



## INTRODUCTION

1. This action is brought by the Navajo Nation against the United States Department of the Interior (“Department”), the Secretary of the Interior (“Secretary”), the Bureau of Reclamation (“Reclamation”), and the Bureau of Indian Affairs (“BIA”) (collectively referred to as “the Defendants”), challenging the Defendants’ failure to consider the water rights of the Navajo Nation, or to otherwise protect the interests of the Navajo Nation by the provision of an adequate water supply from the Lower Basin of the Colorado River to meet the needs of the Navajo Nation, in connection with the Defendants’ management of the waters of the Lower Basin of the Colorado River, including but not limited to the establishment and adoption of the Colorado River Interim Surplus Guidelines, *reprinted in* 66 Fed. Reg. 7772 (Jan. 25, 2001), the establishment and adoption of the Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations for Lake Powell and Lake Mead, *reprinted in* 73 Fed. Reg. 19,873 (Apr. 11, 2008), the adoption of the *Final Environmental Impact Statement, Implementation Agreement, Inadvertent Overrun and Payback Policy, and Related Federal Actions* (Oct. 2002), the promulgation of regulations for the interstate banking of water on the Colorado River, 43 C.F.R. pt. 414, and entering into the *Storage and Interstate Release Agreement* (Dec. 18, 2002) with the States of Arizona and Nevada pursuant to those interstate banking regulations. The Navajo Reservation is adjacent to the Colorado River above Lake Mead in the Lower Basin, and water from the River is

required to meet the needs of tribal members residing on the portion of the Reservation located in the Lower Basin of the Colorado River and above Lake Mead. This case does not address the water rights of the Navajo Nation in the Upper Basin of the Colorado River. Although the Defendants have a responsibility to protect the water resources of the Navajo Nation which are held in trust by the United States for the benefit of the Navajo Nation, and to provide the Navajo Nation with an adequate water supply to meet the needs of the Navajo Nation and its members, the Defendants have administered and managed the waters of the Lower Basin of the Colorado River without regard to the needs and rights of the Navajo Nation to use the waters of the River for the benefit of tribal members residing on the portion of the Navajo Reservation located in the Lower Basin of the Colorado River and above Lake Mead.

### **PARTIES**

2. The Navajo Nation is a federally recognized Indian tribe with reservation lands located in Arizona, New Mexico, and Utah.

3. The Department is a federal agency that includes Reclamation and the BIA. The Department has a fiduciary responsibility to the Navajo Nation to protect tribal trust resources in carrying out its legal responsibilities related to the Colorado River.

4. Sally Jewell is the Secretary. As Secretary, she has a variety of responsibilities over the waters of the Colorado River pursuant to federal law including, but not limited to, the Boulder Canyon Project Act, 43 U.S.C. §§ 617-617u, the Colorado

River Basin Project Act, 43 U.S.C. §§ 1501-56, and the Decree in *Arizona v. California*, 376 U.S. 340 (1964). As Secretary, she has a fiduciary responsibility to the Navajo Nation to protect tribal trust resources in carrying out her legal responsibilities related to the Colorado River.

5. Reclamation is the principal agency charged with implementing the obligations of the Secretary to manage the waters of the Colorado River in the Lower Basin. Reclamation operates the dams and reservoirs for which it has responsibility for the purposes of river regulation, navigation, flood control, water storage, water delivery and hydroelectric power generation. Reclamation has a fiduciary responsibility to the Navajo Nation to protect tribal trust resources in carrying out its legal responsibilities related to the Colorado River.

6. The BIA is the agency charged with providing services to, carrying out the federal trust responsibilities of the United States for, and promoting the self-determination of federally recognized tribal governments, including the Navajo Nation. The BIA has a fiduciary responsibility to the Navajo Nation to protect tribal trust resources in carrying out its legal responsibilities.

### **JURISDICTION**

7. This Court has jurisdiction over the Navajo Nation's claims because the Navajo Nation asserts rights under 28 U.S.C. § 1331 (federal question), and 28 U.S.C. § 1362 (tribal federal question).

8. The Navajo Nation seeks relief under the judicial review provisions of the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701-06, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02.

9. Venue is appropriate in the District Court for the District of Arizona pursuant to 28 U.S.C. § 1391(e).

### **FACTUAL ALLEGATIONS**

#### **The Navajo Nation and the Navajo Indian Reservation**

10. The Navajo Nation is a federally recognized Indian tribe in the United States with over 300,000 members.

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

12. The Navajo Reservation originally was established by the Treaty of June 1, 1868, 15 Stat. 667, and was expanded by various Executive Orders and Acts of Congress from 1868 through 1964. The Navajo Reservation lands are adjacent to the Colorado River both above and below Lee Ferry and are located in the Upper and Lower Basins of the Colorado River Basin. This lawsuit pertains to those lands located in the Lower Basin in Arizona, all of which lands are located above Lake Mead, more particularly described in the following treaties, statutes, and executive orders:

A. The Treaty of June 1, 1868, 15 Stat. 667, established the Navajo Reservation as the permanent homeland of the Navajo Nation, as it was “set apart for the use and occupation of the Navajo tribe of Indians . . . .” *Id.* art. II.

