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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

NAVAJO NATION,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
THE INTERIOR, et al.,

Defendants.

No. CV-03-507 PCT-GMS

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF NAVAJO
NATION'S MOTION FOR
LEAVE TO FILE THIRD
AMENDED COMPLAINT**

1 The Navajo Nation files this memorandum of points and authorities in support of
2 the accompanying *Motion for Leave to File Third Amended Complaint* (Apr. 13, 2018).
3 For the reasons stated below, the Court should permit the Navajo Nation to amend its
4 *Second Amended Complaint for Declaratory and Injunctive Relief* (Nov. 14, 2013) (Doc.
5 281) (“Second Amended Complaint”) pursuant to Rule 15(a)(2) of the Federal Rules of
6 Civil Procedure and Rule 15.1(a) of the Local Rules of Civil Procedure. As required by
7 Local Rule 15.1(a), the proposed amendments are set forth in the *Third Amended*
8 *Complaint for Declaratory and Injunctive Relief* (“Proposed Third Amended
9 Complaint”), attached hereto as **Exhibit 1**.

10 **I. BACKGROUND**

11 The Navajo Nation filed this suit in 2003 against the United States Department of
12 the Interior, the Secretary of the Interior (“Secretary”), the Bureau of Reclamation, and
13 the Bureau of Indian Affairs (collectively “Federal Defendants”) to challenge certain
14 Colorado River programs as violating the National Environmental Policy Act (“NEPA”)
15 and to assert a related breach of trust claim. *See Complaint for Declaratory and*
16 *Injunctive Relief* (Mar. 14, 2003) (Doc. 1) (“Original Complaint”). The breach of trust
17 claim arises from the Federal Defendants’ violation of the Navajo Nation’s treaties with
18 the United States, federal statutes, regulations, and departmental policies and procedures
19 imposing fiduciary obligations and a duty of protection on the Federal Defendants to
20 secure, preserve, and protect the Nation’s trust resources, even while carrying out their
21 authority under the Boulder Canyon Project Act to manage the mainstream of the
22 Colorado River in the Lower Basin. The Original Complaint challenged the Federal
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1 Defendants' approval of certain programs and their ongoing management of Colorado
2 River water without first determining and then appropriately considering the Navajo
3 Nation's water needs.

4 Numerous parties intervened as defendants, so in 2004 the Court stayed the
5 proceedings in order to facilitate settlement discussions. The Court did not lift the stay
6 until May 2013 when it became clear that an agreement could not be reached at that time.

7 **A. THE FIRST AMENDED COMPLAINT.**

8 In June 2013, shortly after the stay ended, the Navajo Nation requested leave to
9 amend and update the Original Complaint after nearly ten years of out-of-court settlement
10 talks. *Navajo Nation's Motion for Leave to File Amended Complaint* (June 3, 2013)
11 (Doc. 218). At that time the Navajo Nation was not aware of any perceived deficiencies
12 in its pleading because the defendants had not filed their motions to dismiss, so believing
13 it had sufficiently plead the existing claims the Navajo Nation simply sought to add a
14 claim to challenge the Colorado River shortage guidelines that the Secretary had
15 approved and implemented during the stay. *See First Amended Complaint for*
16 *Declaratory and Injunctive Relief* at 18-20, 27-28, 34 (July 10, 2013) (Doc. 226) ("First
17 Amended Complaint"). No party opposed the Navajo Nation's motion, so the Court
18 granted the Navajo Nation's request to amend. *Order* (June 27, 2013) (Doc. 225).

19 **B. THE SECOND AMENDED COMPLAINT.**

20 The Federal Defendants moved to dismiss a few months after the Navajo Nation
21 filed the First Amended Complaint. *See Federal Defendants' Motion to Dismiss First*
22 *Amended Complaint* (Sept. 9, 2013) (Doc. 240). The Federal Defendants' primary attack
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1 on the breach of trust claim was grounded on sovereign immunity. *See Federal*
2 *Defendants’ Memorandum in Support of Motion to Dismiss Amended Complaint* at 27-33
3 (Sept. 9, 2013) (Doc. 240-1) (“Federal Defendants’ Memorandum”). The Federal
4 Defendants also made “alternative” arguments against the breach of trust claim based on
5 failure to state a claim, *id.* at 33-37, federal discretion to initiate lawsuits, *id.* at 37-39,
6 and ripeness, *id.* at 39-43, but their main argument focused on a sovereign immunity
7 defense.

