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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

Ak-Chin Indian Community,

 Plaintiff,

 v.
 Maricopa-Stanfield Irrigation & Drainage
 District; Central Arizona Irrigation &
 Drainage District; United States of America.

 Defendants.

Case No.: 2:20-cv-00489-JJT

**CENTRAL ARIZONA IRRIGATION
 & DRAINAGE DISTRICT'S
 RESPONSE TO UNITED STATES'
 MOTION TO DISMISS CAIDD'S
 CROSSCLAIM AGAINST THE
 UNITED STATES**

Central Arizona Irrigation & Drainage
 District,

 Defendant/Counterclaimant,

 v.
 Ak-Chin Indian Community,

 Plaintiff/Counterdefendant,

[Oral Argument Requested]¹

Central Arizona Irrigation & Drainage
 District,

 Defendant/Cross-Claimant,

 v.
 United States of America,

 Defendant/Cross-Defendant.

Central Arizona Irrigation & Drainage District ("CAIDD") hereby responds to the
 United States' Motion to Dismiss CAIDD's Crossclaim Against The United States
 ("Motion"). The Motion over-states the reach of the United States Supreme Court's holding

¹ Counsel for CAIDD is presently in month four of a five-month virtual trial, which
 proceeds from 9 a.m. to 4:45 p.m. Monday through Thursday, with daily lunch breaks from
 12-1:30 p.m. Counsel respectfully requests that oral argument be set on Friday if possible,
 or during the lunch hour or in the later afternoon to allow counsel to appear.

1 in *Orff*,² and ignores a recent decision of this very court, which ***rejected*** a motion to dismiss
 2 a counterclaim for declaratory relief against the United States in substantially similar
 3 circumstances. *Roosevelt Irr. Dist. v. United States, et al*, 2015 WL 13747125, *3-4 (Ariz.
 4 D. November 16, 2015) (rejecting the United States’ claim that § 390uu does not allow a
 5 declaratory relief claim after the United States is joined in the proceedings) [hereinafter,
 6 “*RID*”]. This Court’s previous, well-reasoned decision in *RID* applies with equal force
 7 under the facts of this case. The Motion should be denied.

8 **I. BACKGROUND**

9 By their claims, the Ak-Chin maintain that the groundwater introduced into the Santa
 10 Rosa Canal by CAIDD and co-Defendant Maricopa-Stanfield Irrigation District (“MSIDD”
 11 and collectively with CAIDD, the “Districts”) is degrading the water quality before waters
 12 are delivered to the Ak-Chin Reservoir, then further distributed throughout the Reservation.
 13 As a result of the alleged degradation, the Ak-Chin assert numerous common law tort-based
 14 claims, and seek an injunction to prevent the Districts from pumping groundwater into the
 15 Santa Rosa Canal. *See* Amended Complaint at ¶ 105 (Doc. # 30).

16 After the Districts filed their Motions to Dismiss, this Court directed that the United
 17 States must be joined in these proceedings. *See* September 14, 2020 Order on Motions to
 18 Dismiss (Doc. # 29). The Ak-Chin thereafter filed an Amended Complaint naming the
 19 United States, asserting it waived its sovereign immunity pursuant to 43 U.S.C. § 390uu
 20 and asserted a claim for declaratory judgment against the United States related to, among
 21 other things, a 1985 reclamation contract between the Ak-Chin and United States regarding
 22 delivery of water to the Ak-Chin by the United States (the “1985 Contract”). Amended
 23 Complaint ¶¶ 14, 75-78 (Doc. # 30).

24 By its Answer, Counterclaim and Crossclaim to the Ak-Chin Amended Complaint,
 25 CAIDD denied all liability claimed by the Ak-Chin. CAIDD also asserted a counterclaim
 26 against the Ak-Chin and, pertinent to this Motion, alleged a crossclaim for declaratory relief
 27

28 ² *Orff v. United States*, 545 U.S. 596, 601-03 (2005).

1 against the United States, seeking a declaration from this Court that the contracts between
 2 the Ak-Chin and the United States, including the 1985 Contract,³ do not impose any duties
 3 or obligations upon CAIDD regarding water quality in the Santa Rosa Canal. *Id.* at
 4 Crossclaim ¶¶ 19-25.

5 The United States filed the instant Motion on December 17, 2020. (Doc. #56). On
 6 January 4, 2021, the Ak-Chin filed a Second Amended Complaint, which names the United
 7 States and asserts that the United States has waived sovereign immunity pursuant to 43
 8 U.S.C. § 390uu, but **removes** the claim for declaratory judgment against the United States.
 9 Second Amended Complaint at ¶ 14 (Doc. # 60). Thus, CAIDD's crossclaim is currently
 10 the only claim for relief pending in these proceedings against the United States.

11 II. ARGUMENT

12 a. Standards Applicable to a Rule 12(b)(1) Motion to Dismiss.

