

EXHIBIT 1

M. Kathryn Hoover, Principle Attorney, SBA 013266
Stanley M. Pollack, Contract Attorney, SBA 011046
NAVAJO NATION DEPARTMENT OF JUSTICE
Post Office Drawer 2010
Window Rock, Arizona 86515
Telephone: (928) 871-7510
Fax: (928) 871-7570
khoover@nndoj.org
smpollack@nndoj.org

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

Attorneys for the Navajo Nation

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

NAVAJO NATION,)	
)	
Plaintiff,)	No. CV-03-507 PCT-GMS
)	
v.)	THIRD AMENDED
)	COMPLAINT FOR
UNITED STATES DEPARTMENT OF THE)	DECLARATORY AND
INTERIOR, RYAN ZINKE, Secretary of the)	INJUNCTIVE RELIEF
Interior; BUREAU OF RECLAMATION; and)	
BUREAU OF INDIAN AFFAIRS,)	
)	
Defendants,)	
)	
STATE OF ARIZONA; CENTRAL ARIZONA)	
WATER CONSERVATION DISTRICT;)	
ARIZONA POWER AUTHORITY; SALT)	
RIVER PROJECT AGRICULTURAL)	

1 IMPROVEMENT AND POWER DISTRICT;)
SALT RIVER VALLEY WATER USERS')
2 ASSOCIATION; IMPERIAL IRRIGATION)
DISTRICT; METROPOLITAN WATER)
3 DISTRICT OF SOUTHERN CALIFORNIA;)
COACHELLA VALLEY WATER DISTRICT;)
4 STATE OF NEVADA; COLORADO RIVER)
COMMISSION OF NEVADA; SOUTHERN)
5 NEVADA WATER AUTHORITY; and)
STATE OF COLORADO,)

6 Intervenor-Defendants.
7

8 Plaintiff, the Navajo Nation, complains and alleges as follows:
9

10 **I. INTRODUCTION**

11 1. This action is brought by the Navajo Nation (sometimes “Nation”) against
12 the United States Department of the Interior (“Department”), the Secretary of the Interior
13 (“Secretary”), the Bureau of Reclamation (“Reclamation”), and the Bureau of Indian
14 Affairs (“BIA”) (collectively referred to as “Federal Defendants”), for violation of the
15 treaties between the Nation and the United States and the duty of protection the United
16 States assumed therein, for breach of the fiduciary duty owed to the Nation by the United
17 States, and for failure to consult with the Nation on decisions that affect its trust
18 resources. The lands and waters of the Navajo Nation are held in trust by the United
19 States, and the Federal Defendants are charged with preserving and protecting those trust
20 resources for the Navajo Nation, the trust beneficiary. In addition to serving as trustee
21 for the Nation’s lands and waters, the Secretary is the water master for the Lower Basin
22 of the Colorado River pursuant to the Boulder Canyon Project Act and the Decree in

1 *Arizona v. California*. Despite indisputable evidence that the Navajo Nation will require
2 water from the Lower Basin of the Colorado River to make the Navajo Reservation a
3 viable permanent homeland – an express promise in the Nation’s 1868 Treaty with the
4 United States – and ignoring repeated entreaties from the Navajo Nation, the Federal
5 Defendants have refused to take action to protect the Nation’s interests in, or assist the
6 Nation in the acquisition of, a water supply from the Lower Basin of the Colorado River.
7 The Nation challenges the Federal Defendants’ actions and failures to act in derogation of
8 their trust responsibility, including: failure to determine the water required from the
9 Lower Basin of the Colorado River to make the Navajo Reservation a permanent
10 homeland for Navajo people; failure to protect the sovereign interests of the Navajo
11 Nation by securing an adequate water supply from the Lower Basin of the Colorado
12 River to meet those homeland purposes; failing to consult with Navajo Nation prior to
13 making management decisions that affect Navajo trust resources; and managing the
14 Colorado River through decisions that inure to the benefit of others, including the
15 Intervenor-Defendants, while compromising the interests of the Navajo Nation.

16 **II. PARTIES**

17 2. The Navajo Nation is a federally recognized Indian tribe and the lands of
18 the Navajo Reservation are located in the states of Arizona, New Mexico, and Utah. The
19 Nation is a sovereign with proprietary interests in its lands and waters and governmental
20 interests in the management of its natural resources, including providing adequate water
21 supplies to its Reservation lands to meet the needs of the people residing thereon so that
22 those lands may serve as a permanent homeland for Navajo people.

1 3. The Department is a federal agency that includes Reclamation and the BIA
2 and is charged by Congress with responsibility for managing Indian affairs. 25 U.S.C. §
3 2. The Department has a fiduciary responsibility to the Navajo Nation to preserve,
4 protect, and make productive the Nation's trust resources so that the Navajo Reservation
5 is a viable permanent homeland.

6 4. Ryan Zinke is Secretary of the Interior and is sued in his official capacity.
7 As Secretary, he holds the lands and waters of the Navajo Nation in trust for the benefit
8 of the Nation and the Navajo people. *Id.* § 5108. The Secretary is principally responsible
9 for carrying out the trust responsibility owed by the United States to Indian tribes. *Id.* In
10 his capacity as trustee of the Nation's lands and waters, the Secretary owes the Nation all
11 the obligations of a fiduciary undertaken by the United States to Indian tribes, including
12 duties of protection and loyalty. The Secretary has a variety of responsibilities over the
13 waters of the Colorado River pursuant to federal law, including, but not limited to, the
14 Boulder Canyon Project Act, 43 U.S.C. §§ 617-617u, the Colorado River Basin Project
15 Act, *id.* §§ 1501-56, and the Decree in *Arizona v. California*, 376 U.S. 340 (1964) ("1964
16 Arizona Decree").

17 5. Reclamation is the principal agency charged with implementing the
18 obligations of the Secretary to manage the waters of the Colorado River in the Lower
19 Basin. Reclamation has a fiduciary responsibility to the Navajo Nation to protect tribal
20 trust resources in carrying out its legal responsibilities related to the Colorado River.

1 management decisions concerning the Colorado River that affect the Nation's trust
2 resources.

3 11. Venue is proper in the United States District Court for the District of
4 Arizona pursuant to 28 U.S.C. § 1391(e). The Nation's Reservation lands in the Lower
5 Basin of the Colorado River in Arizona are located in the District.

6 IV. FACTUAL AND LEGAL ALLEGATIONS

7 A. THE NAVAJO NATION AND NAVAJO RESERVATION.

8 12. The Navajo people have occupied lands within the Lower Basin of the
9 Colorado River since time immemorial. The Navajo Nation is a federally recognized
10 Indian tribe in the United States with over 300,000 members.

11 13. The Navajo Reservation is the largest Indian reservation in the United
12 States with over 17 million acres of reservation lands located in Arizona, New Mexico,
13 and Utah. The Reservation is located almost entirely within the Colorado River Basin.

14 14. In the *Treaty with the Navaho, 1849* (Sep. 9, 1849), 9 Stat. 974 ("1849
15 Peace Treaty"), the Navajo Nation and United States agreed that the Nation "was
16 lawfully placed under the exclusive jurisdiction and protection of the Government," *id.*
17 art. I, and further, that the United States "[r]elying confidently upon the justice and the
18 liberality of the aforesaid Government," promised to set aside lands for the use of the
19 Navajo Nation and to promulgate such laws "as will be conducive to the prosperity" of
20 the Navajo Nation. *Id.* art. IX.

21 15. The Navajo Reservation was established initially by the *Treaty with the*
22 *Navaho, 1868* (June 1, 1868), 15 Stat. 667 ("1868 Treaty"), as the "permanent home" of

1 the Navajo Nation, *id.* art. XIII, “set apart for the use and occupation of the Navajo tribe
2 of Indians” *Id.* art. II.

3 16. The Navajo Reservation was expanded by executive orders and acts of
4 Congress from 1868 through the present. The United States holds the lands of the Navajo
5 Reservation in trust for the Navajo Nation. The Navajo Reservation lands are adjacent to
6 the Colorado River both above and below Lee Ferry and are located in the Upper and
7 Lower Basins of the Colorado River Basin. This lawsuit pertains to Navajo Reservation
8 lands located in the Lower Basin in Arizona.

9 17. The Act of June 14, 1934, 48 Stat. 960-62, confirmed the boundary of the
10 Navajo Reservation in Arizona, and described the Colorado River as the western
11 boundary of the Navajo Reservation from the Arizona border with Utah south to its
12 confluence with the Little Colorado River.

13 18. In the 1868 Treaty and the acts of Congress and executive orders expanding
14 the boundaries of the Navajo Reservation, a sufficient amount of water was reserved for
15 the benefit of the Navajo Nation to carry out the purposes for which the Reservation was
16 created, specifically to make the Reservation a livable homeland for the Nation’s present
17 and future generations. *Winters v. United States*, 207 U.S. 564 (1908); *United States v.*
18 *Winans*, 198 U.S. 371 (1905). The Navajo Nation’s beneficial rights to water to make its
19 Reservation lands livable vested *at least as early* as the date of the 1868 Treaty and each
20 congressional act or executive order setting aside the Reservation lands. The Nation’s
21 water resources, even those that remain unquantified, are a trust resource that the Federal
22 Defendants have a fiduciary duty to secure, preserve, and protect.

1 **B. WATER NEEDS OF THE NAVAJO NATION AND NAVAJO**
2 **RESERVATION.**

3 19. The Navajo Reservation suffers from poor living conditions, with a poverty
4 level three times higher than that of the United States generally. Reclamation, *North*
5 *Central Arizona Water Supply Study, Report of Findings* at 13 (Oct. 2006) (Doc. 282-6)
6 (“North Central Arizona Study”). The lack of water in the Arizona portion of the Navajo
7 Reservation contributes to poor living conditions. The percentage of Navajo homes
8 without plumbing facilities in this part of the Navajo Reservation is significantly greater
9 than for the rest of the State of Arizona. *Id.* Over 30% of Navajo tribal members live
10 without plumbing, and in some areas of the Navajo Reservation the percentage is much
11 higher. *Id.* at 14.

12 20. Navajo tribal members who do not have plumbing must haul water
13 substantial distances in order to obtain water for their household uses. *Id.* at 14, 82. This
14 practice is not only expensive, but is a risk to human health because many Navajo people
15 rely on non-potable water sources and the containers used for hauling water are not
16 sanitary. *Id.* Navajo water haulers also consume much less water per day than does the
17 average Arizona resident. *Id.* at 14.

18 21. Hauled water is, on average, much more expensive than municipal or
19 domestic well supplied water, costing approximately \$37,000 per acre-foot. *Id.* In 2003
20 hauled water averaged \$32 per 1,000 gallons but was as high as \$250 for 1,000 gallons.
21 This compares with a cost in 2006 of \$2.93 per 1,000 gallons of water delivered by the
22 Navajo Tribal Utility Authority. *Id.* at 135.

