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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

THE NAVAJO NATION,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR; S.M.R. JEWELL, Secretary of the Interior; BUREAU OF RECLAMATION; and BUREAU OF INDIAN AFFAIRS,

Defendants.

Civ. No. 03-507-PCT-GMS

FEDERAL DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

December 20, 2013

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I. INTRODUCTION

Defendants United States Department of the Interior; S.M.R. Jewell, Secretary of the Interior; Bureau of Reclamation; and Bureau of Indian Affairs, hereby submit this memorandum in reply to the November 14, 2013 memorandum filed by Plaintiff Navajo Nation ("Navajo") (Doc. No. 282) in opposition to Federal Defendants' September 9, 2013 motion (Doc. No. 240) to dismiss the Second Amended Complaint ("SAC") (Doc. No. 281) in its entirety.[1]

In its opposition brief ("Opp."), Navajo's response raises a host of new claims against the Federal Defendants that appear nowhere in the SAC. Navajo denies that its SAC calls upon the Court to require the United States to quantify its potential water rights in the Colorado River. Navajo's opposition brief further introduces new breach of trust claims and theories to revive its flagging Seventh Claim. In its opposition, Navajo seeks also to reinforce the Seventh Claim's allegations (see SAC ¶ 12) that the 1868 Navajo Reservation Treaty, statutes, and executive orders, which created and expanded Navajo's reservation boundaries, impose an asserted, enforceable trust obligation on Federal Defendants to "determine the extent and quantity of the water rights of the Navajo Nation to water of the Colorado River" (SAC ¶ 91). Finally, Navajo's response seeks to rebut Federal Defendants' showing that Navajo has failed to state a claim for violations of the National Environmental Policy Act ("NEPA") and the Administrative Procedure Act ("APA") arising from the Secretary of the Interior's ("Secretary") implementation of the Colorado River management actions (the Surplus Guidelines, the Shortage Guidelines, the Inadvertent Overrun and Payback program, the Storage and

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[1] Since the filing of our motion to dismiss, Navajo sought and was granted leave to amend its First Amended Complaint, which is now referred to herein as the Second Amended Complaint. All references to the first amended complaint in our motion to dismiss are hereby revised retroactively to refer to the Second Amended Complaint. Navajo has withdrawn the Sixth Claim (seeking to declare unlawful unidentified contracts by and between the Secretary and third parties for Central Arizona Project water), and therefore we do not address that claim further in this reply.

Interstate Release program, and the Interstate Water Banking Regulations), and that Navajo lacks Article III and prudential standing to challenge those management actions. As we now explain, Navajo's response does not overcome the jurisdictional and pleading deficiencies addressed in Federal Defendants' Rule 12(b) motion, and therefore, the SAC must be dismissed for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

II. ARGUMENT

A. NAVAJO'S SEVENTH CLAIM (FOR ALLEGED BREACH OF TRUST OBLIGATION TO QUANTIFY NAVAJO's POSSIBLE WATER RIGHTS IN THE COLORADO RIVER) MUST BE DISMISSED

1. The Second Amended Complaint Expressly Seeks To Enjoin Federal Defendants From Declining To Quantify Navajo's Potential Water Rights In The Colorado River

Navajo's Seventh Claim alleges that the Interior Department has breached a trust obligation to "determine the extent and quantity of the water rights of the Navajo Nation to the waters of the Colorado River." SAC ¶ 91. Prayer for Relief "L" requests an injunction restraining further breaches of such trust obligation. We moved for dismissal of this claim because, among others, it calls upon the Court to compel Federal Defendants to quantify and adjudicate Navajo's potential water rights in the River, which not only violates separation of powers and intrudes upon the Attorney General's unreviewable discretion over whether to commence litigation, but also potentially interferes with the Supreme Court's retention of jurisdiction to make modifications in the 1964 Decree in Arizona v. California. In a strategic retreat calculated solely to avoid dismissal of its Seventh Claim on these jurisdictional grounds, Navajo asserts repeatedly that the Seventh Claim and Relief Prayer "L" do not seek quantification of what it claims to be its water rights in the Colorado River. See Opp. 2, 38, 56, 84, 85, 87, 89, 90-92. As we now

explain, these assertions are directly at odds with ¶¶ 90 and 91, and Prayer for Relief "L" of the SAC and, therefore, must be rejected.

Paragraph 90 of the SAC alleges that 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 . . . ." Paragraph 91 of the complaint then plainly states:

> **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.**

(Emphasis added.) In its prayer for relief "L" (related to Paragraph 91), Navajo requests a Court order **"[e]njoining further breaches of the United States' trust responsibility**." (Emphasis added.)

Given this language, Navajo cannot plausibly deny that, construed as a whole, the Seventh Claim (¶91 and Prayer "L") seeks to enjoin the United States from further alleged "fail[ures] 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." This, of course, is simply another way of saying that, to ensure there are no further alleged breaches of trust, the Court must enjoin, *i.e.*, compel, Federal Defendants "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." SAC ¶ 91.[2] Because Navajo has not withdrawn its Seventh Claim, Paragraphs 90 and 91 and Relief Prayer "L" of the

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[2] All of the other claims for relief (One through Five) seek orders declaring unlawful and setting aside each of the respective, challenged management actions as illegal because Federal Defendants have not yet "accounted for" Navajo's potential Winters doctrine water rights in the Colorado River.

SAC remain as Navajo's breach of trust claim and prayed-for remedy, notwithstanding Navajo's tactical about-face and self-contradictory assertions in its opposition brief that it no longer seeks quantification of its potential water rights in this case. [3]

2. Navajo's Opposition Brief Raises, Post Hoc, Several New Breach Of Trust Claims And Liability Theories That Are Not Properly Before The Court, And That, In Any Event, Lack Merit

In its opposition brief, Navajo also raises entirely new claims that are not present in the SAC. Navajo, for the first time in its opposition memo, contends that the Indian Non-Intercourse Act, 25 U.S.C. § 177, and Article VII of the 1922 Compact, each imposes a specific, enforceable trust obligation on Federal Defendants to secure for Navajo a water supply from the Lower Colorado River. (Opp. at 70-71, 77-78.) Next, Navajo invents a claim that NEPA and the APA create independent trust obligations, and now contends that the "administrative conduct challenged in the Second Amended Complaint," by which Navajo means the Surplus and Shortage Guidelines, the interstate water banking regulations, inadvertent overrun/payback agreement, and other water storage programs challenged here, "also gives rise to an independent claim for breach of trust." (Opp. at 66.)

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[3] In its opposition brief at 76, Navajo candidly acknowledges that there are only

> three ways for the Navajo Nation to secure water from the mainstream of the Colorado River in the Lower Basin: 1) by *quantifying its water rights through litigation*; 2) through a settlement of its water rights claims; or 3) through a Section 5 contract with the United States.

(Emphasis added.) Because the Court lacks the power to direct (2) above (*i.e.*, order a settlement of Navajo's water rights claims), and because Navajo concedes that the Secretary does not presently have the authority to do (3) above (*i.e.*, enter into a Colorado River water delivery contract with Navajo in the absence of a settlement (see Opp. 75 n.19), that leaves a Court order requiring Federal Defendants to implement (1) above, quantifying what Navajo claims are its water rights through litigation (as the Seventh Claim and Prayer for Relief "L" demand), as the only avenue remaining in this litigation that could further Navajo's interest in securing water from the Colorado.

