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Attorneys for Defendants Halvorson-Seibold, Inc., Hydro-Resources, Inc., and Squire Motor Inns, Inc.

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Havasupai Tribe,

Plaintiff,

vs.

Anasazi Water Co., L.L.C., Cataract Natural Reserve Land, LLC, City of Williams, William Collins, William & Lorraine Collins Family Trust, Grand Canyon Equipment, Inc., Energy Fuels Resources (USA) Inc., EFR Arizona Strip LLC, Halvorson-Seibold, Inc., Hydro-Resources, Inc., Jentri LLC, Lure Maker, LLC, Pernell McGuire, McGuire Investments LLC, Alvin J. Reed, Christine G. Reed, Squire Motor Inns, Inc., Randy Topel, Topel Properties LLC,

Defendants.

Case No. 3:16-cv-08290-GMS

REPLY IN SUPPORT OF MOTION TO DISMISS

Defendants Halvorson-Seibold, Inc., Hydro-Resources, Inc., and Squire Motor Inns, Inc. ("Defendants") file this Reply in support of their Motion to Dismiss (ECF 18). This Reply addresses the arguments raised by Plaintiff Havasupai Tribe (the "Tribe") in its Response (ECF 63). The Tribe has responded by exaggerating and misapplying case law and by asserting there is precedent for its action when there is not. There remains no basis for the Tribe to move forward with its effort to establish, quantify, and enforce its alleged water rights to the entire flow of Havasu Creek and various streams, seeps, and springs in Grand Canyon National Park and to appropriate groundwater across a vast plateau by suing a handful of well owners located far from tribal lands. For the reasons stated in Defendants' Motion and this Reply, the Court should dismiss this action.

I. THE TRIBE'S ACTION IS UNPRECEDENTED AND CANNOT PROCEED

The Tribe has brought this action to obtain "declaratory judgment that the Tribe has aboriginal and federally-reserved water rights in the full flow of Havasu Creek and the springs, seeps, and streams on its reservation and Traditional Use Lands" in Grand Canyon National Park. [Compl., ¶ 58 and Prayer for Relief]. Although the Tribe seeks a declaration of its alleged rights to water in Grand Canyon National Park, owned by the United States and managed by the National Park Service for the benefit of all Americans, the Tribe has not and cannot name the United States as a defendant (among other indispensable parties). The Tribe insists that it may avoid an adjudication, establish rights to hundreds of square miles of groundwater outside of tribal lands, and shut down water utility service to every resident, visitor, business, government office, and emergency responder in Tusayan and beyond, up to 80 miles away. This includes water utility service that the State of Arizona, through the Arizona Corporation Commission, has ordered be provided using the very groundwater wells the Tribe wants to shut down.

The Tribe asserts it is not seeking an "adjudication" but simply wants a "declaration" that it owns and controls all the water in Havasu Creek and the springs,

seeps, and streams on its reservation and Traditional Use Lands in Grand Canyon National Park. Wordplay does not change what the Tribe seeks to do: establish its far-reaching water rights claims and appropriate groundwater on a vast plateau far from its land without going through the proper adjudicative process or involving the necessary parties.

No case has recognized as a viable cause of action what the Tribe attempts to do. While the Tribe asserts "there is clear legal precedent" for its action in the Supreme Court and Ninth Circuit, that assertion is materially misleading and incorrect. In truth, this action is unprecedented, seeks relief that is unrecognized, and is not the proper course.

A. None of the Cases the Tribe Relies On Are Precedent for This Action

As purported precedent, the Tribe relies in part on *Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District*, 2015 WL 1600065 (C.D.Cal. Mar. 20, 2015), an order in an unrelated case that is unpublished, currently on appeal, and has no precedential value.[1] Even if it had precedential value, it is not on point. With the United States participating in the case (unlike here), the Agua Caliente sought to preserve rights to groundwater underlying its reservation. The history of that case reveals that the United States had previously participated in a state water rights adjudication to secure surface water appropriations for the Agua Caliente (unlike here). *Id*. at *4. The rights sought to be recognized in *Agua Caliente* were to "groundwater underlying the reservation" which was "appurtenant to the reservation itself." *Id*. at *7. The court there addressed whether "*Winters* rights . . . could extend to groundwater underlying the reservation." *Id*. at *8. The court concluded that the Agua Caliente and the United States could apply the tribe's federally reserved water rights to "groundwater underlying the reservation" and to

[1] Unpublished decisions have no precedential value. *See, e.g., Hart v. Massanari*, 266 F.3d 1155, 1180 (9th Cir. 2001) (unpublished cases have no precedential value and are merely "a letter from the court to parties familiar with the facts, announcing the result and the essential rationale"); *Employers Ins. of Wausau v. Granite State Ins. Co.*, 330 F.3d 1214, 1220 (9th Cir. 2003) (unpublished decisions have "no precedential value").