1 22. The majority of Navajo tribal members in the western portion of the Navajo
2 Reservation are water haulers. *Id.* at 58-59. 91% of Navajo households in the
3 Coppermine region of the Reservation lack access to water, 53% of Navajo households in
4 the Cameron region of the Reservation lack access to water, and 44% of Navajo
5 households in the Bodaway Gap region of the Reservation lack access to water. *Id.* at 59.
6 The western portion of the Navajo Reservation in Arizona experiences severe drought,
7 which exacerbates the lack of water. *Id.* at 82.

8 23. Improvement in the living conditions on the Navajo Reservation will not
9 occur without improvements in water supply and water delivery infrastructure. *Id.* at 15.
10 Without such improvements the current water-short conditions will persist, and the
11 Navajo Nation is expected to see a shortfall of water to meet its needs in the western
12 portion of the Navajo Reservation in the amount of 8,263 acre-feet per year by 2050. *Id.*
13 at 79-80. Water from the Colorado River is required to meet these needs.

14 24. The lack of water, which is pervasive in the Arizona portion of the Navajo
15 Reservation, constitutes injury to the Navajo Nation and tribal members who live thereon.

16 **C. THE NAVAJO NATION'S EFFORTS TO SECURE WATER FROM THE**
17 **MAINSTREAM OF THE COLORADO RIVER IN THE LOWER BASIN.**

18 25. Although the Navajo Reservation is adjacent to the Colorado River, the
19 Navajo Nation's rights to use water from the Colorado River in the Lower Basin of the
20 River were not adjudicated in *Arizona v. California*, 373 U.S. 546 (1963), or elsewhere.

21 26. In 1952, Arizona initiated an original action in the United States Supreme
22 Court against California seeking a division of the waters of the mainstream of the

1 Colorado River in the Lower Basin, despite the fact that Congress in the Boulder Canyon
2 Project Act made such an apportionment. *Motion for Leave to File Bill of Complaint and*
3 *Bill of Complaint, Arizona v. California*, Original No. 8 (Aug. 8, 1952). The United
4 States entered the litigation alleging the need to protect federal interests, including the
5 rights of twenty-five Indian tribes in the Lower Basin. *Response of the United States to*
6 *the Motion on Behalf of the Navajo Tribe of Indians for Leave to Intervene* at 6 n.3 (Nov.
7 6, 1961) (“US Response”).

8 27. In 1956, the Navajo Nation and six other Indian tribes moved for leave to
9 file a “representation of interest,” seeking to define the scope of the representation of the
10 tribes by the United States Department of Justice (“USDOJ”) and alleging lack of
11 effective representation and conflict of interest. *Motion for Leave to File Representation*
12 *of Interest and Representation of Interest*. (Jun. 27, 1956). The motion was denied on the
13 now rejected premise that the trusteeship of the United States was a creation of the
14 plenary power of Congress and disqualification of the trustee was “beyond the power of
15 the Courts.” *See Brief of the Navajo Indian Tribe in Support of Motion to Intervene* at 22
16 (Sept. 25, 1961) (“Intervention Brief”).

17 28. The Supreme Court referred the matter to a special master, and in 1960
18 Special Master Rifkind issued his Report (“Rifkind Report”) (Doc. 240-8), which set the
19 stage for the omission of the rights of the Navajo Nation in the 1964 Arizona Decree.
20 The Special Master determined that both the tributaries and the mainstream of the River
21 above Lake Mead were excluded from the adjudication. The lands of the Navajo Nation
22

1 are upstream of Lake Mead and were, as a consequence, omitted from the Rifkind
2 Report, and no evidence concerning those rights was offered.

3 29. After the issuance of the Rifkind Report, the Navajo Nation wrote to the
4 Attorney General requesting that the United States take exception to the Report. US
5 Response, Appendix B (Letter from Norman M. Littell, General Counsel, Navajo Tribe,
6 to Attorney General Robert F. Kennedy (Feb. 2, 1961)). Although the United States did
7 not respond to the Navajo Nation's request for exceptions, it filed exceptions to the
8 Rifkind Report. Dissatisfied with the position taken by the United States in the case, on
9 September 25, 1961, the Navajo Nation moved to intervene. *Motion on Behalf of the*
10 *Navajo Tribe of Indians of the Navajo Reservation, Arizona, New Mexico and Utah, for*
11 *Leave to Intervene* (Sep. 25, 1961) ("Motion to Intervene"); *see* Intervention Brief;
12 *Exceptions of the Navajo Indian Tribe to the Report of the Special Master* (Sept. 25,
13 1961); *Brief in Support of Exceptions of Navajo Indian Tribe to the Report of the Special*
14 *Master* (Sept. 25, 1961).

15 30. In its Motion to Intervene, the Navajo Nation argued that the United States
16 had failed to vigorously assert the Navajo Nation's interests. The Navajo Nation's
17 principal concern was that by failing to assert the justiciability of issues pertaining to "the
18 determination of water rights in the Lower Basin and tributaries between Lee Ferry and
19 Lake Mead," Intervention Brief at 25, the United States "abandoned the case so far as the
20 adjudication of the rights of the Navajo Indians is concerned." Motion to Intervene at 4;
21 *see* Intervention Brief at 25-30. In addition, the Navajo Nation argued that the United
22 States should have opposed the quantification standard of practicably irrigable acreage

1 and asserted a standard that “is co-extensive with the future needs of the Navajo [Nation]
2 for all of its beneficial uses, whether for hunting, grazing, agriculture, or for other arts of
3 civilization.” Motion to Intervene at 6. The Navajo Nation also argued that the United
4 States should have asserted that the Navajo Nation’s water rights are aboriginal in nature
5 and not ““subject . . . to the priority of appropriative rights established before [the]
6 Reservation was created”” *Id.* at 4 (quoting Rifkind Report at 254) (alterations in
7 original). Finally, the Navajo Nation contended that the United States should have
8 asserted that the Indian users have a right to an apportionment separate and apart from the
9 apportionment to the states within which the reservations lie. *Id.* at 5. Most relevant
10 here, and prescient, was the Navajo Nation’s conclusion that this failure put the Nation in
11 “perpetual political conflict” with Arizona, New Mexico, and Utah. *Id.*

12 31. The United States opposed the Navajo Nation’s attempt to intervene,
13 representing to the Court that it “has undertaken representation of the interests of several
14 Indian tribes” and that the United States would ““be governed by . . . considerations of
15 justice”” in its representation of the Navajo Nation. US Response at 6-7 (quoting *Mo.,*
16 *Kan. & Tex. Ry. Co. v. Roberts*, 152 U.S. 114, 117 (1894)).

17 32. The United States argued further, that because the Special Master had
18 determined that mainstream and tributary uses above Lake Mead were not chargeable
19 against each state’s allocation, there was no need to adjudicate the Navajo Nation’s rights
20 to use water from the tributaries above Lake Mead and the extent to which those rights
21 might conflict with mainstream uses below Lake Mead. US Response at 14-15. The
22 United States recognized that no evidence had been submitted on behalf of the Navajo

1 Nation for uses from the mainstream and that such evidence would have had to be
2 submitted in order for the Court to consider the issue of the Navajo Nation's rights to the
3 mainstream above Lake Mead. *Id.* The United States expressly stated that if the Court
4 rejected the Special Master's recommendation that the Boulder Canyon Project Act
5 applied only to uses below Lake Mead, it would then be necessary to address the Navajo
6 mainstream rights above Lake Mead. *Id.*

7 33. Again, the request of the Navajo Nation to represent its own interests was
8 denied.

9 34. The Supreme Court ultimately rejected the Special Master's view that the
10 Boulder Canyon Project Act allocated only the supply of the Colorado River below Lake
11 Mead among California, Arizona, and Nevada (collectively "Lower Basin States"),
12 determining that "[t]he Lower Basin, with which Congress was dealing, begins at Lee
13 Ferry, and it was all the water in the mainstream below Lee Ferry that Congress intended
14 to divide among the [Lower Basin] States." *Arizona v. California*, 373 U.S. at 591. This
15 holding left the claims of the Navajo Nation unresolved.

16 35. Article VIII(c) of the 1964 Arizona Decree expressly left open the question
17 of the Navajo Nation's beneficial rights to the waters of the Colorado River. 376 U.S. at
18 353.

19 36. Clearly, it has long been understood by the United States that the Navajo
20 Nation's water rights to the Colorado River have not been addressed and require
21 additional work to attain resolution. However, the Federal Defendants have failed to
22 undertake the work necessary to resolve the Nation's mainstream rights. The United

1 States' trust responsibility to protect the Navajo Nation's beneficial rights to, and
2 interests in the waters of the Colorado River remain unaffected by the 1964 Arizona
3 Decree.

4 37. Prior to initiating the instant litigation in 2003, the Navajo Nation
5 repeatedly asked the Department, consistent with its trust responsibility to the Navajo
6 Nation, to address the extent of the Nation's rights to use, its interest in, and needs for
7 water from the mainstream of the Colorado River in the Lower Basin to make the lands
8 of the Navajo Reservation a permanent homeland. Salient examples include:

9 a. A letter dated April 4, 2000, from Stanley Pollack, Navajo Nation
10 Department of Justice, to Interior Deputy Secretary David Hayes, requesting resolution of
11 the Nation's Colorado mainstream claims in the context of the development of the
12 Surplus Guidelines, settlement of the Central Arizona Project's ("CAP") repayment
13 obligations, and reallocation of CAP supplies, addressed at ¶¶ 79-80, 92-98, 114, *infra*;

14 b. A letter dated August 1, 2000, from Navajo Nation President Kelsey A.
15 Begaye, to Interior Secretary Bruce Babbitt, requesting a contract for uncommitted water
16 apportioned to Arizona from the mainstream of the Colorado River in the context of the
17 issues outlined in the letter referenced in subparagraph 37(a), *supra*;

18 c. A letter dated August 8, 2001, from Navajo Nation President Kelsey A.
19 Begaye, to Interior Secretary Gale A. Norton, renewing his request that the Navajo
20 Nation receive a contract for uncommitted mainstream Colorado River water.

21 38. By letter dated November 7, 2001, Interior Solicitor William G. Meyers III,
22 responded on behalf of the Secretary to President Begaye as follows:

1 Aside from CAP supplies, there is a very limited quantity of
2 Colorado River water allocated for use within Arizona and there are
3 numerous competing uses for that water. Before any decisions are made
4 with respect to the remaining water, careful consideration must be given to
5 the needs of the competing entities, the views of non-Indians parties and the
6 other tribes that may have an interest in the water. This process is yet to be
7 initiated and we would expect it to be a somewhat lengthy process.

8

9 While the Department appreciates the Navajo Nation's need for
10 additional water supplies, for the reasons discussed above, we believe that
11 it is inappropriate at this time to grant your request for all the remaining
12 uncommitted Colorado River water allocated for use within Arizona.

13 39. To the knowledge of the Navajo Nation, the Federal Defendants never
14 initiated the process the Solicitor alleged would be necessary to grant the Nation a
15 contract for uncommitted Colorado River water. To date, the Secretary has refused to
16 enter into such a contract with the Navajo Nation.

