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12 **UNITED STATES DISTRICT COURT**
 13 **CENTRAL DISTRICT OF CALIFORNIA**
 14 **EASTERN DIVISION**

15 AGUA CALIENTE BAND OF
 16 CAHUILLA INDIANS,

17 Plaintiff,

18 v.

19 COACHELLA VALLEY WATER
 20 DISTRICT, et al.,

21 Defendants.

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

**CVWD'S OPPOSITION TO THE
 22 TRIBE'S MOTION TO AMEND AND
 23 SUPPLEMENT COMPLAINT**

Action Filed: May 14, 2013
 24 Hearing Date: January 13, 2020
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1 **I. Introduction**

2 Six months ago, this Court issued its order resolving Phase 2 by holding that
3 the Tribe does not have standing to pursue its remaining claims, with the exception
4 of the “narrow issue of whether the Tribe owns sufficient pore space to store its
5 federally reserved water rights.” Dkt. 318 at 21. The Court reached its carefully
6 reasoned decision after 18 months of proceedings, thousands of pages of pleadings
7 and evidence, and three hearings. The Tribe, nonetheless, now seeks to start Phase
8 2 all over again and to re-litigate most of the issues resolved by the Court, through
9 the expedient of amending and supplementing its complaint.¹ Just as the Court
10 rejected the United States’ untimely motion for reconsideration, the Court should
11 reject the Tribe’s even more tardy effort to undo Phase 2 through this latest motion.

12 The Tribe seeks three sets of amendments to its complaint.² *First*, the Tribe
13 moves to amend its complaint to argue that it owns pore space underlying its
14 Reservation as a “constituent element” of the land. Dkt. 330 at 1. Coming more
15 than six years after the Tribe filed this case, over five years after the deadline set by
16 this Court for amending complaints, and six months after the resolution of Phase 2,
17 the Tribe’s motion should be denied under Rule 16 of the Federal Rules of Civil
18 Procedure.

19 *Second*, the Tribe moves to amend and supplement its complaint to allow it
20 to re-litigate the Court’s decision that the Tribe does not have standing to seek (1) a
21 quantification of its *Winters* rights, and (2) a quantification of any pore space that it
22 might own, along with an injunction preventing the Agencies from interfering with
23 that pore space. Once again, this motion is untimely under Rule 16. It also is
24 improper under Rule 15. The Tribe manufactured its new allegations in an effort to
25 re-litigate Phase 2. The motion also would prejudice CVWD by forcing it to go

26 _____
27 ¹ The Tribe does not seek to revive its water quality claim. Dkt. 330 at 2 n.2.

28 ² The Tribe also seeks to amend its complaint to name the Water Agencies’ new directors. Dkt. 330-1 ¶¶ 11, 13. CVWD does not object to this narrow change.

1 through months, if not years, of new discovery, expert testimony, briefing, and
2 hearings on standing issues that already consumed two years of the parties' and
3 Court's time. The proposed changes to the complaint are also futile because they
4 cannot change the Court's ruling that the Tribe lacks standing to seek quantification
5 of either water rights or pore space. Indeed, the Tribe's arguments totally ignore
6 the Court's Phase 2 order, which rejects or is inconsistent with all of the Tribe's
7 arguments.

8 *Third*, the Tribe moves to add a grab bag of other changes that risk bringing a
9 variety of unrelated issues into this action. In particular, the Tribe seeks to enjoin
10 CVWD from "producing groundwater on the Reservation without authorization,"
11 apparently even if CVWD is pumping pursuant to CVWD's own water rights. Dkt.
12 330-1 at 23 ¶ 11. Questions regarding the Tribe's geographical authority over
13 pumping operations have never been an issue in this case and raise complex legal
14 questions unrelated to the questions currently before this court. Under Rules 15 and
15 16, the Court should also reject the Tribe's effort to expand its action in new
16 directions.

17 The purpose of Phase 2 was to narrow the issues for final resolution in Phase
18 3. The Court accomplished this goal in its April 2019 Phase 2 order by ruling that
19 Phase 3 would involve one "narrow issue"—does the Tribe own pore space for "use
20 connected to the Tribe's asserted federally reserved right"? Dkt. 318, pp. 20-21 &
21 n.16. The Court should reject the Tribe's effort to overturn the Court's summary
22 judgment order, re-litigate Phase 2, and expand and delay this litigation.

23 **II. Procedural Background**

24 The Tribe's motion comes after more than six years of litigation, two years of
25 which were consumed by Phase 2. This section outlines key procedural actions
26 relevant to the Tribe's current motion. Several conclusions are important. First, the
27 Tribe has filed its motion half a decade after the Court's deadline for amending the
28 complaint (and six months after the Court's order resolving Phase 2). Second, the

1 Tribe has had multiple chances to demonstrate standing (and indeed already made
2 the basic allegations that it now argues call for re-litigating Phase 2).

- 3 • May 1, 2014: The Court-imposed deadline to amend the complaint. Dkt. 59.
- 4 • May 11, 2015: The parties submit a joint report on scheduling for Phase 2.
5 No party requests a modified amendment deadline. Dkt. 120.
- 6 • June 9 & July 8, 2015: The Court issues orders governing the Phase 2
7 schedule and does not modify the amendment deadline. Dkt. 121, 126.
- 8 • August 16, 2017: In a Phase 2 joint status report, the Agencies state that they
9 will raise Article III standing issues as a complete defense. Dkt. 192 at 7, 15.
- 10 • October 20, 2017: All parties file cross-motions for summary judgment on
11 Phase 2 issues. The Agencies argue that the Tribe and U.S. lack standing,
12 and proffer supporting evidence. *See* Dkt. 200 at 11-14; Dkt. 202 at 19-20.
13 The Tribe submits no evidence to show standing.
- 14 • November 20, 2017: All parties file oppositions. The Agencies reiterate that
15 the Tribe lacks standing. Dkt. 207 at 23-25; Dkt. 208 at 9, 20-21. The Tribe
16 again submits no evidence to support standing, but argues that it has standing
17 to quantify its water rights because (1) the Agencies dispute the existence of
18 the Tribe's water right; (2) the Agencies use the Tribe's water; and (3) the
19 Agencies have overdrafted the aquifer. Dkt. 209 at 3-6.
- 20 • December 11, 2017: On reply, the Tribe again submits no evidence, but
21 contends it has standing based on "longstanding and ongoing depletion and
22 degradation of resources" reserved for the Tribe; because the Agencies are
23 "infringing on the Tribe's sovereignty"; and based on the Tribe's "sovereign
24 authority" to manage water, including storage. Dkt. 217 at 5-6.
- 25 • April 26, 2018: At the first Phase 2 summary-judgment hearing, the Tribe
26 asserts it has standing because "[t]here is pumping going on currently on the
27 reservation," Dkt. 241 at 26:7-8; the Tribe "can store the water in the
28 aquifer" rather than pump it, *id.* at 27:4-6; and the Agencies have overdrafted

1 the aquifer, *id.* at 28:17-24. The Tribe also argues it need only “allege”
2 injury, not provide evidence. *Id.* at 28:2-16. The Court asks the Tribe how
3 the Agencies are “interfering with the purposes of the Tribe,” but the Tribe
4 can point to nothing in the record. *Id.* at 47:3-17.