These claims are not properly before the Court because they do not appear anywhere in the SAC, thus should be simply disregarded. See Schneider v. Cal. Dep't. of Corr., 151 F.3d 1194, 1197 n. 1 (9th Cir.1998) ("In determining the propriety of a Rule 12(b)(6) dismissal, a court may not look beyond the complaint to a plaintiff's moving papers, such as a memorandum in opposition to a defendant's motion to dismiss"); Car Carriers, Inc. v. Ford Motor Co., 745 F.2d 1101, 1107 (7th Cir. 1984) ("it is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss," citing cases). In any event, should this Court elect to address them, we now explain why these new claims and liability theories are without substance.

1. Navajo's newly minted claim (Opp. 70) that the United States has breached a trust obligation imposed by the Non-Intercourse Act, 25 U.S.C. § 177, simply cannot withstand analysis. The Non-Intercourse Act, 25 U.S.C. § 177, provides in full:

> No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of $1,000. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

As demonstrated above, 25 U.S.C. § 177 Act restricts non-governmental conveyances of lands between Indians and non-Indians generally. It does not remotely suggest that the United States has a trust duty to secure water rights in the Colorado River on behalf of Navajo.[4] Accordingly, the Non-Intercourse Act cannot be construed to impose a trust

[4] The Non-Intercourse Act "is not applicable to the sovereign United States." FPC v. Tuscarora Indian Nation, 362 U.S. 99, 120 (1960). In addition, the Court of Federal

obligation on the United States "to determine the extent and quantity of the water rights of the Navajo Nation to the waters of the Colorado River." SAC, ¶ 91.

2. Navajo's separate contention (see Opp. at 64-65) that Article VII of the 1922 Compact imposes a trust obligation on Federal Defendants to secure for Navajo a water supply from the Lower Colorado River is destined to fail for the same reason – there is nothing in the language of Article VII that can be interpreted to impute specific enforceable trust duties to Federal Defendants.[5] Article VII is clear and unambiguous.[6] It states: "Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes." By its own terms, Article VII does not create any obligations on the part of the United States to Indian tribes. Equally significant, Article VII does not prohibit any actions on the part of the United States. Rather, Article VII is completely neutral in its effect, and would be relevant only to negate an argument (one that the United States has never sought to make) that the Compact somehow altered

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Claims considered and rejected an argument made by Navajo that the Non-Intercourse Act imposed an affirmative trust obligation on the United States to manage Navajo coal leases. See Navajo Nation v. United States, 68 Fed. Cl. 805, 811 (2005), rev'd on other grounds, 501 F.3d 1327 (Fed. Cir. 2007), rev'd, 556 U.S. 287, 302 (2009). Finally, in Shoshone Bannock Tribe v. Reno, 56 F.3d 1476 (D.C. Cir. 1995), the D.C. Circuit rejected an argument that the Non-Intercourse Act imposed a duty on the United States, against its will, to file water rights claims on behalf of an Indian Tribe. Id. at 1483 (distinguishing Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir.1975)).

[5] See United States v. Jicarilla Apache Nation, 131 S.Ct. 2313, 2323 (2011) (the "Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute . . . . When the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, neither the Government's control over Indian assets nor common-law trust principles matter;" quoting Navajo Nation v. United States, 556 U.S. 287, 288 (2009) ("Navajo II").

[6] Because Article VII of the 1922 Compact is unambiguous, there is no need for this Court to apply the interpretive maxim that ambiguities should be resolved in a manner that favors the Tribe, contrary to Navajo's suggestion. See Opp. 22 n.8.

the preexisting relationship between the United States and Indian Tribes. If there are any obligations owed by the United States to Navajo, they must be found in a source other than Article VII of the 1922 Compact. Accordingly, Navajo's new claim (Opp. 71) that Article VII of the Compact imposes a specific trust obligation on the United States to quantify and/or take other specific actions to secure what Navajo argues are its water rights in the Colorado River must fail.

3. The same destiny must befall Navajo's argument that the challenged management programs (i.e, the Secretary's Surplus and Shortage Guidelines, inadvertent overrun and payback agreement, storage agreement, and interstate water banking regulations) breach an asserted, independent, freestanding federal trust obligation to secure for Navajo a water supply from the Colorado River. In the first five claims of the SAC, Navajo asserts that the Federal Defendants violated NEPA and the APA in the manner in which the challenged management programs were implemented (i.e., because Federal Defendants promulgated the actions allegedly without accounting for, setting aside, and protecting Navajo's potential water rights in the Lower Colorado River). There is no breach of trust cause of action to be found anywhere in the first five claims of the SAC.

Yet Navajo's opposition (at 66-68) now asserts that the challenged management actions give rise to a separate and independent breach of trust claim (i.e., a "secondary" breach of trust claim -- not to be confused with its primary breach of trust claim (SAC, Seventh Claim)). Navajo's new contention -- that NEPA and the APA create an affirmative trust duty on the part of Federal Defendants to quantify and/or take other specific actions concerning Navajo's alleged Winters doctrine rights in the Colorado River -- should be rejected as a procedurally untimely, improper revision of its claims (the claim does not appear in the SAC). In any event, Navajo's claim that NEPA imposes an independent enforceable trust obligation on Federal Defendants affirmatively to take specific actions concerning its potential water rights is wholly without substance. It is well-established that NEPA does not impose substantive obligations on federal agencies,

see Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 351 (1989) ("[o]ther statutes may impose substantive environmental obligations on federal agencies, but NEPA merely prohibits uninformed-rather than unwise-agency action"); Earth Island Inst. v. U.S. Forest Serv., 697 F.3d 1010, 1019 (9th Cir. 2012) ("NEPA sets forth procedural (rather than substantive) requirements for agency decision-makers"). Likewise, Navajo's unpleaded contention that the APA itself creates a specific, enforceable trust obligation requiring Federal Defendants to quantify or take other actions concerning Navajo's potential water rights in the River before implementing the challenged management actions falls under the weight of existing cases establishing that the APA does not impose substantive obligations or prohibitions on federal agencies. See Oregon Natural Res. Council v. Thomas, 92 F.3d 792, 797 n.10 (9th Cir. 1996) (recognizing that there can be no "arbitrary and capricious" review under APA § 706(2)(A) independent of another statute); El Rescate Legal Servs., Inc. v. Exec. Office of Immigration Review, 959 F.2d 742, 753 (9th Cir. 1992) (APA " 5 U.S.C. § 702 does not create substantive rights. There is no right to sue for a violation of the APA in the absence of a relevant statute whose violation forms the legal basis for the complaint;" Utah Shared Access Alliance v. Wagner, 98 F.Supp.2d 1323, 1333 (D. Ut. 2000) (same); Southwest Center for Biological Diversity v. Klasse, Civ. No. S-97-1969, 1999 WL 34689321 at *13 (E.D.Cal. Apr. 1, 1999) (same).

