

PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298



December 24, 2021

Proposed Resolution W-5250

Agenda ID: 20211

To: All Interested Persons

Enclosed is Proposed Resolution W-5250 of the Water Division, which rejects Havasu Water Company's Advice Letter 48-W. Proposed Resolution W-5250 is scheduled to appear on the January 27, 2022 Commission Meeting Agenda (ID# 20211).

The Commission may act on this resolution or it may postpone action until later. When the Commission acts on a proposed resolution, the Commission may adopt all or part of the proposed resolution, as written, or amend or modify the proposed resolution; or the Commission may set the proposed resolution aside and prepare a different resolution. Only when the Commission acts does the resolution become binding.

Interested persons may submit comments on Proposed Resolution W-5250 via email to Water.Division@cpuc.ca.gov on or before January 13, 2022. **Please reference "Proposed Resolution W-5250" in the subject line.**

Interested persons must also serve a copy of their comments on the utility on the same date that the comments are submitted to the Water Division. If email is unavailable, please submit comments to:

California Public Utilities Commission
Water Division
505 Van Ness Avenue
San Francisco, CA 94102

Comments should focus on factual, legal, technical errors, or policy issues in the proposed resolution.

Persons interested in receiving comments submitted may contact the Water Division at Water.Division@cpuc.ca.gov or (415) 703-1133. Please reference "Proposed Resolution W-5250."

/s/ BRUCE DEBERRY

Bruce DeBerry, Program Manager
Water Division

Enclosures: Proposed Resolution W-5250
Certificate of Service
Service List

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

WATER DIVISION

RESOLUTION W-5250
January 27, 2022

RESOLUTION

(RES. W-5250) HAVASU WATER COMPANY. ORDER
REJECTING ADVICE LETTER 48-W IN ACCORDANCE
WITH GENERAL ORDER 96-B, GENERAL RULE 7.6.2.

SUMMARY

By Advice Letter (AL) 48-W, filed on October 22, 2021, Havasu Water Company (Havasu) seeks a general rate increase producing additional annual revenues of \$61,100, or 22.80%, based on a Rate of Margin (ROM) of 23.65%. Havasu also requests a change to Commission Resolution W-5224 addressing the utility's prior AL 45-W to resolve the utility's water supply issue involving the disputed easement with the Chemehuevi Indian Tribe.

This Resolution rejects Havasu's AL 48-W for the following reasons: 1) Havasu did not comply with the Commission's AL requirements set-forth in General Order 96-B, Water Industry Rule 4.1(3) requiring that utilities serve all interested parties;¹ 2) Havasu's request that the Commission find that the easement exists is denied because the Commission has already found that the easement has expired; and 3) Havasu's request for a rate increase to pay for the construction of wells is not properly before the Commission at this time because the wells have not been constructed or placed in service.

BACKGROUND

By Advice Letter (AL) 48-W, filed on October 22, 2021, Havasu Water Company (Havasu) requested authority under General Order (GO) 96-B, Rule 1.7 and 7.6.2, Water

¹ Havasu did not serve a copy of AL 48-W to Chemehuevi Indian Tribe, an interested party involved in the easement dispute with Havasu, an issue the utility is requesting the Commission to address as part of its rate increase request in AL 48-W.

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Industry Rules 7.3.3(5), and Section 454 of the Public Utilities Code to increase its annual revenues by \$61,100, or 22.80% for Test Year (TY) 2021.

Havasu's present rates were approved on June 11, 2020, by Commission Resolution W-5224, which authorized a general rate increase of \$49,165, or 21.67% for TY 2019.

Havasu is a Class D water utility which provides domestic water service to 211 metered service connections. Havasu's service territory is in the unincorporated community of Havasu Lake in San Bernardino County.

Havasu's water system consists of four pumps, a chlorinator, sand filter, 150,000-gallon storage tank, and a 10,000-gallon pneumatic tank. The sole source of the system is Lake Havasu. Under the system's current configuration, the total water supply capacity of the system is 120 gallons per minute (gpm) or 403,200 gallons. As indicated in Havasu's 2017 sanitary survey conducted by the State Water Resources Control Board, Division of Drinking Water (DDW), the system sufficiently meets its maximum day demand (MDD) of 89,700 gallons.²

Havasu purchases water annually from the City of Needles. Havasu pumps water from Lake Havasu to its water treatment plant across land owned by the Chemehuevi Indian Tribe (the "Tribe") pursuant to an easement granted by the United States Department of the Interior and the Tribe, as described below.

Chemehuevi Indian Tribe v. Havasu Water Co. et al.

Havasu is presently a defendant in a complaint brought in Federal Court by the Chemehuevi Indian Tribe seeking declaratory and injunctive relief against Havasu for claims of trespass on tribal land. See First Amended Complaint for Declaratory and Injunctive Relief and for Money Damages (the "Complaint"), *Chemehuevi Indian Tribe v. Havasu Water Co. et al.*, No. EDCV 20-471-GW-KKx (C.D. Cal July 29, 2020), attached here as Appendix 1 ("*Chemehuevi Indian Tribe v. Havasu*"). A central issue in *Chemehuevi Indian Tribe v. Havasu* is the legal status of Havasu's easement running over the Chemehuevi Indian Reservation Land.

² The MDD represents the maximum consumption of water any one day of the year. DDW used peaking factors to estimate the MDD.

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

In *Chemehuevi Indian Tribe v. Havasu*, the Tribe asserts that the easement was created pursuant to a 1976 Settlement Agreement for a term of 30 years with the possibility of extension (the “1976 Settlement Agreement”). The easement could be extended if the Commission, or any other governmental agency having jurisdiction over the operations of Havasu, required the easement to have a longer term for the purpose of providing sufficient access to the Colorado River. *Id.* at 8. The Tribe contends that the easement was never extended, notwithstanding a resolution passed by the San Bernardino County Board of Supervisors purporting to extend it “in perpetuity”. Complaint at 8-10. The Tribe claims that the easement expired by its terms in 2006 and that Havasu is therefore trespassing on the Tribe’s trust lands and must immediately remove itself from those trust lands. *Id.* at 10, 14.

