COHEN DOWD QUIGLEY
The Camelback Esplanade One
2425 East Camelback Road, Suite 1100
Phoenix, Arizona 85016
Telephone 602•252•8400

Daniel G. Dowd (012115)
Email: ddowd@CDQLaw.com
Stacey F. Gottlieb (015084)
Email: sgottlieb@CDQLaw.com
Lauren M. LaPrade (029860)
Email: llaprade@CDQLaw.com
Kaysey L. Fung (032585)
Email: kfung@CDQLaw.com

CENTRAL ARIZONA WATER CONSERVATION DISTRICT
Jay M. Johnson (015122)
23636 North 7th Street
Phoenix, Arizona 85024
Telephone: (623) 869-2333
Email: jjohnson@cap-az.com

Attorneys for Defendant Central Arizona Water Conservation District

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

The Hopi Tribe; The United Mine Workers of America; and Peabody Western Coal Company, Plaintiffs, vs. Central Arizona Water Conservation District; and the Gila River Indian Community, Defendants.	Case No: 2:18-cv-01337-SPL **CAWCD'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS** (Assigned to the Honorable Steven P. Logan) **(Oral Argument Requested)**

Plaintiffs' response does not cure the fatal deficiencies in their Complaint or establish why this action should proceed. Try as they might over 36 pages, Plaintiffs cannot establish that Defendant CAWCD is obligated to purchase CAP's power needs from NGS. That failure dooms the entire action. Plaintiffs' only responses to this threshold legal issue are (i) to mischaracterize the issue as one that Plaintiffs believe they can force-fit into the statutory framework (*i.e.*, NGS ***must supply*** CAP's power requirements), and (ii) to offer Plaintiffs' view as to what Congress must have meant, unencumbered by a shred of authority supporting Plaintiffs' giant leap. Plaintiffs ignore that the United States (DOI, DOE, Reclamation, etc.) has never taken the position Plaintiffs now assert. Plaintiffs further cannot reconcile the broad relief sought in their Complaint with the fact that for years CAWCD has obtained power for CAP from non-NGS sources pursuant to regulatory and contractual provisions with the federal government—contracts to which Plaintiffs are not parties or beneficiaries. Perhaps aware that this long-existing practice destroys the foundation of Plaintiffs' argument, they ignore it. They also ignore that granting the requested relief would force CAWCD to breach these provisions and put CAWCD and millions of Arizona water users at risk of not having water if/when NGS closes in 13 months. Next, Plaintiffs base their alleged standing on an "ongoing sales process" with a third party that has terminated its involvement. The parade of contingencies that must fall perfectly in line for Plaintiffs to have standing—involving third parties or events over which CAWCD has no control—are far too attenuated, speculative and uncertain to confer subject matter jurisdiction. Finally, Plaintiffs cannot credibly refute that the Unites States (CAWCD's only link to NGS) and the Navajo Nation (lessor of the land on which NGS sits) are both necessary to and immune from this action. The Complaint should be dismissed.

I. PLAINTIFFS' SUPREMACY CLAUSE ARGUMENT LACKS MERIT.

Plaintiffs' claim hinges entirely on the assertion that Section 303 of the CRBPA requires CAWCD to obtain all of CAP's pumping power from NGS for as long as NGS remains "open." The problem for Plaintiffs is that this is not what the CRBPA says. Plaintiffs focus on 43 U.S.C.§ 1523(b), which provides that "The Secretary ***may*** enter into agreements

… to construct thermal generating powerplants whereby the United States shall acquire the ***right*** to such portions of their capacity … as he determines is required in connection with the operation of the Central Arizona Project." (emphasis added). This language authorized the Secretary of the Interior ("Secretary") to participate in the ownership of powerplants with capacity to serve CAP, to ***acquire*** such capacity as he concluded appropriate and to use such portions of that capacity as he deemed appropriate. The statute does ***not*** require the ***exclusive*** use of NGS power for CAP's pumping needs. And, it certainly does not prohibit CAWCD—CAP's operator, which did not exist in 1968—from obtaining CAP power from other sources. Rather, the amount of power CAWCD requires to operate CAP is addressed in a contract between CAWCD, the Secretary and the Secretary of Energy. [*See* Doc. 23-2 ("Western Contract").] The CRBPA simply does not require that CAWCD obtain all of CAP's pumping power from NGS. Moreover, CAWCD has never argued that "the [CRBPA] does not require NGS to supply CAP's power requirements." [*Contra* Doc. 41, p. 26] But, when CAWCD optimizes its use of power from other sources, it requires less NGS energy. This is consistent with the policy behind the Hoover Power Plant Act of 1984, the Western Contract and related regulations, which provide that CAWCD use power from Hoover Dam, the New Waddell generating station, and the open energy market to meet CAP's power needs. Absent federal law clearly prohibiting CAWCD from using power sources other than NGS, Plaintiffs' Supremacy Clause and preemption arguments fail as a matter of law.[1]

