

1 Martin P. Clare
2 Campbell, Yost, Clare & Norell, PC
3 101 N. First Avenue, Suite 2500
Phoenix, AZ 85003
(602) 322-1600, mclare@cycn-phx.com

4 Joe Mentor, Jr.
5 Mentor Law Group, PLLC
6 315 Fifth Avenue S., Suite 1000
Seattle, WA 98104
(206) 838-7650, mentor@mentorlaw.com

7 *Counsel for the Hopi Tribe*

8
9 IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

10
11 THE NAVAJO NATION,

12 Plaintiff,

13 v.

14 UNITED STATES DEPARTMENT OF
THE INTERIOR, et al.,

15 Defendants.
16

Case No. CV 03-507 PCT GMS

**HOPi TRIBE'S MOTION TO
DISMISS AND MEMORANDUM
IN SUPPORT**

(Oral Argument Requested)

17 **I. MOTION**

18 Without waiving the Court's lack of jurisdiction in the above-captioned
19 matter, the Intervenor-Applicant Hopi Tribe (Hopi) moves the court to dismiss
20 this action under FED. R. CIV. P. 12(b)(7) on the grounds that the Hopi Tribe is a
21 party whose joinder is indispensable to the just adjudication of this action
22 under Fed R. Civ. P. 19, but that Hopi has not been made and cannot be made
23 a party to this action because it has not waived sovereign immunity to suit.
24

HOPi TRIBE'S MOTION TO
DISMISS AND MEMORANDUM IN
SUPPORT-- 1

Mentor Law Group, PLLC
315 Fifth Avenue South
Suite 1000
Seattle, Washington 98104
TEL 206-838-7650 FAX 206-838-7655

II. MEMORANDUM OF POINTS AND AUTHORITIES

The Plaintiff's First Amended Complaint for Declaratory and Injunctive Relief (herein "Complaint") alleges that the Navajo Nation has rights to or interests in the mainstream waters of the Lower Colorado River based on the federal reserved water rights doctrine. Complaint at 8. As discussed below, the Hopi Tribe has an interest in Lower Colorado River water. Setting aside or holding unlawful agreements and contracts identified by the Navajo Nation would adversely impair the Tribe's interests. The Hopi Tribe cannot be joined as a defendant in this suit under principles of sovereign immunity. And the Tribe's absence will impair its ability to protect its interests and leave the existing parties subject to substantial risk of incurring inconsistent obligations because of the interest. Accordingly, the Court should find that the Hopi Tribe is a "required" party under Fed R. Civ. P. 19(a)(1). The Hopi Tribe is entitled to sovereign immunity. Consequently, it cannot be joined in this suit.

A. The Hopi Tribe is a required party under Fed R. Civ. P. 19(a)(1)

Under FED. R. CIV. P. 19(a)(1), a person or entity is a "required party" if

(A) in that person's absence, the court cannot accord complete relief among existing parties; or

(B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

(i) as a practical matter impair or impede the person's ability to protect the interest; or

(ii) leave an existing party subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations because of the interest.

1 The Hopi Tribe meets the requirements of an interest holder under FED. R. CIV.
 2 P. 19(a)(1)(B) should therefore be joined in the above captioned suit.

3 The Hopi Tribe holds reserved water rights under the doctrine
 4 established in *Winters v. United States*, 207 U.S. 564 (1908) to all groundwater
 5 and surface water in or under to the Hopi Reservation, to the extent necessary
 6 to fulfill the permanent homeland purposes of the Hopi Reservation. The Hopi
 7 Tribe also claims reserved rights under *Winters*, 207 U.S. 564, to water rights
 8 reserved by the Tribe and for the Tribe by the United States, to the extent water
 9 rights are needed from the mainstem Colorado River and the Little Colorado
 10 River to fulfill the homeland purposes of the Hopi Reservation. Finally, the Hopi
 11 Tribe holds present perfected water rights from the mainstem Colorado River
 12 for Cibola Ranch, a 1,525-acre parcel of land the Hopi Tribe owns in La Paz
 13 County, Arizona. The Hopi Tribe's water rights also include rights to 3,500
 14 acre-feet of uncontracted fourth priority mainstream Colorado River water. This
 15 water, known as "Kingman water" is reserved for use in a future Navajo-Hopi
 16 Indian water rights settlement. See Arizona Water Settlements Act, Pub. L. No.
 17 108-451, 118 Stat. 3478, § 104 (2004); Arizona Water Settlement Agreement, §
 18 11.3 (reserving 3,500 acre-feet of uncontracted fourth priority mainstream
 19 Colorado River water for use in a future Navajo-Hopi Indian water rights
 20 settlement); Hopi Tribe's Second Amended Statement of Claimant in *In re the*
 21 *General Adjudication of All Rights to Use Water in the Little Colorado River*
 22 *System*, Civ. No. 6417 (Ariz. Sup. Ct. Apache County) (Doc. 3612) ("*In re Little*
 23 *Colorado River*"). The Hopi Tribe holds concrete and direct interest that the

1 subject matter of this action and, therefore, satisfies the requirements of an
2 interest holder under FED. R. CIV. P. 19(a)(1)(B).