As neither NEPA nor the APA impose specific, substantive trust obligations on the United States, the Federal Defendants' duties toward Navajo are discharged simply "by the government's compliance with general regulations and statutes not specifically aimed at protecting Indian tribes." Gros Ventre Tribe v. United States, 469 F.3d 801, 810 (9th Cir. 2006) (emphasis added). See also id. at 811 (Tribe's trust "claim is no different from that which might be brought under the generally applicable environmental laws available to any other affected landowner, subject to the same statutory limitations"); Okanogan Highlands Alliance v. Williams, 236 F.3d 468, 479 (9th Cir.2000); Morongo Band of Mission Indians v. F.A.A., 161 F.3d 569, 574 (9th Cir.1998). Accordingly,

Navajo's new and untimely claim that NEPA and the APA create independent, specific, enforceable trust obligations upon the Federal Defendants not to implement the challenged management actions, unless they first quantify or take other specific actions concerning Navajo's potential water rights in the Lower Colorado River, has no validity.

3. Navajo's Opposition Confirms That Its Seventh (Breach of Trust) Claim Is Jurisdictionally Defective

Aside from making the facially invalid assertion that its SAC does not seek quantification of its potential water rights, and presenting revised, expanded breach of trust claims that do not appear in the complaint, Navajo's opposition memorandum also seeks to overcome the jurisdictional defects and pleading deficiencies in its Seventh (breach of trust) Claim, that, as we pointed out in our Rule 12(b) motion, require its dismissal. As we now explain, Navajo's opposition brief only reinforces our Rule 12(b) arguments that its breach of trust claim is jurisdictionally defective and/or is one for which no judicial relief can be granted.

a. Navajo's Opposition Arguments Concerning Waiver of Sovereign Immunity For Its Seventh Claim Are Unsustainable

As we demonstrated in our motion to dismiss (Doc. 240-1 at 28-33), Navajo lacks the necessary waiver of sovereign immunity that would permit this Court to adjudicate its Seventh Claim for breach of trust. As we explained, the federal statutes upon which the SAC relies to confer jurisdiction and authorization to sue the United States, i.e., 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1362 (Indian claim jurisdiction), and 28 U.S.C. §§ 2201-2202 (declaratory judgment authority), do not waive the United States' sovereign immunity. We also addressed why the judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, do not provide a waiver of sovereign immunity, *i.e.*, because there is no "final agency action" challenged in the Seventh Claim (Navajo's breach of trust claim only challenges inaction, a failure to quantify water rights), and there are no allegations of agency inaction with respect to a

non-discretionary duty that Federal Defendants are statutorily mandated to perform. See 5 U.S.C. § 706(1).

Navajo's opposition brief does not take issue with the propositions that 28 U.S.C. § 1331, 28 U.S.C. § 1362, and 28 U.S.C. §§ 2201-2202, do not waive sovereign immunity, and thus concedes the points. Navajo likewise does not dispute that its Seventh Claim does not challenge agency action, much less final agency action. See Opp. 81. Likewise, Navajo does not counter our argument that the Seventh Claim is directed at alleged inaction (failure to quantify potential water rights) that Federal Defendants are under no statutorily mandated duty to perform. 5 U.S.C. § 706(1). See Opp. 67, 82.

Navajo nonetheless purports to rely on Presbyterian Church v. United States, 870 F.2d 518, 524 (9th Cir. 1989) for the proposition that the APA waives sovereign immunity for its Seventh Claim, even though it does not challenge administrative action, or seek to remedy agency inaction that is statutorily mandated. See Opp. 81-84. Navajo's reliance on Presbyterian Church is, however, misplaced. Presbyterian Church ruled that a religious organization could rely on the APA's waiver to bring claims of constitutional violations (First Amendment) against the I.R.S. Nine years after Presbyterian Church issued, the Ninth Circuit decided Gallo Cattle Co. v. U.S. Dept. of Agric., 159 F.3d 1194 (9th Cir. 1998), which ruled that the APA does not waive sovereign immunity for a non-constitutional claim against the agency for failing to grant relief to a milk producer from an obligation to pay assessments to a dairy promotion and research organization, because the claim did not challenge final agency action. Most recently, in Robinson v. Salazar, 885 F.Supp.2d 1002, 1027-28 (E.D.Cal. 2012),[7] the court reconciled Presbyterian Church with Gallo Cattle, by recognizing that the APA waiver of sovereign immunity in Presbyterian Church was limited to constitutional

[7] See also Robinson v. Salazar, 838 F.Supp.2d 1006, 1041-42 (E.D.Cal. 2012) (discussing vacated Ninth Circuit opinion addressing Presbyterian Church and Gallo Cattle).

claims brought against the federal government. Robinson reaffirmed that, under Gallo Cattle, the APA does not waive sovereign immunity for non-constitutional challenges to discretionary administrative inaction.

Consistent with Robinson, this Court should conclude that there is no waiver of sovereign immunity to be found in the APA for Navajo's Seventh Claim of breach of trust. The Seventh Claim does not raise any constitutional claim, and does not challenge agency action within the meaning of 5 U.S.C. 702 (much less final agency action within the meaning of 5 U.S.C. § 704). Likewise, Navajo admits that it does not challenge an agency's failure to take action that the agency is statutorily mandated to perform within the meaning of 5 U.S.C. § 706(1). See Opp. 67 (3). For these reasons, Navajo's Seventh Claim should be dismissed for lack of a waiver of sovereign immunity.

b. Navajo's Opposition Arguments That The Seventh Claim Does Not Run Afoul of Separation of Powers Principles, and Is Not Defective For Lack of Ripeness, Are Equally Infirm

In our Rule 12(b) motion, we argued that Navajo's Seventh (breach of trust) Claim suffers from other jurisdictional defects, separate and apart from the absence of a waiver of sovereign immunity. Navajo's breach of trust claim would intrude upon the unreviewable discretion of the Attorney General, and is jurisdictionally unripe.

1. Separation of Powers - Committed To Attorney General Unreviewable Discretion

At Doc. 240-1 at 37-38, we demonstrated that Navajo's Seventh Claim represents an effort by Navajo judicially to compel the United States to quantify its potential water rights, and thus to coerce the United States into commencing water rights litigation on its behalf. As such, we argued, the Seventh Claim is not actionable because, under Shoshone Bannock Tribe v. Reno, 56 F.3d 1480 (D.C. Cir. 1995), a decision by the Attorney General whether to commence litigation to quantify and adjudicate an Indian Tribe's claim for water rights is committed to his discretion by law, and, under separation of powers principles, is not subject to judicial oversight and control.

Navajo's response is simply to ignore the Shoshone Bannock Tribes v. Reno decision. Similarly, Navajo does not take issue with the principle that a decision by the United States to commence litigation to quantify water rights of Indian Tribes is, under separation of powers principles, committed to the sole, non-reviewable discretion of the Attorney General of the United States. Instead, Navajo seeks to evade these principles by repeated assertions that "the Navajo Nation has not brought suit to compel the United States to bring a quantification action . . . but instead seeks relief from the harm occasioned by the Federal Defendants failure to take stock of the Navajo Nation's water rights in light of their failure to secure them." Opp. 67-68. As we have previously discussed, see pp. 2-3 supra, that assertion is untenable.[8] Navajo freely concedes that if there is (as here) no settlement or contract, water rights are quantified through litigation. Opp. at 76; see note 3, p.4, supra. Navajo has not voluntarily dismissed or amended its Seventh Claim, and unless and until it does so, it should not be heard to state that it is not seeking a remedy requiring the United States to quantify its potential water rights through litigation. Accordingly, the Seventh Claim must be dismissed on separation of power grounds, and because the decision of the United States whether to commence litigation to quantify water rights is committed by law to the Attorney General's unreviewable discretion.[9]

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[8] This argument is directly contradicted by Paragraphs 90 and 91, and Prayer for Relief "L," of the Second Amended Complaint, which state collectively that the Tribe requires water from the Colorado River (¶90), that the Federal Defendants have breached a trust obligation by failing to quantify those alleged water rights (¶ 91), and request that the Federal Defendants be enjoined from further breaches of trust (failures to quantify its alleged water rights) (Prayer L).

