Docket No. 14-16864

In the

United States Court of Appeals

for the

Ninth Circuit

NAVAJO NATION,

Plaintiff-Appellant,

v.

DEPARTMENT OF THE INTERIOR, SALLY JEWELL, Secretary of the Interior, BUREAU OF RECLAMATION and 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 and STATE OF COLORADO,

Intervenors-Defendants-Appellees.

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

REPLY BRIEF OF APPELLANT

SCOTT B. MCELROY, ESQ.
ALICE E. WALKER, ESQ.
McELROY, MEYER, WALKER & CONDON, P.C.
1007 Pearl Street, Suite 220
Boulder, Colorado 80302
(303) 442-2021 Telephone
(303) 444-3490 Facsimile

STANLEY M. POLLACK, ESQ.
M. KATHRYN HOOVER, ESQ.
NAVAJO NATION DEPARTMENT OF JUSTICE
Post Office Box 2010
Window Rock, Arizona 86515
(928) 871-7510 Telephone
(928) 871-6200 Facsimile

Attorneys for Appellant Navajo Nation

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

RULES

REGULATIONS

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION.

In this litigation, the United States and four states (or water management authorities within those states) with allocations to the Colorado River (sometimes "River"), oppose the Navajo Nation's ("Nation") procedural challenge to the Federal Defendant's management decisions concerning the Colorado River. Although decided on narrow grounds below, the Defendants have raised numerous issues that were not decided by the District Court and, therefore, not addressed in the opening Navajo Brief.[1] Those additional matters, found in four separate answer briefs, require a comprehensive reply, including a brief review of the history of the litigation over the Colorado River.

The Supreme Court's decision in *Arizona v. California* ("*Arizona I*") determined the rights of three states and five tribes to the waters of the Lower Basin of the Colorado River, however, the Court rejected the Special Master's holding that mainstream uses of the River between Lee Ferry and Lake Mead should be treated as tributary uses outside the scope of the Court's decision. 373 U.S. 546, 591 (1963). Neither the Special Master nor the Court attempted

[1] On December 24, 2014, the plaintiff-appellant Navajo Nation filed its opening brief in this matter. Navajo Brief (Dkt. 44-1). On March 16, 2015, the federal defendant-appellees ("Federal Defendants") and intervenor-defendant-appellees ("Intervenor-Defendants") (collectively "Defendants") filed answer briefs. Federal Brief (Dkt. 69-1); Nevada Brief (Dkt. 62-1); California Brief (Dkt. 67-1); Arizona Brief (Dkt. 61); Colorado Brief (Dkt. 64). Colorado is the only Upper Basin state participating in the litigation.

to quantify mainstream uses between Lee Ferry and Lake Mead, and as a consequence, the Nation's reserved rights to the mainstream in the Lower Basin were not addressed. Although unquantified, the Nation's needs for water to serve its homeland are significant, and if the Colorado River is the source of that water, Navajo uses have the potential to upset the allocation among the states.

Contrary to the Defendants' arguments, this action does not seek a quantification of Navajo reserved rights under federal law. Instead, the Nation brings this action to require the Federal Defendants to assess the water supply needs of the Navajo Indian Reservation ("Reservation") from the Colorado River – in the language of common law trusts, to determine the parameters of the trust res – before making decisions that affect the allocation of the River's waters to the detriment of the Nation and its people. The Nation asserts that the Federal Defendants cannot adequately comply with the procedural requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-70h, without first determining if Navajo trust resources will be adversely affected, and they cannot make that determination without knowing the extent to which the Nation requires water from the Colorado River. Because they failed to consider the water supplies the Nation requires to make the Reservation a permanent homeland, the Federal Defendants have both failed to comply with NEPA's procedural requirements and breached the fiduciary obligations undertaken by the United

States in the Treaty with the Navaho, 1868 ("1868 Treaty") (ER 61), the Colorado River Compact of November 24, 1922 ("1922 Compact") (ER 153), and various additional duties imposed by statutes, regulations, policies, and procedures that are enforceable by this Court.

The Nation seeks declaratory and injunctive relief to remedy the Federal Defendants' misfeasance, and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06, waives the Federal Defendants' immunity for each of the Nation's claims. Accordingly, the Nation asks the Court to (1) reverse the District Court's dismissal of its first, second and seventh claims; (2) remand the case to the District Court for further proceedings; and (3) direct the District Court to permit the Nation to amend its Complaint before any such proceedings occur.

II. REMAND IS APPROPRIATE.

A. THE COURT SHOULD DECLINE TO RULE ON ISSUES NOT DECIDED BELOW.

The Defendants ask the Court to address issues far beyond those decided by the District Court. Granting the Federal Defendants' motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), the District Court dismissed the Nation's NEPA claims on the narrow ground that the Nation had not demonstrated "a NEPA procedural injury" and thus lacked standing to pursue its NEPA claims. (ER14). Similarly, the District Court dismissed the Nation's breach of trust claims on the Federal Defendants' Rule 12(b)(1) motion, reading this Court's precedent to bar

the claim on the basis of sovereign immunity. (ER 17-18). The Nation appealed the District Court's narrow decision and limited its opening brief to those issues. The Defendants now ask this Court to decide, as alternative grounds for upholding the District Court's decision, that each of the claims the Nation appeals can be dismissed for failure to state a claim. The Court should reject the Defendants' requests and remand the case to the District Court rather than decide these alternative issues in the first instance.

1. The Record Before the Court Is Insufficient to Determine Whether the Nation has Failed to State Claims for NEPA Procedural Violations.

The facts underlying the Nation's NEPA claims were not developed below and, as a result, those facts cannot be argued here. The Defendants' attempts to raise arguments about the factual underpinnings of the Nation's claims emphasize the propriety of remand.

Going beyond the issues the District Court decided, the Federal Defendants seek to be absolved of their failure to analyze whether the Nation requires water from the Colorado River by arguing that "water rights reserved for the Navajo Reservation therefore may be satisfied from sources other than the mainstream

Colorado River." Federal Brief at 38-39.[2] The fact that the United States has participated in litigation with the ultimate goal of serving the Nation's needs in other parts of the Reservation is irrelevant to satisfying unmet needs in the western portion of the Reservation, adjacent to the Colorado River. The Court should reject the Federal Defendants' attempt to characterize such arguments as "ground[s] supported by the record" even though "the district court did not expressly rely on [them]." *Id.* at 31; *see also* Nevada Brief at 14, 15. Those arguments were not developed below and cannot be advanced for the first time before this Court.

Nevada presents substantial arguments about its reliance on the Colorado River, its allocation under the decree in *Arizona v. California*, and the impending threats to that reliance as a result of ongoing drought conditions that affect deliveries to Lake Mead. Nevada Brief at 4-12. Nevada goes so far as to include a motion for judicial notice (Dkt. 63), seeking to enter evidence into the record that it did not make available to the District Court. Such arguments may not be developed as a matter of first impression here, and the Court should reject them. "These factual claims rely on documents that were not before the district court, and in any event, are unavailing in light of this court's duty to accept the plaintiffs'

[2] This assertion assumes that the United States has engaged in a comprehensive analysis of the Nation's needs for water, which it admits it has not. *Id.* at 38.

allegations as true at the pleading stage of the litigation." *Merritt v. Countrywide Fin. Corp.*, 759 F.3d 1023, 1035 (9th Cir. 2014). In any event, Nevada's proffered materials are irrelevant to the issue of whether the Federal Defendants violated NEPA. As in *Merritt*, the Court should "decline to decide the question in the first instance on appeal." *Id*.

Taking a different tack, California argues that this litigation is really about quantifying the Nation's water rights in the Colorado River, and that such quantification can only occur in the Supreme Court pursuant to its retained jurisdiction in *Arizona v. California*. California Brief at 5-10, 50-56. The Court should reject California's attempt to characterize this case as something it is not. As the Nation stated in its motion for reconsideration (ER 3) below, it wishes to amend its Complaint in order to clarify its claims and disabuse the Defendants of the notion that this litigation is a backdoor attempt to receive an allocation of mainstream water. That is not the nature of the Nation's claims. *See infra* Part II.B.

2. The Record Before the Court Is Insufficient to Determine Whether the Nation Has Failed to State a Claim for Breach of Trust.

The Federal Defendants argue on appeal as they did below that the Nation's Complaint (ER 123) fails to identify a duty enforceable against the United States that gives rise to a cause of action for breach of trust. Federal Brief at 44-47. The

Federal Defendants invoke Circuit precedent to the effect that a specific duty or obligation of trust in a treaty, statute, or regulation is required to compel the United States to undertake traditional fiduciary duties with respect to trust resources. *See*, *e.g.*, *Gros Ventre Tribe v. United States*, 469 F.3d 801, 812 (9th Cir. 2006) (cited in Federal Brief at 46). Discerning the existence of such a duty is a fact-based inquiry not amenable to resolution on a motion to dismiss. In reviewing the breach of trust claim, a court must consider and apply the following principles:

1) The Indian canons of construction require that treaties be construed as the Indians would have understood them, and that treaties together with statutes and regulations should be liberally construed with ambiguities resolved in their favor;

2) Relying on the Indian canons, the Supreme Court has found that the United States has an implied duty to protect tribal trust assets, particularly those reserved by treaty;

3) When the United States creates procedures for the protection of Indians, it must follow those procedures even if they are more demanding than the law might otherwise require;

4) Similarly, when a federal agency incorporates its policies and procedures into decisional documents, and treats them as mandatory as Federal Defendants did here, then the Court will treat them as mandatory and enforceable; and

5) If, at a minimum, the United States must comply with the requirements of generally applicable statutes like NEPA when it acts as trustee of tribal resources, the failure to comply with such laws gives rise to a breach of trust.