17 40. This litigation was stayed from October 2004 to May 2013 to allow for
18 settlement negotiations. During the pendency of the stay, the Navajo Nation continued to
19 seek the assistance of the Department, consistent with its trust responsibility to the
20 Navajo Nation, to address the extent of the Nation's rights to use, its interest in, and
21 needs for water from the mainstream of the Colorado River in the Lower Basin:

22 a. By a letter dated October 5, 2005, from counsel for the Navajo Nation to
23 Vanessa Willard, USDOJ, and the federal negotiation team for the instant litigation
24 seeking, *inter alia*, to "develop a process for the Navajo Nation and the United States to
25 jointly pursue the quantification" of the Nation's Colorado River mainstream claims;

1 b. By a letter dated April 28, 2006, from Louis Denetsosie, Navajo Nation
2 Attorney General, to Sue Ellen Woolridge, Assistant Attorney General, USDOJ, and
3 David Bernhard, Interior Office of the Solicitor, seeking a meeting to discuss resolution
4 of the instant litigation in the context of, *inter alia*, the Department's development of
5 shortage guidelines (addressed at ¶¶ 99-105, *infra*), through re-alignment of the Federal
6 Defendants as plaintiffs with the Navajo Nation.

7 41. A meeting was held on May 5, 2006 between representatives of the Navajo
8 Nation and the United States in response to the Nation's requests, but the Federal
9 Defendants took no further action after the meeting.

10 42. After the failure of settlement negotiations in 2012, and prior to the time
11 established for filing the Navajo Nation's First Amended Complaint, the Nation again
12 sought the assistance of the Department, consistent with its trust responsibility to the
13 Navajo Nation, to address the extent of the Nation's rights to use, its interest in, and
14 needs for water from the mainstream of the Colorado River in the Lower Basin by a joint
15 letter dated February 7, 2013, from Navajo Nation President Ben Shelly and Navajo
16 Nation Council Speaker Johnny Naize, requesting a meeting with Interior Secretary
17 Kenneth L. Salazar.

18 43. A meeting was held on March 5, 2013, between President Shelly and
19 Deputy Secretary Hayes, BIA Assistant Secretary Kevin Washburn, Commissioner of
20 Reclamation Michael Connor, and their staff, but the outcome was limited to a
21 commitment by the Federal Defendants to engage in further discussions with Navajo
22 leadership. No such discussions ever occurred.

1 44. After the filing of the Nation's First Amended Complaint, the Nation
2 through email communications between counsel, continued to seek the assistance of the
3 Department, consistent with its trust responsibility to the Navajo Nation, to address the
4 extent of the Nation's rights to use, its interest in, and needs for water from the
5 mainstream of the Colorado River in the Lower Basin to no avail.

6 45. In a letter dated March 21, 2014, to Deputy Secretary Michael Connor,
7 Navajo Nation President Shelly wrote to confirm the Nation's understanding of the
8 position of the Department including: the need of the Navajo Nation for water from the
9 mainstream of the Colorado River to make the Navajo Reservation a permanent
10 homeland; the unwillingness of the United States to realign as a plaintiff in the instant
11 litigation or otherwise pursue the Nation's claims and needs to water from the
12 mainstream; the unwillingness of the Federal Defendants to engage in further discussions
13 concerning the needs of the Navajo Nation for water from the mainstream and how to
14 meet those needs because of the pendency of the litigation. While expressing
15 disappointment with the various positions of the Department, and observing that such
16 positions were inconsistent with the trust responsibility owed to the Navajo Nation by the
17 United States, President Shelly asked the Department to reconsider and meet with the
18 Navajo Nation.

19 46. Subsequently, after yet another request from Navajo Nation President
20 Russell Begaye to meet with the Federal Defendants, consistent with their trust
21 responsibility to the Navajo Nation, to address the extent of the Nation's rights to use, its
22 interest in, and needs for water from the mainstream of the Colorado River in the Lower

1 Basin, a meeting was held on January 20, 2016, with Deputy Secretary Michael Connor,
2 Pamela Williams, director of the Secretary's Indian Water Rights Office, and their staff.
3 However, the requests for assistance again went unheeded.

4 47. Efforts by the Navajo Nation to secure the assistance of the United States,
5 consistent with its trust responsibility to the Navajo Nation, to address the extent of the
6 Nation's rights to use, its interest in, and needs for water from the mainstream of the
7 Colorado River in the Lower Basin since the remand of this matter from the Ninth Circuit
8 have been similarly unavailing.

9 48. The Federal Defendants have never sought, through judicial or
10 administrative means, to quantify or otherwise determine the Navajo Nation's rights or
11 needs to water from the mainstream of the Colorado River in the Lower Basin.

12 49. The failure to confirm, estimate, or otherwise quantify the Navajo Nation's
13 needs for and rights to Colorado River water creates a great degree of uncertainty for all
14 Colorado River water users because the water that these users now rely on under the
15 programs challenged herein likely will not be available in the future if Navajo Nation
16 rights are recognized. *See, e.g.*, US Response at 7-8 ("The controversy respecting
17 allocation of the waters of the Lower Colorado River has plagued the . . . entire region for
18 nearly half a century" and has "impeded full development of the water resources of the
19 southwestern region of the United States, and hence the full development of the other
20 resources of the region . . ."). This uncertainty will only be resolved when the rights of
21 the Navajo Nation to the mainstream of the Colorado River in the Lower Basin are
22 quantified.

1 50. The allocation of water from the Colorado River without regard to the
2 Navajo Nation's rights to or the needs of the Navajo Nation and its members for such
3 waters establishes a system of reliance upon the Colorado River that ensures that entities
4 other than the Navajo Nation will continue to depend on water supplies claimed by,
5 reserved for, needed by, and potentially belonging to the Navajo Nation. Such reliance
6 will operate to make allocation of Colorado River water to the Navajo Nation to satisfy
7 its water rights or meet the needs of the Navajo Nation and its members increasingly
8 difficult.

9 **D. OTHER WATER SUPPLIES CANNOT MEET THE NAVAJO NATION'S**
10 **NEEDS.**

11 51. The Navajo Nation lacks adequate water supplies to meet the needs of its
12 members now and in the future to make the Navajo Reservation a viable and permanent
13 homeland.

14 52. Although the ongoing general stream adjudication in *In re General*
15 *Adjudication of All Rights to Use Water in the Little Colorado River System and Source*,
16 No. CV 6417 (Ariz. Super. Ct., Apache County), may result in a declaration of water
17 rights to serve some lands of the Navajo Reservation in the Lower Basin, because the
18 quality and quantity of the water sources in the Little Colorado River Basin are
19 inadequate, the Little Colorado River adjudication will not address the totality of those
20 water needs.

21 53. The Navajo Nation possesses quantified rights to the use of water from the
22 Upper Colorado River Basin in New Mexico by virtue of a settlement between the

1 Navajo Nation, the United States, and the State of New Mexico, ratified by Congress in
 2 the Northwestern New Mexico Rural Water Projects Act, Pub. L. No. 111-11, §§ 1301-
 3 05, 123 Stat. 1367, but the water secured by those rights cannot be used in Arizona.

4 **E. THE DUTY OF THE FEDERAL DEFENDANTS TO PROTECT THE**
 5 **NAVAJO NATION’S TRUST RESOURCES.**

6 54. That the United States owes a fiduciary duty to the Navajo Nation is
 7 beyond dispute. Further:

8 a. This “legally enforceable trust obligation . . . originated in the course of
 9 dealings between the government and the Indians and is reflected in the treaties,
 10 agreements, and statutes pertaining to Indians”;

11 b. “The trust responsibility doctrine imposes fiduciary standards on the
 12 conduct of the executive” and “[t]he government has fiduciary duties of care and loyalty,
 13 to make trust property income productive, to enforce reasonable claims on behalf of
 14 Indians, and to take affirmative action to preserve trust property”; and

15 c. The fiduciary standards imposed on the executive “operate to limit the
 16 discretion not only of the Secretary of the Interior but also of the Attorney General and
 17 other executive branch officials.”

18 Letter from Leo M. Krulitz, Department Solicitor, to James W. Moorman, Assistant
 19 Attorney General (Nov. 21, 1978) (“Krulitz Memo”), attached as an appendix to *Brief for*
 20 *Respondents, United States v. Mitchell*, 445 U.S. 535 (1979) (No. 78-1756), 1979 WL
 21 199447. The Krulitz Memo remains in effect. Secretarial Order No. 3335, *Reaffirmation*
 22

1 *of the Federal Trust Responsibility to Federally Recognized Indian Tribes and Individual*
2 *Indian Beneficiaries* § 3(d) (Aug. 20, 2014) (“Secretarial Order No. 3335”).

3 55. As a consequence of the federal trust responsibility, treaties and statutes
4 affecting Indian tribes and enacted for their benefit must be construed in a manner
5 favorable to the Indians and, in the case of treaties, in the manner the Indians would have
6 understood them, and any ambiguity must be resolved in their favor. Rights of Indian
7 tribes cannot be abrogated or diminished by implication, rather the intent must be clear
8 and susceptible of only that interpretation.

9 56. The United States undertook a formal trust relationship with the Navajo
10 Nation in the 1849 Peace Treaty, which provides that by virtue of the Treaty of
11 Guadalupe Hidalgo the Nation “was lawfully placed under the exclusive jurisdiction and
12 protection of the Government of the said United States, and that they are now, and will
13 forever remain, under the aforesaid jurisdiction and protection.” 1849 Peace Treaty art. I.
14 Thus, the Federal Defendants’ duty of protection, while evident in the course of dealings
15 between the United States and Indian tribes, was expressly stated in the 1849 Peace
16 Treaty.

17 57. The United States, in the exercise of its fiduciary obligations, entered into
18 the 1868 Treaty with the Navajo Nation, and thereby established the Navajo Reservation
19 as its permanent homeland as promised in the 1849 Peace Treaty. 1868 Treaty arts. II,
20 XIII; *see* 1849 Peace Treaty art. IX (“the United States shall, at its earliest convenience,
21 designate, settle, and adjust [the Navajo Nation’s] territorial boundaries”).

1 58. The treaties, together with the executive orders and acts of Congress
2 establishing the Navajo Reservation, provide the legal basis for the Navajo Nation's
3 claim to a reserved right to water from the mainstream of the Colorado River in the
4 Lower Basin to make the Navajo Reservation a viable and permanent home for Navajo
5 people.

6 59. The Federal Defendants hold the Nation's lands and waters in trust and owe
7 a fiduciary duty to the Nation. All the elements of a trust are present: the United States
8 is the trustee; the Navajo Nation is the beneficiary; and the Navajo Nation's beneficial
9 interest in its Reservation lands and the waters of the Colorado River necessary to make
10 its Reservation a livable homeland constitute the trust corpus. The United States has an
11 obligation to make those trust resources productive so that the Reservation may serve as
12 permanent homeland for Navajo people.