- 5 • May 18, 2018: The Tribe moves to supplement the record with the expert
6 declaration of Oliver Page—the first time the Tribe has submitted any
7 evidence on standing. Dkt. 243-1 at 6.
- 8 • June 25, 2018: The Court holds its second Phase 2 hearing. Dkt. 263.
- 9 • August 1, 2018: The Court grants the Tribe’s motion to supplement the
10 record, but allows discovery and orders new briefing to address it. Dkt. 266.
- 11 • October 31, 2018: Following Mr. Page’s deposition at which he repeatedly
12 admits the Tribe suffered no injury on any Phase 2 claim, the Tribe tells the
13 Court it wishes to withdraw Mr. Page as an expert. Dkt. 271, 281.
- 14 • November 7 & 9, 2018: The Agencies file supplemental briefs, pursuant to
15 the Court’s order. Dkt. 281, 287.
- 16 • November 14 & 16, 2018: The Tribe files supplemental briefs, arguing that
17 (1) its quantification claim is “in effect a quiet title action” and that its injury
18 arises from “uncertainty” over its title, including disagreement over the
19 Tribe’s “right to store reserved water,” and (2) the aquifer is in overdraft,
20 resulting in lowered water levels that increase the cost to produce water,
21 which the Tribe “felt...when it pumped water for its golf course as recently
22 as 2012, and its members’ lessees feel ... now when they pump reserved
23 groundwater for use on the Reservation.” Dkt. 289 at 3-7. The Tribe files
24 three new declarations and a lengthy request for judicial notice. Dkt. 289,
25 289-1, 289-2, 289-3, 289-4, 289-5, 290, 294 to 294-8, 298.
- 26 • November 19, 2018: The Court orders the Tribe to resubmit chambers
27 copies, noting that the exhibits “exceed 1,700 pages in length,” produced in
28 an “unusable” “stack.” Dkt. 299.

- 1 • November 21, 2018: The Agencies file supplemental replies. Dkt. 301, 302.
- 2 • February 25, 2019: Third Phase 2 hearing held. Dkt. 314.
- 3 • April 19, 2019: The Court issues its Phase 2 order, holding that neither the
4 Tribe nor the U.S. has standing to pursue quantification, challenge water
5 quality, or obtain injunctive relief for pore space. The “sole,” “narrow issue”
6 remaining for Phase 3 is the Tribe’s declaratory relief claim that it “owns
7 sufficient pore space to store its federally reserved right.” Dkt. 318 at 21.
- 8 • July 9, 2019: The parties hold a telephonic meet and confer following the
9 U.S.’s notification it intends to move for reconsideration. Thompson Decl. ¶
10 3 (filed herewith). CVWD raises the need to discuss Phase 3 scheduling. *Id.*
11 The Tribe states that it will be ready to discuss Phase 3 “shortly,” but never
12 mentions amending or supplementing its complaint. *Id.*
- 13 • July 16, 2019: The U.S. files its motion for reconsideration, Dkt. 319, which
14 the Agencies oppose, Dkt. 321, 322. The U.S. argues the Court disregarded
15 evidence that the Agencies charge tribal lessees replenishment assessments
16 and proffers a new expert report to augment the record. Dkt. 319 at 2-6.
- 17 • August 14, 2019: The Court denies the U.S. motion, holding that it “is a
18 thinly veiled attempt to relitigate the summary judgment motion.” Dkt. 324
19 at 3.
- 20 • September 3, 2019: CVWD contacts the Tribe, seeking to schedule a time to
21 discuss the “structure and timing of Phase 3.” Thompson Decl. ¶ 4. In
22 follow-up emails, the Tribe never mentions any intention to amend or
23 supplement its complaint. *Id.* ¶ 5.
- 24 • September 24, 2019: On the call requested by the Agencies, the Tribe says
25 for the first time it intends to amend and supplement its complaint. *Id.* ¶ 6.
- 26 • October 18, 2019: The Agencies inform the Tribe they oppose all aspects of
27 the Tribe’s motion to amend and supplement as untimely. On one narrow
28 Phase 3 issue, the Agencies stipulate that, if the Court does not reject the

1 Tribe's entire motion as untimely, the Agencies agree the Tribe should be
2 permitted to conform its complaint to the "constituent element" pore space
3 theory briefed on summary judgment. Dkt. 327.

- 4 • October 21, 2019: Tribe files its motion to amend and supplement. Dkt. 329.

5 **III. The Tribe's Entire Motion Should Be Rejected under Rule 16.**

6 Under Rule 16, the Tribe must show "good cause" for amendments sought
7 after the amendment deadline, *see Johnson v. Mammoth Recreations, Inc.*, 975 F.2d
8 604, 610 (9th Cir. 1992), a "more stringent" standard than the Rule 15 timeliness
9 requirement, *AmerisourceBergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 952 (9th
10 Cir. 2006). The procedural history of this case, as described above, demonstrates
11 that the Tribe cannot meet this standard. The time for amendments passed long
12 ago, and the Court should deny the Tribe's entire motion under Rule 16.

13 **A. Rule 16 Applies to the Tribe's Motion.**

14 The Tribe argues that Rule 16 does not apply because there is no Phase 3
15 scheduling order. Dkt. 330 at 22. The Tribe is wrong. Nearly a year after the case
16 started, the Court set May 1, 2014 as the deadline to amend the Tribe's complaint.
17 Dkt. 59 at 2. As a mandatory element of the scheduling order, that date "control[s]
18 the subsequent course of the action" unless modified. Fed. R. Civ. P. 16(e). And
19 over five years have passed since that deadline.

20 The Tribe contends that the Court's deadline applied only to Phase 1. Dkt.
21 330 at 22-23. But Rule 16(b)(3)(A) *requires* that a scheduling order set a date to
22 "amend the pleadings." The Court set that date, and the Tribe never sought a
23 modification. The Tribe did not request a new deadline for Phase 2, nor did the
24 Court's Phase 2 scheduling order set a different date. Dkt. 120 at 12-13; Dkt. 121.

25 To the contrary, the Tribe previously treated the May 2014 deadline to
26 amend as applicable to later phases of the case. In reserving the issue of joinder
27 under Rule 19 until Phase 3, the Tribe stipulated that the amendment date would
28 not "work any prejudice" to the Agencies' ability to argue that the Tribe had failed

1 to join necessary parties, Dkt. 49 at 4-5—an agreement that would have been
2 unnecessary if the deadline applied only to Phase 1.

