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**UNITED STATES DISTRICT COURT**
**CENTRAL DISTRICT OF CALIFORNIA, EASTERN DIVISION**

AGUA CALIENTE BAND OF CAHUILLA INDIANS,

Plaintiff-Intervenor,

v.

COACHELLA VALLEY WATER DISTRICT, et al., and DESERT WATER AGENCY, et al.,

Defendants.

Case No. 5:13-cv-00883-JGB (SPx)
Judge: Hon. Jesus G. Bernal
Dept.: Courtroom 1

**DESERT WATER AGENCY'S RESPONSE TO AGUA CALIENTE TRIBE'S MOTION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL BRIEFER**

Hearing Date: January 13, 2020
Time: 9:00 a.m.

Action Filed: May 14, 2013

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## INTRODUCTION

After many years of litigation addressing issues concerning the Agua Caliente Tribe's reserved water right, in which the parties[1] filed numerous motions and briefs and the Court considered and decided most of the issues, the Tribe has now filed a motion to amend and supplement complaint that raises a host of new factual allegations and claims, many of which could have been (but were not) raised before, some of which are not even remotely relevant to the issues raised in the Tribe's original complaint. The Tribe filed its motion on October 12, 2019, nearly six months after this Court issued its ruling resolving most of the issues on April 19, 2019, during which period the Tribe took no steps to move its case forward.

The Tribe filed its motion to amend and supplement its complaint under Rule 15(a) of the Federal Rules of Civil Procedure (FRCP), which authorizes amended complaints, and Rule 15(d) of the FRCP, which authorizes supplemental complaints. The Tribe argues that the additional factual allegations and claims in its amended and supplemental complaint support its standing to quantify its reserved water right.

Notably, none of the additional facts or claims alleged by the Tribe addresses whether the Tribe has standing to assert its water quality claim—*i.e.*, its claim that its reserved right includes a water quality component—or challenges this Court's ruling that the Tribe does not have standing to assert its water quality claim. On the contrary, the Tribe's supporting memorandum expressly disclaims any intention to raise any new issues concerning this Court's ruling that the Tribe lacks such standing. Dkt. 330 at 8 n. 2. Thus, the Tribe's amended and supplemental

[1] The parties, in addition to the Agua Caliente Band of Cahuilla Indians (Tribe), are intervenor United States, defendant Desert Water Agency (DWA) and defendant Coachella Valley Water District (CVWD). DWA and CVWD will be collectively referred to as "Water Agencies."

complaint raises no issue concerning whether the Tribe has standing to assert its water quality claim.

The Tribe's motion to amend and supplement its complaint fails to meet the requirements of Rules 15(a) and 15(d) of the FRCP—or of Rule 16(b), which applies where, as here, a district court has issued a scheduling order establishing a time limit for filing motions to amend or supplement pleadings. First, the Tribe has failed to proceed with diligence and has caused undue delay, by not moving to amend it complaint until many years after it filed its original complaint, and until many months after this Court issued its ruling resolving most of the claims. Second, the Tribe's revised complaint would cause undue prejudice to the Water Agencies by requiring them to prepare for, conduct discovery on, and litigate numerous additional issues that were not raised in the Tribe's original complaint.

Third, the Tribe has not proceeded in good faith. The Tribe acknowledges in its memorandum that it delayed filing its motion to amend and supplement until after it had reached its decision to commence production of groundwater, and that it decided to commence production of groundwater for the purpose of overcoming this Court's ruling on standing. Dkt. 330 at 21, 29. The Tribe does not allege, however, that its water needs have changed such that the Tribe has a greater need to produce groundwater to fulfill the purposes of the reservation than before. Thus, the purpose of the Tribe's amended pleading is to overcome this Court's ruling on standing, and is not tied to the Tribe's actual need to produce groundwater to fulfill the reservation purposes.

Finally, and most importantly, the Tribe's amended complaint would be futile. The amended complaint alleges numerous additional facts that the Tribe argues support its standing to quantify its reserved right—such as its claim that the basin is in overdraft condition and that the Water Agencies have contributed to the

overdraft by pumping groundwater, and its claim that the Tribe intends to commence production of groundwater—but these additional facts do not address the issue that this Court decided in holding that the Tribe lacks standing to quantify its reserved right—namely that the Tribe has failed to show that the Water Agencies have caused the Tribe to suffer actual or imminent harm by preventing the Tribe from having access to groundwater necessary to fulfill the purposes of the reservation.

The Tribe's amended complaint also raises significant and broad issues concerning the Water Agencies' own water rights. The amended complaint asserts that the Tribe has recently adopted an ordinance that requires the Water Agencies to obtain permits from the Tribe and pay fees to produce groundwater from their wells on the reservation, and prohibits them applying their groundwater replenishment assessments against non-Indians on the reservation who produce groundwater. These new issues concerning the Water Agencies' water rights are fundamentally different from the issues concerning the Tribe's reserved right that were raised in the Tribe's original complaint, and the introduction of these new issues into the instant litigation would fundamentally its nature and scope. The Tribe should not be permitted to insinuate these significant and broad issues into this case at this late date by amendment of a complaint that addresses entirely different issues.