13 60. The trust relationship between the United States and Indian tribes,
14 including the Navajo Nation, encompasses the obligation of Federal Defendants to
15 protect Indian trust resources, to secure the resources needed, and to take the steps
16 necessary to make those trust resources productive. In addition to the 1849 Peace Treaty
17 and federal actions creating the Navajo Reservation, those obligations have been
18 repeatedly confirmed by Congress.

19 61. The Non-Intercourse Act, 25 U.S.C. § 177, first enacted in 1730 and
20 reauthorized repeatedly, provides that tribal lands and waters, as tribal trust resources,
21 cannot be transferred without the approval of the United States. *See* Act of July 22, 1790,
22 § 4, 1 Stat. 137, 138; Act of March 1, 1793, § 8, 1 Stat. 329, 330; Act of May 19, 1796, §

12, 1 Stat. 469, 472; Act of March 3, 1799, § 12, 1 Stat. 743, 746; Act of March 30, 1802, § 12, 2 Stat. 139, 143; Act of June 30, 1834, § 12, 4 Stat. 729, 730. The Non-Intercourse Act pre-dates the United States Constitution and is reflective of the course of dealings between the United States and Indian Tribes, including the duty of protection. The Non-Intercourse Act was expressly made applicable to the Navajo Nation in the 1849 Peace Treaty, providing that the United “States having the sole and exclusive right of regulating the trade and intercourse with the said Navajoes it is agreed that the laws now in force regulating the trade and intercourse . . . with the various tribes of Indians under the protection and guardianship of the aforesaid Government, shall have the same force and efficiency” as if those “laws had been passed for their sole benefit and protection.” 1849 Peace Treaty art. III.

62. The Northwest Ordinance of 1787, 1 Stat. 50, also pre-dates the ratification of the United States Constitution, recognizes the federal duty of protection to Indian tribes, and provides that “[t]he utmost good faith shall always be observed towards the Indians; their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.” *Id.* art. 3, 1 Stat. at 52.

63. The Snyder Act, 25 U.S.C. § 13, provides that the BIA shall direct, supervise, and expend funds that Congress appropriates for the benefit of the Indians.

1 The BIA has express authority over the “extension, improvement, operation, and
2 maintenance of . . . development of water supplies.” *Id.*

3 64. In the Indian Health Care Amendments of 1988, Pub. L. No. 100-713, §
4 302, 102 Stat. 4784 (amending 25 U.S.C. § 1632), Congress declared “the policy of the
5 United States, that all Indian communities and Indian homes . . . be provided with safe
6 and adequate water supply systems and sanitary sewage waste disposal systems as soon
7 as possible.” 25 U.S.C. § 1632(a)(5); *see* North Central Arizona Study at 84-85. This
8 policy cannot be effectuated on the Navajo Reservation without water from the
9 mainstream of the Colorado River in the Lower Basin.

10 65. The American Indian Trust Fund Management Reform Act of 1994, Pub. L.
11 No. 103-412, § 101, 108 Stat. 4329, amended the Act of June 24, 1938, 25 U.S.C. § 162a,
12 to recognize eight “trust responsibilities of the United States,” including “[a]ppropriately
13 managing the natural resources located within the boundaries of Indian reservations and
14 trust lands,” and specifically states that the Secretary’s “proper discharge of the trust
15 responsibilities of the United States shall include (but are not limited to)” those specified
16 duties. 25 U.S.C. § 162a(d).

17 66. In the Indian Trust Asset Reform Act, *id.* §§ 5601-36, Congress reaffirmed
18 that “the fiduciary responsibilities of the United States to Indians also are founded in part
19 on specific commitments made through written treaties and agreements securing peace, in
20 exchange for which Indians have surrendered claims to vast tracts of land, which
21 provided legal consideration for permanent, ongoing performance of Federal trust duties”
22

1 and “have established enduring and *enforceable Federal obligations* to which the
2 national honor has been committed.” *Id.* § 5601(4)-(5) (emphasis added).

3 67. The Federal Defendants’ management actions on the Colorado River affect
4 the environment and must also comply with the National Environmental Policy Act of
5 1969, 42 U.S.C. §§ 4321-70h (“NEPA”). Further, in carrying out its trust
6 responsibilities, Federal Defendants are required, at a minimum, to comply with the
7 requirements of generally applicable federal laws, such as NEPA.

8 68. Acknowledging the application of NEPA, Reclamation prepared
9 environmental impact statements for each of the management decisions challenged
10 herein, purporting to consider impacts of the proposed actions and alternatives on Indian
11 trust assets, but finding that their management decisions would not affect Navajo Nation
12 trust resources.

13 69. NEPA obligates a federal agency to consider every significant aspect of the
14 environmental impact of a proposed action and to ensure that the federal agency informs
15 the public that it has indeed considered environmental concerns in its decision making
16 process.

17 70. NEPA establishes action-forcing procedures that require agencies to take a
18 hard look at a project’s potential environmental consequences.

19 71. Both the Department and the Council on Environmental Quality, an agency
20 within the Executive Office of the President, have promulgated regulations implementing
21 NEPA’s procedural requirements. 43 C.F.R. pt. 46; 40 C.F.R. pt. 1500.
22

1 72. The Federal Defendants have implemented their trust obligations and
2 fiduciary duties imposed by Congress to protect Indian trust resources through the
3 promulgation of Secretarial Orders, agency policies, departmental manual provisions, and
4 handbooks, which together with the implementing regulations are binding and legally
5 enforceable, including:

6 a. Secretarial Order No. 3335, reciting that the “trust responsibility consists of
7 the highest moral obligations that the United States must meet to ensure the protection of
8 tribal and individual Indian lands, assets, resources, and treaty and similarly recognized
9 rights,” and that “[o]ne of the fundamental common-law duties of a trustee is to preserve
10 and maintain trust assets.” § 3(a) (internal quotation marks omitted).

11 b. Secretarial Order No. 3215, *Principles for the Discharge of the Secretary’s*
12 *Trust Responsibility* (Apr. 28, 2000), superseded by incorporation in the Interior
13 Departmental Manual at 303 DM Chapter 2: Principles for Managing Indian Trust
14 Assets (Oct. 31, 2000);

15 c. Secretarial Order No. 3175 *Departmental Responsibilities for Indian Trust*
16 *Resources* (Nov. 8, 1993), superseded by incorporation in the Interior Departmental
17 Manual at 512 DM Chapter 2: Departmental Responsibilities for Indian Trust Resources
18 (Dec. 1, 1995);

19 d. Reclamation’s *Indian Policy* (Jul. 7, 2014), which acknowledges and
20 affirms Reclamation’s “Federal trust responsibility and government-to-government
21 relationship” with Indian tribes, including the Navajo Nation, and by which Reclamation
22 commits to “actively support and participate in the Department’s Indian water rights

1 negotiation and implementation activities, as it works to resolve the water rights claims of
 2 Indian tribes” *Id.* ¶¶ 1, 5(C)(2) (The 2014 Policy supersedes the earlier policy of
 3 the same name dated February 25, 1998.);

4 e. *Reclamation’s NEPA Handbook* (Feb. 2012) (Doc. 283-6), superseding
 5 *Reclamation’s National Environmental Policy Act Handbook* (Oct. 1990);

6 f. *Reclamation’s Environmental Compliance Memorandum No. ECM97-2*
 7 (May 8, 1997) signed by the Director, Office of Environmental Policy and Compliance;

8 g. *The Bureau of Reclamation Indian Trust Asset Policy and NEPA*
 9 *Implementing Procedures: Questions and Answers about the Policy and Procedures*
 10 (Aug. 31, 1994) (Doc. 283-7) (“Reclamation’s ITA Policy Questions and Answers”),
 11 distributed by Memorandum from the Commissioner dated October 21, 1994);

12 h. *Reclamation’s National Environmental Policy Act Handbook Procedures to*
 13 *Implement Indian Trust Asset Policy (NEPA)* (distributed by Memorandum D-5120 from
 14 the Assistant Commissioner-Resources Management dated December 15, 1993); and

15 i. *Reclamation’s Indian Trust Asset Policy* (distributed by Memorandum W-
 16 6100 from the Commissioner dated July 2, 1993).

17 73. The President of the United States has also repeatedly confirmed the
 18 obligation of Federal Defendants to preserve and protect Indian trust resources, and the
 19 necessity for dealing with Indian tribes on a government-to-government basis. Important
 20 to the instant action are:

21 a. President Richard M. Nixon, Public Papers of the Presidents: *Special*
 22 *Message to the Congress on Indian Affairs* (July 8, 1970) (recognizing that the trust

1 relationship “continues to carry immense moral and *legal* force” (emphasis added)); *see*
2 President George H.W. Bush, Public Papers of the Presidents: *Statement Reaffirming the*
3 *Government-to-Government Relationship Between the Federal Government and Indian*
4 *Tribal Governments* (June 14, 1991);

5 b. Executive Order No. 13,175, *Consultation and Coordination with Indian*
6 *Tribes* (Nov. 6, 2000), recognizes as a “Fundamental Principle” the unique trust
7 relationship between the United States and Indian tribes and the federal duty of
8 protection. *Id.* § 2(a). Executive Order 13,175 requires that the Federal Defendants act
9 to strengthen the government-to-government relationship with Indian tribes by engaging
10 in “meaningful consultation and collaboration with tribal officials in the development of
11 Federal policies that have tribal implications.” *Id.* at Preamble. “Policies that have tribal
12 implications” are defined as “regulations, legislative comments or proposed legislation,
13 and other policy statements or actions that have substantial direct effects on one or more
14 Indian tribes.” *Id.* § 1(a). Government-to-government consultation concerning “tribal
15 trust resources, and Indian tribal treaty and other rights” is another Fundamental
16 Principle. *Id.* § 2(b).

17 c. Executive Order No. 13,647, *Establishing the White House Council on*
18 *Native American Affairs* (June 26, 2013), “to ensure that the Federal Government engages
19 in a true and lasting government-to-government relationship with federally recognized
20 tribes” to better carry out its trust responsibilities.

21 74. The United States’ trust relationship with the Navajo Nation requires the
22 Federal Defendants to act affirmatively to protect the Navajo Nation’s trust resources,

1 which include the Nation's Reservation lands and the water necessary to make those
2 lands livable as a permanent homeland for the Navajo people. The Federal Defendants'
3 trust obligations include determining the extent of the Nation's requirement for water
4 from the Colorado River to meet the needs of the Navajo Nation and its members,
5 determining how to meet those requirements after consultation with the Navajo Nation,
6 and taking actions to protect those interests and secure the needed water.

7 **F. THE SECRETARY'S ROLE AS WATER MASTER OF THE COLORADO**
8 **RIVER IN THE LOWER BASIN.**

9 75. Pursuant to the Boulder Canyon Project Act and Article II of the 1964
10 Arizona Decree, 376 U.S. at 341-46, the Secretary is responsible for the allocation of the
11 waters of the mainstream of the Colorado River in the Lower Basin among the Lower
12 Basin States and to decide which users within each State will be delivered water as
13 provided in the Act.

14 76. The Boulder Canyon Project Act authorizes the Secretary to enter into
15 permanent water delivery contracts with users in the Lower Basin of the Colorado River,
16 up to the limit of each State's apportionment.

