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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

The Navajo Nation,

Plaintiff,

v.

United States Department of the Interior, et al.

Defendants.

State of Arizona, et al.,

Defendant-Intervenors.

Case No. CIV-03-0507-PCT-GMS

OPPOSITION OF THE INTERVENOR-DEFENDANTS THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, COACHELLA VALLEY WATER DISTRICT, IMPERIAL IRRIGATION DISTRICT, AND STATE OF ARIZONA TO PLAINTIFF'S MOTION FOR LEAVE TO FILE THIRD AMENDED COMPLAINT

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Intervener-Defendants The Metropolitan Water District of Southern California ("Metropolitan"), Coachella Valley Water District ("CVWD"), Imperial Irrigation District ("IID"), and the State of Arizona respectfully submit this Opposition to Plaintiff's Motion for Leave to File Third Amended Complaint. (Doc. 335).

These Intervener-Defendants also join the grounds set forth in the Federal Defendants' opposition to this instant motion.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Granting the Navajo's Nation's motion for leave to amend is futile because the allegations in the Third Amended Complaint are subject to dismissal for lack of subject matter jurisdiction. Fed. R. Civ. P. 15(a)(2); *Carrico v. City & County of San Francisco*, 656 F.3d 1002, 1008 (9th Cir. 2011). The proposed Third Amended Complaint seeks to add allegations regarding the history of *Arizona v. California* (¶¶ 26-35, 110-114), the Secretary's role as watermaster of the Colorado River in the Lower Basin (¶¶ 75-80), and numerous allegations asserting "rights" and "interests" of the Navajo Nation in the mainstream of the Colorado River in the Lower Basin,[1] as the foundation for breach of

[1] For example, plaintiff alleges the following in the proposed Third Amended Complaint: "[T]he Navajo Nation's rights to use water from the Colorado River" (¶ 25), the "Nation's right to use, its interest in and needs for water from the Mainstream of the Colorado River in the Lower Basin" (¶ 42, 44, 46), "the Navajo Nation's rights or needs to water from the mainstream of the Colorado River in the Lower Basin (¶ 48), "the Navajo Nation's needs for and rights to Colorado River water" and " the rights of the Navajo Nation's to the mainstream of the Colorado River in the Lower Basin" (¶ 49), "allocation of water from the Colorado River without regard to the Navajo Nation's rights or the needs of the Navajo Nation and its members for such waters establishes a system of reliance upon the Colorado River that ensures that entities other than the Navajo Nation will continue to depend upon water supplies claimed by, reserved for, needed by, and potentially belonging to the Navajo Nation" and "allocation of Colorado River water to the Navajo Nation to satisfy its water rights" (¶ 50), "the legal basis for the Navajo Nation's claim to a reserved right to water from the mainstream of the Colorado River in the Lower Basin" (¶ 58), "the Navajo Nation's beneficial interest in . . . the waters of the Colorado River" (¶ 59), " the Navajo Nation's rights to and interests in the Colorado River" (¶ 81), "the Navajo Nation's water rights" (¶ 82), "the water rights of the Navajo Nation to the waters of the Colorado River" (¶ 91), "the Nation's unquantified rights" (¶ 96), "Navajo Nation's unquantified right to or its needs for waters of the Lower Basin of the Colorado River" (¶ 97), "the Navajo Nation's water rights and needs for water to make Reservation lands in the Lower Basin productive" (¶ 103), "[t]he reserved water rights of the Navajo Nation in the mainstream of the Colorado River in the Lower Basin" (¶108), "the Nation's . . . implied right to water" (¶ 122), "the rights of the Navajo Nation to use the waters of the Colorado River" and "the rights of the Navajo Nation to use water from the Colorado River" (¶ 123), "the Nation's mainstream

trust claims against the federal defendants. The Nation seeks leave to pray for an order that "requires the Federal Defendants . . . to (3) manage the Colorado River in a manner that does not interfere with the plan to secure the water from the Colorado River needed by the Navajo Nation." (Third Amended Complaint (Doc. 335, Ex. 1), First and Second Prayers for Relief, p. 53, lines11-17.)