II. THIS COURT LACKS SUBJECT MATTER JURISDICTION.

A. Plaintiffs Do Not Have Article III Standing.

In its Motion to Dismiss ("Motion"), CAWCD explained that Plaintiffs cannot

[1] Distribution of water via the CAP requires power. Congress decided that state law should continue to govern the delivery of water pursuant to Section 8 of the Reclamation Act of 1902. *See Cal. v. U.S.,* 438 U.S. 645, 650, 673-75 (1978) (under "cooperative federalism" embodied in Section 8 of the Reclamation Act of 1902, a state may impose any condition on control, appropriation, use or distribution of water in a federal reclamation project which is not inconsistent with "explicit congressional directives"). Indeed, Congress expressly exempted the CAP from the statute requiring the Secretary's approval of certain power contracts. *See, e.g., Central Ariz. Irr. & Drainage Dist. v. Lujan*, 764 F. Supp. 582, 589 (D. Ariz. 1991) (herein "*Lujan*") (citing 43 U.S.C.§ 1524(b)(1) and 43 U.S.C. § 485h(c)). This carve-out would not have been necessary if Congress intended CAP to use power from NGS only.

establish any of the three prongs of Article III standing: (1) Plaintiffs have no legally protected interest and their alleged economic injuries are speculative, remote and conjectural; (2) Plaintiffs' alleged injuries are not traceable to CAWCD; and (3) Plaintiffs' alleged injuries will not be remedied by their requested relief. [Doc. 22, pp. 4-8.] Plaintiffs recognize that their own alleged future indirect economic injuries are too speculative and remote to confer standing. So, Plaintiffs resort to defining their injuries as the "harm [to the] on-going sale process," to which they are ***not*** parties, but which purportedly establishes their Article III standing. [Doc. 41, p. 17.] The entire foundation of their standing argument is that a private third party, Middle River, might purchase NGS—an assertion which is not true.

Plaintiffs describe Middle River as "earnestly pursuing the purchase of NGS," and "actively exploring the potential purchase of NGS." [Doc. 41, pp. 19-21.] When determining subject matter jurisdiction, this Court need not accept these allegations as true. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004) ("In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment."). Here, one day after Plaintiffs filed their Response to Defendants' Motions to Dismiss, Middle River publicly announced that it had ceased pursuing acquisition of NGS. Middle River has not attributed its decision to CAWCD's position that it is not required to purchase CAP's power requirements from NGS. There is no ongoing sales process with Middle River.[2]

Plaintiffs base their "injury in fact" on the notion that CAWCD has harmed the ongoing NGS sale process and rely heavily *Bryant* and *Clinton* to support this argument. *See*

[2] Multiple media articles attribute Middle River's decision to: (1) California legislation requiring the state's electricity come from zero-carbon sources by 2045 (eliminating California as a potential customer of NGS); (2) similar proposed legislation in Arizona; (3) lack of commitments from customers to purchase NGS power; and (4) the federal environmental impact study of NGS that has yet to commence. *See, e.g.*, *Sale of Navajo Generating Station to new operator falls through*, AZCENTRAL.COM (Sept. 20, 2018), https://www.azcentral.com/story/money/business/energy/2018/09/20/plan-buy-navajo-generating-station-falls-through/1374905002/; Ryan Randazzo; *Death of Navajo coal plant deal will have wide-ranging consequences for tribes*; AZCENTRAL.COM (Sept. 21, 2018), https://www.azcentral.com/story/money/business/energy/2018/09/21/navajo-generating-station-deal-falling-apart-means-plant-mine-closure/1376588002.

Bryant v. Yellen, 447 U.S. 352, 366-68 (1980) (finding potential *buyers* of lands had sufficient stake in controversy to intervene and had standing to appeal district court's decision); *Clinton v. City of N.Y.*, 524 U.S. 417, 432-33 (1998) (finding a cooperative who was a potential *buyer* of processing facilities had standing to challenge the President's veto of legislative provisions *expressly enacted to benefit plaintiffs*). Unlike the claimants in *Bryant* and *Clinton*, Plaintiffs are ***not*** potential buyers of NGS. Rather, Plaintiffs are (1) a supplier of coal to NGS (Peabody), (2) a union representing employees of the supplier (UMWA), and (3) an Indian Tribe that receives revenues from the supplier's operations (the Hopi Tribe).[3] [*See, e.g.*, Doc. 1, ¶¶ 7, 8, 39.] There has been no harm to a sale process involving Plaintiffs and no deprivation of a statutory bargaining chip to which Plaintiffs are entitled.

Plaintiffs are not parties to the sale process and do not have a legally protected interest in a potential sale of NGS. *See, e.g.*, *MainStreet Org. of Realtors v. Calumet City, Ill.*, 505 F.3d 742, 746 (7th Cir. 2007) (brokers had "no right in commissions they may someday earn on sales of property [for] owners [with whom] they have as yet no brokerage contract[]"); *Pub. Citizen v. Lockheed Aircraft Corp.*, 565 F.2d 708, 717 (D.C. Cir. 1977) (third party supplier did not have standing where it had no contract with defendant and it was uncertain whether defendant would purchase from supplier in the future; conjectural chain of inferences was too speculative to be remedied by the relief requested); *cf. Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 732 (3d Cir. 1970) (stockholder lacked standing when harm was to corporation and stockholder's injury was the indirect harm to the value of his stock).