[9] At Opp. 90, Navajo strategically seeks to distance itself from the main thrust of Relief Prayer L, which requests an injunction of Federal Defendants against further breaches of an alleged trust obligation to quantify its water rights, by pointing out that Prayer L also separately requests that the Court, in the alternative, "provide such other relief as the Court deems appropriate." Navajo's reliance on that alternative language is unavailing because that alternative remedy is meaningless boiler-plate that falls short of

2. Ripeness Is Lacking

In our motion to dismiss, we demonstrated that Navajo's Seventh Claim (breach of trust), seeking compelled quantification of its water rights, is unripe for a host of reasons, including: 1) Navajo currently does not have the infrastructure (intake facilities, pumping stations, pipeline and distribution works) to deliver Colorado River water to its tribal communities, and thus is not presently capable of putting the water to use; 2) the United States has acted on behalf of Navajo in obtaining water supplies from the San Juan River, and the United States is currently a party in litigation, on behalf of Navajo as trustee, to obtain water supplies from the Little Colorado River in the ongoing LCR Adjudication in Arizona state court; 3) Congress has set aside Colorado River water for a future, potential Navajo settlement in Title I of the Arizona Water Settlements Act; and 4) regardless of implementation of the challenged management actions, Navajo is not facing loss of any potential Winters doctrine water rights in the Colorado because, under the federal reserved rights doctrine, those rights, if they exist, cannot be forfeited or lost through present non-use. See Doc. No. 240-1 at 41-43.

Navajo takes issue with our position that the Seventh Claim is not ripe for adjudication because, according to the Tribe, Navajo Nation does not seek quantification of its potential Winters doctrine water rights in the Colorado River (Opp. 86), but only seeks to enjoin Federal Defendants from "going about the business of managing the Colorado River" while failing "to consider Navajo's need for water from the Colorado River." As we have already explained, however, Paragraphs 90 and 91, and Prayer L, demand quantification of Navajo's potential Winters doctrine water rights in the Colorado River.[10]

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the requirement in Fed. R. Civ. P. 8(a)(3) that a "pleading that states a claim for relief must contain . . . a demand for the relief sought . . . ," as it lacks the specificity to constitute "a demand for the relief sought."

[10] Navajo argues that the ripeness cases cited by the United States are distinguishable from its Seventh Claim because those cases arose under the APA (by which we

Turning to our other ripeness arguments, Navajo does not dispute that it presently lacks the logistical infrastructure to withdraw, transport, and deliver Colorado River water to its communities. See Opp. 7-8. It nonetheless takes issue with our argument that the Seventh Claim lacks ripeness because Navajo's need for water from the Lower Colorado River is uncertain and speculative, given the other sources of water supply that the United States is still securing on behalf of Navajo. Thus, at Opp. 10-11, 29, Navajo cites a regional water-needs analysis, commonly referred to as the "Kyl Study" (see Nav. Exh. 5; Doc. 282-6), for the asserted proposition that water supplies for Navajo, secured by the United States, from the San Juan River settlement, from the LCR Adjudication, and through a potential future water settlement expressly reserved for Navajo in Title I of the AWSA, will not be sufficient by the year 2050 to satisfy the water needs to make

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understand Navajo to mean they involved an arbitrary and capricious or a statutory authority challenge to federal agency action), whereas Navajo's breach of trust claim does not, but is instead premised solely on federal question jurisdiction. Navajo is simply wrong in its assertion that the claims deemed unripe in the cases cited by the United States all arose as APA-authorized challenges to federal agency action. The constitutional, just compensation claim deemed unripe in Richardson v. City and County of Honolulu, 124 F.3d 1150 (9th Cir. 1997) was not a challenge to agency action or inaction. Neither was the claim about tribal water rights that was declared unripe in Tarrant Reg'l Water Dist. v. Herrmann, 2010 WL 2817220 (W.D. Okla. July, 16, 2010). See 2009 WL 5865236 (W.D.Okla.) (Tarrant Amended Complaint). More significantly, Navajo's attempt to differentiate any of the other ripeness cases cited in our motion to dismiss on the ground that judicial review was authorized by the APA is a non-sequitur, because subject matter jurisdiction in all such cases arose under 28 U.S.C. § 1331, as does Navajo's Seventh Claim.

Surprisingly, Navajo also asserts that, unlike the claims deemed unripe in the cases cited by Federal Defendants, Navajo's Seventh Claim challenges final agency action. That assertion contradicts Navajo's argument, discussed immediately above, that the Seventh Claim is not an APA-related cause of action. In any event, Navajo is simply wrong that its Seventh Claim challenges final agency action – it challenges inaction, a failure to quantify its alleged water rights. This is explained more fully at Doc. 240-1 at 31-32.

Navajo's reservation a livable homeland. Although the Kyl Study was commissioned by the Bureau of Reclamation, it comes with an explicit disclaimer that

> [t]he water demand assumptions and resulting future conditions described in this Report of Findings reflect the position of the study's partners and stakeholder groups. The use of these assumptions and resulting future conditions in the Report of Findings does not reflect any agreement by the Bureau of Reclamation and has no bearing on the position the Department of the Interior may take with respect to the Indian water rights settlement negotiations or litigation.

Doc. No. 282-6 at 4.[11]

In any event, the focus of the Kyl Study is on the projected needs of the Colorado River area in proximity to the western side of the Navajo Reservation in the year 2050, thirty-six years in the future. Since Navajo does not yet know how much water it will be awarded in the LCR Adjudication, and may yet receive Colorado River water statutorily set aside in the AWSA, and may in the future claim water for the western side of its reservation from the Upper Basin of the Colorado River (see SAC ¶ 1; Opp. 12 n.4), it is premature for Navajo to file a lawsuit seeking to compel the United States to quantify the amount of water that Navajo asserts it needs from the Lower Basin Colorado River, even if it were assumed the Kyl Study is reliable and authoritative. Accordingly, the Kyl Study does not rebut our demonstration that Navajo's Seventh Claim is unripe.