The Navajo Nation's claims are founded on the assertion that the Nation has a water right in the mainstream of the Colorado River in the Lower Basin. Absent such a right, there would be no basis for a breach of trust claim. However, the determination of whether the Nation has such a water right lies within the exclusive and retained jurisdiction of the Supreme Court in *Arizona v. California*, No. 8, Original (547 U.S. 150, 166-167 (2006), and this Court therefore cannot decide the issue. Because the absence of jurisdiction here cannot be cured by any amendment, amendment is futile, and leave to amend therefore should be denied. *See Krainski v. Nevada ex rel. Bd. of Regents of Nevada System of Higher Ed.*, 616 F.3d 963, 972 (9th Cir. 2010) (proposed amendment is futile if clear that complaint could not be saved by any amendment). Additionally, the claim of the Second Amended Complaint should also be dismissed for the jurisdictional grounds asserted by Intervener-Defendants in their prior motions to dismiss, which are incorporated herein by reference. (Docs. 242-248, 251.)

II. BACKGROUND

A. The Navajo Nation's Colorado River Water Right Claim in *Arizona v. California*

The 1922 Colorado River Compact apportioned waters of the Colorado River System between the Upper Basin and Lower Basin,[2] but did not further divide the

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Colorado River claims" (¶ 129), "its rights to the mainstream of the Colorado River" (¶ 130), and "its rights to the mainstream of the Colorado River in the Lower Basin" (¶ 132.)

[2] The Colorado River Compact defined the term "Colorado River System" to mean "that portion of the Colorado River and its tributaries within the United States." Colorado River Compact, Art. II (a). The "Lower Basin" means "those parts of Arizona, California, Nevada, New Mexico and Utah within and from which waters naturally drain into the Colorado River System below Lee Ferry, and also all parts of said States located without the drainage area of the Colorado River System which are now or shall hereafter be beneficially served by waters diverted from the System below Lee Ferry." *Id.*,

apportioned waters within each Basin. After a major dispute arose between Arizona and California over their respective apportionments in the Lower Basin, Arizona commenced an action in 1952 within the original jurisdiction of the United States Supreme Court. The case, *Arizona v. California*, United States Supreme Court Case No. 8, Original,[3] spanned fifty-four years between the State of Arizona's motion for leave to file a bill of complaint in 1952, and the entry of the Consolidated Decree in 2006. *Arizona v. California*, *supra*, 547 U.S. 150 (2006). Metropolitan, IID and CVWD were named defendants, and actively participated in all phases of the case. During that fifty-four year period, the Court comprehensively and finally adjudicated many issues regarding the rights and entitlements to waters of the mainstream of the Colorado River in the Lower Basin, and translated those rulings into the injunctions in the Consolidated Decree. What is relevant for this motion is that: (1) *Arizona v California* adjudicated rights to the mainstream of the Colorado River in Arizona above Lake Mead and below Lee Ferry, which is where the Navajo Nation now claims to have Colorado River water rights; (2) the United States represented the Navajo Nation in *Arizona v. California* and asserted a water right claim for the Navajo to the Little Colorado River, but not to the mainstream of the Colorado River; (3) the United States had the opportunity, but declined to assert any Navajo Nation water right to the Colorado River mainstream; (4) the final Consolidated Decree did not recognize any Navajo Nation rights in the mainstream of the Colorado River; and (5) the Supreme Court's adjudication in *Arizona v. California* was intended to be a complete and final resolution of rights to the mainstream of the Colorado River in the Lower Basin.

Art. II (g).

[3] The docket for the case is available on the U.S. Supreme Court's website by using "22o8" (using the letter o and not the number zero) as the case number for the docket search. The 2006 Consolidated Decree summarizes the procedural history of the three phases of the case. See *Arizona v. California*, *supra*, 547 U.S. at 150-152.