Similarly, Plaintiffs' reliance on *CAWCD v. EPA*, 990 F.2d 1531 (9th Cir. 1993) for their indirect injury and traceability arguments is misplaced. There, the Ninth Circuit held that CAWCD had standing to challenge the EPA's regulatory decision because CAWCD would be responsible for a portion of the compliance costs under its contract with the United States. The injury to the United States and CAWCD was the ***same financial harm***, just passed from one payor to another. *Id.* at 1538. Here, in contrast, Plaintiffs' alleged injuries are separate and

[3] UMWA does not address its lack of associational standing to sue on behalf of its members. [Doc. 22, p. 6.]

distinct from those of a potential NGS buyer. [Doc. 41, p. 17.] Plaintiffs' alleged injuries are the future indirect economic harm that will result ***if*** NGS closes ***and*** Peabody decides to close the Kayenta mine. Plaintiffs' alleged "byproduct" injuries are entirely different from a prospective NGS buyer's possible harm and do not satisfy the injury in fact requirement. *See Vt. Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 772 (2000) (stating that "[a]n interest unrelated to injury in fact is insufficient to give a plaintiff standing" (*citing, inter alia, Valley Forge Christian College v. Am. United for Separation of Church & State, Inc.*, 454 U.S. 464, 486 (1982)).[4]

Further, Plaintiffs cannot plausibly contend that their alleged future harm is fairly traceable to CAWCD's issuance of a single RFP for less than 15% of its power requirements or its statement that it is not obligated to purchase power from NGS after its current contract expires. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 505 (1975) (recognizing that indirect injury "may make it substantially more difficult" to have standing and establish that "the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm."). At most, Plaintiffs' harm is traceable to the decision to close NGS, not CAWCD's subsequent effort to responsibly ensure that its customers have water in 2020.

Even if Middle River or another possible buyer was pursuing NGS and the Court ordered CAWCD to purchase all of CAP's power requirements from NGS, numerous third party decisions could still cause the closure of NGS or the Kayenta mine, rendering the requested relief ineffectual. For example, the non-federal NGS owners could decide not to sell if the terms are not acceptable. Even if a sale occurs, the "new" NGS could not operate unless it and the Navajo Nation (the "Nation") amend the lease, as coal combustion under the current lease ends in December 2019. Further, a new owner may decide not to extend the coal supply agreement with Peabody, could demand financial concessions that harm Peabody (and

[4] The environmental cases cited by Plaintiffs do not help their injury in fact analysis. *See Reilly v. Ceridian Corp.*, 664 F.3d 38, 45 (3d Cir. 2011) ("An analogy to environmental injury cases fails as well. As the [Ninth Circuit] explained in *Central Delta Water Agency,* standing is unique in the environmental context because monetary compensation may not adequately return plaintiffs to their original position." (*citing Cent. Delta Water Agency v. U.S.*, 306 F.3d 938, 950 (9th Cir. 2002))). Moreover, Plaintiffs' reliance on cases relating to a plaintiff's ability to compete in the market is inapposite. Plaintiffs are not competing in a sale or bid process or attempting to purchase NGS.

by extension the other Plaintiffs) or could decide to repurpose NGS. And, even if all of those contingencies were resolved, there is no guarantee that the terms of a new NGS operating arrangement would comply with environmental regulations or receive new regulatory approvals required by the December 22, 2019 closure date. CAWCD and this Court have no control over these many potentialities, any one of which could plausibly occur and "cause" the harm alleged by Plaintiffs. The presence of these many variables breaks the causal chain and reveals how utterly speculative it is that a favorable ruling from this Court will have any impact at all. *See, e.g.*, *San Diego Cnty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1130 (9th Cir. 1996) (plaintiffs' claimed injury does not satisfy the requirements of Article III where it results from "the independent action of some third party not before the court") (citation omitted); *see also Novak v. U.S.*, 795 F.3d 1012, 1020 (9th Cir. 2015) ("There is no standing if, following a favorable decision, whether the injury would be redressed would still depend on 'the unfettered choices made by independent actors not before the courts.'") (citation omitted).

Moreover, Plaintiffs' requested relief would force CAWCD into an unfathomable Hobson's choice: either (i) responsibly arrange for post-2019 power to serve millions of water users and face this lawsuit, or (ii) avoid litigation by taking no action to procure post-2019 power based on Plaintiffs' hope that some third party might buy NGS, obtain myriad approvals and produce economical power within the next 13 months. The latter puts at risk millions of citizens and the cities, farms, industries and tribes who depend on delivery of CAP water—all to subsidize Plaintiffs, who are not CAP water users. No law, logic or equity sanctions this irrational outcome.