The Tribe further claims that the State of California, “may not regulate the property or conduct of Indians or tribes in Indian country”, and that therefore, the Commission, an agency of the State of California, has “no jurisdiction to enforce state law against the Tribe, which also enjoys sovereign immunity from suit.” See Plaintiff’s Opposition to Defendant’s Motion for A Stay at 2, *Chemehuevi Indian Tribe v. Havasu*, attached here as Appendix 2.

Havasu responds that the easement was extended in perpetuity by the San Bernardino Board of Supervisors on May 4, 1981, and, if the Commission finds that the easement was not extended, that Havasu will be required to drill new wells. AL 48-W at 1, 3.

Havasu further asserts that the Commission has primary jurisdiction, relative to the Federal District Court, regarding determining status of the easement, stating that “[o]n October 21, 2021, the CPUC obtained primary jurisdiction over the claims in this action when Havasu filed Advice Letter 48-W, invoking the CPUC’s rate making authority.” See Havasu’s Memorandum of Points and Authorities In Support of Motion to Stay This Action at 6, *Chemehuevi Indian Tribe v. Havasu*, attached here as Appendix 3.

Prior Commission Action

In Decision 85-04-056 the Commission interpreted the easement’s terms, stating, “[t]he grant of easement to cross the Indians' land is for a period of 30 years so long as said easement is actually used for its specified purpose, but the grantor agrees to extend its

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

term as may be required by this Commission or other governmental agencies having jurisdiction. Staff recommends that the termination date be extended to such a time as the easement is no longer necessary for providing public utility water service. The staff recommendation appears reasonable and will be adopted.” D.85-04-056 at 9. In that decision, the Commission ordered the extension of the easement, providing that “[t]he termination date of the contract with the Chemehuevi Indians to use the easement to cross their lands shall be extended to such a time as the easement is no longer necessary for providing public utility water service.” *Id.* at Ordering Paragraph 4.

However, despite the language of the Decision, in Resolution W-5059, the Commission subsequently found that Havasu’s easement for the supply line expired in 2006. Res. W-5059 at 2. The Commission directed the Division of Water and Audits to assist the parties to resolve the easement matter. *Id.* The parties were unable to arrive at a resolution, which led to the litigation described above.

Havasu’s present request

By AL 48-W, Havasu asserts that it requires a rate increase “because current rates fall far short of the revenues from its last general rate case Res. W-5224 to drill new wells, which will be required, if HWC’s easement to distribute water to the Havasu Landing community is not determined to have been extended in perpetuity.”

In AL 48-W, Havasu also asks the Commission to “exercise its ratemaking authority” to “construe deeds conveying real property easements” in order to determine that Havasu “owns an easement that permits it to obtain water from Lake Havasu via a pipeline through the government’s land, and therefore need not drill new wells on the government’s land in lieu of the exercise of the easement.” AL 48-W, pp. 3-4. Havasu further requests that the Commission order Havasu to enforce those water rights against the record titleholders, record notice to preserve its easements, and order the Utility and Audits Compliance Division to intervene in proceedings before any court or agency exercising jurisdiction over the record titleholders to prevent them from obtaining rights inconsistent with those held by Havasu under its easement. *Id.*

NOTICE AND PROTESTS

In accordance with GO 96-B, Havasu served a copy of Advice Letter 48-W to its service list on October 21, 2021. However, Havasu did not properly serve all interested parties as required by the Commission’s General Order 96-B, Industry Rule 4.1(3).

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

DISCUSSION

In accordance with the Commission's General Order 96-B, General Rule 7.6.2, the Commission is rejecting Havasu's Advice Letter (AL) 48-W request for the following reasons:

1. Havasu did not properly serve all interested parties as required by the Commission's General Order (GO) 96-B, Water Industry Rule 4.1(3).

In this case Havasu did not serve a copy of its request filed in AL 48-W to Chemehuevi Indian Tribe, an interested party involved in the easement dispute with Havasu, an issue the utility is requesting the Commission to address as part of its rate increase request AL filing. Havasu therefore did not fully comply with the Commission's AL requirements set-forth in GO 96-B, Water Industry Rule 4.1(3).

2. Havasu's request that the Commission find that the easement exists is denied because the Commission already determined that the easement has expired in Res. W-5059.

In AL 48-W, Havasu asks the Commission to find that it owns an easement that permits it to obtain water from Lake Havasu via a pipeline through the tribe's land. Havasu cites to *Camp Meeker Water System, Inc. v. Public Utilities Commission* (1990) 51 Cal.3d 845, 850 ("*Camp Meeker*") for the proposition that the Commission may exercise its ratemaking authority to construe deeds conveying real property and easements to Havasu "in the same manner that a court or agency construes any written instrument". See AL 48-W at 3-4, citing *Camp Meeker* at 850.

Framework for Jurisdictional Analysis

The CPUC has subject matter jurisdiction over a disputed issue if that issue falls within the scope of the authority granted the CPUC by the California Constitution or the Legislature. Lack of subject matter jurisdiction is a fundamental defect that cannot be waived, nor can the parties confer jurisdiction by stipulation. *National Union Fire Ins. Co. v. Stites Prof. Law Corp.* (1991) 235 CA3d 1718, 1724. Further, "[a] judgment rendered by a court that does not have subject matter jurisdiction is void and unenforceable and may be attacked anywhere, directly or collaterally, by parties or by

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

strangers. *Marlow v. Campbell* (1992) 7 CA4th 921, 928. These fundamental principles are equally applicable to the jurisdiction of administrative agencies like the CPUC.