The Complaint was adequate to state a claim for breach of trust. The relevant law, however, makes clear that the facts underlying the Nation's breach of trust claim require further development in the District Court, and dismissal of the Nation's breach of trust claim by this Court on a Rule 12(b)(6) motion – not decided by the District Court − is not appropriate.

B. THE NATION SHOULD BE PERMITTED TO AMEND ITS COMPLAINT.

The Defendants oppose amendment of the Complaint, arguing that the District Court properly concluded that the Nation having amended its Complaint twice, and is now foreclosed from further amendment. (ER 2-3); Federal Brief at 61-63; Nevada Brief at 55; California Brief at 1. That argument cannot stand in the face of precedent directing lower courts to apply the policy of Federal Rule of Civil Procedure 15(a)(2) by freely granting leave to amend "with 'extreme liberality.'" *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (quoting *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981)). In response to a motion to dismiss, "'a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading

could not possibly be cured by the allegation of other facts,'" and this "amendment policy is informed by Federal Rule of Civil Procedure 15(a)." *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (quoting *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995) It is the established policy of this Court, and the purpose of Rule 15, that controversies be resolved on the merits, as opposed to being disposed of summarily on the pleadings.

To the extent the Complaint does not clearly state the NEPA and/or breach of trust claims, the District Court should have permitted the Nation to amend its Complaint. FED. R. CIV. P. 15(a)(2); (ER 44-45). The District Court abused its discretion when it denied leave to amend, including denial of the Nation's motion for reconsideration (ER 3), and an order remanding this matter to the District Court with instructions to permit the filing of an amended complaint is warranted.

III. BACKGROUND.

A. THE NAVAJO NATION'S INTERESTS.

At its core, this case seeks to protect the Nation's concrete interests in the trust lands comprising the Reservation that were set aside by the federal government as a permanent home for the Navajo people adjacent to the River. (ER 73-75, 124-25, 127-30).

1. The Reservation is the Nation's Permanent Homeland.

The 1868 Treaty established the Reservation and promised to make it a "permanent home . . . for the exclusive use and occupation" of Navajo people. (ER 65-66); *accord* (ER 61-62). The 1868 Treaty also encouraged agriculture on the Reservation by promising land and supplies to Navajo individuals intending to cultivate the soil for a living. (ER 62-63); (ER 63) (Article 6 emphasizing need for education on the "agricultural parts of this reservation"). In doing so, the government necessarily understood that an adequate water supply was required if the arid lands comprising the Reservation were to fulfill the promise of a permanent home for Navajo people. (ER 130); *see Winters v. United States*, 207 U.S. 564, 576-77 (1908); *In re General Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 35 P.3d 68, 72-74 (Ariz. 2001). Without water these high desert lands cannot sustain the tribal members who live there. (ER 75-76); *see Arizona I*, 373 U.S. at 599; Federal Brief at 9 ("Much of this large basin is so arid that it is, and has always been, dependent upon managed use of the waters of the Colorado River System to make it productive and inhabitable.").

Despite the passage of 147 years since the 1868 Treaty was signed and ratified, the Arizona portion of the Reservation lacks adjudicated water rights and access to sufficient supplies to meet its basic domestic needs. (ER 76-78); (NNFER 21). In one of the communities in the western portion of the Reservation,

the Bureau of Reclamation ("Reclamation") concluded that 91% of the households lack access to a public water system. (NNFER 22). The absence of a reliable domestic water supply severely affects the health and human needs of the Navajo people living on Reservation lands. (NNFER 19-20).

Given the significance of an adequate water supply to the fulfillment of the federal government's obligation to make the Reservation a permanent homeland, the Federal Defendants were required to carefully analyze the effect of the challenged actions on the United States' ability to secure the water needed to carry out that goal. Admitting that they do not know whether the Nation needs water from the Colorado River or has a right under federal law to use any such water, the Federal Defendants did no more than attempt to determine whether the challenged actions would, as a matter of law, alter any unknown legal right the Nation might have to use the waters subject to the challenged actions. NEPA, the 1922 Compact, and the federal government's trust responsibility require far more.

2. The Law of the River.

The 1922 Compact is the starting point of the "Law of the River." *See*, *e.g.*, Boulder Canyon Project Act ("BCPA"), 43 U.S.C. § 617*l*(b) ("The rights of the United States in or to waters of the Colorado River and its tributaries howsoever claimed or acquired, as well as the rights of those claiming under the United States, shall be subject to and controlled by said Colorado River compact."). Article VII

of the 1922 Compact (ER 156) promises that the Federal Defendants will not manage the Colorado River in conflict with their trust obligation to make Navajo lands productive and livable: "Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes."

In the negotiations resulting in the 1922 Compact, which did not include Indian tribes, Chairman Herbert Hoover first proposed an "Indian article" stating "[n]othing in this compact shall be construed as affecting the rights of Indian Tribes." (ER 84). The next day, he proposed revised language recognizing the "separate obligation of the Federal Government" that flowed from the treaties with "Indian tribes affecting irrigation water." (ER 84-85). The participants unanimously adopted the revised language, now found at Article VII (ER 156), so that the 1922 Compact expressly confirms "the obligations of the United States of America to Indian tribes" (ER 156), including the Federal Defendants' obligation to fulfill the Reservation's promise as a permanent home. At a bare minimum, then, the Federal Defendants must not assert control over or manage the Colorado River in a manner that threatens the Reservation.[3] *See Gila*, 35 P.3d at 74 ("In its role as trustee of such lands, the government must act for the Indians' benefit.").

[3] Federal Indian Service employees at the time of the negotiations remarked that the 1922 Compact required prompt and affirmative action to secure and develop much-needed water supplies on the Reservation. (ER 87-88 (citing (NNFER 29)).

The Federal Defendants and their predecessors, however, have refused to take their affirmative trust obligations seriously.

3. Arizona v. California.

The United States represented the Nation in the *Arizona I* litigation. The Nation took exception to the United States' handling of the case and sought to intervene when Special Master Rifkind's report excluded the Nation's claims from the litigation. *See Report* at 254-91, *Arizona v. California*, No. 8 Original (Dec. 5, 1960) ("Rifkind Report"), *available at* http://digitool.library.colostate.edu/R/?func=dbin-jump-full&object_id=201635; (NNFER 47-48) (acknowledging the Nation's claims that "'[t]he United States has failed vigorously to assert' the interests of the Navajo Indians.").

The federal government vigorously opposed the Nation's intervention by asserting "full," "complete," and "exclusive" authority to litigate the Nation's water rights. (NNFER 42-46); Navajo Brief at 4 n.2. The United States assured the Nation that, in any event, "the Special Master makes no adjudication of the water rights of the Navajo Indian Reservation," stating that "[t]he Special Master's Report does not affect rights or priorities of Indian reservations for which no specific provision is made . . . . [n]othing has been taken from the Navajo Indians" because "their rights have not been affirmatively recognized." (NNFER 41). As justification for its position, the United States argued that "[t]he Special Master's

determination that mainstream and tributary uses above Lake Mead are not accountable in the allocation of mainstream water if approved would make irrelevant an adjudication at this time of the rights to use water on the Navajo Reservation as against users of mainstream water." (NNFER 49-50). The Special Master denied the Nation's intervention in *Arizona I*, and the United States, as the Nation's representative, neither objected to the narrow scope of the Special Master's proceedings, nor presented evidence of the Nation's claims to mainstream Colorado River water for inclusion in the Rifkind Report and consideration by the Supreme Court.[4]

Ultimately, the Supreme Court disagreed with the Special Master's conclusion about mainstream uses above Lake Mead, holding to the contrary that because the Lower Basin officially begins at Lee Ferry, the Secretary of the Interior ("Secretary") must also account for, and charge against Arizona's Lower Basin apportionment, consumptive mainstream uses between Lake Mead and Lee Ferry. *Arizona I*, 373 U.S. at 591; *see Decree* art. II(B)(4), *Arizona v. California*, 376 U.S. 340, 343 (1964) ("1964 Decree"). The Nation's consumptive use would occur in the portion of the mainstream erroneously excluded by the Special Master, but the Court declined to order further proceedings on the scope of the Nation's

[4] The Federal Defendants are correct that "the United States filed claims for water rights associated with the Navajo Reservation," Federal Brief at 38, but those claims were to the Little Colorado River, not mainstream water, and the Special Master declined to reach the claims because they were tributary.

rights to the River. Instead, the Court constructed the 1964 Decree in a way that tabled the issue and protected the rights of all unnamed Indian tribes, such as the Navajo Nation. *See*, *e.g.*, 1964 Decree art. VIII(C), 376 U.S. at 353 ("This decree shall not affect . . . [t]he rights or priorities, except as specific provision is made herein, of any Indian Reservation . . . .").

Accordingly, in spite of the Nation's efforts to have its claims addressed in *Arizona I*, the 1964 Decree did not adjudicate or otherwise affect Navajo water rights. The Federal Defendants have always been aware that the Navajo Nation's mainstream claims in the Lower Basin will require additional evidentiary proceedings (NNFER 50), but it has not acted to fulfill its obligation.[5] Thus, the Federal Defendants have yet to address whether the Reservation – home to over 300,000 Navajo people, encompassing more than thirteen million arid acres above Lake Mead, including more than sixty miles of riparian land along the Colorado River between Lake Mead and Lee Ferry – requires mainstream water in the Lower Basin to enable it to serve as a permanent homeland for the Navajo people. (ER

[5] Article VI of the 1964 Decree, 376 U.S. at 351-52, required that a list be furnished to the Court within two years of all present perfected rights in mainstream water for each Lower Basin state. The United States did not identify any Navajo Nation rights before the deadline, *see* Federal Brief at 15-16, and has subsequently been unresponsive to the Nation's inquiries about what consideration was given at the time, if any, to identify its rights. The Federal Defendants gloss over their predecessors' inaction with respect to the Nation and Article VI. *See id*. Regardless, Article VI cannot be construed as affecting the Nation's reserved water rights. *See* 1964 Decree art. VIII(C), 376 U.S. at 353.

