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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Havasupai Tribe, Plaintiff, v. **Anasazi Water Co., L.L.C., *et al*,** Defendants.	**Plaintiff Havasupai Tribe's Response in Opposition to Joinder by Defendant City of Williams in Motions to Dismiss** Oral Argument Requested No. 3:16-cv-08290-GMS

Plaintiff, the Havasupai Tribe (the "Tribe"), by and through its undersigned attorneys, hereby responds to the Joinder by Defendant City of Williams ("Williams") in Motions to Dismiss by Halvorson-Seibold, Inc.; Hydro-Resources, Inc.; and Squire Motor Inns, Inc.; and Anasazi Water Co., L.L.C. (the "Joinder"), filed January 9, 2017. ECF No. 35.

I. ARGUMENT

Williams' Joinder first states that it joins the Motions to Dismiss filed by Defendants Halvorson-Seibold, Inc., Hydro-Resources, Inc., and Squire Motor Inns, Inc. ("Halvorson-Seibold Motion"), ECF No. 18, and by Anasazi Water Co., L.L.C. ("Anasazi Motion"), ECF No. 15. Joinder at 2. The Tribe hereby incorporates by reference its responses to those motions, including the procedural and factual backgrounds. ECF Nos. 62, 63 ("Anasazi Resp." and "H-S Resp.," respectively). For the reasons stated in those responses, this case should not be dismissed.

Williams also asserts its own arguments why this action should be dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, Joinder at 2–9, and under Rule 12(b)(7) and Rule 19 for failure to join indispensable parties, Joinder at 9–12. These arguments are largely duplicative of the arguments in the Halvorson-Seibold Motion and the Anasazi Motion, and thus have been addressed in the Tribe's responses to those earlier motions, which are incorporated by reference. However, Williams' Joinder makes a few additional arguments, to which the Tribe responds below.

A. The Tribe Has Stated a Claim Under Rule 12(b)(6)

Williams first argues that the Tribe has failed to state a claim under Rule 12(b)(6). Joinder at 2–9. In its response to the Halvorson-Seibold Motion, the Tribe has responded to this general argument and shown that it has stated a claim under the Rule 12(b)(6) standard, and there is clear precedent for the type of action brought by the Tribe. H-S Resp. at 4–12. However, Williams' Joinder raises a three additional arguments that merit a further response.

1. *The Tribe's Complaint Has Adequately Alleged an Injury-in-Fact*

First, Williams contends that the Tribe has insufficiently alleged an "injury in fact" because the Complaint alleges only "an abstract dispute about law . . . abstracted from any concrete actual or threatened harm." Joinder at 3 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). This is incorrect.

"Injury in fact" is a constitutional requirement of standing, which is a requirement for subject matter jurisdiction. *See Lujan*, 504 U.S. at 560–61; *Tagupa v. Bd. of Directors*, 633 F.2d 1309, 1311 (9th Cir. 1980). Although Williams frames its argument as a failure to state a claim under Rule 12(b)(6), Williams actually appears to be arguing here that this Court lacks subject matter jurisdiction under Rule 12(b)(1). To establish Article III standing:

> (1) a "plaintiff must have suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, ... and (b) actual or imminent, not conjectural or hypothetical"; (2) "there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly ... trace [able] to the challenged action of the defendant, and not ... the result [of] the independent action of some third party not before the court"; and (3) "it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision."

San Luis & Delta-Mendota Water Auth. v. United States, 672 F.3d 676, 700 (9th Cir. 2012) (quoting *Lujan*, 504 U.S. at 560–61).

The Tribe's Complaint alleges that "[t]he Tribe possesses aboriginal and federally-reserved water rights to the full flow of Havasu Creek and the springs and seeps on the Havasupai Reservation and in the Havasupai Traditional Use Lands." Compl. at ¶ 35. It

also asserts that Defendants' groundwater withdrawals from the R-aquifer "will reduce the flow of Havasu Springs and the other springs that originate from the R-aquifer, on a gallon-for-gallon basis" because "[n]early the entire outflow of the R-aquifer occurs on the Havasupai Reservation, in Havasu Canyon, and in Grand Canyon National Park." *Id.* at ¶ 55. Thus, the Tribe contends that that the Defendants' groundwater withdrawals "directly infringe the Tribe's water rights, and are causing harm and threaten to cause increased harm in the future to the Tribe's right and ability to utilize the Havasupai Waters, and to the traditional, cultural, natural, ecological and scenic values that attach to those waters, harm that is by its nature irreparable." *Id.* For purposes of motions under either Rule 12(b)(1) or Rule 12(b)(6), these allegations in the Complaint must be accepted as true. *See Carson Harbor Vill., Ltd. v. City of Carson*, 353 F.3d 824, 825 n.3 (9th Cir. 2004); *Brock v. United States*, 64 F.3d 1421, 1422 (9th Cir. 1995).