B. Plaintiffs' Claim Is Not Ripe.

Even if Plaintiffs had standing, their claim of indirect future economic harm is dependent on so many speculative future events, uncertainties and matters beyond CAWCD's control (and this Court's reach) that the claim is not ripe. [*See* Doc. 22, pp. 8-11.] *See, e.g.*, *Swedlow, Inc. v. Rohn & Haas Co.*, 455 F.2d 884 (9th Cir. 1972). Just one example of the many variables that would have to resolve for Plaintiffs' allegations to merit judicial consideration is the need for new enabling legislation from Congress and a new plan from the Secretary.

Plaintiffs' only response is to argue that a sale of NGS does not require congressional approval and is covered by the Participation Agreement. [Doc. 41, pp. 23-24; Doc. 41-2 (Exhibit B).] The sections of the Participation Agreement cited by Plaintiffs state the opposite. Section 18.3 contemplates only transfers of interests between ***existing*** co-tenants, to entities wholly-owned by or merged with a co-tenant or that have acquired all of a co-tenant's property, or to SRP, absent unanimous consent. Plaintiffs' insinuation that the 1969 Plan, through the Participation Agreement, freely permits sale of non-federal NGS ownership interests to anyone in the marketplace without a new plan or Congressional approval is false. If it were true, the Secretary would not have sent CAWCD a letter explaining that it is considering options for post-2019 energy, which may include submitting a new plan and obtaining new Congressional approval for NGS *or which may not include NGS at all.* [Doc. 23-4, p. 3 (June 1, 2018 Letter from DOI Assistant Secretary T. Petty).] Indeed, the sale hoped for by Plaintiffs would replace all of the non-federal owners of NGS with a single private owner—clearly a major change from the ownership structure specified in the 1969 Plan. As Plaintiffs admit, a major change in the 1969 Plan requires congressional approval. [Doc. 1, ¶ 17.] No action—by Congress or the Secretary—in this regard has occurred and may never occur. Given Plaintiffs' dependence on these and many other uncertain future events, their claim is not ripe for judicial review.

III. PLAINTIFFS FAIL TO STATE A CLAIM FOR RELIEF.

A. Plaintiffs' Effort to Recast Their Claim as One for Equitable Relief Should be Rejected.

Plaintiffs concede that there is no private right of action under the CRBPA. *See, e.g., Long v. Salt River Valley Water Users' Ass'n*, 820 F.2d 284, 286-89 (9th Cir. 1987). Trying to elude *Long's* impact, Plaintiffs now assert they are bringing "an equitable claim against a state actor for violation of federal law," even though that is not how their claim is pled. [Doc. 41, pp. 24-26.] Plaintiffs' new theory fails for several independent reasons.

Plaintiffs named CAWCD, a municipal corporation and public improvement district of the state, and ***not*** a state official, as the sole defendant from which it seeks injunctive relief. [Doc. 1, ¶ 9.] They rely heavily on *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635

(2002), to argue that their claim is viable under *Ex parte Young,* but that case confirms only that injunctive relief may be available against *state officials*. It does not hold that equitable relief can be awarded against a government *entity* in the absence of express Congressional authority. *See Verizon*, 535 U.S. at 648 (holding that court had federal subject matter jurisdiction under 28 U.S.C. § 1331 for claim against Commission but allowing injunctive relief claim to proceed ***only*** against individual commissioners).

This narrow basis for injunctive relief is confirmed in *Armstrong v. Exceptional Child Ctr., Inc.* 135 S.Ct. 1378, 1384 (2015) (confirming ability to enjoin unconstitutional actions by state and federal officers). *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 88 (1983), is also inapposite. There, the only question before the Court was whether state laws were preempted by federal law; there was no request for injunctive relief against the state *agencies*. *Id.* at 92 and n.14. None of Plaintiffs' cases allowed injunctive relief to be asserted against political subdivisions. [*Contra.* Doc. 41, p. 25.]

Second, even if the Complaint could be construed as stating an "equitable claim," Plaintiffs have no rights to assert against CAWCD. While "federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law," *Armstrong*, 35 S. Ct. at 1384, a plaintiff asserting a claim to enforce a federal law still must have "a right that [he or she] possesses against" the defendant. *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 260 (2011); *see also Gonzaga Univ. v. Doe*, 536 U.S. 273, 287-88 (2002) (federal statute did not confer privately enforceable right where statute had an "aggregate focus" and provided directives only to the Secretary of Education). Such litigation cannot occur unless the plaintiff has a federal right of his or her own to vindicate. *Stewart*, 563 U.S. at 261, n.8.[5] While Plaintiffs cite to the Supremacy Clause to support their

[5] The Court need look no further than the rights or obligations asserted by the claimants in Plaintiffs' cited authorities. *See Armstrong*, 35 S.Ct. 1378 (providers under Idaho's Medicaid plan claimed that the state Medicaid agency was violating § 30(A) of the Medicaid Act); *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44, 50, 75-76 (tribe sued state for violation of the Indian Gaming Regulatory Act alleging that the state violated its duty to the tribe under that Act); *Sprint Commc'ns, Inc. v. Jacob*, 571 U.S. 69, 73-74 (2013) (national telecommunications service provider sought a declaration that the Telecommunications Act of 1996 preempted a state's board's order requiring plaintiff to pay additional fees for long distance internet calls); *Verizon Md.*, 535 U.S. 635 (incumbent local exchange carrier alleged state commission's order forcing it

preemption argument, "the Supremacy Clause is not the source of any federal rights," and it "certainly does not create a cause of action." *Armstrong*, 35 S. Ct. at 1383 (citation omitted).