73-78, 124-25, 127-30); Navajo Brief at 3-4; (NNFER 52) (Federal Defendants stating "[w]hether Navajo needs any additional water supply from the Lower Colorado River is entirely speculative . . . ."); *but see* (NNFER 18) ("There are unmet demands in the study area which will develop by the year 2050.").[6]

4. Subsequent Events.

Frustrated by the delay in realizing the promise of a permanent home and the water rights reserved for that purpose, the Nation formally asked the Department of the Interior ("Department") to give it a contract for Arizona's limited supply of unallocated Colorado River water. (ER 135). The Department denied the request. *Id.*[7] At no time since then have the Federal Defendants attempted to secure any such water for the benefit of the Nation and its people.

B. THE CHALLENGED GUIDELINES.

In this broad historical context, the Secretary and Reclamation adopted long-term guidelines for managing and allocating Colorado River water in times of

---

[6] S*ee generally* Amy Cordalis & Daniel Cordalis, *Indian Water Rights: How Arizona v. California Left an Unwanted Cloud Over the Colorado River Basin*, 5 ARIZ. J. ENVT'L L. & POL'Y 333 (2014) (noting the dilemma of an over-appropriated Colorado River and extensive unquantified tribal rights).

[7] The circumstances surrounding the rejection of the Nation's request were not developed below, but the Federal Defendants' understanding of the Nation's need for water from the mainstream, and their reasoning for refusing to allocate additional water to the Nation, are directly related to the additional issues raised by the Defendants on appeal and highlight the need for remand to the District Court.

surplus ("Surplus Guidelines") (ER 281), and shortage ("Shortage Guidelines") (ER 118, 180) (collectively "Guidelines"). Navajo Brief at 6-9. To artificially maintain Lake Mead's surface elevation and avoid triggering a shortage, the Shortage Guidelines, among other things, encourage the development of Intentionally Created Surplus ("ICS") water for consumptive use by Lower Basin states. (ER 165-72); Navajo Brief at 7, 25-26.

These two federal management actions, taken in cooperation with the Intervenor-Defendants, continue the effort by the United States and the other Basin States, initiated with the negotiations over the 1922 Compact, to reduce California's over-reliance on water from the Colorado River; California has frequently exceeded the 4.4 million acre-feet per year to which it is entitled under the BCPA and the 1964 Decree. (ER 279-82). California's reliance on water above its legal entitlement, and the fears of the other Basin States over the effect of that reliance, developed despite the clear limitations on California found in the BCPA and the 1964 Decree. *See* 1964 Decree art. II(B), 376 U.S. at 342. Despite the potential seniority of its reserved water rights, the Nation's fears are equally justified.

The Federal Defendants adopted the Basin States' proposal as the preferred alternative for the Surplus Guidelines. (NNFER 54). The stated purpose was "to afford mainstream users of Colorado River water, particularly those in California

who currently utilize surplus flows, a greater degree of predictability" with regard to the flows. *Id.* In describing the need for the Surplus Guidelines, Reclamation observed that "[f]or many years, California has been diverting more than its normal 4.4 maf apportionment." *Id.* Likewise in establishing the Shortage Guidelines, the Secretary's goal was to provide Colorado River water users with "a greater degree of certainty" to allow those "water users in the Lower Basin to know when, and by how much, water deliveries will be reduced in drought and other low reservoir conditions." (NNFER 56). While addressing the concerns of the Basin states, the Guidelines do nothing to meet Navajo needs.

C. THE NEPA PROCEDURAL VIOLATIONS.

In spite of the Nation's clear need for water to make the Reservation livable, and trust obligations attendant to that need, the Federal Defendants did not consider the potential for harm to the Reservation when they prepared environmental impact statements ("EIS") and adopted the Guidelines. Reclamation acknowledged its obligation to consider impacts to tribal lands, water rights, and other Indian trust assets, (CalSER 7); Navajo Brief at 8, but did not examine the Nation's concrete interests in the Reservation and the need to make its lands livable and productive for Navajo people. (ER 119-21); (CalSER 10-11). Instead, all Reclamation did was acknowledge the Nation's unquantified water

rights and promise to manage the River consistent with any water rights decreed in the future. (ER 121).

Because they failed to examine and, therefore, necessarily overlooked impacts to the Nation's trust interests, the Federal Defendants violated NEPA and its implementing regulations. *See* 40 C.F.R. pt. 1500 (Council on Environmental Quality); 43 C.F.R. pt. 46 (Department). NEPA and the regulations provide general protection to the human environment (ER 102-03); 42 U.S.C. §§ 4321, 4331(a), 4332(2)(C) and specifically protect Indian reservations and other trust assets. (ER 103-05); 40 C.F.R. §§ 1502.16(c), 1506.6(b)(3)(ii); 43 C.F.R. § 46.435(c); *see* (NNFER 31); (NNFER 35); Navajo Brief at 10, 19-23, 30-31.

NEPA also protects municipal, agricultural, and other landowners from the adverse effects of potential water shortages, *see Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1086 (9th Cir. 2003); *Churchill County v. Babbitt*, 150 F.3d 1072, 1078-80 (9th Cir. 1998), *amended by* 158 F.3d 491 (9th Cir. 1998); (ER 105); (NNFER 4), and the interests of local governments in managing and sustaining lands for the benefit of their citizens. *See Churchill County*, 150 F.3d at 1081 (citing *Douglas County v. Babbitt*, 48 F.3d 1495, 1501 (9th Cir. 1995)); *City of Davis v. Coleman*, 521 F.2d 661, 672 (9th Cir. 1975); Navajo Brief at 22.

D. THE RESPONSES.

The Federal Defendants argue in answer to the Nation's NEPA claims that the Nation's asserted injury (1) is to a remote and speculative interest, Federal Brief at 34-40; (2) is not imminent, *id.* at 41-42; (3) is not fairly traceable to the Federal Defendants, *id.* at 42-43; (4) is not within NEPA's zone of interests, *id.* at 49; and (5) that this case is not ripe. *Id.* at 47-49. The Federal Defendants argue that the Nation's breach of trust claim (1) is barred by sovereign immunity, *id.* at 53-57, and (2) fails to identify an enforceable duty. *Id.* at 54-55.

The Intervenor-Defendants similarly argue that (1) the Nation lacks a concrete interest susceptible to injury, Nevada Brief at 25-31, 42-47; California Brief at 21-45; Arizona Brief at 8-10, and (2) its claims are not redressable. Nevada Brief at 48-49; California Brief at 45-50. They also argue that the Supreme Court has exclusive jurisdiction to adjudicate rights to Colorado River water. California Brief at 50-56; Nevada Brief at 44; Arizona Brief at 8 n.15. The Intervenor-Defendants do not address the Nation's breach of trust claim.

IV. ARGUMENT IN REPLY.

A. THE NATION HAS STANDING TO ASSERT A NEPA PROCEDURAL INJURY CLAIM.

The Nation recognizes that the fundamental elements of Article III standing – injury, causation, and redressability – apply in all cases, but it is well-settled that the requisite burden of proof for each element "'is lowered'" when a plaintiff

alleges a NEPA procedural violation.[8] Navajo Brief at 16 (quoting *Churchill County*, 150 F.3d at 1077); (NNFER 4-5). As explained below, the Nation made adequate allegations for standing purposes. To the extent it did not, however, Ninth Circuit precedent and the significant tribal interests at stake weigh in favor of giving the Nation leave to amend its Complaint.

1. The Nation Adequately Alleged Injury To Its Concrete Interests In Reservation Lands.

The allegation of a procedural violation significantly relaxes the immediacy component of the injury in fact analysis, Navajo Brief at 16-17 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992); *Cantrell v. City of Long Beach*, 241 F.3d 674, 679 n.3, 682 (9th Cir. 2001)), so that the Nation need only allege the three basic parts of a NEPA procedural injury: (1) a NEPA violation; (2) concrete interests protected by NEPA; and (3) a reasonable probability of threat to its interests. *Id.* at 17. The District Court properly invoked this test (ER 13), which is well-established in the Ninth Circuit. *See*, *e.g.*, *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 (9th Cir. 2011); *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 484-85 (9th Cir. 2010); *City of Sausalito v. O'Neill*,

[8] At this stage of the litigation on a motion to dismiss for lack of standing, the plaintiff's burden is relatively modest because the complaint is presumed to encompass the necessary facts to support the allegations. *Bennett v. Spear*, 520 U.S. 154, 167-71 (1997); Navajo Brief at 15-16, 17-18 & n.7.

386 F.3d 1186, 1197 (9th Cir. 2004); *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 341 F.3d 961, 969-70 (9th Cir. 2003). The Defendants brush the test aside. *See*, *e.g.*, Federal Brief at 32-47 (no mention of test); Nevada Brief at 25 ("the fact that a plaintiff is seeking to enforce a procedural right does not affect the injury in fact analysis"); California Brief at 21-32 (citing numerous out-of-circuit opinions not involving procedural injuries).

a. Allegation of NEPA Procedural Injury.