The Tribe's Complaint thus establishes that the Tribe has a legally-protected interest in the water in the R-aquifer, the source of the flow in Havasu Creek, and that Defendants' conduct is interfering with its rights and reducing the Tribe's water flow. This is sufficient to establish injury-in-fact. *See San Luis & Delta-Mendota Water Auth.*, 672 F.3d at 701–02 (finding reduction in water to be an injury in fact); *Laub v. U.S. Dep't of Interior*, 342 F.3d 1080, 1086 (9th Cir. 2003) (same). Further, the Tribe's allegations that Defendants' groundwater withdrawals will cause future harm to the Tribe is also sufficient for injury in fact. *See San Luis & Delta-Mendota Water Auth.*, 672 F.3d at 701–02 (finding threat of future water reductions constituted injury in fact); *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947–950 (9th Cir. 2002) (same). Williams'

argument that the Tribe has failed to establish an injury in fact must, therefore, be rejected.

2. *Cappaert and Other Cases Provide Clear Precedent for the Tribe's Claims*

Second, Williams argues that the Tribe's claim to water rights in the "full flow" of Havasu Creek and the springs, seeps, and streams on its reservation is not supported by *Cappaert v. United States*, 426 U.S. 128 (1976), "nor any other precedential authority." Joinder at 4. In fact, *Cappaert* is just one of many legal authorities that provides clear legal precedent and support for the Tribe's claims, as explained more fully in the Tribe's Response to Halvorson-Seibold's Motion. H-S Resp. at 5–8; (*citing, inter alia, Winters v. United States*, 207 U.S. 564, 576–77 (1908); *United States v. Adair*, 723 F.2d 1394, 1410–11, 1414 (9th Cir. 1983); *Colville Confederated Tribes v. Walton*, 647 F.2d 42, 47, 48, 53 (9th Cir. 1981); *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water Dist.*, No. EDCV 13-883-JGB, 2015 WL 1600065, at *1–*2 (C.D. Cal. Mar. 20, 2015)).

Williams appears to make two main arguments for why *Cappaert* does not support the Tribe's claims. First, Williams seems to argue that *Cappaert* does not support the Tribe's claims to the "full flow" of water on the Tribe's lands because *Cappaert* allowed some groundwater pumping to continue. Joinder at 5–7. Williams is correct that *Cappaert* did not prohibit all pumping by the defendant, but only pumping that the Court determined would interfere with the federally-reserved water rights appurtenant to Devil's Hole. *Cappaert*, 426 U.S. at 141 ("the level of the pool may be permitted to drop to the extent that the drop does not impair the scientific value of the pool as the natural

habitat of the species sought to be preserved."). There is nothing in the decision, however, which found that federally-reserved water rights could *never* encompass all the water in a system, nor did the Supreme Court find that groundwater pumping must always be allowed to occur to some degree, as Williams appears to be suggesting.

This is a fact issue, in large part. In this case, the Tribe has asserted that its federally-reserved water rights "necessarily include the full flow of the waters on the Havasupai Reservation and Traditional Use Lands, as any reduction in these flows would impair the purposes for which the reservation was created." Compl. at ¶ 50. *Cappaert* provides clear precedent that federal courts may not only recognize such federally-reserved rights by considering the purpose of the reservation, but also that federal courts may enjoin groundwater pumping that infringes those rights. 426 U.S. at 141–42; *see also Winters*, 207 U.S. at 576–77 (affirming decree enjoining interference with Tribe's water rights). Moreover, there is nothing in *Cappaert* that prevents the Tribe from seeking recognition of its rights to the "full flow" of these waters where the "full flow" has been impliedly reserved by Congress, as it has here.

Williams' second argument is that "[u]nlike *Cappaert*, where the *Winters* doctrine right was quantified, and thus served as a measure of the actual and immediate harm suffered by the government, no such right is determined, measured, or quantified here." Joinder at 7. This argument is nonsensical. *Cappaert* does not require that water rights be "determined" or "quantified" in some other proceeding before a claim can be brought. Quite the opposite, part of the *Cappaert* decision *was* a determination of the federally-reserved water rights possessed by the United States (measured, in that case, by the water

level in Devil's Hole), which the Court determined by considering the purpose of the reservation. *Cappaert*. 426 U.S. at 140–42. Similarly, in this proceeding, the Tribe is seeking a determination of its federally-reserved water rights based on the purposes of its reservation (as well as aboriginal and historical-use rights). Compl. at ¶¶ 35–52; *id.* at 19. *Cappaert* clearly permits this Court to make that determination, rather than prohibits it. The *Cappaert* decision also expressly states that federally reserved water rights "vest[] on the date of the reservation" and do not need to be "perfected" under state law. *Cappaert*, 426 U.S. at 138, 143–46; *see also Arizona v. California*, 373 U.S. 546, 600 (1963) (Indian tribes' federally reserved water rights are "effective as of the time the Indian Reservations were created" and are "present perfected rights"). This further confirms that the Tribe does not need to have its water rights determined or quantified in a separate proceeding.

