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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; and United States of America,

Defendants.

Case No.: CV-20-00489-JJT

AK-CHIN'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS CAIDD'S COUNTERCLAIM

As set forth in the Ak-Chin Indian Community's (Ak-Chin or the Community) Motion to Dismiss, Defendant Central Arizona Irrigation and Drainage District's (CAIDD) counterclaim is barred by tribal sovereign immunity and should be dismissed due to lack of subject matter jurisdiction. In response, CAIDD erroneously argues that Ak-Chin waived its immunity from CAIDD's counterclaim by filing the instant lawsuit.[1] CAIDD's argument relies heavily on an opinion from this Court that has been substantially cabined by subsequent Ninth Circuit precedent that controls the outcome on this issue. The established, settled law of this Circuit holds that the mere act of filing of a lawsuit does *not* waive a tribe's immunity from counterclaims—even those that ostensibly mirror the tribe's claims (which CAIDD's does not). The Court should therefore grant Ak-Chin's Motion to Dismiss CAIDD's counterclaim.

Additionally, because Ak-Chin has mounted a facial attack on the Court's subject matter jurisdiction over CAIDD's counterclaim, the declaration and exhibits that CAIDD submitted in support of its response are not properly before the Court. In any event, those documents go to the merits of the dispute and have no relevance to Ak-Chin's sovereign immunity and its effect on this Court's subject matter jurisdiction.

I. CAIDD's counterclaim is barred by sovereign immunity.

A. *Quinault* is the controlling legal framework for analyzing Ak-Chin's sovereign immunity.

In its response, CAIDD relies heavily on *Tohono O'odham Nation v. Ducey*, 174 F. Supp. 3d 1194 (D. Ariz. 2016), as authority to argue that its counterclaim is not barred by Ak-Chin's sovereign immunity because it supposedly mirrors Ak-Chin's claims. Doc. 46, *passim.* Not only is *Tohono O'odham* not binding, but the Ninth Circuit's subsequent decision in *Quinault Indian Nation v. Pearson for Estate of Comenout*, 868 F.3d 1093 (9th Cir. 2017), supersedes it.

In *Quinault*, the Ninth Circuit concluded, contrary to *Tohono O'odham*, that the Quinault Nation was immune from all the counterclaims asserted, even one that "mirrored"

[1] CAIDD's Response to Ak-Chin's Motion to Dismiss, Doc. 81, purports to "incorporate" its previous Response, Doc. 46, as well as to add on to its previous response. Ak-Chin accordingly responds to both opposition briefs herein.

the Nation's claims. *Id.* at 1098. The Court explained that with respect to the four counterclaims at issue, three went "beyond the contours" of the Nation's suit and thus were barred by immunity. *Id.* It also analyzed a fourth counterclaim for declaratory judgment which the Court characterized as "mirror[ing] the merits of the RICO controversy that the Nation asked the court to resolve." *Id.* With respect to this counterclaim, the Ninth Circuit held that "while the Nation took the risk that the court would rule for the [defendant] on the merits and deny the Nation's requested legal relief, the Nation did not waive its immunity because it did not consent to any counterclaims." *Id.* The Ninth Circuit's holding—that a counterclaim mirroring a tribe's underlying claims is also barred by sovereign immunity—is both crystal clear and directly at odds with CAIDD's *Tohono O'odham*-based argument, as other courts have noted. In *Alaska Logistics, LLC v. Newtok Village Council*, 357 F. Supp. 3d 916 (D. Alaska 2019), for example, the court explained that while *Tohono O'odham* "suggest[s] only that a tribe's filing of a lawsuit 'can constitute a limited waiver with respect to issues the [tribe] itself has put at issue,'" *Quinault* "does not support even that limited proposition." *Id.* at 926. Rather, "the Circuit Court held that the Quinault Indian Nation did not waive its immunity even as to a counterclaim that did not 'go beyond the contours of the Nation's suit.'" *Id.*

CAIDD argues that *Quinault* "cannot be read . . . as a ruling that a counterclaim can never fall clearly within the contours of a tribe's waiver of immunity, particularly where it mirrors the tribe's claims." Doc. 81, at 4. To the contrary, consistent with 80 years of case law, *Quinault* could not be clearer on this point—simply filing a lawsuit does not waive tribal sovereign immunity from counterclaims, even those that are within the contours of the tribe's claims—and it is binding precedent that controls this case. *Quinault*, 868 F.3d at 1097; *see also United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 513 (1940); *McClendon v. United States*, 885 F.2d 627, 630 (9th Cir. 1989); *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991); *Chemehuevi Indian Tribe v. Cal. State Bd. of Equalization*, 757 F.2d 1047, 1051 (9th Cir. 1985), *rev'd on other grounds*, 474 U.S. 9 (1985). To the extent that *Tohono O'odham* holds otherwise, it is not good law. CAIDD's argument is without merit, and its counterclaim should be dismissed.