The Nation satisfied the first part of the procedural injury test by simply alleging a NEPA violation. ER 135-44; Navajo Brief at 19. Whether the Federal Defendants actually complied with NEPA goes to the merits of the Nation's claims, not to whether it has standing, Navajo Brief at 19 (citing *Food Safety*, 636 F.3d at 1172), because otherwise only successful plaintiffs could have standing. *Id.* (citing *Better Forestry*, 341 F.3d at 971 n.5). Arguments that the Federal Defendants complied with NEPA are, therefore, irrelevant at this stage of the litigation. *See*, *e.g.*, Nevada Brief at 31-41, 53.

b. Allegation of Concrete Interests Protected by NEPA.

The Nation satisfied the second part of the test by alleging concrete interests in Reservation lands and their purpose as a permanent home for Navajo people. (ER 124-25, 127-30); Navajo Brief at 19-20. The Nation also alleged concrete interests in available water supplies having the potential to satisfy its basic needs

and, in particular, in the water supply reserved to fulfill the Reservation's purpose. (ER 124, 130-31); Navajo Brief at 20-21. Relatedly, the Nation alleged sovereign and proprietary interests in the management and protection of its trust lands and local water supplies for the benefit of the Navajo people. (ER 130); Navajo Brief at 22.

NEPA provides express procedural protection to all of these interests alleged by the Nation. (ER 101-05); (NNFER 4); Navajo Brief at 19-22, 31; *supra* Part IV.A.1.a. Indeed, Reclamation purports to treat adverse impacts to Indian trust assets as "a 'critical environmental' issue" under NEPA, (ER 104 (quoting NNFER 32)), and questions about the availability of water to make land productive invoke NEPA's procedural safeguards. *See Laub*, 342 F.3d at 1086-87; *Churchill County*, 150 F.3d at 1080; (ER 102-03, 105) (NNFER 4); *see also San Luis & Delta-Mendota Water Auth. v. United States*, 672 F.3d 676, 701 (9th Cir. 2012) ("This court has recognized that 'the loss of affordable irrigation water for . . . agricultural lands' is an injury in fact." (quoting *Laub*, 342 F.3d at 1086)). NEPA also protects sovereign and proprietary interests in land and water management. Navajo Brief at 22, 31. Thus, the Navajo Nation has a procedural right to seek judicial enforcement of NEPA whenever a federal action threatens injury to its concrete interests. *Id.* at 20, 23; (ER 105).

The Defendants frame the injury discussion only in terms of the Nation's lack of decreed water rights or other entitlement to mainstream water, and argue it cannot show injury to such remote and speculative interests.[9] *See*, *e.g.*, Federal Brief at 34-35, 38-40; Nevada Brief at 30-49; California Brief at 5, 21-32; Arizona Brief at 8. This ignores the Nation's allegations of threats to its concrete interests in Reservation lands, their purpose as a permanent homeland for Navajo people, and the associated *need* for water with or without a decreed water right. Thus, the Defendants' arguments that the Nation is seeking to enforce a procedural right in a vacuum, without any concrete interests at stake, lack merit. *See*, *e.g.*, Federal Brief at 33; Nevada Brief at 25-26; California Brief at 16-19.

The Colorado River forms the Reservation's western border, so a geographic nexus also exists here. *See Food Safety*, 636 F.3d at 1172; *Kraayenbrink*, 632 F.3d at 485. The Federal Defendants' actions directly affect the availability of mainstream water above Lake Mead, and the Nation is vitally interested in making its lands livable, so it is also interested in the availability of water touching its lands and having the potential to satisfy the Reservation's basic needs. The argument that the Nation relies on geographic proximity to make up for a lack of

[9] The Federal Defendants' position is particularly troubling in light of their trust obligations and the fact that the Nation currently lacks sufficient water supplies. They acknowledge the Nation's sovereign and concrete interests in its Reservation lands and water needs, Federal Brief at 39 n.3, and seem to understand that NEPA protects those interests, but wrongly argue that the Nation only alleged injury to its unquantified water rights, not to its lands. *Id.* at 37, 39 n.3.

concrete interests is, therefore, absurd, *see*, *e.g.*, California Brief at 19-20, as is the argument that the Nation did not describe a geographic nexus between the Reservation and the alleged environmental impacts. *See*, *e.g.*, Nevada Brief at 41-42. It is indisputable that the Guidelines directly affect the availability of water in the mainstream bordering the Reservation, and as explained below, the Nation alleges various potential threats to its lands as a direct result of the Guidelines. *See infra* Part IV.A.1.c. Thus, a geographic nexus exists between the Nation's concrete interests and the affected area.

c. Allegation of Reasonable Probability of Threat.

The Nation satisfied the third part of the Ninth Circuit's procedural injury test by alleging a reasonable probability of threat of harm to its concrete interests in Reservation lands. (ER 132-33); Navajo Brief at 23-27. Since the Nation was and continues to be threatened by the fact that the Federal Defendants overlooked harmful effects to its interests when they adopted the guidelines, it need not allege that any specific injury will occur. Navajo Brief at 23-24. In establishing NEPA's procedural requirements, Congress implicitly acknowledged that a failure to consider all potential impacts causes injury to interested persons. *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1514-15 (9th Cir. 1992). "[P]laintiff was 'surely . . . harmed'" by a NEPA procedural violation because "'the harm consists of added risk to the environment that takes place when

governmental decisionmakers make up their minds without having before them an analysis . . . of the likely effects of their decision on the environment'" and '"NEPA's object is to minimize that risk, the risk of uninformed choice.'" *Better Forestry*, 341 F.3d at 971 (quoting *West v. Sec'y of Dep't of Transp.*, 206 F.3d 920, 930 n.14 (9th Cir. 2000)).

As in *Churchill County*, Defendants "err by placing too much weight on the imminence requirement of injury-in-fact standing" in "a case of procedural standing with its lowered standards for immediacy and redressability." 150 F.3d at 1079-80. The Defendants even cite *Defenders of Wildlife* to argue that the Court should apply a heightened immediacy standard. *See*, *e.g.*, Federal Brief at 35; California Brief at 27-28. In fact, *Defenders of Wildlife* held to the contrary: a person with a procedural right to protect a concrete interest can establish standing "without meeting all the normal standards for redressability and immediacy." 504 U.S. at 572-73 n.7; *accord Better Forestry*, 341 F.3d at 972; Navajo Brief at 16. The Nation was injured the moment the Federal Defendants overlooked potential adverse effects to Navajo lands in violation of NEPA, which satisfies the relaxed standard of immediacy applicable to procedural injuries. Given its need for water and the location of its lands next to the Colorado River, it is logical for the Nation to assert that its interests may be threatened by guidelines controlling how the Federal Defendants manage the mainstream as it flows past the Reservation.

Navajo Brief at 24 (citing *Churchill County*, 150 F.3d at 1079; *Douglas County*, 48 F.3d at 1501).

The Nation alleged specific threats to its interests. Prior to adopting the Guidelines, the Federal Defendants considered several alternatives with wide-ranging likelihoods of triggering a water surplus or shortage, *id.* at 7, but did not consider how the likelihood of either condition would affect Reservation lands. *Id.* at 24-25. Nor did the Federal Defendants examine the potential impacts to Navajo lands from the system of ICS development established by the Guidelines. *Id.* at 25-26.

The Nation's use of mainstream water in the Lower Basin will be charged against Arizona's Lower Basin apportionment, *id.* at 5, and Arizona is particularly vulnerable to water shortages, *id.* at 24, so the Nation reasonably fears that excessive ICS development or an increased likelihood of a shortage will adversely affect its lands by reducing the availability of local water supplies needed to make them productive and livable.[10] Similarly, the Nation fears that the Guidelines tie the Federal Defendants' hands and impair their ability to carry out their trust

[10] While the Nation's reserved water rights can be satisfied from any available sources or supplies, the physical and practical reality is that Colorado River water is needed to fully satisfy the purpose of the Reservation as an enduring home for Navajo people. (ER 77-78). The Federal Defendants' efforts on behalf of the Nation on other stream systems in Arizona, New Mexico, and Utah, *see* Federal Brief at 38-39, do not address needs in other parts of the vast Reservation. (ER 78). Nor can water rights secured from other states be used in Arizona.

obligations to the Nation by pre-determining the conditions under which water will be available, or unavailable, in the future. *See Mumma*, 956 F.2d at 1516 ("To the extent that the plan pre-determines the future, it represents a concrete injury that plaintiffs must, at some point, have standing to challenge.").

The Nation will seek to secure a right to use mainstream Colorado River water while all or portions of the Guidelines are in effect, and the general availability of such water at the time it does so, including any restrictions on that water triggered by the Guidelines, is certain to affect the outcome of those efforts. The precise scope of the Nation's water rights, including their priority and ability to be put to use on the Reservation, will vary significantly depending on whether the Nation litigates, settles, or contracts for its water, Navajo Brief at 24-26, so the Defendants are wrong to assume an absence of harm simply because the Nation may have senior water right claims.[11] *See*, *e.g.*, Federal Brief at 43; California Brief at 12.

2. <u>The Nation Adequately Alleged Causation and Redressability.</u>

After establishing a NEPA procedural injury, the requirements of causation and redressability are also relaxed. Navajo Brief at 28-29. Causation is not

[11] It is not established that the Nation's mainstream rights would be pre-1929 present perfected rights under the BCPA. The Special Master in the Little Colorado River adjudication interpreted the same organic documents extending the Reservation to the Colorado River to provide the Hopi Tribe with a 1934 priority date. (NNFER 10-14).

implicated unless "'the concern is that an injury caused by a third party is too tenuously connected to the acts of the defendant.'" *Id.* at 28 (quoting *Better Forestry*, 341 F.3d at 975). Here, the Defendants ignore the direct threats to Navajo lands posed by the Federal Defendants' uninformed decision-making and the Guidelines themselves, and they latch onto what they characterize as the Nation's "reliance" theory of injury to argue its claims of injury are speculative and dependent on third parties. *See*, *e.g.*, Federal Brief at 39-40, 42-43; California Brief at 32-45. None of the threats alleged rely on third parties, however, so causation is not at issue.