Plaintiffs have not identified any right bestowed on them under Section 303 of the CRBPA, the AWSA or any other law. Plaintiffs cite only provisions of Section 303 that grant rights to and impose obligations on *the Secretary*, not rights or obligations held by Plaintiffs. [Doc. 41, pp. 27-28.] *See also Long*, 820 F.2d at 288 (Reclamation statutes impose obligations *on the Secretary* and private suits against parties other than the Secretary "could very well undermine the discretion the Secretary enjoys in distributing water under the reclamation statutes."). Moreover, while Plaintiffs allege that the AWSA "provides that certain revenues from the sale of the Bureau's NGS capacity not used to run CAP will be used for the benefit of the Indian tribes located in the state of Arizona," [Doc. 1, ¶ 41] the Hopi Tribe concedes that it is not one of the Arizona Indian tribes benefiting from the CAP Development Fund pursuant to the AWSA. [*Compare id. with* Doc. 41, p. 5 (disavowing that Plaintiffs seek rights under a "limited fund")]. The Hopi Tribe has no right to those revenues and is ***not*** a CAP water user. And Plaintiffs have not alleged that CAWCD has subjected them to regulatory action or enforcement that violates any of Plaintiffs' substantive rights. *See*, *supra*, n. 5. Accordingly, they do not possess an equitable claim for relief.

Further, the equitable claim that Plaintiffs now assert has been foreclosed by Congress. "Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law." *Armstrong*, 135 S. Ct. at 1385 (citation and quotations omitted). Congress has defined and prescribed the avenue for seeking relief for violations of the CRBPA: suits by States against the Secretary in the Supreme Court to enforce the CRBPA's provisions. [Doc. 41, p. 26 (citing 43 U.S.C. § 1551(c))]. By enacting a specific enforcement provision in 43 U.S.C. § 1551, Congress deliberately identified the class of claimants and types of claims that may be brought under the CRBPA for non-compliance and

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to make reciprocal compensation payments for ISP-bound calls was preempted by the Telecommunications Act of 1996); *Shaw*, 463 U.S. 85 (employers alleged state disability and human rights laws, which forced employers to pay sick leave benefits to employees unable to work because of pregnancy, was preempted by ERISA).

thus impliedly foreclosed omitted remedies, including equitable actions. *See Armstrong*, 135 S.Ct. at 1385. This result is further compelled by *Armstrong*'s holding that a judicially unadministrable statute, when paired with a method for the states to enforce that statute, precludes equitable relief. 135 S.Ct. at 1385. Here, the Reclamation statutes provide the very "judicially unadministrable" and "judgment-laden" standard that Plaintiffs admit forecloses judge-made equitable claims.[6] [Doc. 41, pp. 25-26.]

Even if Plaintiffs had a cognizable federal statutory right, the sheer complexity of the Reclamation laws, coupled with the provision of specific remedies, indicates here (as it did in *Armstrong*) that Congress intended to foreclose equitable actions. To the extent that Plaintiffs' claim boils down to a contention that the *Secretary* has failed to interpret or apply the CPBRA appropriately, Plaintiffs' "relief must be sought initially through the Secretary rather than through the courts," *Armstrong,* 135 S.Ct. at 1387, if they can establish subject matter jurisdiction under the Administrative Procedures Act ("APA"), 5 U.S.C. § 701, *et. seq.*

B. Neither The CRBPA, The Supremacy Clause, Nor The AWSA Require CAWCD to Purchase All Of CAP's Power Requirements From NGS.

Plaintiffs seek a declaration that Section 303 of the CRBPA requires CAWCD to purchase CAP's power requirements from NGS so long as NGS remains open. [*See, e.g.,* Doc. 1, p. 15.] Plaintiffs also seek an injunction "[r]equiring CAWCD to acquire CAP's power requirements from NGS so long as NGS remains open." [*Id.*] But CAWCD has ***no*** obligation under the CRBPA, the Supremacy Clause or the AWSA to purchase CAP's power requirements from NGS. This dooms Plaintiffs' entire claim.

Although Plaintiffs deny asserting contract-based claims, their Complaint quotes multiple federal contracts. [Doc. 1, ¶¶ 18-19, 22-25.] Yet, nothing in those contracts between

[6] As just one example, Section 107(c) of the Hoover Power Plant Act of 1984 required the Secretary to adopt the "most acceptable" plan for "optimizing" Navajo Surplus. He did this in the Amended Navajo Power Marketing Plan, 72 Fed. Reg. 54289 (Sept. 24, 2007) at ¶ V(A), which provides for CAP's use of Hoover power in accordance with the terms and conditions of CAWCD's contract with the Arizona Power Authority, and in the Western Contract, which provides for other sources of power as well. [Doc. 23-1 ("Marketing Plan").] Plaintiffs' claim would impermissibly require this Court to override the Secretary's broad discretion in the complete absence of any objective criteria by which to evaluate that discretion.