3 Finally, the Tribe suggests that Rule 16 does not apply to requests to
4 *supplement* a complaint. Dkt. 330 at 25. Not so: This Court has expressly applied
5 Rule 16 to requests to supplement, *see Anderson v. City of Rialto*, 2017 WL
6 10562685, at *2 (C.D. Cal. May 17, 2017) (Bernal, J.), as have other district
7 courts.³

8 **B. The Tribe Cannot Show Good Cause for Any Amendment.**

9 Under Rule 16, the Tribe must show good cause for its delay. It cannot do
10 so. The good cause standard “primarily considers the diligence of the party seeking
11 the amendment.” *Johnson*, 975 F.2d at 609. If the party “seeking modification ...
12 was not diligent, the inquiry should end.” *Id.* “The burden [lies] upon [the
13 plaintiff] to prosecute [its] case properly.” *Id.* at 610.

14 1. The Tribe cannot show good cause for any of its pore-space amendments
15 because they all could have been included in the complaint from the beginning.
16 The Tribe pled its claim to pore space, like all its claims, as an element of its
17 asserted federally reserved water right. As the Court has observed, the Tribe
18 asserted ownership in “sufficient pore space” in the aquifer as a whole “to store its
19 federally reserved right to groundwater for all present and future purposes.” Dkt. 1
20 ¶¶ 66, 76. The Tribe could have, but did not, make the very different claim that it
21 owned the specific pore space under its Reservation as a “constituent element” of
22 its land rights. While the Tribe made this argument in its Phase 2 briefs, the Tribe
23 never sought to amend its complaint to make the argument.

24
25
26 ³ *E.g., Infa-Lab, Inc. v. KDS Nail Intern.*, 2008 WL 4793305, at *2 (E.D. Cal.
27 Oct. 27, 2008); *Trilink Saw Chain, LLC v. Blount, Inc.*, 583 F. Supp. 2d 1293, 1329
28 (N.D. Ga. 2008); *Inline Connection Corp. v. AOL Time Warner, Inc.*, 237 F.R.D.
361, 366 (D. Del. 2006).

1 The Tribe, moreover, fails to justify waiting *over half a year* after the Court’s
2 Phase 2 order to make its motion. The Tribe admits that the Court’s order made
3 clear that the Tribe’s complaint did not encompass its “constituent element” theory.
4 Dkt. 330 at 23; Dkt. 318 at 20 n.16. Yet rather than immediately seeking a narrow
5 amendment to address that deficiency, the Tribe waited over six months to bring
6 this motion. Moreover, it made the tactical choice to sit back and wait quietly while
7 the United States pressed its unsuccessful motion for reconsideration—further
8 sandbagging. Courts regularly reject delays of only *one or two months* under the
9 Rule 16 good cause standard. *E.g., Schwerdt v. Int’l Fidelity Ins. Co.*, 28 F. App’x
10 715, 719 (9th Cir. 2002) (one month); *Sako*, 2015 WL 5022326, at *2 (two);
11 *Experexchange, Inc. v. Doculex, Inc.*, 2009 WL 3837275, at *29 (N.D. Cal. Nov.
12 16, 2009) (two). The Court should not accept the longer, strategic delay here.

13 The Tribe says it waited to bring a combined motion to avoid “substantial
14 inefficiency and misuse of Court and party resources.” Dkt. 330 at 24. Yet the
15 Tribe has shown little interest in either the Agencies’ resources or efficiency. The
16 Tribe never informed the Agencies of its planned motion to amend, even when
17 CVWD’s counsel suggested on two separate occasions that the parties should meet
18 to discuss Phase 3. Thompson Decl. ¶¶ 3-5 (filed herewith). The Tribe thus left the
19 Agencies to assume that Phase 3 would involve the one issue set out by the Court in
20 its Phase 2 order and to plan its case accordingly.

21 Contrast the Tribe’s behavior in this case with plaintiff’s diligence and
22 transparency in *Story v. Midland Funding LLC*, 2016 WL 5868077 (D. Or. Oct. 7,
23 2016), which the Tribe cites. There, the court found a three-month delay to be
24 diligent because plaintiff “promptly notified Defendants” of her proposed new
25 claims and engaged in “protracted negotiations on settlement and stipulation” that
26 necessitated the delay. *Id.* at *3. Here, the Tribe did not inform the Agencies of its
27 proposed amendment until the eve of the Tribe’s motion, half a year after this
28 Court’s Phase 2 order. Far from supporting the Tribe, *Story* demonstrates that the

1 Tribe did not have good cause when it not only failed to file its motion quickly after
2 the Court’s order, but also failed to advise the Agencies of its plans for months or
3 see if a stipulation might be possible (as it was in part). There is no question: the
4 Tribe just acted many months too late.

5 2. The Tribe also cannot show good cause for its failure years ago—by the
6 May 2014 deadline, Dkt. 59—to seek many of its other requested amendments,
7 including allegations concerning purported sovereign interests⁴ and a new prayer to
8 enjoin the Agencies “from producing groundwater on the Reservation.”⁵ The Tribe
9 offers no reason for its delay in asserting these claims. The Tribe has raised
10 sovereignty concerns in prior briefs, *see, e.g.*, Dkt. 298 at 4-5; *supra* at 4, and the
11 Agencies have openly operated wells on the Reservation for years. Courts regularly
12 deny leave to amend in such circumstances, because “[t]he good cause standard
13 typically will not be met where the party ... has been aware of the facts and theories
14 supporting the amendment since the inception of the action.” *In re W. States*
15 *Wholesale Nat. Gas Antitrust Litig.*, 715 F.3d 716, 737 (9th Cir. 2013).

16 3. The Tribe also cannot show good cause for its numerous changes seeking
17 to revisit the Court’s determination that the Tribe lacks standing to quantify its
18 groundwater right. The Tribe claims it acted diligently because it sought to add
19 “factual developments that occurred in recent weeks” with “alacrity” and “zero
20 delay.” Dkt. 330 at 25. Yet many of its new allegations consist of facts regarding
21 recharge and agency groundwater production known to the Tribe months, if not
22 years ago.⁶ All of these allegations are untimely for the same reasons as its pore
23 space allegations. Similarly, the Tribe makes the vague allegation that it plans (in
24 some undefined manner and at some unidentified time in the future) to “fully
25

26 ⁴ These proposed amendments include those set out in Dkt. 329-1 (including
page 15, line 4 (¶¶ 72, 73, 74) and page 18, line 14).

27 ⁵ *See id.* (page 20, line 1).

28 ⁶ *E.g., id.* (page 12, line 7 (¶¶ 40, 41, 42, 45, 48); page 13, line 8; page 13, line
11 (¶¶ 52, 53, 58); page 17, line 15; page 20, line 1).