First, the Nation is not required to allege a specific injury to its lands because in a procedural challenge, "'[t]he "asserted injury is that environmental consequences might be overlooked" as a result of deficiencies in the government's analysis under environmental statutes.'" *Better Forestry*, 341 F.3d at 971-72 (quoting *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1355 (9th Cir. 1994)); Navajo Brief at 23; *see* Nevada Brief at 28 (no allegation of specific injury is required if a geographic nexus is shown between plaintiff's interests and alleged impacts). As the Supreme Court made clear in *Friends of the Earth, Inc., v. Laidlaw Envtl. Servs. Inc.*, the "relevant showing for purposes of Article III standing . . . is not injury to the environment but injury to the plaintiff." 528 U.S.

167, 181 (2000). Determining whether a specific injury will occur is the Federal Defendants' responsibility under NEPA, not the Nation's. *Id.* at 23-24.

Nonetheless, the Nation alleged various potential threats to its lands that the Guidelines directly trigger and which do not depend on third parties. Navajo Brief at 24-28; *supra* Part IV.A.1.3. The Guidelines, not third parties, establish when the Secretary will declare a surplus or shortage, and, as explained, the Nation reasonably fears the effects of such a declaration on its trust lands. Navajo Brief at 24-28. Similarly, the Guidelines, not third parties, establish a system for developing ICS water, and the Nation reasonably fears adverse effects here as well. *Id.*

The Nation's standing is supported rather than precluded by the actions of third parties. *Id.* at 27. Here, as in *Mumma*, third party development of and reliance on ICS water, "would not have occurred *but for* the Secretary's decision." 956 F.2d at 1518. Similarly in *Laub*, several farmers asserted injury from federal actions causing water shortages, which caused third parties to look for water beyond their existing sources and compete with the farmers. 342 F.3d at 1085. The Ninth Circuit held this allegation "satisfied the relaxed causation and redressability requirements for a procedural injury standing case." *Id.* at 1087.

Even under the stricter causation standard applicable to non-procedural claims relied on by the Defendants, *see*, *e.g.*, Federal Brief at 42; Nevada Brief at

42-43; California Brief at 34-36, third party action only defeats standing if it is completely independent of the defendant's action. *See Bennett*, 520 U.S. at 169-70; *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1170 (9th Cir. 2011) Causation is satisfied, however, if a defendant's actions have determinative or coercive effect upon the actions of third parties. *Salazar*, 638 F.3d at 1170 (citing *Bennett*, 520 U.S. at 169).

The Shortage Guidelines have coercive effect upon the Lower Basin states by encouraging the development of ICS water. Indeed, the Intervenor-Defendants have already developed ICS water pursuant to the Shortage Guidelines and admit heavy reliance on such supplies. *See*, *e.g.*, Nevada Brief at 11. The Intervenor-Defendants' development of ICS water pursuant to the Shortage Guidelines is ultimate proof of causation, or coercive effect, for standing purposes, because it is indisputable that no ICS water would exist but for the Shortage Guidelines.

A plaintiff with a procedural right to protect a concrete interest under NEPA "'has a relatively easy burden to meet'" to satisfy the final Article III requirement of redressability. Navajo Brief at 29 (quoting *Better Forestry*, 342 F.3d at 976). The Nation need only show that a revised EIS could influence Reclamation's decision, not that a revised EIS will result in a different decision. *Id.* Since NEPA establishes procedures to protect the Nation's concrete interests, it is self-evident that compliance with those procedures in a revised EIS may unearth previously

overlooked effects, and that these effects could influence Reclamation's decision. *See Laub*, 342 F.3d at 1087. Further, if Reclamation discovers previously overlooked effects in a revised EIS, it may decide to redress the Navajo Nation's injuries in ways that do not disrupt the challenged Guidelines but instead implement mitigation measures, for example, that facilitate water development on the Reservation. Put simply, a court order requiring compliance with NEPA will redress the Nation's injuries by removing the risk that Reclamation overlooked harmful effects to the Nation's lands, and that alone suffices. However, with improved information Reclamation may be required to offset or mitigate any newly discovered effects in the manner it determines will best satisfy NEPA and fulfill its trust obligations. *See Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 779 (9th Cir. 2006) ("*Pit River I"*); *supra* Part III.C.

Defendants argue that the Nation's claims are not redressable because a revised NEPA analysis will not aid the Nation to secure water from the Colorado River. *See*, *e.g.*, Nevada Brief at 48-49; California Brief at 45-56. This assertion ignores the relief the Nation seeks, and revised NEPA documents examining whether the Federal Defendants' actions adversely affect the Nation's interests are sufficient to redress its injuries. (NNFER 2-3).

Similarly, the Defendants argue that the Nation's claims are not redressable because it would be impossible for Reclamation to consider impacts to the

Nation's water rights when the scope of those rights is undetermined. *See*, *e.g.*, California Brief at 48-49; *see also* Federal Brief at 28, 48 (characterizing Nation's challenge as abstract and contingent on unforeseeable events).[12] Again this has no bearing on redressability because the Nation only seeks a determination of whether the challenged actions adversely affect Reservation lands and the attendant *need* for water to fulfill the Reservation's purpose. Moreover, water planning is a highly evolved science, and the Arizona Water Supply Study demonstrates that it is possible for Reclamation to estimate Navajo needs and demands in the future and that it is neither too speculative nor abstract to consider impacts to those needs and demands. (NNFER 18, 23-26) (Reclamation estimating Navajo population and evaluating water needs and demands over next fifty years). Reclamation can easily incorporate a similar analysis into a revised EIS examining the Guidelines' effects on the Nation's lands. If Reclamation does so, previously overlooked effects to the

[12] The Federal Defendants also argue the Nation's claims are not ripe by describing the claims as speculative and abstract and pointing out that the challenged actions have no legal effect on the Nation's reserved water rights. Federal Brief at 47-49. This is essentially the same as their argument against standing, *see id.* at 47 ("in many cases – including this one – standing and ripeness 'boil down to the same question'" (quoting *Susan B. Anthony List v. Dreihaus*, 134 S. Ct. 2334, 2341 n.5 (2014))), so the Federal Defendants' ripeness argument necessarily fails for the same reasons their argument against standing fails. The Nation does not seek an adjudication of its water rights in this case, and it is not enough for Reclamation to state that nothing it does can legally affect the Nation's reserved water rights. The risk of overlooked effects and the potential for further injury here is too great for such a simplistic conclusion to pass muster, especially given Reclamation's trust obligations.

human environment and the Nation's concrete interests could influence Reclamation's decision regarding how to proceed.

3. The Nation's Claims Fall Within NEPA's Zone Of Interests.

The District Court dismissed the Nation's claims for lack of standing, (ER 15); *supra* Part II.A, and the zone of interests test is no longer a part of the standing analysis. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S.Ct. 1377, 1387 (2014); Navajo Brief at 29-31. Regardless, the Defendants argue that even if the Navajo Nation has standing, dismissal is appropriate because the alleged injuries are not sufficiently "environmental" to fall within NEPA's zone of interests. *See*, *e.g.*, Federal Brief at 49-52; Nevada Brief at 49-52. They also suggest the Nation's interests are purely economic. Federal Brief at 50; Nevada Brief at 51-52. Defendants' arguments that the Nation has failed to state a claim under NEPA lack merit.

The zone of interests test is not particularly demanding, as an interest falls outside a statute's zone "only if it is 'so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.'" Navajo Brief at 30 (quoting *City of Sausalito*, 386 F.3d at 1200). The Ninth Circuit "liberally" construes the substantive provisions of the underlying statute when a plaintiff brings suit

pursuant to the APA, so plaintiffs "need only show that their interests fall within the "general policy" of the underlying statute, such that interpretation of the underlying statute's provisions or scope could directly affect them.'" *City of Sausalito*, 386 F.3d at 1200 (quoting *Graham v. Fed. Emergency Mgmt. Agency*, 149 F.3d 997, 1004 (9th Cir. 1998)).

Again, NEPA and its implementing regulations expressly protect the human environment, Indian reservations, and other trust assets. *Supra* Part III.C. Further, the availability of water to make land productive, including a local government's interests in managing and protecting its lands, are inherently environmental matters under NEPA. *Id.* Thus, the Nation's interests and alleged injuries thereto fall under NEPA's protection.

B. THE DISTRICT COURT ERRED IN DISMISSING THE NATION'S BREACH OF TRUST CLAIM.

The Complaint states a viable claim for breach of trust and the District Court had subject matter jurisdiction to hear it. As the Federal Defendants correctly observe, "[p]ervading Navajo's allegations are assertions that the United States' trust relationship with the Navajo Nation requires that it 'act affirmatively' to protect Navajo's trust resources." Federal Brief at 44. This is because the trust responsibility of the United States "pervades" every action undertaken by the United States on behalf of Indian tribes. *See Parravano v. Babbitt*, 70 F.3d 539,

544 (9th Cir. 1995) ("this trust responsibility extends not just to the Interior Department, but attaches to the federal government as a whole"); *see also Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942) ("In carrying out its treaty obligations with the Indian tribes the Government['s] . . . conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards."). Accordingly, the trust responsibility informs the way Federal Defendants must approach their obligations under NEPA. *See Supra* Part IV.A. However, the Nation's claim for breach of trust is distinct and alleges that the Federal Defendants cannot manage the Colorado River, as Congress has charged them, without being mindful of their duties as the trustees of tribal resources. The Nation asserts that the Federal Defendants must, at a minimum, determine the Nation's needs to make the Reservation the permanent homeland guaranteed by the 1868 Treaty so they can take appropriate action to protect those trust resources. (ER 131, 145).