8 The defendant-intervenors also moved to dismiss the First Amended Complaint,
9 but none of their motions alleged any deficiencies with respect to the seventh claim
10 regarding breach of trust. *See generally Motion to Dismiss by Intervenor/Defendant State*
11 *of Arizona* (Sept. 23, 2013) (Doc. 242); *Memorandum of Points and Authorities in*
12 *Support of Motion to Dismiss Pursuant to F.R.C.P. 12(b)(1)* (Sept. 23, 2013) (Doc. 244);
13 *Salt River Project’s Motion to Dismiss Fourth and Sixth Claims for Relief in Plaintiff’s*
14 *First Amended Complaint and Motion to Join Required Parties* (Sept. 23, 2013) (Doc.
15 249); *Intervenor-Defendant Central Arizona Water Conservation District’s Motion to*
16 *Dismiss Plaintiff’s First Amended Complaint* (Sept. 23, 2013) (Doc. 250); *Motion to*
17 *Dismiss by Intervenor/Defendant Imperial Irrigation District* (Sept. 23, 2013) (Doc.
18 251); *Motion to Dismiss of the State of Nevada, Colorado River Commission of Nevada,*
19 *and Southern Nevada Water Authority* (Sept. 23, 2013) (Doc. 254). Thus, the Navajo

1 Nation focused its briefing on convincing the Court that sovereign immunity did not bar
2 the breach of trust claim.¹

3 Prior to filing responses to the motions to dismiss, however, the Navajo Nation
4 sought to voluntarily dismiss one of its claims and thereby narrow the scope of this case
5 and the issues to be briefed. Knowing that the defendants would not willingly allow it to
6 make substantive amendments to the First Amended Complaint in direct response to their
7 motions to dismiss, and still believing it had sufficiently plead its claims and that
8 sovereign immunity did not bar the breach of trust claim, the Navajo Nation proposed to
9 amend the First Amended Complaint for the sole purpose of striking its claim against
10 certain contracts for the delivery of Colorado River water. *Navajo Nation's Unopposed*
11 *Motion for Leave to File a Second Amended Complaint and for Approval of Stipulated*
12 *Conditions* at 2 (Nov. 7, 2013) (Doc. 277). The defendants stipulated to this amendment.

13 The Navajo Nation limited its amendments in this manner in order to ensure that
14 the defendants would not object and, as a result, to remove this Court's discretion about
15 whether to grant leave. *See* Fed. R. Civ. P. 15(a)(2) (allowing amendment "only with the
16 opposing party's written consent *or* the court's leave" (emphasis added)); LRCiv 15.1(b)
17 (allowing amendment "as a matter of course *or* with the opposing party's written
18 consent" (emphasis added)). The Navajo Nation reasonably believed that its claims were
19 sufficiently plead to withstand a motion to dismiss at this early stage of the proceedings.
20 Because the parties stipulated to the voluntary dismissal of the claim regarding water

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22 ¹ Indeed, when the Court subsequently held a hearing on the motions to dismiss, the only
23 questions it asked about the breach of trust claim related to sovereign immunity. *See*
infra Section I(C).

1 delivery contracts, the Court was required to allow the filing of the Second Amended
 2 Complaint. *See Order* (Nov. 13, 2013) (Doc. 280).

3 **C. DISMISSAL OF THE SECOND AMENDED COMPLAINT.**

4 In July 2014, at the conclusion of the parties' briefing on the motions to dismiss,
 5 the Court held a hearing to address specific questions it identified regarding the Navajo
 6 Nation's claims. *See Order* (July 1, 2014) (Doc. 297) ("July 2014 Order"); *Order* (July
 7 8, 2014) (Doc. 298). Given the Federal Defendants' primary attack on the breach of trust
 8 claim based on sovereign immunity, the only questions the Court asked about this claim
 9 related to that issue:

10 2. Does the Nation bring count seven pursuant to the Administrative
 11 Procedures Act ["APA"]? To the extent that it does, what is the "final
 12 agency action" or failure to take a discrete action that the agency was
 13 required to take that the Nation challenges?

14 3. To the extent that the Nation brings claim seven independent of the
 15 [APA], what is the applicable waiver of sovereign immunity under which
 16 the Nation brings the claim? And how does the claim, as stated and with
 17 the Defendants who are in the suit, survive the limitation set forth in the
 18 McCarran Amendment?