1 develop and use its groundwater rights,” which it claims to be “at least 60,000 AF
2 per year,” Dkt. 329-1 at 8 ¶ 58—a claim it could have made from the very outset of
3 this lawsuit. While the Tribe offers these amendments in an effort to undo the
4 Court’s Phase 2 rulings, such a “motivation . . . to survive summary judgment”
5 “weighs against granting leave” under the Rule 16 standard. *Lewis v. Russell*, 2012
6 WL 4711959, at *5 (E.D. Cal. Oct. 3, 2012).

7 4. The Tribe admittedly engineered its other proposed amendments to seek a
8 redo of this Court’s summary judgment ruling. The Tribe seeks to add allegations
9 that it: is installing new wells and expects to resume groundwater production by
10 January 2020; created a Tribal water authority to issue permits on the Reservation;
11 and plans to “store” groundwater by not using it.⁷ While those allegations relate to
12 events that post-date the initial complaint, they are not the type of facts that would
13 ordinarily justify a pleading amendment when discovered during litigation. Instead,
14 they all relate to *the Tribe’s voluntary actions* taken *after* this Court ruled—hardly
15 circumstances in which the Tribe was hamstrung in its ability to prosecute its case
16 in a timely fashion. *Cf. Sosa v. Airprint Sys., Inc.*, 133 F.3d 1417, 1419 (11th Cir.
17 1998) (no good cause for motion to amend after case was dismissed where nothing
18 prevented plaintiff from developing the evidence at issue before the court’s ruling;
19 party’s own “lack of diligence,” not some external obstacle, “left to chance a
20 critical component of subject matter jurisdiction”); *S. Grouts & Mortars, Inc. v. 3M*
21 *Co.*, 575 F.3d 1235, 1241-43 (11th Cir. 2009) (similar).

22 The Tribe, moreover, has still failed to demonstrate diligence in pursuing its
23 new claims. For instance, the Tribe proffers a bare allegation that it is drilling new
24 wells,⁸ but provides no information regarding when the Tribe began planning the
25 wells. Additionally, given that the Tribe previously claimed that pumping occurred
26 on the Reservation, *e.g., supra* at 4, the Tribe fails to explain why it had to wait

27 _____
28 ⁷ *Id.* (page 13, line 11 (¶¶ 54-61)).

⁸ *See id.* (page 13, line 11 (¶ 54)).

1 until now to allege pumping. The same is true for its new ordinance—the Tribe
2 provides no evidence regarding when it first considered that course, or why it
3 waited until years after the Court declared it possessed a reserved right to
4 groundwater to enact the ordinance, even though it noted its plan to “store”
5 groundwater years ago. *E.g., id.*; Dkt. 217 at 5-6; Dkt. 241 at 27:4-6; Dkt. 289 at 4.
6 That such allegations post-date the original complaint does not in and of itself show
7 good cause; the Tribe must also “show diligence in seeking amendment . . .” *Story*,
8 2016 WL 5868077, at *2; *see also* *Campion v. Old Rep. Home Prot. Co.*, 861 F.
9 Supp. 2d 1139, 1152 (S.D. Cal. 2012) (no diligence where plaintiff had “ample time
10 and numerous opportunities” to take action).

11 5. As discussed in the next section, the Agencies also would suffer prejudice
12 from reopening Phase 2 after two years of litigation. Re-litigating Phase 2 would
13 require significant new work—including discovery, expert testimony, briefing, and
14 arguments—all just to retry the standing issues that this Court already resolved in
15 its Phase 2 order. The Tribe’s added claims also would require far more extensive
16 proceedings than would be required to resolve the very narrow issue the Court
17 currently framed for Phase 3. The Court need not find prejudice to deny the Tribe’s
18 untimely motion under Rule 16, but such a finding “supplies an additional reason”
19 to do so. *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1295 (9th Cir. 2000).

20 In summary, the Court can and should reject this latest effort to undo the
21 Court’s Phase 2 rulings, which the parties spent millions of dollars and over two
22 years litigating. The Court should deny the Tribe’s motion under Rule 16.

23 **IV. The Court Should Also Reject the Amendments under Rule 15.**

24 Even if the Tribe has satisfied Rule 16, it must also satisfy Rule 15. In
25 evaluating a motion to amend under Rule 15, courts examine several factors,
26 including “undue delay, bad faith or dilatory motive on the part of the movant,
27 repeated failure to cure deficiencies by amendments previously allowed, undue
28 prejudice to the opposing party by virtue of the amendment, [and] futility of the

1 amendment.” *Foman v. Davis*, 371 U.S. 178, 182 (1962). Although undue delay
2 alone is not a sufficient ground to deny a motion, “when combined with a showing
3 of prejudice, bad faith, or futility of amendment, leave to amend will likely be
4 denied.” *Sako v. Wells Fargo Bank, Nat’l Ass’n*, 2015 WL 5022326, at *3 (S.D.
5 Cal. Aug. 24, 2013) (citing *Bowles v. Reade*, 198 F.2d 752, 758 (9th Cir. 1999)).

6 If the Court concludes that the amendments focused on the Tribe’s claim that
7 it owns pore space as a “constituent element” of its land do not violate Rule 16,
8 CVWD has agreed not to object to those specific amendments under Rule 15. Dkt.
9 327. CVWD believes that the Tribe failed to pursue those amendments with the
10 diligence and good faith required by Rule 16, but in an effort to simplify the issues
11 before the Court, is not contending that they raise issues of bad faith, prejudice, or
12 futility.

13 Both Rules 15 and 16, however, call for the denial of the remainder of the
14 Tribe’s motion. The rest of the motion is not only impermissibly late, but violates
15 all of the Rule 15 factors. The amendments and supplemental allegations are
16 designed to re-litigate the Court’s decision that the Tribe lacks standing to pursue
17 quantification of either water rights or pore space. They also (1) improperly seek to
18 circumvent the Court’s summary judgment decision, (2) would require the parties
19 to spend extensive time and money re-litigating issues that the parties just spent a
20 year and a half resolving, and (3) would not change the final conclusion that the
21 Tribe lacks standing. The Tribe’s effort to add a brand new claim regarding the
22 Tribe’s jurisdiction over wells on the Reservation would raise complex new legal
23 issues and factual questions and delay the case on the verge of final resolution. For
24 all of these reasons, the Court should reject the remainder of the Tribe’s motion
25 under Rule 15.