4. Navajo's Opposition Does Not Undermine Our Showing That The Seventh Claim Does Not State A Claim For Breach Of Trust Upon Which Relief Can Be Granted

In our Rule 12(b) motion, we further argued that, separate and apart from the jurisdictional defects addressed above, Navajo's Seventh Claim must be dismissed for

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[11] Navajo does not allege or assert that the Bureau of Reclamation has subsequently adopted or relied on the Kyl Study as part of any water needs planning or other programmatic responsibility, and it remains an open question whether the Study will ever be deemed reliable and authoritative in the future.

failure to state a claim upon which relief can be granted. Fed. R. Civ. (b)(6). As we explained, although the SAC cites the 1868 Treaty, related statutes, and executive orders (see SAC ¶ 12) as the source of Federal Defendants' alleged trust duty to quantify and/or take other specific actions concerning Navajo's potential water rights to the Colorado River, those legal prescriptions do not impose any such fiduciary trust duty on the United States concerning Navajo Nation's potential water rights from the mainstem of the Colorado River. Because Navajo failed to plead or otherwise identify any substantive law imposing a specific, enforceable fiduciary obligation on the United States to quantify and/or undertake other specific actions relating to what Navajo asserts to be its water rights in the mainstem lower Colorado River, we contended that its Seventh (breach of trust) Claim is not actionable, regardless of the level of authority and operational control the Federal Defendants may have over the Colorado River. Doc. 240-1 at 33-37.

At Opp. 69-72, Navajo reiterates the allegations of SAC ¶ 12, *i.e.*, that the 1868 Treaty, related statutes, and executive orders, creating and expanding its reservation boundaries are what Navajo asserts to be the sources of an alleged enforceable trust duty requiring Federal Defendants to quantify its potential water rights claim to the Colorado River. Navajo asserts that, based on the legal prescripts set forth in SAC ¶ 12, a freestanding federal "common law trust" obligation has been created. Opp. 70-71. According to Navajo, all the elements of a federal "common law 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 . . . constitute the trust corpus." Opp. 72. Navajo goes on to argue that the Federal Defendants have pervasive control and comprehensive management authority over the waters of the Colorado River, as well as over the litigation of the quantification of Navajo's potential water rights, and that level of "control," in and of itself and without a specific treaty or statutory basis, gives rise to an enforceable trust obligation in the United States to take affirmative action to preserve and protect Navajo's potential water rights in the River. Opp. 74-80. As

explained below, these arguments are insufficient to prevent dismissal of Navajo's Seventh Claim.

a. The United States Does Not Have An Enforceable Trust Obligation To Quantify Navajo's Potential Water Rights In the Colorado River

Although there is no dispute that the United States acts as a "trustee" in its relationship with Indian Tribes, that status is not determinative of whether the United States owes any specific trust obligation to a particular Tribe on any particular matter. As the Court of Federal Claims confirmed just two months ago in dismissing a breach of trust claim filed by the Hopi Tribe,

> [I]t is the precise trust duty, rather than the United States' status as trustee, that determines the substantive right. In Mitchell I, 445 U.S. 535 (1980), the court held that the existence of a "trust relationship" between the federal government and an Indian tribe is not enough to establish any particular trust duty. Id. at 549. Examining a statute closely, the court held that, despite the statute's reference to land being held 'in trust,' the federal government's 'fiduciary obligations ... as trustee are very narrow' and did not encompass all the duties of a private trustee with respect to trust property. Id. The Supreme Court has never deviated from this line of reasoning and has consistently defined trust duties by closely examining the statutes that impose them. See Mitchell II, 463 U.S. at 224 (holding that statutes and regulations 'define the contours of the United States' fiduciary responsibilities'); United States v. Navajo Nation (Navajo I), 537 U.S. 488, 506 (2003) (holding that, in determining the scope of trust responsibilities, 'the analysis must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions'); Navajo II, 556 U.S. at 293–94, 301, (holding that the scope of trust duties is defined by applicable statutes and regulations); Jicarilla, 131 S.Ct. at 2323 (holding that 'Congress may style its relations with the Indians a 'trust' without assuming all the fiduciary duties of a private trustee, creating a trust relationship that is 'limited' or 'bare' compare to a trust relationship between private parties at common law').

Hopi Tribe v. United States, 113 Fed.Cl. 43, 47-48 (2013) (Emphasis added.) The courts have made it abundantly clear that the analysis of claims that the United States has a particularized trust obligation to Indian Tribes enforceable in federal court must "train on

specific rights-creating or duty-imposing statutory or regulatory prescriptions." Jicarilla, 131 S.Ct. 2313, 2323 (2011); Marceau v. Blackfeet Housing Auth. 540 F.3d 916, 923-24, 927-28 (9th Cir. 2008). [12] In light of this solid line of precedent, this Court should not, as Navajo suggests, focus on the United States' trustee status or on Navajo's trust beneficiary status, but rather on the treaty provisions, statutes, and executive orders identified by Navajo in the SAC to determine whether they create specific "rights," and/or impose specific "duties" on the United States to quantify and/or take certain other actions concerning Navajo's potential water rights in the Lower Colorado River. As explained below, they clearly do not.

Paragraph 12 of Navajo's SAC lists the sources of law that Navajo relies on to support its allegations that the United States has an enforceable trust obligation to quantify what Navajo claims to be its Colorado River water rights. They are: 1) the Treaty of June 1, 1868, 15 Stat. 667 (U.S. Exhibit 19); 2) Executive Order of October 29, 1878 (U.S. Exhibit 20 at 4-5); 3) Executive Order of January 6, 1880 (U.S. Exhibit 20 at 5); 4) Executive Order of December 16, 1882 (U.S. Exhibit 20 at 4); 5) Executive Order of May 17, 1884 (U.S. Exhibit 20 at 5); 6) Executive Order of January 8, 1900 (U.S. Exhibit 20 at 6); 7) Executive Order of November 14, 1901 (U.S. Exhibit No. 20 at 6); 8) Executive Order of November 9, 1907 (U.S. Exhibit 20 at 10); 9) Executive Order No. 2612 of May 7, 1917 (U.S. Exhibit 20 at 11); 10) Executive Order of January 19, 1918 (U.S. Exhibit 20 at 12); 11) Act of May 23, 1930, ch. 317, 46 Stat. 378, 379 (U.S. Exhibit

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[12] At Opp. 71 n. 17, Navajo seeks to distinguish cases recognizing that the enforceable trust duty analysis must "train on specific rights-creating or duty-imposing statutory or regulatory prescriptions," because they assertedly arose in the context of the Indian Tucker Act, and sought money damages for breach of trust. That attempted distinction does not hold up, however, because the Ninth Circuit has applied the same analysis to tribal breach of trust allegations in cases, like this one, where the Plaintiff did not seek money damages, and did not rely on the Indian Tucker Act, but sought only declaratory and injunctive relief under the APA and common law trust principles. See e.g., Marceau v. Blackfeet Housing Auth., 540 F.3d 916, 923 (9th Cir. 2008); see also Gros Ventre Tribe v. United States, 469 F.3d 801, 810-811 (9th Cir.2006).

21); 12) Act of Feb. 21, 1931, ch. 269, 46 Stat. 1204 (U.S. Exhibit 22); 13) Act of June 14, 1934, ch. 521, 48 Stat. 960-62 (U.S. Exhibit 23).