19 July 2014 Order at 1-2. At the hearing, the Court expressed some doubt that the Navajo
 20 Nation could amend the breach of trust claim to show a waiver of sovereign immunity,
 21 *see Reporter's Transcript of Proceedings Before the Honorable G. Murray Snow (Status*
 22 *Conference)* at 49 (July 11, 2014) ("Transcript"), further confirming that sovereign
 23 immunity was the primary obstacle for the Navajo Nation to overcome in order to pursue
 its breach of trust claim.

The Court also asked *sua sponte* whether the Navajo Nation preferred dismissal
 without prejudice or with leave to amend. *Id.* at 33, 48-50. Although in response counsel

1 for the Navajo Nation requested dismissal with leave to amend, *id.* at 48, the Court
2 dismissed this suit without prejudice and without addressing the issue of leave to amend.
3 *Order* at 16-17 (July 22, 2014) (Doc. 305) (“Dismissal Order”). The Court specifically
4 held that the Navajo Nation lacked standing to bring its NEPA claims, *id.* at 10-11, and
5 that sovereign immunity barred the breach of trust claim. *Id.* at 12-15. With respect to
6 the breach of trust claim, the Court found that section 702 of the APA, as limited by
7 section 704, waived federal immunity only in suits challenging final agency action or
8 involving constitutional claims. *Id.* at 14-15; *see* 5 U.S.C. §§ 702, 704.

9 The Navajo Nation reasonably feared that the dismissal was effectively with
10 prejudice due to the six-year statute of limitations for bringing claims against the United
11 States, *see* 28 U.S.C. § 2401(a); *United States v. Taylor*, 487 U.S. 326, 342 (1988);
12 *Pension Benefit Guar. Corp. v. Carter & Tillery Enters.*, 133 F.3d 1183, 1187 (9th Cir.
13 1998), so it filed a post-judgment motion asking for leave to amend the Second Amended
14 Complaint. *See Memorandum of Points and Authorities in Support of Navajo Nation’s*
15 *Motion for Specific Relief from the July 22 Order Pursuant to Rule 60(b)(6)* (Aug. 18,
16 2014) (Doc. 310). This Court denied the post-judgment motion. *Order* at 2-3 (Oct. 1,
17 2014) (Doc. 319).

18 **D. NINTH CIRCUIT APPEAL AND REMAND.**

19 The Navajo Nation appealed the dismissal of two of the NEPA claims and the
20 breach of trust claim, arguing it had standing to bring the former and that sovereign
21 immunity did not bar the latter. Alternatively, the Navajo Nation argued that it should
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1 have been permitted to amend its claims or that this Court was required to explain the
2 denial of leave to amend.

3 The Ninth Circuit affirmed the dismissal of the NEPA claims on standing grounds
4 and found this Court did not abuse its discretion in denying leave to amend those claims.
5 *Navajo Nation v. Dep't of Interior*, 876 F.3d 1144, 1160-67, 1173-74 (9th Cir. 2017).

6 The Ninth Circuit reversed the dismissal of the breach of trust claim, however, *id.* at
7 1167-73, agreeing with the Navajo Nation that section 702 of the APA means what it
8 says, that the Court of Appeals prior decision in *Presbyterian Church* correctly
9 recognized the broad waiver of the United States' immunity that Congress intended in
10 amending section 702, and that the waiver is not limited to constitutional claims. *Id.* at
11 1171-72; *see The Presbyterian Church v. United States*, 870 F.2d 518 (9th Cir. 1989).
12 Thus, the Ninth Circuit held that the waiver of federal immunity in section 702 of the
13 APA "applies squarely to the Nation's breach of trust claim," and on remand it ordered
14 the Court "to consider fully the Nation's breach of trust claim in the first instance, after
15 entertaining any request to amend the claim more fully to flesh it out." *INavajo Nation*,
16 876 F.3d. at 1173.

17 Accordingly, the Navajo Nation now requests leave to amend the second
18 Amended Complaint pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure
19 and Rule 15.1(a) of the Local Rules of Civil Procedure.