Although DWA believes that the Court should deny the Tribe's motion to amend and supplement its complaint for the above reasons, DWA also believes that—if the Court allows any amendment at all—the amendment should be limited to allow the Tribe only to clarify its pore space allegation, by conforming its complaint on the pore space issue with the Tribe's and the Water Agencies' arguments in their motions and briefs in Phase 2. The Tribe's amended complaint for this limited purpose would not be prejudicial to the Water Agencies—because the Water Agencies have already largely addressed the pore space issue raised in

the Tribe's amended complaint in their Phase 2 motions and briefs—and because such an amendment may actually expedite the litigation, by requiring consideration of the pore space issue that the parties addressed rather than the pore space issue they did not address. It should be noted that if the Court allows the Tribe to thus amend its complaint on the pore space issue, the issue that this Court deferred to Phase 3—whether the Tribe owns "sufficient" pore space to "store" its federally reserved water—would no longer be in the case, and there would be no basis or need for the Court to address this issue in Phase 3.

## ARGUMENT

### I. THE TRIBE'S MOTION TO AMEND AND SUPPLEMENT COMPLAINT SHOULD BE DENIED FOR FAILURE TO SATISFY THE REQUIREMENTS OF RULES 15(a), 15(d) AND 16(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

#### A. Requirements of Rules 15(a), 15(d) and 16(b)

Under Rule 15(a) of the FRCP, a party may move to amend its pleading, and, under Rule 15(d), to supplement its pleading. Under Rule 15(a), a district court has "broad discretion" in deciding whether to grant or deny a motion to amend a pleading. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 331 (1971); *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Mir v. Fosburg*, 646 F.2d 342, 347 (9th Cir. 1980). In exercising its discretion, the court considers "the presence of any of four factors: bad faith, undue delay, prejudice to the opposing party, and/or futility." *Owens v. Kaiser Foundation Health Plan, Inc.,* 244 F.3d 798, 712 (9th Cir. 2001); *Nunes v. Ashcroft*, 375 F.3d 805, 808 (9th Cir. 2004). A motion to amend a pleading should also be denied if the amendment "would unduly prolong or complicate the case." *Mayle v. Felix*, 545 U.S. 644, 663 (2005); *see Ellzey v. United States*, 324 F.3d 512, 526 (7th Cir. 2003). Although Rule 15(a) provides that a district court shall "freely give leave [to amend] when justice so

requires," the rule also "arms district courts with ample power to deny leave to amend when justice so requires." *Mayle,* 545 U.S. at 663 (citation and internal quote marks omitted).

The four-factor requirement that applies to a motion to amend a pleading under Rule 15(a) also applies to a motion to supplement a pleading under Rule 15(d). *Johnson v. Mammoth Recreations, Inc*., 975 F.2d 604, 608 (9th Cir. 1992). If, however, a motion to supplement is made after the district court has issued a scheduling order establishing a time limit for filing a motion to amend a pleading—as the Court has issued in this case[2]—the motion to supplement is first governed by Rule 16(b) of the FRCP, which provides that a scheduling order may be modified only for "good cause." *Id*. at 607-608. The "good cause" requirement requires consideration of the "diligence" of the party seeking the amendment. *Id*. at 609. The moving party must first show that it has satisfied the Rule 16(b) "good cause" requirement before the court considers whether the moving party has satisfied the Rule 15(a) four-factor requirement. *Id*. at 608.

Therefore, the Tribe must demonstrate that it satisfies both the "good cause" requirement of Rule 16(b) and the four-factor requirement of Rule 15(a), but must first show that it satisfies the former requirement before showing that it satisfies the latter. In fact, as shall be explained, the Tribe has failed to show that it satisfies either requirement.

[2] The district court issued a scheduling order on April 3, 2014, establishing a deadline of May 1, 2014, for any party to amend its pleading. Dkt. 59 at 2. Although the Tribe contends that the scheduling order applied only to Phase 1, Dkt. 330 at 22-23, Rule 16(b)(3)(A) requires that a scheduling order set a date to "amend the pleadings," and does not differentiate between different phases of a multi-phase case, such as the instant case. Thus, Rule 16(b)(3)(A) contemplates a single date for a party to amend its pleading in a multi-phase case, and does not contemplate that a party can amend its pleading for each phase, a result that would unduly prolong the litigation.

### B. Tribe's Failure to Satisfy Rule 16(b) "Good Cause" Requirement and Rule 15(a) Four-Factor Requirement

The Tribe has failed to satisfy the "good cause" requirement of Rule 16(b), because it has failed to proceed with diligence. Lack of diligence alone disqualifies supplementation of a pleading under Rule 16(b). *Johnson*, 975 F.2d at 609 ("If that [moving] party was not diligent, the inquiry should end."). The Tribe did not file its motion to amend and supplement its complaint until October 12, 2019—more than six years after the Tribe filed its original complaint, and nearly six months after this Court issued its Phase 2 ruling that disposed of most issues in the case. During the latter six-month period, the Tribe made no effort to move its case forward. Indeed, the Tribe sat silently by while the United States filed its motion for reconsideration, which this Court denied on grounds that the United States was attempting to reargue issues that the Court had already decided. Thus, the Tribe has not proceeded with diligence in moving to amend and supplement its complaint, and this Court should deny the Tribe's motion for failure to satisfy the Rule 16(b) "good cause" requirement.