B. The Navajo Nation's Colorado River Claim in Proceedings Before the Special Master

The United States' Petition for Intervention in *Arizona v. California* made specific water right claims for Indian reservations in the Lower Basin, including the Navajo Reservation. See Petition for Intervention, pp. 56-57, ¶¶ XXV through XXVII, and Appendix IIA. (Doc. 247-1[4], Ex. A, pp. 5-6.) However, the Navajo Reservation claim was limited to water from the Little Colorado River and did not seek water from the mainstream of the Colorado River. *Id.* (Doc. 247-1, Ex. A, p.6)

Several Indian Tribes, including the Navajo, filed a motion with Special Master Rifkind, seeking appointment of a Special Assistant Attorney General to represent their interests. The Special Master denied the motion but granted the Tribes leave to file amicus briefs if they wished. (Reporter's Transcript ("RT") 2432-2498 [July 6, 1956] (argument) (Docs. 247-9 and 247-10); RT 2638-2646 [July 18, 1956] (ruling) (Doc. 248-1).) None of the Tribes did so.

The trial before Special Master Rifkind proceeded on the basis that all rights in the Colorado River System in the Lower Basin were to be adjudicated. In its opening statement on its reserved water rights claims for the Indian Reservations, the United States claimed no water from the mainstream of the Colorado River for the Navajo Reservation, but did make claims for 10 projects on the reservation with the water source being the Little Colorado River system and springs and washes. (RT 12500-12502 [Aug. 13, 1957] (Doc 248-2); U.S. Exhibit 349 (Doc. 247-3).)

When the United States was presenting its evidence regarding the irrigable acreage of the Indian reservations, an important colloquy between the Special Master and counsel for the United States occurred which established on the record that the United States would be held to have set forth (as a "bill of particulars") all of the claims for reserved water rights for Indian Reservations in the Lower Basin. *See* RT 14154-14157 [Jan. 7, 1958] (Doc. 248-4.). The Supreme Court would later rely on this colloquy in holding that

[4] Copies of all the relevant documents cited herein are already contained in the docket, for example, here as attachments to the prior Request for Judicial Notice.

reserved Indian water rights for "omitted lands" which were not previously asserted were barred by principles of *res judicata* and finality, and could not be asserted at a later point in the litigation. *See Arizona v. California*, 460 U.S. 605, 617-628, and n. 14 (1983) (describing the colloquy among the Special Master and counsel for the United States).

Following trial, the Special Master's Report scaled back the scope of the water rights being adjudicated in two respects. First, the Special Master concluded that the statutory apportionment of water under the Boulder Canyon Project Act only covered water in Lake Mead behind Hoover Dam, and water in the mainstream of the Colorado River below Lake Mead. (Special Master Report December 5, 1960 ("Report"), pp. 225-226, 305 (Doc. 247-4, Doc. 247-6).) Second, the Special Master found that with the exception of the Gila River, there were no interstate controversies over Colorado River tributaries, nor had tributary water been apportioned by the Boulder Canyon Project Act; therefore, there was no need to adjudicate water rights on the tributaries, including any reserved water rights for Indian reservations on the tributaries. *Id.* at 316-324 (Doc. 247-6). Because the United States had not made any claim for the Navajo on the mainstream of the Colorado River, but only on the tributary of the Little Colorado River, the Special Master's Report did not discuss and made no recommendation regarding water rights for the Navajo Reservation. The Special Master also interpreted the term "present perfected rights" in the Boulder Canyon Project Act, 43 U.S.C. § 617e, which rights were to be addressed in the adjudication, as including both private water rights acquired under state law, and federal reserved rights, including those for Indian Reservations. (Report, pp. 306-311 (Doc. 247-6).)

The United States filed exceptions objecting to the Special Master's exclusion of the mainstream of the Colorado River above Lake Mead from the scope of the adjudication. (Exceptions of the United States, pp. 1-2. (Doc. 247-7)) The United States did not object to the exclusion of the tributaries or the exclusion of Navajo claims to the Little Colorado River from the recommended decree.

After the United States filed its exceptions, the Navajo Nation moved to intervene in the case in 1961. The Supreme Court denied that motion. *Arizona v. California*, 368 U.S. 917 (1961). The Navajo Nation moved for reconsideration and contended that the United States was not adequately representing its interests. The Court denied that motion as well. *Arizona v. California* 368 U.S. 950 (1962).

