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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

HAVASUPAI TRIBE,

Plaintiff,

vs.

ANASAZI WATER CO., L.L.C., *et al.*;

Defendants.

No. 3:16-cv-08290-GMS

ANASAZI WATER CO., L.L.C.'S REPLY IN SUPPORT OF ITS MOTION TO ORDER JOINDER OF REQUIRED PARTIES OR, ALTERNATIVELY, TO DISMISS FOR FAILURE TO JOIN REQUIRED PARTIES

(Oral Argument Requested)

On January 3, 2017, Defendant Anasazi Water Co., L.L.C. ("Anasazi") filed a motion to require that certain non-parties be joined or, in the alternative, to dismiss this action for failure to join those required parties pursuant to Rules 12(b)(7) and 19 of the Federal Rules of Civil Procedure ("FRCP"). *See* Doc. 15. Four other Defendants filed similar motions. *See* Doc. 18, 35, 36, and 47. Plaintiff Havasupai Tribe ("Tribe") filed five separate responses on February 6, 2017. *See* Doc. 62-64, 66-67. Anasazi hereby replies to the Tribe's response to Anasazi's motion [Doc. 62].

Anasazi contends that two groups must be joined: (1) the United States, as trustee of the Tribe; and (2) any other surface water users, well owners, well operators, and owners of land within the geographic area of this action that are not already named as parties. *See* Doc. 15. With respect to joining the United States, the Tribe's response relies upon what it calls "binding Ninth Circuit precedent," *see* Doc. 62, at 5-10, but those cases are clearly distinguishable. Among other things, those cases deal with land, not water rights. *See* Section I, *infra*. This case must be dismissed if the United States is not joined because, unlike the cases upon which the Tribe relies, the Tribe here has an adequate remedy if this action is dismissed. *Id.*

Regarding the joinder of the other non-parties, the Tribe contends that those individuals and entities need not be joined because "[t]his is not a general stream adjudication." *See* Doc. 62, at 10-17. The Tribe's claims in this action are, however, tantamount to an adjudication of the Tribe's water rights. In its responses, the Tribe repeatedly acknowledges that it "is seeking a declaration of its water rights," not simply an enforcement of rights already adjudicated. *See* Doc. 62, at 13; *see also* Doc. 63, at 10 ("The Tribe also seeks a declaration recognizing that it has aboriginal and federally-reserved water rights to the full flows of the seeps and springs on its reservation and traditional use lands."). The non-parties must be joined to afford complete relief and to lessen prejudice to the current Defendants, and those parties (and the United States) can be joined in a properly filed proceeding in the Arizona state courts. *See* Section II, *infra.*

I. The United States Must be Joined under FRCP 19(a) and, if the United States is Not Joined, the Court Should Dismiss the Tribe's Complaint.

The Tribe's arguments about whether the United States must be joined are wrong primarily for three reasons: (1) The "Ninth Circuit precedent" upon which the Tribe relies is distinguishable and does not support its argument here; (2) *Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony, California v. City of Los Angeles*, 637 F.3d 993 (9th Cir. 2011), the most recent pronouncement by the Ninth Circuit on the issue, requires that the

United States be joined; and (3) the Tribe has an alternative forum, in which the United States can be joined, pursuant to the McCarran Amendment, 43 U.S.C. § 666.

A. <u>The Ninth Circuit land cases upon which the Tribe relies do not hold that the United States need not be joined this action</u>.

The Tribe tries to brush off Anasazi's contention that the United States must be joined, citing "binding Ninth Circuit precedent holding that the United States is not an indispensable party" in these types of cases and contending that Anasazi's "arguments disregard controlling Ninth Circuit precedent." *See* Doc. 62, at 2, 5. The Ninth Circuit decisions upon which the Tribe relies, however, are distinguishable and are neither "binding" nor "controlling."

