IN THE UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

No. 14-5018

THE HOPI TRIBE,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee

On Appeal from the Court of Federal Claims,
No. 1:12-cv-00045-LB (Judge L. Block)

ANSWERING BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANT-APPELLEE, UNITED STATES OF AMERICA

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STATEMENT OF RELATED CASES

Counsel for the United States is unaware of any related cases.

JURISDICTIONAL STATEMENT

The Hopi Tribe invoked the Court of Federal Claim's jurisdiction under 28 U.S.C. 1505 (Indian Tucker Act). A10. On October 4, 2013, the Court of Federal Claims entered a final judgment dismissing the Tribe's complaint for lack of jurisdiction. A1; *see* Argument *infra.* The Tribe timely filed a notice of appeal on November 18, 2013. This Court has jurisdiction under 28 U.S.C. 1295(a)(3).

STATEMENT OF THE ISSUE

Does the Executive Order of 1882 or Act of July 22, 1958, Pub. L. No. 85-547, 72 Stat. 403 (hereafter "Act of 1958"), impose a specific fiduciary duty requiring the United States to build water system infrastructure or to deliver drinking water of certain quality to specific locations within the Hopi Reservation?

STATEMENT OF THE CASE SETTING OUT FACTS RELEVANT TO THE ISSUE

A. The Tribe's Claim

The Hopi Tribe appeals from the Court of Federal Claims' dismissal for lack of jurisdiction of the Tribe's single-count complaint, filed on January 20, 2012, seeking money damages from the United States for an alleged breach of a fiduciary duty. The lower court dismissed the Tribe's claim on the ground that the Tribe

failed to identify a statute or regulation that established the specific fiduciary duty that the United States allegedly failed to perform. A5-9; *infra* at 10-12.

The complaint states that the claim "is limited to public water systems serving five communities [these communities are hereafter referred to as the "affected villages"] on the eastern portion of the Hopi Reservation."[1] A12. Local Hopi Villages own and operate the systems for four of the five affected villages; the Bureau of Indian Affairs, an agency within the Department of the Interior, owns and operates the system for the other the affected village (Keams Canyon). A12-13; 108-110; Supplemental Appendix ("SA") at 2. The water source for these systems is groundwater. *See* A77-78,86 [2]

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[1] The five Hopi communities are Mishongnovi (consisting of Upper Sipaulovi and Upper Mishongnovi), Polacca, Sipaulovi (consisting of Lower Sipaulovi and Lower Mishongnovi), Shungopavi, and Keams Canyon. A12-13.

[2] Arsenic occurs naturally in rocks, soil, water, air, plants, and animals. *See* "*Arsenic Small Entity Compliance Guide*" at 3 (this guide can be found in pdf format at http://water.epa.gov/lawsregs/rulesregs/sdwa/arsenic/Compliance.cfm (last visited May 16, 2014)). Because of their contact with naturally-occurring underground rock formations, ground waters tend to have higher levels of arsenic than surface waters. *Id*. In many areas of the United States the naturally-occurring arsenic found in groundwater exceeds 10 parts per billion ("ppb"), the regulatory maximum contaminant level for arsenic in drinking water, as of 2006. *See* http://pubs.usgs.gov/fs/2000/fs063-00/fs063-00.html#HDR1 (U.S. Geological Service Fact Sheet ("*Arsenic In Ground-Water Resources in the United States*") (last visited May 16, 2014). Compared to the rest of the United States, levels of arsenic in groundwater are generally higher in western States due to geologic conditions and there were more public water systems in the western States with

The Tribe's complaint alleges that the United States has a fiduciary duty to "'do all acts necessary'" to provide the Tribe with a drinking water supply for the affected villages that is of sufficient quality to meet regulatory requirements for drinking water. A15. The United States has allegedly breached this duty because water found in the public water systems has at times contained arsenic at levels exceeding a federal regulatory maximum contaminant level for drinking water delivered through public water systems that became effective in 2006. A10-16; SA2; *infra* at 6-9, 53 n.22. The complaint requests an award of money damages sufficient to compensate the Tribe for expenses it has incurred, or will incur, (1) to provide a permanent alternative source of drinking water for the affected villages that meets regulatory drinking water standards and (2) to provide treatment of water to remove arsenic while an alternative supply system is being constructed. A15. The complaint also seeks a declaratory judgment that the United States is responsible for the costs of providing water treatment and a supply of water that meets federal drinking water standards and is otherwise safe for human consumption. A15-16. The Tribe effectively contends that the United States has a money-mandating, specific fiduciary duty to provide water system infrastructure -- *i.e.*, treatment technology to remove arsenic from the current source water and

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arsenic levels higher than the regulatory maximum level made effective to such systems in 2006. *See Id.*; 66 Fed. Reg. at 6998.

construction of new wells and pipelines to deliver water from an alternative ground water source that naturally has lower levels of arsenic than the current ground water source for water delivered through the public water systems -- to ensure that water delivered through public water systems serving the affected villages meets federal drinking water standards.

The Tribe's complaint identified the 1882 Executive Order and the Act of 1958 as the substantive sources of law that impose the specific duties to build drinking water system infrastructure and to deliver water that meets regulatory drinking water standards to the affected villages. A3,7,11. Neither the Executive Order nor the Act of 1958 contains any express mention of water systems or infrastructure. The 1882 Executive Order, issued by President Arthur on December 16, 1882, described the boundaries of a tract of land in northeastern Arizona that "would be withdrawn from settlement and sale, and set apart for the use and occupancy of the Moqui [Hopi] and such other Indians as the Secretary of the Interior may see fit to settle thereon." *See* I Charles J. Kappler, *Indian Affairs: Laws and Treaties* 805 (1904).[3]

[3] The text of the Executive Order is also available at http://digital.library.okstate.edu/kappler/Vol1/html_files/ARI0801.html#az (last visited May 16, 2014.

The Act of 1958 declared that "lands" described in the 1882 Executive Order are "held by the United States in trust for the Hopi Indians and such other Indians, if any, as heretofore have been settled thereon by the Secretary of the Interior pursuant to such Executive order." Pub. L. No. 85-547, 72 Stat. 403. The purpose of the Act of 1958 was "to provide for a judicial resolution of the long-standing territorial dispute between the two tribes [Hopi and Navajo] over [lands within the 1882] reservation in Northeastern Arizona." *Hamilton v. MacDonald*, 503 F.2d 1138, 1141 (9th Cir. 1974). "The legislation authorized either tribe to commence or defend a suit against the other . . . 'for the purpose of determining the rights and interest of said parties . . . and quieting title thereto in the tribes. . . .'" *Id.* (quoting the Act of 1958). Absent this congressional waiver of the tribes' sovereign immunity, neither the Hopi Tribe nor Navajo Nation could bring suit against the other. *See Hopi Tribe v. United States*, 55 Fed. Cl. 81, 83 (2002). After further legislation and extensive litigation between the tribes, the lands within the 1882 Reservation were divided into parcels known as District 6, Hopi Partitioned Lands and Navajo Partitioned Lands. *See Healing v. Jones*, 210 F. Supp. 125, 192 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963); *Sekaquapewa v. MacDonald*, 575 F. 2d 239 (9th Cir. 1978). The Hopi Reservation currently consists of approximately 1,542,306 acres. A12.

B. Background Related to the Regulatory Arsenic Standard

In 2001 the U.S. Environmental Protection Agency promulgated a regulation pursuant to its authority under the Safe Drinking Water Act, *see* 42 U.S.C. 300g-1(b)(1), (b)(12), that set, effective 2006, the maximum contaminant level for arsenic in drinking water delivered through public water systems at 10 micrograms per liter (or 10 ppb).[4] A12; *see* 40 C.F.R. 141.62(b); 66 Fed. Reg. 6976 (Jan. 22, 2001). This revised standard replaced a previous arsenic standard of 50 ppb, which was originally established by the United States Public Health Service in 1942. 65 Fed. Reg. 38894 (June 22, 2000); 40 C.F.R. 141.11(b). The regulation is one of general applicability, meaning it applies to all non-transient public water systems, not just systems on Indian reservations. 66 Fed. Reg. at 7053.

Public water systems that have arsenic concentrations over the revised maximum contaminant level may achieve compliance either by (1) upgrading or installing a treatment technology or (2) changing the water source for the system. *See* A88-89; 66 Fed. Reg. at 7054; "*Arsenic Small Entity Compliance Guide*" at 4,13-17 .

[4] A public water system means a system for the provision to the public of water for human consumption through pipes or, after August 5, 1998, other constructed conveyances, if such system has at least fifteen service connections or regularly serves an average of at least twenty-five individuals daily at least 60 days out of the year. *See* 42 U.S.C. 300f(4); 40 C.F.R. 141.2.

As indicated in the preamble to the regulation, the federal government is not responsible for funding direct costs incurred by operators of public water systems, including tribal governments, to comply with the revised arsenic rule. 66 Fed. Reg. at 7052. However, numerous federal programs offer assistance (*e.g.*, grants, loans, or technical assistance) to State, tribal, or local governmental operators of public water systems endeavoring to comply with drinking water standards.[5] The arsenic rule identified affordable compliance technologies that small systems may use to comply with the revised arsenic standard. 66 Fed. Reg. at 7052; 40 C.F.R. 141.62(d).

