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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

The Hopi Tribe, *et al*.,

Plaintiffs,

v.

Central Arizona Water Conservation District,

Defendant.

No. 2:18-cv-01337-SPL

GILA RIVER INDIAN COMMUNITY'S REPLY IN SUPPORT OF MOTION TO DISMISS

The Gila River Indian Community ("Community") hereby files this reply in support of its motion to dismiss the complaint. As shown below, the Colorado River Basin Project Act, Pub. L. 90-537, 43 U.S.C. §§ 1501-1556 ("Basin Project Act" or "Act"), authorized the Secretary of the Interior ("Secretary") to purchase capacity at a thermal generating power plant. That grant of authority, exercised by the Secretary 50 years ago to purchase capacity at the Navajo Generating Station ("NGS"), does not now require that the Central Arizona Water Conservation District ("CAWCD") and Central Arizona Project ("CAP") water users continue to buy power from NGS at above-market rates as an indirect subsidy for Plaintiffs' coal mine. Further, Plaintiffs have no right to equitable relief against CAWCD under the Basin Project Act and have no Article III standing to raise their baseless claim.

ARGUMENT

I. THE COMPLAINT FAILS TO STATE ANY COGNIZABLE CLAIM AGAINST CAWCD FOR VIOLATION OF THE BASIN PROJECT ACT

The complaint must be dismissed because CAWCD and CAP water users are not required by federal law to subsidize Plaintiffs' coal operations by purchasing uneconomical electricity generated by Plaintiffs' coal. Neither Section 303 of the Basin Project Act, 43 U.S.C. § 1523, nor the 1969 Plan submitted by the Secretary that outlined his plans to invest in NGS, requires CAWCD to purchase power from NGS. And Plaintiffs have no right under the Act to seek equitable relief against a water district such as CAWCD for an alleged violation.

A. CAWCD has no statutory duty to contract for or buy NGS power.

1. Plaintiffs attempt to conflate Congress's authorization for the Secretary to purchase the right to capacity with an indefinite mandate requiring CAP to buy that power.

In responding to the motions to dismiss, Plaintiffs rely on statutory provisions in the Basin Project Act that authorize the Secretary to obtain the right to capacity at a power plant so it is available to CAP for purchase. Ignoring the plain meaning of the statutory text, they attempt to graft onto the statute an imagined obligation on the part of CAWCD to contract for and buy that power indefinitely. Congress authorized the Secretary to provide the Central Arizona Project with a source of affordable power by purchasing the right to capacity at a power plant. That does not equate to a mandate providing coal miners, an Indian tribe, and a coal company a federal statutory guarantee that the Central Arizona Project must continue to buy power from NGS 50 years later, instead of from more affordable sources. Making NGS power available to CAP has historically served the statutory purpose of affordable water distribution, a purpose Plaintiffs implicitly acknowledge. *See* Pls.' Resp. Br., Doc. 41, at 31 n.7 ("Br.") ("NGS has provided over the

long term the lowest cost power for CAP."). Requiring continued purchase of such power despite its becoming uneconomical would contravene that statutory purpose.

Plaintiffs' arguments are contrary to the plain language of the Basin Project Act. Subsection 1523(b) is an *authorization* for the Secretary to acquire "the *right* to" whatever portion of the capacity of power plants that "he determines is required in connection with" operating CAP. In this provision, Congress authorized the Secretary to enter into agreements to acquire the right to power-plant capacity for purposes of supplying CAP with as much power as it might need: "the Secretary may enter into agreements with non-Federal interests proposing 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." 43 U.S.C. § 1523(b). Congress authorized the Secretary to use appropriated funds for the purchase of an entitlement to capacity at NGS for the specific purpose of securing an affordable source of power for CAP. This gave CAWCD the right to contract for and buy power out of the United States' entitlement to 24.3% of NGS capacity.