17 77. Pursuant to the Boulder Canyon Project Act and other federal legislation,
18 on February 9, 1944, the United States and the State of Arizona entered into a contract for
19 the delivery of water stored in Lake Mead ("Arizona Contract") (Doc. 240-6). Under the
20 Arizona Contract, the United States is required to deliver to Arizona, its agencies, or
21 water users, 2.8 million acre-feet of water per year "from storage in Lake Mead," *id.* art.
22 7(a), for irrigation and domestic uses in Arizona, consistent with the provisions of the

1 Colorado River Compact (Nov. 24, 1922) (“1922 Colorado River Compact”), *reprinted*
2 *at* 70 CONG. REC. 324 (1928) (Doc. 240-2), and the Boulder Canyon Project Act. The
3 Arizona Contract further provides that “nothing in this contract shall be construed as
4 affecting the obligations of the United States to Indian tribes.” Arizona Contract art. 5.

5 78. The delivery obligations are to “be diminished to the extent that
6 consumptive uses now or hereafter existing in Arizona above Lake Mead diminish the
7 flow into Lake Mead” *Id.* art. 7(d). Therefore, the provision of water to the Navajo
8 Nation from the mainstream of the Colorado River for any of the Navajo Reservation
9 lands within Arizona and within the Lower Basin, must be charged against Arizona’s
10 entitlement to 2.8 million acre-feet per year of water from the Colorado River as
11 established under the Boulder Canyon Project Act. *Arizona v. California*, 373 U.S. at
12 601 (“all uses of mainstream water within a State are to be charged against that State’s
13 apportionment”).

14 79. Under the Colorado River Basin Project Act, Congress authorized the
15 construction of the CAP. 43 U.S.C. §§ 1521(a). Reclamation funded and constructed the
16 Project. CAP diverts water from the Colorado River at Lake Havasu on Arizona’s
17 western boundary and transports part of Arizona’s allocation of Colorado River water to
18 the central and southern regions of the state.

19 80. The Colorado River Basin Project Act authorizes the Secretary to enter into
20 contracts with Indian tribes in Arizona for the delivery of water from CAP. *Id.* § 1524.
21 To date, the Secretary has entered into contracts with numerous Arizona Indian tribes,
22 with a total contract water delivery obligation of approximately in excess of 500,000acre-

1 feet. In addition, settlements with Arizona tribes create entitlements to an additional
2 614,806 acre-feet. The water delivered to Arizona tribes is charged against Arizona's
3 total Colorado River entitlement of 2.8 million acre-feet.

4 **G. CONFLICTING OBLIGATIONS OF THE SECRETARY DO NOT**
5 **VITIATE THE TRUST RESPONSIBILITY.**

6 81. The United States exercises pervasive control over the Colorado River
7 pursuant to the Boulder Canyon Project Act and the 1964 Arizona Decree, and
8 simultaneously is charged with the assertion and protection of the Navajo Nation's rights
9 to and interests in the Colorado River.

10 82. Article VII of the 1922 Colorado River Compact states that even though the
11 Navajo Nation's water rights were not considered in the Compact negotiations or the
12 Compact itself, "[n]othing in this compact shall be construed as affecting the obligations
13 of the United States of America to Indian tribes." Article 5 of the Arizona Contract is
14 virtually identical to Article VII of the 1922 Colorado River Compact: "nothing in this
15 contract shall be construed as affecting the obligations of the United States to Indian
16 tribes." By including this language, the United States demonstrated that it was well-
17 aware at the time of negotiations that the 1922 Colorado River Compact would play a
18 major role in the future development of the waters of the Colorado River, and that the
19 protection of unaddressed Indian water needs and the recognition of the federal obligation
20 to secure water for the benefit of the affected tribes required express language. The same
21 concern drove the inclusion of the nearly identical language in Article 5 of the Arizona
22 Contract.

1 83. As discussed above, the trust relationship between the United States and the
2 Navajo Nation encompasses the corresponding duty of the United States to ensure that
3 the Navajo Reservation lands have sufficient water to make them livable.

4 84. The United States preserved its obligations to the Navajo Nation regarding
5 the Nation's use of water from the Colorado River in Article VII of the 1922 Colorado
6 River Compact, in Article 5 of the Arizona Contract, and elsewhere. Thus, the United
7 States' trust obligations to the Navajo Nation are undiminished by the 1922 Colorado
8 River Compact.

9 85. The affirmative obligations of the Federal Defendants to assert water rights
10 claims and protect water rights on its beneficiaries' behalf are confirmed by well-
11 established federal jurisprudence, beginning with the United States Supreme Court's
12 decisions in *Winans*, 198 U.S. 371, and *Winters*, 207 U.S. 564. The USDOJ is
13 specifically authorized to represent Indians in all suits at law and in equity. 25 U.S.C. §
14 175; *see* 28 U.S.C. §§ 516, 519 (the conduct of litigation in which the United States is a
15 party is reserved to USDOJ). The discretion of the USDOJ to initiate litigation on behalf
16 of Indian tribes is circumscribed by the fiduciary duty of the United States, including the
17 duty of protection and loyalty.

18 86. The McCarran Amendment, 43 U.S.C. § 666, waives the sovereign
19 immunity of the United States in comprehensive state court proceedings to adjudicate
20 water rights claims. This waiver of immunity extends to the United States in its capacity
21 as trustee for Indian water rights, and establishes the policy of the United States as trustee
22 to pursue the determination of the nature and extent of tribal water rights.

1 87. *The Working Group in Indian Water Settlements; Criteria and Procedures*
2 *for the Participation of the Federal Government in Negotiations for the Settlement of*
3 *Indian Water Rights Claims*, 55 Fed. Reg. 9,223-01 (Mar. 12, 1990) (“Criteria and
4 Procedures”), reaffirms that “Indian water rights are vested property rights for which the
5 United States has a trust responsibility, with the United States holding legal title to such
6 water in trust for the benefit of the Indians” and states that “[i]t is the policy of this
7 Administration . . . that disputes regarding Indian water rights should be resolved through
8 negotiated settlements rather than litigation.” *Id.* at Preamble.

9 88. Communications between the Department and Indian tribes are replete with
10 representations by the Department of the significance of Indian trust resource and the
11 Department’s obligation of trust and duty of protection. For example, a letter directed to
12 tribal leaders concerning consultation on the Criteria and Procedures recognizes that
13 “[w]ater rights are some of the most important trust resources held by federally
14 recognized Indian tribes . . . and the United States as trustee.” Letter from Lawrence S.
15 Roberts, Principal Deputy Assistant Secretary – Indian Affairs, to Tribal Leader (Dec. 9,
16 2016). The letter continues, “[t]he trust responsibility owed by the United States
17 Government to tribes . . . is a well-established legal principle that has its origins in the
18 formation of the United States Government,” and recites that among the “guiding
19 principles for honoring the trust responsibility for the benefit of current and future
20 generations . . . is to ensure trust resources, such as water rights, are recognized and
21 protected to the maximum extent possible.” *Id.*

1 89. The Federal Defendants are obligated to uphold the United States’ trust
2 responsibility to the Navajo Nation even while Congress charges them with other
3 responsibilities, such as those in the 1922 Colorado River Compact, the Boulder Canyon
4 Project Act, the 1964 Arizona Decree, and NEPA, and they may not compromise the
5 United States’ trust responsibility to the Navajo Nation in the performance of other
6 statutory obligations.

7 90. The Federal Defendants “may not reject or postpone the assertion of a
8 claim on behalf of [the Navajo Nation] on the ground that it would be inimical to some
9 other governmental or private interest” Krulitz Memo.

10 **H. ACTIONS OF THE SECRETARY IN DEROGATION OF THE TRUST**
11 **RESPONSIBILITY.**

12 91. Despite the fact that the Department has failed to (1) determine the extent
13 and quantity of the water rights of the Navajo Nation to the waters of the Colorado River;
14 (2) determine the amount of water that the Navajo Nation requires from the mainstream
15 of the Colorado River in the Lower Basin to meet the needs of the Navajo Nation and its
16 members and make its Reservation lands productive; or (3) develop a plan or course of
17 action to secure the needed water, the Secretary, pursuant to the authority to manage the
18 waters of the Colorado River recognized in the Boulder Canyon Project Act and the 1964
19 Arizona Decree, has repeatedly taken action to manage the waters of the Colorado River
20 that threaten the availability of Colorado River water to satisfy the Navajo Nation’s
21 rights and needs.
22

Surplus Guidelines

92. On January 16, 2001, Secretary Bruce Babbitt issued a record of decision adopting specific interim surplus guidelines for the Colorado River used to determine the conditions under which the Secretary would declare the availability of surplus water for use within the Lower Basin States. *Record of Decision, Colorado Interim Surplus Criteria; Final Environmental Impact Statement* (“Surplus Guidelines ROD”), reprinted at 66 Fed. Reg. 7,772-02 (Jan. 25, 2001) (Doc. 240-12); see *Colorado River Interim Surplus Criteria Final Environmental Impact Statement* (Dec. 2000) (Doc. 282-2) (“Surplus Guidelines FEIS”); *Criteria for Coordinated Long-Range Operation of the Colorado River Reservoirs Pursuant to the Colorado River Basin Project Act of September 30, 1968* (P.L. 90-537) art. III(3)(b) (June 8, 1970) (“LROC”). Among other things, the LROC require the Secretary to determine the extent to which the water requirements of mainstream water users in the Lower Basin States can be met in any year.

93. In the Surplus Guidelines FEIS, Federal Defendants acknowledge that:

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

1 Surplus Guidelines FEIS at 3.14-1. That duty includes an obligation to protect the utility
2 of Reservation lands by securing the water needed to make such lands productive and
3 capable of serving their intended purpose as a permanent homeland.

4 94. The Surplus Guidelines ROD recites that “[t]he FEIS was prepared
5 pursuant to the National Environmental Policy Act of 1969 (NEPA), as amended, the
6 Council on Environmental Quality’s (CEQ) Regulations for Implementing the Procedural
7 Provisions of NEPA (40 Code of Federal Regulations [CFR] Parts 1500 through 1508,
8 Department of Interior Policies, and Reclamation’s [1990] NEPA Handbook.” Surplus
9 Guidelines ROD at 1. Accordingly, the Surplus Guidelines FEIS and ROD incorporate
10 and make mandatory the Federal Defendants’ policies, manuals, handbooks, and
11 directives, and the Navajo Nation was entitled to rely upon the procedural requirements
12 included in those documents.

13 95. The Surplus Guidelines FEIS analyzed five alternatives for interim surplus
14 guidelines and a No Action Alternative/Baseline Condition. Surplus Guidelines FEIS ch.
15 2; Surplus Guidelines ROD at 4-7. None of the alternatives sought to account for the
16 unquantified water rights or unmet needs of the Navajo Nation in the Lower Basin above
17 Lake Mead. Although the Surplus Guidelines FEIS included the results of extensive
18 modeling of the hydrology of the Colorado River, including discrete representation of the
19 demand schedules through demand nodes for each of the ten tribes in the Colorado River
20 Basin, including the Navajo Nation, no information was included for the water rights or
21 water needs of the Navajo Nation and its members in the Lower Basin.