"underlying groundwater." *Id*. at *9, *12. It reserved for another day the quantification of any such reserved rights, and put off for later the remote potential for any injunction. *Id*. at *2, *5.

Since the effort by the tribe and the United States in *Agua Caliente* was limited to an assertion of rights to groundwater underlying the tribe's reservation, nothing in the unpublished decision suggests that defendants in that case raised the arguments made by Defendants here. *Agua Caliente* does not stand for the proposition asserted by the Tribe that it may pursue, unilaterally or otherwise, an appropriative, exclusive, and vast reserved right to groundwater not underlying its reservation or anywhere near it, but located on a plateau 40 to 80 miles away. The unpublished ruling in *Agua Caliente* is what the Tribe holds up as "clear legal precedent" for its claims. It is nothing of the sort.

The Tribe relies on *Cappaert v. United States*, 426 U.S. 128 (1976) as precedent for "federal common law" pertaining to water rights. *Cappaert* does not mention "federal common law," a phrase the Tribe uses to obscure what is in reality an effort by the Tribe to adjudicate its water rights claims. In *Cappaert*, the Court found that "the purpose of reserving Devil's Hole Monument is preservation of the pool" and applied a federally reserved water right to protect a single pool of water within a national monument from depletion from adjacent groundwater use. 426 U.S. at 141. The Supreme Court emphasized that the wells at issue were "on land 2½ miles from Devil's Hole," that the evident drawdown in water levels was close to four feet, and that defendants "admitted that their wells draw water from the same underlying sources supplying Devil's Hole." *Id.* at 133, 135-36. That case involved the United States as a party acting to protect its federally reserved water rights. The extreme notion that the Tribe here, without properly adjudicating and quantifying its claimed water rights, may sue to enjoin all groundwater pumping from wells located in a 40 to 80 mile-radius from its land under a principle of "federal common law" finds no precedent, and *Cappaert* certainly does not provide it.

The Tribe also points to *Winters v. United States*, 207 U.S. 564 (1908), *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), and *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981). When one actually follows the legal authorities cited by the Tribe, none of them are on point with this case. Courts may view *Winters* as establishing the federal reserved water rights doctrine as applied to Indian tribes, but it does not resemble the Tribe's present action. In *Winters*, the United States brought suit to preserve surface water rights in the Milk River granted to the Fort Belknap Indian Reservation by agreement in May 1888. 207 U.S. at 575-76. While *Winters* recognized "the power of the [federal] government to reserve waters" for Indian tribes, the decision was limited to a traditional understanding of surface water rights. *Id.* at 577. As noted above, *Agua Caliente* explored whether "*Winters* rights . . . could extend to groundwater underlying the reservation." 2015 WL 1600065, *8. It has never been held or suggested that *Winters* rights can be asserted by a tribe to appropriate groundwater far from reservation lands, or that the federally reserved water rights doctrine could possibly extend that far.

In *Adair*, unlike here, the United States filed suit against 600 owners of land within the former Klamath Indian Reservation, seeking a declaration of water rights in an action involving all potential claimants. 723 F.2d at 1397-98. "[T]he case presented, for all practical purposes, a suit to adjudicate Indian water rights on behalf of an Indian Tribe," and in the action upheld, the district court limited its analysis to "federal water rights on lands roughly within the boundaries of the former Klamath Indian Reservation," not over a vast expanse of outside land. *Id.* at 1407. And further contrary to the Tribe's request here, no quantification of water rights occurred in *Adair*, where quantification was "left for judicial determination . . . by the State of Oregon under the provisions of 43 U.S.C. § 666 [the McCarran Amendment]." *Id.* at 1399 (brackets in original).