That does not mean that Congress mandated the use of that "right" in any particular quantity or for any particular time period. There is no statutory mandate that CAP must continue to exercise the right to that portion of capacity beyond the useful life of NGS, or seek to artificially prolong the life of NGS rather than obtain power from some other source. If Congress had intended such a mandate as a guarantee to coal producers, it would have said so. That it did not is not surprising, because acquiring a right to power-plant capacity was a means to an end: powering CAP in the most economical manner. Congress required the Secretary to provide for a source of power for CAP in the 1969 Plan. But Congress did not prejudge, predetermine, or mandate the useful life of that power supply.

Indeed, the 1969 Plan itself is focused solely on obtaining the most affordable available power. As the plan makes clear, purchasing the right to capacity at NGS made available a lower-cost source of power than would otherwise have been available to CAP.

The 1969 Plan summarizes the efforts the Secretary made to arrive at "[t]he most feasible plan to supply the power requirements of the Central Arizona Project." Doc. 41-1 at 7. The Secretary evaluated what the lowest-cost source of available power would be, and considered the possibility of "direct purchase" from existing suppliers. *Id.* at 6. Several potential suppliers could not supply the needed power. *See id.* at 7. Three potential suppliers offered to sell the power at prices of $55.65 per kilowattyear, $46-$57 per kilowattyear, and $54 per kilowattyear respectively. *See id*. "By comparison the cost to the United States by the purchase of entitlement to power is approximately $27 per kilowattyear." *Id.* It was only after making that cost comparison that the Secretary exercised his authority to use appropriations under the Act to purchase the entitlement to power at NGS, effectively creating a captive supplier of power that could undercut open-market options. It would be inconsistent with the logic of the 1969 Plan, nearly 50 years later and in drastically different market conditions, to require purchase of NGS power at above-market prices.

Although Plaintiffs purport to rely on the 1969 Plan, they ignore its focus on finding the lowest cost power. And they point to no congressional ratification of the 1969 Plan that would transform it into the mandate to buy NGS power that they seek. Indeed, in submitting the 1969 Plan, the Secretary did not seek, and did not need to seek, further congressional approval. Rather, the Secretary stated, "I am proceeding pursuant to Section 303(b) to execute the necessary agreements and contracts to implement the recommended plan." *Id.* at 8. Contrary to Plaintiffs' arguments, that does not detract from the statutory requirement that the Secretary submit the plan to Congress for it to become operative. The plan was subject to further approval only if it recommended something outside the authority already granted in subsection 1523(b), which it did not. *See* 42 U.S.C. § 1523(c) ("Except as authorized by subsection (b) of this section, such plan shall not become effective until approved by the Congress."). Thus, the language requiring congressional approval of any plan outside § 1523(b) is contingent, not surplus.

Nor is there support for a mandated subsidy of NGS or coal production in any of the other authorities relied on by Plaintiffs. The Hoover Power Plant Act of 1984, Pub. L. 98-381, merely provides for the marketing of any NGS power not sold to CAP. *Id.* § 107(a). That Congress required the Secretary to sell power not used by CAP is unremarkable and irrelevant. Congress did not thereby mandate that CAWCD buy NGS power for any period at any price. The Navajo Power Marketing Plan likewise merely recognizes that the Secretary must make the United States' NGS power available to CAP for purchase. That the Secretary must do so, and that he may sell to others only what CAP does not use, is consistent with Congress's evident purpose to ensure that CAP can buy from NGS what it needs for its operations. It does not mean that CAP is *required* to contract for and buy such power no matter the cost. The Basin Project Act and other reclamation acts are not acts to keep coal-fired power plants in operation indefinitely at any cost. They are acts that provide for delivery of water in arid climates through the most practicable, economical means.