C. The 1963 Opinion and 1964 Decree in *Arizona v. California*

The Supreme Court's 1963 decision in *Arizona v. California*, 373 U.S. 546, held that, contrary to the Special Master's recommendation, the apportionment of the Colorado River water under the Boulder Canyon Project Act included not just the mainstream of the Colorado River below Lake Mead, but extended to the entire mainstream of the Colorado River in the Lower Basin, including the portion of the river above Lake Mead and below Lee Ferry. *Id.* at 590-591. The Court did agree with the Special Master that reserved water claims for Indian Reservations on the tributaries should be excluded from the litigation. *Id.* at 595. Thus, the Navajo Nation's claim to the Little Colorado River was carved out of the litigation, but not any claim the Navajo might have to the Colorado mainstream above Lake Mead and below Lee Ferry. The Court also accepted the Special Master's recommendation to use the "practicably irrigable acreage" standard for measuring the quantum of water rights, and agreed with the Special Master that "present perfected rights" included federal reserved water rights for Indian Reservations. *Id.* at 595-601.

The 1964 decree in *Arizona v. California*, 376 U.S. 340, incorporated these rulings and modified the definition of the "mainstream" to refer to "the mainstream of the Colorado River downstream from Lee Ferry," *Id.* at 340. The 1964 Decree also directed the States to submit lists of "present perfected rights" in waters of the Colorado River mainstream, and directed the United States to submit a similar list with respect to claims for federal reserved rights within each State. *Id.* at 351-352. Article VII of the Decree also provided that the Decree would not affect "[t]he rights or priorities, except as specific provision is made herein, of any Indian Reservation," *id.* at 352-353, and Article

IX of the Decree provided that parties may apply to amend the decree, and that the Court retained jurisdiction of the case for any modification or supplemental decree. *Id.* at 353.

D. The United States' List of Present Perfected Rights for Federal Reservations

Pursuant to Article VI of the 1964 Decree, the United States submitted its list of present perfected rights in March 1967. The list only included water right claims for the Yuma, Fort Mojave, Chemehuevi, Cocopah and Colorado River Indian Reservations. (List of Present Perfected Rights Claimed by the United States, filed March 10, 1967 (Doc. 247-8).) The United States did not list or seek any water rights for the Navajo Reservation even though the scope of the adjudication covered the mainstream of the Colorado River in Arizona below Lee Ferry and above Lake Mead. After intense and protracted negotiations among the State parties and the United States, the parties filed a joint motion asking the Supreme Court to enter a supplemental decree confirming the present perfected rights submitted by the parties. The Court granted the motion, and entered the 1979 Supplemental Decree, *Arizona v. California,* 439 U.S. 419 (1979). The Supplemental Decree did not recognize or confirm any reserved water rights for the Navajo Reservation.

E. Later Claims for Additional Indian Reserved Water Rights

While the joint motion for a supplemental decree was under submission, the United States filed a motion to modify the decree to claim additional reserved water rights in the Colorado River mainstream for various Indian reservations. The Navajo Reservation was not one of these reservations. When the Supreme Court entered the 1979 supplemental decree, it referred the United States' motion for additional Indian reserved water rights to the Special Master, along with various motions by Indian Tribes to intervene.

The claims for additional Indian reserved rights fell into two categories: (1) water for so-called "omitted lands" which were irrigable lands within the 1964 recognized boundaries of reservations but which had not been asserted in previous proceedings, see

Arizona v. California, *supra*, 460 U.S. at 612-628; and (2) water for "boundary lands" which were irrigable lands whose inclusion within reservation boundaries had been disputed or was uncertain in the past, but whose status as part of the reservation had supposedly been resolved. *Id.* at 628-641.