The Commission has traditionally left matters of easement construction and interpretation to the Courts, however there are limited exceptions where the Commission will review easements when necessary to address issues within the Commission's jurisdiction. *See e.g., Camp Meeker* (ascertaining facts regarding deeds which conveyed easements and associated water rights, as necessary to address an application for increased rates.)

The *Camp Meeker* Court held that our authority in construing deeds conveying real property and easements is limited to ratemaking and is "not for the purpose of resolving disputes between parties claiming rights under the deeds, or to enforce rights conveyed by those deeds." *Camp Meeker* at 850.³ In that case, we acknowledged that we do not have jurisdiction equivalent to that of a court to adjudicate incidents of title and that we "would be bound by a judicial ruling in a quiet title action brought by any person claiming an interest in the subject property who believes the Commission ruling clouds his title." *Id.* at 850.

Here, Havasu would have us resolve the easement dispute between the Tribe and Havasu in Havasu's favor, under the rationale that it would be an exercise of our ratemaking authority. However, we have already found that the easement has expired. *See Res. W-5059* at 2. In that Resolution we stated that, "in accordance with CA Health and Safety Code Section 116555 (a)(3), [Havasu] must ensure that the system provides a reliable and adequate supply." *Id.* We further stated that "[w]hile there has been no negotiated settlement during the past 9 years and water has continued to be delivered under the past agreement, continuing this uncertainty does not benefit [Havasu] or its customers." Six years have passed since *Res. W-5059* and the parties still have not resolved the easement dispute. Further, pursuant to the 1976 Settlement Agreement we

³ The central holding of *Camp Meeker* was technically overruled by the California Legislature in the Calderon-Peace-MacBride Judicial Review Act of 1998 (Stats. 1998, c. 886, Sections 1-1.5) (hereafter referred to as "SB 799"). However, SB 799 extended only to the standard of judicial review of Commission decisions articulated in *Camp Meeker*. SB 799 did not overrule *Camp Meeker's* holding that the Commission can construe property ownership only for ratemaking purposes, provided that such construal shall not bind the parties in any future civil actions involving title to the property in question.

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

may have had authority to *extend* the easement prior to its expiration. However, post-expiration we have no further authority over the easement.

We therefore find that Havasu's request that the Commission determine the rights of the Tribe and Havasu with regard to the easement would address disputed property rights, which is beyond the scope of our subject matter jurisdiction, as recognized in *Camp Meeker*. Resolution of the easement dispute is a matter for the courts.

3. Havasu's request for a rate increase is not properly before the Commission at this time.

Rate base offsets are available for used-and-useful utility plant only (unless specifically exempted by the Commission). *See* D.96-02-032 at 2 (finding that water utility may seek rate base offsets on capital projects that are used and useful); *see also* P.U. Code Section 727.5.

Here, Havasu has requested a rate increase to pay for the construction of new water wells, should the Commission find the easement does not exist. AL 48-W at 1. That issue is not properly before the Commission at this time, however, because the water wells have not been constructed or placed in service and it is speculative whether Havasu needs to or will construct the wells.

As we have previously found that the easement is expired, it therefore does not exist for ratemaking purposes. Continuing uncertainty over the status of the easement does not benefit Havasu or its customers. We remind Havasu that it has the obligation under Health and Safety Code Section 116555(a)(3) to ensure that its system provides a reliable and adequate supply of water.

Accordingly, Havasu should take appropriate steps to ensure that it is meeting its obligation to provide reliable and adequate supply of water, either by reaching an agreement with the Tribe to renew the easement, or otherwise resolve the easement dispute, drilling new wells, or identifying another source of water for its customers. While Havasu may pursue drilling new wells in light of our findings, it remains speculative at this time whether Havasu will in fact drill wells and when such wells will be placed into service. Havasu may seek a general rate increase based on operation and

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

maintenance costs and utility capital expenditures that are appropriate for cost recovery at the time of the request.

COMMENTS

Public Utilities Code section 311(g)(1) provides that resolutions generally must be served on all parties and subject to at least 30 days public review and comment prior to a vote of the Commission.

Accordingly, the draft resolution was mailed to the service list and made available for public comment on December 24, 2021.

FINDINGS

1. By Advice Letter (AL) 48-W, filed on October 22, 2021, Havasu Water Company (Havasu) requested a general rate increase for Test Year 2021 producing additional annual revenues of \$61,100, or 22.80%, based on a Rate of Margin of 23.65%.
2. By AL 48-W, Havasu also requests a change to Commission Resolution W-5224 addressing the utility's prior AL 45-W to resolve the utility's water supply issue involving the disputed easement with the Chemehuevi Indian Tribe.
3. In accordance with General Order 96-B, Havasu served a copy of AL 48-W to its service list on October 21, 2021.
4. Havasu did not serve a copy of AL 48-W to Chemehuevi Indian Tribe, an interested party involved in the easement dispute with Havasu. This is an issue the utility is requesting the Commission to address as part of its rate increase request in AL 48-W.
5. Havasu did not properly serve all interested parties with AL-48 as required by the Commission's General Order 96-B, Industry Rule 4.1(3).
6. In Resolution W-5059, the Commission found that Havasu's easement for the supply line expired in 2006.

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

7. The Commission lacks subject matter jurisdiction to resolve property disputes between the Tribe and Havasu concerning the expired easement.
8. Havasu's request for a rate increase to construct new water wells is not properly before the Commission at this time.

THEREFORE, IT IS ORDERED THAT:

1. Havasu Water Company's Advice Letter 48-W, filed on October 22, 2021 is rejected.

This Resolution is effective today.