Before and since this suit was filed, the United States has taken action to assist the Tribe and to bring the public system at Keams Canyon into compliance with the regulation. SA1-4. With respect to the four affected villages where the public water systems are owned and operated by the local Hopi villages, the federal government (through agencies such as EPA, the Indian Health Service (an agency within the Department of Health and Human Services), and Department of the Interior) has voluntarily provided technical and financial assistance with investigation of the arsenic problem and of solution options; the agencies have also

[5] *See, e.g.*, http://water.epa.gov/lawsregs/rulesregs/sdwa/arsenic/funding.cfm (EPA website includes materials in pdf format with information concerning technical and financial assistance for small drinking water systems) (last visited May 16, 2014).

offered assistance to the Tribe to seek funding from a Department of Agriculture loan program for rural systems for a proposed tribal project known as the Hopi Arsenic Mitigation Project. *See* A91,107; SA2-3. The Hopi Arsenic Mitigation Project proposes to dig groundwater wells along the Turquoise Trail, an area within the Reservation north of the affected villages where the natural occurrence of arsenic in groundwater is at concentration levels lower than the levels in the current groundwater source for the public water systems serving the affected villages; water pumped from the new wells will be transported via pipelines for use by the public water systems serving the affected villages. A91-93,99-103; SA2-3. The Tribe asserts that it intends to use a damage award from this suit to "improve the infrastructure" and that it will cost an estimated $20 million to address the United States' alleged breach of trust, which is the estimated total cost for the Hopi Arsenic Mitigation Project. Br. 56.[6]

The Keams Canyon public water system is owned and operated by the Department of the Interior. This system serves Bureau of Indian Affairs offices, tribal offices, businesses, and local residences. A86,88,110. In 2011 (*i.e.*, prior to the filing of this suit) EPA issued an administrative compliance order (EPA Docket

[6] The Tribe's $20 million estimate for damages does not appear to include any offset for the millions of dollars of voluntarily-provided federal assistance for the project that has already been provided by federal agencies using discretionary funds.

No. PWS-AO-2011-6003) to Interior pursuant to its authority under the Safe Drinking Water Act for, *inter alia*, Interior's violations of the arsenic maximum contaminant level and monitoring requirements for the Keams Canyon public water system, and Interior developed a corrective action plan for this system in coordination with EPA. *See* A81-99,191,195-96,203. For a period of time (but no longer), Interior provided bottled water to all Keams Canyon system users as a short-term remedy. A196; SA2. Interior has now installed and continues to operate a treatment system that removes arsenic to bring that system's arsenic levels into compliance with the Safe Drinking Water Act regulation on a long-term basis.[7] SA2; A94-99.

[7] In September 2013, EPA issued a separate administrative penalty order (EPA Docket No. SDWA-09-2013-0001) for violations of arsenic MCL and monitoring requirements that occurred from July 1, 2008 through 2012, *see* http://www.epa.gov/region9/enforcement/pubnotices/pubnotice-bia-keams-canyon.html (last visited May 16, 2014), and on December 12, 2013, EPA provided written confirmation that Interior had completed corrective action and was in compliance with the arsenic standard. Violations of arsenic maximum contaminant level and monitoring requirements that occurred up until July 1, 2008, at the Keams Canyon public water system were addressed in a 2011 global consent agreement between EPA and the Department of the Interior, filed in administrative proceedings with separate docket numbers. A150,155-56,195-96,203. This global consent agreement addressed numerous Interior facilities across the Nation and numerous statutes. In relevant part, Interior agreed to comply with the arsenic standard for the Keams Canyon system. See A81-99,191,195-96,203. The global consent agreement also required Interior to provide bottled water to all Keams Canyon users until full compliance with the administrative order was achieved.

C. The Court of Federal Claims' Decision

In the Court of Federal Claims, the United States moved to dismiss the Tribe's complaint for lack of jurisdiction on the ground that the Tribe had not met either of two requisite elements to establish jurisdiction for a claim seeking money damages for a breach of trust. First, the Tribe failed to identify any statute or regulation that imposes a fiduciary duty on the United States to construct water system infrastructure to treat water or to build a new system to deliver water from an alternative source that meets regulatory drinking water standards. Second, the Tribe failed to identify any substantive law that can be interpreted as mandating compensation for damages sustained as a result of breach of duties imposed by it.

In a decision published at 113 Fed. Cl. 43, the Court of Federal Claims granted the United States' motion and dismissed the Tribe's complaint, noting that "this case is simple and straightforward." A9. The court explained that under Supreme Court precedent, in order to establish the existence of a substantive right enforceable in the Court of Federal Claims under the Indian Tucker Act, a tribe must first identify a substantive source of law tethered to a statute or regulation that establishes the specific fiduciary duty that the Government has failed to perform. A7. The court concluded that the Tribe had not cleared this first

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A195-96. EPA acknowledged that requirement was met and that provision of bottled water could cease on January 14, 2014.

jurisdictional hurdle because neither the Executive Order nor the Act of 1958 imposed any specific duties on the United States to protect and manage the quality of drinking water on the Reservation. A5-9. The court stated that specific fiduciary duties respecting water quality and management were not established by the Act of 1958's declaration that reservation lands are held in trust by the United States. A7-9. The court also rejected the Tribe's argument that specific fiduciary duties could be inferred from the degree of federal control over water resources and the Tribe's water supply system, as evidenced by other federal statutes not cited in the Tribe's complaint and agency actions. A8. (The court understood the Tribe to invoke other statutory provisions only to demonstrate a degree of federal control over water resources that is sufficient to show that the federal government must exercise common law trust duties and not to allege a violation of such statutes. A4 n.1.) The court held that under relevant Supreme Court precedent, common law trust principles (including degree of control) are legally irrelevant at the first step in the jurisdictional inquiry. A8-9.

Accordingly, the court denied the Tribe's request for jurisdictional discovery related to the degree of control that federal agencies had exercised in the past over water resources on the Reservation. A9. And, the court found it unnecessary to decide the second jurisdictional inquiry (*i.e.*, whether the source of law

establishing the specific fiduciary or other duty can fairly be interpreted as mandating compensation by the federal government for damages sustained). A7,9.

SUMMARY OF ARGUMENT

The Supreme Court has held that there are two hurdles that must be cleared before a tribe can invoke jurisdiction under the Indian Tucker Act for a breach of trust claim seeking money damages. The Court of Federal Claims correctly held that the Tribe failed to clear the first hurdle of identifying a substantive source of law that establishes specific fiduciary duties that the government allegedly has failed to perform. The Supreme Court has instructed that the inquiry for this first hurdle "must train on specific rights-creating or duty-imposing statutory or regulatory prescriptions." *United States v. Navajo Nation* ("*Navajo Nation I*"), 537 U.S. 488, 5013 (2003). The Tribe has not identified a specific, applicable, trust-creating statute or regulation that establishes any specific fiduciary duties to build water system infrastructure or to deliver to the affected villages drinking water that meets Safe Drinking Water Act regulatory requirements. The Supreme Court's decisions in breach of trust cases leave no room for the Tribe's claim here based on the substantive sources of law on which it relies.

The Act of 1958's declaration that Hopi reservation "lands" are held "in trust" does not impose any specific mandatory duty on the United States to build

water system infrastructure or to deliver water that meets regulatory drinking water requirements to specific locations within the reservation. Contrary to the Tribe's contention, no such duty may be premised on the reserved water rights doctrine or from the United States' holding reserved water rights in trust. A reserved water right confers a right with respect to flow or use of waters enforceable against competing users and does not create a right to water system infrastructure. The reserved water rights doctrine does not provide a basis for imposing on the United States as trustee of reserved water rights a fiduciary obligation to build water system infrastructure to put reserved water to use or to deliver water of certain quality to specific locations within a reservation.

Contrary to the Tribe's contention, there exists no network of statutes requiring the United States to construct water systems or to manage reserved water that are akin to the network of statutes and regulations that the Supreme Court held in *United States v. Mitchell* ("*Mitchell II*"), 463 U.S. 206, 212 (1983), established the requisite, relevant specific fiduciary duties with respect to management of timber resources. Nor does there exist a statute here with the attributes of the unique statute that the Supreme Court held established the fiduciary duty in *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003), *i.e.*, a statute that

both declared a specific property held in trust and authorized the United States to make use of that same specific property for its own purposes.

The Tribe's reliance on other statutes and on federal actions as the substantive source of the requisite duty is unavailing. Contrary to the Tribe's suggestion, statutes authorizing lump sum appropriations for, *inter alia*, water system construction on Indian lands that accord federal agencies discretion as to where and how to expend the limited appropriated funds do not create a duty to construct a new water system serving the particular villages here. The Tribe's reliance on federal actions involving water resources and systems – such as federal installation of wells many years ago, use at a federal facility of water delivered through a tribal water system, and legal representation in a water rights adjudication – is also misplaced. Common law duties based on control or use of property are not a permissible substitute for a well-articulated, specific statutory duty.

As for the Keams Canyon public water system, it is the Department of the Interior's status as owner and operator of that system -- not the United States' role as trustee of reserved water rights -- that makes Interior responsible for that system's compliance with regulatory requirements of the Safe Drinking Water Act. Interior has brought that system into compliance with regulatory requirements.

The Safe Drinking Water Act is not a money-mandating statute and the Tribe does not allege otherwise.

ARGUMENT

THE COURT OF FEDERAL CLAIMS CORRECTLY HELD THAT THE TRIBE FAILED TO IDENTIFY A STATUTE THAT ESTABLISHES THE REQUISITE SPECIFIC FIDUCIARY DUTY

A. Standard of Review on Appeal

This Court reviews *de novo* a trial court's statutory interpretation and a dismissal of a complaint for lack of jurisdiction. *See Bell/Heery v. United States*, 739 F.3d 1324, 1330 (Fed. Cir. 2014); *Samish Indian Nation v. United States*, 657 F.3d 1330, 1335 (Fed. Cir. 2011). "In deciding a motion to dismiss, the court must accept well-pleaded factual allegations as true and must draw all reasonable inferences in favor of the claimant." *Kellogg Brown & Root Servs., Inc. v. United States*, 728 F.3d 1348, 1365 (Fed. Cir. 2013). This rule does not apply, however, to legal conclusions. *Rack Room Shoes v. United States*, 718 F.3d 1370, 1376 (Fed. Cir. 2013). To survive a motion to dismiss, a plaintiff must specifically identify the money-mandating statute or regulation that vests the Court of Federal Claims with jurisdiction. *See Allred v. United States*, 33 Fed. Cl. 349, 353 (1995); Section B *infra*.