Williams' Joinder goes on to discuss the various standards for quantification of Indian water rights found in *Arizona v. California*, 373 U.S. 546 (1963) and *In re the General Adjudication of All Rights to Use Water in the Gila River*, 201 Ariz. 307, 35 P.3d 68 (2001), and to argue that "whatever standard is employed, quantification is an essential predicate to any determination of actual and imminent injury." Joinder at 7–8. But Williams does not explain how these arguments relate to the Tribe's claims or how they show the Tribe's claims to be inadequately stated under Rule 12(b)(6). The Tribe is clearly seeking a determination and declaration of its water rights *in this proceeding*, and, as to quantification, it claims the full flow of Havasu Creek. Compl. at 19. Williams does not identify any legal authority that requires the Tribe to establish its rights in some

separate proceeding, and as discussed above, the Tribe believes there is no such authority.[1] And here, the Tribe claims rights to the full flow of Havasu Creek, a claim that adequately quantifies its rights.

3. *The Tribe Has Adequately Alleged Harm By Williams*

Third, Williams contends that the Tribe has failed to sufficiently allege a harm to the Tribe's Water Rights based on Williams' wells. Joinder at 8–9. Specifically, Williams argues: "No allegation establishes that the City of Williams' wells pump water from the Redwall-Muave [sic] (R2) aquifer." *Id.* at 9. This is simply untrue. The Complaint specifically asserts that Williams owns three wells "*that draw from the R-aquifer*," and is in the process of completing a fourth well "th*at will draw from the R-aquifer*." Compl. at ¶ 9 (emphasis added). The Complaint also alleges that the Defendants, which includes Williams, "are current owners and users of wells *that draw from the R-aquifer*." *Id.* at ¶ 53 (emphasis added). These allegations must be accepted as true for purposes of a Rule 12(b)(6) motion. *See Brock*, 64 F.3d at 1422.

Williams also asserts that there is an "absence of any allegations that the City of Williams' water wells are presently causing harm to the Havasupai Tribe's alleged rights." Joinder at 8–9. In fact, the Tribe's Complaint specifically alleges that the Defendants' groundwater withdrawals from the R-aquifer "*are causing harm* and threaten to cause increased harm in the future" to the Tribe's water rights. Compl. at ¶ 55

[1] The *Gila River* decision discussed by Williams at Joinder at 8, has no relevance to the issues at hand, as explained in the Tribe's Response to Halvorson-Seibold. H-S Resp. at 11 n.2.

(emphasis added). The Tribe has thus clearly alleged a present harm caused by Williams. The Complaint also states that "Defendants' current and future withdrawal of groundwater from the R-aquifer will reduce the flow of the Tribe's Waters, causing irreparable harm to the Tribe." *Id.* at ¶ 59. The Tribe also explains that based on the unique hydrology of the R-aquifer, which discharges virtually all of its water on the Tribe's lands, Defendants' groundwater withdrawals will reduce the flow of the Tribe's waters "on a gallon-for-gallon basis." Compl. at ¶¶ 31, 55; *see also id.* at ¶ 19..

Finally, Williams also states that it is located approximately 80 miles from the Tribe's reservation, and suggests that the Tribe has offered only "hypothetical speculation and conjecture" linking its groundwater pumping to harm to the Tribe. Joinder at 9. But the Complaint unquestionably alleges that Williams' wells are causing a direct, immediate, and irreparable harm by reducing the Tribe's water flow and infringing its rights, as discussed above, and these allegations must be accepted as true at this stage of the proceeding. *See Brock*, 64 F.3d at 1422. Moreover, the question of whether groundwater pumping is causing a harm 80 miles away is a factual dispute that cannot be resolved at this stage of the proceeding, prior to discovery and expert testimony. *See Zoccoli v. DBSI, Inc.*, No. CV-08-1339-PHX-GMS, 2008 WL 5381579, at *3 (D. Ariz. Dec. 23, 2008) (declining to resolve factual disputes at motion to dismiss stage).