Navajo's opposition does not discuss the contents or provisions of any of the foregoing statutes, executive orders, and Treaty -- and for good reason. None of them compels the United States to bring litigation or take any specific action for the purpose of allocating Colorado River water to Navajo; none requires the United States to manage operations of the River for Navajo's benefit; and none compels the United States to quantify and/or undertake other specific action on behalf of Navajo concerning its potential water rights. The statutes, executive orders, and Treaty referenced in SAC ¶ 12 are completely silent about Navajo's relationship to the Colorado River. Because there are no "duty-imposing statutory or regulatory prescriptions" in U.S. Exhibits 19 through 31, requiring the United States to administer the Colorado River for Navajo's benefit, the United States has no specific trust obligation to Navajo to quantify potential water rights in the Colorado River or otherwise to undertake any particular actions with respect to such potential rights. The Seventh Claim should be dismissed for this reason alone.[13]

b. Navajo's Opposition Argument That Colorado River Water Is A "Common Law Trust Corpus" In Which Navajo Has An "Unquantified But Vested" Right As Trust Beneficiary Fares No Better

Navajo seeks to overcome its pleading deficiencies by taking a different tack -- arguing that it has "vested but unquantified" rights in Colorado River water, see Opp. 66, 75, 80, that must be protected under a nonstatutory "common law" trust obligation the

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[13] At pp. 4-9, supra, we addressed why Navajo's new claims (set forth for the first time in its opposition brief), i.e., that Article VII of the 1922 Compact, Article V of the Arizona Delivery Contract, the Indian Non-Intercourse Act, NEPA, and the APA establish enforceable trust duties on the Federal Defendants, do not state a claim upon which relief can be granted. We explained in detail why those statutes and legal prescriptions do not impose specific trust obligations on Federal Defendants. We incorporate that discussion by reference here.

United States allegedly owes Navajo. See Opp. 72-73. That argument is wrong because even if Navajo has a vested but unquantified right to Colorado River water, which is not certain, the potential existence of such a right still does not impose any specific duty (where none is outlined in a treaty, statute, or regulation) requiring the United States to take specific actions with respect to Navajo's potential water rights.

Navajo cites cases such as Pyramid Lake for the proposition that courts can intervene to protect tribal resources and compel the type of relief that Navajo seeks here. See Opp. at 72-74 (citing Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 256 (D.D.C. 1972); Joint Bd. of Control v. United States, 832 F.2d 1127, 1130-31 (9th Cir. 1987); Kittitas Reclamation Dist. v. Sunnyside Valley Irrigation Dist., 763 F.2d 1032 (9th Cir. 1985); Parravano v. Babbitt, 70 F.3d 539, 547 (9th Cir. 1995)); Nw Sea Farms, Inc. v. U.S. Army Corps of Eng'rs, 931 F. Supp. 1515, 1520 (W. D. Wash. 1996)). Those cases are distinguishable, however, because the Tribes in those cases had already been putting the relevant resources to use, and judicial intervention was necessary to protect external actual or threatened interruptions to those ongoing uses. Moreover, those cases involved instances in which the respective Tribe's ability to exercise reserved fishing rights were put at immediate and direct risk by dewatering streams or lakes (Kittitas, Joint Board, Pyramid Lake), by overfishing (Parravano), or otherwise infringing on treaty-reserved rights (Nw Sea Farms). [14]

In contrast, at this juncture, Navajo is not currently using Colorado River water nor does it have infrastructure that could allow such use. Furthermore, Navajo's potential water rights in the Lower Colorado River have not yet been confirmed or precisely

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[14] Navajo also seeks support for its argument from Fort Mojave Tribe v. United States, 23 Cl.Ct. 417 (1991). See Opp. at 72. Yet the appellate court in Shoshone Bannock Tribe v. Reno specifically rejected the Shoshone-Bannock Tribe's claim that the Fort Mojave decision supports a conclusion that the United States owes a trust duty to litigate water rights claims as demanded by a Tribe, or stands for the proposition that a Court may compel such action. 56 F.3d 1476 (D.C. Cir. 1995); see also Fed. Def'ts Rule 12(b) Mem.,Doc. 240-1 at 38-39.

delineated. Even if such rights exist, which is unresolved, Navajo cannot show that Federal Defendants or anyone else have put those rights at risk. As explained previously, Winters Doctrine water rights cannot be lost via non-use or otherwise, and the relative seniority of those rights are likewise unaffected by non-use. See Doc. 240-1 at 5. Simply put, Navajo has failed to plead or otherwise identify any positive law (treaty, statute, executive order, or otherwise) that imposes a specific fiduciary duty on the United States to take certain actions regarding its potential water rights on the mainstem Colorado River, something it must do to assert a legally cognizable claim for breach of a fiduciary duty. See United States v. Navajo Nation, 556 U.S. 287, 302 (2009) (Navajo Nation II); United States v. Navajo Nation, 537 U.S. 488, 506 (2003); United States v. Mitchell, 445 U.S. 535, 545 (1980); see also Jicarilla, 131 S. Ct. 2313, 2325 (2011). Accordingly, the cases cited by Navajo do not support its assertions (at Opp. 66, 75) that it has water rights in the Lower Colorado River that the Federal Defendants or this Court must take specific actions to protect.

Furthermore, Navajo's suggestion (Opp. 72-73) that this Court may invoke "common law trust" law principles to impose on the Federal Defendants an enforceable obligation to quantify and/or take other specific actions concerning Navajo's potential water rights in the Colorado River must be rejected as contrary to existing case law. Most recently in Jicarilla, 131 S.Ct. 2313 (2011), the Supreme Court made it clear that "[t]he Government assumes Indian trust responsibilities only to the extent it expressly accepts those responsibilities by statute," and also that "[w]hen the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, neither the Government's control over Indian assets nor common-law trust principles matter." Id. at 2325 (emphasis added) (quoting Navajo II , 556 U.S. at 302).[15]

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[15] Common law principles may not be the sole basis for creating an enforceable trust obligation. See Gros Ventre Tribe v. United States, 469 F.3d at 810 ("the Tribes cannot allege a common law cause of action for breach of trust that is wholly separate from any statutorily granted right"); Hopi Tribe v. United States, 113 Fed.Cl. at 48 ("common law

c. Navajo's Arguments That Federal Defendant "Control" The Operations of the Colorado River, And "Control" The Litigation of Navajo's Potential Claim Of Water Rights, Do Not Establish An Enforceable Trust Obligation In Federal Defendants To Quantify Navajo's Alleged Water Rights

At Opp. 74-80, Navajo devotes extensive discussion to what it characterizes as the "Secretary's comprehensive control over the entire resource combined with the Federal Defendants' control over every avenue available to the Navajo Nation to finally secure its rights to some part of that resource – including the ability to litigate in Navajo's absence and to dictate the terms upon which those rights may be settled." Opp. 75. This plenary control, Navajo argues, "gives rise to a fiduciary duty to preserve and protect" the Navajo's potential water rights in the Colorado River. Id. The short answer to this is that enforceable trust obligations in the United States are not established by the nature and extent of the United States' "control" over resources to which Indian Tribes may lay claim. See Navajo Nation II, 556 U.S. at 301 ("Federal Government's liability cannot be premised on control alone"); Jicarilla, 131 S.Ct. at 2323 ("[w]hen the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated," control does not matter).