B. The Executive Order of October 29, 1878 added lands west of the June 1, 1868 Treaty Reservation, which lands were “withdrawn from sale and settlement and set apart as an addition to the present reservation for the Navajo Indians.”

C. The Executive Order of January 6, 1880 added lands west and south of the June 1, 1868 Treaty Reservation, which lands were “withdrawn from sale and settlement and set apart as an addition to the present Navajo Reservation . . . .”

D. The Executive Order of December 16, 1882 added lands west of the 1878 and 1880 additions, which lands were “withdrawn from settlement and sale, and set apart for the use and occupancy of the Moqui and such other Indians as the Secretary of the Interior may see fit to settle thereon.” The Navajo Nation’s interest in these lands was affirmed in *Healing v. Jones*, 210 F. Supp. 125 (D. Ariz. 1962), *aff’d*, 373 U.S. 758 (1963).

E. The Executive Order of May 17, 1884 added lands north of the 1882 addition, which lands were “withheld from sale and settlement and set apart as a reservation for Indian purposes . . . .”

F. The Executive Order of January 8, 1900 added lands east of and partially adjacent to the Colorado River to the Reservation, which lands were “withdrawn from sale and settlement until further ordered.”

G. The Executive Order of November 14, 1901 added the Leupp Extension to the Reservation, withdrawing lands south of the 1900 addition “from sale and settlement . . . .”

H. Executive Order No. 709 of November 9, 1907 added lands south of the 1880 addition, which lands were “withdrawn from sale and settlement and set apart for the use of the Indians as an addition to the present Navajo Reservation . . . .”

I. Executive Order No. 2612 of May 7, 1917, amended by the Executive Order of January 19, 1918, added lands west of the 1900 addition to the Reservation.

J. The Act of May 23, 1930, ch. 317, 46 Stat. 378, 379, withdrew lands formerly part of the Tusayan National Forest and made such lands “a part of the Western Navajo Indian Reservation,” which lands lie east of and partially adjacent to the Colorado River.

K. The Act of Feb. 21, 1931, ch. 269, 46 Stat. 1204, withdrew lands formerly part of the Tusayan National Forest and added them to the Reservation, which lands lie south of the Colorado River and west of the Little Colorado River.

L. The Act of June 14, 1934, ch. 521, 48 Stat. 960-62, added additional lands in the Reservation in Arizona, and confirmed the boundary of the Navajo Reservation in Arizona.

13. The western boundary of the Navajo Reservation, as confirmed in the Act of June 14, 1934, ch. 521, 48 Stat. 960-62, runs along the Colorado River. With the exception of the United States, the Navajo Nation owns more miles of riparian land along the Colorado River than any other landowner.

#### **Navajo Nation Water Rights and the Trust Relationship**

14. By establishing the Navajo Reservation as the permanent homeland of the Navajo Nation, under, inter alia, the 1868 Treaty and the Acts of Congress and Executive Orders described above in ¶ 12, 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. The Navajo Nation's beneficial rights to water to make its Reservation lands livable vested at least as early as the date of each congressional act or executive order setting aside the Reservation lands.

15. The legal effect of the 1868 Treaty, congressional acts and executive orders described above in ¶ 12, which established the Navajo Reservation, was to create a trust relationship between the Navajo Nation and the United States. All the elements of a trust are present: the United States is the trustee; the Navajo Nation is the beneficiary; and the



Navajo Nation's beneficial interest in and rights to the waters of the Colorado River to make its Reservation a livable homeland constitute the trust corpus.

16. The United States' trust relationship with the Navajo Nation requires that it act affirmatively to protect the Navajo Nation's trust resources, which include the Reservation lands and the water necessary to make those lands livable as a permanent homeland for the Navajo Nation. Affirmative protection of the Navajo Nation's beneficial interest in and rights to use water from the Colorado River to make the Navajo Reservation lands livable includes protecting the Navajo Nation's interests in the Colorado River as a source of water to meet the needs of the Navajo Nation and its members and to make the Reservation a permanent and liveable homeland.

17. The United States exercises pervasive control over the assertion and protection of the Navajo Nation's rights to, and interests in, the Colorado River, as established under the following:

A. The 1868 Treaty, congressional acts, and executive orders described above in ¶ 12, which established the trust relationship between the United States and the Navajo Nation, and the corresponding duty of the United States to ensure that the Navajo Reservation lands have sufficient water to make them livable.

