "the Secretary") oversees the control, storage, and delivery to the Western states of the waters of the Colorado River. In most years, each state in the Colorado River Basin receives a fixed amount of water from the river; in "surplus" and "shortage" years, that amount changes. In the face of unprecedented drought and ever-increasing demand for water, Interior published guidelines in 2001 and 2008 to clarify how it would make these "surplus" and "shortage" determinations from year to year. This case concerns challenges to

those guidelines by the Navajo Nation ("Nation"), a federally recognized Indian tribe.

The Nation occupies vast reservation lands along the Colorado River but has no judicially decreed right to its waters. Aggrieved by its lack of enforceable rights to Colorado River water, the Nation filed suit to challenge the surplus and shortage guidelines, alleging principally that Interior neglected to consider the guidelines' impact on its potential, but as-yet unadjudicated, water rights in the Colorado River and so violated the National Environmental Policy Act ("NEPA"). The Nation also charged Interior with more broadly breaching the trust duties the government owes the Nation by failing to account for or safeguard the tribe's interests in and rights to water in the river. The district court rejected all of the Nation's challenges, which are now raised anew here.

I. BACKGROUND

A. The Navajo Nation

The Nation is a federally recognized Indian tribe whose reservation lands sprawl over 13 million acres in the American Southwest.[1] The Navajo Reservation ("Reservation"), the largest Indian reservation in the United States, was established by treaty in 1868 and grew piecemeal between 1868 and 1934, as lands were

[1] These facts are drawn from the complaint, which we accept as true for purposes of reviewing a motion to dismiss for lack of subject-matter jurisdiction. *See Courthouse News Serv. v. Planet*, 750 F.3d 776, 780 (9th Cir. 2014).

added to it by treaty, executive order, and statute. The Reservation covers parts of Arizona, New Mexico, and Utah, and lies almost entirely within the drainage basin of the Colorado River,[2] which demarcates much of the Reservation's western boundary. Aside from the federal government, the Nation is the largest riparian landowner along the Colorado.

The United States is trustee of the Nation's tribal lands and resources. *United States v. Mitchell*, 463 U.S. 206, 225 (1983). The Nation's claims in this action arise either directly or derivatively from the alleged breach of fiduciary responsibilities created by this trust relationship.

B. The Law of the River

The Colorado River begins in the mountains of Colorado and flows nearly 1,300 miles to the Sea of Cortez, adjacent to the Sonoran Desert in Mexico, draining an area amounting to almost one-twelfth of the continental United States. *Arizona v. California*, 373 U.S. 546, 552 (1963). "Much of this large basin is so arid that it is, as it always has been, largely dependent upon managed use of the waters of the Colorado River System to make it productive and inhabitable." *Id.*

Because of the Colorado's importance to the West, river water is pervasively managed, regulated, and

---

[2] A river "drains" the surface water that flows into it; a "drainage basin" is the whole tract of land "drained by a river and its tributaries." WEBSTER'S THIRD NEW INT'L DICTIONARY 182, 685 (1971).

contested. Interior, through the Bureau of Reclamation, operates large dams and reservoirs that control the flow of the Colorado's waters. Additionally, federal statutory law and regulations, Supreme Court decrees, interstate compacts, state and federal common law, and treaties foreign and domestic affect the allocation and management of the River's waters. This byzantine legal regime is known as "The Law of the River," the relevant portions of which we summarize below.

i. The 1922 Compact[3]

In 1922, seven states entered into an interstate compact to govern the gross allocation of water from the Colorado River. The states wanted to assure that the Colorado became a regular, dependable source of water; they recognized that doing so would require a regional or national solution.[4]

The Colorado River Compact ("1922 Compact") entered into by the affected states divided the river in two at Lee Ferry, Arizona. 1922 Compact art. II, *reprinted in* 70 Cong. Rec. 324 (Dec. 10, 1928). The

---

[3] The Court may take judicial notice of compacts, statutes, and regulations not included in the plaintiff's complaint. *See*, *e.g.*, *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 547 F.3d 962, 968 n.4 (9th Cir. 2008) (noticing tribal-state compacts); *United States v. Woods*, 335 F.3d 993, 1001 (9th Cir. 2003) (holding it was proper for the district court to notice published agency regulations).

[4] *See Arizona v. California*, 373 U.S. at 554. Fears of overappropriation by California played a role in the compact as well. *Id.* at 556.

"Upper Basin" States[5] (Colorado, New Mexico, Utah, and Wyoming) and the "Lower Basin" States (Arizona, California, and Nevada) would each be entitled to 7.5 million acre-feet per year ("mafy") of water.[6] *Id.* arts. II-III. This suit concerns water in the Lower Basin only. The Compact stated that it did not establish, alter, or impair any present perfected rights within the States, *id.* art VIII, nor "affect[] the obligations of the United States of America to Indian tribes," *id.* art VII. Commissioners from each state signed the compact, but it became effective under its terms only if ratified by Congress and the legislature of each signatory state. *Id.* art XI.

ii. The Boulder Canyon Project Act

In 1928, Congress addressed the management of the Colorado River through the Boulder Canyon Project Act, 43 U.S.C. § 617 *et seq*. The Act conditionally approved the 1922 Compact and authorized the Secretary of the Interior to construct a massive dam at Boulder Canyon (now the Hoover Dam) and the attendant water delivery infrastructure (a reservoir, now Lake Mead, and delivery canals) to effectuate the allocations

---

[5] The Compact refers to states of the "Upper Division" and "Lower Division," *see id.* art. II. We instead follow the custom of the Supreme Court and refer to Arizona, California, and Nevada collectively as the "Lower Basin" states. *See*, *e.g.*, *Arizona v. California*, 373 U.S. at 558–59.

[6] An acre-foot is the volume of water that would cover an acre of land to the depth of one foot. WEBSTER'S THIRD NEW INT'L DICTIONARY 19.

laid out in the 1922 Compact. 43 U.S.C. § 617. The Act also allowed the Secretary to enter into contracts with users for the storage and delivery of water in the Project's reservoir. *Id.* § 617d.

Most relevant for our purposes, the Act authorized the three Lower Basin States to negotiate a second compact divvying up their 7.5 mafy share of the Colorado's water—4.4 to California, 2.8 to Arizona, and 0.3 (i.e., 300,000 afy) to Nevada. If entered into, this agreement would take effect once all three states had ratified the 1922 Compact. *Id.* § 617c(a).

The Boulder Canyon Project Act became effective in 1929, after six of the seven states ratified the Compact, *see id.*, and California "irrevocably and unconditionally" covenanted to limit its consumption to 4.4 mafy.[7] Arizona did not ratify the 1922 Compact, so the Lower Basin states never agreed to the second compact that would have apportioned the 7.5 mafy among the three states. *See Arizona v. California*, 373 U.S. at 561–62. The Secretary nonetheless entered into water contracts with the Lower Basin states.[8] *Id.* at 562.

---

[7] *See* Act of March 4, 1929, *in* Statutes and Amendments to the California Codes, ch. 16, 48th Session (1929), at 38–39. The Boulder Canyon Project Act lowered the 1922 Compact's ratification threshold: six states would suffice for ratification as long as California was among them and committed to a ceiling on its apportionment. *See* 43 U.S.C. § 617c(a).

[8] While the Secretary contracted with Arizona and Nevada for their shares as laid out in the Boulder Canyon Project Act, 43 U.S.C. § 617c(a), it contracted to deliver 5.36 mafy to California,

iii. Arizona v. California

Conflict over Lower Basin water continued between Arizona and California, coming to a boil in 1952 when Arizona sued California in an original action in the Supreme Court. The United States intervened to represent federal interests, including the interests of 25 Indian tribes,[9] and other Basin States intervened as well. Based on the report, findings, and recommended decree of a Special Master, *see Arizona v. California*, 373 U.S. at 551, the Court issued a decree clarifying each state's rights to Lower Basin water. *See Arizona v. California*, 376 U.S. 340 (1964) ("1964 Decree").

The 1964 Decree affirmed the provisional apportionments set out in the Boulder Canyon Project Act. In years when the Secretary determined that 7.5 maf of water was available for release to the Lower Basin states, Nevada was entitled to 0.3 mafy; Arizona to 2.8 mafy; and California to the lion's share, 4.4 mafy. 1964 Decree art. II(B)(1), 376 U.S. at 342. The Decree also parceled out the relative shares each Lower Basin State would get in years in which, "as determined by the Secretary of the Interior," there was surplus water available.[10] 1964 Decree art. II(B)(2), 376 U.S. at 342. If, instead, the Secretary determined in a given year

---

significantly more than the 4.4 mafy the Act contemplated. *Arizona v. California*, 373 U.S. at 562.

[9] *See* Findings of Fact and Conclusions of Law Proposed by the United States of America, at 51, *Arizona v. California*, 373 U.S. 546 (1963) (No. 9, Original).

[10] California would receive 50% of the surplus, Arizona 46%, and Nevada 4%. *See* 1964 Decree art. II(B)(2), 376 U.S. at 342.

that there was a *shortage* of water—less than 7.5 maf available in the Lower Basin—the Decree required the Bureau of Reclamation first to "provid[e] for satisfaction of present perfected rights in the order of their priority dates without regard to state lines." *Id.* art. II(B)(3), 376 U.S. at 342. Then, "after consultation with the parties to major delivery contracts and such representatives as the respective States may designate, [the Secretary] may apportion the amount remaining available for consumptive use in such manner as is consistent with the Boulder Canyon Project Act," the Decree, and other applicable federal statutes. *Id.*

iv. Winters *rights*

In addition to partitioning the Colorado River waters among the three Lower Basin States, the 1964 Decree adjudicated the "*Winters* rights" of five Indian tribes. *Winters v. United States* held that "when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert v. United States*, 426 U.S. 128, 138 (1976); *see also Winters v. United States*, 207 U.S. 564, 577 (1908). The rights to this water—also called "reserved rights"—vest on the original date of withdrawal of the land and trump the rights of later appropriators.[11] *Cappaert*,

[11] Most water rights are acquired through appropriation. "Under the doctrine of prior appropriation, the first to divert and use water beneficially establishes a right to its continued use as

426 U.S. at 138. For Indian reservations, courts look to the treaties, executive orders, and statutes that set aside reservation land for the tribe in question.[12] *Winters* rights, unlike water rights gained through prior appropriation, are not lost through non-use. *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51 (9th Cir. 1981).

In *Arizona v. California*, the Supreme Court reaffirmed the vitality of the *Winters* doctrine, noting that "most of the [reservation] lands were of the desert kind—hot, scorching sands—and . . . water from the [Colorado] would be essential to the life of the Indian people and to the animals they hunted and the crops they raised." 373 U.S. at 599. The Decree awarded five tribes a right to Lower Basin water commensurate with the "practicably irrigable acreage" of each tribe's reservation. *Id.* at 600; 1964 Decree art. II(D), 376 U.S. at 343–45. Following the Special Master's lead, the Court declined to reach the claims of the other twenty tribes, including the Navajo Nation's. *See* 373 U.S. at 595. The Decree made clear, however, that it did not affect "[t]he rights or priorities, except as specific provision is made herein, of any Indian Reservation." *Id.* art. VIII(C), 376 U.S. at 352–53.

---

long as the water is beneficially diverted." *Cappaert*, 426 U.S. at 139 n.5.

[12] *See*, *e.g.*, *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, 849 F.3d 1262, 1265 (9th Cir. 2017) (dating the reservation of water from the Executive Orders that withdrew land for the tribe), *petition for cert. filed* (U.S. July 3, 2017) (No. 17-42).

The Supreme Court retained jurisdiction over the suit, 1964 Decree art. IX, 376 U.S. at 353, and, over the next few decades, announced several sequels to the original opinion. *See*, *e.g.*, *Arizona v. California*, 460 U.S. 605 (1983) (holding that res judicata barred reopening the quantification of tribes' *Winters* rights); *Arizona v. California*, 530 U.S. 392 (2000) (holding that res judicata did *not* bar certain claims stemming from reservation boundary disputes); *Arizona v. California*, 547 U.S. 150 (2006) (consolidating prior decrees and implementing the water rights settlement concerning one Indian reservation).

C. The Nation's Rights to Water in the Colorado River

Under the *Winters* doctrine, when setting aside lands for the Navajo Nation, the United States impliedly reserved for the tribe "the waters without which their lands would [be] useless." *Arizona v. California*, 373 U.S. at 600. As noted above, in the first iteration of *Arizona v. California*, the Special Master—and the Supreme Court—declined to reach the *Winters* claim put forward on behalf of the Nation.[13] *Id.* at 595.

---

[13] The Nation attempted to intervene in the suit on its own behalf, but the United States successfully opposed the motion. *See* Response of the United States to the Motion on Behalf of the Navajo Tribe of Indians for Leave to Intervene, *Arizona v. California*, 373 U.S. 546 (1963) (No. 8, Original). The claim filed on behalf of the Nation was for water in the Little Colorado River, a tributary of the Lower Colorado River. *See* Findings of Fact and Conclusions of Law Proposed by the United States of America, *supra* note 9, at 58. The Special Master, and the Court, declined to reach

The Nation has in the last half-century repeatedly asserted its right to water in the Lower Colorado,[14] but its potential water rights in the Lower Colorado have never been adjudicated or quantified.

"particularly those [claims] relating to tributaries." *Arizona v. California*, 373 U.S. at 595.

[14] The Nation has been, and is, actively seeking additional water for the Reservation in several forums. The Nation's rights to water from the Little Colorado River, which flows through eastern Arizona and western New Mexico,

are being considered in an ongoing adjudication in Arizona state court. *See In re General Adjudication of All Rights to Use Water in Little Colorado River Sys. & Source*, No. CV 6417 (Ariz. Super. Ct., Apache Cty.). The Nation filed its claim in that adjudication in 1985. *See* Statement of Claimant The Navajo Nation, *In re General Adjudication*, No. CV 6417 (Nov. 27, 1985). The Nation may also receive an allocation of water from the Central Arizona Project ("CAP"), a major diversion canal in Arizona. In the Arizona Water Settlements Act of 2004, Pub. L. No. 108-451, 118 Stat. 3478, 3487 (2004), Congress directed the Secretary to set aside a specified amount of water from the CAP for distribution to the Navajo Nation—6,411 afy—should the Nation obtain rights through ongoing settlement negotiations. Congress conditioned the Nation's access to CAP water on approval of a water rights settlement by Congress before 2030. No such settlement has been reached to date.

Finally, the Nation requested that the Secretary of the Interior contract with the Nation for any of the water allocated to Arizona not committed to other users. The Secretary has not agreed to such a contract.