B. CAIDD's claim does not mirror Ak-Chin's claims.

In addition to being wrong as a matter of law, CAWCD's contention that "sovereign immunity is waived when claims are mirrored" (Doc. 81, at 4) is also irrelevant because CAIDD's counterclaim does not mirror Ak-Chin's claims. In contrast to *Tohono O'odham*, where the Nation did not dispute that the counterclaims sought the inverse of the relief the Nation sought, here CAIDD's counterclaim is far broader than simply the inverse of Ak-Chin's claims and relief sought.

In its Second Amended Complaint, Ak-Chin asks the Court to permanently enjoin the Districts from mixing poor quality groundwater with Ak-Chin Settlement water or otherwise interfering with the Community's right to take delivery of CAP water. Doc. 60, at 16. By contrast, CAIDD's counterclaim asks the Court for an order "enjoining the Ak-Chin from seeking to impose water quality standards on CAIDD that it has no requirement to deliver to the Ak-Chin." Doc. 67, ¶ 27. Whereas Ak-Chin asks the Court to enjoin specific, discrete actions by the Districts, CAIDD asks the Court to broadly prevent Ak-Chin from seeking to impose any water quality standards on CAIDD. CAIDD's requested relief is thus in no way the "exact opposite" of the relief sought by Ak-Chin, and *Tohono O'odham* would be inapplicable even if it remained good law.

C. The remaining cases cited by CAIDD are distinguishable.

Finally, CAIDD relies on several cases that are simply irrelevant. For example, it cites *Rupp v. Omaha Indian Tribe*, 45 F.3d 1241 (8th Cir. 1995), a case the Ninth Circuit distinguished in *Quinault* for reasons that apply here as well. Doc. 46, at 6. In *Rupp*, where the Eighth Circuit allowed counterclaims to quiet title and for damages to be asserted against a tribe that filed a quiet-title action, "the tribe . . . did more than file a lawsuit: it invoked the district court's equitable power to determine the status of land and explicitly asked that the court order the defendants to 'assert any claims in the disputed lands they possessed against the Tribe.'" *Quinault*, 868 F.3d at 1098 (quoting *Rupp*, 45 F.3d at 1244). The Quinault Nation's action of merely filing suit, the Ninth Circuit observed, "d[id] not rise to that level of unequivocal consent to the declaratory judgment counterclaim." *Id*. Here, *Rupp* can be

distinguished for the same reason: Ak-Chin has not asked the court to quiet title to a disputed *res* or to order the defendants to assert any claims that they have against the Community. *Rupp* is therefore inapposite.

Likewise, CAIDD relies upon *United States v. Oregon*, 657 F.2d 1009 (9th Cir. 1981), another case that the Ninth Circuit distinguished in *Quinault* and that does not apply here. 868 F.3d at 1098-99. In *Oregon*, the Court held that the Yakama Tribe waived its immunity by intervening in a suit to protect its treaty fishing rights and by expressly agreeing to submit issues to federal court for determination. 657 F.2d at 1011. As the Ninth Circuit pointed out in *Quinault*, the parties in *Oregon*, including the tribe, "reached a suitable agreement, which provided for continuing jurisdiction in the district court over future disputes." *Quinault*, 868 F.3d at 1099. Here, however, there is no such agreement.

CAIDD also argues that *Oregon* is not distinguishable as an *in rem* case, because both *Oregon* and the instant case are instead "***analogous*** to an *in rem* case," making *Oregon* applicable. Doc. 81, at 2 (emphasis original). But whether *Oregon* was a bona fide *in rem* case or "analogous" to an *in rem* case is of no import; the relevant distinction is that here, unlike in *Oregon*, Ak-Chin has not put any *res* at issue before the Court. In that case, the original action sought a declaration of treaty fishing rights, thereby seeking to apportion a fishery between the State and competing tribes. 657 F.2d at 1015. It was by placing the *res* at issue that the Court found that the Tribe had consented to suit. *See id.* at 1015-16 (explaining that a court "possessed of the res in a proceeding in rem, such as one to apportion a fishery, may enjoin those who would interfere with that custody" (citation omitted)). In contrast, Ak-Chin's federal tort claims against CAIDD allege interference with a senior water rights, nuisance, trespass, and unjust enrichment and place no *res* at issue before the Court.[2] *Oregon* is thus inapposite.