In *Walton*, where the State of Washington and the United States were also parties

(so far, in all of its claimed "precedent" for this action, the Tribe has not cited one case where the United States did not participate), the court addressed claims to a hydrogeological system consisting of an underground aquifer and creek "located entirely on the Colville Reservation." 647 F.2d at 45. The non-Indian defendant owned allotted land within the reservation and was found to have associated water rights. *Id.* at 49-51. No precedent for the Tribe's unilateral action to establish and enforce rights to control groundwater over a vast area far from reservation lands is found in *Agua Caliente, Cappaert, Winters, Adair, Walton* or any other case.[2]

It is a misapplication of authority for the Tribe to assert that its cited cases support a cause of action against distant well owners for "trespassory and unlawful interference" with unadjudicated Tribal water rights. First, none of these cases addressed such a claim, which seems to have been made up by the Tribe or its counsel. Second, under the federal reserved water rights doctrine that the Tribe actually seeks to employ, none of these cases are "clear precedent" for the Tribe's action. Certainly, none of them stand for the proposition that a tribe may sue distant well owners to establish tribal water rights on and off tribal land (and not on defendants' land either) and on that basis effectively appropriate and prohibit the use of groundwater over a vast plateau. The law does not recognize such relief. This case lacks a cognizable legal theory, and that is fatal under Rule 12(b)(6). *See Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011).

B. <u>The Proper Means to Establish Water Rights Is Not "Irrelevant"</u>

The fact that the water rights of other Arizona tribes have been or are being duly determined through Acts of Congress and comprehensive adjudications is not "irrelevant."

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[2] The Tribe has urged, for purposes of Rule 12(b)(6), that the Court wear blinders when it comes to the distant location of the streams, seeps, and springs the Tribe claims for itself and the wells it seeks to shut down. But the Tribe's Complaint makes clear the Tribe is seeking to establish water rights in areas far outside of its reservation and that defendants' wells are nowhere close.

Defendants listed every instance where Indian water rights are known to have been established in Arizona. [Motion, Table 1]. The Tribe waives it off, as if ignoring such precedent will make it go away. It won't. What the Tribe proposes to do in this case dramatically departs from precedent and would, if allowed, undo more than a century of established protocol and legal means.

The Tribe asserts in italics that it is not "*required*" to follow the proper course for establishing and enforcing its federally reserved water rights and that nothing "*prohibits*" the Tribe from bringing a novel and expansive action with no legal basis. For this portion of its argument, it relies again on the assertion that "there is clear legal precedent for the claims the Tribe has brought," but in truth it can find no precedent for its chosen course.

Like any plaintiff in any lawsuit, the Tribe is "required" to assert and prove its claims using proper legal mechanisms designed to bring about a recognized result. It is "prohibited" from acting outside the law to hail Defendants into court to demand relief not available from them (a declaration of tribal water rights on reservation land and Grand Canyon National Park) or at all (the appropriation of groundwater over a vast plateau far from tribal land). The means for establishing tribal water rights are demonstrated by the historical and ongoing efforts listed in Defendants' Motion. The Tribe has avenues for establishing its asserted rights, whether by federally-assisted settlement and Act of Congress, a State adjudication, or federal action involving the necessary parties. The Tribe is not at liberty to dispense with available and proper legal means, nor can it proceed to lock up groundwater in vast reaches of the Coconino Plateau. There is no precedent for such relief.

C. <u>The Tribe Cannot Obtain the Relief it Seeks from Defendants</u>

The Tribe has sued distant well owners to establish water rights on tribal land and in Grand Canyon National Park. Defendants do not own Grand Canyon National Park, and the water rights the Tribe seeks are not on or near Defendants' land (although the

Tribe wishes to appropriate hundreds of square miles of groundwater to serve its aims). The Tribe cannot obtain the relief it seeks -- a declaration that it owns all the water in Havasu Creek and various streams, seeps, and springs in Grand Canyon National Park -- by suing distant well owners who do not own the Park. As Defendants pointed out in their Motion, these rights are not something the Tribe can sue these Defendants to get. The Tribe plays cute by saying it is the Court, not Defendants, that would grant the Tribe its requested relief, but such deflection does not resolve the problems in the Complaint.

Following its demand for water rights allegedly (but in reality not) obtainable from Defendants to all the water in Havasu Creek plus streams, seeps, and springs in Grand Canyon National Park, the Tribe seeks to appropriate and enjoin the use of groundwater across a vast plateau far from its land. The law does not provide such relief. The Tribe's claims are not saved by reference to 28 U.S.C. § 2201(a); that statute allows an action for declaratory judgment but does not authorize it to proceed in a vacuum against the wrong or incomplete parties and does not authorize unrecognized relief. The Tribe again makes reference to *Agua Caliente* and other cases, but these offer no precedent or justification for the present action. The Tribe's Complaint demanding relief unobtainable from the defendants it has sued and unrecognized by the law fails to state a claim.