The letters Plaintiffs cite to attempt to support their arguments instead reinforce the point that CAWCD's purchase of NGS power is a matter of choice, based on feasibility considerations. In a letter dated November 6, 2017, the Acting Assistant Secretary for Water and Science asked CAWCD to "seriously and fully *consider* NGS as being its primary source of baseload power for the CAP." Doc. 41-3 at 3 (emphasis added). Thus, "[t]he Department… stands ready to continue our efforts to find manners in which to continue NGS operations post-2019 and *encourages* CAWCD to be a part of this effort." *Id*. (emphasis added). If CAWCD had no choice but to purchase its power from NGS, there would be nothing to consider. Indeed, in a letter dated June 1, 2018, the Assistant Secretary for Water and Science provided an analysis of the Basin Project Act and characterized it as "the applicable governing authority," but pointed to nothing in the Act requiring the purchase of NGS power if it is uneconomical. Rather, the Act "must be *addressed* in any decision relating to future sources of Project power. With the 1968 Act in mind, *the*

Department expects to consider several options going forward, *including the feasibility* of continued use of NGS-provided power." Doc. 23-4 at 3 (emphasis added). "Feasibility" is the touchstone; there is no mandate. Far from asserting or acceding to any statutory mandate for the purchase of NGS power, the Assistant Secretary only "look[ed] forward to a constructive *dialogue* regarding the most *appropriate* path forward." *Id.* (emphasis added).

2. Plaintiffs misread the Arizona Water Settlements Act, a statute that reinforces the Basin Project Act's purpose to provide affordable water delivery.

The Community showed in its motion to dismiss that the Basin Project Plan and the Arizona Water Settlements Act of 2004, Pub. L. 108-451, 118 Stat. 3478, 43 U.S.C. § 1501 note (2004) ("AWSA"), must be read in harmony, and that in particular both provide for affordable delivery of CAP water to the Community. Doc. 27 at 8-10. The Basin Project Act authorized the Secretary to obtain capacity as a means of lowering delivery costs. The AWSA provides structural subsidies and other mechanisms to lower the cost of delivering CAP water to the Community so as to make such water an adequate substitute for the on-reservation water the rights to which the United States as trustee agreed to relinquish in the Community's water settlement. Rather than acknowledge these points and address the Community's argument about AWSA head-on, Plaintiffs mischaracterize it as an argument "that Congress *amended* the 1969 Plan's requirement respecting NGS when Congress enacted the AWSA." Br. at 26 (emphasis added). There was no such requirement in the 1969 Plan, and so the Community has never argued that AWSA amended it.

Plaintiffs argue that because Congress specified that certain non-CAP works be powered with "the least expensive source of power available," this means Congress did not care about the cost of power for CAP. Br. at 31. But the provision they cite, AWSA § 203(d)(1)(B), contradicts their argument. It requires the Secretary to "provide electric power for San Carlos Irrigation Project wells and irrigation pumps at the Secretary's direct

cost of transmission, distribution, and administration, using the least expensive source of power available." *Id.* Plaintiffs miss that the San Carlos Irrigation Project ("SCIP") is responsible for delivering to the Community's Reservation a large proportion of the water to which it is entitled under the AWSA, water from the Gila River and the San Carlos Reservoir. *See In re General Adjudication of All Rights to Use Water in the Gila River System and Source*, 224 P.3d 178, 187 (Ariz. 2010) (en banc). Congress had previously taken steps in the Basin Project Act to facilitate lowest-cost delivery of CAP water to the Community, as the Plaintiffs acknowledge. *See* Br. at 31 n.7 ("NGS has provided over the long term the lowest cost power for CAP."). It is nonsensical to view Congress's explicit guarantee of low-cost delivery for another component of the Community's entitlement, SCIP water, as any indication that Congress disclaimed such concern for the cost of delivery for CAP water. Rather, this provision of the AWSA for non-CAP water complements and reinforces Congress's concern for keeping the costs of delivery for CAP water affordable, which is evident in the Basin Project Act and structurally reinforced in AWSA by the subsidies given to the Community for fixed operation and maintenance charges for delivery of Community CAP Water. *See* AWSA §§ 205(a)(6), 205(a)(7), 205(a)(8), 205(e), 208. Plaintiffs' arguments to the contrary defy logic.