The Tribe has also failed to satisfy the four-factor requirement of Rule 15(a). First, and most obviously, the Tribe has caused undue delay for the same reason it has failed to proceed with diligence—because it did not file its motion to amend and supplement its complaint until several years after it brought its action, and until several months after this Court issued its ruling resolving most of the issues.

Second, the Tribe's motion to amend, if granted, would cause undue prejudice to the Water Agencies, by requiring them to prepare for, conduct discovery for, and litigate a fundamentally different case from the one presented in the Tribe's original complaint. This fundamentally different case would present issues, among others, concerning the Tribe's declared intention to commence production of groundwater, and concerning the Water Agencies' own rights to

produce groundwater on the reservation and to apply their groundwater replenishment assessments. The Tribe should not be permitted to present these fundamentally different issues by amendment of a complaint that solely addresses the Tribe's reserved water right, and that is based on factual circumstances existing when the Tribe filed its complaint or at least when the Court issued its ruling on standing.

Third, the Tribe has not proceeded in good faith. The Tribe delayed filing its motion to amend its complaint until it had decided to commence production of groundwater, and it decided to commence production of groundwater for the purpose of overcoming this Court's ruling that the Tribe lacks standing to quantify its reserved right—and not because the Tribe's water needs have changed such that the Tribe now has a greater need to produce groundwater to fulfill the purposes of the reservation than before. This obvious purpose of the Tribe's motion appears from the Tribe's own memorandum, which argues that the amended complaint is not "futile" because it will "cure the jurisdictional defects" identified by the Court in its ruling on standing, Dkt. 330 at 21, and states that the Tribe delayed filing its amended complaint because, after receiving this Court's ruling on standing, the Tribe "took time to assess the order and consider its course of action," and "to take steps . . . to address the standing issues that the Court identified," *id.* at 29. The Tribe does not allege in its complaint or argue in its memorandum that the facts have changed such that the Tribe now has a greater need than before to produce groundwater to fulfill the purposes of the reservation. Thus, while the Tribe claims that the facts have changed, the Tribe itself changed the facts for the purpose of defeating this Court's ruling on standing and for no other apparent purpose. The Tribe should not be permitted bootstrap its standing because of changed circumstances that the Tribe itself has manufactured. Just as a party cannot rely on one theory in an attempt to defeat a summary judgment motion and then, having

lost, "come back long thereafter and fight on the basis of some other theory," *Nguyen v. United States*, 792 F.2d 1500, 1503 (9th Cir. 1986), the Tribe cannot rely on one set of facts in support of a summary judgment motion and then, having lost, come back much later and fight on the basis of other facts that the Tribe itself has manufactured.

Finally, and most importantly, the Tribe's amended complaint would be futile. Under Rule 15(a), a motion to amend a pleading should be denied if the amendment would be "futile." *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Owens v. Kaiser Foundation Health Plan, Inc.,* 244 F.3d 798, 712 (9th Cir. 2001). "Futility of amendment can, by itself, justify the denial of a motion for leave to amend." *Bonin v. Calderon*, 59 F.3d 813, 845 (9th Cir. 1995). The Tribe's amended complaint would be futile because it does not address the issue that this Court decided in holding that the Tribe lacked standing to quantify its reserved right—that the Tribe has failed to show that the Water Agencies have caused the Tribe to suffer an actual or imminent injury by preventing the Tribe from having access to groundwater necessary to fulfill the purposes of the reservation.

In the next part of this brief, in Argument II, we will examine more closely the Tribe's specific factual allegations in its amended complaint, and explain why the amended complaint would be futile for its failure to address the issue that this Court decided in holding that the Tribe lacks standing to quantify its reserved right—that the Tribe has failed to show that the Water Agencies have caused actual or imminent harm to the Tribe by preventing its access to necessary groundwater.

For the above reasons, the Court should deny the Tribe's motion to amend and supplement its complaint.

## II. THE TRIBE'S ADDITIONAL FACTUAL ALLEGATIONS DO NOT ADDRESS THE ISSUE THAT THE COURT DECIDED IN RULING THAT THE TRIBE LACKS STANDING, NAMELY THAT THE TRIBE HAS NOT SHOWN THAT THE WATER AGENCIES HAVE CAUSED THE TRIBE TO SUFFER ACTUAL OR IMMINENT HARM.

The Tribe's amended complaint alleges numerous additional facts that the Tribe contends support its standing to quantify its reserved right. The Tribe contends that these additional factual allegations show that (1) the groundwater basin is in an overdraft condition and the Water Agencies are contributing to the overdraft by pumping groundwater; (2) the Tribe has decided to commence production of groundwater; (3) the Tribe owns a specific quantity of federal reserved water and a specific quantity of pore space, both of which should be quantified; and (4) the Tribe's action is in the nature of a quiet title action. The Tribe's additional factual allegations do not, however, address the issue that the Court decided in holding that the Tribe lacks standing to quantify its reserved right—namely that the Tribe has failed to show that the Water Agencies have caused the Tribe to suffer actual or imminent harm by preventing the Tribe's access to groundwater necessary to fulfill the purposes of the reservation. Thus, the Tribe's amended complaint, in alleging these additional facts, would be futile.