22

1 96. The Surplus Guidelines ROD and Surplus Guidelines FEIS also failed to
2 account for the fact that neither the Navajo Nation’s water rights nor its needs for water
3 in the Lower Basin have been determined, despite the Surplus Guidelines ROD’s
4 assertion that “Reclamation fully identified and analyzed Tribal water rights in the FEIS .
5 . . .” Surplus Guidelines ROD at 9. The Surplus Guidelines ROD further acknowledged
6 that Reclamation had “identified a significant quantity of confirmed but unused water
7 rights belonging to several Indian tribes in the Colorado River basin.” *Id.* Like the
8 Nation’s unquantified rights, these undeveloped tribal rights are factored into the
9 available water supply and managed as surplus. *Id.*

10 97. The Surplus Guidelines FEIS acknowledges that the Navajo Nation’s rights
11 to the waters of the Colorado River are unquantified, but fails to include any provision for
12 such rights in the allocation of surplus water or to institute a process to determine and
13 protect the water supply required to satisfy the unmet needs of the Navajo Nation and its
14 members. Surplus Guidelines FEIS at 3.14-4 to -5. As a result, the Surplus Guidelines
15 FEIS does not account for the Navajo Nation’s unquantified rights to or its needs for the
16 waters of the Lower Basin of the Colorado River.

17 98. The Surplus Guidelines FEIS requires the allocation each year of any
18 surplus water of the Colorado River among the Lower Basin States. *Id.* at 2-10 to -14.
19 Thus, the Surplus Guidelines FEIS establishes a system of reliance upon the surplus
20 water in the Colorado River among the Lower Basin States, to the exclusion of the
21 Navajo Nation and other Indian tribes. As surplus water is allocated each year pursuant
22 to the Surplus Guidelines, Reclamation will manage the Colorado River in a manner that

1 ensures that entities other than the Navajo Nation will continue to rely on water supplies
 2 claimed by, reserved for, needed by, and potentially belonging to the Navajo Nation,
 3 which reliance will operate to make allocation of Colorado River water to the Navajo
 4 Nation to satisfy its water rights or meet the needs of the Navajo Nation and its members
 5 increasingly difficult.

6 **Shortage Guidelines**

7 99. On December 13, 2007, then Secretary Dirk Kempthorne issued a record of
 8 decision adopting specific interim shortage guidelines for the Colorado River to manage
 9 Lake Powell and Lake Mead under low reservoir and drought conditions, for the express
 10 purpose of providing greater predictability of Colorado River water supplies. *Record of*
 11 *Decision, Colorado River Interim Guidelines for Lower Basin Shortages and the*
 12 *Coordinated Operations for Lake Powell and Lake Mead* (“Shortage Guidelines ROD”),
 13 *reprinted at* 73 Fed. Reg. 19,873-01 (Apr. 11, 2008); *see Final Environmental Impact*
 14 *Statement, Colorado River Interim Guidelines for Lower Basin Shortages and*
 15 *Coordinated Operations for Lake Powell and Lake Mead* (Oct. 2007) (Docs. 287-4, 283-
 16 5) (“Shortage Guidelines FEIS”).

17 100. Chapter 3 of the Shortage Guidelines FEIS discusses the ITAs that may be
 18 affected by the proposed federal action:

19 ITAs are “. . . ‘legal interests’ in ‘assets’ held in ‘trust’ by the federal government
 20 for federally recognized Indian tribes or individual Indians” [Reclamation’s ITA
 21 Policy Questions and Answers]. The United States, as trustee, is responsible for
 22 protecting rights reserved by, or granted to, Indian tribes or individual Indians by
 treaties, statutes, executive and secretarial orders, and other federal actions. The
 Department’s policy is that when a proposed federal action appears likely to
 adversely affect an ITA, the action agency should seek ways to minimize or avoid

1 the adverse effect; if adverse effects cannot be avoided, then the action agency
2 should provide appropriate mitigation or compensation.

3 Shortage Guidelines FEIS at 3-87 (alterations in original).

4 101. The Shortage Guidelines ROD recites that the Shortage Guidelines FEIS
5 “was prepared pursuant to the National Environmental Policy Act of 1969 (NEPA), as
6 amended, the Council on Environmental Quality’s (CEQ) Regulations for Implementing
7 the Procedural Provisions of NEPA (40 Code of Federal Regulations [CFR] Parts 1500
8 through 1508), Department of the Interior Policies, and Reclamation’s [1990] NEPA
9 Handbook.” Shortage Guidelines ROD at 2. Accordingly, the Shortage Guidelines ROD
10 incorporates and makes mandatory the Federal Defendants’ policies, manuals,
11 handbooks, and directives, and the Navajo Nation was entitled to rely upon the
12 procedural requirements included in those documents.

13 102. The Shortage Guidelines FEIS analyzed five alternatives for interim
14 shortage guidelines and a No Action Alternative. Shortage Guidelines FEIS at ch. 2;
15 Shortage Guidelines ROD at 7-11. None of the alternatives sought to account for the
16 unquantified water rights or unmet needs of the Navajo Nation in the Lower Basin above
17 Lake Mead, and no information was included for the water rights or water needs of the
18 Navajo Nation and its members in the Lower Basin.

19 103. The Shortage Guidelines ROD also failed to account for the fact that the
20 Navajo Nation’s water rights and needs for water to make Reservation lands in the Lower
21 Basin productive have not been determined, despite the assertion in the Shortage
22

1 Guidelines ROD that it considered the effects on Indian trust assets. Shortage Guidelines
2 ROD at 16.

3 104. The Shortage Guidelines FEIS acknowledges that the Navajo Nation's
4 rights to the waters of the Colorado River are unquantified, Shortage Guidelines FEIS at
5 1-13 and 3-96 to -97, and states that such "[u]nquantified water rights of the Navajo
6 Nation are considered an ITA." *Id.* at 3-96. While the Shortage Guidelines FEIS
7 purports to consider the adverse effects of the proposed action on all ITAs, *id.* at 3-87, the
8 Navajo Nation's unquantified water rights are not included in the list of the ITAs "that
9 might potentially be impacted as a result of implementing the proposed federal action . . .
10 ." *Id.* Despite acknowledging that the Navajo Nation's unquantified rights to waters of
11 the Colorado River constitute an ITA, the Shortage Guidelines FEIS only addresses the
12 effects of the proposed action on the ITAs of the five tribes specifically awarded water in
13 *Arizona v. California* and on the "Colorado River water Tribal delivery contracts where
14 such contracts are part of a congressionally approved water rights settlement"; the effects
15 of the proposed action on other water rights ITAs or on Reservation lands that require
16 water to be productive are not considered. *Id.* As a result, the Shortage Guidelines FEIS
17 does not account for the unquantified rights of the Navajo Nation to the waters of the
18 Lower Basin of the Colorado River. It also does not account for the unmet needs of the
19 Navajo Nation and tribal members for water from the Lower Basin of the Colorado River
20 to make Reservation lands productive.

21 105. The Shortage Guidelines FEIS provides for a system of allocation of
22 Colorado River water in times of shortage and drought, and provides mechanisms to

1 create surplus water and conservation to ease the severity of any shortages. *See, e.g., id.*
 2 at ES-2. Thus, the Shortage Guidelines FEIS establishes a system of reliance upon the
 3 flows in the Colorado River among the Lower Basin States, to the exclusion of the
 4 Navajo Nation and other Indian tribes. As shortages are allocated in any year pursuant to
 5 the Shortages Guidelines, Reclamation will manage the Colorado River in a manner that
 6 ensures that entities other than the Navajo Nation will continue to rely on water supplies
 7 claimed by, reserved for, needed by, and potentially belonging to the Navajo Nation.
 8 Such reliance will operate to make allocation of Colorado River water to the Navajo
 9 Nation to satisfy its water rights or meet the needs of the Navajo Nation and its members
 10 increasingly difficult.

11 **The Federal Defendants’ On-going Management Efforts Continue to Ignore the**
 12 **Needs of the Navajo Nation for Water from the Colorado River in the Lower Basin**

13 106. The Surplus Guidelines and Shortage Guidelines are just two examples of
 14 the Federal Defendants’ decisions and actions to manage the Colorado River in the
 15 Lower Basin that ignore the needs of the Navajo Nation for a supply of that water to
 16 make the Navajo Reservation a permanent home. Other such actions include:

17 a. Entering into Minute No. 323, *Extension of Cooperative Measures and*
 18 *Adoption of a Binational Water Scarcity Contingency Plan in the Colorado River Basin*
 19 (Sep. 21, 2017), with Mexico (creating a Binational Water Scarcity Contingency Plan
 20 permitting the United States to “save” quantities of water at specified low reservoir
 21 elevations for recovery at a later date; providing for conditions under which the United
 22 States will deliver to Mexico quantities of Colorado River water in excess of its 1944

1 Water Treaty obligations; establishing a “revolving account” to permit Mexico to defer
2 delivery of a portion of its Colorado River water and store such water in the United
3 States; and allowing Mexico to generate intentionally created surplus);

4 b. Issuing a *Notice of Proposed Rulemaking: Regulating the Use of Lower*
5 *Colorado River Water Without an Entitlement*, 73 Fed. Reg. 40,916 (July 16, 2008)
6 (proposing to address the unlawful use of Colorado River water via pumping
7 underground water located in the floodplain in the estimated amount of 9,000 to 15,000
8 acre-feet per year by, *inter alia*, providing “various options” to groundwater pumpers to
9 bring the uses of water from the Colorado River in the Lower Basin into compliance with
10 Federal law, by such mechanisms as a contract for delivery of water through ADWR);

11 c. Preparing the *Final Environmental Impact Statement, Implementation*
12 *Agreement, Inadvertent Overrun and Payback Policy, and Related Federal Actions* (Oct.
13 2002) (Doc. 283-8) (inadvertent overruns could have a significant impact on the Navajo
14 Nation’s ability to satisfy its claims to and needs from the Colorado River in the Lower
15 Basin; the FEIS contains no analysis of such claims or needs despite purporting to
16 analyze the impacts on all tribal resources); and

17 d. Preparing the *Final Environmental Assessment and Finding of No*
18 *Significant Impact* (Jun. 19, 2002) and entering into the *Storage and Interstate Release*
19 *Agreement* (Dec. 18, 2002) (creating a program of interstate water banking of Arizona
20 and Nevada entitlements in underground aquifers in Arizona, which fails to account for
21 the unquantified rights of the Navajo Nation to, or the unmet needs of the Navajo Nation
22 and from, the Colorado River in the Lower Basin).