B. Under *Long v. Salt River Valley Water Users' Ass'n,* Plaintiffs cannot bring a private equitable claim to enforce the Basin Power Act against CAWCD.

In response to the motion to dismiss their complaint to enforce the Basin Project Act, Plaintiffs concede that "Congress did not create a remedy to enforce the Basin Project Act against the States or their subdivisions" such as CAWCD. Br. at 26. Indeed, as *Long v. Salt River Valley Water Users' Ass'n,* 820 F.2d 284, 288 (9th Cir. 1987), squarely held, there is no private right of action under the Basin Project Act, so Plaintiffs' suit here against CAWCD cannot proceed. In an attempt to rescue the complaint, Plaintiffs disclaim any attempt to sue directly under the Basin Project Act: "Plaintiffs do not purport to assert a

claim under the Basin Project Act." Br. at 24. Instead they characterize it as an equitable action raising a judge-made claim to enjoin future violations of federal law—the Basin Project Act—by a "state actor" (CAWCD).

As shown above, the Basin Project Act does not impose any duties on CAWCD, and therefore Plaintiffs have not pleaded any violation of the Act that can be enjoined. But even if federal law imposed a duty on the Secretary to require CAWCD to buy power from NGS as long as it remains open, *Long* still precludes the Plaintiffs from enforcing the Basin Project Act by any means other than an APA claim against the Secretary.

In *Long*, acknowledging the possibility of injunctive relief against the Secretary under the APA, the Ninth Circuit specifically noted that "to say that [plaintiff] may have a right of action under the APA to compel *the Secretary's* compliance with reclamation law does not mean that reclamation law provides a right of action against *parties other than the Secretary*." *Long,* 820 F.2d at 287 n.5 (citing *Legal Aid Soc'y v. Brennan*, 608 F.2d 1319, 1332 (9th Cir. 1979)) (emphasis added). Plaintiffs have not invoked the APA here; the complaint makes no mention of it and the Plaintiffs have chosen not to sue the Secretary.

Contrary to Plaintiffs' arguments, *Armstrong v. Exceptional Child Ctr., Inc.,* 135 S. Ct. 1378 (2015), does not support their position; it refutes it. *Armstrong* held that "[t]he power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations," and that a plaintiff "cannot, by invoking [a federal court's] equitable powers, circumvent Congress's exclusion of private enforcement" of a federal statute. *Id.* at 1385. *Armstrong*'s analysis echoes and reinforces the Ninth Circuit's conclusion in *Long.* The Supreme Court cited two reasons the statute at issue precluded claims for equitable relief by private parties. First, the statute already provided a specific remedy for its violation, and the "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Id.* Second, the statute conferred discretion on the federal official in question to administer the statute. *Id.* Years earlier, *Long* applied this same analysis and likewise held that Congress excluded

private enforcement of the reclamation acts. On the first point, *Long* held that Congress's creation of a right for states to sue the Secretary directly in the Supreme Court under the reclamation statutes "suggests its intent not to provide [another] remedy." *Long*, 820 F.2d at 288. On the second point, the Ninth Circuit cautioned that "private suits against parties other than the Secretary" to enforce the Act "could very well undermine the discretion the Secretary enjoys in distributing water under the reclamation statute." *Id.* It would violate *Armstrong* and *Long* to allow a private party to sue CAWCD in equity to impose duties under the Basin Project Act.

The complaint alleges that any purported duty of CAWCD to buy power from NGS is derivative of the Secretary's duties under the Basin Project Act. *See* Complaint ¶ 2. Plaintiffs allege that CAWCD has agreed contractually "to operate and maintain" CAP and that "[c]onsistent with its principal's obligation under federal law to obtain CAP's power requirements from NGS," CAWCD is required to do so as well. *Id.* Plaintiffs cannot enforce the Secretary's alleged duties, and end run seeking whatever relief might be available under the APA, by suing a water district instead. There is no private cause of action here, equitable or otherwise, against CAWCD to enforce the Basin Project Act.