1. The District Court had Subject Matter Jurisdiction Because the APA Waives the Federal Defendants' Immunity.

The Complaint states a common law claim for breach of trust, not premised on the APA, in reliance on duties and obligations undertaken by the United States through the 1868 Treaty, the 1922 Compact, and various federal statutes, regulations, policies, and procedures. In its brief, the Navajo Nation examined

Ninth Circuit precedent on the waiver of sovereign immunity encompassed in section 702 of the APA, Navajo Brief at 31-43, especially *The Presbyterian Church v. United States,* which held that the APA waives federal immunity for "all actions seeking relief from official misconduct except for money damages." 870 F.2d 518, 525 (9th Cir. 1989). The Nation also cited *Pit River Home & Agric. Coop. v. United States*, 30 F.3d 1088, 1097 n.5 (9th Cir.1994), for the proposition that the APA waives the United States' sovereign immunity in non-monetary actions for breach of fiduciary duty brought pursuant to 28 U.S.C. § 1331. Navajo Brief at 34; *see id.* at 42-43 n.14 (citing *El Paso Natural Gas Co. v. United States*, 750 F.3d 863, 892 (D.C. Cir. 2014)). The Federal Defendants' statement that "Navajo has cited no authority holding that § 702 waives the United States' immunity from common-law breach-of-trust claims," Federal Brief at 57, is, therefore, wrong.

The Federal Defendants' reliance on *Gros Ventre* to argue that the APA's waiver of sovereign immunity does not extend to a common law action for breach of trust is also misplaced. *Id.* at 54-55. In *Gros Ventre*, this Court upheld the district court's determination that the plaintiff tribes failed to demonstrate a statutory duty giving rise to a claim for breach of trust. 469 F.3d at 814. And while the Court espoused the view that *Presbyterian Church* could not be reconciled with the Court's subsequent decision in *Gallo Cattle Co. v. United*

States Dep't of Agric., 159 F.3d 1194 (9th Cir. 1998), this statement did not form the basis of the Court's decision *Gros Ventre*, 469 F.3d at 808-09, and the two cases are "readily distinguishable." *Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 867 n.22 (9th Cir. 2011); (distinguishing cases because "*Gallo Cattle* concerns challenges under the APA itself"), *vacated on other grounds en banc*, 678 F.3d 1013 (9th Cir. 2012); Navajo Brief at 38-42. For those same reasons, contrary to the position advanced by the Federal Defendants, Federal Brief at 57 n.4, there is no need for an en banc call.[13]

2. The Complaint States a Claim for Breach of the Federal Defendants' Fiduciary Obligations.

The Nation alleged below that the Federal Defendants' duty to protect its trust resources can be found in the 1868 Treaty and Executive Orders establishing the Reservation, Article VII of the 1922 Compact, Secretarial Order 3215 – *Principles for the Discharge of the Secretary's Trust Responsibility* (Apr. 28, 2000), and the common law as expressed most potently in the *Winters* doctrine. (ER 130-31, 145); (NNFER 37-38). The Nation alleged further that the "pervasive control" exercised by the Federal Defendants over the "Nation's rights to, and interests in, the Colorado River," gives rise to an enforceable duty, citing, in

[13] The Court in *Shinseki* did not see the need for an en banc call to clarify its previous rulings.

addition to the forgoing, the McCarran Amendment, 43 U.S.C. § 666, where Congress waived the United States' immunity as trustee of tribal water resources to permit the adjudication of tribal water rights in state courts even though the tribes remain immune from state court jurisdiction. (NNFER 37-38). That the trust responsibility pervades the actions of all federal agencies is not a vacuous statement, but one tethered in the rich and long-standing history of federal-tribal relations. The Complaint states a claim for violation of the Federal Defendants' express and implied fiduciary duties.[14]

a. The Trust Responsibility and the Indian Canons of Construction Inform the Court's Review of the 1868 Treaty and Other Sources of Substantive Law.

The origins of the trust responsibility lie in early acts of Congress including the Northwest Ordinance, 1 Stat. 51 (1787), and the several Trade and Intercourse Acts, the first being enacted in 1790 (codified at 25 U.S.C. § 177). *See* Mary C. Wood, *The Promise of Native Sovereignty: The Trust Doctrine Revisited*, 1994 UTAH L. REV. 1471, 1498-99. These statutes gave rise to enforceable fiduciary

[14] The Federal Defendants err in arguing that "[e]ven if . . . the APA waives immunity from the breach of trust claim that claim nonetheless fails for lack of subject matter jurisdiction." Federal Brief at 54. If the APA waives sovereign immunity, as the Nation demonstrates that it does, but it failed to state a claim for breach of trust (the alternate ground not decided by the District Court upon which Federal Defendants argue dismissal should be granted), then dismissal would be for failure of a cause of action, not lack of subject matter jurisdiction. *See*, *e.g.*, *Trustees of Screen Actors Guild-Producers Pension & Health Plans*, 572 F.3d 771, 774-75 (9th Cir. 2009); *see also Bell v. Hood*, 327 U.S. 678, 682 (1946).

duties: "[a]fter the Northwest Ordinancewas adopted in 1787, the United States began to negotiate treaties with the Indians . . . requiring that 'the utmost good faith' always be observed toward the Indians and that their lands and property never be taken without their consent." *Mille Lacs Band of Chippewa Indians v. Minnesota*, 853 F. Supp. 1118, 1139 (D. Minn. 1994), *aff'd*, 526 U.S. 172 (1999). In *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, the Court rejected the United States' argument that the Nonintercourse Act did not provide a cause of action:

> Nor are we moved by intervenor's other complaint that the judgment below implies some sort of overly 'general' fiduciary relationship, unlimited and undefined. A fiduciary relationship in this context must indeed be based upon a specific statute, treaty or agreement which helps define and, in some cases, limit the relevant duties; but, as we have held, the Nonintercourse Act is such a statute.

528 F.2d 370, 379 (1st Cir. 1975); *accord Worcester v. Georgia* , 31 U.S. (6 Pet.) 515, 555 (1832) (characterizing the United States as "protector" of Indian tribes).

The Indian canons of construction are an essential corollary to the trust responsibility recognized by the Supreme Court in *Worcester*, reading the treaties between the Cherokee Tribe and the United States liberally in the Tribe's favor, and holding that the treaties should be interpreted as the Indians would have understood them because the Cherokees were not "critical judges of the [English] language" and it was "probable the treaty was interpreted to them." 31 U.S. at 551; *accord Winters v. United States*, 143 F. 740, 746 (9th Cir. 1906). Thus, "[t]he

canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians." *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985).

The Indian canons of construction, though developed through decades of jurisprudence, can be summarized as follows:

> 1. Treaties and agreements are to be construed as the Indians would have understood them.
> 2. Treaties, statutes and agreements should be liberally construed in favor of the Indians.
> 3. Ambiguities should be resolved in favor of the Indians.
> 4. Indian rights and sovereignty are retained unless congressional intent to diminish is clear.

Scott C. Hall, *The Indian Law Canons of Construction v. The Chevron Doctrine*, 37 CONN. L. REV. 495 n.3 (2004).

b. The 1868 Treaty and the Executive Orders Establishing the Navajo Reservation Encompass An Enforceable Federal Duty to Protect Tribal Natural Resources.

The 1868 Treaty and the Executive Orders establishing the Reservation do not impose an express duty on the United States to protect Navajo water uses or water needs, but neither do these documents recognize a right to use water; and neither omission is fatal to the breach of trust claim. In *Winters*, the Supreme Court upheld this Court's decision that the tribes of the Fort Belknap Reservation had implied rights to water although the treaty establishing their reservation was silent on the matter. 207 U.S. at 576-77. The Supreme Court opined it was

inconceivable that the Indians would have agreed to part with much of their aboriginal land holdings, and retain pursuant to the treaty a more limited land base, without access to water. *Id.* at 576. The Indian canons of construction apply with the same force to executive orders creating Indian reservations. *Parravano*, 70 F.3d at 544.

This Court has determined, particularly in the case of treaties, that like rights to resources necessary to fulfill the purposes for which an Indian reservation was set aside, fiduciary duties to protect those resources may also be implied. *Id.* at 547 (recognizing implied trust obligation to protect hunting and fishing rights); *United States v. Eberhardt*, 789 F.2d 1354, 1359 (9th Cir. 1986) (Secretary had authority to promulgate regulations to protect tribal reserved rights to fish under 25 U.S.C. §§ 2, 9, which are the "source of Interior's plenary administrative authority in discharging the federal government's trust obligations to Indians"); *see also Seminole Nation v. United States*, 102 Ct. Cl. 565, 602 (1944) (fiduciary duty "[i]mplicit" in treaties); *cf. Gros Ventre*, 469 F.3d at 810 (federal duty giving rise to a cause of action may be found where "'a treaty, statute or agreement imposes, expressly or by implication, that duty.'" (quoting *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995))). Indeed, the Court must imply a fiduciary duty of the United States to protect retained Indian tribal resources:

> If the defendant has ever owed plaintiff the duty of a fiduciary, it owed it this duty when the treaties were signed and the Acts were

> passed on which plaintiff sues. Implicit in those agreements and in the Acts was the obligation to carry out their terms with the fidelity a fiduciary owes his ward.

Seminole Nation, 102 Ct. Cl. at 602.