CAWCD and the United States obligates CAWCD to acquire all of CAP's power from NGS. [Doc. 22, pp. 16-17.] Plaintiffs further concede by their silence that they cannot enforce contracts between CAWCD and the United States to which they are not parties. [*Id.*, p. 17.]

Unable to rely on contracts, Plaintiffs turn to a straw man. Plaintiffs distort CAWCD's position, saying it argues that "the Basin Project Act does not require NGS to supply CAP's power requirements." [Doc. 41, p. 26.] To disprove CAWCD's misstated stance, Plaintiffs dedicate five pages detailing the Secretary's intent and obligations pertaining to NGS as derived from the 1969 Plan, CRBPA, Hoover Power Plant Act, and the Marketing Plan to demonstrate that ***NGS*** must ***supply*** CAP's power requirements. [*Id.*, pp. 26-31.] But CAWCD has never taken this position; rather, it rightfully contends that nothing in the CRBPA or the other statutes and contracts Plaintiffs cite in their Complaint requires ***CAWCD*** to ***purchase*** CAP's power requirements from NGS. [Doc. 22, pp. 16-17.] Whether NGS was created to supply CAP's power requirements is a fundamentally different and inapposite issue than whether CAWCD can be compelled to buy all of CAP's required power from NGS for as long as NGS remains "open" (whatever that means). Plaintiffs cannot identify any federal law obligating CAWCD to purchase all of CAP's power from NGS. Such a mandate would contradict CAWCD's longstanding use of alternative power sources and the express terms of its contracts with the Secretary, WAPA and others requiring CAWCD to use non-NGS power.[7] [*Id.*, p. 3.]

Further, the only support for Plaintiffs' assertion is their supposition that this requirement should be read into the CRBPA. [*See* Doc. 41, p. 30 ("[i]t is absurd to assume that Congress would have authorized construction of a major power plant for the primary purpose of providing CAP's power requirements, while at the same time permitting CAP's operator … to purchase CAP's power elsewhere").] Plaintiffs' conjecture is not supported by any authority and violates hornbook principles of statutory construction. *See L.A. Lakers, Inc. v. Fed. Ins. Co.*, 869 F.3d 795, 802-03 (9th Cir. 2017) (legislative purpose is expressed in the ordinary meaning of the words used, not from extrinsic sources such as "an assumption about the legal drafter's

[7] Ordering CAWCD to purchase all of CAP's power requirements from NGS would place CAWCD in breach of those contracts.

desires") (citation omitted); *Sacramento Reg'l Cty. Sanitation Dist. v. Reilly*, 905 F.2d 1262 (9th Cir. 1990) (starting point of statutory construction is the language itself and strong presumption exists that Congress expresses its intent through language it chose) (citations omitted).

Accepting Plaintiffs' interpretation would eliminate the need for the United States to enter into contracts with CAWCD regarding its purchase of NGS power. [*See generally* Doc. 23-2 (Western Contract).] The only contract currently governing CAWCD's use of NGS power—the Western Contract, which Plaintiffs omit from their Complaint and Response—terminates December 31, 2019. [*See id.*, pp. 39-40 (Amendment 1 to Western Contract, § 5).] It would be superfluous for the United States and CAWCD to enter into a contract defining how much power CAWCD will use from NGS ***and*** other power sources if Section 303 required CAWCD to obtain all of its power from NGS. Moreover, as Plaintiffs admit, the Secretary has never taken the position Plaintiffs assert here. The Secretary has merely "request[ed]" that CAWCD continue to purchase power from NGS.[8] If Section 303 required CAWCD to purchase power from NGS, the Secretary would have demanded that CAWCD comply with federal law, not requested that CAWCD consider using NGS power post-2019.

IV. PLAINTIFFS HAVE FAILED TO JOIN INDISPENSIBLE PARTIES.

A. The United States and the Nation are Necessary to This Dispute.

Plaintiffs' attempts to minimize the interests held by absentees the United States and the Nation and to negate their necessity to this action are unpersuasive. Each absentee is required under Rule 19(a)(1). *See Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1155 (9th Cir. 2002) (absent party is necessary if complete relief cannot be afforded in its absence ***or*** it claims a legally protected interest in the subject of the suit such that a decision in its absence will impair its ability to protect that interest).