D. Implementing the Law of the River

The Secretary "is vested with considerable control over the apportionment of Colorado River waters," *Arizona v. California*, 373 U.S. at 593, and is generally responsible for the management and delivery of water from the Colorado pursuant to the Law of the River. Each state's water portion is dictated by the 1964 Decree, as is the allocation of surplus water; *Arizona v. California* accords discretion to the Secretary to apportion shortfalls in years of shortage, *see id.* at 593–94. The 1964 Decree also commits the *determination* of surplus and shortage years to the Secretary. *See* 1964 Decree art. II(B)(2)–(3), 376 U.S. at 342.

The Colorado River Basin Project Act of 1968 required the Secretary to adopt criteria for the coordinated management of Lake Mead and Lake Powell, the reservoirs under the Secretary's management in the Lower Basin. *See* 43 U.S.C. 1552(a)–(b). These "Operating Criteria" for the coordinated management of the storage reservoirs in the Lower Basin help the Secretary determine whether to declare a shortage or surplus in any given year. *See Colorado River Reservoirs: Coordinated Long-Range Operation*, 35 Fed. Reg. 8951 (June 10, 1970). Before adopting the challenged guidelines, the Secretary made year-to-year determinations about declaring a shortage or surplus, relying on a varying combination of factors, including the year-end water levels in Lake Mead and Lake Powell, potential run-off conditions, and projected water demands. *See Colorado River Interim Surplus Guidelines*, 66 Fed. Reg. 7772, 7774 (Jan. 25, 2001) (describing the factors

the Secretary historically considered in making shortage and surplus declarations). This ad hoc approach bred uncertainty about the possibility of surplus or shortage in any particular year, which grew untenable as demand for surplus water increased. *Id.* To partially remedy this problem, the Secretary first decided to adopt more specific, objective criteria for making the annual determinations regarding surplus water. *Id.* Guidelines for determining shortages came later.

E. The Challenged Surplus and Shortage Guidelines

i. Surplus Guidelines

In 2001, the Secretary adopted the Colorado River Interim Surplus Guidelines ("Surplus Guidelines"). The Guidelines would "determine the conditions under which the Secretary would declare the availability of surplus water for use within" the Lower Basin states every year. *See Surplus Guidelines*, 66 Fed. Reg. at 7773. This declaration and allocation of a surplus, if there was one, were to be consistent with the 1964 Decree, the Colorado River Basin Project Act, and the Operating Criteria adopted pursuant to that Act. The Surplus Guidelines aimed to provide greater consistency and predictability in the Secretary's surplus declarations from year to year, in light of growing (and competing) demands for surplus water, and of California's continued diversion of more than its allotted 4.4 mafy share of Lower Basin water. *See id.* at 7773–74.

The Surplus Guidelines pegged the surplus declaration to the year-end water level in Lake Mead. *See id.* at 7775. If that water level equaled or exceeded the highest "tier,"[15] surplus water would be made available for all types of water uses. At or below the lowest "tier," a "Normal" or "Shortage" year would be declared and no surplus water would be released. At the middle tier, water would be released subject to use restrictions. *See id.* at 7780. These "interim" guidelines were set to expire in 2016. *See id.* at 7773–74, 7780–81.

Before adopting the Surplus Guidelines and issuing the Record of Decision, the Secretary published a draft environmental impact statement ("EIS") assessing the environmental impacts of four alternatives along with the "No-Action Alternative." *See Colorado River Interim Surplus Criteria, Notice of Availability of Draft EIS*, 65 Fed. Reg. 42,028, 42,029 (July 7, 2000). In December 2000, after receiving comments on its draft, the Secretary issued his final EIS ("FEIS"),[16] and one month later its Record of Decision, adopting the preferred alternative as the Surplus Guidelines. *See Surplus Guidelines*, 66 Fed. Reg. at 7772.

During the development of the EIS, the Secretary consulted with various Indian tribes whose lands or water resources lay in the Lower Basin. *See Final*

---

[15] The three "tiers" correspond to three water surface elevations in Lake Mead. *Surplus Guidelines*, 66 Fed. Reg. at 7775.

[16] The full Surplus Guidelines FEIS is available at *Final Environmental Impact Statement: Colorado River Interim Surplus Criteria*, https://www.usbr.gov/lc/region/g4000/surplus/SURPLUS_FEIS.html (last updated Jan. 16, 2007).

Environmental Impact Statement, Colorado River Interim Surplus Criteria ("*Surplus Guidelines FEIS*"), Executive Summary, at 33, 44. Both the Navajo Nation and the Colorado River Basin Ten Tribes Partnership, of which the Nation is a member, submitted comments on the draft, calling it "fundamentally flawed" and "deeply and fatally flawed." *Surplus Guidelines FEIS* at B-187, B-196. The Nation complained that the proposed Surplus Guidelines did not account for its unquantified rights in the Lower Basin and fostered reliance by third parties on water to which it was, or would or could be, entitled. *Id.* at B-187 to B-190. The Ten Tribes objected to the lack of consideration of "Indian Trust Assets" and claimed that the Guidelines would generally frustrate the development and protection of Indian water rights. *Id.* at B-196 to B-215.

The Secretary responded that it was actively assisting tribes in obtaining their water rights, and it disagreed that the Guidelines would hamper or decrease incentives to develop Indian water rights in the Lower Basin. *Id.* at B-189; B-203 to B-205. "The Department does not believe this proposed action would preclude the Tribes or any entitlement holder from using their Colorado River entitlement. The interim surplus criteria will not alter the quantity or priority of Tribal entitlements." *Id.* at B-204.

ii. Shortage Guidelines

The adoption of criteria for declarations of surplus water in the Colorado River coincided with the driest

eight-year period in the recorded history of the River. *See Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead* ("*Shortage Guidelines*"), 73 Fed. Reg. 19,873 (Apr. 11, 2008). This historic drought, combined with increasing demand for river water, led the Secretary to implement guidelines for declaring shortages as well. These guidelines would, like the Surplus Guidelines, offer greater predictability to mainstream Colorado water users regarding the supply of water in any given year. The Shortage Guidelines also created mechanisms to encourage water banking and conservation that would provide greater year-to-year flexibility for the Secretary and water users. *See Final Environmental Impact Statement, Shortage Guidelines* ("*Shortage Guidelines FEIS*"), Executive Summary, at ES-1 to ES-2.[17]

In 2008, the Secretary adopted the Shortage Guidelines and issued an accompanying Record of Decision. *See Shortage Guidelines*, 73 Fed. Reg. at 19,873. Like the Surplus Guidelines, the Shortage Guidelines linked the Secretary's declaration of a shortage to the level of water in Lake Mead. *See id.* at 19,874; *Shortage Guidelines FEIS*, Executive Summary, at ES-6. The Shortage Guidelines also implemented procedures for the coordinated operation of the Lake Mead and Lake

---

[17] The full Shortage Guidelines FEIS is available at *Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lakes Powell and Mead: Final Environmental Impact Statement*, https://www.usbr.gov/lc/region/programs/strategies/FEIS/#VolI (last updated Nov. 2007).

Powell reservoirs in times of low water and shortage. *See Shortage Guidelines*, 73 Fed. Reg. at 19,874.

Beyond delineating when and how the Secretary would declare a shortage, the Shortage Guidelines also provided for the creation of "Intentionally Created Surplus" ("ICS") water. Water users could bank ICS water by either (i) conserving water through a variety of measures[18] or (ii) importing water from outside the Colorado ("non-system water") into the Lower Basin system. *Id.* at 19,877, 19,883, 19,887. The Guidelines also modified the Surplus Guidelines and extended them through 2026. *Id.* at 19,874.

In its comments on the draft EIS for the Shortage Guidelines, the Nation largely reiterated its objections to the Surplus Guidelines. *See Shortage Guidelines FEIS*, vol. IV, at IT-103 to IT-108. The FEIS included a discussion of Indian Trust Assets, including water rights.[19] *See id.* at 3–87. The Shortage Guidelines FEIS recognized that the Nation's unquantified *Winters* rights in the Lower Basin constituted an Indian Trust Asset, and noted that the Nation maintains that some portion of its *Winters* rights will need to be satisfied from the Colorado River. *Id.* at 3–96. Ultimately, however, the FEIS concluded that "[t]he proposed federal action would not result in any substantive effects on

---

[18] These measures include fallowing fields, lining canals, desalinating non-river water, or implementing other "extraordinary conservation measures." *Id.* at 19,886.

[19] The FEIS also considered potential impacts on tribal historic properties, tribal sacred sites, cultural resources, and biological resources. *See* Shortage Guidelines FEIS at 4–244 to 4–250.

[Indian Trust Assets]." *See id.* at 5–12. To the Nation's concerns about possible injury to its unquantified water rights, the Secretary responded:

> No vested water right of any kind, quantified or unquantified, including federally reserved Indian rights to Colorado River water . . . will be altered as a result of any of the alternatives under consideration.
>
> To the extent that additional Tribal water rights are developed, established or quantified during the interim period of the proposed federal action, the United States will manage Colorado River facilities to deliver water consistent with such additional water rights, if any, pursuant to federal law.

See id. at 4–249.

II. PROCEDURAL HISTORY

The Nation filed its initial complaint against the Department of the Interior, the Secretary, the Bureau of Reclamation, and the Bureau of Indian Affairs (collectively "Federal Defendants") in March 2003. The Nation challenged under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, the 2001 Surplus Guidelines,[20] alleging that the Secretary's failure adequately to consider and protect the Nation's rights to, and interest in, water violated the National

[20] The Nation also challenged several other agency actions in its complaint. Only the Nation's First, Second, and Seventh Claims for relief are at issue on appeal.

Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*. The Nation further alleged that the United States had breached its trust obligations to the Nation by failing to consider or protect the Nation's water rights while managing the Colorado River.

Various states and local government entities from California, Arizona, Nevada, and Colorado intervened as defendants.[21] In October 2004, on the joint motion of the parties, the district court stayed proceedings to allow for settlement negotiations.

In 2013, after almost a decade of unsuccessful settlement negotiations, the district court lifted the stay and the litigation started anew. The Nation twice amended its complaint, adding a challenge to the 2008 Shortage Guidelines, and the district court then granted motions to dismiss the Nation's Second Amended Complaint without prejudice, holding that the Nation lacked Article III standing to bring its NEPA claims and that its breach of trust claim was barred by sovereign immunity. At the hearing on the

---

[21] From Arizona, the intervenors are the State of Arizona, Salt River Project Agricultural Improvement and Power District, Salt River Water Users' Association, and Central Arizona Water Conservation District; from California, the Coachella Valley Water District, Imperial Irrigation District, and the Metropolitan Water District of Southern California; and from Nevada, the State of Nevada, Colorado River Commission of Nevada, and Southern Nevada Water Authority. The State of Colorado also intervened. The Arizona, California, and Nevada Intervenor-Defendants each filed separate answering briefs in this appeal, and Colorado joined the arguments set out in the Arizona and Nevada briefs.

motions to dismiss, the district court inquired whether, if necessary, the Nation preferred a dismissal with leave to amend the complaint or a dismissal with prejudice. Notwithstanding the Nation's expressed preference for dismissal with leave to amend, the district court ultimately dismissed without leave to amend and without prejudice.

The Nation filed a Rule 60(b)(6) motion for relief from the final judgment, contending that because the relevant statute of limitations had run, the dismissal was effectively with prejudice. In the Nation's view, the district court should have re-opened the proceedings and granted it leave to further amend its complaint. The district court denied that motion. The Nation appeals both orders.

III. STANDING

The district court dismissed the Nation's NEPA claims, holding that the alleged harm to the Nation's unquantified *Winters* rights was too speculative to confer standing. Although the district court considered the Nation's interests in adequate water too narrowly, we agree that the Nation failed to show it "reasonably probable" that the new Guidelines threatened its interests in obtaining adequate water. *See Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 969–70 (9th Cir. 2003). Accordingly, we affirm the district court's dismissal of the NEPA claims.

A. Legal Standards

"[S]tanding is an essential and unchanging part of the case-or-controversy requirement of Article III." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). To establish standing, a plaintiff must demonstrate "(1) a concrete and particularized injury that is 'actual or imminent, not conjectural or hypothetical'; (2) a causal connection between the injury and the defendant's challenged conduct; and (3) a likelihood that a favorable decision will redress that injury." *Pyramid Lake Paiute Tribe of Indians v. Nev. Dep't of Wildlife*, 724 F.3d 1181, 1187 (9th Cir. 2013) (quoting *Lujan*, 504 U.S. at 560–61). Our review of standing is de novo. *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1196–97 (9th Cir. 2004).

Where plaintiffs allege a "procedural injury"—that is, that the government's violation of a procedural requirement could impair some separate interest of the plaintiffs'—the "normal standards for . . . [the] immediacy" of injury are relaxed. *Lujan*, 504 U.S. at 572 n.7. A plaintiff alleging procedural harm can demonstrate injury in fact by showing (i) the agency violated certain procedural rules, (ii) those rules protect a concrete interest of the plaintiff, and (iii) it is "reasonably probable" that the challenged action threatens that concrete interest. *Citizens for Better Forestry*, 341 F.3d at 969–70.

The universe of interests procedurally protected by NEPA is broad: birdwatchers' and outdoorsmen's interests in their ability to "picnic, birdwatch, walk, and

swim" in a particular area, *Cantrell v. City of Long Beach*, 241 F.3d 674, 681 (9th Cir. 2001); municipalities' interests "as varied as [their] responsibilities, powers, and assets," *City of Sausalito*, 386 F.3d at 1197, including harm to water resources, *see Churchill Cty. v. Babbitt*, 150 F.3d 1072, 1079 (9th Cir. 1998) (identifying harms such as "unknown changes to the underground water supply system, and reduced quality of local drinking water"); and, as here, Indian tribes' interest in assuring water is available on their reservation lands, *see Pyramid Lake Paiute*, 724 F.3d at 1188 ("[T]he Tribe's interest in maximizing flows to Pyramid Lake . . . is well established."). In any instance, though, the plaintiff must assert that the procedural violation could harm an interest specific to it, not an abstract interest in assuring that NEPA's procedural requirements for considering environmental impacts are followed. "A free-floating assertion of a procedural violation, without a concrete link to the interest protected by the procedural rules, does not constitute an injury in fact." *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 938 (9th Cir. 2005).

Although standing inquiries are inherently fact-specific, we have laid down some guideposts for determining whether it is "reasonably probable" that agency action threatens a plaintiff's interests. For one thing, the imminence inquiry is "less demanding" for procedural harms. *Hall v. Norton*, 266 F.3d 969, 976 (9th Cir. 2001). The challenged action need not immediately or directly cause the harm as a first-order effect. "[T]hat the potential injury would be the result of a chain of

events need not doom the standing claim." *Idaho Conservation League*, 956 F.2d at 1515. "The relevant inquiry . . . is whether there is a 'reasonable probability' that the challenged procedural violation will harm the plaintiffs' concrete interests, not how many steps must occur before such harm occurs." *Citizens for Better Forestry*, 341 F.3d at 975 (internal citations omitted).