20 **II. ARGUMENT**

21 The Navajo Nation respectfully asks the Court to grant it leave to amend its
22 complaint to allege additional claims for breach of the Federal Defendants' breach of
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1 their fiduciary obligations and duty of protection with regard to the Navajo Nation’s trust
 2 resources, including its Reservation lands and waters. The proposed amendments add
 3 numerous factual and legal allegations to clarify and bolster the substance of the claim.
 4 *See* Proposed Third Amended Complaint ¶¶ 12-119. The proposed amendments also
 5 clarify the causes of action, *id.* ¶¶ 120-136, and the type of relief that the Navajo Nation
 6 is requesting. *See id.* ¶¶ 53-54. Moreover, as explained below, not only does justice
 7 require the Court to freely grant such leave, but the Navajo Nation did not unduly delay
 8 or act in bad faith, the defendants cannot show prejudice, and the proposed amendments
 9 are not futile.

10 **A. JUSTICE REQUIRES THE COURT TO FREELY GIVE LEAVE TO**
 11 **AMEND.**

12 The Court should allow the Navajo Nation to amend the Second Amended
 13 Complaint consistent with Ninth Circuit precedent and the policies embodied in the
 14 Federal Rules of Civil Procedure. Indeed, courts should “freely give leave” to amend
 15 “when justice so requires,” FED. R. CIV. P. 15(a)(2), “a policy ‘to be applied with extreme
 16 liberality.’” *Navajo Nation*, 876 F.3d at 1173 (quoting *Morongo Band of Mission Indians*
 17 *v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990)). Moreover, courts “‘must be guided by the
 18 underlying purpose of Rule 15 – to facilitate decision on the merits, rather than on the
 19 pleadings or technicalities.’” *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th
 20 Cir. 1987) (quoting *United States v. Webb*, 655 F.2d 977, 979 (9th Cir. 1981)); *accord*
 21 *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 712 (9th Cir. 2001).

22 Here, a denial of leave to amend the complaint will not serve justice. The Navajo
 23 Nation is a federally recognized Indian tribe in desperate need of a long-term and

1 sustainable water supply, and the United States has a solemn trust responsibility to
 2 address that need. As the Supreme Court reiterated in *Washington v. Wash. State*
 3 *Comm'l Fishing Vessel Ass'n*:

4 [T]his Court has already held that . . . treaties confer enforceable special
 5 benefits on signatory Indian tribes, e. g., *Tulee v. Washington*, 315 U.S.
 6 681; *United States v. Winans*, 198 U.S. 371; and has repeatedly held that
 7 the peculiar semisovereign and constitutionally recognized status of Indians
 8 justifies special treatment on their behalf when rationally related to the
 9 Government's "unique obligation toward the Indians." *Morton v. Mancari*,
 10 417 U.S. 535, 555. *See United States v. Antelope*, 430 U.S. 641; *Antoine v.*
 11 *Washington*, 420 U.S. 194.

12 443 U.S. 658, 673 n.20 (1979). Moreover, given the applicable statute of limitations, *see*
 13 28 U.S.C. § 2401(a) (six-year deadline to bring suit against United States), any dismissal
 14 of the Navajo Nation's breach of trust claim prior to reaching the merits will effectively
 15 be with prejudice. *See Taylor*, 487 U.S. at 342; *Pension Benefit*, 133 F.3d at 1187; *see*
 16 *also Navajo Nation*, 876 F.3d at 1173-74 ("Contrary to the district court, we do think the
 17 Nation sufficiently explained why the district court's dismissal of claims was effectively
 18 with prejudice—because the relevant statutes of limitations had run on those claims.").

19 While technically the Navajo Nation has already amended its complaint twice, as
 20 described above those amendments were relatively minor and for specific purposes other
 21 than bolstering the substance of its breach of trust claim. The Federal Defendants'
 22 primary argument against the breach of trust claim was based on sovereign immunity,
 23 Federal Defendants' Memorandum at 27-33, so this Court squarely focused on that issue,
see July 2014 Order at 1-2, and ultimately dismissed the breach of trust claim on
 sovereign immunity grounds. Dismissal Order at 13-15. Although the Navajo Nation
 was confident in its position that sovereign immunity did not apply, this was clearly a

1 legal issue that could not have been addressed by alleging additional facts. *See Hutsell v.*
2 *Sayre*, 5 F.3d 996, 1005-06 (6th Cir. 1993) (amendments futile because defendants
3 enjoyed sovereign immunity); *Schepp v. Fremont County, Wyo.*, 900 F.2d 1446, 1453
4 (10th Cir. 1990) (same); Transcript at 49 (Court expressing doubt that amendments
5 would overcome sovereign immunity defense).