I certify that the foregoing resolution was duly introduced, passed, and adopted at a conference of the Public Utilities Commission of the State of California held January 27, 2022; the following Commissioners voting favorably thereon:

RACHEL PETERSON
Executive Director

PROPOSED RESOLUTION

**Resolution W-5250
WD**

**January 27, 2022
Agenda ID #20211**

Appendix 1

First Amended Complaint for Declaratory and Injunctive Relief and For Money
Damages.

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 17 Filed 07/29/20 Page 1 of 21 Page ID #:332

1 LESTER J. MARSTON
2 Email: lmarston@rmlawoffice.net
3 *Attorney for Plaintiff, Chemehuevi Indian Tribe*
4 California State Bar No. 081030
5 RAPPORT AND MARSTON
6 405 West Perkins Street
7 Ukiah, California 95482
8 Telephone: 707-462-6846
9 Facsimile: 707-462-4235

10 KOSTAN R. LATHOURIS
11 Email: law@lathouris.com
12 *Attorney for Plaintiff, Chemehuevi Indian Tribe*
13 California State Bar No. 315329
14 LATHOURIS LAW PLLC
15 1447 Evening Song Ave
16 Henderson, NV 89012
17 Telephone: 702-473-0581

18 **UNITED STATES DISTRICT COURT**
19 **CENTRAL DISTRICT OF CALIFORNIA**

20 CHEMEHUEVI INDIAN TRIBE, a
21 federally recognized Indian tribe,

22 Plaintiff,

23 v.

24 HAVASU WATER COMPANY, a
25 California for profit corporation;
26 JENNIFER HODGES, in their official
27 capacity as an Officer of Havasu Water
28 Company; Diane Holley, in their official
capacity as an Officer of Havasu Water
Company; and JOHN DOE 1 THROUGH
10,

Defendants.

Case No. 5:20-cv-00471-GW-KK

**FIRST AMENDED
COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF AND
FOR MONEY DAMAGES**

[Trespass to Indian Trust Land;
25 U.S.C. § 177; 25 U.S.C. §
323-328; 25 U.S.C. § 5123]

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 17 Filed 07/29/20 Page 2 of 21 Page ID #:333

INTRODUCTION

This is an action for trespass against the Havasu Water Company and its owners and officers (collectively, “HWC”) for its continued use of Chemehuevi Indian Reservation land (“trust land”) owned by the United States of America in trust for the Chemehuevi Indian Tribe (“Tribe”) after a water pipeline easement expired. Despite several attempts to settle the trespass action, the Tribe has been unable to do so because the HWC refuses to pay the Tribe the annual fair rental value for the use of the Tribe’s trust land. HWC’s continued and ongoing use of the expired easement violates 25 U.S.C. § 177; 25 U.S.C. §§ 323-328; and 25 U.S.C. § 5123¹; the Tribe’s inherent powers of sovereignty; and constitutes a federal common law trespass for which ejectment, accounting, and damages are proper remedies (collectively “Applicable Federal Law”).

Consequently, the Tribe now seeks a declaration from this Court that HWC’s easement has expired, that HWC is trespassing on the Tribe’s trust lands, and that HWC must pay the Tribe the annual fair rental value for the use of the Tribe’s trust lands. In addition, the Tribe seeks an injunction prohibiting HWC from using the Tribe’s trust lands unless or until it has a valid easement from the Tribe as required by Applicable Federal Law.

Finally, the Tribe seeks an order of ejectment, accounting, and damages as remedies for HWC’s federal common law trespass to the Tribe’s trust lands.

JURISDICTION

1. This Court has jurisdiction over the Tribe’s claims based upon the following:

a. 28 U.S.C. § 1331, in that this action arises under the Constitution and laws of the United States, specifically, 25 U.S.C. § 177 (“Non-Intercourse

¹ Part of the Indian Reorganization Act of June 18, 1934 (“IRA”), 25 U.S.C. §§ 5101 et seq. The IRA, which currently appears generally as 25 USC §§ 5101 et seq., was originally codified as 25 USC § 476 prior to September 1, 2016.

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 17 Filed 07/29/20 Page 3 of 21 Page ID #:334

1 Act” or “NIA”), 25 U.S.C. §§ 323-328 (“Indian Rights Of Way Statutes” or
2 “IROWS”), 25 U.S.C. §§ 5123 (“Indian Reorganization Act” or “IRA”), and
3 federal common law; and

4 b. 28 U.S.C. § 1362, in that this action is brought by an Indian tribe
5 with a governing body duly recognized by the Secretary of the Interior
6 (“Secretary”) and the Tribe is asserting claims against HWC that arise under the
7 Constitution and laws of the United States.

VENUE

8
9 2. Venue is proper in this Court, pursuant to 28 U.S.C. § 1391, because
10 a substantial part of the events or omissions giving rise to the Tribe’s claims
11 against HWC occurred in the Central District of California and the trust land that
12 is the subject of the action is situated in this District.

PARTIES

13
14 3. The Tribe is a federally recognized Indian Tribe. The Tribe is
15 organized pursuant to § 16 of the IRA under a constitution that has been approved
16 by the Secretary, and which designates the Chemehuevi Tribal Council
17 (“Council”) as the governing body of the Tribe. The Tribe is the beneficial owner
18 of the Chemehuevi Indian Reservation (“Reservation”), which comprises
19 approximately 32,000 acres of land adjacent to Lake Havasu in San Bernardino
20 County, California. The United States of America holds legal title to the Tribe’s
21 Reservation trust lands in the name of the United States of America in trust for the
22 Tribe. The Tribe exercises powers of self-government on the Reservation,
23 consistent with its quasi-sovereign status.