Winters is viewed as a pathmarking case, and its genesis was in the rationale applied in the District Court of Montana and affirmed by this Court. There are notable factual similarities between *Winters* and the instant case, which should guide the Court's inquiry here. In *Winters*, even though, as here, the extent of the tribes' water rights had not been adjudicated, the Supreme Court upheld a Ninth Circuit decree enjoining water use by non-Indians that infringed on Indian uses necessary to make the reservation habitable. 207 U.S. at 567, 575-78. *Winters* and its progeny demonstrate that quantification of the Navajo Nation's reserved rights is not a prerequisite to an action by the Nation seeking to compel the Federal Defendants to protect its treaty-guaranteed right to a permanent homeland. *See Pyramid Lake Paiute Tribe of Indians v. Morton*, 354 F. Supp. 252, 256-57 (D.D.C. 1972) (although tribe's water rights had yet to be quantified, to protect treaty-based fishing rights the Secretary had a fiduciary obligation to protect flows into Pyramid Lake on tribe's reservation); *see also Pyramid Lake Paiute Tribe v. U.S. Dept. of Navy*, 898 F.2d 1410, 1420 (9th Cir. 1990) (adhering to *Pyramid Lake*, 354 F.Supp. 252); *Joint Bd. of Control v. United States*, 832 F.2d 1127, 1130-31 (9th Cir. 1987) (in controversy concerning adequacy of BIA operating

strategy controlling distribution of water supplies from Flathead Irrigation Project, district court could not blind itself to the potential senior, though unadjudicated, water rights of the Tribes); *Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist.*, 763 F.2d 1032, 1035 & n.5 (9th Cir. 1985) (court "need not decide the scope of fishing rights reserved to the Yakima Nation under the 1855 treaty" prior to effectuating emergency measures regarding the allocation of water within the Yakima River system to protect those unquantified rights). *Truckee-Carson Irrigation Dist. v. Sec'y of Dept. of Interior*, 742 F.2d 527, 530-32 (9th Cir. 1984) (adhering to *Pyramid Lake*, 354 F.Supp. 252). In holding that the *Winters* doctrine extends to reservations created by Executive Order, the Supreme Court reiterated in *Arizona I* that the United States could not have intended to relegate Indian tribes to reservation lands without water required to make those lands productive. 373 U.S. at 598-600.

It is clear, based on Supreme Court precedent, that a review of the bare language of the 1868 Treaty and the Executive Orders establishing the Reservation will not suffice to determine whether those documents encompass the duties alleged as the basis of the Nation's seventh claim for relief. Rather, review of treaties requires an examination of the history of the negotiations to determine the parties' intent:

> Our holding in *Klamath* was not based *solely* on the bare language of the 1901 agreement. Rather, to reach our conclusion about the

> meaning of that language, we examined the historical record and considered the context of the treaty negotiations to discern what the parties intended by their choice of words. This review of the history and the negotiations of the agreements is central to the interpretation of treaties.

Minnnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172, 202 (1999)

Accordingly, the Court should remand this matter to the trial court for further factual development.

c. The 1922 Compact and Other Statutes Enacted for the Benefit of the Nation Encompass an Enforceable Federal Duty to Protect Tribal Resources.

While the Indian canons of construction have their origin in treaty interpretation, the extension of the canons to statutes has been recognized since at least 1912. *Choate v. Trapp*, 224 U.S. 665, 675 (1912) ("in the Government's dealings with the Indians . . . [t]he construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of [the Indians]"); *see Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985) ("statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit"). In the 1922 Compact, the seven Basin States and Congress promised that "[n]othing in this compact shall be construed as affecting the obligations of the United States to the Indian tribes." (ER 156). The Compact was negotiated shortly after the Supreme Court's decision in *Winters*. As the tribes with interests in the waters of the

Colorado River were not parties to the negotiations or granted allocations apart from those to each of the states, Article VII is properly understood as an express statement of the United States' continuing obligation to tribes with interests in the Colorado River. It is clear from the negotiation transcripts that Article VII was included to protect tribal interests. *See supra* Part III.A.2.

In the American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, 108 Stat. 4239 ("1994 Trust Reform Act"), Congress expressly confirmed the Federal Defendants' general duty to protect tribal interests in natural resources. The Act's legislative history makes clear that it was passed in response to concerns about the government's mismanagement of tribal trust assets. "[D]espite clear guidance on its fiduciary duties contained in treaties, law, and court decisions, the BIA's indifferent supervision and control of the Indian trust funds has consistently resulted in a failure to exercise its responsibility . . . ." H.R. REP. NO. 102-499, at 8 (1992) The Act provides in relevant part that "[t]he Secretary's proper discharge of the trust responsibilities of the United States shall include (but are not limited to) . . . [a]ppropriately managing the natural resources located within the boundaries of Indian reservations and trust lands." 25 U.S.C. § 162a(d)(8).[15] As the Nation alleged in its Complaint, to carry out this

[15] The Nation did not cite the 1994 Trust Reform Act in its Complaint. Rather, it relied on Secretarial Order 3215 implementing the Act (ER 131), which was "issued in accordance with the Reform Act," Order 3215 § 3, "to provide

responsibility the Federal Defendants were required to ascertain the water needed to make the Reservation a homeland for the Navajo people and to identify the water sources available to meet that need. (ER 131). This they have never done, and this failure to comply with the statutory mandate to protect the Nation's natural resources gives rise to a claim for breach of trust.

d. The NEPA Regulations, Policies, and Procedures Encompass an Enforceable Federal Duty to Protect Tribal Resources.

The Complaint alleges that the Federal Defendants have a "fiduciary trust responsibility to protect [the Nation's] trust resources," (ER 141), that the Federal Defendants "failed to comply with the requirements of NEPA," (ER 141), by reviewing only cursorily "the effects of [their actions] upon tribal trust property," (ER 143), and as a result, that they "failed to protect the Navajo Nation's water rights and interests as the Nation's trustee." (ER 142). The Nation elaborated on these allegations below, identifying obligations undertaken by the Federal Defendants in both formally published federal regulations and in internal

---

guidance to the employees of the Department of the Interior who are responsible for carrying out the Secretary's trust responsibility as it pertains to Indian trust assets," *id.* § 1, and included verbatim the list of duties included at 25 U.S.C. § 162a(d). Order 3215 § 2. The Secretarial Order has now been incorporated in the Interior Departmental Manual. Citation of the Secretarial Order was sufficient to advise the Federal Defendants of the Nation's allegation that the Act was another source of federal fiduciary duties. *See Alvarez v. Hill*, 518 F.3d 1152, 1157 (9th Cir. 2008) ("A complaint need not identify the statutory or constitutional source of the claim raised in order to survive a motion to dismiss.").

departmental manuals, policies, and procedures to carry out their obligations under NEPA in light of the trust responsibility. (ER 103-05) (citing the Department's NEPA regulations, Reclamation's NEPA Handbook, and Reclamation's NEPA Q&A).[16] Because these agency documents established procedures for the Federal Defendants to follow in carrying out the trust responsibility, and created reasonable expectations in the Nation that these procedures would be followed, they created enforceable duties.

In *Morton v. Ruiz*, the Supreme Court required the Secretary to extend welfare benefits to the plaintiff Indians who lived near but outside their Reservation. 415 U.S. 199 (1974). While the Secretary's internal policy excluded coverage for off-reservation Indians, the Secretary's failure to publish eligibility criteria in the Federal Register as dictated by its own manual led the Court to determine that the criteria could not be used to deny the plaintiffs benefits. "[I]t is

---

[16] As Reclamation explained:

> The responsibility enunciated in the policy statement concerning protecting [Indian Trust Assets or] ITAs from adverse impacts of Reclamation actions applies in all situations: to completed, operational projects as well as to new actions. *However, Reclamation deemed it best to use the NEPA process to implement the ITA policy.* The NEPA compliance process is triggered by "federal actions." This means there are no procedures at this time to deal with ITAs affected by operational, completed projects, absent an action triggering NEPA compliance.

(NNFER 34) (emphasis added).

incumbent upon agencies to follow their own procedures . . . even where the internal procedures are possibly more rigorous than otherwise would be required." *Id*. at 235. The Supreme Court concluded "[t]hat the overriding duty of our Federal Government [is] to deal fairly with Indians" and, as a result, the denial of welfare benefits on the facts before the Court was "inconsistent with 'the distinctive obligation of trust incumbent upon the Government in its dealings with [Indians]." *Id.* at 236 (quoting *Seminole Nation*, 316 U.S. at 296).

Although in *Ruiz* the Supreme Court dealt with individual Indians, two Courts of Appeals have extended the holding to tribes. In *Oglala Sioux Tribe of Indians v. Andrus*, the court held:

> where the Bureau [of Indian Affairs] has established a policy requiring prior consultation with a tribe, and has thereby created a justified expectation on the part of the Indian people that they will be given a meaningful opportunity to express their views before Bureau policy is made, that opportunity must be afforded.

603 F.2d 707, 721 (8th Cir. 1979). The court opined that the Bureau's failure to comply with its own policy of consultation "not only violates those general principles which govern administrative decision-making," *id.* (citing *United States v. Caceres*, 440 U.S. 741, 751 n.14 (1979)), but also violates the federal government's "'distinctive obligation of trust'" to Indian tribes. *Id.* (quoting *Ruiz*, 415 U.S. at 236).