13 As CAIDD noted in its response to the Motion to Dismiss filed by the Ak-Chin
 14 asserting sovereign immunity (Doc. # 46), although the doctrine of sovereign immunity has
 15 been described as quasi-jurisdictional, federal courts have evaluated assertions of sovereign
 16 immunity under Rule 12(b)(1). *See Pistor v. Garcia*, 791 F.3d 1104, 1111 (9th Cir. 2015).

17 b. This Court has already determined that Joinder of the United States Waives 18 Sovereign Immunity In These Proceedings and Authorizes CAIDD's Crossclaim.

19 CAIDD does not dispute that the United States must have waived its sovereign
 20 immunity to be named as a party in these proceedings. The parties also do not appear to
 21 dispute that the United States was joined in this litigation by order of the Court, which
 22 determined that "Section 390uu waives the United States' sovereign immunity for joinder
 23 to the claims in Ak-Chin's original complaint." Motion at p. 5 (Doc. # 56); *see also*
 24 September 14, 2020 Order at pp. 10-11 (Doc. #29). In dispute is the scope of the United
 25 States' waiver of sovereign immunity.

26 This Court's determination in *RID* as well as this Court's September 14, 2020 Order

27 ³ The 1985 Contract is attached as Exhibit A to the Ak-Chin Second Amended
 28 Complaint. (Doc. #60).

1 demonstrate that CAIDD's crossclaim is properly maintained because the United States'
2 joinder results in a waiver sovereign immunity in these proceedings. As this Court has
3 previously observed, "sovereign immunity is waived under § 390uu when the United States
4 is joined as a 'necessary party defendant.'" *See RID*, 2015 WL 13747125 at *4. The *RID*
5 case involved "a declaratory judgment action to determine whether under a series of
6 contracts, RID may continue pumping from certain wells—the East Side Wells—located
7 within the boundaries of the [Salt River Valley Water Users'] Association and the Salt River
8 Federal Reclamation Project (the 'Project') after 2020." *Id.* at *1. This Court determined
9 that the Plaintiff, who was not a direct party to the contracts that were the subject of the
10 declaratory relief claim at issue, was nonetheless entitled to join the United States in the
11 litigation and maintain its declaratory judgment claim against the United States because the
12 United States was a necessary party to the proceedings, holding that "[b]ecause this action
13 involved the adjudication of the parties' rights under contracts made pursuant to Federal
14 reclamation law repayment contracts as defined in § 390bb, the § 390uu waiver applies."
15 *Id.* at *5.

16 Similarly here, although CAIDD is not a direct party to the contract at issue in its
17 declaratory relief crossclaim, it is seeking a declaration of parties' rights under contracts
18 made pursuant to Federal reclamation law. The Ak-Chin and United States are parties to
19 the 1985 Contract. The 1985 Contract is a reclamation contract related to deliveries of
20 water for agricultural use to the Ak-Chin. Although the 1985 Contract, and the water
21 settlement agreement it references, are between the United States and the Ak-Chin, the Ak-
22 Chin has named CAIDD in these proceedings and maintains that **CAIDD** (not the United
23 States) owes obligations to the Ak-Chin related to the water quality present in the Santa
24 Rosa Canal. CAIDD disagrees, and this Court is vested with authority to determine who is
25 correct pursuant to Section 390uu.

26
27 In this matter, the Court has already determined that the United States is a necessary
28

1 party such that it must be joined because “[Section 390uu] waives the United States’
2 sovereign immunity from a declaratory relief action brought by a party to a contract with
3 the United States to establish the party’s rights under that contract.” See September 14,
4 2020 Order at p. 11 (Doc. # 29) (quoting *State of Wyo. v. United States*, 933 F. Supp. 1030,
5 1038 (D. Wyo. 1996)). As the United States was properly joined in these proceedings
6 based upon its waiver of sovereign immunity under the circumstances, CAIDD’s crossclaim
7 may proceed because it, like the plaintiff in *RID*, seeks a declaration of the “contractual
8 rights of a contracting entity and the United States;” here, the Ak-Chin. *Id.* at **5-6.

9 The authority cited by the United States does not change this result. The *Smith* case
10 referenced by the United States focusses on third party beneficiary status with only a
11 fleeting reference to sovereign immunity waivers under § 390uu that, in fact, do not support
12 the United States’ arguments. See *Smith v. Central Ariz. Water Cons. Dist.*, 418 F.3d 1028,
13 (9th Cir. 2005) (observing, “Congress had expressly waived the government’s sovereign
14 immunity for suits seeking to interpret contractual rights in federal water reclamation
15 contracts where the United States is a necessary party defendant, the waiver was limited to
16 suits involving the rights of the ‘contracting parties’”). There is no limitation in *Smith*
17 regarding the nature of claims that may be alleged against it once the United States is joined.

18 The United States Supreme Court’s *Orff* opinion does not assist the United States
19 because it simply held that the United States may be joined where it is a necessary party.
20 The Court did not evaluate to what extent the United States, once so joined, may be sued
21 by other parties. *Orff*’s conclusory paragraph notes that Section 390uu allows “joinder of
22 the United States as a necessary party defendant to permit a complete adjudication of the
23 rights under a reclamation contract[,]” which indicates that, once the United States is joined,
24 claims, counterclaims or crossclaims related to the rights of the reclamation contract at issue
25 should be litigated for a full and final resolution. *Orff*, 545 U.S. at 604.