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[2] CAIDD contends that "Ak-Chin points to nothing from which one can infer a duty in CAIDD to provide any water to Ak-Chin, at all" and that Ak-Chin "does not explain why CAIDD would be burdened by duties to be found in an agreement between the United States and Ak-Chin" as "CAIDD is not even the water master." Doc. 81 at 6, fn. 2. CAIDD misconstrues the nature of Ak-Chin's claims. Neither Ak-Chin's claims against CAIDD nor MSIDD are based

In any event, the Ninth Circuit and other courts have expressed misgivings regarding *Oregon*, describing it as a case that "tests the outer limits of [the Supreme Court]'s admonition against implied waivers" of tribal sovereign immunity. *Quinault*, 868 F.3d at 1099 (alteration in original) (quoting *Pan Am. Co. v. Sycuan Band of Mission Indians*, 884 F.2d 416, 420 (9th Cir. 1989)); *Alaska Logistics*, 357 F. Supp. 3d at 926-27 (explaining that "the Ninth Circuit has expressed reluctance to apply the *Oregon* court's reasoning in distinguishable contexts"). CAIDD's argument for an expansive reading of *Oregon* runs directly contrary to the Ninth Circuit's subsequent cabining of that decision and should not be accepted by this Court.

Finally, CAIDD asserts that *McClendon v. United States*, 885 F.2d 627 (9th Cir. 1989), is instructive to establish that Ak-Chin broadly waived sovereign immunity as to any dispute between the parties over "the rights and duties concerning the water at issue in this case." Doc. 81, at 6. That decision, however, offers no support to CAIDD's position. *McClendon* confirms only that when a tribe files a lawsuit, it "consents to the Court's adjudication of the merits of ***that particular controversy***." 885 F.2d at 630 (emphasis added). In other words, a tribe cannot initiate a lawsuit and then claim not to be bound by an adverse determination on the very issue it has brought before the court. *Id.* ("By initiating the 1972 action, the Tribe accepted the risk that it would be bound by an adverse determination of ownership of the disputed land."). As the Ninth Circuit makes clear in that case, however, a tribe's waiver of sovereign immunity by bringing suit "is not necessarily broad enough to encompass related matters, even if those matters arise from the same set of underlying facts." *Id.* Moreover, consent to adjudication of the dispute brought forth by a tribe's complaint does not automatically authorize counterclaims on related matters. *Id.* (explaining that the Ninth Circuit "consistently [had] held that a tribe's participation in litigation does not constitute consent to counterclaims asserted by the

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upon a duty to provide water nor the role of the water master; rather, they are based upon the duty not to degrade Ak-Chin's water, which is a duty that is owed both in federal common law tort and because of the senior nature of Ak-Chin's water right. *See* Doc. 60, ¶ 57 (alleging the Districts' pumping of groundwater into the Santa Rosa Canal degrades the Ak-Chin Settlement Water and prevents Ak-Chin from receiving CAP or equivalent quality water that is suitable for agriculture).

defendants in those actions"). And *McClendon* correctly held that the Tribe had not consented to the adjudication of a related issue simply by initiating the action. *Id.* at 631. To the extent that *McClendon* applies here, it instructs that Ak-Chin has not waived sovereign immunity to CAIDD's counterclaim.

In sum, the cases offered by CAIDD do not further its claim that Ak-Chin has waived immunity. *Quinault*, however, is directly on point and controlling, and it clearly establishes that Ak-Chin did not waive its sovereign immunity by initiating litigation against the Districts. CAIDD's counterclaim must be dismissed.

II. CAIDD's evidentiary submissions are improper and irrelevant and should not be considered.

In its response, CAIDD included a declaration purporting to address the merits of its counterclaim, asserting that the Court may consider it and "other matters" beyond the pleadings. This evidence should be disregarded both because it is not properly before the Court in the context of Ak-Chin's facial attack on the Court's subject matter jurisdiction over CAIDD's counterclaim and because it purports to address merits issues that are irrelevant to the Court's subject matter jurisdiction in any event.