Plaintiffs argue that the Secretary must assert an interest *in the proceedings* to be

[8] [*See, e.g.*, Doc. 1., ¶ 28 ("[O]n November 6, 2017, the Department of the Interior sent CAWCD a letter reminding CAWCD of the ongoing efforts to locate a buyer willing to run NGS after 2019 and ***requesting*** CAWCD commit to purchasing its power from NGS after 2019 if NGS remained open.") (emphasis added); Doc. 41, pp. 10 (same), 12 ("Interior ***requested*** CAWCD engage in a dialogue with Interior and other stakeholders about 'several [power] options going forward, including the feasibility of continued use of NGS[.]").]

necessary. This interpretation would turn Rule 19(a) on its head (*i.e.* a non-party does not have a legally protected interest unless it seeks to intervene). None of the cases cited by Plaintiffs impose that standard. *See Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1043 (9th Cir. 1983) (government was not a necessary party where it was not a party to the private contracts at issue and never "asserted a formal interest in the subject matter of this action ***or*** the action itself") (emphasis added)); *see also U.S. v. Bowen*, 172 F.3d 682, 689 (9th Cir. 1999) (reciting standards from *Northrop Corp.*, 705 F.2d at 1043). Rather, the party need only assert an interest in the lawsuit's *subject matter*. *Id.* Here, the documents cited by Plaintiffs confirm that the United States has claimed an interest in the subject matter of this action. [*See* Doc. 41-3 ("As CAWCD considers its future power needs, the Department requests that it seriously and fully consider NGS as being its primary source for baseload power for the CAP. The Department is committed to protecting the interests of current NGS beneficiaries and CAP water users, including Arizona Tribes[.]").] The Secretary's conduct satisfies Rule 19(a)(1)(B).

Next, Plaintiffs state the Nation's claimed interests will not be impaired if the suit proceeds in its absence as those interests will be adequately represented by the Hopi Tribe. Plaintiffs disregard that the Nation, while it may share the Hopi Tribe's desire to receive economic benefits from the Kayenta Mine, holds a critical interest the Hopi Tribe does not: it owns the land on which NGS is located. *Compare Confederated Tribes of Chehalis Indian Reservation v. Lujan*, 928 F.2d 1496, 1498-99 (9th Cir. 1991) (Indian Tribe is necessary to action affecting its legal interests, including governing authority over its reservation, *with Salt River Project Agr. Imp. & Power Dist. v. Lee*, 672 F.3d 1176, 1180-81 (9th Cir. 2012) (Nation was not necessary where its interests were aligned with Nation's tribal officials already participating in action). For example, if the Nation wanted to alter the terms of its lease with NGS or repurpose NGS for renewable energy generation, it could not rely on Plaintiffs to advance those interests. Indeed, Plaintiffs admit their interest is in assuring the continued operations of the Kayenta Mine. [*See, e.g.*, Doc. 1, ¶¶ 7, 8, 39; *see also supra*, p. 5.]

Plaintiffs argue that neither Secretary (of Energy or the Interior) has a legally protected interest. They ignore *Ak-Chin Indian Cmty. v. CAWCD*, wherein this Court recognized the

United States' interest in judicial interpretation of statutes and agreements that define the scope of its authority and duties. 2017 WL 3190783, at **1, 4 (D. Ariz. July 27, 2017); *see also Lujan*, 764 F. Supp. at 589 ("Secretary [] is authorized to perform any and all acts and to make rules and regulations which are necessary and proper to carry the provisions of the [CRBPA] into full force and effect."). The United States' contractual delegation of certain duties to CAWCD did not render the United States unnecessary in *Ak-Chin*, and it should not do so here. [*See* Doc. 22, pp. 2-3.] Plaintiffs also ignore that the Marketing Plan requires CAWCD to use power from other sources *before* using power from NGS, and the Western Contract acknowledges CAWCD's use of power from non-NGS sources. [*Compare* Doc. 41, pp. 7-8, *with* Doc. 23-1 (Marketing Plan) *and* Doc. 23-2, pp. 28-29 (Western Contract Operating Proc. 1, Rev. 1 §§ 4.5, 6.1.2, 6.1.3, 6.1.5).] As the relief Plaintiffs request (ordering CAWCD to acquire all power from NGS) would force CAWCD to breach obligations imposed in these contracts, the Secretaries have interests that would be impaired if this action proceeds without them.

Finally, complete relief cannot be afforded absent the United States and the Nation. *See Dawavendewa*, 276 F.3d at 1155-56. The injunctive relief Plaintiffs request will have no effect if it is not also binding on the Nation and the NGS owners, as the NGS lease must be extended/amended for NGS to continue combusting coal beyond 2019, even if CAWCD is ordered to purchase power from NGS "for as long as it is open." *See Confederated Tribes*, 928 F.2d at 1498-99. Similarly, Plaintiffs' alleged injuries cannot be redressed in the absence of the United States, as a sale of NGS would likely require new congressional authorization and require the Secretary to submit a new plan to Congress (that may or may not include NGS, even if it remains open). *See supra*, pp. 6-7. Further, no ownership share in NGS can be transferred to any party other than an original NGS owner without the Secretary's consent. [Doc. 41-2, § 18.3]. The United States and the Nation's participation in this action is necessary for the requested relief to have even a remote possibility of being effective.

B. The United States Has Not Waived Its Immunity, and Plaintiffs Admit the Nation Cannot Be Joined if the United States Is Not Joined First.