Notwithstanding this relaxed standard, injury in fact requires a likelihood that the challenged action, if ultimately taken, would threaten a plaintiff's interests. Where a plaintiff cannot "explain *in any way* how their [interests] may be affected" by agency action, it has not suffered an injury in fact. *Nuclear Info. & Res. Serv. v. Nuclear Regulatory Comm'n* ("*NIRS*"), 457 F.3d 941, 953 (9th Cir. 2006) (emphasis in original). So, although a contingent "chain of events" can create a "reasonably probable" threat to a plaintiff's interests, a purely speculative sequence of occurrences will not meet this standard. *See Bell v. Bonneville Power Admin.*, 340 F.3d 945, 951 (9th Cir. 2003).

B. Discussion

The Navajo Nation proposes for standing purposes that it has suffered two sorts of injuries. The Guidelines, the Nation maintains, (1) "do[] not account for the unquantified *rights* of the Navajo Nation to the waters of the Lower Basin of the Colorado River" and (2) disregard "the unmet *needs* of the Navajo Nation and tribal members for water from the Lower Basin." The two interests are distinct: the former arises out of the

Nation's potential reserved water rights under *Winters v. United States*, while the latter is a freestanding interest in an adequate water supply for the Nation that exists notwithstanding the lack of a decreed right to water. The district court's analysis focused only on the threat to the former interest. We consider each in turn.

i. Injury to the Nation's unquantified Winters rights

The Nation's first alleged injury is to its as-yet-unquantified water rights under *Winters v. United States*, discussed in Part I.B.iv *supra*. The parties agree that the Nation may have unquantified *Winters* rights in some body of water.[22] Unquantified *Winters* rights in the Lower Basin are sufficiently concrete interests, the impairment of which—coupled with a procedural violation—gives rise to standing under NEPA. *See Citizens for Better Forestry*, 341 F.3d at 969–70. Indeed, interests in water less concrete than unquantified *Winters* rights have formed the basis for standing in the past. In *Laub v. U.S. Department of Interior*, 342 F.3d

[22] When the United States intervened in *Arizona v. California* as trustee on behalf of the Nation (among other tribes), it presented evidence that the Nation had 8,490 acres of irrigable land on which to base a *Winters* claim. *See supra* notes 9 & 13 and accompanying text. This claim, however, was not adjudicated.

In the run-up to the present litigation, the tribe sent to the Bureau of Reclamation, during the consultation process on the Guidelines, a "water budget" of 76,732 afy that would need to be satisfied out of the Colorado River. The defendants contend that whatever water rights the Nation has under *Winters* might be satisfied from sources other than the Lower Basin of the Colorado.

1080, 1086 (9th Cir. 2003), for example, the "loss of affordable irrigation water" for farmers was a concrete interest sufficient for NEPA standing. The precise scope and status of the Nation's possible *Winters* rights do not concern us; it is enough to establish standing to demonstrate that however those rights are delineated, they are threatened by the Guidelines. But the Nation, we conclude, cannot so establish.

The Guidelines do not act directly upon the Nation's unquantified water rights, nor could they.[23] So how could the Guidelines injure these rights?

The Nation alleges that the Secretary's actions will create a complex and difficult-to-reverse combination of third-party reliance and political inertia that will frustrate future attempts by the Nation to secure and enjoy its *Winters* rights. In support of its allegation, the Nation posits the following chain of events: the Guidelines will "establish[] a system of reliance upon the Colorado River 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" it. This reliance will make it "increasingly difficult" to satisfy the Nation's water rights from the Lower Basin, and will "limit the Navajo Nation's future options" for securing water,

---

[23] "These Guidelines are not intended to, and do not . . . [a]ffect the rights of any holder of present perfected rights or reserved rights, which rights shall be satisfied within the apportionment of the State within which the use is made, and in the Lower Basin, in accordance with the Consolidated Decree." *See* Shortage Guidelines, 73 Fed. Reg. at 19,884.

notwithstanding the seniority of its rights. Even with senior rights, "the complex process of bringing water to the Reservation in a contentious political climate" will cast a pall of uncertainty over the Nation's entitlement.

Further developing its hypothetical scenario, the Nation argues that the United States will not be "inclined" to re-open the issue of water allocation in the Colorado, having forged a multi-state consensus for the Guidelines that "appeased the Lower Basin states." The Secretary's assurance that he will manage the Colorado consistent with any *Winters* rights quantified or obtained in the future "ignores political and practical realities," namely the "disincentive" for the United States to protect the Nation's water rights created by this system of reliance.

Critically, the Nation does not contend that the Guidelines *legally* impair any unquantified rights it has in Lower Basin water. It is common ground among all affected that *if* the Nation obtained decreed rights in the Lower Colorado Basin, that entitlement would trump all claims with a later priority date, "regardless of whether that water has been developed or relied upon by third parties with junior priority dates." Rather, the Nation's fear is that the Guidelines threaten to solidify a web of reliance interests and incentives that, as a *practical* matter, may prevent the Nation (or disincline the United States, as its trustee) from enjoying or pursuing those decreed rights.

Whether or not the Nation's realpolitik predictions have some truth to them, the posited injury to the Nation's unquantified *Winters* rights due to the Guidelines is too speculative to confer standing. The string of contingencies connecting the Guidelines to the frustration of the Nation's rights is not only long—not disqualifying in itself—but spindly, too. The Nation's allegations about the future development of reliance interests, and the government's intransigence in upsetting these interests in pursuit of the Nation's unadjudicated water rights, are supported by "no facts, figures, or data." *See Bell*, 340 F.3d at 951.

For example, the Nation offers no support for its allegation that the United States will shirk its trust duties for fear of upsetting the water rights apple-cart. From the Secretary's stated attempt to avoid "destabilizing litigation," and to gain consensus among the Basin States for the challenged Guidelines, the Nation predicts that the United States would no longer be inclined to pursue water rights for the Nation if such actions necessitated a reallocation of rights or potentially upset the multi-state consensus underlying the Guidelines. But the tribe offers no actual support for this conjecture—no statements by any government officials, for example, and no pattern of such behavior in the past.[24]

---

[24] The complaint does not spell out this theory—that the United States will be disinclined to revisit water rights adjudications after the Guidelines are implemented—with any clarity. Nevertheless, we construe the complaint, favorably to the Nation, to embrace these allegations of injury. We note that at other

Instead, the Nation attempts to shore up its allegations by invoking the "presum[ption] that general allegations embrace those specific facts that are necessary to support the claim" at the pleading stage. *Lujan*, 504 U.S. at 561 (citations omitted). "Conclusory allegations and unreasonable inferences, however, are insufficient to defeat a motion to dismiss." *Sanders v. Brown*, 504 F.3d 903, 910 (9th Cir. 2007). "We do not . . . assume the truth of legal conclusions merely because they are cast in the form of factual allegations," and, most especially, where our jurisdiction is at stake, "[w]e cannot construe the complaint so liberally as to extend our jurisdiction beyond its constitutional limits." *W. Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981).

The Nation need not provide smoking-gun allegations of harm. But mere "speculation or 'subjective apprehension' about future harm [does not] support standing." *Mayfield v. United States*, 599 F.3d 964, 970 (9th Cir. 2010) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 184 (2000)). Instead, the Nation must plausibly allege that adoption of the Guidelines will in some fashion impede the ascertainment and declaration of the Nation's *Winters* rights. That it has not done.[25]

---

junctures as well we have relied on the briefs on appeal to clarify the complaint, in compliance with our obligation to construe the complaint favorably to the plaintiff.

[25] We also question whether the *Guidelines* create reliance interests over and above the pre-existing third-party reliance on the fully appropriated (or overappropriated) water of the Colorado River. The gross allocations of water in the 1964 Decree would

Absent more concrete allegations, the Nation cannot show that "harm to [its] concrete interests"—here, its possible *Winters* rights—"is reasonably probable," *Citizens for Better Forestry*, 341 F.3d at 975, and therefore that it has suffered the injury needed for standing.

ii. Injury to the Nation's generalized interest in Lower Basin water

In addition to its unadjudicated *Winters* rights, the Nation articulated a different interest—a generalized interest in availability for its use of water in the Lower Basin—that, it alleged, the Guidelines could adversely affect. We reaffirm that the interests upon which a NEPA plaintiff bases its standing need not be legal entitlements or substantive rights, and that an impairment as a practical matter of access to adequate water for use on one's land can qualify. We hold, however, that the Nation again failed to trace a reasonably probable link between this second interest in water availability and the Guidelines, and so lacks standing under this theory of injury as well.

---

seem primarily responsible for reliance on Lower Basin water. Unless the Nation can show that the Guidelines are creating *new* or *additional* reliance interests, it cannot demonstrate it to be reasonably probable that the Guidelines themselves pose any threat to the Nation's interests. *See Bell*, 340 F.3d at 951 (emphasizing that *the amendments* to the power delivery contracts, and not the contracts themselves, were the agency actions in question, and the amendments alone did not threaten the plaintiff's interests). *See also* Shortage Guidelines, 73 Fed. Reg. at 19,873 (describing the reliance of the West on the Colorado River for drinking water and agriculture).

The complaint does adequately allege an interest in water availability aside from the tribe's *right* to water under *Winters*. It states, for example, that the Guidelines will "adversely affect[] the water supply available to satisfy the Navajo Nation's rights *or to otherwise meet its needs*," (emphasis added) and that the Secretary's actions "fail to protect the Navajo Nation's rights to and *its interests in water* from the Lower Basin of the Colorado River" (emphasis added). Peppered throughout the complaint as well are mentions of the Nation's "*needs* and rights" (emphasis added). The Nation's repeated invocation of this distinct concrete interest—its generalized need for water from the Lower Basin, independent of any rights to it—offers an alternative basis upon which the Nation could have standing.

This interest, unlike unquantified *Winters* rights—which depend on the special status of the Nation's home as federally reserved land—is similar to that of any large landowner, or municipality, or other potential Lower Basin water user. Indeed, the Nation is the largest riparian landowner along the Colorado River apart from the United States.

If such an interest in adequate water were, to a reasonable probability, potentially injured by a proposed federal action, the Nation would have standing to challenge NEPA compliance. To support NEPA standing, the interest affected need not be "a substantive right sounding in property or contract," although it must be "distinct from the interest held by the public at large," *Cantrell*, 241 F.3d at 681 (citing *Lujan*, 504

U.S. at 562–63). *Cantrell*, for example, held that bird-watchers had legally protected aesthetic interests in a bird habitat located on a closed naval station, even though they lacked a legal right of access to the base and viewed the birds from "areas in and around the station." *Id.* at 680. Closer to this case, we regularly recognize concrete interests in access to water although the plaintiff has no decreed or contractual right to water. *See Laub*, 342 F.3d at 1086 (the "loss of affordable irrigation water" for agricultural uses resulting from increased competition for irrigation water was sufficient injury to a cognizable interest for standing under NEPA); *Pyramid Lake Paiute*, 724 F.3d at 1187–88.

So the Nation's lack of decreed rights to Lower Basin water does not matter for standing. Its interest in, and need for, the water is a cognizable interest—much like the farmers' interests in *Laub*—which, when threatened, may support standing under NEPA.

Our question, then, is whether the Nation has alleged a "reasonably probable" threat from the Guidelines to its interest in accessing Lower Basin water. *Citizens for Better Forestry*, 341 F.3d at 969. If that interest is not imperiled by the Guidelines, the Nation has suffered no injury.

At the outset, we reject the Nation's reiterated argument that the Guidelines impair the Nation's interests in, and need for, Lower Basin water by establishing a system of third-party reliance that will make it harder to satisfy this need. For the same reasons laid

out in Part III.B.i with regard to the Nation's *Winters* rights, these allegations are too speculative to demonstrate injury to any of the Nation's interests.

But the Nation also alleges—albeit sparsely—another, different sort of injury to its generalized interest in Lower Basin water: there will simply be less of it available. The Surplus Guidelines, the Nation maintains, will "adversely affect[ ] the water supply available to . . . meet [the Nation's] needs" by "allocat[ing] all of the surplus waters of the Colorado River" each year. As for the Shortage Guidelines:

> The Nation's use of mainstream water in the Lower Basin will be charged against Arizona's Lower Basin apportionment, and Arizona is particularly vulnerable to water shortages, so the Nation reasonably fears that excessive ICS development[26] or an increased likelihood of a [declared] shortage will adversely affect its lands by *reducing the availability of local water supplies* needed to make them productive and livable.

(emphasis added) (internal citations omitted).

The constraints imposed by the Law of the River affect the plausibility of these averments concerning the Guidelines' possible impact on the water available to the Nation. As noted above, the Nation's use of mainstream water "shall be charged to [Arizona's] apportionment." 1964 Decree art. II(B)(4), 376 U.S. at 343.

---

[26] For an explanation of ICS, *see supra* note 18 and accompanying text.

Arizona's apportionment, as set out in the 1922 Compact and reaffirmed in the 1964 Decree, is 2.8 mafy. *Id.* art. II(B)(1), 376 U.S. at 342. In times of shortage, the Colorado River Basin Project Act subordinates the water rights of Arizona's largest mainstream diverter, the Central Arizona Project ("CAP"), to those of California users.[27] *See* 43 U.S.C. § 1521(b). In flush years, the 1964 Decree grants Arizona 46% of the Lower Basin surplus water. 1964 Decree art. II(B)(2), 376 U.S. at 342. So the broad contours of water allocation, and indeed many of the specific ones, are settled by existing law; the Guidelines merely shade in the details.

With those parameters in mind, we conclude that the Nation has not plausibly alleged that the Guidelines themselves—independently of the pre-existing water allotments—will impair the tribe's interest in the availability of Lower Basin water. Construed as liberally as possible in the Nation's favor, the complaint does not explain why or how the Secretary's decisions on surplus and shortage declarations, or the Shortage Guidelines' rules on the banking of ICS water, threaten to reduce the amount of water available to the Nation.

Arizona's relative allotment of surplus water is fixed by the 1964 Decree. *See id.* The Guidelines do not make any allotments during times of surplus or shortage; they only ascertain the parameters for declaring whether there is a surplus or shortage. And it is another statutory provision, not the Guidelines, that

---

[27] The Central Arizona Project diverts more than 1.2 mafy of Arizona's 2.8 mafy allocation. *Shortage Guidelines FEIS*, at 3–35.

triggers a statutory prioritization scheme that disadvantages Arizona. *See* 43 U.S.C. § 1521(b).

Given the disadvantage to Arizona in times of shortage, how the Secretary determines a shortage could, in theory, reduce the availability of local water supplies. For instance, if the Guidelines declared a shortage more often than would some other method of determining a shortage, part of Arizona's allotment (the CAP water) would be subordinated to California's needs, pursuant to the Colorado River Basin Project Act, more often than under the alternative approach, and less water would be available on the tribe's land. But the Nation's complaint does not anywhere allege that the Guidelines do, in fact, result in "an increased likelihood of a shortage" as compared to alternatives; it says only that "the likelihood of a shortage determination would be different under each of the alternatives in the guidelines proposed in the EIS." Fair enough. But it does not follow, as the Nation asserts, that the existence of an array of alternatives *itself* makes it "reasonably probable that unexplored effects threaten the Navajo Nation's interests."