The Tribe acknowledges (as it must) that "the Ninth Circuit cases [upon which it relies] concerned disputes over land," not water rights, Doc. 62, at 7, but the Tribe then proceeds to ignore that distinction throughout the remainder of its response. The only arguments the Tribe can muster for its contention that "the reasoning [in those cases] is equally applicable to suits brought by a tribe to enforce its water rights," *id.*, are that (1) the Tribe's federal reserved water rights are derived from the United States' creation and expansion of the Tribe's reservation and (2) Anasazi's motion itself refers to the United States' ownership of the reservation land. *Id.*

Neither of these arguments supports the Tribe's contention that the Ninth Circuit land cases are controlling here, and the Tribe's discussion of those decisions in its response demonstrates a fundamental misunderstanding of the Ninth Circuit's holding and rationale in those cases. The distinction between tribal land cases and tribal water rights cases, in the context of whether the United States is an indispensable party under FRCP 12(b)(7) and 19, is important to addressing the issues raised by Anasazi's motion. The land decisions that the Tribe cites turned on the conclusion that the tribe had no alternative remedy if the case was dismissed because the United States could not be joined. In water rights cases, Congress has expressly provided for the waiver of the United States' sovereign immunity in the McCarran Amendment, so the tribe does have an alternative forum.

In the Ninth Circuit decisions regarding tribal lands on which the Tribe relies, the court has recognized that the United States will not be bound by any judgment unless it is a party to the action.[1] The court has further acknowledged that, even in the land cases, "[a]bsent joinder of the United States, a judgment entered in favor of the [Defendant] will not necessarily render complete relief to the [Defendant] or protect the [Defendant] from inconsistent judgments." *Puyallup*, 717 F.2d at 1254.

In the land cases that the Tribe cites, despite finding that the United States was a "required party" under FRCP 19(a), the Ninth Circuit found that the United States was not an "indispensable party" under FRCP 19(b) and that the action could proceed in the United States' absence. Those findings were based upon a determination under FRCP 19(b) of whether, "in equity and good conscience, the action should proceed among the existing parties or should be dismissed" and not on whether the United States was a "required party" under FRCP 19(a). *See, e.g.*, *Fort Mohave*, 478 F.2d at 1018. As stated in *Puyallup*, the FRCP 19(b) decision is made based upon the "'practical ramifications of joinder versus nonjoinder.'"[2]

The basis for the FRCP 19(b) holding in the Ninth Circuit cases on which the Tribe relies was that the United States could not be joined without its consent, the United States had not consented to joinder, and, therefore, the tribe had no alternative remedy if the action was dismissed. *See* FRCP 19(b)(4) (one factor for courts to consider under FRCP 19(b) is "whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder"). In the land cases, because the United States had not waived its sovereign

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[1] *See, e.g., Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1254 (9th Cir. 1983), *cert. denied*, 465 U.S. 1049, *reh'g denied*, 466 U.S. 954 (1984); *Fort Mohave Tribe v. Lafollette*, 478 F.2d 1016, 1018 (9th Cir. 1973); *Skokomish Indian Tribe v. France*, 269 F.2d 555, 559 (9th Cir. 1959).

[2] *Puyallup*, 717 F.2d at 1255 (citing *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1042 & n.14a (9th Cir. 1983)); *see also Lyon v. Gila River Indian Community*, 626 F.3d 1059, 1068-69 (9th Cir. 2010), *cert. denied*, 132 S. Ct. 498 (2011) ("We next determine whether the United States is necessary and indispensable to adjudication of claims regarding the Trustee's rights of access in Section 16. In this regard, the Trustee does not dispute the district court's conclusion that the United States should be joined as a necessary party under Rule 19(a).").

immunity, the plaintiff tribe had no other forum in which to pursue its claim. For example, the *Lyon* court noted:

> The district court concluded, and the Trustee does not dispute that the United States' joinder was impossible because it had not waived sovereign immunity. We therefore review "whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b).

626 F.3d at 1069.

In a water rights case, the analysis under FRCP 19(b)(4) is inherently different because the plaintiff tribe has an alternative forum if it chooses to use it. This is not a situation, as in the land cases, where the Tribe will be left without a remedy if the Court dismisses this case. The McCarran Amendment expressly provides for state court jurisdiction over the United States and a waiver of sovereign immunity in water rights adjudications. In its Complaint, the Tribe seeks, among other things, "[a] declaratory judgment that the Tribe has aboriginal and federally-reserved water rights in the full flow of Havasu Creek and the springs, seeps and streams on its reservation and Traditional Use Lands." Doc. 1, at 19; *see also* Doc. 63, at 10. The Tribe can seek that remedy, but it must do so in a forum in which the United States can be joined. *See* Section I(C), *infra*. The Tribe itself asserts that the United States cannot be joined in the present case. *See* Doc. 62, at 2. Thus, this case should be dismissed because it cannot and should not proceed in the United States' absence.[3]