1 **A. Bad Faith: The Tribe’s Motion Seeks to Circumvent Summary**
2 **Judgment.**

3 According to the Ninth Circuit, filing a motion to amend after a court has
4 entered summary judgment, or even after briefing is complete, weighs against the
5 moving party under the bad faith factor. A motion to amend “is not a vehicle to
6 circumvent summary judgment,” which represents a significant investment by the
7 parties and the Court, and filing a motion after “a pending summary judgment
8 motion ha[s] been fully briefed[],” much less decided, “*weighs heavily against*
9 *allowing leave.*” *Schlacter-Jones v. Gen. Tel. of Cal.*, 936 F.2d 435, 443 (9th Cir.
10 1991) (italics added). Accordingly, denial of leave to amend is proper where such a
11 motion is “brought to avoid the possibility of an adverse summary judgment
12 ruling.” *Acri v. Int’l Ass’n of Machinists & Aerospace Workers*, 781 F.2d 1393,
13 1398 (9th Cir. 1986). “Much of the value of summary judgment ... would be
14 dissipated if a party were free to rely on one theory in an attempt to defeat a motion
15 for summary judgment and then, should that theory prove unsound, come back long
16 thereafter and fight on the basis of some other theory.” *Nguyen v. United States*,
17 792 F.2d 1500, 1503 (9th Cir. 1986); *Lockheed Martin Corp. v. Network Sols., Inc.*,
18 194 F.3d 980, 986 (9th Cir. 1999) (amendment sought when moving party was
19 “facing a summary judgment motion” supported bad-faith finding). For all of these
20 reasons, courts are rightly “reluctant to allow leave to amend to a party against
21 whom summary judgment has been entered.” *Nguyen*, 792 F.2d at 1503; see 10A
22 WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2712 (4th ed. 2019) (same).

23 Heeding this precedent, numerous district courts in this Circuit have denied
24 leave to amend when the court has granted or the parties have briefed summary
25 judgment. *E.g.*, *Sako*, 2015 WL 5022326, at *4 (denying leave to amend due to a
26 “pending motion for summary judgment”); *Parapluiie, Inc. v. Mills*, 2012 WL
27 12887556, at *15 (C.D. Cal. Apr. 30, 2012) (“[T]he Ninth Circuit and others have
28 repeatedly held that leave to amend may not be used to avoid the entry of summary

1 judgment.”); accord *Forty-Niner Sierra Res., Inc. v. Subaru of Am., Inc.*, 416 F.
2 Supp. 2d 861, 871 (E.D. Cal. 2004).

3 The Court therefore should deny all of the Tribe’s supplemental allegations
4 designed to re-litigate the standing questions resolved by this Court’s Phase 2
5 summary judgment order. It is important to emphasize that the Tribe has crafted all
6 of these allegations explicitly to seek a second bite at the standing apple. This is
7 not a case where external actions have suddenly changed the facts on which the
8 Court based its summary judgment order. Although the Tribe’s motion reads as if
9 its proffered supplement is based on facts that fortuitously materialized through
10 extrinsic circumstances, *e.g.*, Dkt. 330 at 9-10 (citing “the emergence of new facts
11 ... since the Court issued its Phase 2 order”), all of the Tribe’s “new facts” involve
12 either actions that the Tribe alleges that it itself is taking or that rehash old ground
13 covered by the Tribe or the U.S. in earlier briefs. None of the allegations involve
14 new actions by the Agencies. The Tribe thus alleges that:

- 15 • The Tribe is “resuming groundwater production on the Reservation” and will
16 face lower groundwater levels (a claim that the Tribe has previously made
17 and the Court has already held does not by itself establish standing), *compare*
18 Dkt. 329-1 at 6 ¶¶ 53-55, *with* Dkt. 318 at 15-16;
- 19 • The Agencies impose a replenishment assessment on non-*de minimis*
20 groundwater pumpers on the Reservation (an assessment that the Tribe has
21 known about for years, but never challenged, and that the United States
22 already raised in its failed motion for reconsideration), *see* Dkt. 329-1 at 9 ¶¶
23 60-61; Dkt. 324 at 3-4;⁹
- 24 • The Tribe passed a new ordinance to issue permits for groundwater pumping
25 on the Reservation and plans to “store” groundwater in the aquifer by not
26

27 ⁹ The replenishment assessment, which state law authorizes, pays for the cost of
28 replenishing the aquifer with new water in order to avoid overdraft. *See* Cal. Water
Code §§ 31630-31639.

1 using it (a plan that the Tribe already raised in its Phase 2 arguments),
2 *compare* Dkt. 329-1 at 7-9 ¶¶ 56-57, *with* Dkt. 217 at 5-6; Dkt. 241 at 27:4-6;
3 Dkt. 289 at 3-7; and

- 4 • The Tribe plans to impose a fee on the Agencies if they produce the Tribe’s
5 groundwater on the Reservation, *see* Dkt. 329-1 at 8-9 ¶ 59.

6 This transparent effort to undo the Court’s ruling based on old allegations or
7 actions the Tribe could have taken at any point earlier in the litigation—*i.e.*, before
8 putting the Court and parties through extensive rounds of costly briefing on its
9 now-rejected theories—“smacks of gaming the Court and opposing party” and
10 should not be rewarded. *Trans Video Elecs., Ltd. v. Sony Elecs., Inc.*, 278 F.R.D.
11 505, 510 (N.D. Cal. 2011).

12 **B. Prejudice: The Tribe’s Amendments Are Prejudicial Because**
13 **They Would Require the Parties to Re-litigate Issues and Engage**
14 **in Extensive New Proceedings, Delaying Resolution of the Case.**

15 1. As noted earlier, the purpose of Phase 2 was to narrow the issues for
16 Phase 3 and thus streamline this case. The Court’s April 2019 order accomplished
17 this goal. After considering the Phase 2 summary judgment motions, the Court
18 concluded that the “sole remaining claim” to be litigated in Phase 3, and thus this
19 case as a whole, would be the “narrow issue of whether the Tribe owns sufficient
20 pore space to store its federally reserved right.” Dkt. 318 at 21. All of the Tribe’s
21 requested amendments and additions, except for those amendments narrowly
22 focused on the Tribe’s argument that it owns pore space as a “constituent element”
23 of its land, would overturn this effort, require the parties to engage in extensive new
24 discovery and other legal proceedings (much of its focused on re-litigating what the
25 Court has already decided), potentially require the joinder of additional parties
26 whose rights could be impacted, and dramatically delay resolution of a case that is
27 ready now to proceed to Phase 3. For all of these reasons, the Tribe’s proposed
28 amendments and additions would be extremely prejudicial.

1 2. The most important factor in evaluating motions for leave under Rule 15
2 is prejudice. *See William Inglis & Sons Baking Co v. ITT Cont'l Banking Co.*, 668
3 F.2d 1014, 1053 (9th Cir. 1981). The portion of the Tribe's motion focused on re-
4 litigating the standing issues that the Court already resolved in its Phase 2 order
5 would cause obvious substantial prejudice. The Agencies spent two years and
6 incurred extensive legal fees demonstrating to the Court in Phase 2 that the Tribe
7 did not have standing to pursue any of its remaining claims except for one narrow
8 issue involving pore space. The Tribe, however, would require the parties to redo
9 this effort. If the Tribe's motion were granted, the Agencies would be forced once
10 again to disprove the Tribe's factual allegations (requiring extensive discovery),
11 provide its own expert testimony (and depose any tribal experts), brief relevant
12 legal issues, and then seek summary judgment. Perhaps not surprisingly, courts
13 have frequently have found motions to amend brought in such circumstances to be
14 prejudicial. *See, e.g., Quan v. S.F. Police Dep't*, 2011 WL 2470477, at *5 (N.D.
15 Cal. June 21, 2011) (finding post summary-judgment motion to amend prejudicial,
16 and collecting cases).