The Nation's allegations regarding the ICS provisions of the Shortage Guidelines are equally unavailing. The Nation does not sketch out why ICS development—the banking of extra water saved or procured by water users—will be excessive, or how that development would reduce available water supplies for the Nation and thus threaten its interests in said water. We note that, under the Shortage Guidelines, states and users can only "bank" water by offsetting their

water consumption in some other way. *See* 73 Fed. Reg. at 19,886. Because the only water that can be banked this way is water saved by users *for the purpose of banking it*, the Nation's argument that the water would otherwise be available to meet the Nation's needs is difficult to understand.

Ultimately, the Nation has not shown why the Guidelines threaten injury to its interests in having water available to meet its needs, as compared to any available alternative. General references to the "risk of overlooking harmful effects"—without describing these effects—or to a "certain [e]ffect [on] the outcome of th[e] efforts" by the Nation to secure water—without any description of that effect—do not suffice.

The cases cited by the Nation in its discussion of the reasonably probable threat to its interests do not support its position to the contrary. Rather, those cases reiterate the requirement that plaintiffs must identify how the challenged action threatens, to a reasonable probability, some separate interest belonging to them, and determined that the plaintiffs had done so.

Douglas County v. Babbitt, 48 F.3d 1495, 1501 (9th Cir. 1995), for example, concerned a county's allegation that its lands "could be threatened by how the adjoining federal lands [were] managed" with respect to pest, disease, and fire control. We held the allegation sufficient to demonstrate standing because "a concrete interest . . . could [have been] harmed" by the challenged action. *Churchill County*, 150 F.3d at 1079, similarly held that an increased risk of "fire hazards, airborne

particles, [and] erosion," among other things, made it "reasonably probable" that a transfer of water rights threatened county land. And in *Pyramid Lake Paiute Tribe*, 724 F.3d at 1188, it was common ground that the transfer of water rights would "reduce[] flows to Pyramid Lake" and thereby injure the Tribe's interests in maximizing flows to the lake. The plaintiffs in those cases thus affirmatively demonstrated that agency action would, to a reasonable probability, harm their interests.

We do not doubt the Nation's needs for water, or its skepticism that its needs and rights will be front and center as the Secretary and other stakeholders vie for water rights in the years to come. "The United States historically has not been vigorous in litigating to establish or preserve Indian water rights." William C. Canby, Jr., AMERICAN INDIAN LAW 504 (6th ed. 2015).[28] More than half a century has passed since the Nation's *Winters* rights were first put forward for adjudication in *Arizona v. California*, and they go unquantified still.

In short, the challenged Guidelines do not, as far as the Nation has alleged, present a reasonable probability of threat to either the Nation's unadjudicated water rights or its practical water needs. We therefore affirm the dismissal of the Nation's NEPA claims for lack of standing.

---

[28] "The tribes themselves can bring suit, but the cost of such litigation is frequently prohibitive." *Id.* at 504–05.

IV. SOVEREIGN IMMUNITY

The district court dismissed the Nation's breach of trust claim because the United States had not waived sovereign immunity for that claim. The Nation alleged, as a breach of trust, Interior's failure "to determine the extent and quantity of water rights . . . or otherwise determine the amount of water which the [Nation] requires from the Lower Basin to meet the needs of the [Nation]." The Nation's breach of trust claim is thus predicated not on an affirmative action but rather a failure to act.

The broad waiver of immunity found in § 702 of the APA did not apply, the district court held, because this Court's decisions construing the scope of § 702 limited its waiver to (i) challenges to "final agency action" and (ii) constitutional claims. Because the Nation "fail[ed] to challenge any particular final agency action or bring a constitutional claim," the district court held, it could not avail itself of § 702's waiver.

We now review, and clarify, the scope of that waiver.

A. Legal Background

"The United States, as sovereign, is immune from suit save as it consents to be sued." *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (citations omitted). As the contours of any such waiver define a court's authority to entertain a suit against the government, *id.*, each claim against the government must rest upon an

applicable waiver of immunity. We review whether sovereign immunity is waived de novo. *Orff v. United States*, 358 F.3d 1137, 1142 (9th Cir. 2004).

Congress has enacted several broad waivers of the United States' sovereign immunity.[29] The waiver here at issue appears in § 702 of the APA, which provides:

> [1] A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. [2] An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity . . . shall not be dismissed nor relief therein be denied on the ground that it is against the United States.

5 U.S.C. § 702.

Section 702, notably, does double duty, nestling a broad waiver of sovereign immunity (its second sentence) within an "omnibus judicial-review provision, which permits suit for violations of numerous statutes . . . that do not themselves include causes of action for judicial review." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1389 (2014). We are

---

[29] *See*, *e.g.*, Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1) (waiving immunity as to certain torts committed by government employees acting in the scope of their employment); Tucker Act, 28 U.S.C. § 1491(a)(1) (waiving immunity as to contract claims and claims for damages not sounding in tort).

mainly concerned here with the waiver, but, as will appear, the relationship between the § 702 cause of action and the § 702 waiver is key to making sense of our cases in this area.

The first sentence of § 702—the "omnibus" mechanism for review of agency action by courts—was the sum and substance of the judicial review provision of the APA as originally enacted in 1946. *See* Administrative Procedure Act, Pub. L. No. 79-404 § 10(a), 60 Stat. 237, 243 (1946) (codified as amended at 5 U.S.C. § 702). The second sentence—which waives sovereign immunity in cases "seeking relief other than money damages" for wrongs committed by agencies, their officers, and their employees, 5 U.S.C. § 702—was added in 1976 to clear up a morass of federal sovereign immunity jurisprudence, which at the time was "illogical," a "thankless" undertaking for federal courts, and "a mass of confusion . . . [and] confusion compounded." H.R. Rep. No. 94-1656, at 6–8 (1976) (internal citations omitted). In addition to ending "the injustice and inconsistency" begat by the doctrinal confusion, *id.* at 10, the amendment aimed to "broaden the avenues for judicial review of agency action by eliminating the defense of sovereign immunity in cases covered by the amendment." *Bowen v. Massachusetts*, 487 U.S. 879, 891–92 (1988). Just how broad those avenues are is our issue.

B. Ninth Circuit Law on § 702

A perceived conflict between two of our opinions construing § 702 lies at the root of this appeal.

Compare The Presbyterian Church (U.S.A.) v. United States, 870 F.2d 518, 524 (9th Cir. 1989) (holding that "[n]othing in the language of [§ 702] suggests that the waiver of sovereign immunity is limited to cases challenging . . . 'agency action' "), *with Gallo Cattle Co. v. U.S. Dep't of Agric.*, 159 F.3d 1194, 1198 (9th Cir. 1998) (noting § 702's "waiver of sovereign immunity contains several limitations," including § 704's requirement that the challenged conduct be "final agency action" or agency action otherwise reviewable by statute). A panel of this Court pronounced these two cases "directly contrary" to one another, and could find "no way to distinguish them," but, resolving the case before it on other grounds, declined to call the case en banc to harmonize the perceived intra-circuit conflict. *See Gros Ventre Tribe v. United States*, 469 F.3d 801, 809 (9th Cir. 2006); *see also EEOC v. Peabody W. Coal Co.*, 610 F.3d 1070, 1086 (9th Cir. 2010) (noting the same "tension" between the same two decisions but again finding no need to resolve it). As we face the issue squarely, we delve into *Presbyterian Church* and *Gallo Cattle* in some detail.

Presbyterian Church held that § 702 waived sovereign immunity for the plaintiff churches' First and Fourth Amendment claims against the (now-defunct) Immigration and Naturalization Service (INS). 870 F.2d at 526 (9th Cir. 1989). The claims in *Presbyterian Church* arose from the dispatch of INS agents to attend, and furtively record, worship services at four Arizona churches as the agents were investigating the sanctuary movement, which was aiding refugees

fleeing civil war in Central America. *Id.* at 520. The INS prevailed in district court on its argument that § 702 waived sovereign immunity only for claims challenging "agency action" as defined in 5 U.S.C. § 551(13). Under that definition, "'agency action' includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Id.* at 524–25. The INS's argument was premised on the first sentence of § 702, which grants judicial review to "person[s] suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action." 5 U.S.C. § 702.

We reversed, interpreting the second sentence of § 702 as, on its face, "an unqualified waiver of sovereign immunity in actions seeking nonmonetary relief." *Presbyterian Church*, 870 F.2d at 525. *Presbyterian Church* noted that the second sentence of § 702 does not use the term "agency action." *Id.* And the legislative history of the waiver provision, which *Presbyterian Church* surveyed at length, evinced Congress' intent to "eliminate the sovereign immunity defense in all equitable actions for specific relief" against the federal government. *Id.* at 525 (quoting H.R. Rep. No. 94-1656, at 9 (1976)) (emphasis omitted). Whatever restrictions were imposed by the first sentence's limitation of judicial review to "agency action" were absent in the broad waiver legislated three decades later, we concluded. *Id.* at 525. *Presbyterian Church* pronounced that reading in an "agency action" limitation to that second, independently enacted provision both "offend[ed] the plain

meaning of the amendment" and flew in the face of the drafting history. *Id.*

Gallo Cattle Co. v. U.S. Department of Agriculture, 159 F.3d 1194 (9th Cir. 1998), pointed in a different direction, stating that "the APA's waiver of sovereign immunity contains several limitations," including a proviso in § 704 that only "final agency action" and agency action otherwise reviewable by statute are subject to judicial review.[30] *Id.* at 1198. *Gallo Cattle* concerned a dairy producer who sought review in federal district court of a denial by an administrative board of its petition for interim relief. *Id.* at 1195–96. Gallo Cattle proposed paying the monetary assessments it was challenging on First Amendment grounds into escrow, rather than to the dairy board, pending the outcome of its constitutional challenge. *Id.* The district court held that it lacked jurisdiction over the claim because the statute governing the dairy assessments allowed review only after the Secretary of Agriculture had decided the merits of Gallo's petition, *id.* at 1197–98, and this Court affirmed.

Relevant to our analysis, we rejected Gallo Cattle's alternative argument that the APA provided a source of jurisdiction, holding that there was no "final agency action" under § 704. *Id.* at 1198–99. The Court

---

[30] Section 704 provides: "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. § 704.

identified the final agency action requirement of § 704 as a "limitation[]" on § 702's waiver of sovereign immunity, *id.* at 1198, and thus a "jurisdictional" requirement of suit. *See id.* at 1199 (holding that the lack of final agency action meant § 704 "could not vest the district court with jurisdiction to review the order"); *id.* at 1200 (same).

How could there be this limitation, when recently we had said there was "no such limitation"? *Presbyterian Church*, 870 F.2d at 525. Notably—and inexplicably—*Gallo Cattle* did not cite or discuss *Presbyterian Church*. Still, notwithstanding the dictum in *Gros Ventre Tribe*, 469 F.3d at 809, that there is "no way to distinguish" these "directly contrary" holdings, a panel of this Court recently did just that.

Veterans for Common Sense v. Shinseki ("*VCS I*"), 644 F.3d 845 (9th Cir. 2011), *opinion vacated on reh'g en banc*, 678 F.3d 1013 (9th Cir. 2012), untangled the *Gallo Cattle-Presbyterian Church* knot. Gallo's claim for interim relief,[31] it noted, was brought directly under the APA—specifically, the first sentence of § 702, which grants judicial review to those people "'suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action.'" *VCS I*, 644 F.3d at 865–66 (quoting 5 U.S.C. § 702). APA claims, as outlined in the first sentence of § 702, are subject to

[31] Gallo appealed to the district court only from the Secretary's denial of interim relief—the escrowing of the disputed assessments. The Secretary had not yet passed on, and so Gallo did not appeal, the merits of its First Amendment challenge. *Gallo Cattle*, 159 F.3d at 1198.

"§ 704's limitation on what agency action is reviewable—meaning subject to 'judicial review' under the first sentence of § 702." *Id.* at 866. Claims not grounded in the APA, like the constitutional claims in *Presbyterian Church* and *VCS I*, "do[] not depend on the cause of action found in the first sentence of § 702" and thus § 704's limitation does not apply to them. *Id.* at 867. According to *VCS I*, then, the limitation on the APA's waiver of sovereign immunity discussed in *Gallo Cattle* is simply that a court is foreclosed by § 704 from entertaining claims *brought under the APA* seeking review of non-final agency action (and not otherwise permitted by law).[32] "[N]o such limitation," *Presbyterian Church*, 870 F.2d at 525, applies to other types of claims (like the constitutional claims in *Presbyterian Church*).

VCS I was vacated upon rehearing en banc, so its analysis does not stand as the law of the circuit.[33] But we believe the panel opinion persuasively reconciled *Gallo Cattle* and *Presbyterian Church* and so follow its lead.

First, the text of the second sentence of § 702 contains no limitation to "final agency action," to APA cases, or to APA and constitutional cases. We read statutes as written, subject to very limited exceptions,

---

[32] In addition to making reviewable final agency action, the APA permits suit to "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706.

[33] *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013 (9th Cir. 2012) (en banc).

none of which apply here.[34] As there is no basis for reading into the amendment to § 702 language that is not there, we should not do so. And, as *VCS I* concluded, nothing in *Gallo Cattle* requires us to adopt an atextual reading of § 702, as *Gallo Cattle* concerned a cause of action under the APA. We therefore hold, as did *VCS I*, that § 702 waives sovereign immunity for all non-monetary claims; § 704's final agency action requirement constrains only actions brought under the APA.

The district court concluded otherwise, viewing *Presbyterian Church* as an exception to § 704 for constitutional claims only. By so holding, the district court took the wrong path.

What *Presbyterian Church* actually determined was that when Congress amended § 702 by adding its second sentence, it enacted an "unqualified" waiver of sovereign immunity in "all actions seeking relief from official misconduct except for money damages." *Presbyterian Church*, 870 F.2d at 525. This Court has long so understood the opinion—that is, as holding that § 702 waives "whatever sovereign immunity the United States enjoyed from prospective relief" with respect to "any action for injunctive relief." *Cabrera v. Martin*, 973 F.2d 735, 741 (9th Cir. 1992) (citing *Presbyterian Church*, 870 F.2d at 524–25) (emphasis omitted); *see also Hill v. United States*, 571 F.2d 1098, 1102 (9th Cir.

[34] "It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004).

1978) ("[Section 702] is cast as a blanket waiver of sovereign immunity as to a broad category of actions against the government"); *Clinton v. Babbitt*, 180 F.3d 1081, 1087 (9th Cir. 1999) (holding that § 702 flatly "expressly waived" immunity for non-statutory claims for "nonmonetary relief against the United States").