II. PLAINTIFFS FAIL TO SHOW THEY HAVE STANDING

The Plaintiffs have failed to meet their burden, as the parties invoking federal jurisdiction, to "clearly … allege facts demonstrating" that they "have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540, 1547 (2016) (alteration original) (citations omitted). "It is the responsibility of the complainant clearly to allege facts demonstrating that he is a *proper party* to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Warth v. Seldin*, 422 U.S. 490, 518 (1975) (emphasis added). The Plaintiffs are not the proper parties to bring the claim they assert.

Plaintiffs ignore that "[s]tanding, unlike other jurisdictional doctrines, 'focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated." *Pritkin v. Department of Energy*, 254 F.3d 791, 796 (9th Cir. 2001) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo*, 136 S.Ct. at 1548 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Here the Plaintiffs assert an injury to an "on-going sale process" (Br. at 17) *in which they are neither buying nor selling*. Even assuming that some absent party could sue for such an injury, the Plaintiffs cannot.

Plaintiffs' reliance on *Bryant v. Yellen*, 447 U.S. 352 (1980), ignores the distinction between participants in a sale process who have standing and third parties who do not, evident in the lower court decisions in *Bryant*. In *Bryant* the district court held that certain lands were not subject to irrigation restrictions asserted by the United States under the Boulder Canyon Project Act, 43 U.S.C. §§ 617-617v—a victory for landowners which improved the value of their lands. The United States did not appeal, but the Ninth Circuit held that parties who sought to purchase the lands at a discount if the restriction were applied could intervene and appeal. *U.S. v. Imperial Irrigation Dist.*, 559 F.2d 509, 521-22 (9th Cir. 1977) (affirmed in part, vacated in part). The Ninth Circuit compared the case to *Bowker v. Morton*, 541 F.2d 1347 (9th Cir. 1976), where "a group of small family farmers in one area of California" lacked standing "to compel the government to apply" the same statutory limitation "to an irrigation project in another area of California." *Id.* at 517 (citing *Bowker*, 541 F.2d at 1349). The Ninth Circuit distinguished *Bowker* because there "the plaintiffs sought only to force landowners in another area to sell their land at prices determined by the application of [reclamation laws]. They did not desire to purchase this land, even if the price were to be reduced, and those plaintiffs were therefore not injured by higher land prices." *Id.* at 522. The Supreme Court briefly considered the standing

issue on appeal and affirmed the Ninth Circuit's standing analysis because the price of the lands respondents *wished to purchase* would be affected by the outcome of the case. *Bryant*, 447 U.S. at 368.

Under the Ninth Circuit's analysis in *Bryant*, Plaintiffs lack standing. Plaintiffs allege that CAWCD's power-purchasing decisions "have harmed the on-going sale process" of NGS. Br. at 17. But Plaintiffs allege no ownership interest in NGS, nor any interest or ability to purchase NGS. Thus, their claims fall outside the scope of *Bryant*, where the Court affirmed the Ninth Circuit's analysis that the intervenors had standing precisely because they sought to purchase the land at issue in the case.

Similarly, in *Clinton v. City of New York*, 524 U.S. 417 (1998), the Supreme Court held that an effect on a sale process could constitute injury-in-fact to participants. There, a farm cooperative "was formed … to assist Idaho potato farmers in marketing … and stabilizing prices, in part through a strategy of acquiring potato processing facilities," to take advantage of an anticipated amendment to the capital gains tax that would favor such acquisitions. *Id.* at 426. The farm cooperative "was engaged in negotiations with the owner of an Idaho potato processor that would have qualified for the tax benefit" but these negotiations ended when President Clinton used the Line-Item Veto Act to cancel that portion of the legislation. *Id.* The Supreme Court held that the farm cooperative had standing and noted "three critical facts": (1) the legislation had the "specific purpose" of benefiting "a defined category of potential purchasers of a defined category of assets"; (2) the canceled benefit was one of only two tax benefits singled out for cancellation; and (3) "the [farm cooperative] was organized for the very purpose of acquiring processing facilities, it had concrete plans to utilize the benefits of § 968, and it was engaged in ongoing negotiations …." *Id.* at 432.