B. The McCarran Amendment, 43 U.S.C. § 666, which provides that the United States waives sovereign immunity in state court proceedings to comprehensively adjudicate water rights claims, including for the assertion of Indian

water rights claims as trustee, and by which the United States has expressed its policy of pursuing the determination of the nature and extent of tribal water rights.

C. Well-established federal jurisprudence, beginning with *Winters v. United States*, 207 U.S. 564 (1908), which confirms the United States' continuing, affirmative obligation to assert and protect water rights claims on its beneficiaries' behalf.

18. Failure by the United States to take all actions necessary to protect the trust corpus, that is, the Navajo Nation's beneficial ability to use the waters of the Colorado River which are necessary to make its Reservation a livable homeland, constitutes a breach of the United States' trust responsibility to the Navajo Nation.

19. In Article VII of the Colorado River Compact of November 24, 1922, *reprinted at* 70 CONG. REC. 324 (1928), Article 5 of the contract between Arizona and the United States dated February 9, 1944 ("Arizona Contract"), and elsewhere, the United States protected its obligations to the Navajo Nation regarding the Nation's use of water from the Colorado River. Thus, the United States' trust obligations to the Navajo Nation are undiminished by the Colorado River Compact.

20. The United States consistently has represented itself as the Navajo Nation's trustee, including representation of all of the Arizona Indian tribes in the initial phases of *Arizona v. California*. The United States, in opposing the Navajo Nation's attempt to intervene in *Arizona v. California*, acknowledged that it had "undertaken representation of the [Navajo Nation]" and that the United States would "be governed by . . .

considerations of justice” in its representation of the Navajo Nation. *See Response of the United States to the Motion on Behalf of the Navajo Tribe of Indians for Leave to Intervene* at 6-7, *Arizona v. California*, Original No. 8 (Nov. 1961) (“*United States Response*”) (quoting *Mo., Kan. & Tex. Ry. Co. v. Roberts*, 152 U.S. 114, 117 (1894)).

21. Although the Navajo Reservation is adjacent to the Colorado River, the Navajo Nation’s rights to use water from the Colorado River in the Lower Basin of the River were not adjudicated in *Arizona v. California* or elsewhere. The United States acknowledged that for any claims of the Navajo Nation to the Colorado River, “additional evidence” would be required, “because no pleading, no evidence and no argument to support such a claim has been submitted.” *United States Response* at 15 n.9. It has, therefore, long been the understanding of the United States that the Navajo Nation’s water rights to the Colorado River have not been addressed and require additional work to attain resolution. *E.g., id.; see also id.* at 2 (noting that “no adjudication of the water rights of the Navajo Indian Reservation” had occurred).

22. Article VIII(c) of the Decree in *Arizona v. California* expressly left open the question of the Navajo Nation’s beneficial rights to the waters of the Colorado River. 376 U.S. at 353. The United States’ trust responsibility to protect the Navajo Nation’s beneficial rights to, and interests in the waters of the Colorado River remain unaffected by the Decree in *Arizona v. California*.

23. The Defendants have an obligation under Secretarial Order 3215 – Principles for the Discharge of the Secretary’s Trust Responsibility (Apr. 28, 2000), both to account for the potential effect on the Navajo Nation’s beneficial rights to and interests in the waters of the Colorado River, and to ensure that the Department’s actions promote and protect the Nation’s interests.

24. The Defendants are obligated to uphold the United States’ trust responsibility to the Navajo Nation even while Congress charges them with other responsibilities, such as those in the Colorado River Compact of 1922, the Boulder Canyon Project Act, 43 U.S.C. §§ 617-617u, and the National Environmental Policy Act of 1969 (“NEPA”), 42 U.S.C. §§ 4321-70h, and they may not compromise the United States’ trust responsibility to the Navajo Nation in the performance of other statutory obligations.

25. The Navajo Nation has asked the Department, consistent with its trust responsibility to the Navajo Nation, to address the extent of the Nation’s rights to use, and its interest in, water from the mainstream of the Colorado River in the Lower Basin. To date, the Department has failed to comply with that request.

26. The 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.

27. The Navajo Nation lacks adequate water supplies to meet the needs of its members now and in the future.

28. Although the ongoing general stream adjudication, *In re the General Adjudication of All Rights to Use Water in the Little Colorado River System and Source*, No. CV 6417 (Ariz. Super. Ct., Apache County), may result in a declaration of water rights to serve some of the Navajo Reservation lands described in ¶ 12, above, the Little Colorado River adjudication will not address the water needs of all of the Reservation lands described in ¶ 12, above.

29. Despite the fact that the 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, the Secretary, consistent with the United States' obligation to manage the waters of the Colorado River described in the Decree in *Arizona v. California*, 376 U.S. 340, has taken a variety of actions allocating the waters of the Colorado River that threaten the availability of Colorado River water to satisfy the Navajo Nation's rights and needs.