24 4. The Tribe is informed and believes, and on that basis alleges, that
25 defendant, Havasu Water Company, is a for profit corporation organized under
26 California law (Entity (File) No: C0404584) that is a water distribution and
27 treatment business, which is regulated by the California Public Utilities
28 Commission. Upon information and belief, the Tribe alleges that HWC is owned

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 17 Filed 07/29/20 Page 4 of 21 Page ID #:335

1 by the Everett L Hodges and Mary M Hodges Trust Dated September 22, 1988, a
2 revocable trust with Jennifer Hodges as the trustee of the trust. HWC derives
3 economic benefits from its operation that uses and occupies an expired easement
4 running through three (3) parcels of the Tribe's prime, lakefront trust lands
5 located within the Tribe's Reservation, in the Southwest one-quarter of Township
6 5 North, Range 25 East, Section 31, ("Expired Easement ") without the approval
7 of the Secretary and Tribe as required by applicable federal law.

8 5. The Tribe is informed and believes, and on that basis alleges that
9 defendant, Jennifer Hodges, is an individual who, either alone or in concert with
10 one or more other individuals and/or business entities, owns and/or controls
11 HWC, as Chief Executive Officer/Secretary/Chief Financial Officer of HWC, and
12 caused the use and occupation of the Expired Easement Land by the HWC,
13 without the approval of the Secretary and the Tribe, and has derived and/or
14 continues to derive economic benefit from so doing. Upon information and belief,
15 the Tribe also alleges that Jennifer Hodges is the trustee of the Everett L Hodges
16 and Mary M Hodges Trust Dated September 22, 1988, which owns HWC.
17 Defendant Hodges is sued in their official capacity as a chief executive officer of
18 HWC.

19 6. The Tribe is informed and believes, and on that basis alleges that
20 defendant, Diane Holley, is an individual who, either alone or in concert with one
21 or more other individuals and/or business entities, owns and/or controls HWC, as
22 an officer/director of HWC, and caused the use and occupation of the Expired
23 Easement Land, without the approval of the Secretary and the Tribe, and has
24 derived and/or continues to derive economic benefit from so doing. Defendant
25 Holley is sued in her official capacity as an officer/director of HWC.

26 7. Defendants, John Doe 1 through 10, who are not yet known to the
27 Tribe are entities and individuals that have caused or directly used and occupied
28 the Expired Easement Land without the approval of the Secretary and the Tribe

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 17 Filed 07/29/20 Page 5 of 21 Page ID #:336

1 and have derived and/or continue to derive economic benefit from so doing. Once
2 the true names of the Doe defendants become known to the Tribe, the Tribe shall
3 amend this complaint to add the true identity of the Doe defendants.

4 8. At all times relevant hereto, each named defendant was acting as the
5 agent of or on behalf of all other defendants, and each defendant has authorized or
6 ratified the acts and omissions of all other defendants named in this First
7 Amended Complaint.

GENERAL ALLEGATIONS

8
9 9. Since time immemorial, the Tribe has occupied the lands that
10 presently comprise the Reservation in the Chemehuevi Valley, California.

11 10. On February 2, 1907, the Secretary of the Interior issued an order to
12 the general land office directing that the following lands be withdrawn from
13 settlement and entry for the purpose of establishing the boundaries of the
14 Reservation for the Tribe: Fractional Townships 4N., R. 25 E., T. 4N., R 26 E., T.
15 5N., R 25 E., 6 N., R 25 E.; the E/2 of 5 N., R. 24 E, and Secs. 25, 26, 35, and 36,
16 T. 6 N., R. 24 E, S.B.M.

17 11. The Secretary issued his order creating the Reservation pursuant to
18 the inherent authority of the President of the United States, which authority was
19 ratified by Congress with the passage of the Act of March 1, 1907, an "Act
20 Making Appropriation for the Current and Contingent Expenses of the Indian
21 Department, for Fulfilling Treaty Stipulations with Various Indian Tribes, and for
22 Other Purposes, for the Fiscal Year Ending June 13, 1908." Kappler, Charles J.
23 ("Kappler") Indian Affairs Laws and Treaties, Vol. III, p. 266 (34 Stat. 1015). At
24 the time the Secretary issued the Order, the Reservation comprised approximately
25 32,000 acres of land.

26 12. On July 8, 1940, Congress passed an "Act for the Acquisition of
27 Indian Lands for the Parker Dam and Reservoir Project, and for Other Purposes"
28 ("Parker Dam Act") Kappler, Vol. VI, pp. 88-89 (54 Stat. 744). The Act granted,

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 17 Filed 07/29/20 Page 6 of 21 Page ID #:337

1 among other things, “all the right, title, and interest of the Indians in and to the
2 tribal and allotted lands of the . . . Chemehuevi Reservation in California as may
3 be designated by the Secretary of the Interior.”

4 13. Pursuant to the Parker Dam Act, the Secretary designated 7,778 acres
5 of the Tribe’s trust lands within the Reservation for the construction of Parker
6 Dam and the creation of Lake Havasu. In his designation, the Secretary designated
7 all of the Tribe’s Colorado River shoreline lands up to and including all lands
8 lying below the 465-contour line. After the United States acquired title to those
9 portions of the Tribe’s trust lands with the Reservation designated by the
10 Secretary, the United States completed the construction of Parker Dam and
11 flooded the trust lands, including all of the trust lands, including all of the
12 Chemehuevi Valley, thereby creating Lake Havasu. The Lake level, however,
13 only rose to approximately the 450-contour line, instead of the original 465-
14 contour line designated by the Secretary, leaving a strip of land (“Strip”) owned
15 by the United States of America but not in trust for the Tribe, lying between the
16 actual high water mark of Lake Havasu (i.e., 450-contour line) and the 465-
17 contour line within the boundaries of the Reservation.

18 14. This Strip of land located within the boundaries of the Reservation,
19 was administered by the Bureau of Land Management (“BLM”) and the United
20 States Fish and Wildlife Service (“USFWS”) until November 1, 1974.