17 Consider just one example of the inevitable prejudice of granting the Tribe's
18 motion. In an effort to manufacture standing, the Tribe says it intends to "fully
19 develop and use its groundwater rights," which it estimates to be 60,000 acre-feet
20 per year ("AFY") (or approximately *double* the amount of water naturally available
21 at the Reservation's creation). Dkt. 329-1 at 8 ¶ 58. If the Tribe were able to insert
22 this conclusory allegation at this late date, the Agencies would be entitled, at a
23 minimum, to document discovery, depositions of tribal officials, and expert
24 discovery—all for a claim of at best doubtful validity.¹⁰ Such extensive work on an
25

26 ¹⁰ The Tribe asserts no basis whatsoever to support this claim, and includes no
27 allegations suggesting it needs or has ever used anywhere close to that much water.
28 *Cf.* Dkt. 324 at 4 (The Court: The Tribe "failed to provide evidence that the aquifer
has insufficient water to satisfy both the purpose of the reservation and the
Agencies' use."). Indeed, the Tribe has never disputed the voluminous record

1 issue the Court has already resolved in the Agencies’ favor would plainly cause
2 prejudice—particularly when nothing stopped the Tribe from asserting this theory
3 from the beginning of its case, some six years ago. And courts in the Ninth Circuit
4 regularly find prejudice on the facts above. Prejudice plainly results where
5 “proceedings [are] further prolonged” through an amendment, and “Defendants
6 would be entitled to conduct discovery related to the additional facts and causes of
7 action that Plaintiff seeks to allege.” *Weeks v. Union Pac. Rr. Co.*, 2017 WL
8 714368, at *7 (E.D. Cal. Feb. 22, 2017).

9 3. The Tribe’s new claim involving authority over pumping on the
10 Reservation¹¹ would also prejudice the Agencies by introducing complex new
11 issues, dramatically delaying the case’s resolution. For example, the Tribe’s new
12 claim would raise complicated new factual and legal issues regarding the Tribe’s
13 authority over fee-simple lands on the Reservation. *See Montana v. United States*,
14 450 U.S. 544 (1981). This claim, in short, would “substantially change[] the theory
15 on which the case has been proceeding and [are] proposed late enough that [the
16 Agencies] would be required to engage in significant new preparation.” 6 WRIGHT
17 ET AL., FEDERAL PRACTICE & PROCEDURE § 1487 (2d ed. 1990). Cases like
18 *AmerisourceBergen* establish that amendments that “drastically chang[e] [a party’s]
19 litigation theory” far into litigation, particularly new theories that would “require
20 proof of different facts,” are deeply prejudicial because they “unfairly impos[e]
21 high, additional litigation costs.” 465 F.3d at 953.

22 These rules apply equally in cases involving tribal claims. In *United States v.*
23 *Pend Oreille Public Utility District No. 1*, 28 F.3d 1544, 1552-53 (9th Cir. 1994),

24 _____
25 evidence (including admissions from its own expert) showing that it has been
26 incredibly economically successful using far less water. *E.g.*, Dkt. 200-4, Ex. A at
27 12-14 (Howitt); Dkt. 277-3, Ex. 1 at 109:5-112:21, 147:24-149:16 (Page). And the
28 expert report proffered by the United States *admitted* that the Tribe could claim no
water in excess of the safe yield, estimating its claim at 33,608 AFY (a number that
is still too high, but roughly half what the Tribe now claims). Dkt. 319-2 at 10, 14.

¹¹ *See supra* at 9 nn. 4-5.

1 for example, the Ninth Circuit upheld denial of leave to amend on timeliness and
2 prejudice grounds where a tribe sought to add a new claim requiring additional
3 discovery into water and fishing rights and the joinder of new parties, delaying an
4 upcoming phase of trial. Similarly, in *Western Shoshone National Council v.*
5 *Molini*, 951 F.2d 200, 204 (9th Cir. 1991), the court found prejudice where a tribe
6 asserted new claims involving aboriginal and treaty-based hunting and fishing
7 rights, finding that the State of Nevada was prejudiced by “the time and expense of
8 continued litigation on a new theory, with the possibility of additional discovery.”¹²

9 4. The Tribe contends that the Agencies will suffer no prejudice because “the
10 parties always anticipated substantial discovery in Phase 3.” Dkt. 330 at 12. Just
11 the opposite is true: the parties hoped that Phase 2 might narrow the claims needed
12 to be resolved in Phase 3 and thereby limit needed discovery. *See* Dkt. 54 at 10-11;
13 Dkt. 120 at 3. The parties expressly stated that expensive discovery and ancillary
14 motion practice “*could be rendered moot* depending on how the Court rule[d]” in
15 Phase 2, thereby “[a]voiding unnecessary factual development of claims ... that the
16 Court rules untenable as a matter of law” Dkt. 54 at 11. And that is exactly
17 what happened here: The Court held that the Tribe did not have standing to pursue
18 its remaining claims except for a narrowed pore-space claim. *See* Dkt. 318 at 21.

19 The cases on which the Tribe relies for arguing that there would be little
20 prejudice here involved amended pleadings that would have added little if any
21 discovery in relation to the discovery that *would have occurred anyway*. By
22 contrast, the Tribe’s motion would cause an extremely broad and lengthy discovery
23 period that would dwarf the discovery needed to resolve the one, limited pore-space

24
25 ¹² *Accord, e.g., Bryant v. Spectrum Brands, Inc.*, 2012 WL 2339115, at *6 (E.D.
26 Cal. June 19, 2012) (amendment “would require [defendant] to expend significant
27 additional resources to conduct discovery and complete additional motion
28 practice”); *Schilling v. TransCor Am., LLC*, 2012 WL 4859020, at *2 (N.D. Cal.
Oct. 11, 2012) (need for revised expert reports prejudicial); *Fox v. Good Samaritan
Hosp. LP*, 2008 WL 2805407 (N.D. Cal. July 17, 2008) (prejudicial to permit
amendment after summary judgment “after seven years of litigation”).

1 issue the Court allowed to survive for Phase 3. And to the degree the Tribe objects
2 to the “limited discovery thus far in this case” (an argument also made in the United
3 States’ failed motion for reconsideration), that is a circumstance of its own making.
4 Dkt. 330 at 13; *see* Dkt. 319 at 21-23. As described in CVWD’s opposition to the
5 United States’ motion, the Tribe and United States consistently and vehemently
6 opposed discovery in Phase 2. *See* Dkt. 321 at 8-9. And the Court already
7 provided the Tribe an opportunity to supplement the record and take discovery.
8 Dkt. 266. The Tribe cannot use this motion to undo its prior strategic decisions.