Gallo Cattle is fully consistent with this understanding of *Presbyterian Church*, and of § 702, as *Gallo Cattle* addressed a claim brought directly under the APA. Even if sovereign immunity is waived for claims not involving "final agency action," § 704's requirement that to proceed under the APA, agency action must be final or otherwise reviewable by statute is an independent element without which courts may not determine APA claims. Section 702, notably, expressly preserves the § 704 limitations, among many others, by providing that nothing in § 702 "affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." 5 U.S.C. § 702; *see also Darby v. Cisneros*, 509 U.S. 137, 153 (1993) (noting that the finality requirement for actions brought under the APA, 5 U.S.C. § 704, is undiminished by § 702's waiver of sovereign immunity).

Read this way, *Gallo Cattle* has much to say about the elements of the APA cause of action, and little to say about sovereign immunity.[35] As noted, missing

[35] We draw confidence from this court's varying characterizations of the issue in *Gallo Cattle*: whether the APA "vested [the court] with jurisdiction," 159 F.3d at 1196; the court "had jurisdiction to review" the denial of relief "pursuant to the judicial

from *Gallo Cattle* is *any* discussion of *Presbyterian Church*. This significant omission is further evidence that *Gallo Cattle* governs only in cases where, unlike *Presbyterian Church*, the APA supplies the cause of action. For non-APA claims, "it is *Presbyterian Church* and not *Gallo Cattle* that controls." *VCS I*, 644 F.3d at 866.

Our conclusion—that the second sentence of § 702 waives sovereign immunity broadly for all causes of action that meet its terms, while § 704's "final agency action" limitation applies only to APA claims—is consistent with case law in almost all our sibling circuits. In *Trudeau v. FTC*, for example, the D.C. Circuit rejected a government agency's argument that § 702's waiver is "restricted to conduct that falls within th[e] compass" of final agency action. 456 F.3d 178, 186 (D.C. Cir. 2006). The court noted, as have we, that the language of the APA "provides no support" for a cramped reading of the waiver incorporating § 704's final agency action requirement, and that the legislative history likewise offers no basis for that position. *Id.* at 187. Rather, both the statutory language and its history counsel a broad waiver of "any" and "all" immunity

---

review provisions of the [APA]," *id.* at 1198; the order was "reviewable," *id.*; or the APA "vest[ed] the district court with jurisdiction to review the order," *id.* at 1199. Only once does *Gallo Cattle* characterize the issue as one of sovereign immunity. *Id.* at 1198.

for non-monetary claims. *Id.* (internal citations omitted). Other circuits are in near-unanimity.[36]

In sum, pigeonholing *Presbyterian Church* as a case about constitutional claims alone, as the district court did, is not supported by the statute, the language of the case, or any of our case law interpreting the statute, before or after *Presbyterian Church*. Instead, we read *Gallo Cattle* in light of its facts to be a case primarily about the justiciability of APA claims challenging non-final action. This reading does not trench at all upon *Presbyterian Church* or our other

---

[36] *See Red Lake Band of Chippewa Indians v. Barlow*, 846 F.2d 474, 475–76 (8th Cir. 1988) (rejecting the argument that § 702's waiver "exists only to allow review of a final agency decision" in Indian trust claims and holding that it depends only "on the suit against the government being one for non-monetary relief"); *Treasurer of N.J. v. U.S. Dep't of Treasury*, 684 F.3d 382, 400 (3d Cir. 2012) ("Section 704 concerns whether a plaintiff has a cause of action under the APA that can survive a motion to dismiss under Rule 12(b)(6) but does not provide a basis for dismissal on grounds of sovereign immunity"); *Michigan v. U.S. Army Corps of Eng'rs*, 667 F.3d 765, 775 (7th Cir. 2011) ("[T]he conditions of § 704 affect the right of action contained in the first sentence of § 702, but they do not limit the waiver of immunity in § 702's second sentence.") (citing *VCS I*, 644 F.3d at 866–68); *Muniz-Muniz v. U.S. Border Patrol*, 741 F.3d 668, 672 (6th Cir. 2013) (same); *Delano Farms Co. v. Cal. Table Grape Comm'n*, 655 F.3d 1337, 1344 (Fed. Cir. 2011) (same); *see also United States v. Mitchell*, 463 U.S. 206, 227 & n.32 (1983) (noting that Congress "enacted a general consent" in § 702 to claims for declaratory and injunctive relief in a case alleging breach of fiduciary duty regarding tribal timber resources). The Fifth Circuit appears to be alone in holding to the contrary. *See Alabama-Coushatta Tribe of Texas v. United States*, 757 F.3d 484, 489 (5th Cir. 2014) ("the plaintiff must identify some 'agency action' affecting" it as defined under 5 U.S.C. § 551(13) to avail itself of § 702's waiver).

cases recognizing that § 702 enacted a broad, unqualified waiver for all non-monetary claims for relief against federal agencies. And, our reading best squares the holdings of *Presbyterian Church* and *Gallo Cattle* in light of the text of § 702, the legislative history of the provision, and the strong weight of authority in the federal courts.

C. The Nation's Breach of Trust Claims

Here, the Nation in its breach of trust claim against Interior seeks "relief other than money damages" for claims "that an agency or an officer or employee thereof acted or failed to act in an official capacity." 5 U.S.C. § 702. The waiver of sovereign immunity in § 702 applies squarely to the Nation's breach of trust claim.

The district court expressed some tentative views on the merits of this claim but ultimately rested its dismissal squarely on the bar of sovereign immunity. We therefore remand to the district court to consider fully the Nation's breach of trust claim in the first instance, after entertaining any request to amend the claim more fully to flesh it out.

V. RULE 60(B) RELIEF FROM JUDGMENT

After the district court entered judgment against the Nation, the Nation moved for relief under Federal Rule of Civil Procedure 60(b)(6), seeking to re-open the proceedings so that it could amend its pleadings.

Where none of Rule 60(b)'s five enumerated circumstances applies, its catch-all provision permits a court to grant relief for "any other reason that justifies relief." Fed. R. Civ. P. 60(b)(6). The district court denied the motion because the Nation had failed to cure its pleading deficiencies in previous amendments, did not explain why its claims would be time-barred after dismissal without prejudice, and did not spell out with sufficient specificity how it intended to amend its complaint. "We review the district court's denial of a Rule 60(b) motion for an abuse of discretion." *Delay v. Gordon*, 475 F.3d 1039, 1043 (9th Cir. 2007).

Because we reverse the district court's dismissal of the Nation's breach of trust claim, its appeal from the district court's denial of its 60(b) motion is moot to the extent the Nation sought to amend its complaint to plead additional or alternative waivers of sovereign immunity. *See Thompson v. Calderon*, 151 F.3d 918, 920 (9th Cir. 1998) (en banc). Our affirmance of the district court's dismissal of the Nation's NEPA claims, however, requires us to address this appeal insofar as the Nation sought to replead those claims.

A court should "freely give leave [to amend] when justice so requires," Fed. R. Civ. P. 15(a)(2), a policy "to be applied with extreme liberality." *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990). But "after final judgment has been entered, a Rule 15(a) motion may be considered only if the judgment is first reopened under Rule 59 or 60." *Lindauer v. Rogers*, 91 F.3d 1355, 1356 (9th Cir. 1996).

In contrast to the "freely give[n]" dispensation to amend in Rule 15, Rule 60(b) relief should be granted "sparingly" to avoid "manifest injustice" and "*only* where extraordinary circumstances prevented a party from taking timely action to prevent or correct an erroneous judgment." *United States v. Alpine Land & Reservoir Co.*, 984 F.2d 1047, 1049 (9th Cir. 1993) (emphasis added). "Rule 60(b)(6) relief normally will not be granted unless the moving party is able to show both injury and that circumstances beyond its control prevented timely action to protect its interests." *Id.* After judgment, then, "our policy of promoting the finality of judgments" somewhat displaces Rule 15's openhandedness. *Lindauer*, 91 F.3d at 1357.

Contrary to the district court, we do think the Nation sufficiently explained why the district court's dismissal of claims was effectively with prejudice—because the relevant statutes of limitations had run on those claims. *See* 28 U.S.C. § 2401(a) (six-year statute of limitations against the United States). Nonetheless, the district court did not abuse its discretion in denying the Nation relief from final judgment to allow leave to amend.

The Nation amended its complaint twice before the court dismissed its claims. Although the Nation argues that it amended its complaint each time for other reasons,[37] it had ample opportunity at those junctures

---

[37] The Nation first amended its complaint to bring it up to date after a nearly decade-long stay pending unsuccessful

to address the deficiencies in its pleading—deficiencies which, at least at the time the Second Amended Complaint was filed, the defendants had identified in their motions to dismiss. *See Premo v. Martin*, 119 F.3d 764, 772 (9th Cir. 1997); *Weeks v. Bayer*, 246 F.3d 1231, 1236 (9th Cir. 2001). The Nation also had time after filing its Second Amended Complaint, but before the court dismissed its claims, to seek further leave to amend. *See Premo*, 119 F.3d at 772 (noting the plaintiff's "ample opportunity to file an amended complaint with new allegations before the court issued its final judgment"). Based on the Nation's past failures to amend its complaints and its present failure specifically to identify how it would amend its pleading to overcome its standing problems, the district court reasonably concluded that the Nation had not negated futility.

Given the Nation's opportunities (and failures) to amend, the district court acted within its discretion in refusing post-judgment leave to amend.

VI. CONCLUSION

The Nation lacks Article III standing for its NEPA claims and is not entitled to relief from judgment under Rule 60(b) to amend its pleadings as to those allegations. The Nation's breach of trust claim, however, is not barred by sovereign immunity. As the dismissal of that claim on sovereign immunity grounds was

---

settlement talks. It later amended the complaint to voluntarily strike one of its claims.

unwarranted, we remand to the district court to consider the claim on its merits, after entertaining any request to amend it.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Navajo Nation, Plaintiff, v. United States Department of the Interior, et al., Defendants.	No. CV-03-00507-PCT-GMS **ORDER** (Filed Jul. 22, 2014)

Pending before the Court are multiple related motions. They include: (1) Defendants United States Department of the Interior (the "Department"), Secretary of the Interior Sally Jewell, Bureau of Reclamation, and Bureau of Indian Affairs' (the "Federal Defendants") Motion to Dismiss (Doc. 240), (2) Defendant-Intervenor State of Arizona's Motion to Dismiss (Doc. 242), (3) Defendant-Intervenors Metropolitan Water District of Southern California and Coachella Valley Water District's (the "Metropolitan Defendants") Motion to Dismiss (Doc. 243), (4) Defendant-Intervenors Salt River Project Agricultural Improvement and Power District and the Salt River Water Users' Association's (the "SRP Defendants") Motion to Dismiss and to Join Required Parties (Doc. 249), (5) Defendant-Intervenor Central Arizona Water Conservation District's Motion to Dismiss (Doc. 250), (6) Defendant-Intervenor Imperial Irrigation District's Motion to Dismiss (Doc. 251), (7) the Hopi Tribe's Motion to Intervene (Doc. 252), (8) the Hopi Tribe's Motion to

Dismiss (Doc. 253), and (9) Defendant-Intervenors Colorado River Commission of Nevada, State of Nevada, and Southern Nevada Water Authority's (the "Nevada Defendants") Motion to Dismiss (Doc. 254).

For the following reasons, the Federal Defendants' Motion to Dismiss is granted and the remaining Motions are denied as moot.

BACKGROUND

I. The Navajo Nation

Plaintiff Navajo Nation (the "Nation") is a federally recognized Indian Tribe. (Doc. 281, "Second Amended Complaint" ("SAC") ¶ 10.) The Navajo Nation's Reservation (the "Reservation") is the largest Indian reservation in the United States, with land spanning over 13 million acres located in Arizona, New Mexico, and Utah. (*Id.* ¶ 11.) The Reservation was originally established by the Treaty of June 1, 1868, 15 Stat. 667, and was expanded by a number of Executive Orders and Acts of Congress between 1868 and 1964. (*Id.* ¶ 12.) The Reservation is adjacent to the Colorado River and is located in both the Upper and Lower Basins of the Colorado River Basin. (*Id.*) This case concerns only the lands located in the Lower Basin in Arizona (the "Lower Basin"). (*Id.* ¶ 5.)

The SAC alleges that by establishing the Reservation, "the United States impliedly reserved for the benefit of the Navajo Nation a sufficient amount of water 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." (*Id.* ¶ 14.) It further alleges that an effect of establishing the Reservation "was to create a trust relationship between the Navajo Nation and the United States," (*Id.* ¶ 15), that "requires [the United States] to protect the Navajo Nation's land and the water necessary to make those lands livable as a permanent homeland for the Navajo Nation" (*Id.* ¶ 16).

The Nation alleges that the United States has failed in its trust obligation to assert and protect the Nation's water rights by "expressly" leaving "open the question of the Navajo Nation's beneficial rights to the waters of the Colorado River." (*Id.* ¶¶ 17–18, 20–22.) The Nation claims that it has asked the Department to address the extent of the Nation's rights to use, and its interest in, water from the Lower Basin, but that the Department has not done so. (*Id.* ¶ 25.) Further, the Federal Defendants "have never sought, through judicial or administrative means, to quantify or estimate the Navajo Nation's rights to water from the mainstream of the Colorado River in the Lower Basin." (*Id.* ¶ 26.)

II. *Winters* and Reservation Water Rights

The Nation asserts that it has water rights in the Lower Basin of the Colorado River pursuant to *Winters v. United States*, 207 U.S. 564 (1908), and its progeny. Beginning with its decision in *Winters*, the Supreme Court "has long held that when the Federal

Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." *Cappaert v. United States*, 426 U.S. 128, 138 (1976). "In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators." *Cappaert*, 426 U.S. at 138. Further, this right "is not dependent on beneficial use" and "retains priority despite nonuse." *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 201 Ariz. 307, 310–11, 35 P.3d 68, 71–72 (2001). This doctrine applies to Indian reservations. *Cappaert*, 426 U.S. at 138; *Colo. River Water Cons. Dist. v. United States*, 424 U.S. 800, 805 (1976); *United States v. Dist. Court for Eagle Cnty.*, 401 U.S. 520, 522–23 (1971); *Arizona v. California*, 373 U.S. 546, 601 (1963) [*Arizona 1*]; *FPC v. Oregon*, 349 U.S. 435 (1955); *United States v. Powers*, 305 U.S. 527 (1939); *Winters* 207 U.S. 564.