### A. Alleged Facts Relating to Basin Overdraft

In its original complaint, the Tribe alleged that the groundwater basin is in an overdraft condition, and that the Water Agencies are contributing to the overdraft by pumping groundwater. Dkt. 1 at ¶¶ 33-34, 36-44, 46, 48-53, 64, 69; *id*. at ¶¶ 4, 8 (Prayer for Relief). In its amended complaint, the Tribe alleges additional facts that the Tribe claims support this conclusion. The Tribe alleges that the Water Agencies have made estimates of the amount of the natural groundwater recharge, Dkt. 330-1 at ¶¶ 40-42; that they have pumped certain specific amounts of groundwater from

the basin, *id*. at ¶¶ 45, 48; that the alleged overdraft consists of a certain volume amount and has resulted in lower groundwater levels and additional costs in producing groundwater, *id*. at ¶¶ 52-53; and that the basin is in cumulative overdraft, *id.* at ¶ 88 (lines 10-11).

This Court has already addressed the Tribe's argument concerning the alleged overdraft of the basin and the Water Agencies' production of groundwater, and has held that the Tribe's argument does not demonstrate that it has standing to quantity its reserved water right, because the Tribe has failed to show that the Water Agencies have caused the Tribe to suffer an actual or imminent injury by preventing the Tribe from having access to water necessary to fulfill the purposes of the reservation. Dkt. 318 at 11-19.

More specifically, the Court stated that "[f]or standing purposes, the Tribe must show an invasion to its legally protected interest." Dkt. 318 at 12. Citing the Federal Circuit's decision in *Crow Creek Sioux Tribe v. United States*, 900 F.3d 1350 (Fed. Cir. 2018), the Court stated that it "agrees with the Federal Circuit's analysis and finds that the Tribe must provide evidence of injury to its ability to use sufficient water to fulfill the purposes of the reservation." *Id.* at 13. The Court stated that the cases cited by the Tribe, such as *United States v. Ahtanum*, 236 F.2d 321, 324-325 (9th Cir. 1983), "address hostile, competing uses between the tribes and their opposing parties." *Id*. at 13. The Court stated that the Supreme Court in *Arizona v. California*, 373 U.S. 546, 595 (1963), declined to quantify the reserved rights of certain tribes because there was "no 'indication that such enjoyment [of the use of tributary inflow] is in any immediate danger of being interfered with'." *Id.* (citation omitted).

Following this discussion, the Court then stated that the Tribe, to demonstrate standing, "must provide *evidence that Defendants' actions actually or imminently harm the Tribe's ability to use sufficient water to fulfill the purposes of the reservation,"* and the Court looks for evidence that "the Tribe is unable, or may imminently become unable, to use sufficient water to fulfill the purposes of the reservation." *Id.* at 14. "[A]n overdraft condition—whether currently or cumulatively over many years—is not enough to satisfy the Tribe's burden to provide evidence of injury related to its quantification claim." *Id.* at 15. "[T]he Tribe's legally protected interest is its ability to use sufficient water to fulfill the purposes of the reservation." *Id.* Although "[t]he Tribe asserts that water levels underlying the reservation continue to decline," the Tribe provides "*no evidence connecting the declining water level with any of the Tribe's current or future use needs*." *Id.* (emphasis added). "Without any such evidentiary connection to its use needs, the Tribe cannot establish a non-speculative actual or imminent injury to its Winters right." *Id.* The Tribe's evidence "may reflect injury to the water table, but it does not reflect injury to the Tribe's Winters right." *Id.* The Court concluded that "there is *no evidence that the Tribe will not be able to access sufficient water to fulfill any particular purpose, much less the purposes of the reservation*." *Id.* at 16 (emphasis added).

Thus, the Court held that—regardless of the Tribe's factual allegations concerning the alleged overdraft and the Water Agencies' production—the Tribe has failed to show that the Water Agencies have caused the Tribe to suffer actual or imminent harm by preventing the Tribe from having access to water necessary to fulfill the purposes of the reservation, and thus the Tribe has failed to sustain its burden of demonstrating that it has standing to quantify its reserved right. The Tribe's amended complaint does not allege any additional facts that show that the Water Agencies have caused the Tribe to suffer such actual or imminent harm by

preventing its access to necessary groundwater. Thus, the Tribe's amended complaint does not address the issue this Court decided in holding that the Tribe lacks standing to quantify its reserved right. Accordingly, the Tribe's amended complaint would be futile.

### B. Alleged Facts Relating to Tribe's Intention to Produce Groundwater

The Tribe's amended complaint alleges that the Tribe has produced groundwater on the reservation in the past, and that the Tribe intends to resume production of groundwater in the near future. Dkt. 330-1 at ¶¶ 54, 55. As noted earlier, the Tribe decided to produce groundwater in order to overcome this Court's ruling on standing, and not because the Tribe's water needs have changed such that the Tribe now has a greater need than before to produce groundwater to fulfill the purposes of the reservation. *See* pages 7-8, *supra*.

In any event, the fact that the Tribe intends to commence production of groundwater, as the Tribe alleges, does not address the issue that this Court decided in holding that the Tribe lacks standing to quantify its reserved right—that the Tribe has failed to show that the Water Agencies have caused the Tribe to suffer actual or imminent harm by preventing the Tribe's access to groundwater necessary to fulfill the reservation purposes.