3 The Hopi Tribe's interests are unique and cannot be protected by the
4 plaintiff or Federal Defendants in this suit because the Tribe's interests diverge
5 from the other parties' interests. The plaintiff is a direct competitor to the Hopi
6 Tribe for mainstem Colorado River water, so it has no incentive to protect the
7 Hopi Tribe's interests such water. In addition, the United States has argued
8 that it has no trust obligation to quantify and affirmatively manage the Navajo
9 Nation's interests in Colorado River water. Federal Defendants' Motion to
10 Dismiss at 36. Such an assertion suggests that the United States does not
11 believe its trust obligation requires it to quantify or manage other tribal
12 interests, such as those belonging to the Hopi Tribe.

13 Moreover, the United States has an inherent conflict of interest that
14 leads to inconsistent obligations. On one hand it must defend itself against
15 claims that it failed to consider the Navajo Nation's interests. On the other
16 hand, as the Hopi Tribe's trustee, the United States must protect the Hopi
17 Tribe's claims to the waters of the Lower Basin of the Colorado River. It would
18 be difficult for the United States to simultaneously argue that the same actions
19 did not represent consideration of another tribe's interests. The United States
20 is also in a difficult position as trustee for the Navajo Nation and Hopi Tribe –
21 competitors for water from the mainstem Colorado River. As President Richard
22 Nixon noted, "no self-respecting law firm would ever allow itself to represent
23 two opposing clients in one dispute." Message from the President of the United
24 States Transmitting Recommendations for Indian Policy, H.R. No. 91-363 9-10

(1970). Yet this is precisely the position the Federal government would find itself in if the Hopi Tribe were not allowed to represent itself.

Based on the Hopi Tribe's rights to mainstem Colorado River water, the fact that not being joined in the suit would impede the Hopi Tribe's ability to protect its interests, and the fact that the United States has inconsistent obligations, the Hopi Tribe is a "required" party for purposes of Fed. R. Civ. P. 19(a)(1)(B).

B. This suit must be dismissed pursuant to Fed. R. Civ. P. 12(b)(7) because the Hopi Tribe has sovereign immunity and has not consented to be joined

The Hopi Tribe, while a necessary party, cannot be joined due to its sovereign immunity. *Arizona Public Service Co. v. Aspaas*, 77 F.3d 1128, 1133 (9th Cir. 1995); *Shermoen v. United States*, 982 F.2d 1312, 1318 (9th Cir. 1992). Thus, under FED. R. CIV. P. 19(b), the court must determine whether, in equity and good conscience, the action should be dismissed.

FED. R. CIV. P. 19(b) requires the consideration of four factors:

(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;

(2) the extent to which any prejudice could be lessened or avoided by:

(A) protective provisions in the judgment;

(B) shaping the relief; or

(C) other measures;

(3) whether a judgment rendered in the person's absence would be adequate; and

(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

1 In the present case, taking into consideration the four factors specified in
 2 FED. R. CIV. P. 19(b), the case should be dismissed. First, the Hopi Tribe clearly
 3 would be prejudiced by a judgment rendered in Hopi's absence. As previously
 4 stated, the Hopi Tribe also has claims to water from the mainstem Colorado
 5 River that conflict with Navajo claims, and Hopi would be prejudiced if the
 6 Navajo claims were quantified or adjudicated and Hopi claims were not.
 7 Second, for the same reasons, any prejudice to Hopi could not be avoided by
 8 how the court fashioned relief for Navajo. Third, a judgment rendered in the
 9 absence of the Hopi Tribe would be inadequate as it would leave open the
 10 question whether and to what extent the Hopi Tribe had conflicting claims to
 11 Navajo and to other Colorado River water uses.

12 Finally, the Hopi Tribe recognizes that Navajo would not have an
 13 adequate remedy if the action were dismissed for nonjoinder. Nevertheless, in
 14 the case of sovereign entities, a case must be dismissed when a required
 15 sovereign is not amenable to suit. *Republic of Philippines v. Pimentel*, 553 U.S.
 16 851, 867 (2008) (citing *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371
 17 (1945); *Minnesota v. United States*, 305 U.S. 382 (1939)).

18 The Ninth Circuit frequently has dismissed lawsuits against parties
 19 because a tribe with sovereign immunity was deemed an indispensable party.
 20 See, e.g., *Kescoli v. Babbitt*, 101 F.3d 1304, 1311 (9th Cir. 1996); *Quileute*
 21 *Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460 (9th Cir. 1994); *Confederated Tribes*
 22 *of the Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1500 (9th Cir.
 23 1991). Other circuits also follow this approach. *Fluent v. Salamanca Indian*
 24 *Lease Auth.*, 928 F.2d 542 (2nd Cir. 1991); *Enterprise Mgt. Consultants, Inc. v.*

1 *United States*, 883 F.2d 890 (10th Cir.1989). The principle of tribal sovereign
 2 immunity is so important that motions to dismiss are granted in those cases,
 3 even though failure to join the tribal indispensable party results in a remedy
 4 being denied the plaintiff against the non-tribal party. *Shermoen*, 982 F.2d
 5 1312. In this case, the Hopi Tribe is a required party, has sovereign immunity,
 6 and has not consented to suit. Consequently, this case should be dismissed.