B. Jurisdictional Requirements for a Breach of Trust Claim

"'It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction.'" *Navajo I*, 537 U.S. at 503 (quoting *Mitchell II*, 463 U.S. 206, 212 (1983)). Moreover, a waiver of sovereign immunity must be unequivocally expressed in statutory text, and the scope of the congressional act must be strictly construed in favor of the sovereign and not enlarged beyond what the language requires. *See Lane v. Pena*, 518 U.S. 187, 192 (1996); *United States v. Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992).

The United States' consent to be sued by Indian tribes in the Court of Federal Claims is found in the Indian Tucker Act, which provides that the Court of Federal Claims shall have jurisdiction of any claim against the United States brought by a tribe, "whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President or is one which otherwise would be cognizable in the Court of Federal Claims if the claimant were not an Indian tribe. . .." 28 U.S.C. 1505. The final clause alludes to the Tucker Act, "which waives immunity with respect to any claim 'founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for

liquidated or unliquidated damages in cases not sounding in tort.'" *United States v. Navajo Nation* ("*Navajo II*"), 556 U.S. 287, 290 (2009) (quoting 28 U.S.C. 1491(a)(1)). "Although the Indian Tucker Act confers jurisdiction upon the Court of Federal Claims, it is not itself a source of substantive rights." *Navajo I*, 537 U.S. at 503. Rather, the Indian Tucker Act and Tucker Act "are simply jurisdictional provisions that operate to waive sovereign immunity for claims premised on other sources of law." *Navajo II*, 556 U.S. at 290.

The Supreme Court has held that there are "two hurdles that must be cleared before a tribe can invoke jurisdiction under the Indian Tucker Act" for a non-contract claim. *Navajo II*, 556 U.S. at 290. "First, the tribe 'must identify a substantive source of law that establishes specific fiduciary or other duties, and allege that the Government has failed faithfully to perform those duties.'" *Id.* at 290 (quoting *Navajo I*, 537 U.S. at 506); *see also Wolfchild v. United States*, 731 F.3d 1280, 1288 -1289 (Fed. Cir. 2013). The general trust relationship between the United States and Indian people is "insufficient to support jurisdiction under the Indian Tucker Act." *Navajo I*, 537 U.S. at 507; *see also United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313, 2323 (2011) ("Congress may style its relations with the Indians a 'trust' without assuming all the fiduciary duties of a private trustee"). Instead, the reviewing court's analysis "must train on specific rights-

creating or duty-imposing statutory or regulatory prescriptions." *Navajo I*, 537 U.S. at 507. "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." *Jicarilla Apache*, 131 S. Ct. 2325 (internal quotations and citations omitted); *see also Navajo II*, 556 U.S. at 301.

Second, "'[i]f that initial threshold is passed, the court must then determine whether the relevant source of substantive law 'can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties [the governing law] impose[s].'" *Navajo Nation II*, 556 U.S. at 290-91 (quoting *Navajo I*, 537 U.S. at 506). At this second stage, principles of trust law (including control of the trust asset) might be relevant in drawing the inference that Congress intended damages to remedy a breach. *Navajo II*, 556 U.S. at 291, 301.

C. The Executive Order and Act of 1958 Do Not Establish the Requisite Specific Fiduciary Duty

The Tribe's complaint identified only the Executive Order and Act of 1958 as the substantive source of law that establishes the requisite specific fiduciary duty entitling it to the money relief it requests. As the Court of Federal Claims correctly held, the Executive Order and Act do not establish any relevant, specific fiduciary duty that satisfies the initial step of the jurisdictional criteria. Neither

contains any directives respecting drinking water system infrastructure or delivery of water of certain quality to the affected villages.

1. The Act of 1958's statement that reservation "lands" are held "in trust" does not establish a specific fiduciary duty with respect to water system infrastructure

The statutory hook on which the Tribe relies consists of the Act of 1958's declaration that "lands" described in the 1882 Executive Order are held "in trust." However, this declaration does not establish any "specific fiduciary or other dut[y]," *Navajo I*, 537 U.S. at 506, respecting water quality to meet Safe Drinking Water Act standards, nor does it establish an actionable duty with respect to drinking water system infrastructure. The purpose of the Act of 1958 was to provide a judicial mechanism to resolve a land dispute between the Navajo Nation and Hopi Tribe. The Act of 1958's declaration that lands described in the 1882 Executive Order are held in trust for Hopi Indians and such other Indians that had been settled there prior to the date of the Act by the Secretary of the Interior provided a predicate for the judicial process authorized by the Act to resolve the tribes' conflicting claims to use and occupancy of the land.[8] *See Healing v. Jones*, 174 F. Supp. 211, 216 (D. Ariz. 1959) ("as long as the lands in question had status

[8] Given this purpose, the Act of 1958 cannot fairly be interpreted to mandate compensation for damages sustained as a result of breach of duties respecting water system infrastructure. However, that second step in the jurisdictional analysis need not be reached.

only as executive order lands, the parties to this suit could have had no interest therein amenable to judicial determination"). The ensuing litigation between the tribes focused on the extent that the Hopi Tribe had a right to use and occupancy of the area encompassed within the 1882 reservation and whether, and to the extent that, Navajo Indians had been settled by the Secretary on 1882 reservation lands pursuant to the Executive Order language recognizing the Secretary's authority to settle "such other Indians" thereon. *See, e.g., Healing*, 210 F. Supp. at 138-192.

The Tribe argues (Br. 33-35) that when Congress declared in the Act of 1958 that the reservation lands are held in trust, Congress would have been aware that courts had held that the federal reserved water rights doctrine applied to federal reservations for Indians. The Tribe refers to the fact that since at least 1908, courts have recognized that a federal reservation of land impliedly reserves the right to use appurtenant unappropriated waters necessary to accomplish the purposes for which the government created the reservation; the federal reserved water rights doctrine (also referred to as the *Winters* doctrine) applies to lands reserved for Indians. *See Arizona v California*, 373 U.S. 546, 598-601 (1963); *Winters v. United States*, 207 U.S. 564, 577 (1908). The federal reserved water rights doctrine also recognizes and preserves a Tribe's aboriginal rights to water. *See United States v. Adair*, 723 F.2d 1394, 1414 (9th Cir. 1983).

The Tribe argues that because Congress did not expressly alter reserved water rights implied from the 1882 Executive Order reserving land, the federal reserved water right doctrine applies. Br. 33. While the United States agrees that the doctrine applies to these reserved lands,[9] such applicability does not help the Tribe's position here because neither the Act of 1958 specifically, nor the federal reserved water right doctrine generally, is a statute or regulation that articulates a *specific* duty with respect to construction of water system infrastructure or delivery of water of certain quality to the affected villages by the United States. The Act of 1958's bare statement that reservation lands are held in trust simply falls short of establishing the first jurisdictional requirement for a non-contract Indian Tucker Act claim. *See supra* at 17-18; *Mitchell II*, 463 U.S. at 224; *United States v. Mitchell* ("*Mitchell I*"), 445 U.S. 535, 541 (1980); *see also Pawnee v.United States*, 830 F.2d 187, 191 (Fed. Cir.1987) (the existence of a trust relationship does not mean that any and every claim by the Indians "necessarily states a proper claim for breach of the trust"). As the Court of Federal Claims correctly stated, "it is the precise trust duty, rather than the United States' status as trustee, that determines the substantive right." A6. Stated differently, the fact that the word "trust" appears in the Act of 1958 and that Hopi's implied reserved water right originates from the

[9] Indeed, the United States has made claims to federal reserved water rights in an ongoing water rights adjudication for the Little Colorado River, *see infra* at 54-55.

1882 Executive Order reserving land for the use of Hopi Indians does not negate the requirement that the Tribe show a specific statutory duty related to the relief sought here -- *i.e.*, money damages to compensate for an alleged failure to install treatment technology to remove arsenic from source groundwater and to construct new infrastructure (new wells and pipelines) to deliver water of better quality from an alternative source of the federal reserved water rights. The Tribe has not, and cannot, show that the Act of 1958 (or any other statute, *see infra* Section D.1) prescribes such specific duties.

The Tribe's claim here falls within the domain of Supreme Court cases holding that the statutes invoked by tribes did not establish the requisite specific fiduciary duty to allow claims alleging breach of a duty to manage land or resources to proceed. For example, in *Mitchell I*, the Supreme Court held that language in the General Allotment Act requiring the United States to "hold the land" allotted for individual Indians "in trust for the sole use and benefit" of those Indians created only a "limited" trust relationship and did not impose a fiduciary duty on the government to manage timber resources on such land. *Mitchell I*, 445 U.S. at 542-43; *see also Mitchell II*, 463 U.S. at 224 (characterizing General Allotment Act as creating only a "bare trust"). Although the United States held the land in trust, the statute did not assign the United States any specific obligations to

manage timber resources; accordingly, the Supreme Court held, the statute did not impose the requisite duty to allow the breach of trust claim to proceed. *Mitchell* I, 445 U.S. at 541. Similarly, here, the 1958 Act's declaration that reservation lands are held in trust is insufficient because the statute is devoid of any specific directives related to the construction of water system infrastructure or delivery of water of certain quality to the affected villages.