21 15. On November 1, 1974, the Secretary of the Interior issued an order
22 (“Shoreline Restoration Order”) restoring a portion of the Strip, which was not
23 needed in connection with the construction of Parker Dam and which was located
24 within the Reservation, the equitable ownership of the Tribe.

25 16. In 1974, in the case of *Havasus Landing, Inc., Lake Havasu*
26 *Homeowners Association, et al. v. Morton, et al.*, U.S.D.C., C.D. Cal., Civil No.
27 74-3665-EC (“*Havasus Landing*”) the Havasu Landing, Inc., a California
28 Corporation that leased a portion of the Strip from the BLM for the operation of a

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 17 Filed 07/29/20 Page 7 of 21 Page ID #:338

1 resort and the Lake Havasu Homeowners Association, a voluntary association of
2 homeowners, including Everett L. Hodges, then Secretary of HWC, who leased
3 individual parcels of land located within the Strip for summer homes from the
4 USFWS, sued the Secretary challenging the authority of the Secretary to issue the
5 Shoreline Restoration Order.

6 17. On June 22, 1976, the parties to the Havasu Landing litigation settled
7 the case by entering into a settlement agreement (“Shoreline Settlement”). A copy
8 of the Shoreline Settlement is hereby incorporated by this reference and attached
9 hereto as **Exhibit A**. As part of the Shoreline Settlement (see Exhibit A to
10 Shoreline Settlement), the Tribe and the United States of America, acting by and
11 through the Superintendent, Colorado River Agency, Department of the Interior,
12 Bureau of Indian Affairs (“BIA”),² granted to HWC an easement for the purpose
13 of maintaining and repairing a pump station at the edge of Lake Havasu and a
14 1,500 foot water pipeline, that ran from the pump station across the trust lands to
15 HWC’s water tank located on fee land, which it owned within the boundaries of
16 the Reservation, for the purpose of transporting water from Lake Havasu to
17 HWC’s water treatment plant (“1976 Easement”). See **Exhibit A**.

18 18. Additionally, as part of the Shoreline Settlement, HWC agreed not to
19 “directly or indirectly initiate, prosecute or participate” in an action related to the
20 Shoreline Restoration; not to “encourage, assist or cause any other person to”
21 challenge the Shoreline Restoration; and not to “directly or indirectly pay any
22 monies to or on behalf of any person suing or engaging in any action or
23 proceeding relating to” the *Havasus Landing* litigation or the Shoreline
24 Restoration.

25 19. The Secretary and the Tribe, in the Shoreline Settlement, granted to

26 ² Acting under authority set forth in 230 DM 1, 10 BIAM 3, and 10 BIAM 11, 25 U.S.C. §§323-
27 328, and Part 169 of Title 25 of the Code of Federal Regulations (“Part 169”). The
28 implementing regulations for the IRWA, which are currently codified at 25 CFR pt. 169, were
codified at 25 CFR pt. 161 prior to 1983.

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 17 Filed 07/29/20 Page 8 of 21 Page ID #:339

1 HWC “a nonexclusive easement or right of way for the sole purpose of
2 transporting water across said easement for the use of [HWC] and its customers,
3 on, over, and across the land embraced within the right of way situated on [three
4 (3) parcels of land] located within the Chemehuevi Reservation” The three
5 (3) parcels of land that comprise the 1976 Easement are all located over and
6 across trust lands.

7 20. Under the Shoreline Settlement, the 1976 Easement was “subject to
8 any prior valid existing right or adverse claim and is for a period of 30 years, so
9 long as said easement shall be actually used for the purpose. . .specified.”
10 However, the Settlement Agreement also provided that if the Public Utilities
11 Commission of the State of California or any other governmental agency “having
12 jurisdiction over the operations of [HWC]” *required* the easement to have a longer
13 term “for the purpose of providing sufficient access to the Colorado River,” the
14 Tribe agreed to extend the term of the 1976 Easement “for such longer term as
15 may be required by the California Public Utilities Commission or such other
16 governmental agency”

17 21. On April 21, 1981, then San Bernardino County (“County”) Sheriff,
18 Frank Bland, requested, on behalf of the HWC, that the County Board of
19 Supervisors (“Board of Supervisors”) adopt a resolution extending the term of the
20 1976 Easement from thirty years to a term in perpetuity.

21 22. On May 1, 1981, the County Counsel submitted a memorandum
22 (“1981 Memo”) to the Board of Supervisors finding that “the County has
23 ‘jurisdiction over the operations’ of the [HWC] in respect to the health aspects of
24 [HWC]’s domestic water supply activities,” because “[HWC] presently has less
25 than 200 connections.” However, the 1981 Memo found that, since “[i]t does not
26 appear that the County could legally deny an operating permit to the Company
27 solely on account of the water supply being transported over a thirty-year
28 easement . . . it would not be correct to say that the County could require an

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 17 Filed 07/29/20 Page 9 of 21 Page ID #:340

1 extension of the term of the easement.” A true and correct copy of the 1981 Memo
2 is hereby incorporated by this reference and attached hereto to as **Exhibit B**.

3 23. On May 4, 1981, the Board of Supervisors passed Resolution 81-134
4 (“Res. 81-134”), in which they determined that, pursuant to Section 4010.8 of the
5 California Health and Safety Code (since repealed) and Section 36.022 of the
6 County Code (no longer in effect), the County had jurisdiction over “the domestic
7 water supply operations of the [HWC],” stating that “it would be in the best
8 interests of the community at Havasu Landing if the [1976 Easement] is
9 determined to be an easement in perpetuity rather than an easement for thirty
10 years.” A true and correct copy of Res. 81-134 is hereby incorporated by this
11 reference and attached hereto as **Exhibit C**.