B. <u>The most recent Ninth Circuit decision regarding tribal lands provides that the United States must be joined</u>.

In its motion, Anasazi relied upon, among other things, the Ninth Circuit's 2011 decision in *Paiute-Shoshone*. *See* Doc. 15, at 4, 6-8. That decision is the most recent of the

[3] The one water rights case upon which the Tribe relies is unpersuasive on its face. *See Agua Caliente Bank of Cahuilla Indians v. Coachella Valley Water Dist.*, 215 WL 1600065 (C.D. Cal., March 20, 2015), *cited in* Doc. 62, at 12. That district court decision is currently on appeal to the Ninth Circuit. *See* Doc. 63, at 6-7. Furthermore, the United States moved to intervene in that case a month after it was filed, so no FRCP 19 issue arose. *Id.* at *2.

Ninth Circuit tribal land cases and, to the extent those cases are even persuasive authority in the present matter, it is *Paiute-Shoshone* and not the prior decisions upon which the Tribe relies that is the "binding" and "controlling" Ninth Circuit precedent.

In *Paiute-Shoshone*, the court discussed many of the prior cases that the Tribe now cites in its response and concluded that the United States was a "required party" under FRCP 19(a): "Because we conclude that the district court could not accord complete relief to Plaintiff in the absence of the United States, the United States is a required party under Rule 19(a)." 637 F.3d at 998. Finding that the United States could not be joined in that land case because there was no waiver of sovereign immunity, the court then turned to the FRCP 19(b) question of whether the United States was an "indispensable" party. *Id.* In performing its FRCP 19(b) analysis, the court considered four factors: (1) the plaintiff's interest in having a forum; (2) the defendant's interest in not proceeding without the required party; (3) the interest of the non-party, including "the extent to which the judgment may as a practical matter impede [its] ability to protect [its] interest in the matter;" and (4) the interests of the courts and the public in "complete, consistent, and efficient settlement of controversies." *Id.* at 1000 (citing and quoting *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 109-11 (1968)).

The *Paiute-Shoshone* court examined each of those four factors. The court found that the second, third, and fourth factors outweighed the plaintiff tribe's interest in having a forum, even in that land case where the tribe clearly had no other forum.[4] The four factors to be considered under FRCP 19(b) are discussed at length in Anasazi's motion, and Anasazi will not repeat that analysis in this reply. *See* Doc 15, at 6-7. The one argument by the Tribe that does warrant mention in this reply is its unsupported assertion that, if this case proceeds without the United States and Defendants ultimately prevail, "it is exceedingly unlikely that the United States would file a new suit with identical claims to those that failed." *See* Doc.

[4] "Because it has no other forum for litigating this dispute, Plaintiff argues that the public's interest in the settlement of controversies favors letting Plaintiff proceed with its action in the absence of the United States." 637 F.3d at 993.

62, at 9. Anasazi wishes it could be so confident in predicting the United States' future actions as the Tribe appears to be. The difficulty in knowing what the absent party will do in the future if it is not bound by the outcome of the present action is, however, one of the key components of the second factor in the four-part test clearly articulated by the Ninth Circuit in *Paiute-Shoshone*—i.e., "the defendant's interest in not proceeding without the required party." 637 F.3d at 1000. That factor is even more important in the present situation where the Tribe is the beneficiary of the United States' interest in the reservation lands and water rights. If this case proceeds without the United States and the Tribe fails on its claims, nothing prevents the Tribe from attempting to convince the United States to reassert those or similar claims in a future case. Anasazi and the other Defendants have a strong interest in not proceeding without the United States.

The balance of the four FRCP 19(b) factors set forth in *Paiute-Shoshone* and *Patterson* weighs even more clearly in favor of dismissal in this tribal water rights case, where Congress has expressly consented to jurisdiction and a waiver of the United States' sovereign immunity in another forum and the Tribe thus has an alternate remedy if this matter is dismissed. The United States is a required and indispensable party in this action, and it must be joined and bound if this action is to proceed in accordance with FRCP 19.