26
27 CAIDD acknowledges that Judge Campbell reached a different conclusion from this
28

1 Court with respect to the scope of Section 390uu waivers of sovereign immunity in *Ak-Chin*
 2 *Indian Comm. v. Cent. Ariz. Water Conser. Dist.*, 2018 WL 397233 at **2-4 [hereinafter,
 3 the “2018 *Ak-Chin Indian Comm* case”]. That ruling is not binding upon this Court,⁴
 4 however, and is based upon an analysis that is not supported by any of the authority
 5 specifically addressing § 390uu. Moreover, the 2018 *Ak-Chin Indian Comm* case ignores
 6 this Court’s holding in *RID*, and does not detail how or why it reaches a contradictory result.

7 Finally, the United States asserts (Motion at p. 8, fn. 2, Doc #56) that the crossclaim
 8 for declaratory relief does not confer jurisdiction to this Court. This argument ignores that,
 9 by its prior order on the Districts’ Motions to Dismiss, this Court determined that it “has
 10 jurisdiction through at least two avenues: 28 U.S.C. § 1331 and § 1362.” September 14,
 11 2020 Order at p. 4 (Doc. #29).

12 The Motion should be denied, or, as further detailed in Section c; if the Motion is
 13 granted, this entire litigation should be dismissed due to the Ak-Chin’s recently-filed
 14 Second Amended Complaint, which does not assert any claims or seek any relief against
 15 the United States.

16 **c. If the Court Is Inclined To Grant The United States’ Motion, This Entire**
 17 **Case Should Be Dismissed.**

18 CAIDD also notes the odd procedural development in this case that would dictate
 19 dismissal of this entire action should the United States’ Motion succeed. As noted above,
 20 in the Second Amended Complaint, the Ak-Chin no longer assert any claims against the
 21 United States. CAIDD’s crossclaim is thus the only relief alleged against the United States
 22 in these proceedings. *See* Second Amended Complaint at ¶¶ 77-103 (alleging four claims
 23 and seeking relief against the Districts only) (Doc. #60). Thus, although the United States
 24 appears in the Ak-Chin caption as a “Defendant,” there are claims and no relief sought by
 25 the Ak-Chin from the United States in this litigation.

26 To the extent the Court is inclined to agree with the United States that its sovereign

27 ⁴ *See F.T.C. v. Neovi, Inc.*, 604 F.3d 1150, 1156 (9th Cir. 2010)
 28 (unpublished district court orders not precedential); 9th Cir. R. 36-3(a) (“Unpublished
 dispositions and orders ... are not precedent”).

immunity bars maintenance of CAIDD's crossclaim, there will be no affirmative relief pending in this litigation against the United States. The attempt by the Ak-Chin to plead around this issue by identifying the United States as joined per this Court's Order without thereafter asserting any claims against the United States does not comport with the requirements of Rule 19 or this Court's September 14, 2020 Order (Doc. #29). This Court's determination that the United States is a necessary party that must be joined was based upon the fact that:

[a] judgment against Defendants could also impinge on their rights to use the Canal to convey pumped groundwater—rights that are allegedly born out of their contracts with the United States. Accordingly, *the Court cannot accord complete relief to either Plaintiff or Defendants in the absence of the United States.*

September 14, 2020 Order at p. 10 (Doc. #29) (emphasis supplied). If CAIDD's crossclaim is dismissed, the Court (and the parties) will be right back where they were in September 2020. Any judgment issued in this case would *not* be directed to the United States, as it has no claims against it, and thus complete relief would be unavailable to the plaintiff or defendant. Thus, in the event this Court determines that the United States' waiver of sovereign immunity is as circumscribed as it asserts, this entire action should be dismissed because the United States—a necessary party to these proceedings—would no longer be a party.

III. CONCLUSION

This Court's decision in *RID* resolves the dispute and does so in CAIDD's favor. The United States' Motion should be denied. Alternatively, if this Court agrees with the United States, then this entire litigation should be dismissed because the Ak-Chin have not pled any affirmative claims against the United States despite its previous assertions that it would do so in order to avoid the jurisdictional bar of Rule 19, Federal Rules of Civil Procedure.

DATED this 15th day January, 2021.

1 **TSL LAW GROUP, PLC**

2 By /s/ Lee A. Storey

3 Lee A. Storey

4 Sara V. Ransom

5 *Attorneys for the Central Arizona Irrigation*
6 *& Drainage District*

7 **CERTIFICATE OF SERVICE**

8 I hereby certify that on 15th day January, 2021, I electronically transmitted the foregoing
9 document to the Clerk's Office using the CM/ECF System and for filing transmittal of a
10 Notice of Electronic Filing to the CM/ECF registrants on record

11 /s/ Tanya M. Ferreira