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

herein might not be available in the future if Navajo Nation rights are recognized. This uncertainty contravenes the entire purpose of quantifying water rights to the Colorado River. *See, e.g., United States Response* at 7-8 (“The controversy respecting allocation of the waters of the Lower Colorado River has plagued the . . . entire region for nearly half a century” and has “impeded full development of the water resources of the [S]outhwest[] . . . and hence the full development of the other resources of the region . . . .”).

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

#### **Arizona Contract**

32. Pursuant to the Boulder Canyon Project Act, 43 U.S.C. §§ 617-617u, and Article II of the Decree in *Arizona v. California*, 376 U.S. at 341-46, the Secretary is responsible for the allocation of the waters of the mainstream of the Colorado River

among the Lower Basin States (California, Arizona and Nevada) and to decide which users within each State will be delivered water as provided in the Act.

33. The Boulder Canyon Project Act authorizes the Secretary to enter into permanent water delivery contracts with users in the Lower Basin of the Colorado River, up to the limit of each State's apportionment. Pursuant to the Boulder Canyon Project Act and other federal legislation, the United States and the State of Arizona entered into the Arizona Contract for the delivery of water stored in Lake Mead. Under the Arizona Contract, the United States is required to deliver to Arizona, its agencies or water users, 2.8 million acre-feet of water per year "from storage in Lake Mead," Arizona Contract art. 7(a), for irrigation and domestic uses in Arizona, consistent with the provisions of the Colorado River Compact of 1922 and the Boulder Canyon Project Act. Article 5 of the Arizona Contract further provides that "nothing in this contract shall be construed as affecting the obligations of the United States to Indian tribes."

34. The delivery obligations are to "be diminished to the extent that consumptive uses now or hereafter existing in Arizona above Lake Mead diminish the flow into Lake Mead . . . ." *Id.* art. 7(d). Therefore, the provision of water to the Navajo Nation from the mainstream of the Colorado River for any of the Navajo Reservation lands within Arizona and within the Lower Basin, described above in ¶ 12, to serve those lands as a permanent homeland for the present and future benefit of the members of the Navajo Nation, must be charged against Arizona's entitlement to 2.8 million acre-feet per

year of water from the Colorado River as established under the Boulder Canyon Project Act: “all uses of mainstream water within a State are to be charged against that State’s apportionment . . . .” *Arizona v. California*, 373 U.S. 536, 601 (1963).

35. The Navajo Nation has requested that the Secretary enter into a contract with it for all uncommitted water allocated to Arizona from the mainstream of the Colorado River. The Secretary has refused to enter into such a contract with the Navajo Nation.

#### **Surplus Guidelines**

36. On January 16, 2001, then Secretary of the Interior Bruce Babbitt issued a *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 Act of September 30, 1968 (P.L. 90-537)* (June 8, 1970) (“LROC”). The Surplus Guidelines ROD adopted specific interim surplus guidelines for the Colorado River which guidelines will be used to determine the conditions under which the Secretary would declare the availability of surplus water for use within the States of California, Arizona and Nevada. Among other things, the LROC



require the Secretary to determine the extent to which the water requirements of mainstream water users in the three states can be met in any year.

37. The Surplus Guidelines FEIS analyzed five alternatives for interim surplus guidelines and a No Action Alternative/Baseline Condition. Surplus Guidelines FEIS 2-1; Surplus Guidelines ROD at 4-7. None of the alternatives sought to account for the unquantified water rights or unmet needs of the Navajo Nation in the Lower Basin above Lake Mead. Although the Surplus Guidelines FEIS included the results of extensive modeling of the hydrology of the Colorado River, including discrete representation of the demand schedules through demand nodes for each of the ten tribes in the Colorado River basin, including the Navajo Nation, no information was included for the water rights or water needs of the Navajo Nation and its members in the Lower Basin.

38. The Surplus Guidelines ROD for the Surplus Guidelines FEIS also failed to account for the fact that the Navajo Nation's water rights in the Lower Basin have not been determined or its needs determined, despite the Surplus Guidelines ROD's assertion that "Reclamation fully identified and analyzed Tribal water rights in the FEIS . . . ." Surplus Guidelines ROD at 9. The Surplus Guidelines ROD further acknowledged that it had "identified a significant quantity of confirmed but unused water rights belonging to several Indian tribes in the Colorado River basin. These undeveloped rights are a factor in the available water supply which is being managed as surplus." *Id.*

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

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

**Shortage Guidelines**

41. On December 13, 2007, then Secretary Dirk Kempthorne issued a *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 specific interim shortage guidelines for the Colorado River which will be used to manage Lake Powell and Lake Mead under low reservoir and drought conditions, so as to provide greater predictability of Colorado River water supplies.