B. The United States, the State of Arizona, and Other Well Owners are Not Indispensable Parties Under Rule 19.

Williams' second major argument in its Joinder is that the Complaint should be dismissed for failure to join the United States, the State of Arizona, and "other relevant

well owners," who are indispensable parties under Rule 19. Joinder at 9–12. The Tribe has addressed and responded to these arguments in the Tribe's responses to Anasazi's Motion and Halvorson-Seibold's Motion, which are incorporated by reference. Anasazi Resp. at 4–17; H-S Resp. at 12–16.

In support of its argument, Williams relies generally upon the case of *Dawavendewa v. Salt River Project Agriculture Improvement & Power District,* 276 F.3d 1150 (9th Cir. 2002). Joinder at 11. That case found that the Navajo Nation was a necessary and indispensable party to a lawsuit which challenged the requirement in a lease between the Navajo Nation and regional power district which required preference in hiring to Navajos at the Navajo Generating Station. *Dawavendewa*, 276 F.3d at 1153. The Court dismissed the case because the Tribe could not be joined due to its sovereign immunity. *Id.* at 1161. This case, in contrast, does not involve a challenge to a contract with an absent party who is immune from suit. Rather, the Tribe's Complaint names specific Defendants who are infringing its water rights through groundwater pumping and all of those Defendants are parties to this case. Compl. at ¶¶ 7–19. *Dawavendewa*, thus, provides no support for Williams' Rule 19 arguments.

Williams also argues:

> Prejudice to the City of Williams would occur because it would bear the burden of curtailing its groundwater pumping for domestic and municipal purposes while absent parties, both those who could be joined and those who cannot by reason of sovereign immunity, would not be bound by such decision and could even work through alternative legal action to shift a disproportionate share of liability onto the City of Williams and its taxpayers. No relief can be shaped that would lessen such a

> disproportionate shifting of burdens to the City of Williams and its taxpayers.

Joinder at 11. The Tribe does not understand what Williams is arguing here, nor does it know what "liability" or "burdens" Williams is referring to. This argument appears to be based on speculation or facts that Williams has not offered any evidence to support and which are outside the allegations in the Complaint. Moreover, Williams does not explain how any such "prejudice" to it is relevant under the Rule 19 analysis. For all of these reasons, this argument should be rejected.

Williams also contends that "no adequate remedy can be shaped, even if incomplete, without joining all other groundwater users of the [R-aquifer]." Joinder at 12. The remedy sought by the Tribe, however, is an injunction prohibiting the named Defendants from any pumping from the R-aquifer on the grounds that such pumping infringes the Tribe's water rights. Compl. at 19. There is no reason that other absent parties would need to be joined to issue such an injunction. Furthermore, Williams has not identified *any* groundwater users of the R-aquifer that have not been joined to this proceeding, and the Tribe believes that there are none. Even if there were, however, there is no reason that they would be necessary to this proceeding in order to grant the relief sought by the Tribe.

Finally, Williams also contends that Arizona's general stream adjudication procedure "is available to Plaintiff." Joinder at 12. However, Williams fails to identify any legal authority that *requires* the Tribe to bring its claims in a general stream adjudication, nor any legal requirement that *prohibits* the type of action brought by the

Tribe.[2] Furthermore, a general stream adjudication would not be an appropriate or efficient means of resolving the claims asserted in this litigation, as described more fully in the Tribe's Responses to Halvorson-Seibold and Anasazi. Anasazi Resp. at 10–13; H-S Resp. at 16. For all of these reasons, Williams' Rule 19 arguments must be rejected.

C. Lack of Subject-Matter Jurisdiction

Williams also "reserve[s] the right" to assert that this case must be dismissed for lack of subject matter jurisdiction under Rule 12(b)(1). Defs.' Br. at 14. The Tribe will respond to such arguments when and if Williams ever decides to assert them. If the Court decides to rule on this issue now, however, the Tribe requests the opportunity to fully brief its opposition.

II. CONCLUSION

For all of the foregoing reasons, Williams' Joinder should be denied. If this Court does rule in favor of Williams' Joinder, however, the Tribe respectfully requests the opportunity to cure any deficiencies by amending its pleadings or joining any necessary and indispensable parties.

[2] Williams describes general stream adjudications as an "exclusive procedure," but does not explain what it means by that claim. Joinder at 12. To the extent that Williams is contending that such proceedings are the "exclusive procedure" by which the Tribe can assert its water rights, it has offered no legal authority or argument in support of that claim, and the Tribe is aware of none.

Respectfully submitted,

Dated: February 6, 2017

s/ Richard W. Hughes

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I hereby certify that on this 6th day of February, 2017, I caused the attached document to be electronically transmitted to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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