7 **C. Prayer for Relief**

8 For the reasons set forth above, Intervenor-Applicant, Hopi Tribe,
 9 respectfully requests the Court issue an order dismissing the Navajo Nation's
 10 claims without prejudice for failure to join an indispensable party pursuant to
 11 FED. R. CIV. P. 12(b)(7) and FED. R. CIV. P. 19.

12
 13 Date: Sept. 23, 2013

Respectfully submitted,

14 Martin P. Clare
 15 Campbell, Yost, Clare & Norell, PC
 16 101 N. First Avenue, Suite 2500
 17 Phoenix, AZ 85003
 (602) 322-1600, mclare@cycn-phx.com

18 Joe Mentor, Jr.
 19 Mentor Law Group, PLLC
 315 Fifth Avenue S., Suite 1000
 20 Seattle, WA 98104
 (206) 838-7650, mentor@mentorlaw.com

21
 22 By: Joe Mentor

Joe Mentor, Jr.

23 *Counsel for the Hopi Tribe*
 24

CERTIFICATE OF SERVICE

I hereby certify that I have this 23rd day of September, 2013, electronically filed the foregoing *Hopi Tribe's Motion to Dismiss and Memorandum in Support* with the Clerk of the Court using the CM/ECF system, which will generate and transmit notice of the electronic filing to the following:

- Alice Elizabeth Walker awalker@mmwclaw.com,
dvitale@mmwclaw.com
- Catherine M Stites cstites@mwdh2o.com, cnagai@mwdh2o.com,
mboucher@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.drevetzki@lvvwd.com
- David E Lindgren dlindgren@downeybrand.com
- Douglas V Fant dsfant@gowebway.com, doug@powerauthority.org
- Edward S Geldermann jay.geldermann@usdoj.gov,
Efile_nrs.enrd@usdoj.gov, geldermann@comcast.net,
robert.snow@sol.doi.gov, susan.middagh@usdoj.gov
- Gregory K Wilkinson Gregory.Wilkinson@bbklaw.com,
Linda.Peabody@bbklaw.com
- Gregory Loyd Adams gadams@fclaw.com, jjohnsto@fclaw.com
- James H Davenport jamesdavenport@netzero.net
- 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, bjs@slwplc.com
- John Pendleton Carter, III jcarter@hkcf-law.com
- Joseph A Vanderhorst jvanderhorst@mwdh2o.com,
gosorio@mwdh2o.com
- Karen Marie Kwon barb.scherer@state.co.us,
shanti.rossetodonovan@state.co.us
- Kenneth Cary Slowinski kcslowinski@azwater.gov
- Lauren James Caster lcaster@fclaw.com
- Linus Serafeim Masouredis lmasouredis@mwdh2o.com,
tkirkland@mwdh2o.com
- Lisa Michelle McKnight lmk@slwplc.com, bjs@slwplc.com
- Louis Denetsosie louisdenetsosie@yahoo.com
- Marcia L Scully mscully@mwdh2o.com, jmiyashiro@mwdh2o.com

HOPI TRIBE'S MOTION TO
DISMISS AND MEMORANDUM IN
SUPPORT-- 8


Mentor Law Group, PLLC
315 Fifth Avenue South
Suite 1000
Seattle, Washington 98104
TEL 206-838-7650 FAX 206-838-7655

- Melissa R Cushman melissa.cushman@bbklaw.com,
linda.peabody@bbklaw.com
- Michael A Johns mike.johns@usdoj.gov, glenna.millsaps@usdoj.gov,
howard.woodberry@usdoj.gov, mary.bangart@usdoj.gov
- Michael J Pearce mpearce@mpwaterlaw.com,
rmaguire@mpwaterlaw.com
- Robert B Hoffman rhoffman@somachlaw.com,
sbentley@somachlaw.com
- Scott Bowne McElroy smcelroy@mmwclaw.com
- Scott L Shapiro sshapiro@downeybrand.com
- Stanley M Pollack smpollack@nndoj.org, cslinkey@nndoj.org
- Steven Bane Abbott sabbott@redwineandsherrill.com,
fluna@redwineandsherrill.com
- Steven M Anderson steve.anderson@bbklaw.com,
lynda.byrd@bbklaw.com
- Steven P Saxton ssaxton@downeybrand.com
- Stuart Leslie Somach ssomach@somachlaw.com,
astevens@somachlaw.com, blewis-roberts@somachlaw.com,
sbentley@somachlaw.com

I hereby certify that I have this 23rd day of September, 2013, served the foregoing *Hopi Tribe's Motion to Dismiss and Memorandum in Support* by U.S. Mail, postage prepaid, on the following, who are not registered participants of the CM/ECF system:

James P Bartlett
Arizona Power Authority
1810 W Adams St.
Phoenix, AZ 85007

By: _____



Tammy Liddle