Plaintiffs here share none of these characteristics. Congress enacted the Basin Project Act "to provide federal financing, construction, and operation of water storage and distribution projects throughout the United States," not to confer any benefit on the

Plaintiffs or the Kayenta Mine. *Smith v. Central Ariz. Water Cons. Dist.*, 418 F.3d 1028, 1030 (9th Cir. 2005). Moreover, the Plaintiffs were not organized to participate in the attempts to sell NGS, nor do they allege any direct interest in participating in the NGS sale process. Rather, they ask this Court decide issues that could be presented, if at all, only by a potential buyer or seller of NGS.

Nor does *CAWCD v. EPA*, 990 F.2d 1531 (1993), support Plaintiffs. In *CAWCD,* standing rested on CAWCD's direct contractual obligations to pay the costs that the litigation would impose. CAWCD had standing to challenge environmental regulations at NGS as though it were an owner, "given their obligation to repay BOR's share of the costs imposed by the Final Rule." *Id.* at 1538. In contrast, here, the Plaintiffs do not and cannot allege that they would be contractually obligated to bear the cost of an NGS closure on behalf of an owner. Rather, they would be only indirectly and incidentally affected as suppliers of coal to NGS. If Plaintiffs were to have standing on the ground of indirect economic effects, so too would all of "those entities that currently benefit directly and indirectly from NGS, including Tribal Nations and millions of people and thousands of businesses in the State of Arizona." Doc. 41-3 at 2.

Moreover, the distinctions between Plaintiffs' relationship to the potential sale of NGS and CAWCD's contractual obligations in *CAWCD v. EPA* illustrate how Plaintiffs fail to show causation and redressability here. In *CAWCD v. EPA*, the Ninth Circuit found that the Final Rule was the direct cause of CAWCD's *liability*. "While CAWCD's contractual obligations may provide the basis for its economic liability for the increased costs imposed by the Final Rule, that hardly means that the Final Rule itself is not the direct cause of that liability." *CAWCD v. EPA*, 990 F.2d at 1538. There, CAWCD had a legal relationship with an owner of NGS which obligated it to bear the cost of compliance with the Final Rule at issue in the case. Further, the Ninth Circuit found that CAWCD's "economic injury [was] likely to be redressed by a favorable decision since elimination of the Final Rule would necessarily eliminate the increased financial burden the rule causes." *Id.* Plaintiffs do not

and cannot allege such a causal link here between their interests and the relief sought; where Plaintiffs are not involved in the sale process, a harm to the "process" that is not an actual and proximate cause of NGS closure does not harm them. "[W]here the causal chain involves numerous third parties whose independent decisions collectively have a significant effect on plaintiffs' injuries, … the causal chain is too weak to support standing." *Washington Environmental Council v. Bellon*, 732 F.3d 1131 (2013) (quoting *Native Vill. Of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 867 (2012) (alterations original)). Indeed, Middle River, the potential buyer that Plaintiffs reference 20 times in their response, has backed out of negotiations to purchase NGS.[1]

The Plaintiffs have not met their burden in pleading the "irreducible constitutional minimum" requirements for Article III standing. *See Lujan*, 504 U.S. at 560. Rather, they have alleged that CAWCD's purchasing decisions cause injury to a sale process in which they claim no legal interest. Accordingly, Plaintiffs fail to establish this Court's Article III jurisdiction to hear this case.

III. THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO JOIN A REQUIRED PARTY UNDER FED. R. CIV. P. 19

The Community showed in its motion to dismiss that the United States is required to be joined and cannot be joined here. Doc. 27 at 16-17. Plaintiffs do not squarely dispute that the United States is a required party. Plaintiffs argue instead that the Secretary of the Interior, the Secretary of Energy, the Navajo Nation, and "CAP Water Buying Tribes" are not required parties, Br. at 34-35. And even as to the Secretary of the Interior, the Plaintiffs' arguments are incorrect.