In *Navajo I* and *Navajo II*, the Supreme Court held that the Navajo Nation did not satisfy the initial jurisdictional hurdle for its claim seeking compensation for an asserted breach of trust by the Secretary of the Interior in connection with his approval of amendments to a coal lease. In *Navajo I*, the Supreme Court held that inherent control conferred by a statute requiring the Secretary of the Interior to approve mineral leases on reservation lands that the Court recognized were held in trust by the United States, was insufficient to demonstrate a fiduciary obligation cognizable under the Indian Tucker Act. *Navajo Nation I*, 537 U.S. at 501. The Supreme Court held that the statute requiring Secretarial approval of the lease amendment was insufficient because it did not assign to the United States managerial control over coal leasing and prescribed no other specific duties. *Id*. at 507-08. Here too, the sources of law on which the Tribe relied in its complaint – the Executive Order and Act of 1958 -- assigned no specific duties respecting

water system infrastructure and delivery. And, as explained in Section D.1 below, other statutes mentioned by the Tribe during briefing likewise fail to impose specific prescriptions.

In *Navajo II*, the Supreme Court held that other statutes invoked by the Tribe also did not impose the requisite specific duty and rejected the notion that the government's "comprehensive control" over coal leasing on tribal lands could give rise to fiduciary duties enforceable in a breach of trust claim. *Id*. 556 U.S. at 297-302**.** The Court stated: "Because the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, we do not reach the question whether the trust duty was money mandating. Thus, neither the Government's 'control' over coal nor common-law trust principles matter." *Id.*, 556 U.S. at 302. The Court instructed that only if a tribe identifies a specific statutory or regulatory prescription that bears the hallmarks of a conventional fiduciary relation can "trust principles (including any such principles premised on 'control') play a role in inferring that the trust obligation is enforceable by damages," *i.e.*, at the second step of the jurisdictional analysis. 556 U.S. at 301.

Under Supreme Court precedent, the 1958 Act's declaration that reservation lands are held in trust is insufficient to satisfy the initial jurisdictional requirement that the statute impose the specific fiduciary duty that the United States is alleged

to have failed to perform. The Act of 1958 does not establish a fiduciary duty to construct water system infrastructure or to deliver water of certain quality to the affected villages.

2. Holding reserved water rights in trust does not impose a fiduciary duty on the United States to construct water system infrastructure or to deliver reserved water from alternative sources to the affected villages

Contrary to the Tribe's suggestion (Br. 26-32), the reserved water rights doctrine provides no sound basis for concluding that the United States, as trustee of Indian reserved water rights, has a specific fiduciary duty to provide water system infrastructure or to deliver reserved water from alternative sources to the affected villages. Under the doctrine, first enunciated in *Winters*, the establishment of an Indian reservation implicitly reserves that amount of appurtenant, unappropriated water necessary to fulfill the purposes of the reservation. *See Winters*, 207 U.S. at 577; *Arizona v. California*, 373 U.S. at 600-601. The federal reserved water right is superior to rights of subsequent appropriators and grants a right to exclude others from subsequent diversions of water which feeds the government reservation or to limit the volume of water that others may use. *See Winters*, 207 U.S. at 577; 78 Am. Jur.2d Waters § 15 (2014).

The Tribe argues that the reserved water rights doctrine protects water quality, not just water quantity, because water quantity and water quality are

inseparable and because reserved water is intended to satisfy the needs of Indians residing on Reservations. Br. 31. However, that reasoning does not compel the result the Tribe seeks here. While there may be circumstances in which water quantity and quality are sufficiently intertwined that the owner of water rights has some sort of viable claim against a polluter or a competing appropriator, that does not mean that the Tribe has a cognizable breach-of-trust claim for money damages against the United States in the circumstances here. The Tribe does not allege that the United States has failed to protect water rights from diversion or appropriation by competing users. Moreover, the Tribe's complaint does not allege that the United States (or any other party) has caused the level of arsenic in the groundwater source. *See* A10-16; *see also* Br. 48 (aquifers supplying water for the public water systems "have naturally high levels of arsenic"); A86 (groundwater supply for Keams Canyon public water system contains naturally elevated concentrations of arsenic); *supra* at 2 n.2.

The Tribe effectively contends that holding reserved water rights in trust creates fiduciary duties requiring the United States to provide treatment technology to remove arsenic (even when the arsenic is naturally occurring) and to construct infrastructure (*i.e.*, dig new wells and lay pipelines) to deliver water from an alternative source of the reserved water rights. However, a water right does not

bring with it a right to the capital investment necessary to put water to use for particular purposes. *See* F. Cohen, *Handbook of Federal Indian Law* (1982 ed.) at 598. "'[T]he property right in the water right is separate and distinct from the property right in reservoirs, ditches or canals.'" *Nevada v. United States*, 463 U.S. 110, 125 (1983) (quoting *Nebraska v. Wyoming*, 325 U.S. 589, 614 (1945)); *accord Grey v. United States*, 21 Cl. Ct. 285, 295 (1990), *aff'd*, 935 F.2d 281 (Fed. Cir. 1991). *See also* Weil, *Water Rights in the Western United States* (3d Ed. 1911), Vol. 1, §280, p 293-94 (a water right is entirely distinct from the right to the ditch, canal or other structure conveying water). Moreover, because Indian reserved water rights vest even though water has not yet been put to use and because Indian reserved water rights cannot be lost by disuse or abandonment,[10] title to reserved water rights is not diminished by the absence of water system infrastructure facilities.

In *Salt River Pima Maricopa Indian Community v. United States*, 26 Cl. Ct. 201, 202, (1992), the United States Claims Court dismissed a claim brought by a tribe alleging that the United States had breached a trust duty by failing to develop

[10] *See, e.g., In re Adjudication of All Rights to Use Water in Gila River System and Source*, 35 P.3d 68, 71 (Ariz. 2001).

irrigation systems to enable water to be used to irrigate certain Indian lands.[11] The Court held that the tribe had not identified any statutes or regulations supporting such claim. The court also relied on its reasoning in *Grey v. United States*, 21 Cl. Ct. 285 (1990), a companion case arising from the same facts where individual Indian allottees unsuccessfully claimed the existence of a federal duty to build a water supply system to deliver tribal water to their allotments. *See Salt-River Pima-Maricopa*, 26 Cl. Ct. at 202-03. *Grey* rejected plaintiffs' argument that legislation dealing with irrigation of Indian lands gave rise to a fiduciary duty obligating the government to deliver water to plaintiffs' lands. *Grey*, 21 Cl. Ct. at 293-94. *Grey* held that plaintiffs identified no statutory scheme comparable to the scheme in *Mitchell II,* explaining that "the statutes and regulations cited by plaintiffs do not contain an *explicit and detailed enumeration of duties* sufficient [to] permit this court to impose a 'trust' relationship contemplated in *Mitchell II*," *id*., at 294 (emphasis added). Among other differences between the government's role with respect to use of water rights and the statutes and regulations governing management of timber on allotments in *Mitchell II* is the fact that the use of water

[11] *See also White Mountain Apache Tribe v. United States*, 11 Cl. Ct. 614, 625 (1987) (dismissing claim seeking damages under Indian Claims Commission Act based on failure to develop facilities for all practically irrigable acreage on reservation because the United States has no obligation to construct irrigation facilities), *aff'd*, 5 F.3d 1506 (Fed. Cir. 1993).

on Indian land is not subject to extensive daily supervision and pervasive control by the government, nor does the government directly control how Indian land is used. *Id*. at 294, 300. [12]

Under the reserved water rights doctrine, an implied reservation of a quantity of unappropriated water sufficient to effectuate the purposes of the reservation accompanies the creation of an Indian reservation. The doctrine does not, however, impose a duty on the United States to provide water of certain quality at certain locations on a reservation, as alleged here. To hold that the United States, as trustee, has such duty would effectively make the United States an insurer or guarantor against losses or contamination solely attributable to natural causes, and that is not the United States' role as trustee. *See United States v.*

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[12] By contrast, in *Duncan v. United States*, 667 F.2d 36 (Ct. Cl. 1981), the Court of Claims held that the federal government was required to construct water system facilities as a condition precedent to terminating federal supervision over, and distribution of assets of, a rancheria (rancherias are small reservations or communities purchased for use by Indians of California). However, Congress had enacted the Rancheria Act, Pub. L. No. 85-671, 72 Stat. 619 (1958), a statute not applicable to the Hopi Reservation, setting forth specific obligations of the Secretary of the Interior which the plaintiffs alleged were left unfulfilled, including a specific directive to install or rehabilitate irrigation and domestic water systems (before termination) upon which the Department should agree with the Indians. *See* Pub. L. No. 85-671 §3(c); *Duncan*, 667 F.2d at 43. While *Duncan* also includes some overly-broad statements suggesting that a general trust relationship is sufficient for a tribe to bring a breach of trust claim (*see, e.g.*, *id*. at 42-43), such statements were unnecessary given the specific language of the Rancheria Act and the Supreme Court has instructed otherwise.

Mason, 412 U.S. 391, 398 (1973). Moreover, a water right does not confer a right to higher quantity or quality of water than naturally occurs in the water source for the right. *See* Weil, *Water Rights in the Western United States* (3d ed. 1911) §279, Vol. 1 at p. 292 (a water right does not entitle the owner to water flow where for natural causes, such as drying up, the stream if undisturbed would not reach him anyway); *cf. United States v. Gila Valley Irrigation Dist*., 920 F. Supp. 1444 (D. Ariz. 1996) (holding that factual evidence did not support junior appropriators' argument that degradation was the result of purely natural causes), *aff'd*, 117 F.3d 425 (9th Cir. 1997).