6 Put differently, attempting to amend the breach of trust claim in response to a
7 sovereign immunity defense would have been a futile exercise because this was purely a
8 legal issue and no additional factual or legal allegations would have assisted the Court in
9 interpreting section 702 of the APA. Now that the Ninth Circuit has held that section 702
10 of the APA waives the Federal Defendants' immunity and also directed the Court to
11 "fully" consider the breach of trust claim on remand, *Navajo Nation*, 876 F.3d at 1173,
12 justice requires that the Navajo Nation be allowed an opportunity to amend this claim for
13 the first time.

14 As shown, the Court should freely grant leave to amend the Second Amended
15 Complaint consistent with the clear policy of Rule 15(a)(2) to promote decisions based
16 on the merits rather than on outdated pleadings or technicalities. The important tribal
17 interests at stake and related federal trust obligations further support such relief, as does
18 the fact that any dismissal will effectively be with prejudice due to the applicable statute
19 of limitations.

20 **B. NONE OF THE FACTORS FOR DENYING LEAVE TO AMEND APPLY.**

21 In determining whether to grant leave to amend, courts must consider four factors:
22 (1) whether the moving party unduly delayed; (2) whether the moving party acted in bad
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1 faith; (3) whether the non-moving parties will be unfairly prejudiced; and (4) whether the
2 proposed amendments are futile. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Eminence*
3 *Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051-52 (9th Cir. 2003) (*per curiam*).
4 Courts perform this determination “with all inferences in favor of granting” leave, *Griggs*
5 *v. Pace Am. Group, Inc.*, 170 F.3d 877, 880 (9th Cir. 1999), and if no reason exists to
6 deny relief, “the leave sought should, as the rules require, be ‘freely given.’” *Foman*, 371
7 U.S. at 182. None of these four factors is present in this case, so the Court should allow
8 the Navajo Nation to amend its breach of trust claim as set forth in the Proposed Third
9 Amended Complaint.

10 **1. The Navajo Nation Did Not Unduly Delay.**

11 The Navajo Nation did not unduly delay in requesting leave to amend. The Ninth
12 Circuit reversed and remanded this Court’s dismissal of the breach of trust claim on
13 December 4, 2017, and this Court set the matter for a status conference on February 13,
14 2018. *See Order* (Jan. 29, 2018) (Doc. 330). At the status conference, counsel for the
15 Navajo Nation proposed a briefing schedule on the leave to amend issue that all of the
16 parties agreed to. *See Civil Minutes – General* (Feb. 13, 2018) (Doc. 333). The Navajo
17 Nation timely filed this motion by the April 13, 2018, deadline, *see id.*, so no party can
18 argue that the Navajo Nation unduly delayed in making this request.

19 In any event, “delay alone no matter how lengthy is an insufficient ground for
20 denial of leave to amend.” *Webb*, 655 F.2d at 980. So even if undue delay exists here,
21 which it does not, the Court may only deny leave if it makes “a contemporaneous specific
22 finding of prejudice to the opposing party, bad faith by the moving party, or futility of the
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1 amendment.” *Bowles v. Reade*, 198 F.3d 752, 758 (9th Cir. 1999). As explained below,
 2 no other reason exists to deny leave to amend.

3 **2. The Navajo Nation is Not Acting in Bad Faith.**

4 The Navajo Nation is not acting in bad faith or with a dilatory motive in
 5 requesting leave to amend and no defendant has ever suggested otherwise. As any
 6 plaintiff would, the Navajo Nation simply wants a decision on its breach of trust claim to
 7 be based on the merits, not on pleading technicalities, *see DCD Programs*, 833 F.2d at
 8 186 (Rule 15 encourages merits-based decisions), and it believes its proposed
 9 amendments will survive any motion to dismiss. Indeed, the Navajo Nation proposes to
 10 add numerous factual and legal allegations in support of its breach of trust claim. *See*
 11 Proposed Third Amended Complaint ¶¶ 12-119. Moreover, the Ninth Circuit expressly
 12 required this Court to consider leave to amend, so it cannot be argued that the Navajo
 13 Nation is now acting in bad faith by requesting such relief.