9 **C. Futility: The Agencies Would Still Be Entitled to Summary**
10 **Judgment Even if the Tribe’s Amendments Were Accepted.**

11 The Court should also reject the Tribe’s attempt to re-litigate the Court’s
12 Phase 2 standing decisions because the Tribe’s proposed amendments are futile.
13 Futility “can, by itself, justify the denial of a motion for leave to amend.” *Nat. Res.*
14 *Def. Council v. Pruitt*, 2017 WL 5900127, at *6 (N.D. Cal. Nov. 30, 2017) (quoting
15 *Bonin v. Calderon*, 59 F.3d 815, 845 (9th Cir. 1995)). An amendment is futile “if it
16 could be defeated by a motion to dismiss or ... summary judgment.” *Miller v.*
17 *Rykoff-Sexton, Inc.*, 845 F.2d 209, 214 (9th Cir. 1988).

18 1. The Tribe’s attempt to avoid the Court’s ruling that the Tribe lacks
19 standing to seek a quantification of its reserved water right is futile. Indeed, this
20 Court has already rejected the theories underlying nearly all of the Tribe’s proposed
21 amendments on this point. As the Court found in its summary judgment order, “to
22 satisfy the injury-in-fact requirement for standing to quantify its Winters right, the
23 Tribe must provide evidence that Defendants’ actions actually or imminently harm
24 the Tribe’s *ability to use sufficient water to fulfill the purpose of the reservation.*”
25 Dkt. 318 at 14 (emphases added); *see id.* (“the Court looks for evidence that the
26 Tribe is unable, or may imminently become unable, to use sufficient water to fulfill
27 the purposes of the reservation”). None of the Tribe’s new allegations, even if
28

1 provable, would demonstrate that the Tribe either now or in the imminent future
2 would be unable to use sufficient water to fulfill the purposes of the Reservation.

3 The Tribe claims that its new allegations, if proven, would establish standing
4 in four ways. *First*, it alleges that it will initiate groundwater production at wells
5 within the Agencies' service areas by January 2020, and that the cost of doing so
6 will be more expensive than if the water table were at its "natural level." But the
7 Tribe already offered this precise theory based on its past groundwater pumping
8 and failed to present any evidence connecting any supposedly higher costs to any
9 activity by the Agencies. The Court accordingly rejected it. *See* Dkt. 318 at 15.

10 In Phase 2, the Tribe noted that it had pumped groundwater from 2009 to
11 2012 and that its members' lessees still pumped groundwater. *Id.* The Tribe
12 further argued that declining groundwater levels had led to increasing pumping
13 costs. *Id.* The Court found that these allegations lacked "any citation to the
14 record." *Id.* The Court, moreover, concluded that "injury to the water table" is not
15 the same as "injury to the Tribe's Winters right." *Id.* An "overdraft condition—
16 whether currently or cumulatively over many years—is not enough to satisfy the
17 Tribe's burden to provide evidence of injury related to its quantification claim." *Id.*
18 Instead, the Tribe must be able to demonstrate that the Tribe is "unable to access
19 sufficient water." *Id.* The Tribe's new allegations do not provide the missing link
20 but merely recast the Tribe's claim in terms of potential future pumping rather than
21 past or current pumping (a difference that is inconsequential under the Court's
22 ruling, reasoning, and analysis—as well as the cases it cited in support).

23 The Tribe's new allegations also continue to rely on the rejected theory that
24 the Tribe can show an injury simply by providing evidence that the costs of
25 pumping water are now higher than when the water table was at its "natural level"
26 before any development occurred in the Coachella Valley. *See* Dkt. 329-1 at 7 (¶¶
27 53-55). The Tribe is transparently attempting to rely upon a "past injury" (*i.e.*,
28 historical overdraft) instead of "the prospect of future injury" required to support

1 standing to seek prospective relief, including quantification. *Ervine v. Desert View*
2 *Reg'l Med. Ctr. Holdings, LLC*, 753 F.3d 862, 868 (9th Cir. 2014). The Tribe
3 already attempted and failed to provide evidence of current, recent, or impending
4 overdraft through its purported expert. *See* Dkt. 302 at 6. Worse still, *its own*
5 *consultants acknowledged that there has been no overdraft in the Basin for the past*
6 *10 years*. *See* Dkt. 277-3, Ex. 1 at 88:13-20. And Mr. Page separately admitted
7 that there was no overdraft condition affecting tribal lands—to the contrary, the
8 Tribe's own data showed an upward trend at nearly every well on the reservation.
9 *See id.* at 99:2-103:20, 107:5-12, 108:7-109:4. The Tribe's continued reliance on
10 vague allegations about long-past overdraft is particularly problematic given
11 CVWD's already-submitted evidence that since 2010 CVWD has recharged more
12 water than it has pumped. Dkt. 302 at 7; Dkt. 281 at 9. Accordingly, the Tribe also
13 cannot satisfy the standing requirement that it show any injury is "fairly traceable"
14 to CVWD's conduct. *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016).

15 *Second*, the Tribe alleges that it has directed its Water Authority to "store"
16 20,000 acre feet of water per year, by not pumping it, and that the Agencies'
17 pumping will threaten this "use" of its water. Dkt. 329 at 16-17. Again, this is a
18 claim it advanced in Phase 2. *See* Dkt. 217 at 5-6; Dkt. 241 at 27:4-6; Dkt. 289 at
19 4. The Tribe's new allegations therefore add nothing new to the standing question
20 already resolved by the Court. While the Tribe did not lead with this argument in
21 Phase 2, presumably that is because the Tribe realizes that it is wrong. When the
22 Tribe says that it plans to "store" groundwater, it means that it does not plan to
23 pump the groundwater. The Tribe, in short, is claiming the right to groundwater
24 that is not using. But as the Court emphasized in its Phase 2 order, a "tribe's
25 property right [is] usufructuary in nature in that the tribe [does] not own particular
26 molecules of water but the advantage of its use." Dkt. 318 at 13 (citing case law).
27 Thus, a "tribe *cannot be injured*" by "action that does not affect [its] ability to *use*
28 *sufficient water* to fulfill the purposes of the [r]eservation." *Id.* (italics added); *see*

1 also *Crow Creek Sioux Tribe v. United States*, 900 F.3d 1350 (Fed. Cir. 2018) (no
2 standing to sue for allegedly diverting and appropriating a tribe’s federal reserved
3 water right because right is “usufructuary” and tribe was not using the water).

4 The Tribe’s repackaged theory remains as meritless as before. The two cases
5 it cites to contend that it can claim water that it does not use are the same ones the
6 Tribe has cited throughout this litigation, and they are readily distinguishable. Both
7 involved tribes who actively used their *Winters* rights to preserve surface water for
8 fishing and hunting. The tribes used the water to keep fish and wildlife stocked and
9 to exercise their treaty rights to fish and hunt. See *United States v. Anderson*, 736
10 F.2d 1358, 1365 (9th Cir. 1984); *United States v. Adair*, 723 F.3d 1394, 1411 (9th
11 Cir. 1983); *United States v. Adair*, 478 F. Supp. 336, 340 (D. Or. 1979).