12 24. Neither the Tribe nor the United States received notice of the Board
13 of Supervisors’ public hearings on Res. 81-134. As a result, neither participated in
14 those hearings and the Tribe and the United States did not approve extending the
15 term of the 1976 Easement in perpetuity.

16 25. The 1976 Easement set forth two (2) narrow conjunctive conditions
17 that would allow for the extension of the 1976 Easement’s term, neither of which
18 was present when the Board of Supervisors passed Res 81-134. First, the County
19 had insufficient jurisdiction over HWC’s operations to qualify as a “governmental
20 agency with jurisdiction over HWC’s operations” to be able to *require* “a longer
21 term easement for the purpose of providing sufficient access to the Colorado
22 River.” Second, HWC never applied to the Secretary for an extension of the 1976
23 Easement as required by applicable federal law. Third, neither the Secretary nor
24 the Tribe ever approved the extension of the term of the 1976 Easement as
25 required by applicable federal law. Finally, HWC never paid any compensation to
26 the Secretary or the Tribe for the extension of the 1976 Easement and the
27 continued use of the Tribe’s trust lands in perpetuity as required by applicable
28 federal law.

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 17 Filed 07/29/20 Page 10 of 21 Page ID #:341

1 26. On July 8, 2005, HWC submitted a written request to then-Mayor of
2 the City of Barstow, Lawrence E. Dales, to make a presentation to the City
3 Council “with respect to the problems [the] Havasu Water Company has
4 encountered over the years with the Chemehuevi Indian Tribe.” In the request,
5 HWC challenged the Shoreline Restoration Order and the trust status thereof, in
6 an effort to frustrate the Tribe’s proposed development with the City of Barstow
7 in violation of the binding release under the Shoreline Settlement.

8 27. On December 6, 2005, HWC’s attorney, Sheldon L. Foreman, sent a
9 written comment to the Colorado River Board again challenging the lawful
10 creation of the Reservation and the Reservation’s trust status, in violation of the
11 binding release under the Shoreline Settlement.

12 28. HWC’s repeated violations of the Shoreline Settlement,
13 notwithstanding, in a letter dated December 21, 2005, the Tribe’s attorney advised
14 HWC that it was the Tribe’s position that the 1976 Easement was due to expire in
15 June, 2006 and the Council requested that HWC enter into good faith negotiations
16 to renew the 1976 Easement. A true and correct copy of the December 21, 2005,
17 letter is hereby incorporated by this reference and attached hereto as **Exhibit D**.

18 29. On January 31, 2006, HWC’s attorney sent a letter to the Tribe in
19 response to the notice of expiration of the 1976 Easement, conveying HWC’s
20 intent to negotiate with the Tribe to, among other things, extend the 1976
21 Easement.

22 30. By its terms, the 1976 Easement expired on June 22, 2006. After
23 expiration of the 1976 Easement, HWC continued to pay the Tribe only \$500.00
24 per year for the use of the Tribe’s trust lands that formally comprised the 1976
25 Easement (“Expired Easement Lands”), instead of the annual fair rental of the
26 trust lands as required by applicable federal law, until the Tribe, notified HWC
27 that it would no longer accept the \$500.00 per year payment from HWC.

28 31. Since HWC did not renew the 1976 Easement, it was required to

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 17 Filed 07/29/20 Page 11 of 21 Page ID #:342

1 acquire a new easement in order to continue to use and occupy the Expired
2 Easement Lands.

3 32. On July 18, 2006, the Tribe's attorney sent a letter to Allen J.
4 Anspach, then-Regional Director of the BIA, setting forth the Tribe's position that
5 the 1976 Easement had expired and that the Board of Supervisors' Res. 81-134
6 was invalid and unenforceable. Nevertheless, the Tribe was prepared to renew the
7 1976 Easement for: (1) a period of twenty five (25) years, with subsequent
8 renewal subject to the Tribe's approval, under which; (2) HWC would pay the
9 annual fair rental value of the Expired Easement Lands; and (3) a fee for wheeling
10 the water across the Tribe's trust lands. A copy of the July 18, 2006, letter is
11 hereby incorporated by this reference and attached hereto as **Exhibit E**.

12 33. In the same letter, the Tribe requested that the BIA issue a notice to
13 HWC that the 1976 Easement had expired and, unless HWC entered into a new
14 easement from the Tribe, HWC was trespassing on the Tribe's trust lands and
15 would be subject to an eviction action filed by the United States. The letter further
16 stated that, if HWC was not willing to agree to the conditions set forth in the
17 letter, the Tribe would request that the BIA authorize the United States Justice
18 Department to bring an action on behalf of the Tribe to evict HWC, its officers,
19 employees, agents, and assigns, as trespassers.

20 34. On November 15, 2006, the Tribe sent a proposed "Grant of Water
21 Pipeline Easement" to HWC for review and execution.

22 35. On January 22, 2007, the Tribe received a letter from HWC's
23 attorney, which stated that he had presented the Tribe's proposal to the HWC
24 president for his review, and that the president would be presenting it to the
25 HWC's Board of Directors for its consideration at their next meeting.

26 36. While engaged in negotiations with the Tribe to execute a new water
27 pipeline easement, on February 11, 2007, HWC sent a letter to the Havasu Lake
28 Municipal Advisory Council, mischaracterizing the terms of the 1976 Shoreline

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 17 Filed 07/29/20 Page 12 of 21 Page ID #:343

1 Settlement and asserting that HWC had a pipeline easement in perpetuity, in
2 violation of the binding release under the 1976 Shoreline Settlement.