In its ruling that the Tribe lacks standing, the Court specifically noted that the Tribe has produced groundwater in the past—from 2009 to 2012, when the Tribe pumped groundwater to irrigate a golf course. Dkt. 318 at 15. The Court stated, however, that the Tribe has produced no evidence that it was "unable to access sufficient water" during that period. *Id*. Thus, the Court made clear that the Tribe does not have standing simply because it produces groundwater, but that the Tribe

must show that the Water Agencies have prevented the Tribe from having "access to sufficient water."

This conclusion is even more apparent from the Court's discussion of what the Tribe must show to demonstrate that it has standing. As noted above, *see* pages 10-11, *supra*, the Court stated that the Tribe, to demonstrate standing, must produce evidence showing that the Water Agencies have caused "an invasion to [the Tribe's] legally protected interest," Dkt. 318 at 12; that they have injured the Tribe's "ability to use sufficient water to fulfill the purposes of the reservation," *id.* at 13; that their actions "actually or imminently harm the Tribe's ability to fulfill the purposes of the reservation," *id.* at 14; and that they have caused harm to the Tribe's "ability to use sufficient water to fulfill the purposes of the reservation," *id.* at 15. The Court concluded that the Tribe has provided no evidence showing that "the Tribe will not be able to access sufficient water to fulfill any particular purpose, much less the purposes of the reservation." *Id.*

Thus, the Court did not hold that the Tribe lacks standing to quantify its reserved right simply because it does not produce groundwater, which might imply that the Tribe has standing if it does produce groundwater. Rather, the Court held that—regardless of whether the Tribe produces groundwater—the Tribe is required to show for standing purposes, but has failed to show, that the Water Agencies have prevented the Tribe from having access to groundwater necessary to fulfill the purposes of the reservation. The fact that the Tribe has produced groundwater in the past or intends to produce groundwater in the future, does not indicate that the Water Agencies have caused the Tribe to suffer actual or imminent harm such that the Tribe has standing to quantify its reserved right. Thus, the Tribe's amended complaint alleging that the Tribe intends to commence production of groundwater would be futile.

### C. Alleged Facts Relating to Quantities of Federally Reserved Water and Pore Space Ownership

The Tribe's amended complaint alleges additional facts that purportedly show that the Tribe's reserved right includes a specific quantity of water, that the Tribe owns a specific quantity of pore space, and that the Court should quantify these amounts. Dkt. 330-1 at ¶¶ 3, 8, 58, 85; *id.* at ¶ 8 (Prayer for Relief).

First, the Tribe's amended complaint alleges that the Tribe's reserved right includes a specific quantity of water, *i.e.*, "at least 60,000 AF per year." Dkt. 330-1 at ¶ 58. In its ruling on standing, however, this Court held that the Tribe does not have standing to quantify its federally reserved water because the Tribe has failed to show that the Water Agencies have prevented the Tribe from having access to groundwater necessary to fulfill the purposes of the reservation. Dkt. 318 at 11-16. Since the Tribe does not have standing to quantify its federally reserved water, the alleged quantity of the water is not relevant. The Tribe should not be permitted to amend its complaint to raise an issue concerning the quantity of its reserved right that is not relevant under this Court's ruling.

Second, the Tribe's amended complaint alleges that the Tribe owns a specific quantity, or "amount," of pore space, and that the Court should quantify the amount of the allegedly-owned pore space. Dkt. 330-1 at ¶¶ 3, 8, 85; *id.* at ¶ 8 (prayer for relief).[3] The Tribe's amended complaint also alleges, however, that the Tribe owns the pore space because pore space is a "constituent element" of its reserved land.

[3] Specifically, the amended complaint alleges that the Court should declare and quantify the Tribe's beneficial ownership of "the *volume* of pore space underlying the Tribe's reservation," Dkt. 330-1 at ¶ 3; that the Tribe has beneficial ownership of "a defined *volume* of subterranean pore space," *id.* at ¶ 8; and that the Tribe is entitled to a declaration that it has a prior and paramount ownership interest in "the *volume* of pore space" underlying the reservation, *id.* at ¶ 85. (All emphases added.) In the Prayer for Relief, the Tribe requests that the Court issue a declaration that "quantifies the *volume* of pore space beneficially owned by the Tribe." *Id.* at ¶ 8 (Prayer for Relief) (emphasis added).

Dkt. 330-1 at ¶¶ 70-71, 73, 80; *id.* at ¶ 6 (Prayer for Relief). Under the Tribe's "constituent element" argument, either the Tribe owns or does not own the pore space as a "constituent element" of its reserved lands, and the quantity or amount of the allegedly-owned pore space is not relevant to this inquiry. The Tribe should not be permitted to amend its complaint to allege that it owns a specific quantity of pore space, since the issue raised in the Tribe's amended complaint—whether the pore space is a "constituent element" of the Tribe's reserved land—is not dependent on the quantity of the Tribe's allegedly-owned pore space.