Even if it were somehow relevant to the Court's breach of trust analysis, Navajo makes several assertions about the level of United States' control over Navajo's potential water rights in the Colorado River that are incorrect. First of all, contrary to Navajo's assertion (Opp. 75), the United States does not dictate the terms on which Navajo's water rights claims can be settled. Navajo's rejection of the settlement of LCR water rights proposed in legislation last year by former Senator Kyl (which led to the reactivation of this case) is ample proof of that. Second, Navajo overstates the level of federal government control over Navajo's access to federal courts to obtain judicial remedies in

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trust principles applied in [United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003)] only because the statute in question used trust language in combination with conferring specific authority on the government").

its own right. Pursuant to 28 U.S.C. § 1362, Indian Tribes have the authority to institute litigation in federal court independent of the United States.[16] See Arizona v. San Carlos Apache Tribe, 463 U.S. 545, 560 n.10 (1983).[17] Finally, as even Navajo acknowledges (Opp. 75 n.19), Federal Defendants do not have the authority to enter a contract with Navajo for CAP water (and thus do not have "control" over that water) at least until the year 2030, unless it is pursuant to a settlement authorized by Title I of the Arizona Water Settlements Act. See Doc. 240-1 at 33 n.21.

B. THE FIRST - FIFTH CLAIMS CHALLENGING THE COLORADO RIVER MANAGEMENT ACTIONS MUST BE DISMISSED

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[16] At Opp. 77, Navajo theorizes that the Eleventh Amendment would pose a "significant hurdle" to a federal quantification suit commenced by Navajo against the State of Arizona, or its water department. Such a hurdle would not likely exist however, if, as Navajo also maintains (see Opp. 77 n. 21), the State of Arizona does not presently provide a forum in which to adjudicate water rights that fall within Arizona's 2.8 mafy share of the BCPA and Arizona v. California Decree apportionments. In certain contexts, federal courts allow declaratory and injunctive suits to proceed against state officials (such as an executive official of the Arizona Department of Water Resources) under the Ex Parte Young doctrine, 209 U.S. 123 (1908), where the Eleventh Amendment would otherwise bar the action. One of those contexts presents itself when the State does not provide any forum in which to adjudicate the federal rights at issue. See Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 270 (1997) (acknowledging that the Ex Parte Young exception to 11th Amendment immunity still applies where "there is no state forum available to vindicate federal interests"). Thus, the Eleventh Amendment would not likely bar a federal action if the State does not provide a forum in which to adjudicate Navajo's claim.

[17] If Arizona were to provide a state court forum for Navajo to pursue its claim, then there would, of course, be no issue of Eleventh Amendment immunity, and Navajo also would have authority to file claims, independent of the United States, in any such state court proceeding. See Shoshone-Bannock Tribes v. Reno, 56 F.3d at 1483 ("United States does not hold any recognized off-reservation water right in trust for the Tribes—it denies that one exists. Whether the United States is correct may ultimately be determined by the Idaho court if the Tribes pursue their claim on their own behalf, as they have every right to do" (emphasis added)).

1. Navajo's Opposition Does Not Establish Standing To Challenge The Secretary's Management Actions

The gravamen of Navajo's NEPA and APA challenges to the Secretary's management actions is that, although each of the programs are designed to foster greater annual predictability of Colorado River water supply, and promote greater efficiency and conservation among existing users of Colorado River water, each of the programs violates NEPA and the APA because, in adopting them, the Interior Department did not address whether it holds reserved water rights from the Colorado River for the benefit of the Navajo Nation, did not consider whether the Nation needs water from the mainstream of the Colorado River to make its Reservation a permanent homeland, and did not "advance[] a claim for," or otherwise seek "to secure any such water, on behalf of the Navajo Nation." Opp. at 35. These claims do not establish Article III standing or APA prudential standing to bring these NEPA and APA claims.

a. Article III Standing

In our motion to dismiss, we provided a host of reasons why Navajo lacks Article III standing to mount these NEPA and APA challenges to the Secretary's management actions. First, the existence and quantity of Navajo's water rights are uncertain, unclear and speculative at this time. Doc. 240-1 at 46. Second, there are no allegations in the SAC that any of the challenged management actions purport to vitiate tribal water rights, to affect the quantification of such rights, or to subordinate the priority of water rights for Tribes who may have rights in the Colorado River that have not yet been judicially confirmed. Id. Third, assuming that Navajo does have Winters doctrine rights to Colorado River water, neither its priority nor the quantification of those rights can be affected by the management actions, because Navajo would enjoy a preferred priority that is unaffected by non-use, and the quantification of its right would be based on criteria wholly unrelated to the management actions, and unaffected by the timing of any future adjudication of its potential claim. Doc. 240-1 at 47.

In its opposition, Navajo does not dispute any of the foregoing arguments against its standing. It thus does not argue that the challenged management actions have caused Navajo any direct injury. Navajo nonetheless argues that it has been harmed by the challenged management actions because they are likely to generate "a politically formidable reliance by other waters users . . . that ultimately will interfere with Federal Defendants' ability to secure water for use on the Navajo Indian Reservation." Opp. at 39. This "indirect injury" argument does not pass the Article III test for standing. "[U]nadorned speculation will not suffice to invoke the federal judicial power." Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 44 (1976). As the Supreme Court explained in Simon,

> [I]ndirectness of injury, while not necessarily fatal to standing, may make it substantially more difficult to meet the minimum requirement of Art. III: To establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm. Respondents have failed to carry this burden. Speculative inferences are necessary to connect their injury to the challenged actions of petitioners.

Id. at 44-45 (quoting Warth v. Seldin, 422 U.S. 490, 504 (1975). As the Simon Court succinctly put it: "Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party . . . ." 426 U.S. at 41-42.

Like the Simon plaintiffs' concerns about potential actions of third parties, Navajo's claims about what politically formidable others may do in response to a more predictable water supply are too speculative and attenuated to satisfy Article III standing requirements. See Warth v. Seldin, 422 U.S. at 504; Allen v. Wright, 468 U.S. 737, 758 (1984); Simon, 426 U.S. at 45-46. In the first instance, Navajo does not explain how "politically formidable reliance" by third parties on water supply made more predictable by the challenged management can "interfere with Federal Defendants' ability to secure water for use on the Navajo Indian Reservation." Opp. at 39. Navajo's potential Winters doctrine rights to the Colorado River are legal in nature, and if adjudicated through

independent judicial procedures, cannot be affected by political pressures from junior priority users. Second, Navajo's concerns that "politically formidable reliance" interests may develop in the wake of the challenged management action appears to assume that those reliance interests did not already exist before the management programs were adopted, and there is no factual basis for that assumption. Finally, it is purely speculative for Navajo to suggest that, if and when its Winters doctrine rights ever become judicially confirmed, those asserted "politically formidable reliance" interests would be any greater with the challenged management actions in place, than without them. Simply stated, Navajo has not supplied any logical nexus between the predictability of water supply caused by the management actions and the alleged repercussions of "politically formidable reliance" interests on its Winters doctrine claim. [18]

b. Prudential Standing

At Opp. 46-48, 53-55, Navajo argues that its NEPA challenges to the Secretary's management actions satisfy APA prudential standing requirements because Navajo's potential Colorado River water rights fall within the zone of interests protected by NEPA. Navajo calls attention to the Bureau of Reclamation's NEPA Handbook and

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[18] At Opp. 29-30, Navajo also purports to analogize its present plight to that of the State of Arizona in Arizona v. California when, after Arizona won its case against California over Arizona's disputed 2.8 mafy share of mainstem Colorado River water, Arizona was allegedly forced to bow to political pressures exerted by California legislators and accept a priority to that water that was subordinated to California's 4.4 mafy share (during times of shortage) in exchange for California's support for federal funding for construction of the CAP. Perhaps Navajo is implying that its alleged Winters doctrine rights, if ever judicially confirmed, would face the same kind of pressure from similar "politically formidable reliance" interests.