II. THE CASE CANNOT PROCEED WTHOUT INDISPENSABLE PARTIES

A. The United States is a Necessary and Indispensable Party

The Tribe asserts that the Ninth Circuit "has clearly established that the United States is not an indispensable party in proceedings such as this one." Response at 2. There has never been a proceeding such as this one, so the assertion is untrue. For this bit of hyperbole, the Tribe relies on cases decided in altogether different contexts: *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir. 1983); *Lyon v. Gila River Indian Community*, 626 F.3d 1059 (9ht Cir. 2010); *Fort Mohave Tribe v. Lafollette*, 478 F.2d 1016 (9th Cir. 1973); and *Skokomish Indian Tribe v. France*, 269 F.2d 555 (9th Cir.

1959).[3]

In its abbreviated argument in response to Defendants' Motion, the Tribe does not explain why it believes these cases permit the Tribe to secure water rights in Grand Canyon National Park without involving the United States as a party. Upon examination the cited cases do not support the Tribe's position. In *Puyallup*, the tribe claimed title to real property (not water rights) in a former riverbed; the defendant title-holder, three days before trial, moved to add the United States and state as a party. 717 F.2d at 1254. The court, with little analysis, declared the United States to be dispensable in a suit by a tribe to assert title to tribal lands held by a third party. *Id.* The ruling does not extend to cases where the tribe seeks water rights from the government or on federal land, as here.

Lyon involved a tribe's claim in a third-party bankruptcy proceeding to real property surrounded by its reservation. 626 F.3d at 1065-66. The tribe moved to add the United States but the court found the government dispensable based on "several considerations" that are not present here, including that the tribe was seeking to protect Indian land from alienation, which it could accomplish without the United States. In *Fort Mohave*, the tribe asserted a quiet title action to real property, and the court found it could obtain relief without the United States. 478 F.2d at 1017. Similarly, *Skokomish* involved the tribe's effort to quiet title to tidelands not owned by the United States, so the federal government was dispensable. 269 F.2d at 556-60. Nothing in these cases suggests that a tribe may seek a declaration of its alleged water rights to streams, springs, and seeps in a National Park without involving the federal government. The Tribe grossly misstates the

[3] The Tribe has attempted to incorporate large sections of its argument by reference. It filed a 17-page Response to Defendants' Motion but did not address all of Defendants' arguments. With respect to the argument that the Tribe omitted indispensable parties, particularly the United States, the Tribe refers to its 17-page response to co-defendant Anasazi's motion and "incorporates its responses to those arguments." The Tribe has essentially filed a 34-page Response to Defendants' Motion without leave of court. Defendants endeavor to respond, but the Tribe has not properly presented its arguments.

law by asserting that "binding Ninth Circuit case law" holds the federal government to be dispensable when a party seeks a declaration of water rights on federal land in a National Park. It has cited no such binding case law.[4]

In every Indian water rights case cited by the Tribe in its Response, including *Agua Caliente*, the United States was a party. This is true even though none of the tribes in those cases was attempting to assert a claim to water in a National Park, as the Tribe is doing here. The Supreme Court has recognized that "national forests, national parks, and other federal uses provide benefits to non-Indian residents, including lumbering operations, grazing, recreational purposes, watershed protection, and tourist revenues." *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 576 n.5 (1983). The Tribe's claim to water rights in a National Park is a claim directly adverse to the federal government, which holds its own reserved water rights on behalf of the many users of national parks.

The decree the Tribe seeks cannot issue without the United States as a defendant, and since it cannot be added, all of the factors for dismissal under Rule 12(b)(7) and Rule 19(a) are satisfied. Finding precedent in either direction is difficult, because no tribe or other plaintiff appears to have tried to secure water rights within a National Park without involving the United States. The conclusion is self-evident that the Tribe cannot do this.