After receiving the Special Master's Report, the Court ruled on the "omitted" and "boundary" lands claims in 1983 in *Arizona v. California*, *supra*, 460 U.S. 605. The Court ruled that notwithstanding the retention of jurisdiction in Article IX to modify the decree, principles of *res judicata* and finality barred any further claims for additional water for "omitted" Indian reservation lands. *Id.* at 615-628. The Court stressed the importance of having certainty of water rights in the Western United States. *Id.* at 620. The Court also noted that an increase in reserved Indian water rights would necessarily diminish the water rights of other parties, *id.* at 620-621; that advances in irrigation technology making it feasible to irrigate an area that previously was infeasible to irrigate was not a sufficient "change in circumstances" to justify modifying the decree, *id.* at 625, n. 18; and that the Court would not revisit a water right determination to reconsider a factual determination that had been previously made. *Id.* at 624-625. The Court also held that even though the Tribes were not parties to former proceedings, they had been represented by the United States and were bound by the previous water right determinations. *Id.* at 626-628. Turning to the claims for the "boundary" lands, the Court held that where there had been a final judicial determination of reservation boundaries, claims for such lands were permissible. *Id.* at 628-641. But where the final boundary determinations had been by administrative action which had not yet been subject to judicial review, such claims would not be recognized. *Id.* The Court then entered a supplemental decree incorporating the water rights for certain boundary lands. *Arizona v. California*, 466 U.S. 144 (1984).

The remaining *Arizona v. California* proceedings, which went on for another 20 years, dealt with disputed reservation boundary issues for the Colorado River, Fort Mohave and Fort Yuma Indian Reservations, and water right claims for those disputed

boundary lands. When those controversies were finally resolved, the Court issued its 2006 Consolidated Decree. No claims for reserved water rights in the mainstream of the Colorado River for the Navajo Reservation were ever made throughout the 50 year course of the litigation.

III. THE SUPREME COURT RETAINED JURISDICTION IN *ARIZONA V. CALIFORNIA*, THEREFORE THIS COURT LACKS JURISDICTION TO DETERMINE WHETHER THE NAVAJO NATION HAS ANY COLORADO RIVER WATER RIGHTS

The Supreme Court's proceeding in *Arizona v California* lasted more than half a Century, involved hundreds of witnesses, thousands of exhibits, tens of thousands of pages of transcript, numerous reports of Special Masters, and multiple Supreme Court decisions. *Arizona v. California*, supra, 373 U.S. at 551. The litigation culminated in the 2006 Consolidated Decree that comprehensively adjudicated the Colorado River water rights of the Lower Basin States, the United States, Indian Tribes, and private parties. The Navajo Nation was represented in that litigation by the United States, and it is bound by the judgment therein. *Arizona v California*, *supra*, 460 U.S. at 605, 615, 626-627 (1983); *Nevada v. United States*, 463 U.S. 110, 135 (1983).

There is a substantial argument that the Navajo Nation is barred under principles of *res judicata* from claiming a Colorado River water right for their Reservation at this late date. See *Nevada v. United States*, *supra*, 463 U.S. at 128-145. As described above, the United States asserted a water right claim for the Navajo Nation to the Little Colorado River, but not to the mainstream Colorado River in the *Arizona v. California* litigation. The United States could have asserted a Navajo Nation claim to the Colorado River mainstream. The *Arizona v. California* adjudication included all claims to the mainstream of the Colorado River below Lee Ferry. The United States was directed to list the present perfected rights of all Indian Tribes and Reservations to the mainstream. And the parties were on clear notice that the *Arizona v. California* adjudication was intended, for important legal and policy reasons, to be a final and conclusive adjudication of Colorado River water rights. Principles of *res judicata*, which the Supreme Court has

held are applicable in *Arizona v. California*, bar not only claims that were made but also ones that could have been made in the litigation. *Nevada v. United States, supra,* 463 U.S. at 129-130.

To attempt to avoid a *res judicata* bar, the Navajo Nation will undoubtedly rely upon Article VIII(C) of the Consolidated Decree which provides that the Decree does not affect "[t]he rights or priorities, except as specific provision is made herein, of any Indian Reservation…" But *res judicata* is not so easily disposed of. Whether an issue was or could have been litigated in a prior proceeding is "tested by an examination of the record and proceedings therein, including the pleadings, the evidence submitted, the respective contentions of the parties, and the findings and opinion of the court." *Oklahoma v. Texas*, 256 U.S. 70, 88 (1921). The Supreme Court is in the best position to examine its own proceedings and record in *Arizona v. California* to determine the *res judicata* effect of its own decree in that case. But there is no need to address the merits of the *res judicata* issue or any other potential defenses here because this Court lacks jurisdiction to determine whether the Navajo have water rights in the Colorado River.