C. The McCarran Amendment provides the Tribe a forum for its claims.

Unlike in the tribal land cases, this Court need not reach the question of whether this case would need to be dismissed if the Tribe had no other adequate remedy, because Congress has clearly provided tribes another forum for litigating their water rights disputes. The McCarran Amendment provides for jurisdiction and waives the United States' sovereign immunity in water rights adjudications. *See* 43 U.S.C. § 666. The Tribe raises several complaints about why a McCarran proceeding is not desirable, but the real reason why the Tribe protests so much is simply that it would prefer not to engage in a such a proceeding. The Tribe wants to sue who it wants, where it wants, and for what claims it wants, but the law

allows it to pursue those claims only in the proper forum and only with the proper individuals and entities as parties.

As discussed in Section III of Anasazi's motion relating to required parties other than the United States, Congress and the United States Supreme Court have expressed a strong preference for comprehensive water rights proceedings.[5] The *Colorado River* decision is particularly instructive in the present matter. In that case, the Supreme Court deferred to state court jurisdiction in a tribal water rights case, in part because of the waiver of the United States' sovereign immunity and the preference for comprehensive proceedings set forth by Congress in the McCarran Amendment. The Court upheld the district court's abstention even though concurrent jurisdiction in that matter existed in federal and state courts because the United States was a party to the federal case. 424 U.S. at 820-21.

In its decision, the *Colorado River* court relied primarily upon "the desirability of avoiding piecemeal litigation." 424 U.S. at 1247. The Court stated:

> Turning to the present case, a number of factors clearly counsel against concurrent federal proceedings. The most important of these is the McCarran Amendment itself. The clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system. . . . This concern is heightened with respect to water rights, the relationships among which are highly interdependent. Indeed, we have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings. . . . The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals.

Id. at 819.

The Court also relied upon the "inconvenience of the federal forums" and the fact that the district court was much further from the location at issue than was the state court. 424 U.S. at 818, 820. In the present case, primary counsel for the Tribe are located in New

[5] *See* Doc. 15, at 11-12 (citing McCarran Amendment and *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, *reh'g denied*, 426 U.S. 912 (1976)).

Mexico, and counsel for the Defendants are in Phoenix or Flagstaff. All of the parties themselves, however, own property or use water in Coconino County. Thus, the state superior court in Coconino County is in much closer proximity to the parties than is this Court sitting in Phoenix.

The third factor addressed by the *Colorado River* Court was that the state court proceeding already was underway and the federal court case was just beginning. 424 U.S. at 820. Although Anasazi knows of no state court action that has yet been filed in this matter, this district court case also is in its infancy. In addition, the Arizona state courts are perhaps better equipped to handle water rights cases given the statutory framework that is already in place (A.R.S. §§ 45-251 to -264), the existence of the Arizona Department of Water Resources to serve as a technical adviser to the court (*see* A.R.S. § 45-256),[6] and the extensive proceedings that already have been underway in the Arizona courts with regard to the Gila and Little Colorado River watersheds. *See* Doc. 15, at 11.

The *Colorado River* decision was discussed and applied to Arizona Indian tribes seven years later in *San Carlos Apache Tribe*, 463 U.S. at 545. In that decision, the Supreme Court applied *Colorado River* abstention to uphold a district court's dismissal of a federal court lawsuit in favor of a state court adjudication. *Id.* at 571. The *San Carlos* Court reasoned that the most important consideration in *Colorado River* was the "policy underlying the McCarran Amendment." *Id.* at 569-70 (quoting *Colorado River*, 425 U.S. at 80). The Court found that "water rights adjudication is a virtually unique type of proceeding, and the McCarran Amendment is a virtually unique federal statute . . . ." *Id.* at 571.