Plaintiffs chose not to sue the United States under the APA, the only arguably viable

claim they might have. Thus, any waiver of the United States' sovereign immunity under the APA is not a waiver of its immunity in this action.[9] *See Fostvedt v. U.S.*, 978 F.2d 1202, 1203-04 (10th Cir. 2008) (plaintiffs could not benefit from APA's waiver of sovereign immunity in action brought under general jurisdiction statutes, including 28 U.S.C. § 1331, since action was statutorily prohibited). Moreover, Plaintiffs do not allege that they suffered a legal wrong "because of agency action" or even attempt to establish how the APA applies under the circumstances. *See Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1168 (9th Cir. 1144) (quoting 5 U.S.C. § 702 (right of review under the APA)). Further, in determining whether the United States can be joined in this non-APA action, the Court must examine whether the CRBPA expressly or impliedly forecloses the relief sought. *See* 5 U.S.C. § 702 (waivers under Section 702 do not apply in presence of other limits on judicial review); *see Tucson Airport Auth. v. Gen. Dynamics Corp.*, 136 F.3d 641, 645 (9th Cir. 1998) (waiver of immunity in equitable relief claim under the APA applies ***only if*** adequate remedy was not available elsewhere and claim did not seek relief forbidden by other statutes). Foreclosure exists here, as 43 U.S.C. § 1551 contains a waiver of immunity only to permit a state to seek a declaration against the United States regarding obligations arising under the CRBPA. [*See* Doc. 1, ¶ 46; Doc. 22, pp. 13-14.]

Plaintiffs do not dispute that the Nation cannot be joined as it is a federally recognized Indian Tribe with sovereign immunity. Plaintiffs' only response is that ***if*** the United States is joined, it can join the Nation. [Doc. 41, p. 36.] However, the single case they rely on holds that tribal immunity does not apply "in suits brought by the EEOC." *E.E.O.C. v. Peabody W. Coal Co.*, 400 F.3d 774, 781 (9th Cir. 2005). This is not such a case. As the United States remains immune, the Nation cannot be joined and this action must be dismissed. *See White v. Univ. of Cal.*, 765 F.3d 1010, 1028 (9th Cir. 2014).

V. CONCLUSION.

CAWCD respectfully requests that the Court dismiss Plaintiffs' Complaint.

[9] Plaintiffs also mischaracterize *Long*, 820 F.2d 284, which did not reach the issue of whether a private party had a claim under the APA.

RESPECTFULLY SUBMITTED this 24th day of October, 2018.

COHEN DOWD QUIGLEY
The Camelback Esplanade One
2425 East Camelback Road, Suite 1100
Phoenix, Arizona 85016

By: */s/ Daniel G. Dowd*
Daniel G. Dowd
Stacey F. Gottlieb
Lauren M. LaPrade
Kaysey L. Fung

Jay M. Johnson
CENTRAL ARIZONA WATER CONSERVATION DISTRICT
23636 North 7th Street
Phoenix, Arizona 85024

Attorneys for Defendant Central Arizona Water Conservation District

CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2018, 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:

John Shadegg
Eric E. Lynch
POLSINELLI
One East Washington, Suite 1200
Phoenix, Arizona 85004
jshadegg@polsinelli.com
elynch@polsinelli.com
Attorneys for Peabody Western Coal Company

Matthew C. Corcoran (*Pro Hac Vice*)
JONES DAY
325 McConnell Boulevard, Suite 600
Columbus, Ohio 43215-2673
mccorcoran@jonesday.com
Attorney for Peabody Western Coal Company

Timothy R. Macdonald (*Pro Hac Vice*)
ARNOLD & PORTER KAYE SCHOLER LLP
370 Seventeenth Street, Suite 4400
Denver, Colorado 80202-1370
timothy.macdonald@arnoldporter.com
Attorney for the Hopi Tribe

Ethan G. Shenkman (*Pro Hac Vice*)
Laura Cottingham (*Pro Hac Vice*)
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave, NW
Washington, DC 20001-3743
ethan.shenkman@arnoldporter.com
lauracottingham@arnoldporter.com
Attorneys for the Hopi Tribe

Eugene M. Trisko (*Pro Hac Vice*)
LAW OFFICES OF EUGENE M. TRISKO
Post Office Box 596
Berkeley Springs, West Virginia 25411
emtrisko@earthlink.net
Attorney for the United Mine Workers of America

Nicholas J. Enoch
Kaitlyn A. Redfield-Ortiz
Stanley Lubin
LUBIN & ENOCH, P.C.
349 North 4th Avenue
Phoenix, Arizona 85003-1505
nick@lubinandenoch.com
kaitlyn@lubinandenoch.com
stan@lubinandenoch.com
Attorneys for the United Mine Workers of America

Charles F. Donnelly (*Pro Hac Vice*)
General Counsel
UNITED MINE WORKERS OF AMERICA
18354 Quantico Gateway Dr. #200
Triangle, Virginia 22172
cdonnelly@umwa.org
Attorney for the United Mine Workers of America

Linus Everling
Thomas L. Murphy
GILA RIVER INDIAN COMMUNITY
Office of General Counsel
Post Office Box 97
Sacaton, Arizona 85147
linus.everling@gric.nsn.us
thomas.murphy@gric.nsn.us
Attorneys for the Gila River Indian Community

By: */s/ Erik O'Malley*