First, Defendants argue that the Secretary cannot be "required" under Rule 19(a)(1)(B) unless he affirmatively claims an interest in the litigation. Br. at 33. But Rule 19 requires only that the absent party "claim[] an interest *relating to the subject of* the

[1] See Sept. 20, 2018 Press Release, *available at* https://www.srpnet.com/newsroom/releases/092018.aspx.

action," not that it claim an interest in the litigation directly. *See* Fed. R. Civ. P. 19(a)(1)(B). Thus, in *EEOC v. Peabody Western Coal Co.*, 610 F.3d 1070, 1081-82 (9th Cir. 2010), the Ninth Circuit held that the Secretary of the Interior was a "required" party under Rule 19(a)(1)(B) despite not claiming an interest in the litigation itself and not being a party to the leases at issue. *Accord, e.g., Shermoen v. United States*, 982 F.2d 1312, 1317 (9th Cir. 1992) ("[T]he finding that a party is necessary to the action is predicated only on that party having a claim to an interest."). In *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030 (9th Cir. 1983), cited by Plaintiffs, the Court itself analyzed the Government's unasserted interest: "The Government … has never asserted a formal interest in either the subject matter of this action *or* the action itself" so the Court "will take a closer look at the nature of the Government's interest in this dispute." *Id.* at 1044 (emphasis added). And "the United States has a concrete interest in the judicial interpretation of the statutes and agreements" that govern CAWCD acting as operating agent of the CAP. *Ak-Chin Indian Community v. CAWCD,* No. CV-17-00918-PHX-DGC, 2017 WL 3190783 at *4 (D. Ariz. July 27, 2017) (slip op.).

Plaintiffs also suggest that the Secretary is necessary only "in cases seeking to enforce contracts" to which the Secretary is a party. Br. at 35. In making this argument, Plaintiffs ignore the language of the only case they cite: "There is no precise formula for determining whether a particular nonparty should be joined under Rule 19(a) … The determination is heavily influenced by the facts and circumstances of each case." *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 547 F.3d 962 (9th Cir. 2008)[2] (quoting *Bakia v. County of Los Angeles*, 687 F.2d 299, 301 (9th Cir. 1982) (per curiam)). They also ignore the explicit contractual foundation for their own complaint

[2] Plaintiffs cite *Cachil Dehe Band of Wintun Indians of Colusa Indian Cmty. v. California*, 536 F.3d 1034 (9th Cir. 2008), but that opinion was amended and superseded on denial of rehearing in *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 547 F.3d 962 (9th Cir. 2008).

against CAWCD, which is based solely on CAWCD having contractually assumed the Secretary's duties. *See* Doc. 1 ¶ 2.

Plaintiffs argue further that the Secretary is not necessary because CAWCD asserts authority to make power purchasing decisions without the Secretary's consent. But the scope of the purchasing authority claimed by CAWCD does not change the United States' interests, or the fact that the allegations here are based on the Secretary's duties under the Basin Project Act. *See id.*

Finally, Plaintiffs argue that the United States could be joined pursuant to the waiver of sovereign immunity in the Administrative Procedure Act. Br. at 36. But the complaint does not plead a claim under that Act and therefore the waiver of sovereign immunity there does not apply. It is not feasible to join the United States here, and equity and good conscience weigh in favor of dismissal to protect the United States' sovereign immunity. *See* Fed. R. Civ. P. 19(b).

CONCLUSION

The complaint should be dismissed.

RESPECTFULLY SUBMITTED this 24th day of October 2018.

GILA RIVER INDIAN COMMUNITY

By s/ *Thomas L. Murphy*
Linus Everling
Thomas L. Murphy

CERTIFICATE OF SERVICE

On October 24, 2018, I transmitted this document for filing at the United States District Court for the District of Arizona through its ECF system and for transmission to counsel of record registered for electronic filing.

s/ *Thomas L. Murphy*