In 1952, the State of Arizona brought suit against the State of California and seven of its public agencies, alleging that it was entitled to a certain quantity of water from the lower Colorado River under the Colorado River Compact of 1922 and the Boulder Canyon Project Act. (Doc. 240-1 at 9.) Arizona sought a decree confirming its title to that quantity of water. (*Id.*) The United States sought and was granted leave to intervene in that action. *Arizona v. California*, 347 U.S. 985 (1954). In the action, in its role as trustee, the United

States claimed federally reserved *Winters* water rights in the Lower Colorado River on behalf of a number of entities, including the Nation. (Doc. 240-1 at 9.) However, the United States filed its *Winters* rights claim on behalf of the Nation only with respect to water from the Little Colorado River, a tributary of the Colorado. (*Id.*) The Supreme Court referred all of the matters in the *Arizona v. California* litigation to a Special Master for evidentiary proceedings. (*Id.*) The Special Master recommended that conflicting claims to the Little Colorado River not be adjudicated in *Arizona v. California*, and the Supreme Court, in its 1963 Opinion, affirmed that recommendation. 373 U.S. 546, 595 (1963) (the "1963 Opinion"). Thus, while the United States did file and present a claim for rights to the Little Colorado River on behalf of the Nation, that claim was not ultimately adjudicated in that action. (Doc. 240-1 at 10.) Therefore no determination was made as to whether the Nation was entitled to any particular quantity of water coming from the Little Colorado River.

III. The Challenged Administrative Actions

Following this 1963 Opinion, the Court issued the 1964 Decree. 376 U.S. 340 (1964). Under Article II of the 1964 Decree and the Boulder Canyon Project Act, 43 U.S.C. §§ 617–617u, the Secretary is responsible for the allocation of the waters of the mainstream of the Colorado River among California, Arizona, and Nevada (the "Lower Basin States"), and for deciding which users in those Lower Basin States will be delivered water under the Act. (SAC ¶ 33.) The Secretary

has undertaken various actions to do so which the Nation now challenges. These include:

- *Record of Decision, Colorado Interim Surplus Criteria; Final Environmental Impact Statement, reprinted at* 66 Fed. Reg. 7772, 7773–82 (Jan 25. 2001) ("Surplus Guidelines ROD") for the *Colorado River Interim Surplus Criteria Final Environmental Impact Statement* (Dec. 2000) ("Surplus Guidelines FEIS"), pursuant to Article III(3)(b) of the *Criteria for Coordinated Long-Range Operation of the Colorado River Reservoirs Pursuant to the Colorado River Basin Project Area Act of September 30, 1968* (P.L. 90-537) (June 8, 1970) ("LROC"). The Surplus Guidelines ROD adopted guidelines for the Secretary to determine when there is a surplus of water from the Colorado River for use within the Lower Basin States. The LROC requires the Secretary to determine the extent to which the requirements of mainstream water uses in those states can be met in any year. The Surplus Guidelines FEIS considered five alternatives for interim surplus guidelines. (SAC ¶¶ 36–40.)

- *Record of Decision, Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead, reprinted at* 73 Fed. Reg. 19,873 (Apr. 11, 2008) ("Shortage Guidelines ROD") for the *Final Environmental Impact Statement, Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead* (Oct. 2007) ("Shortage Guidelines FEIS"). The Shortage Guidelines ROD adopted guidelines for the Secretary to use

to manage Lake Powell and Lake Mead under low reservoir and drought conditions. The Shortage Guidelines FEIS analyzed five alternatives for those interim shortage guidelines. (SAC ¶¶ 41–45.)

- *Final Environmental Impact Statement, Implementation Agreement, Inadvertent Overrun and Payback Policy, and Related Federal Actions* (Oct. 2002) ("Implementation Agreement FEIS"). The Secretary, through the Bureau of Reclamation, developed the Implementation Agreement FEIS to analyze a procedure requiring the Secretary to deliver California's share of Colorado River water in accordance with a certain agreement and to require payback of water used in excess of the amounts set forth in contracts entered into under the Boulder Canyon Project Act. (SAC ¶¶ 46–49.)

- Offstream Storage of Colorado River Water and Development and Release of Intentionally Created Unused Apportionment in the Lower Division States, 64 Fed. Reg. 58,986 (Nov. 1, 1999), 43 C.F.R. pt. 414. The Secretary adopted final regulations under which she may enter into certain agreements with the Lower Basin States to permit offstream storage of those States' individual entitlements. (SAC ¶¶ 50–51.)

- The *Storage and Interstate Release Agreement* (Dec. 18, 2002) ("Storage and Release Agreement") with the States of Nevada and Arizona, pursuant to the regulations described above, creates a program of interstate water banking of

> those States' entitlements under the Decree in *Arizona v. California*. (SAC ¶¶ 52–55.)

The Nation does not allege that any of these actions actually regulate any of its activities. Instead, it argues that because the United States did not determine the extent and quantity of the Navajo Nation's water rights under *Winters*, the Secretary's subsequent actions in connection with the management of the Lower Basin, pursuant to the Decree describing the management of the Colorado River in *Arizona v. California*, 376 U.S. 340 (1964) ("the 1964 Decree"), have otherwise allocated the waters of the Colorado River in a way "that threaten[s] the availability of Colorado River water to satisfy the Navajo Nation's rights and needs." (*Id.* ¶ 29.) The Nation alleges that these actions "establish[] a system of reliance upon the Colorado River 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." (*Id.* ¶ 31.) In turn, "[s]uch 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." (*Id.*)

The United States "generally agrees that [the Nation] has reserved water rights under the *Winters* doctrine." (Doc. 240-1 at 41.) But, it claims it has assisted the Nation with acquisition of water supply in the San Juan Settlement and that it is currently pursuing the establishment of *Winters* rights in the ongoing general adjudication of the Little Colorado River System (*Id.*),

and that additional mainstream water may be available to the Nation should the various applicable parties be able to arrive at a water rights settlement under the Arizona Water Settlements Act (*Id.* at 33–34).

IV. Claims One, Two, Three, and Five

In Claims One, Two, Three, and Five of its Second Amended Complaint, the Nation alleges that the Federal Defendants violated the National Environmental Policy Act ("NEPA") and the Administrative Procedure Act ("APA") by undertaking the actions to manage the Lower Basin flow described above.

In Claim One, the Nation alleges that the Implementation of the Surplus Guidelines violates NEPA and the APA. It claims that the United States failed to meet the NEPA requirement to take a hard look at all of the effects of proposed federal action because it did not consider the rights of the Nation. (SAC ¶¶ 63, 64.) Further, the Nation claims that the Surplus Guidelines FEIS states that the United States examined all Indian water rights that could be affected by implementation of the LROC, but that this statement is false because the Unite States did not consider the needs of the Nation's possible right to mainstream water in the Lower Basin. The Nation argues that, as a result of these failures, the documents are "arbitrary, capricious, an abuse of discretion, [and] otherwise not in accordance with law," "contrary to constitutional right, power, privilege, or immunity," and "in excess of

statutory jurisdiction, authority, or limitations, [and] short of statutory right." (*Id.* ¶ 67.)

In Claim Two, the Nation alleges that the Implementation of the Shortage Guidelines was similarly deficient because the United States claimed in the Shortage Guidelines FEIS that it examined all Indian water rights that could be affected by implementation of the LROC, but did not actually consider the needs of the Nation. (*Id.* ¶¶ 69–71.)

In Claim Three, the Nation alleges that the Development of the Implementation Agreement FEIS is also lacking as the Implementation Agreement FEIS also purports to have examined all Indian water rights that could have been impacted, but did not do so because it did not actually consider the needs of the Nation. (*Id.* ¶¶ 73–76.)

In Claim Five, the Nation alleges that the Federal Defendants violated NEPA and the APA by entering into the Storage and Release Agreement. It claims that the Agreement fails to consider the Nation's unquantified rights and memorialized a plan for water banking without considering those rights. (*Id.* ¶¶ 82–84.)

V. Claim Four

In Claim Four, the Nation alleges that the Implementation of the Interstate Banking Regulations violates the APA. It alleges that the Secretary failed to protect the Nation's rights to and interests in the water from the Lower Basin. In so doing, the regulations

allow entitlement holders other than the Nation to store water they would otherwise be unable to use and allows those entitlement holders to develop reliance upon the use of those waters, which may potentially belong to the Nation. (*Id.* ¶¶ 78–79.) This, the Nation alleges, resulted in a final rule that is "arbitrary, capricious, an abuse of discretion, [and] otherwise not in accordance with law," "contrary to constitutional right, power, privilege, or immunity," and "in excess of statutory jurisdiction, authority, or limitations, [and] short of statutory right." (*Id.* ¶ 80.)

VI. Claim Seven

In Claim Seven, the Nation notes that under *Winters*, it requires water from the Lower Basin of the Colorado River to fulfil its purpose as a permanent homeland. (*Id.* ¶ 90.) By failing to determine the extent and quantity of the Nation's water rights, the United States breached its fiduciary obligation to the Nation. (*Id.* ¶ 91.)

VII. Pending Motions

The Nation brought these six claims against the Federal Defendants.[1] (Doc. 281.) The Federal Defendants now move to dismiss each of these claims. (Doc. 240.) In their Motion to Dismiss, the Federal Defendants argue that Plaintiff has failed to establish

[1] The Nation voluntarily struck their Sixth Claim for Relief. (SAC ¶¶ 85–88.)

standing to bring Claims One through Five and that it has failed to identify a breach of a specific, enforceable trust obligation and waiver of sovereign immunity that allows it to bring Claim Seven. (*Id.*)

Additionally, various Defendant-Intervenors have joined the case and filed their own Motions to Dismiss. (Docs. 242, 243, 249, 250, 251, and 254.)[2] Also pending are the Hopi Tribe's Motion to Intervene (Doc. 252) and Motion to Dismiss (Doc. 251).

DISCUSSION

I. Legal Standard

The Court may only reach the merits of a dispute if it has jurisdiction to do so. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–95 (1998). Jurisdiction is limited to subject matter authorized by the Constitution or by statute. *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). Under Rule 12(b)(1), a defendant may challenge at any time a federal court's jurisdiction to hear a case. *See* Fed. R. Civ. P. 12(b)(1), 12(h)(3). In such a challenge, the defendant may either facially or factually attack the plaintiff's complaint for lack of subject matter jurisdiction. A facial challenge asserts that the complaint, on its face, fails to allege facts that would invoke federal jurisdiction. *Safe Air For Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2003). A factual attack, on the other hand, disputes the

[2] The SRP Defendants' Motion to Dismiss also includes their Motion to Join Required Parties. (Doc. 249.)

veracity of allegations in the complaint that would, if true, invoke federal jurisdiction. *Id.*

II. Standing

To establish Article III standing to seek injunctive relief, "a plaintiff must show that he is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (citing *Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)).

Under the first prong, the Nation alleges that it is under the threat of suffering "injury in fact" due to the challenged administrative actions in Counts One through Five. The Nation states that in establishing the Navajo Reservation, "the United States impliedly reserved for the benefit of the Navajo Nation a sufficient amount of water 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." (Doc. 281, SAC ¶ 14.) While the Nation alleges that they have these water rights, they also assert that the United States has never adjudicated, quantified, or estimated these rights as to the mainstream of the Colorado River in the Lower Basin. (*Id.* ¶¶ 25–26.) However, consistent

with *Winters*, the Nation does not challenge the Federal Defendants' assertion that the priority of any such rights will not be legally impacted by any of the challenged administrative actions. That is because any such water rights "vested at least as early as the date of each congressional act or executive order setting aside the Reservation lands" (*Id.* ¶ 14), which occurred between 1868 and 1964 (*Id.* ¶ 12), many decades before any of the challenged administrative actions (*Id.* ¶¶ 36, 41, 46, 50). Further, under *Winters*, any such rights would retain priority despite non-use.

The Nation also does not allege that any of the challenged actions directly regulate any of the Nation's activities. Instead, they assert that the actions regulate third-party activities, and that this regulation, devised without consideration of the Nation's potential water rights, could cause injury to the Nation because it "establishes a system of reliance upon the Colorado River 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." (*Id.* ¶ 31.) In turn, "[s]uch 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." (*Id.*)

Here, in Claims One, Two, Three, and Five, the Nation alleges a number of procedural violations under NEPA. For these claims, the Nation may demonstrate injury under the standard for demonstrating a procedural injury under that statute. To show that these

alleged procedural violations constitute a cognizable injury for purposes of establishing Article III standing, the Nation "must demonstrate that (1) [Defendants] violated certain procedural rules; (2) these rules protect [Plaintiff's] concrete interests; and (3) it is reasonably probable that the challenged action will threaten their concrete interests." *Center for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 (9th Cir. 2011) (citing *Citizens for Better Forestry*, 341 F.3d at 969–70)).

Here, the Court will assume without deciding that the Federal Defendants violated some procedural rules of NEPA, that the Nation has some kind of interest in the water of the Lower Basin, and the procedural rules protect the Nation's interests in that water. This satisfies the first two prongs of the NEPA injury inquiry. Under the third prong, the Nation must demonstrate that it is "reasonably probable" that the challenged administrative actions will threaten their interests. The Nation has not done so. As explained above, the only injury the Nation asserts in this case is that the challenged administrative actions will create a system of reliance that will somehow make it harder for the Nation to satisfy its water rights, even though the Nation concedes that these challenged actions do not vitiate those rights or otherwise legally alter those rights under *Winters*. The Nation does not explain how any "system of reliance" created by the challenged administrative actions could nonetheless injure the Nation's interests. Without this connection, the Nation has not demonstrated that it is "reasonably probable" that the

actions will threaten their interests. Thus, in Claims One, Two, Three, and Five, the Nation fails to establish injury under the standard for establishing a NEPA procedural injury and therefore the Nation does not have Article III standing to bring those claims.

In Claim Four, the Nation alleges that the Implementation of the Interstate Banking Regulations violates the APA, but not NEPA. As the Nation does not bring Claim Four under NEPA, it is not relevant whether it meets the Ninth Circuit's requirements for establishing injury under that particular statute. However, the Nation must still establish injury under this Claim for Article III standing. As in Claims One, Two, Three, and Five, the Nation alleges that the challenged regulations will allow entitlement holders other than the Nation to develop a system of reliance on water that may someday be determined to belong to the Nation. As with Claims One, Two, Three and Five, the Nation fails to allege any facts to suggest that any possible injury deriving from a theoretical, future "system of reliance" is "actual or imminent" as opposed to merely "conjectural or hypothetical." *Summers*, 555 U.S. at 493. Thus, Plaintiffs also fail to establish standing to bring Claim Four.[3]

---

[3] A plaintiff bringing a suit under the APA must also fulfill statutory standing requirements by establishing "(1) that there has been final agency action adversely affecting the plaintiff, and (2) that, as a result, it suffers legal wrong or that its injury falls within the zone of interests of the statutory provision the plaintiff claims was violated." *Citizens for BetterForestry*, 341 F.3d at 976 (citations omitted). Because the Nation does not establish Article III standing to bring its APA/NEPA claims, the Court need not

III. Breach of Trust Claim

A. Trust Relationship

In its Claim Seven, the Nation challenges the Federal Defendants' alleged breach of their fiduciary trust responsibility. (SAC ¶¶ 90–91.) The Nation asserts that "[t]he Department has failed to determine the extent and quantity of the water rights of the Navajo Nation to the waters of the Colorado River, or otherwise determine the amount of water which the Navajo Nation requires from the Lower Basin of the Colorado River to meet the needs of the Navajo Nation and its members." (*Id.*) To remedy this alleged violation, it asks the Court to enjoin "further breaches of the United States' trust responsibility." (*Id.* ¶ L.) The Nation claims that this "primary breach of trust claim is not premised on the APA." (Doc. 282 at 67.)