The Tribe here attempts to convince the Court that it should proceed with this matter in the United States' absence by characterizing state court adjudications as "extremely costly and inefficient means of resolving the claims at issue in this case." *See* Doc. 62, at 12-13. The Court cannot ignore the applicable statutes and rules for the sake of the Tribe's desires

[6] *See also Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 570, *reh'g denied*, 464 U.S. 874 (1983) (referring to "the expertise and administrative machinery available to the state courts").

and "efficiency," however. Furthermore, that the two ongoing Arizona stream adjudications have taken a long time does not mean that a proceeding on the watershed at issue in the Tribe's Complaint would require a similar amount of time and expense. Litigation of the Tribe's claim for a declaratory judgment that it "has aboriginal and federally-reserved water rights in the full flow of Havasu Creek and the springs, seeps, and streams on its reservation and Traditional Use Lands" is going to be neither speedy nor cheap, regardless of in what forum it occurs. It is in the parties' interests that such litigation take place in the proper forum and that the United States be joined and bound so it only has to happen once, and that is what FRCP 19 requires. The Tribe has an alternate remedy if this case is dismissed due to the United States' absence.

II. All Other Surface Water Users, Well Owners, Well Operators, and Landowners Must be Joined Under FRCP 19(a) and, if Those Individuals and Entities are Not Joined, the Court Should Dismiss the Tribe's Complaint.

In response to Anasazi's assertion that non-parties other than the United States also must be joined under FRCP 19, the Tribe makes arguments similar to those addressed in Section I(C) above. *See* Doc. 62, at 10-17. All of these individuals and entities (and the United States) can be joined in a McCarran Amendment proceeding, and FRCP 19 requires that they be joined.

With respect to parties other than the United States, the Tribe argues that the relevant question under FRCP 19 is not whether the Court can grant it complete relief against every possible party but rather whether it can "afford the plaintiffs the relief *for which they have prayed*." *See* Doc. 62, at 14 (quoting *Cedar Ridge Investments LLC v. Great W. Bank*, No. CV-13-02468-PHS-GMS, 2014 WL 11515623 (D. Ariz., June 30, 2014)) (emphasis in original). What the Tribe continues to ignore, however, is that the relief for which it has prayed includes (1) a declaratory judgment that it has aboriginal and federal reserved water rights to the "full flow" of Havasu Creek and the springs, seeps, and springs on the reservation and other lands; (2) a declaratory judgment that groundwater pumping interferes

with "the Tribe's water rights;" and (3) injunctive relief prohibiting future withdrawals of groundwater to prevent any reduction of flows. *See* Doc. 1, at 19; Doc. 15, at 2-3. The relief for which the Tribe has prayed requires the presence of the United States and the other non-parties who use surface water, own wells, operate wells, and own land within the geographic area of this action. *See* Doc. 15, at 8-12. The Tribe cannot avoid the consequences of its requested relief merely by repeating over and over the mantra that "[t]his is not a general stream adjudication." *See, e.g.*, Doc. 62, at 10. Regardless of how this case is characterized, resolution of the Tribe's claims will require the presence of the absent parties.

In its response, the Tribe concedes that, if the case proceeds with only the current parties, (1) the Tribe might need to file subsequent lawsuits against other individuals and entities who are not now parties and (2) the burden will be on Defendants to sort out the impacts caused by those non-parties in any action to enforce the injunctive relief that the Tribe now seeks. *See* Doc. 62, at 14-15. Those considerations are, of course, key among the factors that courts look at when determining whether a non-party is required and indispensable under FRCP 19. *See* Section I(B), *supra.* Those admissions by the Tribe, even alone on their face, are sufficient to require joinder or dismissal under the applicable rules.

The Tribe again alleges that it "would be severely prejudiced if this action were dismissed and it were unable to assert its claims and unable to prevent interference with its water rights." *See* Doc. 62, at 17. No such prejudice to the Tribe will occur if this action is dismissed, because the Tribe has a readily available alternative forum. *See* Section I(C), *supra.* That the Tribe does not prefer that alternative forum does not mean that it does not exist or that this case should proceed on a piecemeal basis without the required parties.

III. Summary and Requested Action

Anasazi requests that the Court (1) order the Tribe to join the United States and the absent surface water users, well owners, operators, and landowners as parties and (2) if those individuals and entities are not joined, dismiss the Tribe's Complaint for failure to join required and indispensable parties under FRCP 12(b)(7) and 19.

DATED this 21st day of February, 2017.

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I hereby certify that on February 21, 2017, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants.

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I further certify that on or before February 22, 2017, one business day following the electronic transmittal of the foregoing document, I will provide a copy of the foregoing by U.S. Mail to:

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/s/ John B. Weldon, Jr.