42. The Shortage Guidelines FEIS analyzed five alternatives for interim shortage guidelines and a No Action Alternative. Shortage Guidelines FEIS at ES-3; Shortage Guidelines ROD at 8-11. None of the alternatives sought to account for the unquantified water rights or unmet needs of the Navajo Nation in the Lower Basin above Lake Mead, and no information was included for the water rights or water needs of the Navajo Nation and its members in the Lower Basin.

43. The Shortage Guidelines ROD also failed to account for the fact that the Navajo Nation’s water rights and needs in the Lower Basin have not been determined,

despite the assertion in the Shortage Guidelines ROD that it considered the effects on Indian trust assets (“ITA”). Shortage Guidelines ROD at 16.

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

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

**Implementation Agreement for Inadvertent Overrun and Payback Policy**

46. In an action connected to the adoption of the Surplus Guidelines, the Secretary, through Reclamation, developed an environmental impact statement analyzing a procedure which: 1) requires the Secretary to deliver California's share of Colorado River water in accordance with the proposed Colorado River Quantification Settlement Agreement which allocates the water among three California water entities; and 2) requires payback of water used in excess of the amounts set forth in contracts entered into under the Boulder Canyon Project Act. *Final Environmental Impact Statement,*

*Implementation Agreement, Inadvertent Overrun and Payback Policy, and Related Federal Actions* (Oct. 2002) (“Implementation Agreement FEIS”).

47. Like the Surplus Guidelines FEIS and the Shortage Guidelines FEIS, the Implementation Agreement FEIS purports to analyze the impacts of that policy upon “all tribal resources . . . that have the potential to be directly or indirectly impacted by the proposed Federal action.” Implementation Agreement FEIS at 3.10-2. However, the statement’s discussion of tribal resources contains no analysis of the rights or needs of the Navajo Nation and its members to the waters of the Lower Basin of the Colorado River.

48. The Implementation Agreement FEIS does not account for the unquantified rights of the Navajo Nation to the waters of the Colorado River or the unmet needs of tribal members and the Navajo Nation that require the use of water from the Colorado River. Inadvertent overruns could have a significant impact on the Navajo Nation’s ability to utilize its Colorado River water rights or to otherwise meet its needs using water from the Lower Basin of the Colorado River.

49. The Implementation Agreement FEIS is part of a pattern by which Reclamation continues to manage the Lower Basin of the Colorado River in a manner that ensures that entities other than the Navajo Nation will continue to rely on water supplies claimed by, reserved for, needed by, and potentially belonging to the Navajo Nation, which reliance will operate to make allocation of Lower Basin of Colorado River water to

the Navajo Nation to satisfy its water rights and to meet the needs of the Navajo Nation and its members increasingly difficult.

**Water Banking and Storage and Release Agreement**

50. On November 1, 1999, the Secretary adopted final regulations under which she may enter into Storage and Interstate Release Agreements with the Lower Basin States to permit offstream storage of the States' individual entitlements to Colorado River water as set forth in the *Arizona v. California* Decree. See 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) (codified at 43 C.F.R. pt. 414). Among other things, the regulations require that the Secretary may only enter into offstream storage agreements if the water to be stored has first been "offered to all entitlement holders within the Storing State [i.e., Arizona] for purposes other than interstate transactions under proposed Storage and Interstate Release Agreements." 43 C.F.R. § 414.3(a)(2).

51. The Navajo Nation is an entitlement holder pursuant to the Secretary's obligation to reserve water to satisfy the Navajo Nation's beneficial claims to the waters of the Colorado River. 43 C.F.R. § 414.2.

52. Pursuant to the regulations at 43 C.F.R. pt. 414, and after a *Final Environmental Assessment and Finding of No Significant Impact* (June 19, 2002) ("Storage and Release Agreement FONSI"), the Secretary has entered into the *Storage*

*and Interstate Release Agreement* (Dec. 18, 2002) (“Storage and Release Agreement”) with the States of Arizona and Nevada to create a program of interstate water banking of Arizona’s and Nevada’s entitlements as set forth in the Decree in *Arizona v. California* in underground aquifers in Arizona.

53. The Storage and Release Agreement does not account for the unquantified rights of the Navajo Nation to, or the unmet needs of the Navajo Nation and its members from, the waters of the Colorado River.

54. The Secretary’s regulations require that “the water must first be offered to all entitlement holders within [Arizona] for purposes other than interstate transactions under proposed Storage and Interstate Release Agreements.” 43 C.F.R. § 414.3(a)(2). Although the Navajo Nation possesses beneficial rights to water from the Colorado River for its lands situated in Arizona and adjacent to the Colorado River and requires such water to meet its needs and those of its members, neither the Secretary nor Arizona offered the water presently stored in underground aquifers in Arizona to the Navajo Nation for use on its Reservation lands in Arizona, in violation of the regulations governing interstate water banking in Arizona.