Ak-Chin's Fed. R. Civ. P. 12(b)(1) motion makes a facial, not factual, attack on the Court's subject matter jurisdiction over CAIDD's counterclaim. In other words, Ak-Chin is not attacking the truth of CAIDD's allegations as grounds for dismissal. Rather, it is arguing that CAIDD's allegations contained in its counterclaim are insufficient on their face and that its counterclaim is barred by tribal immunity. *See Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). By contrast, in a factual attack, the challenger to jurisdiction disputes the truth of the allegations necessary to give rise to federal jurisdiction. *Id.* In resolving a factual attack, the Court may rely on extrinsic evidence beyond the complaint. *Id.* Here, in the absence of a factual attack on CAIDD's allegations, there is no reason for the Court to consider any evidence in connection with this motion. *See, e.g., Gesty v. United States*, 400 F. Supp.3d 859, 865 (D. Ariz. 2019) (finding that because the challenge involved a facial attack on jurisdiction, as opposed a factual one, the court would only consider the

complaint as true); *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) ("The district court resolves a facial attack as it would a motion to dismiss under Rule 12(b)(6): Accepting the plaintiff's allegations as true and drawing all reasonable inferences in the plaintiff's favor, the court determines whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction.")

CAIDD relies on *Pistor v. Garcia*, 791 F.3d 1104 (9th Cir. 2015), in support of its argument that the Court should look outside the pleadings. *Pistor* is inapposite, however, because it involved a factual challenge to jurisdiction, and the materials submitted outside the pleadings directly impacted whether the tribal defendants were immune from suit based on whether they were acting in their individual or official capacity in carrying out the allegedly unlawful acts. *Id.* at 1111.

The impropriety of CAIDD's evidentiary submissions notwithstanding, it is well-understood that questions of tribal sovereign immunity are jurisdictional in nature and must be resolved regardless of the merits of the claim. *Chemehuevi Indian Tribe*, 757 F.2d at 1051. CAIDD's declaration does not address jurisdiction. It only purports to address the merits of its counterclaim. The declaration blames Ak-Chin for its own water quality problems, implying that Ak-Chin has caused the water quality degradation giving rise this lawsuit. Doc. 46-1, ¶ 10. It further states that the declarant "cannot recall an instance wherein a member of CAIDD complained that water quality from the Santa Rosa Canal was impeding the growth of any crops," *id.*, ¶ 5, and that "[t]he Ak-Chin are aware . . . that any waters introduced into the Santa Rosa Canal while it traverses CAIDD's boundaries do not result in degraded water quality." *Id.*, ¶ 6.[3] Unlike in *Pistor*, the assertions in the declaration and the exhibits thereto are

[3] CAIDD's declaration is grossly misleading. It states that CAIDD shared the water quality results attached to the declaration with Ak-Chin in 2018, when Ak-Chin actually first received these results from CAIDD just a few weeks before CAIDD filed its response to Ak-Chin's original motion to dismiss. In addition, CAIDD relies on water quality results from the Fall of 2018 to claim that it is not degrading Ak-Chin's CAP water, but from October 2018 to February 2019 the parties had a temporary agreement in place pursuant to which CAIDD and MSIDD agreed to refrain from pumping groundwater into the Santa Rosa Canal from their wells that had particularly poor quality. Before and after this time period, no such agreement

immaterial to the question of sovereign immunity, and instead attempt to improperly argue the merits of CAIDD's counterclaim, which are not at issue here.[4] Because the documents submitted outside of the pleadings and the information contained therein are not germane to Ak-Chin's motion, the Court should not consider them.

III. Conclusion

CAIDD's counterclaim is barred by controlling Ninth Circuit precedent holding that the mere filing of a lawsuit does not waive tribal sovereign immunity. *Quinault*, 868 F.3d at 1098. Because CAIDD relies upon outdated and clearly distinguishable cases, it cannot meet its burden to establish that Ak-Chin has waived its sovereign immunity. CAIDD's counterclaim should be dismissed.

Dated this 31st day of March, 2021.

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was in place; therefore, the test results CAIDD relies upon are not probative of the quality of the water before this interim agreement or since.

[4] CAIDD alleges that Ak-Chin "repeatedly" indicated that the Santa Rosa Canal was constructed exclusively for Ak-Chin. Ak-Chin has never made this contention. In fact, its Second Amended Complaint states that the canal "was constructed for the purposes of delivering water from the CAP facilities to the Community and *also for irrigation of lands in Pinal County*." Doc. 60, ¶ 38 (emphasis supplied). Ak-Chin even cites to the same 1988 contract CAIDD attaches to its response.

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