None of the cases cited by the Tribe supports finding that the United States as trustee of reserved water rights has a fiduciary duty to provide water system infrastructure or to deliver water that meets regulatory drinking water requirements to specific locations within a reservation. *Winters* concerned competing claims to use of the same water body: the Supreme Court upheld an injunction preventing private defendants from constructing or maintaining dams or by other means preventing a river from flowing to an Indian Reservation. [13]

[13] The Tribe asserts (Br. 9) that in *Winters* the Supreme Court agreed with the United States' allegation

> that in furthering and advancing the civilization and improvement of the Indians and to encourage habits of industry and thrift among them, it is

Gila Valley Irrigation Dist., another case cited by the Tribe (Br. 31), also involved a dispute between competing water users. That case was a suit to enforce provisions of an elaborate consent decree. In relevant part, a downstream party (an Indian tribe with a senior priority date) claimed that upstream users with more junior priority dates had deprived the tribe of its right under the decree to the "'natural flow'" of the stream.[14] *Id*., 920 F. Supp. at 1448; *see also id*. at 1449 (flow rate is primary factor affecting water quality). The court held that upstream users' diversions of water and farming practices caused degradation of such

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> essential and necessary that all of the waters of the river flow down the channel uninterruptedly and undiminished in quantity and undeteriorated in quality.

Id., 207 U.S. at 567. The Supreme Court did not, however, express agreement (or disagreement) with the specific allegation that a reserved water right confers a right to "all of the waters of the river flow . . . undeteriorated in quality," *Id*. In any event, the Tribe here has not alleged that a third party diverted river flow to the detriment of water quantity or quality.

[14] A priority date is an element of a federal reserved water right and of a state-law water right under a prior appropriation system (this system is recognized in one form or another in all of the western states, including Arizona). *See Confederated Salish and Kootenai Tribes v. Clinch*, 336 Mont. 302, 340, 158 P.3d 377, 401 (Mont. 2007) (Quantity and priority date "are the essential elements in the bundle of sticks recognized as a water right"). When there is insufficient water to satisfy all water rights holders and competing uses, water is allocated by priority date; a water right with an older (more senior) priority date takes precedent over, and may reduce the amount of water available for appropriation by the owner of a water right with a more recent (junior) priority date. *See United States v. New Mexico*, 438 U.S. 696, 705 (1978).

magnitude that injunctive relief to enforce the decree was warranted. *Id*., 920 F. Supp. at 1448, 1454; *see also id*. at 1448 ("courts of the western states generally agree that a prior appropriator of water is entitled to protection, including injunctive relief, against material degradation of the quality of the water *by junior appropriators upstream*") (emphasis added).

These cases involving claims between competing water users do not speak to the circumstances here where there is no allegation of diversion or degradation by competing users and the question is whether the United States as trustee of reserved water rights has a fiduciary duty to provide a drinking water system or to deliver water of certain quality to the affected villages.

The Tribe's reliance on *Fort Mojave Indian Tribe v. United States,* 23 Cl. Ct. 417 (1991), is also misplaced because that case is inapplicable here. That case alleged a breach of trust predicated on the United States' legal representation in a water rights adjudication determining rights of competing claimants. In that case, the Claims Court allowed a breach of trust claim to proceed where the tribe alleged that the United States' representation was deficient and, as a result, the tribe was not decreed title to the full quantity of vested reserved water rights to which it was entitled. The court stated "the title to plaintiffs' water rights constitutes the trust property, or the res, which the government, as trustee, has a duty to preserve." *Id*.,

23 Cl. Ct. at 426. Here the Tribe has not alleged that the United State has conveyed, transferred, or failed to preserve title to reserved water rights. And *Ft. Mojave* does not dictate the that the United States has a duty as trustee of reserved water rights to build water system infrastructure or to deliver reserved water rights to specific locations within a reservation. As explained above, the so-called "res" of a reserved water right does not include such elements.

D. Other Statutes Cited By the Tribe and Alleged Federal Control Do Not Establish the Requisite Fiduciary Duty

The Tribe attempts to align this case with *Mitchell II* and *White Mountain Apache*, two cases in which the Supreme Court held that statutes or regulations established relevant specific fiduciary duties, thus allowing the breach of trust claims to proceed. The Tribe's reliance on those two cases is misplaced because they differ materially from the instant case. In *Mitchell II*, the Supreme Court held that a network of statutes and regulations that specifically required Interior to manage timber resources on allotted Indian lands so as to generate proceeds for Indians established the fiduciary relationship and defined the contours of the United States fiduciary responsibilities. *Mitchell II*, 463 U.S. at 225. Importantly, the Supreme Court described the statutes and regulations there as requiring the government directly to make specific decisions regarding the sale, management, and harvesting of tribal timber resources for the sole benefit of the Indian owners,

and as giving the government a "pervasive role in the sales of timber from Indian lands" under "detailed regulations" addressing "virtually every aspect of forest management." *Mitchell II*, 463 U.S. at 219. The statute and regulations accorded the government "'comprehensive' control over the harvesting of Indian timber," *id*. at 209, and required the government to exercise literally daily supervision over timber harvesting and management, *id*., 463 U.S. at 222.

Although in its complaint the Tribe identified only the 1882 Executive Order and Act of 1958 as the substantive source of law for its claim, in briefing the Tribe cites several other statutes that supposedly create an elaborate network of statutes and regulations respecting water resources akin to those that the Supreme Court found established the fiduciary duty in *Mitchell II*. Br. 45. However, as explained in Section D.1 below, the other statutes cited by the Tribe (Br. 40-41,51-52) are not analogous to the statutes and regulations in *Mitchell II* and do not establish a specific fiduciary duty respecting water system infrastructure.

This case also does not resemble *White Mountain Apache*, in which the Supreme Court held that the United States had a fiduciary obligation to preserve and maintain historic buildings and other property improvements on the former military post of Fort Apache, an area within the much larger White Mountain Apache Tribe reservation. The Supreme Court in *White Mountain Apache*

construed a unique, single-sentence statute specifying that the former Fort Apache Military Reservation be "'held by the United States in trust for the White Mountain Apache Tribe, subject to the right of the Secretary of the Interior to use any part of the land and improvements for administrative or school purposes.'" *White Mountain Apache*, 537 U.S. at 469 (quoting Act of Mar. 18, 1960, Pub. L. No. 86-392, 74 Stat. 8). The government's fiduciary duty in *White Mountain Apache* derived directly from the combination in a single statute of language stating that the relevant property was held in trust and simultaneously stating that the United States was authorized to make exclusive use of this very same property for the government's own purposes. *See id*., 537 U.S. at 474-477; *id*. at 480 (Ginsburg, J., concurring) ("threshold" requirement of "a substantive source of law that establishes specific fiduciary or other duties" is met by the Act providing that Fort Apache shall be held in trust and simultaneously authorizing the government-trustee's use and occupancy). The Supreme Court concluded that, as a matter of statutory construction, in that context, the Act's use of the term "trust" did not confer only a "bare" trust because the statute proceeded to invest the United States with express authority to make direct use of the trust corpus. *White Mountain Apache*, 537 U.S. at 475; *see also id.* at 479-480 (Ginsburg, J., concurring). *White*

Mountain Apache does not hold that either of these statutory elements alone, or appearing in separate statutes, would have been sufficient.

The Tribe suggests the requisite fiduciary duty here can be premised on a combination of the 1958 Act's declaration that lands are held "in trust" and actions taken by federal agencies that allegedly evidence federal control over, or use of, water resources or tribal water systems. Br. 47-51. The actions the Tribe points to include design and installation of groundwater wells by federal agencies many years ago, use at a federal facility of water delivered through a tribal public water system, Interior's ownership and operation of the Keams Canyon public water system, and legal representation to claim reserved water rights in an ongoing water rights adjudication. However, as explained above, in *White Mountain Apache,* it was the combination in the same statute of language providing that property was held "in trust" and that the United States could make exclusive use of that same property for its own purposes that satisfied the first step of the jurisdictional analysis. *White Mountain Apache* did not hold that the first step was satisfied by a combination of bare "in trust" statutory language and a few examples of limited federal activities involving a resource.

And, there is no basis for reading *White Mountain Apache* to have rendered such holding *sub silentio*. Both *Navajo I* and *White Mountain Apache* were

decided on the same day, and Justice Ginsburg, who authored *Navajo I*, joined *White Mountain Apache* based on her express understanding that *White Mountain Apache* "is not inconsistent" with *Navajo I*. *White Mountain Apache*, 537 U.S. at 479 (Ginsburg, J., concurring). Justice Souter, who authored *White Mountain Apache*, acknowledged in dissent in *Navajo I* that the second stage of the relevant inquiry – where general trust principles such as control of property can be considered in determining whether there is a right to damages for a violation of a specific obligation -- occurs only "once a statutory or regulatory provision is found to create a specific fiduciary obligation." *Navajo I*, 537 U.S. at 514 (Souter, J., dissenting).

This case differs materially from *White Mountain Apache*. First, as explained above, a water right is a unique property interest that does not confer rights respecting infrastructure that the Tribe's argument assumes. Second, here there exists no applicable statute stating both that water rights are held in trust and that the United States may make exclusive use of such water rights for its own purposes. Third, the types of actions on which the Tribe relies to support its argument that there has been federal use and control of water resources are different in kind and far more limited than the exclusive federal use of trust

property authorized and exercised by the United States under the relevant statute in *White Mountain Apache*.

In sum, the Tribe's reliance on *Mitchell II* and *White Mountain Apache* is unavailing. As we further explain below, the Tribe's arguments that the requisite duty can be premised on other statutes and on federal actions are meritless.