55. The implementation of the Secretary’s water banking regulations has failed to consider the rights of the Navajo Nation to the waters of the Colorado River or the needs of the Nation and its members, and instead fosters reliance by other water users in Arizona and Nevada upon banked water that is claimed by, reserved for, needed by, and



potentially belonging to the Navajo Nation. Thus, the Secretary's and Arizona's implementation of the water banking regulations establishes a system of reliance upon the water in the Lower Basin of the Colorado River to the exclusion of the Navajo Nation. The Secretary's regulations, as implemented, thereby perpetuate the departmental pattern of managing the Lower Basin of the Colorado River in a manner that ensures that entities other than the Navajo Nation will continue to rely on water supplies claimed by, reserved for, needed by, and potentially belonging to the Navajo Nation, which reliance will operate to make allocation of the Colorado River water in the Lower Basin to the Navajo Nation to satisfy its water rights and to meet the unmet needs of the Navajo Nation and those of its members increasingly difficult.

#### **Allocation of Water from Central Arizona Project**

56. Under the Colorado River Basin Project Act, Congress authorized the construction of the Central Arizona Project. 43 U.S.C. §§ 1521. Reclamation funded and constructed the Project. The Central Arizona Project transports a portion of Arizona's share of the Colorado River to eastern portions of the state.

57. The Colorado River Basin Project Act authorizes the Secretary to enter into contracts with Indian tribes in Arizona for the delivery of water from the Central Arizona Project. 43 U.S.C. § 1524. To date, the Secretary has entered into contracts with numerous Arizona Indian tribes, with a total contract water delivery obligation of

approximately 400,000 acre-feet. The water delivered to Arizona tribes is charged against Arizona's total Colorado River entitlement of 2.8 million acre-feet.

58. Stricken.

59. Stricken.

**FIRST CLAIM FOR RELIEF**  
**VIOLATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT**  
**AND THE ADMINISTRATIVE PROCEDURE ACT IN THE**  
**IMPLEMENTATION OF THE SURPLUS GUIDELINES**

60. Paragraphs 1-59 are incorporated herein by reference.

61. The United States is the equitable owner of the trust resources of the Navajo Nation, including the lands of the Navajo Reservation and the water rights associated with such lands. *Winters v. United States*, 207 U.S. 564. The Navajo Nation is the beneficial owner of these trust resources.

62. The United States has a fiduciary trust responsibility to protect these trust resources, and has an affirmative obligation to make these trust resources productive for the benefit of the Navajo Nation.

63. In the compilation of the Surplus Guidelines FEIS and Surplus Guidelines ROD, the Defendants failed to comply with the requirements of NEPA, which requires that the United States take a hard look at all the effects of a proposed federal action, including the effects upon tribal trust property.

64. The Surplus Guidelines purport to allocate all of the surplus waters of the Colorado River on an annual basis, without consideration of the rights of the Navajo

Nation to or the needs of the Navajo Nation and its members from the waters of the Lower Basin of the Colorado River, thereby adversely affecting the water supply available to satisfy the Navajo Nation's rights or to otherwise meet its needs and those of its members in contravention of the Secretary's fiduciary obligation to protect and make productive all tribal trust resources.

65. By failing to account for the unquantified rights to and the unmet needs of the Navajo Nation and its members from the waters of the Lower Basin of the Colorado River, while adopting the Surplus Guidelines to allocate the excess waters of the Colorado River and allowing others to rely on the use of such waters which are claimed by, reserved for, needed by, and potentially belonging to the Navajo Nation, the Secretary has failed to protect the Navajo Nation's water rights and interests as the Nation's trustee.

66. By the plain language of the Surplus Guidelines FEIS, the United States purported to have examined all Indian water rights that could be affected by implementation of the LROC, even though the Navajo Nation's Lower Basin Colorado River water rights were omitted and the unmet needs of the Navajo Nation and its members were not described. Thus, the statement that Reclamation examined all Indian water rights is false.

67. The failure to account for the unquantified water rights of the Navajo Nation to and its interests in the Lower Basin of the Colorado River resulted in a Surplus Guidelines FEIS and Surplus Guidelines ROD that do not comply with NEPA, and, as a

result, 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.” 5 U.S.C. § 706(2)(A)-(C).

**SECOND CLAIM FOR RELIEF**  
**VIOLATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT**  
**AND THE ADMINISTRATIVE PROCEDURE ACT IN THE**  
**IMPLEMENTATION OF THE SHORTAGE GUIDELINES**

68. Paragraphs 1-67 are incorporated herein by reference.

69. In the compilation of the Shortage Guidelines FEIS and Shortage Guidelines ROD, the Defendants failed to comply with the requirements of NEPA, which requires that the United States take a hard look at all the effects of a proposed federal action, including the effects upon tribal trust property.