First, the Supreme Court retained jurisdiction in *Arizona v. California*. This Court should not entertain issues and claims that properly can be addressed by the Supreme Court under its retained jurisdiction. Article IX of the Supreme Court's 2006 Consolidated Decree describes the scope of the retained jurisdiction:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.

Arizona v. California, 547 U.S. 150, 166-167 (2006).[5] The reservation of jurisdiction is broadly stated, referring to "any order," "direction" or "modification of the decree," as

[5] The initial 1964 Decree contained the same "reservation of jurisdiction" provision. *See Arizona v. California, supra,* 376 U.S. at 353. Other supplemental decrees contained reservations that were worded slightly differently. *See Arizona v. California, supra,* 439 U.S. at 421 (stating that Article IX is not affected by the list of present perfected rights); *Arizona v. California, supra,* 466 U.S. at 146 (retaining jurisdiction to order further

well as "supplemental decree[s]." Rather than being limited to modification of just the terms of the decree, the retention of jurisdiction extends, without limitation as to time, to the broader "subject matter in controversy." To be sure, *Arizona v. California*, *supra*, 460 U.S 605 made clear that Article IX is governed by general principles of finality and repose, *id.* at 619, and does not "permit retrial of factual or legal issues that were fully and fairly litigated" in the proceeding. *Id.* at 621. Instead, the reservation of jurisdiction is intended to accommodate "changed circumstances," *id.* at 619, 622, or "unforeseen issues not previously litigated." *Id.* at 619.

It should be remembered that *Arizona v. California* is a case within the original and exclusive jurisdiction of the Supreme Court under 28 U.S.C. section 1251(a). *California v. Arizona*, 440 U.S. 59, 61 (1979). Given these circumstances, the place to resolve whether *res judicata* bars the Navajo's Colorado River water rights claim or whether the Navajo are entitled to assert such a claim despite the *Arizona v. California* proceeding and final decree, is the Supreme Court, not this Court.

Second, if this Court were to determine that the Navajo have Colorado River water rights, that determination would undermine the rights that water right holders have under the existing *Arizona v. California* decree. The Court explained in *Arizona v. California, supra*, 460 U.S. at 620-621, how the recognition of additional Indian reserved water rights, which must be satisfied first in a Colorado River shortage, necessarily harm and diminish the rights of other holders of Colorado River water rights:

> A major purpose of this litigation, from its inception to the present day, has been to provide the necessary assurance to States of the Southwest and to various private interests, of the amount of water they can anticipate to receive from the Colorado River system. 'In the arid parts of the West …claims to water for use on federal reservations inescapably vie with other public and private claims for the limited quantities to be found in the rivers and streams.' [citation omitted] If there is no surplus water in the Colorado River, an increase in federal reserve water rights will require a 'gallon-

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proceedings and enter supplemental decrees as appropriate); *Arizona v. California*, 531 U.S. 1, 3 (2000) (same).

> for-gallon reduction in the amount of water available for water-needy state and private appropriators.' [citation omitted]. As Special Master Tuttle recognized, '[n]ot a great deal of evidence is really needed to convince anyone that western states would rely upon water adjudications.' [citation omitted] 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 Tribe's allocation cannot help but exacerbate potential water shortage problems for these projects and their States.

(Emphasis added.) Thus, if this Court were to adjudicate the Navajo Nation's claim to Colorado River water rights, that could potentially upset the priorities and amount of water available to those with existing rights under the *Arizona v. California* decree. Jurisdiction to modify rights and priorities in the *Arizona v California* decree lies exclusively with the Supreme Court, not the district court. *Nebraska v. Wyoming*, 515 U.S. 1, 21 (1995) ("Wyoming's claim derives not from [water] rights under individual contracts but from the decree, and the decree can be modified only by this Court."). (Emphasis added.)