14 **3. The Proposed Amendments Do Not Prejudice the Defendants.**

15 Leave to amend the Second Amended Complaint will not prejudice the
 16 defendants. Prejudice to an opposing party “carries the greatest weight” in determining
 17 whether to grant leave to amend, so that absent prejudice a “strong showing of any of the
 18 remaining *Foman* factors” is required to deny leave. *Eminence Capital*, 316 F.3d at 1052
 19 (without prejudice to opposing party a presumption exists “in favor of granting leave to
 20 amend”); *accord Howey v. United States*, 481 F.2d 1187, 1190 (9th Cir. 1973) (prejudice
 21 is “crucial factor”). Unlike with undue delay, bad faith, and futility, however, the burden
 22 of showing prejudice falls on the parties opposing leave to amend. *Eminence Capital*,

1 316 F.3d at 1052; *DCD Programs*, 833 F.2d at 187. Thus, the defendants must show that
2 leave to amend will prejudice their interests; the Navajo Nation is not required to show
3 that its proposed amendments will not cause prejudice.

4 Nonetheless, leave to amend will not prejudice any defendant. First, the Navajo
5 Nation desires to pursue its breach of trust claim against the Federal Defendants and to
6 have a decision based on the merits, not on pleading technicalities, and the proposed
7 amendments simply refine and sharpen the focus of that claim. Second, this case was in
8 the early stages of litigation when the Court dismissed it, before time and effort was spent
9 on discovery and other pretrial matters, so leave to amend will not burden the defendants
10 with having to repeat those activities.

11 **4. The Proposed Amendments Are Not Futile.**

12 Leave to amend the breach of trust claim is also not futile, as evidenced by the fact
13 that this Court previously dismissed the Second Amended Complaint without prejudice.
14 *See DCD Programs*, 833 F.2d at 188 (“Again it is worth noting that the district court
15 dismissed appellants’ third amended complaint *without prejudice*, implying that defects
16 in the complaint could be remedied by amendment.”). In addition, in the absence of a
17 showing of prejudice by the defendants, a particularly strong showing of futility is
18 required before the Court may dismiss the claim at this stage of the proceedings based
19 only on the pleadings. *See Eminence Capital*, 316 F.3d at 1052; *supra* Section II(B)(3).
20 Moreover, the Ninth Circuit ordered this Court to consider the breach of trust claim
21 “fully” after entertaining a request for leave to amend. *Navajo Nation*, 876 F.3d at 1173.

1 Regarding the Navajo Nation's assertion that multiple actions by the Federal Defendants
2 engendered reliance in third parties, making it more difficult for the Nation to secure the
3 water needed to make the Navajo Reservation a permanent home for the Navajo people
4 as promised in the Treaty of 1968, the Court of Appeals observed:

5 For example, the Nation offers no support for its allegation that the United
6 States will shirk its trust duties for fear of upsetting the water rights apple-
cart . . . and offers no pattern of such behavior in the past.

7 *Navajo Nation*, 876 F.3d at 1163. As noted above, this matter was dismissed with no
8 development of the underlying facts. The Proposed Third Amended Complaint includes
9 specific allegations to address the concerns expressed by the Court of Appeals.

10 Similarly, regarding the Nation's breach of trust claim, this Court made

11 no determination as to whether a claim for breach of trust could be stated
12 against the United States under other factual circumstances, such as for
13 example, if the Nation were unable to obtain on its own and the United
States has refused to otherwise pursue a determination whether the Nation
had any right in Lower Basin waters.

14 Dismissal Order at 13 n.4. Again, the additional allegations in the Proposed Third
15 Amended Complaint address this Court's concerns. Merely dismissing the claim now on
16 futility grounds without providing the Navajo Nation an opportunity to flesh it out will
17 contravene the Ninth Circuit's remand order.

18 As established by the Ninth Circuit, proposed amendments are futile only if it is
19 clear that the claim (1) cannot be saved by any amendment; (2) is duplicative of existing
20 claims; or (3) is patently frivolous. *Murray v. Schriro*, 745 F.3d 984, 1015 (9th Cir.
21 2014). Here, the breach of trust claim, as amended, is not futile on its face. The
22 Proposed Third Amended Complaint cites numerous statutes, executive orders, compact
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provisions, policies, and other legal authorities that relate to and establish an enforceable trust obligation on the part of the Federal Defendants with respect to the Navajo Nation's need for a secure water supply. *See* Proposed Third Amended Complaint ¶¶ 12-119; Dismissal Order at 12-13. As a result, the Court should allow the breach of trust claim, as set forth in the Proposed Third Amended Complaint, to move forward for full consideration on the merits.

III. CONCLUSION

For all of the foregoing reasons, the Navajo Nation respectfully requests the Court to grant it leave to amend the Second Amended Complaint as set forth in the Proposed Third Amended Complaint.

Respectfully submitted this 13th day of April, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2018, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CE/ECF registrants:

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