12 Here, there is no allegation, nor could there be, that the presence of
13 groundwater under the reservation as an end in itself furthers any purpose of the
14 Agua Caliente Reservation. Instead, the Tribe simply seeks *not to exercise* its right
15 to pump and use groundwater. To establish standing, however, what the Tribe must
16 show is that some action by CVWD will “actually or imminently harm the Tribe’s
17 ability to use sufficient water to fulfill the purposes of the reservation.” Dkt. 318 at
18 14. As already explained, the Tribe did not do so in Phase 2 and cannot do so now.

19 *Third*, the Tribe asserts that its supplemental allegations show that the
20 Agencies’ conduct imposes imminent harm on the Tribe’s “sovereign interests.”
21 Dkt. 330 at 17-19. Once again, these allegations add nothing to the record that was
22 before the Court when it resolved the summary judgment motions in Phase 2. The
23 Tribe specifically raised sovereignty claims numerous times in Phase 2, only to
24 have those claims rejected. *E.g.*, Dkt. 217 at 5-6; Dkt. 209 at 6. The Tribe’s
25 argument, moreover, simply repeats the prior one, as it is entirely premised on the
26 concept that the Tribe owns the groundwater itself (rather than holding merely a
27 use, or usufructary, right). For example, the Tribe argues that its own ordinance
28 gives it authority to “protect the Reservation’s federal reserved groundwater and

1 direct[] the use of a portion of that water for aquifer replenishment.” Dkt. 330 at
2 17. But because the Tribe does not “own” any water, it necessarily lacks authority
3 to dictate how that water will be used except to the extent it uses the water “to
4 fulfill the purposes of the reservation.” Dkt. 318 at 13.

5 *Finally*, the Tribe argues that its new allegations would show that its planned
6 use of groundwater places it in “hostile” competition with the Agencies. Dkt. 330
7 at 20-21. Precisely the opposite is true. The Agencies have consistently stated
8 throughout this litigation that the Tribe is free to pump groundwater under its state
9 correlative rights, and that the Agencies will not interfere. *E.g.*, Dkt. 200 at 11-13.
10 The fact that the Tribe has now announced an intent to begin installing and using
11 new wells simply proves *the Agencies’* point that there is no present conflict over
12 whether or how much the Tribe may pump. The Tribe’s claimed conflict is based
13 on its bare assertion that it is entitled to and will at some point pump or otherwise
14 develop 60,000 AFY. That assertion is entirely baseless—as noted above, *supra* at
15 n.10—and includes nothing suggesting any imminent conflict whatsoever. In any
16 event, the assertion that the Tribe will pump such a large amount of water is plainly
17 speculative, and therefore insufficient to show an imminent injury. *Cf.* Dkt. 318 at
18 16 (Tribe’s MOU with Mission Springs did not create standing because it did “not
19 evidence that the Tribe *will* pump water” (italics added)). As the Court explained in
20 its Phase 2 order, relying on the Supreme Court’s decision in *Arizona v. California*,
21 373 U.S. 546 (1963), *should a true quantity-related dispute arise in the future, it*
22 *“can be settled at that time.”* Dkt. 318 at 14 (italics added).

23 2. The Tribe’s amendments designed to re-litigate its standing to seek
24 quantification of its pore space or an injunction prohibiting the Agencies from
25 pursuing their recharge activities are also futile in light of the Court’s Phase 2
26 order.¹³ The Court has already ruled that the Tribe lacks standing to pursue such

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28 ¹³ See Dkt. 329-1 at 2 (page 4, line 6), 10 (page 16, line 27; page 17, line 1), 11
(page 19, line 17; page 19, line 21).

1 relief, which exceeds the narrow issue of pore space *ownership* at issue in Phase 3.
2 Dkt. 318 at 20-21. Both the Tribe and the Court have specifically distinguished
3 between declaring an ownership interest in pore space and adjudicating the scope of
4 that interest through quantification and injunctive relief. *See id.*; Dkt. 209 at 8-9.

5 The Tribe contends that this Court should permit it to seek “quantification of
6 the volume of pore space” under its constituent-element theory because that theory
7 asserts a “fixed property right.” Dkt. 330 at 11 n.4. But that does not explain why
8 a volumetric calculation is necessary or appropriate. For example, while a tribe
9 might own coal as a constituent element of its land, that does not mean that it
10 automatically has the right to force a court—and countless parties—to quantify its
11 precise volume of coal without an Article III case or controversy requiring such
12 inquiry and relief. *See Davis v. FEC*, 554 U.S. 724, 734 (2008) (Tribe must prove
13 justiciability for “each form of relief that is sought”); Dkt. 324 at 5 (Court noting
14 that “quantification and injunction” are “additional” forms of relief beyond a
15 declaration of a right). Here, the Tribe does not even attempt to explain how the
16 Agencies have caused a concrete, imminent injury that the Court could or should
17 redress by embarking on the complex calculation the Tribe requests; indeed, the
18 Tribe devotes only a conclusory footnote to the issue. Dkt. 330 at 11 n.4.

19 Moreover, its long-standing consultant and expert already admitted that the
20 Agencies had caused no damage to the Tribe’s pore space or tribal land, no harm to
21 the Tribe’s development opportunities, and no harm to any water storage projects.
22 Dkt. 277-3, Ex. 1 at 162:12-163:2; Dkt. 281 at 4-5. Accordingly, the Tribe’s
23 amendments seeking quantification of pore space and an injunction are futile.

24 **D. Undue Delay: The Tribe’s Amendments Are Untimely.**

25 The Tribe’s proffered amendments are also untimely under Rule 15 for the
26 same reasons discussed earlier in connection to Rule 16. *Supra* Part III. Just as
27 under Rule 16, “late amendments to assert new theories are not reviewed favorably
28 [under Rule 15] when the facts and theory have been known to the party seeking

1 amendment since the inception of the action.” *Acri*, 781 F.2d at 1398. In
2 combination with the severe and readily apparent prejudice to the Agencies, and the
3 futility of the Tribe’s amendments (many of which simply seek to re-litigate claims
4 the Court has already rejected), the Tribe’s delay in seeking amendment is
5 “sufficient to deny amendment.” *Weeks*, 2017 WL 714368, at *6.

6 **V. Conclusion**

7 For the foregoing reasons, the Court should deny the Tribe’s motion under
8 Rule 16 or, alternatively, under Rule 15. This Court has patiently decided motion
9 after motion from the Tribe and U.S. attempting to revive the Tribe’s claims. It
10 should reject this last one and allow the parties to proceed finally to try the narrow
11 issue it reserved for Phase 3—and to end this case.

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Certification in Compliance with Local Rule 5-4.3.4

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

Dated: November 25, 2019

/s/ Barton Thompson, Jr.
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