Third, leaving aside the fact that the adjudication of Colorado River water rights among the Lower Basin States is, by statute, within the exclusive jurisdiction of the Supreme Court, retention of jurisdiction provisions are generally construed to preserve exclusive jurisdiction in the court that issued the judgment or decree, or that approved the settlement agreement, over which jurisdiction was retained. *See United States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007, 1012-1013 (9th Cir. 1999) ("Not only is the district court's jurisdiction continuing, it is exclusive."); *Flanigan v. Arnaiz*, 143 F.3d 540, 545 (9th Cir. 1998) ("The reason why exclusivity is inferred is that it would make no sense for the district court to retain jurisdiction to interpret and apply its own judgment to the future conduct contemplated by the judgment, yet have a state court construing what the federal court meant in the judgment. Such an arrangement would potentially frustrate

the federal court's purpose. [citation omitted] It would also impose an uncomfortable burden on the state judge to determine what the federal judge meant.").

For one court to adjudicate issues within the retained jurisdiction of another court, let alone the highest court in the land, is inappropriate. *See Lapin v. Shulton*, Inc., 333 F.2d 169, (9th Cir.), *cert. denied*, 379 U.S. 904 (1964). ("[F]or a nonissuing court to entertain an action for such relief would be seriously to interfere with, and substantially to usurp, the inherent power of the issuing court… to supervise its continuing decree by determining from time to time whether and how the decree should be supplemented, modified or discontinued in order properly to adapt it to new or changing circumstances. We need not go so far as to hold that these considerations … deprive all courts other than the issuing court of jurisdiction in such a case as this. We do hold that considerations of comity and orderly administration of justice demand that the nonrendering court should decline jurisdiction of such an action and remand the parties for their relief to the rendering court, so long as it is apparent that a remedy is available there."). *See also Treadaway v. Academy of Motion Picture Arts and Sciences*, 783 F.2d 1418, 1421-1422 (9th Cir. 1986); *Mann Manufacturing, Inc. v. Hortex, Inc.*, 439 F.2d 403, 407-408 (5th Cir. 1971); *McGinley v. Houston*, 2003 U.S.Dist. LEXIS 14947, Op at 16-25 (S.D. Ala. 2003), *affirmed*, 361 F.3d 1328 (11th Cir. 2004).

Fourth, under the "prior exclusive jurisdiction" doctrine, the first court to obtain jurisdiction over a *res* exercises exclusive jurisdiction over actions involving the *res*. *United States v. Alpine Land & Reservoir Co.*, *supra*, 174 F.3d at 1013; *State Engineer v. South Fork Band of the Te-Moak Tribe of Western Shoshone Indians*, 339 F.3d 804, 809 (9th Cir. 2003). This has been described as a "mandatory jurisdictional limitation." *Id.* at 810. Water adjudications, like that in *Arizona v. California*, are in the nature of an *in rem* proceeding involving a *res*. *Nevada v. United States*, *supra*, 463 U.S. at 143-144; *Alpine Land & Reservoir Co.*, *supra*, 174 F.3d at 1014. In water right cases, the "zero-sum nature of the resource," *State Engineer, supra*, 339 F.3d at 811, where an entitlement by one diminishes the amount remaining for others, makes it particularly important to avoid

multiple adjudications by different courts. That is what would happen here if this Court were to entertain the Navajo's claims for breach of trust.

IV. CONCLUSION

Because (1) the Navajo Nation's claims are premised on the Nation having a water right in the mainstream of the Colorado River in the Lower Basin, and (2) this Court lacks jurisdiction to decide whether such a right even exists, no amendment, let alone the proposed amendment, can salvage what remains of this action. Leave to amend should be denied, and the extant claim of the Second Amended Complaint should be dismissed for the jurisdictional grounds asserted by Intervener-Defendants in their prior motions to dismiss. (Docs. 242-248, 251.)

Dated: May 25, 2018

Respectfully submitted,

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

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Dated: May 25, 2018

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COACHELLA VALLEY WATER DISTRICT

Dated: May 25, 2018

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Dated: May 25, 2018

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Dated: May 25, 2018

ARIZONA DEPARTMENT OF WATER RESOURCES

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STATE OF ARIZONA

Dated: May 25, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2018, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmitting of a Notice of Electronic Filing to the following CM/ECF registrants:

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