1. Other statutes cited by the Tribe do not establish any applicable, specific fiduciary duty

The Tribe asserts that "[l]ike in *Mitchell II*," there exists a "network of statutes and regulations" giving the United States "'elaborate control' over the Hopi Tribe's water resources." Br. 45. The Tribe cites (Br. 40-41, 50-51) the following statutes: the subsection of the Indian Health Care Improvement Act (25 U.S.C. 1632(a)(5)), the Indian Sanitation Facilities Act, 42 U.S.C. 2004a(a)(1), the Snyder Act (42 Stat. 208, as amended, 25 U.S.C. 13), 25 U.S.C. 162(d)(8), and the Navajo-Hopi Rehabilitation Act of 1950 (25 U.S.C. 631, 638). However, none of these statutes were mentioned, much less relied upon as the substantive source of law, in the Tribe's complaint. The Court of Federal Claims appropriately held that because the Tribe failed to identity these statutes in its complaint and did not seek

to amend its complaint, the Tribe was barred from arguing that these statutes are the source of, and establish, a fiduciary duty[15] A4 n.1.

In any event, none of these statutes creates money-mandating, fiduciary duties and two of the statutes are inapplicable here. These statutory provisions, whether viewed individually or together, are in no way comparable to the network of statutes and regulations that the Supreme Court found by their terms established the relevant, specific fiduciary duties in *Mitchell II.*

[15] The Court of Federal Claims also rejected the Tribe's suggestion that these statutes demonstrate federal control over and involvement with water resources and systems from which it can be inferred, based on common law trust principles such as control, that the Act of 1958 imposes relevant specific fiduciary duties. A8. The Supreme Court held in *Mitchell II* that the network of statutes and regulations, by their terms, imposed specific obligations and established the relevant fiduciary duties; contrary to the Tribe's suggestion (Br. 45), the Supreme Court did not hold that at the first step of the jurisdictional inquiry, the fiduciary duty could be premised on, or inferred from, authority to control. *See infra* Section D.2. Moreover, in *Navajo II*, the Supreme Court rejected this Court's reasoning that the requisite specific fiduciary duty was established through a combination of a statute stating that reservation lands are held in trust (coal was treated as a constituent element of those lands) and other statutes and regulations that gave the federal government control over coal on Indian lands. *Id.*, 556 U.S. at 301-302 (rejecting this Court's analysis in *Navajo Nation v. United States*, 501 F.3d 1327, 1341-43 (Fed. Cir. 2007), *rev'd, Navajo II*)). The Supreme Court stated: "The Federal Government's liability cannot be premised on control alone . . . trust principles (including any such principles premised on "control") could play a role in" the "second step of the jurisdictional analysis, not (as the Federal Circuit made it) the starting point." *Navajo II*, 556 U.S. at 301; *see also Jicarilla Apache*, 131 S. Ct. at 2325.

In *Allred v. United States*, 33 Fed. Cl. 349, 35-57 (1995), the Court of Federal Claims correctly held that the Indian Health Care Improvement Act, Snyder Act, and Indian Sanitation Facilities Act, 42 U.S.C. 2004a(a)(1), do not create specific, money-mandating duties related to Indian health care services but instead "are in essence discretionary lump-sum appropriations, 'the very point of [which] is to give an agency the capacity to adapt to changing circumstances and meet its statutory responsibilities in what it sees as the most effective or desirable way." *Allred*, 33 Fed. Cl. at 355 (quoting *Lincoln v. Vigil*, 508 U.S. 182, 192 (1993)).[16] Furthermore, authority provided by such statutes to provide monetary assistance to construct water supply systems on reservations does not create a fiduciary duty to do so in every instance. To the contrary, "authority to act does not support an inference of the asserted *duty* to act (enforceable by a suit for money damages)." *Wolfchild*, 731 F.3d at 1289 (emphasis in original); *see also Quechan Tribe of Fort Yuma Indian Reservation v. U.S*, No. Civ. 10-02261-PHX-FJM, 2011

[16] In *Lincoln*, the Supreme Court held that the decision by the Director of Indian Health Services to discontinue a health program altogether was "'committed to agency discretion by law.'" 508 U.S. at 193 (citation omitted). Recognizing the existence of a general trust relationship in dealing with Indian tribal property, the Court stated: "Whatever the contours of that relationship, though, it could not limit the Service's discretion to reorder its priorities from serving a subgroup of beneficiaries to serving the broader class of all Indians nationwide." *Id*. at 195. Thus, the Indian Health Service discharges Congress's desire to ensure the existence of health services to qualified Indians as best it can, within its discretion, given the limited resources provided by Congress.

WL 1211574 (D. Ariz. 2011) (the provision of services under the Indian Health Care Improvement Act and Snyder Act "is a matter of grace, not a legal obligation"); *cf. Begay v. United States*, 16 Cl. Ct. 107, 128 (1987) ("taking action to solve a problem can hardly be equated with the creation of a trust"), *aff'd*, 865 F.2d 230 (Fed. Cir. 1988); *Hopi Tribe*, 55 Fed. Cl. at 87 (where funding under a statute is discretionary, the statute is not money-mandating).

The statutory language confirms that these statutes do not impose a specific, money-mandating fiduciary duty to build water system infrastructure here. The Tribe cites (Br. 41-42) a subsection of the Indian Health Care Improvement Act, 25 U.S.C. 1632(a)(5), setting forth a list of congressional findings that included: "[I]t is in the interest of the United States, and it is the policy of the United States that all Indian communities and Indian homes, new and existing, be provided with safe and adequate water supply systems and sanitary sewage waste disposal systems as soon as possible." But a congressional finding expressing a policy goal does not create a specific prescription and thus does not satisfy the first jurisdictional criteria for bringing a breach of trust claim. *See Blackfeet Housing v. United States*, 106 Fed.Cl. 142, 151-2 (2012) (rejecting tribe's argument that congressional findings set forth in statute coupled with control of tribal trust lands and housing resources created a trust obligation to protect and maintain the tribe's property),

aff'd w/o op., 521 Fed.Appx. 925 (Fed. Cir. 2013); *Navajo I*, 537 U.S. at 506 (analysis for initial test "must train on specific rights-creating or duty-imposing statutory or regulatory *prescriptions*") (emphasis added)); *cf. Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 19 (1981) (Congress sometimes makes declarations of policy but requires only measures that fall short of goal).

The Indian Sanitation Facilities Act, 42 U.S.C. 2004a, "authorizes" the Indian Health Service to undertake various activities with appropriated funds, including authority for the Service "to construct, improve, extend, or otherwise provide and maintain ... domestic and community water supplies and facilities ... for Indian homes, communities and lands," 42 U.S.C. 2004a(a)(1).[17] However, the Service has discretion to determine how and where to expend funds appropriated for this purpose. This statutory provision does not impose a duty on the Indian Health Service to construct, provide, and maintain all water supply systems on Indian lands held in trust.

[17] Legislative history for this provision states that general legislation of this nature was desirable "to avoid the necessity of having the Congress enact legislation authorizing on a project-by-project basis individual Indian sanitation projects." H.R. Rep. No. 86-589, 86th Cong., 1st Sess., *reprinted in*,1959 U.S.C.C.A.N. 1963,1964. Another purpose of the bill was to clarify uncertainty about whether a 1955 transfer of authority from the Department of the Interior to the Public Health Service relating to conservation of Indian health and operation of hospitals and health facilities for Indians included authority for provision of sewage disposal, water supply, and other sanitation facilities. *Id*.

The Snyder Act, 25 U.S.C. 13, was passed in 1921 to provide authorization for the Bureau of Indian Affairs to exercise its discretion to expend general appropriations for various activities. The Snyder Act was enacted to remedy the problem of appropriation requests by the House Committee on Indian Affairs being consistently stricken on the House floor by point-of-order objections. *See Morton v. Ruiz*, 415 U.S. 199, 206 (1974). The Supreme Court has explained the limited nature of the Snyder Act's mandate: the Act imposes no "geographical limitation on the availability of general assistance benefits and does not prescribe eligibility requirements or the details of any program." *Id*. at 207. Instead, the Act is broadly phrased and leaves the direction and supervision of programs for the "benefit, care and assistance of the Indians" to the discretionary authority of the Bureau of Indian Affairs. In relevant part, the Snyder Act states: "The Bureau of Indian Affairs, under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes . . . [listing among many other purposes:] . . . [f]or extension, improvement, operation, and maintenance of existing Indian irrigation systems and for development of water supplies . . ." 25 U.S.C. 13.[18] Congressional

[18] By its terms, the Snyder Act applies only to the Bureau of Indian Affairs, an

authorization for the Bureau of Indian Affairs to exercise discretionary authority to decide how to expend lump-sum appropriated funds for a wide range of purposes and among numerous Indian lands does not create the sort of specific fiduciary duty that is required for the Tribe to overcome the first jurisdictional hurdle in a breach of trust case. *See Allred*, 31 Fed. Cl. at 355; *see also Erikson v. United States*, 12 Cl. Ct. 754, 759 (1987) (rejecting claim for damages based on Snyder Act and other statutes, stating that "[t]he mere recitation of statutes cannot make express what is only dubiously implied); *Adams v. Hodel*, 617 F. Supp. 359, 361-62 (D.D.C. 1985) (supporting limited view of Snyder Act's mandate); *Virgil v. Andrus*, 667 F.2d 931, 934 (10th Cir.1982) (Snyder Act does not give rise to a specific fiduciary duty to continue to provide free lunches to all Indian school children).

The other two statutes are wholly inapplicable here. Section 162a(d)(8) of Title 25 only applies in the context of trust funds and has no relevance to whether Interior has an enforceable duty to drill wells or establish water infrastructure on an Indian Reservation. Section 162a(a) involves the deposit and management of tribal funds in banks. *Id*. In 1994, Congress amended Section 162a in the American

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agency within the Department of the Interior. However, under 42 U.S.C. 2001(a), the Bureau's authorities and responsibilities with respect to "the conservation of the health of Indians" have been transferred to the Department of Health and Human Services.

Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412 §101, 108 Stat. 4239 (1994), by adding subsection d entitled "Trust responsibilities of Secretary of the Interior." Subsection d listed eight responsibilities, one of which is "[a]ppropriately managing the natural resources located within the boundaries of Indian reservations and trust lands." *Id*. at §101(a)(8). The House Report's section-by-section- analysis of the amendments stated that "Section 101 [codified as 25 U.S.C. 162a(d) amends 25 U.S.C. 162a by adding a new subsection which provides a list of guidelines for the Secretary's proper discharge of trust responsibilities *regarding Indian trust funds*." H.R. Rep. No. 103-778, 103d Cong., 2d Sess., *reprinted in* 1994 U.S.C.C.A.N. 3467, 3474. Management of natural resources is linked to such trust funds because proceeds derived from development of natural resources on trust lands are held by the United States in trust for the Tribe or individual Indian owner. *See Jicarilla Apache*, 131 S. Ct. at 2318.

Finally, the Navajo-Hopi Rehabilitation Act of 1950 plays no role here because the program and limited funds authorized by that Act expired long ago. That Act authorized the Secretary of the Interior in 1950 to undertake, "within the limits of the funds . . . appropriated pursuant to [the Act]," a "program of basic improvements for the conservation and development of the resources of the Navajo and Hopi Indians [and] the more productive employment of their manpower." 25

U.S.C. 631. The program included projects for education, road, soil and water conservation, irrigation, telecommunications, and business development, and the Act expressly specified the amount of federal funding "authorized to be appropriated" for each such element of the program. *Id*. The Act authorized $2.5 million in appropriated funds for "[a]gency, institutional and domestic water supply." 25 U.S.C. 631(9). Congress directed that the "foregoing program" shall be conducted "in a manner which will provide for completion of the program, so far as practicable, within ten years from April 19, 1950." 25 U.S.C. 632; *see* H.R. Rep. No. 85-2455, 85th Cong., 2d Sess. at 4, 7 (1958) (discussing program's status). After Congress added new funding for essential road-building in 1958, *see* H.R. Rep. No. 85-2455 at 1, 4 (discussing amendment to 25 U.S.C. 631(7)), the associated road construction ended around 1964, and the Secretary completed the program authorized by the Act at that time. S. Rep. No. 93-11, 93d Cong., 1st Sess. at 1 (1973). Likewise, the Rehabilitation Act's requirement that the Navajo Tribal Council and affected Indian communities "be kept informed and afforded opportunity to consider from their inception plans pertaining to the program authorized by [the Act]," 25 U.S.C. 638, ceased to have any effect around 1964,

long before the breach of trust based on arsenic levels exceeding the 2006 revised standard were alleged to have occurred.[19]

Notably, in *Navajo II*, the Supreme Court rejected the Navajo Nation's argument that the Navajo-Hopi Rehabilitation Act of 1950 imposed relevant money-mandating duties on the Secretary. *Navajo II*, 556 U.S. at 296-301. The Court held that the coal lease at issue was not approved under the Rehabilitation Act and that the Tribe could not mix-and-match statutes to combine an allegedly duty-creating mechanism of the Rehabilitation Act with provisions of a different statute. *Id*. at 296-98. The Supreme Court also rejected a contention that a provision of the Rehabilitation Act affording the Tribe opportunity to consider plans pertaining to the program authorized under Section 631 imposed a money-mandating duty on the Secretary to follow the Tribe's recommendations as to the royalty rates for the subject lease. *Id*. at 299-301.

In sum, these statutory provisions do not require the United States to develop or to exercise daily supervision over water system facilities and do not constitute an elaborate comprehensive scheme for developing and managing reserved water

[19]Even if the United States' assistance or contracting for drilling wells constituted a breach of trust (which it does not), the Tribe alleges that the wells were drilled long after 1964. *See* A77 (stating that wells were installed in 1968, 1970, 1970, and 1986); A320 (stating well drilled in 1998).

resources. The statutes conferring authority on the Indian Health Service and Department of the Interior to expend lump sum appropriations for certain purposes are not comparable to the network of statutes and regulations that established the requisite fiduciary duty in *Mitchell II*. In *Mitchell II*, the statutes and regulations required the Department of the Interior to manage timber resources on allotted lands and provided considerable detail and specificity as to how those resources were to be managed. *See supra* at 33-34; *infra* at 50-51.

2. The Tribe's reliance on federal control or use of water is unavailing at the first step of the jurisdictional inquiry

The Tribe asserts that "[t]he United States has undertaken extensive control of the Hopi Tribe's water systems," including design and installation of groundwater wells, federal agency use of water, and legal representation to claim reserved water rights in an ongoing water rights adjudication. Br. 47. The Tribe suggests (Br. 47-51) that these actions in combination with the Act of 1958 and statutes discussed above establish a fiduciary obligation "to rehabilitate the drinking water systems" (Br. 51). This line of argument focusing on common law trust principles of control or use runs afoul of the Supreme Court's instruction to "train on specific rights-creating or duty-imposing statutory or regulatory prescriptions" in the initial inquiry of whether there exists a relevant specific fiduciary duty. *Navajo I*, 537 U.S. at 50. A fiduciary duty cannot be premised on

common law principles, including exercise of control, at the first step of the jurisdictional inquiry. *See supra* at 16-18; *Jicarilla Apache*, 131 S. Ct. at 2325 ("[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") (internal quotations omitted). In short, common law duties based on control or use of property are not a permissible substitute for identifying specific statutory or regulatory rights whose violation forms the predicate for an Indian Tucker Act claim and cannot be the basis for importing specific duties into the Act of 1958.

The Tribe mistakenly suggests (Br. 42) that *White Mountain Apache* and *Mitchell II* countenance its attempt to inject common law duties into statutes that do not in themselves establish the requisite fiduciary duty. As explained above, in *White Mountain Apache*, it was the combination in the same statute of language providing that specific property was held in trust and conferring authority for the United States to use that same property for its own purposes that established the fiduciary duty required to satisfy the initial step in the jurisdictional analysis. In other words, in *White Mountain Apache*, the Supreme Court held that the duties arose from the terms of the statute itself, not from the government's subsequent action of using or controlling the property. *See id*., 537 U.S. at 475; *supra* at 34-36.

The discussion in *White Mountain Apache* respecting common law duties to preserve property that the government had been using and over which the government was the sole caretaker pertained to the second step of analysis, *i.e.*, whether the statute supported a fair inference that a remedy of money damages is available. *Id.*, 537 U.S. at 476-78; 480-81 (Ginsburg, J., concurring).

In *Mitchell II*, the Supreme Court first examined the "Acts of Congress and executive department regulations" on which the plaintiffs "based their money claims." 463 U.S. at 219. While those claims were described in the aggregate as "alleged breaches of trust in connection with [the government's management] of forest resources on allotted [Indian] lands," *id.* at 207, each of the violations alleged by the plaintiffs tracked specific provisions in statutes and regulations governing the federal government's management of timber resources on Indian land. *Id*. at 210 (describing claims); *id*. at 209, 211, 219-23 & nn. 23-28 (discussing governmental duties under statutes and regulations at issue and nowhere invoking common-law trust principles to define the applicable duties).[20] *Mitchell II*'s discussion of trust principles was limited to Part III.B of the opinion (463 U.S. at 224-228), which addressed – at step two of the jurisdictional analysis

[20] For example, the Supreme Court cited statutes providing for deductions from proceeds for administrative expenses and explained that plaintiffs had asserted the administrative fee deductions were excessive or improper. *Id*., 463 U.S. at 210, 222 n.23.

– whether the relevant statutes and regulations could in turn fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the duties they impose.

In short, these Supreme Court cases do not support the Tribe's suggestion that common law principles based on control and use can be used at the initial step of the jurisdictional analysis to convert the bare trust language in the Act of 1958 into a specific fiduciary duty to provide water system infrastructure. *See El Paso Natural Gas Co. v. United States*, __ F.3d __, 2014 WL 1328164 (D.C. Cir. 2014) (*White Mountain Apache* does not reduce to a simple formula that a statute's statement that lands are held in trust plus actual governmental use or control of property equals enforceable trust duties). The Tribe's assertion (Br. 51-52) that it relies on a combination of statutes and common law principles of control and use to establish the existence of a specific trust obligation to construct or rehabilitate drinking water systems is in reality an impermissible attempt to create fiduciary obligations based on common law principles.

Moreover, the particular actions on which the Tribe relies provide no sound basis for concluding that the United States has a specific trust duty to dig new wells and pipe water and to provide treatment facilities to remove arsenic. The Tribe alleges that in 1969, 1970, 1978, 1986, and 1998, federal agencies installed

certain ground water wells to which the affected villages' public water systems are connected.[21] Br. 10-11. However, the Tribe's suggestion that past federal installation of wells gives rise to a fiduciary duty to dig new wells elsewhere, to lay pipelines to convey water, and to construct treatment facilities is not grounded in any specific statutory or regulatory provision that establishes a fiduciary duty and that can fairly be interpreted as mandating money damages. Moreover, the Tribe ignores that four out of the five public water systems at issue are owned and operated by the local Hopi villages.[22]

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[21] *See* A77,320. Notably, at the time those wells were drilled, the regulatory maximum arsenic level was higher (*i.e.*, 50 ppb) and the Tribe has not alleged that arsenic levels exceeded the applicable regulatory standard when the wells were drilled. *See supra* at 6. Moreover, because the Tribe did not mention past well-digging as a basis for its claim in the complaint, the United States did not raise a statute of limitations defense in the motion to dismiss. However, to the extent the Tribe contends that the United States breached a fiduciary duty by making unsound decisions about where to dig the wells, its claim is barred by the statute of limitations, *see* 28 U.S.C. 2415(a). More importantly, before getting to the question of whether a particular act or omission constitutes a breach, the existence of a relevant, specific, fiduciary duty must first be established.