1 107. Like the Surplus Guidelines and Shortage Guidelines, these actions
2 demonstrate a pattern of conduct by which Reclamation manages the Lower Basin of the
3 Colorado River in a manner that ensures that entities other than the Navajo Nation will
4 continue to rely on water supplies claimed by, reserved for, needed by, and potentially
5 belonging to the Navajo Nation. Such reliance will operate to make allocation of Lower
6 Basin of Colorado River water to the Navajo Nation to satisfy its water rights and to meet
7 the needs of the Navajo Nation and its members increasingly difficult and thereby harm
8 the Navajo Nation and its members.

9 **I. FEDERAL DEFENDANTS MANAGEMENT DECISIONS INDUCING**
10 **RELIANCE BY THE LOWER BASIN STATES ON WATERS RESERVED**
11 **FOR THE NAVAJO NATION GIVE RISE TO REDRESSABLE HARM.**

12 108. The reserved water rights of the Navajo Nation to the mainstream of the
13 Colorado River in the Lower Basin are impaired by the management decisions of the
14 Secretary that artificially enhance Colorado River water supplies and induce users of this
15 water to rely on those supplies.

16 109. The Federal Defendants attempt to use the unique attribute of federal
17 reserved rights – that such rights cannot be lost through non-use, forfeiture or
18 abandonment – against the Navajo Nation as a sword, arguing that the Nation’s inchoate
19 rights cannot be impaired and so the United States has no obligation to ascertain the
20 extent to which the Navajo Nation requires water from the Colorado River, to determine
21 the scope of such rights, or to examine the impact of its management actions on those
22 rights or other Colorado River water supplies available to meet the needs of the Navajo
Nation. However, when the Supreme Court held that treaties and executive orders

1 establishing Indian reservations impliedly reserved sufficient water to make those
2 reservations permanent homelands for tribal people, it recognized that without an
3 exemption from the prior appropriation doctrine of “use it or lose it,” the benefit of
4 implying such a reservation of rights would be defeated. Providing that federal reserved
5 rights could not be lost through non-use was intended to shield those unquantified rights
6 to compensate for historic failures of the United States to carry out its duty to determine,
7 protect, and make Indian water rights productive. The Federal Defendants’ use of this
8 unique attribute of reserved water rights crafted to protect tribal water rights as
9 justification for their failure to address the rights of the Navajo Nation further abrogates
10 their fiduciary duty to the Navajo Nation.

11 110. As discussed above, in 1952, Arizona sued California alleging that the
12 award of contracts for Colorado River water to California in excess of 4.4 million acre-
13 feet per year would cause Arizona harm. *See* ¶ 26, *supra*. Although the Secretary was
14 authorized under the Boulder Canyon Project Act to contract with Arizona for 2.8 million
15 acre-feet per year of Lower Basin Colorado River water, Arizona was unable to use this
16 water and was concerned that should California become reliant on supplies in excess of
17 its 4.4 million acre-feet per year allocation, Arizona would be unable to recover such
18 waters, despite its rights under the Act. The 1964 Arizona Decree confirmed the rights of
19 the respective states under the Boulder Canyon Project Act, however, Arizona has been
20 attempting to claw back its full allocation ever since.

1 111. Article IX of the 1964 Arizona Decree provides that “[a]ny of the parties
2 may apply at the foot of this decree for its amendment or for further relief.” 376 U.S. at
3 353.

4 112. On January 9, 1979, the Supreme Court entered a supplemental decree
5 identifying the present perfected rights to the use of the mainstream water in each State,
6 including the rights of the Colorado River Indian Tribes, Fort Mojave Indian Tribe,
7 Chemehuevi Indian Tribe, Cocopah Indian Tribe, and Fort Yuma (Quechan) Indian
8 Tribe. 439 U.S. 419 (1979). The five tribes intervened in the action and together with
9 the United States alleged that certain practicably irrigable acreage was “omitted” in the
10 1964 Arizona Decree and from the calculation of their water rights.

11 113. Despite assurances from the Supreme Court that it would retain jurisdiction
12 for purposes of modifying the Decree, the Court declined to entertain the claims for the
13 “omitted” acreage because “[r]ecalculating the amount of practicably irrigable acreage
14 runs directly counter to the strong interest in finality” *Arizona v. California II*, 460
15 U.S. 605, 620 (1983).

16 114. In *Arizona v. California II*, the Court recognized that:

17 If there is no surplus of water in the Colorado River, an increase in federal
18 reserved water rights will require a “gallon-for-gallon reduction in the
19 amount of water available for water-needy state and private appropriators.”
20 [*United States v. New Mexico*, 438 U.S. 696, 699 (1978)]. As Special
21 Master Tuttle recognized, “not a great deal of evidence is really needed to
22 convince anyone that western states would rely upon water adjudications.”
[Report of Special Master Tuttle (Feb. 22, 1982)] at 46. Not only did the
Metropolitan Water District in California and the Central Arizona Project
predicate their plans on the basis of the 1964 allocations, but, due to the
high priority of Indian water claims, an enlargement of the Tribes’

1 allocation cannot help but exacerbate potential water shortage problems for
2 these projects and their States.

3 *Id.* at 621.

4 115. In the Arizona Water Settlements Act, Pub. L. No. 108-451, 118 Stat. 3478
5 (2004) (“AWSA”), Congress directed the Secretary to reallocate 67,300 acre-feet of non-
6 Indian agricultural priority CAP water for future Indian tribal water rights settlements.
7 *Id.* §§ 104(a)(1)(A)(iii) and (a)(1)(B)(i). The AWSA, while settling some Indian water
8 rights claims, also resolved litigation between the Department and the Intervenor-
9 Defendant Central Arizona Water Conservation District (“CAWCD”), the entity that
10 operates CAP, over repayment of CAP construction costs. While fully settling its
11 financial dispute with CAWCD, the Department agreed to the reallocation of CAP NIA
12 supplies that they conceded before Congress were inadequate to address the unquantified
13 claims of Indian tribes in the Lower Basin. The testimony presented by the Department’s
14 Assistant Secretary for Water and Science was as follows:

15 **Senator MURKOWSKI.** So under this settlement agreement there is
16 going to be approximately 67,300 acre-feet of CAP water available for
these future Indian water rights settlements. Is this going to be sufficient
water to settle those claims that you have just identified?

17 **Mr. RALEY.** Senator, I believe that if you aggregate the claims in
18 existence now, it is about 3.3 million acre-feet. If you subtract the claims
that would be addressed within this legislation, it leaves the claims
19 outstanding at something like 1.7 million acre-feet. Suffice it the [*sic*] say
that, just to make a point, even if the entire Central Arizona Project were
20 dedicated to those claims, which is not being contemplated by anyone, that
would not provide adequate water by itself.

21 We believe that resolution of these future claims, first of all, would
22 not be precluded by this existing legislation, this proposal, and that it is
obvious that for settlement of those other claims water from other than CAP

1 sources would have to be included. Otherwise it is simply impossible to
 2 even enter into the ball park of what those claims are. And the quantities
 3 and sources are something that would have to be addressed in claim-
 specific negotiations.

*To Provide for Adjustments to the Central Arizona Project in Arizona, to
 4 Authorize the Gila River Indian Community Water Rights Settlement, to Authorize
 5 and Amend the Southern Arizona Water Rights Settlement Act of 1982, and for
 6 Other Purposes: Joint Hearing on S. 437 before the Subcomm. on Water and
 7 Power of the Senate Comm. on Energy and Natural Resources and the Comm. on
 Indian Affairs, 108th Cong., 1st Sess. (2003) at 16-17 (testimony of Bennett W.
 Raley, Assistant Secretary, Water and Science, Dep't. of the Interior) (Doc. 250-
 6).*

8 116. The Federal Defendants' management decisions on the mainstream of the
 9 Colorado River that induce water users to "predicate their plans" in reliance on such
 10 decisions harm the Navajo Nation and its trust resources by making it less likely that a
 11 court would subsequently "exacerbate potential water shortage problems for [existing]
 12 projects and their States. *Arizona v. California*, 460 U.S. at 621. Whether in litigation or
 13 settlement, the ability of an Indian tribe to secure recognition and development of water
 14 rights to water supplies relied upon by others – even despite their knowledge of a tribe's
 15 water rights claims to those waters and the cloud those claims place on those uses – has
 16 proven to be virtually impossible.

17 117. The Federal Defendants' actions that foster reliance on unquantified or
 18 unused tribal water rights create an incentive for parties who have put that water to use
 19 with the encouragement of the Federal Defendants to use their political influence to
 20 prevent the use or development of tribal rights. Again, *Arizona v. California*, is
 21 instructive. While Arizona won its court battle to confirm its right to use 2.8 million
 22 acre-feet per year from the mainstream of the Colorado River in the Lower Basin,

ultimately California, with its unequalled political might in Congress, required Arizona to subordinate the majority of its water rights to secure funding for the CAP – the only way Arizona could put its mainstream water to use to benefit its population centers distant from the River. Colorado River Basin Project Act, 43 U.S.C. § 1521(b).

118. The right to use water is a usufruct, and water not put to use by the holder of the right may lawfully be used by others. However, when the Federal Defendants induce reliance on these supplies through management practices such as those complained of herein, and an Indian tribe subsequently seeks quantification and development of its reserved rights, neither the United States, Congress, nor any court are likely to require water users to abandon beneficial uses to which that water is being put.

119. In conclusion, as one Arizona commentator has observed:

Many non-Indian appropriators are strongly opposed to the idea of having to pay for water that they have used freely for generations, particularly where, absent federal funding, the tribes will be unable to build the water storage and delivery systems that would allow them to fully utilize their water rights. Rather than participating in water marketing arrangements with the tribes, many non-Indian appropriators would prefer to use political clout in Congress to prevent the tribes from obtaining the funds necessary to exercise their reserved rights.

JOHN B. WELDON, JR., *Non-Indian Users' Goals: More is Better, All Is Best*, in INDIAN WATER IN THE NEW WEST 83 (McGuire, Lord & Wallace eds. 1993) (Doc. 283-4).

V. CAUSES OF ACTION

First Cause of Action: Breach of 1849 Peace Treaty and 1868 Treaty

120. Paragraphs 1-119 are incorporated herein by reference.

1 121. The Navajo Nation requires water from the Colorado River in order to
2 make Navajo lands productive and to fulfill the purpose of the Navajo Reservation as a
3 permanent homeland for the Navajo people.

4 122. In the 1849 Peace Treaty, the United States undertook an enforceable duty
5 of protection to the Navajo Nation. Pursuant to the 1868 Treaty establishing the Navajo
6 Reservation, the United States holds the Nation's lands and waters in trust for the benefit
7 of the Navajo Nation. As promised in the treaties, the United States owes to the Navajo
8 Nation all the obligations of a fiduciary, including a duty of loyalty, and a duty to
9 preserve, protect, and make productive the Nation's lands and implied rights to water.

10 123. The Federal Defendants have breached the duty of protection expressly
11 undertaken in the treaties between the United States and the Navajo Nation by failing to
12 determine the extent and quantity of the rights of the Navajo Nation to use the waters of
13 the Colorado River. Having failed to quantify the rights of the Navajo Nation to use
14 water from the Colorado River, the only way for the Federal Defendants to adequately
15 protect the land and water resources held in trust by the United States for the benefit of
16 the Navajo Nation is for the Federal Defendants to (1) consult with the Navajo Nation;
17 (2) determine the amount of water which the Navajo Nation requires from the Lower
18 Basin of the Colorado River to meet the needs of the Nation and its members; and (3)
19 develop a plan to secure that water.