B. The State is a Necessary and Indispensable Party

The Court may consider information outside the pleadings on a Rule 12(b)(7)

[4] If anything, case law goes the other way. While Defendants will not exaggerate the strength of precedent as the Tribe has done, see *Moody v. Johnston*, 66 F.2d 999, 1003 (9th Cir. 1933) (regarding the Flathead Indian Reservation) ("a determination of the amount of water to which the land may be entitled . . . may not be determined without not only the Secretary of the Interior being made a party defendant, but the United States or others who may be affected"); *Michel v. Nalder*, 174 F.Supp. 546, 550 (E.D. Wash. 1959) ("the conclusion is inescapable that his suit is essentially one to reach water . . . owned by the government. Under these circumstances the government is an indispensable party. It is also the opinion of the court that the Secretary of Interior is [an] indispensable party.").

motion. *McShan v. Sherrill*, 283 F.2d 462, 464 (9th Cir. 1960). The information about Colorado River water rights granted to the State of Arizona and its interests in water utility service, Grand Canyon airport, and emergency operations in and around Tusayan, contained in reported cases and ACC orders cited in or attached to Defendants' Motion, is properly before the Court. That information demonstrates that the State has water rights at stake inconsistent with the Tribe's demand, that the requested decree of tribal water rights could not be effectuated without the State, and that what the Tribe is asking this Court to do -- prohibit the use of Defendants' wells -- *directly contradicts orders of the Arizona Corporation Commission* requiring certain of the Defendants to supply groundwater to Tusayan, Grand Canyon Airport, and fire hydrants from those very wells.

The single case the Tribe cites in this section of its Response does not apply. *Puyallup Indian Tribe* involved an action by a tribe to eject a defendant from real property allegedly belonging to the tribe. The court found the state was not a necessary party to the title dispute and that the defendant was not susceptible to conflicting obligations. 717 F.2d at 1255-56. Analogy between *Puyallup* and the present case is nonexistent.

Since the Tribe seeks an order from this Court directly contrary to and in conflict with an order of the State of Arizona, the Tribe cannot avoid involving the State in this action. Otherwise, the State would not be bound by the order (however improbable it is that the Tribe could obtain it) and Defendants could face one order *banning* their use of wells and another order *requiring* their use of the same wells. For this and other reasons, this case cannot proceed without involving the State of Arizona as required by Rule 19(a)(1)(A), 19(a)(1)(B)(ii), and 19(b).

The Tribe complains it would be prejudiced by the dismissal of this action, but that is not true. The Tribe can pursue its water rights claims properly through adjudication or legislation, as nearly every other tribe in Arizona has done. It is Defendants and other stakeholders who would be prejudiced if this action were permitted to proceed against an

incomplete list of interested parties. Equity and good conscience favor dismissal.

C. Other Water Users Are Necessary and Indispensable Parties

The Tribe again attempts to import a large section of its brief by reference. It has not properly responded to Defendants' argument that numerous other water users have interests that must be taken into account when declaring the Tribe's water rights. The Tribe itself alleges "Uranium mines, theme parks, tourist stops, resorts, commercial enterprises, private developments, ranches, municipalities, and others have been drilling wells into this aquifer to support their ever-growing demands for water." Compl., ¶ 2. But it has sued only a subset of these acknowledged stakeholders. In its Response, the Tribe says "[t]his case only concerns wells that draw water from the R-aquifer," which is precisely the problem. It is evident from its own Complaint that the Tribe has omitted numerous defendants. And it is improper and impossible under the law for the Tribe to win a declaration of "water rights in the full flow of Havasu Creek and the springs, seeps, and streams on its reservation and Traditional Use Lands" in Grand Canyon National Park by suing a subset of well owners far from tribal land. The Tribe argues in a circle: other water users are not necessary parties because the Tribe has not sued them. The Tribe must involve all stakeholders in its effort to resolve its vast water rights claims. This action fails because it does not do so.

III. CONCLUSION

The Tribe asserts there is "clear precedent" for its action, but that turns out not to be true. The Tribe says its ability to proceed without indispensable parties is "clearly established," but that turns out not to be true, either. This action against distant well owners to have tribal water rights declared and to appropriate and prohibit the use of groundwater on the Coconino Plateau far from tribal lands cannot proceed. The Tribe has other options. The Court should dismiss this Complaint.

RESPECTFULLY SUBMITTED this 21st day of February, 2017.

By *s/ Jeremy A. Lite*

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CERTIFICATE OF SERVICE

I hereby certify that on February 21, 2017, a copy of the foregoing document was filed electronically. A Notice of Electronic Filing (NEF) will be sent by operation of the Court's Electronic Case Filing (ECF) system to the filing party, the assigned Judge and any registered user in the case as indicated on the NEF.

s/ Catherine Gould