[22] A report prepared by Tetrach Tech EMI for the Hopi Water Resources Program states that populated areas on the Reservation consist of 14 residential areas scattered across the central part of the Hopi Reservation. A106-110. Drinking water is provided to most residents by 16 active public water systems operated and maintained by multiple organizations including ten independent village water committees, a non-profit village cooperative, the U.S. Bureau of Indian Affairs, and the Hopi Tribe Department of Facilities Management. *See* A108. Interior owns three public water systems on the Hopi Reservation, including Keams Canyon. A86. Two other systems owned by Interior serve schools (Hopi High School and

The Tribe's suggestion that the Indian Health Service's use of water delivered through a public water system at a hospital facility somehow supports finding jurisdiction over its breach of trust claim is also meritless. Br. 11-12. The Supreme Court did not state in *White Mountain Apache* or in any other case that an executive agency's actual use of a resource gives rise to a fiduciary duty or can substitute for a specific statutorily-imposed duty. The Indian Health Service is a user connected to a public water system operated by a local Hopi village and receives water bills from the tribal operator that it pays like any other customer of that system. This transaction provides no basis for concluding that there exists a fiduciary duty to improve the tribal system by installing treatment technology or building infrastructure to connect the system to an alternative source.

The public water system for Keams Canyon is owned and operated by the Department of the Interior, and because of Interior's status as owner and operator, Interior is responsible for complying with regulatory requirements of the Safe Drinking Water Act.[23] The United States is not, however, responsible for the

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Second Mesa Day Schools); prior to the filing of this suit, central arsenic treatment systems were installed for these school systems and adequately reduce arsenic concentrations. A86. The complaint does not specifically mention these two systems.

[23] The Tribe also asserts that the U.S. Bureau of Indian Education (an agency within the Department of the Interior) owns and operates schools on the Hopi

quality of water delivered through that system because of its role as trustee of reserved water rights, but because it owns and operates that system. As explained *supra* at 8-9, Interior has installed a treatment system to remove arsenic to bring that system into compliance with the regulatory arsenic requirement. Notably, the Tribe has not alleged that the Safe Drinking Water Act and implementing regulations are the substantive source of law for its breach of trust claim, nor does it allege that this Act entitles it to compensation for money damages. And there would no basis for such allegation, as Congress provided a civil remedy against the United States or any federal agency "who is alleged to be in violation of any requirement" of the Safe Drinking Water Act. 42 U.S.C. 300j-(8)(a)(1). *See United States v. Bormes*, 133 S. Ct. 12, 18-20 (2012) (Tucker Act is displaced when a law assertedly imposing monetary liability on the United States contains its own judicial remedy).

The Tribe further argues that the United States' legal representation to claim reserved water rights for the Hopi Reservation in an ongoing water rights

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Reservation that rely on the affected villages' water systems, citing the global consent agreement between the EPA and the Tribe. Br. 12, citing A77-78,157,238. As explained *supra* at 53 n.22, Interior owns public water systems serving Hopi High School and Second Mesa Day School and prior to the filing of this suit, had installed treatment technology to bring them into compliance with the revised arsenic standard. These systems are not specifically mentioned in the complaint.

adjudication for the Little Colorado River supports finding that the United States has a fiduciary duty that allows its claim here to proceed. Br. 50. However, the Tribe has not alleged that the United States has breached any fiduciary duty with respect to its legal representation in that adjudication and as explained *supra* at 32-33, legal representation in a water rights adjudication to claim title to reserved water rights does not give rise to an enforceable trust obligation in the circumstances here to construct water system infrastructure.

The Tribe also relies (Br. 50) on a statement in a final *draft* global settlement agreement stating that the United States, acting in its capacity as trustee, has the right to use water set aside for the Hopi Tribe. However, a Congressional enactment was required to effectuate that agreement and that has not occurred (and is not expected to be forthcoming because the Navajo Nation, another party to the draft agreement, withdrew support for the agreement).

In sum, pursuant to the general trust relationship and as a matter of policy and discretionary authority, the United States has vigorously argued on behalf of the Tribe in the ongoing water rights adjudication, has contributed financial resources and high-level personnel to negotiating resolution of Hopi's water rights, and has provided financial and technical assistance to help the Tribe to develop water resources and to seek funding for the Hopi Arsenic Mitigation Project. The

United States intends to continue to assist the Hope Tribe in reaching its water quality goals. But legal representation in the water rights adjudication for the Little Colorado River and other assistance provided as a matter of agencies' discretionary authority to expend lump sum appropriations do not amount to a substantive source of law that establishes a fiduciary duty with respect to water system infrastructure that could entitle the Tribe to the money damages it seeks here.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Federal Claims should be affirmed.

Respectfully submitted.

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May 16, 2014
90-2-20-13617

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2014, I electronically filed the foregoing Answering Brief and Supplemental Appendix with the Clerk of Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME-LIMITATIONS, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure. Excepting the portions described in Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Circuit Rule 32(b), the brief contains 13,705 words.

I further certify that this complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared using Microsoft Word 2007 in a proportionally-spaced typeface using Times New Roman, 14-point.

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May 16, 2014

IN THE UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

No. 14-5018

THE HOPI TRIBE,

Plaintiff-Appellant,

v.

UNITED STATES OF AMERICA,

Defendant-Appellee

On Appeal from the Court of Federal Claims,
No. 1:12-cv-00045-LB (Judge L. Block)

SUPPLEMENTAL APPENDIX OF DEFENDANT-APPELLEE, UNITED STATES OF AMERICA

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IN THE UNITED STATES COURT OF FEDERAL CLAIMS

THE HOPI TRIBE, Plaintiff, vs. THE UNITED STATES Defendant.	**CASE NO. 1:12 – cv – 00045 - LB** **Judge Lawrence J. Block** **JOINT STATUS REPORT**

JOINT STATUS REPORT

Plaintiff Hopi Tribe and Defendant United States (hereinafter "Parties") respectfully submit this Joint Status Report.

1. On January 20, 2012, Plaintiff filed its Complaint in this Court. ECF No. 1. On May 24, 2012, this Court granted the Parties' Joint Motion For Stay thru September 24, 2012. The Parties requested a stay based on an on-going administrative process that has the potential to resolve Plaintiff's claims as well as introduced legislation, which the United States' views as having the potential to resolve Plaintiff's claims.

2. The Court further required that the parties submit a Joint Status Report on September 24. Due to some miscommunications, the Parties did not submit the Joint Status Report until today. As such, we have also filed a Motion for Leave to File this Joint Status Report out of time.

3. This action arises out of Plaintiff's claims alleging that its federal reserved water rights for a quantity of water necessary to fulfill the purposes of the Hopi Reservation also creates a fiduciary duty for water quality. Compl. ¶ 26, 31. Specifically, the Hopi Tribe alleges the United States has a trust duty to ensure water quality for its Reservation and that it has

breached this obligation to provide sufficient drinking water that meets Federal standards for human consumption. *Id.* ¶ 33. The United States does not believe Plaintiff's Complaint sets forth an enforceable, specific, money mandating trust duty. Plaintiff brings this claim with respect to the high levels of arsenic found in the drinking water systems that serve the Hopi villages of Mishongnovi, Polacca, Sipaulovi, Shungopavi and Keams Canyon. *Id.* ¶ 17. Of note, the Bureau of Indian Affairs currently owns and operates the water supply system for Keams Canyon, and the Hopi villages own and operate the water supply systems for the other four villages.

4. Well before this litigation was filed, the Parties have been working to secure temporary, mid-range and a permanent alternative water supply source for the affected Hopi Villages. For example, the BIA has been providing bottled water to Keams Canyon since November 2011, has built and is operating a treatment plant to bring that village's arsenic levels into compliance with the Safe Drinking Water Act standards. With respect to the other four villages, the Parties have been exploring options to fund and construct a well-field along the Turquoise Trail and pipe water to those four villages, thereby providing those four villages with an alternative source of drinking water. This proposed project is known as the Hopi Arsenic Mitigation Project ("HAMP").

5. Since the beginning of the stay there have been a number of meetings between the Parties to further efforts to secure an alternative water supply source for the Hopi Villages by beginning funding and implementation of the HAMP. These meetings have included representatives of the Hopi Tribe Water Resources Program, United States Indian Health Services, United States Environmental Protection Agency, and United States Bureau of Indian Affairs. There have also been a number of community meetings with the affected Villages.

These meetings have been productive in moving the planning of the project, and the preliminary engineering work for the alternative wellfield and water delivery system, forward.

6. Additionally, the proposed legislation regarding a resolution of water rights claims related to the Little Colorado River in Arizona (the "LCR Adjudication") remains uncertain. *See* Navajo-Hopi Little Colorado River Water Rights Settlement Act of 2012, S. 2108 103(b). The Hopi Tribe believes the fate of this proposed legislation in this Congress will be resolved in the next several months as the Congressional session comes to a close and that the claims in the LCR Adjudication are separate and distinct from this action, and are not for, or in respect to, the same claims that are raised in this action. The United States believes that, if enacted, the legislation, by authorizing the Hopi groundwater project, might have alleviated the need for part or all of the relief the Hopi Tribe seeks from the Court, but that it is now unlikely that the legislation will be enacted.

7. As such, while the stay has been productive, the Parties respectfully request that the Court set November 5, 2012 for the United States to respond to the complaint.

NOW, THEREFORE, the Parties, through their respective undersigned counsel, jointly move the Court to enter an order setting November 5, 2012 as the date for which the United States will respond to the complaint.

Respectfully submitted this 27th day of September, 2012.

THE UNITED STATES

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