70. By the plain language of the Shortage Guidelines FEIS, the United States purported to have examined all Indian water rights that could be affected by implementation of the LROC, even though the Navajo Nation’s Lower Basin Colorado River water rights were omitted and the unmet needs of the Navajo Nation and its members were not described. Thus, the statement that Reclamation examined all Indian water rights is false.

71. The failure to account for the unquantified water rights of the Navajo Nation to and its interests in the Lower Basin of the Colorado River resulted in a Shortage Guidelines FEIS and Shortage Guidelines ROD that do not comply with NEPA, and, as a

result, 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.” 5 U.S.C. § 706(2)(A)-(C).

**THIRD CLAIM FOR RELIEF**  
**VIOLATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT**  
**AND THE ADMINISTRATIVE PROCEDURE ACT**  
**IN THE DEVELOPMENT OF THE**  
**IMPLEMENTATION AGREEMENT FEIS**

72. Paragraphs 1-71 are incorporated herein by reference.

73. The Secretary has agreed to deliver California’s share of Colorado River in accordance with the proposed Colorado River Quantification Settlement Agreement which allocates the water among three California water entities; and requires payback of water used in excess of the amounts set forth in contracts entered into under the Boulder Canyon Project Act.

74. By failing to account for the unquantified rights to, and the unmet needs of the Navajo Nation and its members from, the waters of the Lower Basin of the Colorado River, while adopting the Implementation Agreement FEIS, the Secretary has failed to protect the Navajo Nation’s water rights and interests as the Nation’s trustee.

75. By the plain language of the Implementation Agreement FEIS, the United States purported to have examined all Indian water rights that could be affected by implementation of the LROC, even though the Navajo Nation’s Lower Basin Colorado

River water rights were omitted and the unmet needs of the Navajo Nation and its members were not described. Thus, the statement that Reclamation examined all Indian water rights is false.

76. The failure to account for the unquantified water rights of the Navajo Nation to and its interests in the Lower Basin of the Colorado River resulted in an Implementation Agreement FEIS that does not comply with NEPA, and, as a result, the document 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.” 5 U.S.C. § 706(2)(A)-(C).

**FOURTH CLAIM FOR RELIEF**  
**VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT**  
**IN THE IMPLEMENTATION OF THE**  
**INTERSTATE BANKING REGULATIONS**

77. Paragraphs 1-78 are incorporated herein by reference.

78. The Secretary’s interstate water banking regulations, 43 C.F.R. pt. 414, fail to protect the Navajo Nation’s rights to and its interests in water from the Lower Basin of the Colorado River by permitting the Lower Basin States to store water for future use that they otherwise would have been unable to use, thus creating reliance on water which otherwise would be available to meet the unmet needs of the Navajo Nation and its tribal members.

79. By failing to account for the Navajo Nation's unquantified rights to and its interests in the waters of the Colorado River, while promulgating final regulations which (1) allow entitlement holders other than the Navajo Nation to store Colorado River water they would otherwise be unable to use and (2) allow others to develop reliance upon the use of such waters which are claimed by, reserved for, needed by, and potentially belonging to the Navajo Nation, the Secretary has failed to protect the Navajo Nation's water rights and interests as the Nation's trustee.

80. The failure to account for the unquantified water rights of the Navajo Nation to and its interests in the Lower Basin of the Colorado River 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." 5 U.S.C. § 706(2)(A)-(C).

**FIFTH CLAIM FOR RELIEF**  
**VIOLATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT AND**  
**THE ADMINISTRATIVE PROCEDURE ACT**  
**BY ENTERING INTO THE STORAGE AND RELEASE AGREEMENT**

81. Paragraphs 1-80 are incorporated herein by reference.

82. The Storage and Release Agreement fails to account for the Navajo Nation's unquantified rights to and its interests in the waters of the Lower Basin of the Colorado River, yet it memorializes a plan under which the Secretary must deliver water to Arizona and Nevada for banking in Arizona without regard to future quantification of the Nation's

rights and without protecting the water supply required to meet the needs of the Navajo Nation and its members.

83. By failing to account for the Navajo Nation's unquantified rights to and its interests in the waters of the Colorado River, while adopting the Storage and Release Agreement FONSI and entering into the Storage and Release Agreement which allocates the waters of the Colorado River and allows entitlement holders other than the Navajo Nation to develop reliance upon the use of such waters which are claimed by, reserved for, needed by, and potentially belonging to the Navajo Nation, the Secretary has failed to protect the Navajo Nation's water rights and its interests as the Nation's trustee.

84. The failure to account for the unquantified water rights of the Navajo Nation to and its interests in the Lower Basin of the Colorado River resulted in a Storage and Release Agreement FONSI and a Storage and Release Agreement that do not comply with NEPA, and, as a result, 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." 5 U.S.C. § 706(2)(A)-(C).