While the Ninth Circuit recognizes that the United States owes a general trust responsibility to Indian tribes, "unless there is a specific duty that has been placed on the government with respect to Indians, [the government's general trust obligation] is discharged by [the government's] compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." *Gross Ventre Tribe v. United States*, 469 F.3d 801, 810 (9th Cir. 2006) (quoting *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569, 574 (9th Cir. 1998)). Here, the Nation argues that the Colorado River Compact of 1922 created a specific,

---

address whether the Nation meets the additional requirements for statutory standing.

enforceable trust obligation in stating that "[n]othing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes." (Doc. 282 at 64; Doc. 293 at 14.) But, by its terms, this statement does not create any new or additional obligations of the United States of America to Indian tribes. It merely recognizes the existence of such rights as may have pre-existed the Compact. The Nation has not identified a relevant, specific duty that pre-existed the Compact and that was owed to it by the Federal Defendants that would either support its general breach of trust claim or its claim that the Federal Defendants have breached a specific duty to the Nation in undertaking any of the challenged management activities in the Lower Basin.

No party contests that the United States has a trust responsibility to the Nation consistent with *Winters* that pre-existed the Compact. No party contests that the Nation was allocated no water right in the Lower Basin as a result of *Arizona v. California*. Yet when, as a current result of *Arizona v. California* the Nation has no present, existing and determined right in the allocation of that water, the Nation does not point to any duty that either existed before or after the Compact that requires the United States, in regulating the use of the waters between the present determined and existing rights holders, to include the potential future interest which may accrue to the Nation as a result of *Winters*. The allegation of such facts simply is insufficient to meet the specificity requirement set forth in *Gross Ventre* as a prerequisite for a breach of

trust claim.[4] Further, the Nation's claim to Lower Basin water would be wholly unimpaired by any third-party claim that post-dated the time from which the Nation could base its claim through *Winters*. This only highlights the non-existence of a breach of trust claim against the United States for actions taken with third parties that post-date the time from which the Nation bases its claims.

B. Sovereign Immunity

To bring Claim Seven or any other claim against the Federal Defendants, the Nation must also identify an applicable waiver of sovereign immunity. "A party may bring a cause of action against the United States only to the extent [the United States] has waived its sovereign immunity. A party bringing a cause of action against the federal government bears the burden of demonstrating an unequivocal waiver of immunity." *Cunningham v. United States*, 786 F.2d 1445, 1446 (9th Cir. 1986) (citations omitted). "A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text." *Lane v. Pena*, 518 U.S. 187, 192 (1996) (citations omitted). Further, "a waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of

---

[4] The Court, of course, makes no determination as to whether a claim for breach of trust could be stated against the United States under other factual circumstances, such as for example, if the Nation was unable to obtain on its own and the United States refused to otherwise pursue a determination whether the Nation had any right in Lower Basin waters.

the sovereign." *Id.* As the SAC specifies that it seeks relief under the APA, 5 U.S.C. §§ 701–06 (*Id.* ¶ 8), the Court will consider whether that statute contains a waiver of sovereign immunity that would allow the Nation to bring its Claim Seven, even though the Nation does state that its Claim Seven falls outside the bounds of the APA (Doc. 282 at 67).

The APA waives sovereign immunity for certain actions brought against the Federal Government. 5 U.S.C. § 702. In relevant part, it states that "[a]n action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity .. . shall not be dismissed . . . on the ground that it is against the United States." *Id.* Section 704, which describes the scope of reviewable agency action under the APA, states in relevant part that judicial review extends to "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. *See also Gallo Cattle v. US. Dep't of Agric.*, 159 F.3d 1194, 1198 (9th Cir. 1998) (describing that "the APA's waiver of sovereign immunity contains several limitations" including § 704, which limits review to actions "made reviewable by statute or final agency action").

As the Nation notes, the Ninth Circuit has held that this § 704 limitation does not limit the § 702 waiver for some constitutional claims. *See Presbyterian Church v. United States*, 870 F.2d 518, 526 (9th Cir. 1989) (declining to read "§ 702 as preserving sovereign immunity in claims for equitable relief against

government investigations alleged to violate First and Fourth Amendment rights"); *See also Robinson v. Salazar*, 885 F. Supp. 2d 1002, 1027–28 (E.D. Cal. 2012) (reconciling the Ninth Circuit's opinions in *Gallo Cattle* and *Presbyterian Church*, noting that *Presbyterian Church* was limited to the availability of a sovereign immunity waiver to bring constitutional claims). However, no such constitutional claims are present in this action. The APA also waives sovereign immunity under 5 U.S.C. § 706(1) for certain claims challenging agency inaction. However, a § 706(1) claim must assert that an agency failed to take a discrete agency action that it is actually required to take. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004). The Nation concedes that it is not bringing any § 706(1) claims in this case. (Doc. 282 at 67.)

Here, Claim Seven is indeed a claim for relief other than damages, brought against the United States. However, Claim Seven does not challenge any final agency action or allege any constitutional claim. (Doc. 282 at 67.) Because the Nation fails to challenge any particular final agency action or bring a constitutional claim, Claim Seven falls outside of the scope of the APA's waiver of sovereign immunity and is thus barred. The Nation invites the Court to adopt a broad reading of *Presbyterian Church* that would expand its reading of the APA's waiver beyond constitutional claims to encompass a general breach of trust claim. *See Robinson*, 885 F. Supp. 2d at 1027–28; *but see Valentini v. Shinseki*, 860 F. Supp. 2d 1079, 1101 (C.D. Cal. 2012).The Court declines that invitation. The

Nation alleges no other applicable waiver of sovereign immunity. Therefore, Claim Seven is dismissed as barred by the Federal Defendants' sovereign immunity.

CONCLUSION

Plaintiff fails to establish the injury in fact necessary to confer standing to bring its claims One through Five and has voluntarily struck its Claim Six. In addition, Plaintiff fails to identify a waiver of sovereign immunity that permits it to bring Claim Seven. The Court thus lacks subject matter jurisdiction to consider the merits of the Nation's Second Amended Complaint. Due to this lack of subject matter jurisdiction, the Second Amended Complaint is dismissed without prejudice pursuant to the Federal Defendant's Motion to Dismiss (Doc. 240). The Court denies the other pending Motions to Dismiss (Docs. 242, 243, 249, 250, 251, 253, 254) and the Hopi Tribe's Motion to Intervene (Doc. 252) as moot.

IT IS THEREFORE ORDERED THAT:

1. Defendants United States Department of the Interior, Secretary of the Interior Sally Jewell, Bureau of Reclamation, and Bureau of Indian Affairs' (collectively the Motion to Dismiss (Doc. 240) is **granted**.

2. Defendant-Intervenor State of Arizona's Motion to Dismiss (Doc. 242) is **denied as moot**.

3. Defendant-Intervenors Metropolitan Water District of Southern California and Coachella Valley

Water District's Motion to Dismiss (Doc. 243) is **denied as moot**.

4. Defendant-Intervenors Salt River Project Agricultural Improvement and Power District and the Salt River Water Users' Association's Motion to Dismiss and to Join Required Parties (Doc. 249) is **denied as moot**.

5. Defendant-Intervenor Central Arizona Water Conservation District's Motion to Dismiss (Doc. 250) is **denied as moot**.

6. Defendant-Intervenor Imperial Irrigation District's Motion to Dismiss (Doc. 251) is **denied as moot**.

7. Intervenor Hopi Tribe's Motion to Intervene (Doc. 252) is **denied as moot**.

8. Intervenor Hopi Tribe's Motion to Dismiss (Doc. 253) is **denied as moot**.

9. Defendant-Intervenors Colorado River Commission of Nevada, State of Nevada, and Southern Nevada Water Authority's Motion to Dismiss (Doc. 254) is **denied as moot**.

10. Plaintiff's Second Amended Complaint is dismissed without prejudice. The Clerk of Court is directed to terminate this action and enter judgment accordingly.

Dated this 22nd day of July, 2014.

/s/ G. Murray Snow
G. Murray Snow
United States District Judge

United States Constitution
Art. III, § 2, Cl 2

Jurisdiction of Supreme Court.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

TREATY WITH THE NAVAHO, 1849

The following acknowledgements, declarations, and stipulations have been duly considered, and are now solemnly adopted and proclaimed by the undersigned; that is to say, John M. Washington, governor of New Mexico, and lieutenant-colonel commanding the troops of the United States in New Mexico, and James S. Calhoun, Indian agent, residing at Santa Fe, in New Mexico, representing the United States of America, and Mariano Martinez, head chief, and Chapitone, second chief, on the part of the Navajo tribe of Indians: nA. nB.

nA. Ratified Sept. 9, 1850.

nB. Proclaimed Sept. 24, 1850.

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

nC. Navaho under jurisdiction of the United States.

II. That from and after the signing of this treaty, hostilities between the contracting parties shall cease, and perpetual peace and friendship shall exist; the said

tribe hereby solemnly covenanting that they will not associate with, or give countenance or aid to, any tribe or band of Indians, or other persons or powers, who may be at any time at enimity with the people of the said United States; that they will remain at peace, and treat honestly and humanely all persons and powers at peace with the said States; and all cases of aggression against said Navajoes by citizens or others of the United States, or by other persons or powers in amity with the said States, shall be referred to the Government of said States for adjustment and settlement. nD.

nD. Perpetual peace to exist.

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

territory of the Navajoes is hereby annexed to New Mexico. nE.

nE. Laws now in force regulating trade and peace to be binding upon the Navaho.

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

nF. The Navaho to deliver to the United States murderer or murderers of M. Garcia.

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

nG. Captives and stolen property to be delivered to United States, by the 9th Oct., 1850

VI. Should any citizen of the United States, or other person or persons subject to the laws of the United States, murder, rob, or otherwise maltreat any Navajo

Indians, he or they shall be arrested and tried, and, upon conviction, shall be shall be subjected to all the penalties provided by law for the protection of the persons and property of the people of the said States. nH.

nH. Citizens of the United States committing outrages upon Navaho to be subjected to the penalties of law.

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

nI. Free passage through their territory.

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

nJ. Military posts and agencies to be established.

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

nK. The United States to adjust territorial boundaries.

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

nL. Donations, presents, and implements to be given.

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

nM. To be binding after signed, and to receive a liberal construction.

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

J. M. Washington, (L.S.)

Brevet Lieutenant-Colonel Commanding.

James S. Calhoun, (L.S.)

Indian Agent, residing at Santa Fe.

Mariano Martinez, Head Chief, his x mark, (L.S.)

Chapitone, Second Chief, his x mark, (L.S.)

J. L. Collins.

James Conklin.

Lorenzo Force.

Antonio Sandoval, his x mark.

Francisco Josto, Governor of Jemez, his x mark.

Witnesses - -

H. L. Kendrick, Brevet Major U.S. Army.

J. N. Ward, Brevet First Lieutenant Third Infantry.

John Peck, Brevet Major U.S. Army.

J. F. Hammond Assistant Surgeon U.S. Army.

H. L. Dodge, Captain Commanding Eut. Regulars.

Richard H. Kern.

J. H. Nones, Second Lieutenant Second Artillery.

Cyrus Choice.

John H. Dickerson, Second Lieutenant First Artillery.

W. E. Love.

John G. Jones.

J. H. Simpson, First Lieutenant Corps Topographic Engineers.

TREATY WITH THE NAVAHO, 1868

Articles of a treaty and agreement made and entered into at Fort Sumner, New Mexico, on the first day of June, one thousand eight hundred and sixty-eight, by and between the United States, represented by its commissioners, Lieutenant-General W. T. Sherman and Colonel Samuel F. Tappan, of the one part, and the Navajo Nation or tribe of Indians, represented by their chiefs and head-men, duly authorized and empowered to act for the whole people of said nation or tribe, (the names of said chiefs and head-men being hereto subscribed,) of the other part, witness: nA. nB.

nA. Ratified July 25, 1868.

nB. Proclaimed Aug. 12, 1868.

ARTICLE 1. From this day forward all war between the parties to this agreement shall forever cease. The Government of the United States desires peace, and its honor is hereby pledged to keep it. The Indians desire peace, and they now pledge their honor to keep it. nC.

nC. Peace and friendship.

If bad men among the whites, or among other people subject to the authority of the United States, shall commit any wrong upon the person or property of the Indians, the United States will, upon proof made to the agent and forwarded to the Commissioner of Indian Affairs at Washington City, proceed at once to cause the offender to be arrested and punished according to the

laws of the United States, and also to reimburse the injured persons for the loss sustained. nD.

nD. Offenders among the whites to be arrested and punished.

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

nE. Among the Indians, to be given up to the United States.

nF. Rules for ascertaining damages.

ARTICLE 2. The United States agrees that the following district of country, to wit: bounded on the north

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

nG. Reservation boundaries.

nH. Who not to reside thereon.

ARTICLE 3. The United States agrees to cause to be built, at some point within said reservation, where timber and water may be convenient, the following buildings: a warehouse, to cost not exceeding twenty-five hundred dollars; and agency building for the residence of the agent, not to cost exceeding three thousand dollars; a carpenter-shop and blacksmith-shop, not to cost

exceeding one thousand dollars each; and a schoolhouse and chapel, so soon as a sufficient number of children can be induced to attend school, which shall not cost to exceed five thousand dollars. nI.

nI. Buildings to be erected by the United States.

ARTICLE 4. The United States agrees that the agent for the Navajos shall make his home at the agency building; that he shall reside among them, and shall keep an office open at all times for the purpose of prompt and diligent inquiry into such matters of complaint by or against the Indians as may be presented for investigation, as also for the faithful discharge of other duties enjoined by law. In cases of depredation on person or property he shall cause the evidence to be taken in writing and forwarded, together with his finding, to the Commissioner of Indian Affairs, whose decision shall be binding on the parties to this treaty. nJ.

nJ. Agent to make his home and reside where.

ARTICLE 5. If any individual belonging to said tribe, or legally incorporated with it, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within said reservation, not exceeding one hundred and sixty acres in extent, which tract, when so selected, certified, and recorded in the "land-book" as herein described, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it. nK. nL.

nK. Heads of family desiring to commence farming may select lands, etc.

nL. Effect of such selection.

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

nM. Persons not heads of families.

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

nN. Certificates of selection to be delivered, etc.

nO. To be recorded.

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

nP. Survey.

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

nQ. Alienation and descent of property.