### D. Alleged Facts Relating to Quiet Title Claim

In the Prayer for Relief of its amended complaint, the Tribe requests a declaration that "[q]uiets the Tribe's title to pore space." Dkt. 330-1 at ¶ 8 (Prayer for Relief). The Tribe thus suggests that its action is in the nature of a quiet title action. The reference to the alleged need to quiet title, however, appears only in the Prayer for Relief of the amended complaint, and does not appear elsewhere in the amended complaint—in the factual allegations or claims for relief, or elsewhere. Thus, there is no predicate for the Tribe's request for a declaration quieting the Tribe's title to pore space, and the Tribe's request for the declaration should be denied.

Moreover, the Court has already addressed, and rejected, the Tribe's claim that its action is in the nature of a quiet title action. In its ruling on standing, the Court stated that it is "unpersuaded" by the Tribe's claim that its action is "akin to a quiet title action," because the Tribe has provided no citation for its contention that any "uncertainty" concerning its reserved right excuses the Tribe from offering evidence showing that it is "currently or imminently unable to use sufficient water to fulfill the purposes of the reservation." Dkt. 318 at 14.

## III. THE TRIBE'S AMENDED COMPLAINT WOULD UNDULY PROLONG AND COMPLICATE THE CASE AND CAUSE UNDUE PREJUDICE TO THE WATER AGENCIES BY RAISING ADDITIONAL ISSUES CONCERNING THE WATER AGENCIES' OWN WATER RIGHTS.

Under Rule 15(a), a motion to amend a pleading should be denied if the amendment "would unduly prolong or complicate the case." *Mayle v. Felix*, 545 U.S. 644, 663 (2005); *see Ellzey v. United States*, 324 F.3d 512, 526 (7th Cir. 2003). A motion to amend a pleading should also be denied if the amended pleading would be prejudicial to the non-moving party. *Owens v. Kaiser Foundation Health Plan, Inc.,* 244 F.3d 798, 712 (9th Cir. 2001). The Tribe's proposed amendment of its complaint raises broad issues concerning the Water Agencies' own water rights, and thus would unduly prolong and complicate the case, and would cause prejudice to the Water Agencies by requiring them to litigate an entirely different case from the one presented in the Tribe's original complaint.

This case has, since its inception, solely addressed issues concerning the Tribe's rights, specifically the Tribe's reserved water right and its alleged ownership of pore space. The Tribe's original complaint alleged that the Tribe has a reserved right in groundwater underlying its reservation; that its reserved right includes a water quality component; that it owns pore space to store its federally reserved water; and that the Court should quantify the Tribe's reserved water right. Dkt. 1. In Phase 1, this Court ruled that the Tribe has a reserved right in groundwater. Dkt. 116. In Phase 2, this Court held that the Tribe does not have standing to quantify its right or pursue its water quality claim, but has standing to pursue its pore space claim, which the Court deferred to Phase 3. Dkt. 318. Thus, this action, from start to the present, has solely addressed issues concerning the Tribe's rights.

In its amended complaint, however, the Tribe raises expansive new issues concerning the Water Agencies' own water rights, and more particularly whether the Water Agencies have the right to produce groundwater from their wells on the reservation, and to apply their groundwater replenishment assessments against non-Indians who produce groundwater on the reservation. The Tribe's amended complaint alleges that the Water Agencies produce groundwater from their wells on the reservation "without the Tribe's authorization" (which, incidentally, the Tribe has never required before), Dkt. 330-1 at ¶¶ 45, 48; that the Tribe has enacted an ordinance that establishes the Tribe's Water Authority, with authority to require producers of "the Tribe's Groundwater" to obtain permits from the Tribe and pay fees, *id.* at ¶ 56; that the Tribe's Water Authority is required to store a certain amount of the Tribe's federally reserved groundwater in the aquifer each year, *id.* at ¶ 57; that the Tribe intends to develop its reserved water right, which the Tribe estimates to be 60,000 acre-feet per year, *id.* at ¶ 58; that the Tribe's Water Authority is preparing a report that will recommend water production fees to be applied to production of "the Tribe's groundwater on the reservation," including production by the Water Agencies, *id.* at ¶ 59; that the Water Agencies "regulate and unlawfully burden" lessees of allotted reservation land who produce groundwater, by applying their replenishment assessments to them based on the amounts of their production, *id.* at ¶ 60; and that DWA sent a groundwater replenishment assessment to the Tribe for its production of groundwater from 2009 to 2012, *id.* at ¶ 61. In its Prayer for Relief, the Tribe requests that this Court enjoin the Water Agencies from "producing groundwater on the Reservation without authorization" from the Tribe. *Id.* at ¶ 11 (Prayer for Relief).

Thus, the Tribe's amended complaint raises broad, new issues concerning the Water Agencies' water rights that go far beyond the issues raised in the Tribe's original complaint concerning the Tribe's reserved right. These new issues largely

arise in the context of the Tribe's recently-adopted ordinance, which, according to the Tribe, requires the Water Agencies to obtain permits from the Tribe and pay fees to produce groundwater from their wells on the reservation, and prohibits the Water Agencies from applying their groundwater replenishment assessments against non-Indians on the reservation who produce groundwater. Dkt. 330-1 at ¶¶ 56-59.