**STRICKEN – SIXTH CLAIM FOR RELIEF**  
**VIOLATION OF THE ADMINISTRATIVE PROCEDURE ACT**  
**BY ENTERING INTO CONTRACTS FOR DELIVERY OF**  
**COLORADO RIVER WATER VIA THE CENTRAL ARIZONA PROJECT**



85. The Navajo Nation voluntarily dismissed its sixth claim for relief and it is stricken.

86. Stricken.

87. Stricken.

88. Stricken.

**SEVENTH CLAIM FOR RELIEF**  
**BREACH OF FIDUCIARY TRUST RESPONSIBILITY**  
**BY FAILING TO PROVIDE COLORADO RIVER WATER**  
**TO MEET THE NEEDS OF THE NAVAJO PEOPLE**

89. Paragraphs 1-88 are incorporated herein by reference.

90. The Navajo Nation requires water from the Colorado River in order to fulfill the purpose of the Navajo Reservation as a permanent homeland for the Navajo people. *Winters v. United States*, 207 U.S. 564.

91. The 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, thereby breaching the United States' fiduciary obligation to the Navajo Nation.

**PRAYER FOR RELIEF**

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

A. Declaring that the Surplus Guidelines FEIS violates NEPA and the APA by establishing and recommending the implementation of the Surplus Guidelines for the Colorado River, and in so doing failing to consider the Navajo Nation's claims to and interests in the waters of the Lower Basin of the Colorado River required to meet the needs of the Navajo Nation and its members.

B. Holding unlawful and setting aside the Surplus Guidelines FEIS and any decision based on that document, as required by the APA, 5 U.S.C. § 706(2), or providing such other relief as the Court deems appropriate.

C. Declaring that the Shortage Guidelines FEIS violates NEPA and the APA by establishing and recommending the implementation of the Shortage Guidelines for the Colorado River, and in so doing failing to consider the Navajo Nation's claims to and interests in the waters of the Lower Basin of the Colorado River required to meet the needs of the Navajo Nation and its members.

D. Holding unlawful and setting aside the Shortage Guidelines FEIS and any decision based on that document, as required by the APA, 5 U.S.C. § 706(2), or providing such other relief as the Court deems appropriate.

E. Declaring that the Implementation Agreement FEIS violates NEPA and the APA by failing to consider the Navajo Nation's claims to and interests in the waters of the Lower Basin of the Colorado River required to meet the needs of the Navajo Nation and its members.

F. Holding unlawful and setting aside the Implementation Agreement FEIS and any decision based on that document, as required by the APA, 5 U.S.C. § 706(2), or providing such other relief as the Court deems appropriate.

G. Declaring that the adoption of the interstate water banking regulations, 43 C.F.R. pt. 414, violates the APA by failing to consider the Navajo Nation's claims to and interests in the waters of the Lower Basin of the Colorado River required to meet the needs of the Navajo Nation and its members.

H. Holding unlawful and setting aside the interstate water banking regulations, 43 C.F.R. pt. 414, and any decisions based on those regulations, as required by the APA, 5 U.S.C. § 706(2), or providing such other relief as the Court deems appropriate.

I. Declaring that the Storage and Release Agreement FONSI and the resulting Storage and Release Agreement violate NEPA and the APA by failing to consider the Navajo Nation's claims to and interests in the waters of the Lower Basin of the Colorado River required to meet the needs of the Navajo Nation and its members.

J. Holding unlawful and setting aside the Storage and Release Agreement FONSI and the Storage and Release Agreement, as required by the APA, 5 U.S.C. § 706(2), or providing such other relief as the Court deems appropriate.

K. Stricken together with the sixth claim for relief.

L. Enjoining further breaches of the United States' trust responsibility, or providing such other relief as the Court deems appropriate, (1) to protect the Navajo Nation's beneficial rights to and interests in the waters of the Lower Basin of the Colorado River required to meet the needs of the Navajo Nation and its members and (2) to affirmatively protect the Navajo Nation's tribal trust assets and to make those assets productive for the Navajo Nation's benefit by setting aside the water from the Lower Basin of the Colorado River required to meet the needs of the Navajo Nation and its members.

M. Stricken together with the sixth claim for relief.

Date: November 14, 2013

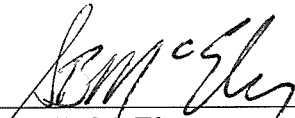
Respectfully submitted,

Stanley M. Pollack, Attorney ID 011046  
M. Kathryn Hoover, Attorney ID 013266  
NAVAJO NATION DEPARTMENT OF JUSTICE  
P.O. Drawer 2010  
Window Rock, Arizona 86515  
(928) 871-7510, 928 (871-6200) (fax)  
smpollack@nndoj.org,  
khoover@nndoj.org



By: \_\_\_\_\_  
Stanley M. Pollack

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

By:   
\_\_\_\_\_  
Scott B. McElroy

*Attorneys for the Navajo Nation*