ARTICLE 6. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted, especially of such of them as may be settled on said agricultural parts of this reservation, and they therefore pledge themselves to compel their children, male and female, between the ages of six and sixteen years, to attend school; and it is hereby made the duty of the agent for said Indians to see that this stipulation is strictly complied with; and the United States agrees that, for every thirty children between said ages who can be induced or compelled to attend school, a house shall be provided, and a teacher competent to teach the elementary branches of an English education shall be furnished, who will reside among said Indians, and faithfully discharge his or her duties as a teacher. nR. nS. nT.

nR. Children between 6 and 16 to attend school.

nS. Duty of agent,

nT. Schoolhouses and teachers.

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

ARTICLE 7. When the head of a family shall have selected lands and received his certificate as above

directed, and the agent shall be satisfied that he intends in good faith to commence cultivating the soil for a living, he shall be entitled to receive seeds and agricultural implements for the first year, not exceeding in value one hundred dollars, and for each succeeding year he shall continue to farm, for a period of two years, he shall be entitled to receive seeds and implements to the value of twenty-five dollars. nU.

nU. Seeds and agricultural implements.

ARTICLE 8. In lieu of all sums of money or other annuities provided to be paid to the Indians herein named under any treaty or treaties heretofore made, the United States agrees to deliver at the agency-house on the reservation herein named, on the first day of September of each year for ten years, the following articles, to wit: nV.

nV. Delivery of articles in lieu of money and annuities.

Such articles of clothing, goods, or raw materials in lieu thereof, as the agent may make his estimate for, not exceeding in value five dollars per Indian – each Indian being encouraged to manufacture their own clothing, blankets, &c.; to be furnished with no article which they can manufacture themselves. And, in order that the Commissioner of Indian Affairs may be able to estimate properly for the articles herein nW. nX.

nW. Clothing, etc.

nX. Indians to be furnished with no articles they can make.

named, it shall be the duty of the agent each year to forward to him a full and exact census of the Indians, on which the estimate from year to year can be based. nY.

nY. Census.

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

nZ. Annual appropriation in money for ten years.

nAA. May be changed.

nBB. Army officer to attend delivery of goods, etc.

ARTICLE 9. In consideration of the advantages and benefits conferred by this treaty, and the many pledges of friendship by the United States, the tribes who are parties to this agreement hereby stipulate that they will relinquish all right to occupy any territory outside their reservation, as herein defined, but retain the right to hunt on any unoccupied lands contiguous to their reservation, so long as the large game may range thereon in such numbers as to justify the chase; and they, the said Indians, further expressly agree: nCC.

nCC. Stipulations by the Indians as to outside territory.

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

nDD. Railroads.

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

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

nEE. Residents, travelers, wagon trains.

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

nFF. Women and children.

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

nGG. Scalping.

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

nHH. Roads or stations.

nII. Damages.

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

nJJ. Military posts and roads.

ARTICLE 10. No future treaty for the cession of any portion or part of the reservation herein described, which may be held in common, shall be of any validity or force against said Indians unless agreed to and executed by at least three-fourths of all the adult male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any

individual member of the tribe of his rights to any tract of land selected by him as provided in article (5) of this treaty. nKK.

nKK. Cession of reservation not to be valid unless, etc.

ARTICLE 11. The Navajos also hereby agree that at any time after the signing of these presents they will proceed in such manner as may be required of them by the agent, or by the officer charged with their nLL.

nLL. Indians to go to reservation when required.

removal, to the reservation herein provided for, the United States paying for their subsistence en route, and providing a reasonable amount of transportation for the sick and feeble.

ARTICLE 12. It is further agreed by and between the parties to this agreement that the sum of one hundred and fifty thousand dollars appropriated or to be appropriated shall be disbursed as follows, subject to any condition provided in the law, to wit: nMM.

nMM. Appropriations, how to be disbursed.

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

nNN. Removal.

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

nOO. Sheep and goats.

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

nPP. Cattle and corn.

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

nQQ. Remainder.

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

nRR. Removal, how made.

ARTICLE 13. The tribe herein named, by their representatives, parties to this treaty, agree to make the reservation herein described their permanent home, and they will not as a tribe make any permanent settlement elsewhere, reserving the right to hunt on the lands adjoining the said reservation formerly called theirs, subject to the modifications named in this treaty and the orders of the commander of the department in

which said reservation may be for the time being; and it is further agreed and understood by the parties to this treaty, that if any Navajo Indian or Indians shall leave the reservation herein described to settle elsewhere, he or they shall forfeit all the rights, privileges, and annuities conferred by the terms of this treaty; and it is further agreed by the parties to this treaty, that they will do all they can to induce Indians now away from reservations set apart for the exclusive use and occupation of the Indians, leading a nomadic life, or engaged in war against the people of the United States, to abandon such a life and settle permanently in one of the territorial reservations set apart for the exclusive use and occupation of the Indians. nSS. nTT.

nSS. Reservation to be permanent home of Indians.

nTT. Penalty for leaving reservation.

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

W. T. Sherman,

Lieutenant-General, Indian Peace Commissioner.

S. F. Tappan,

Indian Peace Commissioner.

Barboncito, chief, his x mark.

Armijo, his x mark.

Delgado.

Manuelito, his x mark.

Largo, his x mark.
Herrero, his x mark.
Chiqueto, his x mark.
Muerto de Hombre, his x mark.
Hombro, his x mark.
Narbono, his x mark.
Narbono Segundo, his x mark.
Ganado Mucho, his x mark.
Council:
Riquo, his x mark.
Juan Martin, his x mark.
Serginto, his x mark.
Grande, his x mark.
Inoetenito, his x mark.
Muchachos Mucho, his x mark.
Chiqueto Segundo, his x mark.
Cabello Amarillo, his x mark.
Francisco, his x mark.
Torivio, his x mark.
Desdendado, his x mark.
Juan, his x mark.
Guero, his x mark.
Gugadore, his x mark.
Cabason, his x mark.
Barbon Segundo, his x mark.

Cabares Colorados, his x mark.

Attest:

Geo. W. G. Getty, colonel Thirty-seventh Infantry, brevet major-general U.S. Army.

B. S. Roberts, brevet brigadier-general U.S. Army, lieutenant-colonel Third Cavalry.

J. Cooper McKee, brevet lieutenant-colonel, surgeon U.S. Army.

Theo. H. Dodd, United States Indian agent for Navajos.

Chas. McClure, brevet major and commissary of subsistence, U.S. Army.

James F. Weeds, brevet major and assistant surgeon, U.S. Army.

J. C. Sutherland, interpreter.

William Vaux, chaplain U.S. Army.

43 USCS § 617c

Condition precedent to taking effect of provisions

(a) Ratification by interested States of Colorado River compact; agreements for apportionment of waters. This Act shall not take effect and no authority shall be exercised hereunder and no work shall be begun and no moneys expended on or in connection with the works or structures provided for in this Act, and no water rights shall be claimed or initiated hereunder, and no steps shall be taken by the United States or by others to initiate or perfect any claims to the use of water pertinent to such works or structures unless and until (1) the States of Arizona, California, Colorado, Nevada, New Mexico, Utah, and Wyoming shall have ratified the Colorado River compact, mentioned in section 13 hereof [43 USCS § 617 l], and the President by public proclamation shall have so declared, or (2) if said States fail to ratify the said compact within six months from the date of the passage of this Act [enacted Dec. 21, 1928] then, until six of said States, including the State of California, shall ratify said compact and shall consent to waive the provisions of the first paragraph of Article XI of said compact, which makes the same binding and obligatory only when approved by each of the seven States signatory thereto, and shall have approved said compact without conditions, save that of such six-State approval, and the President of public proclamation shall have so declared, and, further, until the State of California, by act of its legislature, shall agree irrevocably and

unconditionally with the United States and for the benefit of the States of Arizona, Colorado, Nevada, New Mexico, Utah, and Wyoming, as an express covenant and in consideration of the passage of this Act, that the aggregate annual consumptive use (diversions less returns to the river) of water of and from the Colorado River for use in the State of California, including all uses under contracts made under the provisions of this Act and all water necessary for the supply of any rights which may now exist, shall not exceed four million four hundred thousand acre-feet of the waters apportioned to the lower basin States by paragraph (a) of Article III of the Colorado River compact, plus not more than one-half of any excess or surplus waters unapportioned by said compact, such uses always to be subject to the terms of said compact.

The States of Arizona, California, and Nevada are authorized to enter into an agreement which shall provide (1) that of the 7,500,000 acre-feet annually apportioned to the lower basin by paragraph (a) of Article III of the Colorado River compact, there shall be apportioned to the State of Nevada, 300,000 acre-feet and to the State of Arizona 2,800,000 acre-feet for exclusive beneficial consumptive use in perpetuity, and (2) that the State of Arizona may annually use one-half of the excess or surplus waters unapportioned by the Colorado River compact, and (3) that the State of Arizona shall have the exclusive beneficial consumptive use of the Gila River and its tributaries within the boundaries of said State, and (4) that the waters of the Gila River and its tributaries, except return flow after

the same enters the Colorado River, shall never be subject to any diminution whatever by any allowance of water which may be made by treaty or otherwise to the United States of Mexico but if, as provided in paragraph (c) of Article III of the Colorado River compact, it shall become necessary to supply water to the United States of Mexico from waters over and above the quantities which are surplus as defined by said compact, then the State of California shall and will mutually agree with the State of Arizona to supply, out of the main stream of the Colorado River, one-half of any deficiency which must be supplied to Mexico by the lower basin, and (5) that the State of California shall and will further mutually agree with the States of Arizona and Nevada that none of said three States shall withhold water and none shall require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses, and (6) that all of the provisions of said tri-State agreement shall be subject in all particulars to the provisions of the Colorado River compact, and (7) said agreement to take effect upon the ratification of the Colorado River compact by Arizona, California, and Nevada.

(b) Agreements for revenues to meet expenses of construction, operation, and maintenance of works. Before any money is appropriated for the construction of said dam or power plant, or any construction work done or contracted for, the Secretary of the Interior shall make provision for revenues by contract, in accordance with the provisions of this Act, adequate in his judgment to insure payment of all expenses of

operation and maintenance of said works incurred by the United States and the repayment, within fifty years from the date of the completion of said works, of all amounts advanced to the fund under subdivision (b) of section 2 [43 USCS § 617a(b)] for such works, together with interest thereon made reimbursable under this Act.

Before any money is appropriated for the construction of said main canal and appurtenant structures to connect the Laguna Dam with the Imperial and Coachella Valleys in California, or any construction work is done upon said canal or contracted for, the Secretary of the Interior shall make provision for revenues, by contract or otherwise, adequate in his judgment to insure payment of all expenses of construction, operation, and maintenance of said main canal and appurtenant structures in the manner provided in the reclamation law.

If during the period of amortization the Secretary of the Interior shall receive revenues in excess of the amount necessary to meet the periodical payments to the United States as provided in the contract, or contracts, executed under this Act, then, immediately after the settlement of such periodical payments, he shall pay to the State of Arizona 18 ¾ per centum of such excess revenues and to the State of Nevada 18 ¾ per centum of such excess revenues.

43 USCS § 617d

Contracts for storage and use of waters for irrigation and domestic purposes; generation and sale of electrical energy

The Secretary of the Interior is hereby authorized, under such general regulations as he may prescribe, to contract for the storage of water in said reservoir and for the delivery thereof at such points on the river and on said canal as may be agreed upon, for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which, in addition to other revenue accruing under the reclamation law and under this Act, will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under this Act and the payments to the United States under subdivision (b) of section 4 [*43 USCS § 617c(b)*]. Contracts respecting water for irrigation and domestic uses shall be for permanent service and shall conform to paragraph (a) of section 4 of this Act [*43 USCS § 617c(a)*]. No person shall have or be entitled to have the use for any purpose of the water stored as aforesaid except by contract made as herein stated.

After the repayments to the United States of all money advanced with interest, charges shall be on such basis and the revenues derived therefrom shall be kept in a separate fund to be expended within the Colorado

River Basin as may hereafter be prescribed by the Congress.

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

(a) Duration of contracts for electrical energy; price of water and electrical energy to yield reasonable returns; readjustments of prices. No contract for electrical energy or for generation of electrical energy shall be of longer duration than fifty years from the date at which such energy is ready for delivery.

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

(b) Renewal of contracts for electrical energy. The holder of any contract for electrical energy not in

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

(c) Applications for purchase of water and electrical energy; preferences. Contracts for the use of water and necessary privileges for the generation and distribution of hydroelectric energy or for the sale and delivery of electrical energy shall be made with responsible applicants therefor who will pay the price fixed by the said Secretary with a view to meeting the revenue requirements herein provided for. In case of conflicting applications, if any, such conflicts shall be resolved by the said Secretary, after hearing, with due regard to the public interest, and in conformity with the policy expressed in the Federal Water Power Act as to conflicting applications for permits and licenses, except that preference to applicants for the use of water and appurtenant works and privileges necessary for the generation and distribution of hydroelectric energy, or for delivery at the switchboard of a hydroelectric plant, shall be given, first, to a State for the generation or purchase of electric energy for use in the State, and the States of Arizona, California, and

Nevada shall be given equal opportunity as such applicants.

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

(d) Transmission lines for electrical energy; use; rights of way over public and reserved lands. Any agency receiving a contract for electrical energy equivalent to one hundred thousand firm horsepower, or more, may, when deemed feasible by the said Secretary, from engineering and economic considerations and under general regulations prescribed by him, be required to permit any other agency having contracts hereunder for less than the equivalent of twenty-five thousand firm horsepower, upon application to the Secretary of the Interior made within sixty days from the execution

of the contract of the agency the use of whose transmission line is applied for, to participate in the benefits and use of any main transmission line constructed or to be constructed by the former for carrying such energy (not exceeding, however, one-fourth the capacity of such line), upon payment by such other agencies of a reasonable share of the cost of construction, operation, and maintenance thereof.

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

43 USCS § 617g

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

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

(b) Also the United States, in constructing, managing, and operating the dam, reservoir, canals, and other works herein authorized, including the appropriation, delivery, and use of water for the generation of power, irrigation, or other uses, and all users of water thus delivered and all users and appropriators of waters stored by said reservoir and/or carried by said canal, including all permittees and licensees of the United States or any of its agencies, shall observe and be subject to and controlled, anything to the contrary herein notwithstanding, by the terms of such compact, if any, between the States of Arizona, California, and Nevada, or any two thereof, for the equitable division of the benefits, including power, arising from the use of water accruing to said States, subsidiary to and consistent with

said Colorado River compact, which may be negotiated and approved by said States and to which Congress shall give its consent and approval on or before January 1, 1929; and the terms of any such compact concluded between said States and approved and consented to by Congress after said date: *Provided*, That in the latter case such compact shall be subject to all contracts, if any, made by the Secretary of the Interior under section 5 hereof [*43 USCS § 617d*] prior to the date of such approval and consent by Congress.