20 **Second Cause of Action: Breach of Trust**

21 124. Paragraphs 1-123 are incorporated herein by reference.
22

1 125. The Federal Defendants owe fiduciary duties to the Navajo Nation as
2 trustees of the Nation's lands and waters. The trust obligation of the United States to
3 Indian tribes has its origins in the course of dealings between the United States and the
4 sovereign tribal governments occupying the North American continent before the arrival
5 of the British and other European colonists, and is enshrined in the Indian Commerce
6 clause of the United States Constitution. U.S. CONST. art. I, § 8, cl. 3. The common law
7 duties of trust owed by the United States are independent of duties imposed by statutes
8 subsequently enacted by Congress, and are legally enforceable.

9 126. In both the 1849 Peace Treaty, in which the United States took the Navajo
10 Nation under its jurisdiction and protection and promised to establish a reservation for the
11 Nation, and the 1868 Treaty setting aside the original Navajo Reservation, the United
12 States undertook specific obligations to protect Navajo people and their resources from
13 depredations. The United States holds Navajo lands and waters in trust and is bound by
14 the common law duties of a trustee to determine the extent of the trust res, to protect the
15 trust corpus, and to make the trust assets productive.

16 127. The United States Congress has enacted numerous statutes for the benefit
17 of Indian tribes, charging the Federal Defendants with providing for their welfare, and
18 imposing duties on the Federal Defendants to protect trust assets, as set forth in ¶¶ 61-70,
19 *supra*. The Executive has issued regulations, executive orders, secretarial orders,
20 policies, handbooks, manuals, and other directives that implement federal statutes,
21 including NEPA. *See* ¶¶ 71-73, *supra*. The Federal Defendants are required to comply
22 with duties and obligations to Indian tribes imposed therein.

1 128. In its capacity as trustee for the Navajo Nation, the United States not only
2 appeared in the litigation in *Arizona v. California* on behalf of twenty-five tribes with
3 lands in the Lower Basin of the Colorado River, but affirmatively and successfully
4 opposed efforts by the Nation to intervene to protect its own interests, when concerns
5 arose over the adequacy of the USDOJ's representation. Whether characterized as an
6 oversight or error, the rights of the Navajo Nation were not determined in *Arizona v.*
7 *California*. The United States has never acted to correct this omission despite repeated
8 requests from the Navajo Nation to do so.

9 129. Having failed to quantify the Nation's water rights in *Arizona v. California*,
10 the United States has also, despite repeated requests documented herein, refused to join
11 with the Nation to bring an independent action in this Court seeking to quantify the
12 Nation's mainstream Colorado River claims. Counsel for Arizona stated here, in open
13 court, that the state would assert its immunity from suit as a defense to such an action
14 initiated by the Navajo Nation alone.

15 130. For over six decades the Navajo Nation has actively sought the
16 determination of its rights to the mainstream of the Colorado River. The Federal
17 Defendants, when not affirmatively obstructing such efforts by asserting that the United
18 States alone could adequately represent the Nation, have refused to assist the Nation in
19 determining the extent of its needs from the Colorado River to make the Navajo
20 Reservation a permanent homeland, and to develop a plan to meet those needs.

21 131. Further, the Federal Defendants have breached the United States' fiduciary
22 obligation to the Navajo Nation by taking administrative actions to manage the waters of

1 the Lower Basin of the Colorado River without engaging in the required analysis of the
2 impacts of those actions on the Nation's trust assets and, if mandated by that analysis,
3 taking action to protect and preserve the Navajo Nation's trust resources.

4 132. The management decisions made by the Federal Defendants have breached
5 the fiduciary obligations of the United States to the Navajo Nation by elevating the
6 interests of the United States and other entities, including the Intervenor-Defendants, over
7 the interests of the Navajo Nation in securing its rights to the mainstream of the Colorado
8 River in the Lower Basin. The management decisions challenged herein as breaches of
9 the fiduciary duty of the Federal Defendants encourage reliance on the limited water
10 supplies of the Colorado River, thereby impairing the rights of the Navajo Nation and the
11 ability of the United States to secure the water needed to make the Navajo Reservation a
12 permanent homeland and causing the Nation harm.

13 **Third Cause of Action: Failure to Consult with the Navajo Nation**

14 133. Paragraphs 1-132 are incorporated herein by reference.

15 134. Executive Order No. 13,175 requires the Federal Defendants to
16 meaningfully consult with the Navajo Nation in implementing any regulation or policy
17 that has tribal implications.

18 135. The Federal Defendants failed to consult with the Navajo Nation prior to
19 making the administrative decisions complained of, as required by Executive Order No.
20 13,175.

21 136. Executive Order No. 13,175 requires the Federal Defendants to honor tribal
22 treaty rights, *id.* § 3(a), and work on a government-to-government basis to protect tribal

1 trust resources and tribal treaty rights. The Nation requires water from the mainstream of
2 the Colorado River in the Lower Basin to make the Navajo Reservation a permanent
3 homeland. The Federal Defendants have failed to meaningfully consult with the Navajo
4 Nation to determine the needs of the Navajo Nation for water from the Colorado River
5 and to devise a plan for securing the water necessary to meet those needs.

6 **FIRST PRAYER FOR RELIEF**

7 Plaintiff, the Navajo Nation, respectfully requests that the Court declare that the
8 obligations undertaken by the United States through its course of dealings with Indian
9 tribes, in the 1849 Peace Treaty and the 1868 Treaty between the United States and the
10 Navajo Nation, and in statutes, regulations, executive orders, regulations, and policies
11 enacted or promulgated for the protection and benefit of Indian tribes requires the Federal
12 Defendants, in consultation with the Navajo Nation, to (1) determine the extent to which
13 the Nation requires water from the mainstream of the Colorado River in the Lower Basin
14 to enable its Reservation to serve as a permanent homeland for the Navajo Nation and its
15 members; (2) develop a plan to secure the water needed; and (3) manage the Colorado
16 River in a manner that does not interfere with the plan to secure the water from the
17 Colorado River needed by the Navajo Nation

18 **SECOND PRAYER FOR RELIEF**

19 Plaintiff, the Navajo Nation, respectfully requests the Court to issue an Order
20 enjoining further breaches of the 1849 Peace Treaty, the 1868 Treaty, and the United
21 States' trust responsibility, or providing such other relief as the Court deems appropriate
22 and in consultation with the Navajo Nation:

1 (a) to determine the extent to which the Navajo Nation requires water from the
2 mainstream of the Colorado River in the Lower Basin to enable its Reservation to serve
3 as a permanent homeland for the Navajo Nation and its members;

4 (b) to develop a plan to secure the water needed;

5 (c) to manage the Colorado River in a manner that does not interfere with the
6 plan to secure the water from the Colorado River needed by the Navajo Nation; and

7 (d) to require the Federal Defendants to analyze their actions in adopting the
8 Shortage and Surplus Guidelines, and other management decisions identified herein, in
9 the light of the plan to secure the water from the Colorado River and adopt appropriate
10

11 Respectfully submitted this 13th day of April, 2018.

12 M. Kathryn Hoover, SBA 013266
13 Stanley M. Pollack, SBA 011046
14 NAVAJO NATION DEPARTMENT
15 OF JUSTICE
16 Post Office Drawer 2010
17 Window Rock, Arizona 86515
18 Telephone: (928) 871-7510
19 Fax: (928) 871-7570
20 khoover@nndoj.org
21 smpollack@nndoj.org
22

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

By: /s/ Scott B. McElroy
Scott B. McElroy

Attorneys for the Navajo Nation

CERTIFICATE OF SERVICE

I hereby certify that on April ___, 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:

Catherine M Stites cstites@mwdh2o.com, cnagai@mwdh2o.com,
mboucher@mwdh2o.com, mgagar@mwdh2o.com

Charles T DuMars ctd@lrpa-usa.com, cjb@lrpa-usa.com, dml@lrpa-usa.com

Dana R Walsh dana.walsh@snwa.com, Theresa.drevetzi@lvvwd.com

David E Lindgren dlindgren@downeybrand.com

David Scott Johnson djohnson@cap-az.com, cvisconti@cap-az.com

Dena Rosen Benjamin Dena.benjamin@azag.gov, AdminLaw@azag.gov

Gregory K Wilkinson Gregory.Wilkinson@bbklaw.com

Gregory Loyd Adams gadams@fclaw.com

James H Davenport jhdavenportllc@gmail.com

Jay Michael Johnson jjohnson@cap-az.com, cvisconti@cap-az.com

Jennifer T Crandell jcrandell@crc.nv.gov, jennifercrandel@yahoo.com

Joanna M Smith jmsmith@iid.com, acmachado@iid.com, dml@lrpa-usa.com

John B Weldon jbw@slwplc.com, bjj@slwplc.com

John Pendleton Carter , III jcarter@hkcf-law.com

Joseph A Vanderhorst jvanderhorst@mwdh2o.com, gosorio@mwdh2o.com

Joseph P Mentor , Jr mentor@mentorlaw.com

Karen Marie Kwon shanti.rossetodonovan@state.co.us

1 Kenneth Cary Slowinski kcslowinski@azwater.gov
2 Lauren James Caster lcaster@fclaw.com
3 Linus Serafeim Masouredis lmassouredis@mwdh2o.com, tkirkland@mwdh2o.com
4 Lisa Michelle McKnight lmcknight@slwplc.com, bjj@slwplc.com
5 Marcia L Scully mscully@mwdh2o.com, jmiyashiro@mwdh2o.com
6 Martin P Clare mclare@cycn-phx.com, usdc@cycn-phx.com
7 Melissa R Cushman melissa.cushman@bbklaw.com
8 Michael A Johns - Inactive USAAZ.DepartedAUSAs@usdoj.gov
9 Michael J Pearce mpearce@mpwaterlaw.com, rmaguire@mpwaterlaw.com
10 Rita Pearson Maguire rmaguire@azlandandwater.com
11 Robert B Hoffman rhoffman@somachlaw.com
12 Scott L Shapiro sshapiro@downeybrand.com
13 Shanti Rosset shanti.rossetodonovan@state.co.us
14 Stanley M Pollack smpollack@nndoj.org
15 Steven Bane Abbott sabbott@redwineandsherrill.com, fluna@redwineandsherrill.com
16 Steven M Anderson steve.anderson@bbklaw.com, lynda.byrd@bbklaw.com
17 Steven P Saxton ssaxton@downeybrand.com
18 Stuart Leslie Somach ssomach@somachlaw.com, cgarro@somachlaw.com,
19 rstephenson@somachlaw.com
20 Thomas K Snodgrass thomas.snodgrass@usdoj.gov, carla.valentino@usdoj.gov,
21 efile_nrs.enrd@usdoj.gov

22

/s/Bonnie Ray