The principles of federal law that apply to the Water Agencies' rights to produce groundwater on the reservation and impose their groundwater replenishment assessments are fundamentally different from the principles that apply to the Tribe's reserved right, which is based on the principles established in *Winters v. United States*, 207 U.S. 564 (1908). The Court, in deciding the issues raised in the Tribe's amended and supplemental complaint, would be required to consider and decide entirely different issues of federal Indian law than are presented in the Tribe's original complaint, which solely raised issues concerning the Tribe's reserved right. Although the Tribe contends that its supplemental allegations "do not alter the scope or nature of Agua Caliente's claims" and instead "simply add recent, significant factual developments," Dkt. 330 at 18, the opposite is true: The Tribe's supplemental allegations raise a host of significant and far reaching issues concerning the Water Agencies' rights that would fundamentally alter the nature and scope of the existing lawsuit, and that would comprise the basis for an entirely new lawsuit. The Tribe should not be permitted to present these fundamentally different issues concerning the Water Agencies' rights through the back door of the instant litigation by supplementation of a complaint that addresses completely different issues. In particular, the Tribe should not be permitted to present these fundamentally different issues at this late date, when, after many years of litigation, the parties have addressed the issues raised in the Tribe's original complaint and the Court has resolved most of the issues.

## IV. IF THE TRIBE IS PERMITTED TO AMEND ITS COMPLAINT, THE AMENDMENT SHOULD LIMITED TO THE TRIBE'S CLARIFICATION OF ITS PORE SPACE ALLEGATION, IN WHICH CASE THERE WOULD BE NO BASIS OR NEED TO CONSIDER THE ISSUE THAT THE COURT DEFERRED TO PHASE 3.

### A. Tribe's Motion to Amend Pore Space Allegation

The Tribe's motion to amend its complaint might properly be denied on the grounds described above—lack of diligence, undue delay, prejudice, futility and bad faith. If, however, the Court allows the Tribe to amend its complaint, the amendment should be limited to allowing the Tribe to clarify its allegation on the pore space issue, by conforming its allegation on the pore space issue with the Tribe's and the Water Agencies' arguments in their motions and briefs in Phase 2. The Tribe's proposed amendment for this limited purpose would not be prejudicial to the Water Agencies, because they have already largely addressed the pore space issue as alleged in the Tribe's amended complaint in their Phase 2 motions and briefs. The Tribe's proposed amendment would not prolong or delay the case—and indeed may expedite the case—because the amendment would present the pore space issue that the Tribe and the Water Agencies addressed in their motions and briefs, and not the pore space issue they did not address. Thus, there is less basis to deny the Tribe's motion to amend its complaint on the pore space issue than for denying the Tribe's motion to amend on the other issues described above.

In its original complaint, the Tribe alleged that it owns "sufficient" pore space to "store" its federally reserved water. Dkt. 1 at ¶¶ 8, 55, 66, 75. In its summary judgment motion and briefs in Phase 2, however, the Tribe phrased its pore space argument differently. The Tribe argued in its motion and briefs that it beneficially owns the pore space underlying the reservation, because pore space is a "constituent element" of its reserved land and the Supreme Court in *United States v.*

*Shoshone Tribe*, 304 U.S. 111 (1938), held that Indian tribes are beneficial owners of all "constituent elements" of their reserved lands. Dkt. 203-1 at 25; Dkt. 209 at 38; Dkt. 217 at 21. In its memorandum here, the Tribe states that it seeks to amend its complaint on the pore space issue for the "limited purpose of clarifying the legal basis" for its pore space ownership claim, because *Shoshone Tribe* held that Indian tribes own "all constituent elements" of their reserved lands. Dkt. 330 at 20.

In their motions and briefs in Phase 2, the Water Agencies addressed the pore space issue presented in the Tribe's motion and briefs and not the pore space issue alleged in its complaint. DWA argued, for example, that the Tribe does not "own" the pore space underlying its reservation; that *Shoshone Tribe* did not hold or suggest otherwise, and did not even involve groundwater; that a groundwater basin is a "public resource" available to all who have the right to use groundwater; and that this Court should "borrow" this state law principle as the federal rule of decision. Dkt. 202-1 at 8-24; Dkt. 207 at 34-39; Dkt. 216 at 20-24. DWA did not address the Tribe's pore space allegation in its complaint—*i.e.,* that the Tribe allegedly owns "sufficient" pore space to "store" its federally reserved water—because the Tribe did not present this argument in its motion and briefs.

The Tribe's amended complaint would conform its complaint on the pore space issue with the Tribe's and the Water Agencies' motions and briefs, in two ways. First, the Tribe's amended complaint *deletes* the Tribe's allegations in its original complaint that it owns "sufficient" pore space to "store" its federally reserved water. *Compare* Dkt. 1 (Tribe's Original Complaint) at ¶¶ 8, 55, 66, 75, *with* Dkt. 330-1 (Tribe's Amended Complaint) at ¶¶ 8, 70-74, 85, 94. Second, the Tribe's amended complaint *adds* the allegations that the Tribe has "beneficial ownership" of the pore space because pore space is a "constituent element of the land" reserved for the Tribe. Dkt. 330-1 at ¶¶ 70-71, 73, 80; *id.* at ¶ 6 (Prayer for Relief). Thus, the Tribe has deleted its allegation that it owns "sufficient" pore

space to "store" its federally reserved water, and substituted therein the allegation that it owns the pore space as a "constituent element" of its reserved lands, which was the argument addressed by the Tribe and Water Agencies in their motions and briefs.