Similarly, in *Jicarilla Apache Tribe v. Supron Energy Corp.*, the court held that the "Secretary's actions . . . are constrained by principles of Indian trust obligations as well as by standards of administrative law," observing that "[t]he Supreme Court has implicitly recognized that stricter standards apply to federal agencies when administering Indian programs." 728 F.2d 1555, 1567 (10th Cir. 1984) (Seymour, J., concurring in part and dissenting in part), *dissent adopted as majority opinion*, 782 F.2d 855 (10th Cir. 1986) (en banc), *modified*, 793 F.2d 1171 (10th Cir. 1986);[17] *Assiniboine & Sioux Tribes v. Bd. of Oil & Gas Conservation of Mont.*, 792 F.2d 782, 792 & n.9 (9th Cir. 1986) (tribes' claim that "Secretary exceeded his statutory authority and breached congressionally-imposed fiduciary duties . . . is clearly reviewable" and observing that the "Tenth Circuit appears to impose a stricter standard when reviewing the Secretary's administrative actions, when the Secretary acts as tribal trustee.").

Even outside the context of the government's dealings with Indian tribes, when a federal agency treats its facially unenforceable policy and guidance documents as mandatory, the Court will enforce them as such. In *Ecology Ctr. v. Castaneda*, this Court held that "where an otherwise advisory document has been clearly incorporated into a Forest Plan or other binding document, its requirements

[17] The court also noted that the Indian canons of construction govern the interpretation of regulations. 728 F.2d at 1567 (citing *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1332 (10th Cir. 1982)).

become mandatory." 574 F.3d 652, 660 (9th Cir. 2009). The Federal Defendants incorporated Reclamation's Indian Trust Asset Policy, guidance concerning the implementation of that Policy, and Reclamation's NEPA Handbook into the Surplus Guidelines FEIS and ROD and Shortage Guidelines FEIS and ROD, making them mandatory.[18] Accordingly, this Court should consider the incorporated policies and guidance documents to be mandatory. *See Ecology Ctr., Inc. v. Austin*, 430 F.3d 1057, 1069-70 (9th Cir. 2005) (it was "arbitrary and capricious for the Forest Service to ignore [its own Standard] because both the draft EIS and final EIS discuss the Standard as if it is binding and claim that the Service developed the Project in compliance with its provisions"), *overruled on other grounds sub nom. The Lands Council v. McNair*, 537 F.3d 98 (9th Cir. 2008) (en banc); *Rocky Mountain Wild v. Vilsack*, 843 F. Supp. 2d 1188, (D. Colo. 2012)

[18] The Surplus Guidelines FEIS provides that:

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

(CalSER 7). The Surplus Guidelines ROD states that the EIS "was prepared pursuant to" NEPA, "Department of Interior Policies, and Reclamation's NEPA Handbook." (ER 159).

(incorporation of Forest Service Handbook in EA binds agency). As the decision in *Ruiz* and its progeny make clear, the trust relationship heightens the general responsibility of the Federal Defendants when their actions, policies, and procedures create expectations on which Indian tribes are entitled to rely.

e. The Nation Stated a Viable Common Law Claim for Breach of Trust at the Pleading Stage.

The Nation "faces three threshold requirements to stating a viable claim for relief [against the United States] at the pleading stage: it must establish federal subject matter jurisdiction, a waiver of sovereign immunity, and a cause of action." *El Paso*, 750 F.3d at 892; *see generally Alvarado v. Table Mountain Rancheria*, 509 F.3d 1008 (9th Cir. 2007). While the Federal Defendants argue that the Nation "has not identified any source of law establishing either that it has specific right to water from the River or that the United States has a duty to take specific actions regarding the Navajo Nation's potential, but unadjudicated, claims to the River," Federal Brief at 55, at the pleading stage the law does not require so much. As demonstrated above, the Nation has a protectable interest in its Reservation lands and unquantified *Winters* rights to use water from the Colorado River to make the Reservation a permanent homeland. It is undisputed that the Federal Defendants hold both the Reservation lands and reserved rights to water in trust. The Nation also demonstrated above that the Federal Defendants' duty to protect tribal trust

assets can be found in the 1868 Treaty, the 1922 Compact, the 1994 Trust Reform Act, and Federal Defendants' regulations, manuals, policies, and procedures.

The Navajo Nation asks the Court to compel the United States to take an action essential to the preservation of the trust res: undertake an assessment of the Reservation's water supply needs that can only be secured from the Colorado River. (ER 145). '"One of the fundamental common-law duties of a trustee is to preserve and maintain trust assets,'" *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003) (quoting *Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc.*, 472 U.S. 559, 572 (1985)), and this duty "encompasses determin[ing] exactly what property forms the subject-matter of the trust." 472 U.S. at 572 (1985) (quoting G. Bogert et al., Law of Trusts and Trustees § 583 (2d rev. ed. 1980)). Once a plaintiff tribe has identified a fiduciary duty in some source of substantive law, the common law can be used to shape the parameters of that duty. *See White Mountain Apache Tribe*, 537 U.S. at 475-76; *see also Jicarilla Apache Nation v. United States*, 112 Fed. Cl. 274, 279 (2013) ("once [federal fiduciary obligations are] established, they may be reinforced by principles that flow from the general trust relationship that has existed between the United States and the Tribes for centuries."). As the trustees of the Nation's lands and waters, the Federal Defendants are obliged to assess the extent of those trust resources, and

the Nation has stated a claim for breach of their fiduciary duty arising from their failure to do so.

In addition, the Nation has stated a claim because the Federal Defendants' failure to comply with the procedural requirements of NEPA, a law of general application, gives rise to a claim for breach of trust. The Complaint alleges that the Federal Defendants' repeated failure to consider the impact of their Colorado River management decisions on the Nation's trust resources not only violates the procedural requirements of NEPA, but also violates the fiduciary responsibilities of the United States. (ER 141-43, 145); (NNFER 38). This Court has held that when the United States violates its statutory obligations to an Indian tribe under NEPA, it breaches its fiduciary obligations arising from the trust responsibility as well. *Pit River I*, 469 F.3d at 788 (breach of NEPA and National Historic Preservation Act were breaches of federal fiduciary obligations to tribes); *see also Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1073 (9th Cir. 2010) (restating holding of *Pit River I*). To meet its fiduciary obligations, the Federal Defendants "must at least show compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." *Pit River I*, 469 F.3d at 788 (internal quotation marks omitted).

In *Pit River I*, the Court held that by failing to prepare an EIS prior to extending leases permitting geothermal development on the tribe's aboriginal lands

lying outside the tribe's reservation, in contravention of NEPA, the federal "agencies violated their minimum fiduciary duty to the Pit River Tribe." *Id.* Similarly, the Nation alleges that by failing to comply with the procedural requirements of NEPA to adequately consider the potential impact of their actions on the Nation's trust resources, the Federal Defendants have breached their fiduciary duties to the Nation. Should this Court find that the Nation has standing to bring its NEPA claims, then it has stated an ancillary claim for breach of trust under *Pit River I*, and the APA provides the necessary waiver of Federal Defendants' immunity from suit.

f. The Trust Responsibility Requires More than Mere Adherence to the Requirements of Generally Applicable Laws.

This Court has on at least two occasions reserved the question of whether, in construing sources of substantive law alleged to give rise to federal duty, the special fiduciary relationship between the United States and Indian tribes "requires more" than bare adherence to that duty. *Id.* ("we do not reach the question of whether the fiduciary obligations of federal agencies to Indian nations might require more"); *Gros Ventre*, 469 F.3d at 810 n.10 ("We are leaving open the question of whether the United States is required to take special consideration of tribal interests when complying with applicable statutes and regulations and when such an obligation may or may not arise."); *see also Island Mountain Protectors et*

al., 144 I.B.L.A. 168, 185 (1998) (since the Tribes had treaties the "BLM was required to consult with the Tribes and to identify, protect, and conserve trust resources, trust assets, and Tribal health and safety" in its administration of NEPA and other laws). Both the Supreme Court and this Court have already answered that question in the affirmative. The federal fiduciary duty to Indian tribes and the corollary Indian canons of construction must, in every instance, guide the courts as they consider claims that the United States, as trustee of tribal resources, failed to comply with its duty to preserve and protect those assets. As this Court observed in *Winters*, to accept the Federal Defendants' argument that they have no fiduciary duty to protect the Nation's trust resources, "would certainly be . . . 'an impotent outcome to negotiations and a convention, which seemed to promise more and give the word of the nation for more.'" 143 F. at 746 (quoting *United States v. Winans*, 198 U.S. 371, 380 (1905)).

V. CONCLUSION.

For all of the foregoing reasons, the Nation respectfully asks this Court to reverse the District Court's order of dismissal, and to remand to the District Court with directions to permit the Nation to amend its Complaint.

Respectfully submitted
this 1st day of May 2015.

Stanley M. Pollack
M. Kathryn Hoover
NAVAJO NATION DEPARTMENT
OF JUSTICE
Post Office Drawer 2010
Window Rock, Arizona 86515
Telephone: (928) 871-7510
Fax: (928) 871-6200
smpollack@nndoj.org
khoover@nndoj.org

Scott B. McElroy
Alice E. Walker
McELROY, MEYER, WALKER &
CONDON, P.C.
1007 Pearl Street, Suite 220
Boulder, Colorado 80302
Telephone: (303) 442-2021
Fax: (303) 444-3490
smcelroy@mmwclaw.com
awalker@mmwclaw.com

By: */s/ Scott B. McElroy*
SCOTT B. McELROY

ATTORNEYS FOR
THE NAVAJO NATION

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. Proc. 32(a)(7)(B) and Local Rules 32-1 and 32-2, the undersigned certifies that the foregoing Reply Brief of Appellant (excluding the Table of Contents and Table of Authorities and including footnotes) contains 13,861 words. A motion for leave to file an over-sized Brief is being filed concurrently.

Dated: May 1, 2015

By: */s/ Scott B. McElroy*
SCOTT B. McELROY

CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Stephen Moore
Senior Appellate Paralegal
COUNSEL PRESS LLC