Such concerns are too remote, hypothetical, illogical and speculative to meet Article III standing requirements. Navajo does not explain how or why the magnitude of such opposition would vary depending on the existence or nonexistence of challenged management actions. In other words, there is no logical reason to assume that such forecasted political opposition would be any higher with the challenged management action still in force, than if the management programs were enjoined.

Reclamation's NEPA policies specifying that Reclamation must, in its NEPA analyses, evaluate any "social, cultural, and economic" impacts on Indian Trust Assets ("ITAs"), and asserts that its potential Winters doctrine claim to Colorado River water qualifies as an ITA. Opp. 47, 54-55. To buttress that argument, Navajo points to a statement in the Shortage Guidelines FEIS in which Reclamation observed:

> The existence of a federally reserved right for the Navajo Nation to mainstream Colorado River water has not been judicially determined at this time. Unquantified water rights of the Navajo Nation are considered as ITA.

(Opp. 47, citing Nav. Exh. 14 at 3-96, Doc. No. 283-5; emphasis added.) Contrary to Navajo's argument, Reclamation has not, by making the above-referenced statement, declared Navajo's potential rights to Colorado River water to be an ITA. As explained in greater detail in our Rule 12(b) motion (Doc. 240-1 at 9-10), the United States filed water rights claims on behalf of Navajo in Arizona v. California, but determined that the only claims for Navajo's Reservation that should be presented were located in the LCR basin. (U.S Exh. 8, Prop. F.F. 4.2.10; Doc. No. 240-9). Navajo fully supported that approach at that time. See Doc. 257-1 at internal 23-24 (PDF pages: 27-28 of 33) (Appendix A of Corrected U.S. Exh. 9). Although Navajo later changed its position, and sought to intervene to file claims to the mainstem, the United States determined that it would be inappropriate to do so unless and until "additional evidence" came to light suggesting there was a need for water on Navajo's reservation that should be satisfied from the mainstem rather than the LCR. See Doc. No. 257-1 at internal p. 15 n.9 (PDF page 19 of 33 n.9)[19] Because LCR tributary claims were later excluded from adjudication in

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[19] In November 1961, the United States filed an opposition to a post-hearing motion by Navajo to intervene, stating

> If, as suggested in the letter of February 2, 1961, from the General Counsel for the Navajo Tribe to the Attorney General, there is possible basis for a claim of right to use water from the mainstream on the Navajo Reservation,

Arizona v. California, no water right was established for Navajo at the time by the Arizona v. California opinion and ensuing Decree. The LCR General Stream Adjudication is currently underway in the Arizona District Court. Given this history, the above-quoted statement in the Shortage Guidelines final EIS that "[u]nquantified water rights of the Navajo Nation are considered as ITA" must be regarded, not as declaration that Colorado River water is a Navajo ITA, but rather, as a mere placeholder preserving for the United States the leeway to file a claim to the mainstem, and to treat such claim as an ITA, if and when the United States determines that additional evidence exists, and that there is a need for the United States to seek judicial confirmation of a Winters doctrine right to Colorado River water for Navajo.

Relying on Laub v. U.S. Dep't. of the Interior, 342 F.3d 1080, 1085-86 (9th Cir. 2003), Navajo also argues that its challenges to the Secretary's management fall within the "zone of interests" protected by NEPA because "threats to water supplies" of any kind are "sufficient to establish standing under NEPA." Opp. at 48-49. This argument, too, lacks substance. In Laub, the Ninth Circuit found a group of farmers had standing where they challenged a water management operation program under NEPA, alleging that implementation of the program would directly result in shortages of water supply on the west side of the San Joaquin Valley, and would "convert agricultural lands to other uses, including habitat, levee improvements, and water storage," and would reallocate agricultural waters in some areas." Laub, 342 F.3d at 1083, 1087. Laub bears no resemblance to the instant case. Navajo's complaint does not allege that the management

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> this is a matter of which the Court can properly be asked to take cognizance only by an application to receive additional evidence after decision on the pending exceptions to the Special Master's report. It is not an appropriate subject for exception now because no pleading, no evidence and no argument to support such a claim has been submitted to the Court or to the Special Master.

Doc. 257-1 at [internal] 15 n.9 (PDF page 19 of 33 n.9) (emphasis added).

actions will have any environmental effects, or deprive Navajo of any water from the Colorado River that it is currently entitled to use, and therefore the concrete injury from the management action of the kind alleged in Laub does not exist in this case.

2. Navajo's Opposition To Dismissal of the Fourth Claim (Challenging Interstate Water Banking Regulations) Raises A New Cause of Action That Does Not Appear in the Second Amended Complaint, And Which, In Any Event, Fails To State A Claim Upon Which Relief Can Be Granted

In the Fourth Claim of the SAC, i.e., Navajo's challenge to the Interstate Water Banking regulations, Navajo alleges that because those regulations permit the Lower Basin States to store water for future use that they otherwise would have been unable to use, without accounting for the potential water rights of the Navajo Nation in the Lower Colorado River, those regulations violate the APA, 5 U.S.C. § 706(2)(A)-(C). We moved to dismiss that claim because there can be no cause of action under the APA independent of an alleged violation of some other federal statute.[20] Navajo's opposition offers no rebuttal to that basis for dismissal of the Fourth Claim and so, for that reason, that Claim should be dismissed. In its opposition, Navajo nonetheless devises a new claim, namely, that the Law of the River and the laws establishing the Navajo Indian Reservation are in fact "[t]he substantive law underlying the allegation of the APA violation in the Fourth Claim for Relief." Opp. 59. Because it does not appear in the complaint, the Court need not address it. In any event, the argument has no merit because neither the "Law of the River" (whatever Navajo may mean by invoking that phrase), nor the laws establishing the Navajo Indian Reservation), prohibit or condition the Secretary's authority to

[20] Doc. 240-1 at 57, citing Citizens for Better Forestry v. U.S. Dep't. of Agric., 481 F.Supp.2d 1059, 1069 (N.D. Cal. 2007); Defenders of Wildlife v. Johanns, No. C-04-4512-PJH, 2005 WL 2620564, at *4 (N.D. Cal. Oct. 4, 2005) (same); Prairie Wood Products v. Glickman, 971 F. Supp. 457, 472 (D. Or. 1997).

implement those regulations on the United States' quantifying or otherwise securing for Navajo a Colorado River water right.

III. CONCLUSION

For all the foregoing reasons, and all of the reasons set forth in our September 9, 2013 memorandum (Doc. 240-1), the Second Amended Complaint should be dismissed in its entirety.

Date: December 20, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2013, I electronically transmitted the attached "Federal Defendants' Reply Memorandum In Support Of Its Motion To Dismiss The Second Amended Complaint" to the Clerk's Office using the CM/ECF System for filing, and served both a Notice of Electronic Filing and the attached documents on all defendants through transmittal of an electronic Notice of Electronic Filing to the following CM/ECF System registrants:

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