Therefore, if the Court allows the Tribe to amend its complaint, it should limit the amendment to the Tribe's clarification of its pore space allegation, in which the Tribe alleges that it owns the pore space as a "constitutional element" of its reserved lands, because such an amendment would not be prejudicial to the Water Agencies and may expedite rather than prolong or delay the case.

**B. Absence of Basis or Need to Consider Issue Deferred to Phase 3**

If the Court grants the Tribe's motion to amend its complaint on the pore space issue to conform its complaint with the parties' motions and briefs in Phase 2, the pore space issue that the Court deferred to Phase 3 would no longer be in the case, and there would be no basis or need for this Court to consider this issue in Phase 3, or otherwise.

In its ruling on standing, this Court declined to consider the pore space issue addressed by the Tribe and the Water Agencies in their Phase 2 motions and briefs, *i.e.,* whether the Tribe owns the pore space as a "constituent element" of its reserved lands. The Court stated that the Tribe's argument that it owns the pore space as a "constituent element" of its reserved lands "directly conflicts" with the allegations in the Tribe's complaint that the Tribe owns "sufficient" pore space to "store" its federally reserved water, and therefore that the "constituent element" issue is not "properly before this Court." Dkt. 318 at 20 n. 16. The Court deferred to Phase 3 the "narrow issue" of whether the Tribe "owns sufficient pore space to store its federally reserved water right," which was the issue raised in the Tribe's complaint. *Id.* at 21.

Thus, if the Court grants the Tribe's motion to delete its allegation that it owns "sufficient" pore space to "store" its federally reserved water, and to allege instead that it owns the pore space as a "constituent element" of its reserved lands, the issue that the Court deferred to Phase 3—whether the Tribe owns "sufficient" pore space to "store" its reserved water—would no longer be in the case. In that eventuality, there would be no basis or need for the Court to consider the issue in Phase 3, or otherwise. Simply put, the basis or need to consider the pore space issue deferred to Phase 3 would cease to exist, because the issue would no longer be in the case.[4]

## CONCLUSION

This Court should deny the Agua Caliente Tribe's motion to amend and supplement its complaint, except that, if the Court decides to allow the Tribe to amend its complaint for any purpose, the amendment should be limited to allowing the Tribe to conform its complaint on the pore space issue with the Tribe's and the Water Agencies' motions and briefs in Phase 2.

Dated: November 25, 2019

*/s/ Roderick E. Walston*
Roderick E. Walston
Arthur L. Littleworth
Michael T. Riddell
Piero C. Dallarda
Miles B. H. Krieger
Attorneys for Defendant Desert Water Agency

[4] The Tribe's amended complaint also substitutes the Water Agencies' current directors for their former directors. Dkt. 330-1 at ¶¶ 11, 13. DWA has no objection to the substitution of the current directors for the former directors, and indeed the current directors are automatically substituted for the former directors under Rule 25(d) of the Federal Rules of Civil Procedure.

**CERTIFICATE OF COMPLIANCE (LOCAL RULE 5-4.3.4)**

I certify that, pursuant to Local Rule 5-4.3.4, I have obtained the authorization of the above signatories to file the above-referenced document, and that the above signatories concur in the filing's content and have authorized the filing.

Dated: November 25, 2019 */s/ Roderick E. Walston*
Roderick E. Walston
Attorney for Defendant Desert Water Agency

CERTIFICATE OF SERVICE

At the time of service I was over 18 years of age and not a party to this action. My business address is Best Best & Krieger LLP, 2001 N. Main Street, Suite 390, Walnut Creek, California 94596. On November 25, 2019, I served the following document(s):

**DESERT WATER AGENCY'S RESPONSE TO AGUA CALIENTE TRIBE'S MOTION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL BRIEFER**

by transmitting via electronic transmission to the person(s) at the e-mail address(es) set forth below by way of filing the document(s) with the U.S. District Court, Central District of California Via the Court's Electronic Case Filing System. Federal Rule of Civil Procedure § 5(b)(2)(E).

Executed on November 25, 2019 at Walnut Creek, California.

*/s/ Irene Islas*
Irene Islas

# Responses, Replies and Other Motion Related Documents

5:13-cv-00883-JGB-SP Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District et al

(SPx),DISCOVERY

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

## Notice of Electronic Filing

The following transaction was entered by Walston, Roderick on 11/25/2019 at 11:35 AM PST and filed on 11/25/2019

**Case Name:** Agua Caliente Band of Cahuilla Indians v. Coachella Valley Water District et al
**Case Number:** 5:13-cv-00883-JGB-SP
**Filer:** Desert Water Agency
**Document Number:** 333

**Docket Text:**
**OPPOSITION to NOTICE OF MOTION AND MOTION for Leave to file First Amended and Supplemental Complaint [329] *Desert Water Agency's Response to Agua Caliente Tribe's Motion for Leave to File Amended and Supplemental Briefer* filed by Defendant Desert Water Agency. (Walston, Roderick)**

**5:13-cv-00883-JGB-SP Notice has been electronically mailed to:**

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**5:13-cv-00883-JGB-SP Notice has been delivered by First Class U. S. Mail or by other means BY THE FILER to :**

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