3 37. On February 26, 2007, William W. Quinn, then-Acting Field
4 Solicitor, United States Department of the Interior, submitted a legal opinion to
5 Stan Webb, Regional Realty Officer, Western Regional Office, BIA, concluding,
6 among other things, that the 1976 Easement expired on June 22, 2006; that the
7 1981 Resolution, Res. 81-134, “did not have the effect of exercising the provision
8 for an extension of the term of the easement”; and, under the Settlement
9 Agreement’s Release, HWC was “estopped from raising any appeal to the
10 expiration of the easement . . . or from any prosecution of [HWC’s] trespass based
11 on that expiration.” A true and correct copy of William Quinn’s February 26,
12 2007, letter is hereby incorporated by this reference and is attached hereto as
13 **Exhibit F.**

14 38. On July 31, 2007, the BIA notified HWC that it had been in trespass
15 on the Tribe’s trust lands since June 2006, and that neither the Tribe nor the
16 United States would allow the trespass to continue indefinitely.

17 39. The Solicitor’s Office then referred the matter to the United States
18 Attorney’s Office for the Central District of California. The U.S. Attorney’s office
19 accepted the referral and assigned the case to Assistant U.S. Attorney (“AUSA”)
20 Russell W. Chittenden. In a letter dated June 15, 2010, AUSA Chittenden,
21 demanded that HWC: “(1) cease its trespass and (2) remit payment to the United
22 States of an amount equal to the fair rental value of the Easement for the period of
23 trespass. To effect a cessation of the trespass, the HWC must immediately remove
24 all pipes and any other equipment from the land legally described in the Grant of
25 Easement.”

26 40. AUSA Chittenden offered, alternatively, to settle the case if HWC
27 accepted the terms of the Tribe’s settlement offer.

28

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 17 Filed 07/29/20 Page 13 of 21 Page ID #:344

1 41. Chittenden enclosed with the letter a draft federal court complaint
2 alleging trespass against HWC.

3 42. The Tribe and HWC engaged in some negotiations subsequent to the
4 June 15, 2010 letter, including participating in a settlement meeting mediated by
5 the California Public Utilities Commission. At that meeting the parties reached an
6 agreement that provided a path to settling the dispute. Under the terms of the
7 settlement agreement ("CPUC Settlement Agreement") the Tribe agreed to: (1)
8 have an appraisal done to determine the amount of trespass damages that HWC
9 owed to the Tribe for the use of the Expired Easement Lands; (2) have an engineer
10 determine the costs to extend a water pipeline connecting the HWC's water tank
11 to the Tribe's water distribution system; (3) assist HWC in obtaining grants and
12 other funding to construct the water pipeline extension; and (4) wheel the water
13 that HWC had a right to divert from Lake Havasu through the pipeline extension
14 to HWC's water storage tank. In exchange for these promises, HWC agreed to: (1)
15 pay the Tribe the amount of trespass damages determined by the appraiser to be
16 due to the Tribe; (2) cooperate with the Tribe in seeking funding for the pipeline
17 extension; and (3) pay the Tribe an administrative fee to wheel HWC's water
18 through the Tribe's water distribution system, including the pipeline extension, to
19 HWC's storage tank once construction of the waterline extension was completed.
20 A true and correct copy of the CPUC Settlement Agreement is hereby
21 incorporated by this reference and attached hereto as **Exhibit G**.

22 43. The Tribe carried out all of the conditions of the CPUC Settlement
23 Agreement. It obtained the appraisal and the engineer's estimate of cost to
24 construct the pipeline extension. True and correct copies of the appraisal and the
25 engineer's estimate are hereby incorporated by this reference and attached hereto
26 as **Exhibits H and I** respectively.

27 44. HWC never carried out any of the terms and conditions of the CPUC
28 Settlement Agreement.

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 17 Filed 07/29/20 Page 14 of 21 Page ID #:345

1 45. Ultimately, despite the Tribe's good faith attempts to settle the
2 dispute, negotiations failed, and no settlement was ever achieved regarding
3 HWC's ongoing use and occupation of the Expired Easement Lands.

4 46. HWC has and continues to use and occupy the Expired Easement
5 Lands, despite the expiration of the 1976 Easement and despite being informed by
6 both the Federal Government and the Tribe that it is trespassing on the Tribe's
7 trust lands and that it must immediately remove itself from those trust lands.

FIRST CLAIM FOR RELIEF

8
9 **(Violation of 25 U.S.C. § 177)**

10 47. The Tribe hereby incorporates each of the preceding paragraphs as if
11 fully incorporated herein

12 48. The INA provides that no purchase, grant, lease, or other conveyance
13 of lands, or of any title or claim thereto from an Indian tribe is valid unless it is
14 approved by Congress.

15 49. The INA applies to easements.

16 50. The Secretary may approve transactions that fall within the scope of
17 the INA only if a law grants the Secretary the power to approve the transactions.
18 Congress has empowered the Secretary to grant rights-of-way through Indian trust
19 lands, but that power is subject to the requirements of the IRWA.

20 51. Defendants' continued use and occupation of the Expired Easements
21 Tribe's trust lands without obtaining a right-of-way pursuant to the IRWA after
22 the expiration of the 1976 Easement violates 25 U.S.C. § 177, and, therefore, is
23 prohibited.

24 52. An actual case and controversy now exists between the Tribe and
25 HWC in that the Tribe maintains that HWC's continued use and occupation of the
26 Expired Easement Lands without a valid easement violates 25 U.S.C. § 177, while
27 HWC maintains that it is not a violation.

28 53. Unless the Court declares that HWC has no right to the use and

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 17 Filed 07/29/20 Page 15 of 21 Page ID #:346

1 occupation of the Expired Easement Lands and that the HWC's use and
2 occupation of the Expired Easement Lands is in violation of 25 U.S.C. § 177 and
3 orders the HWC to vacate the Expired Easement Lands, the Tribe will suffer
4 severe and irreparable harm for which it has no plain, speedy, or adequate remedy
5 at law, in that the Tribe will continue to be prevented from using its trust lands
6 without interference from HWC.

SECOND CLAIM FOR RELIEF

(Violation of 25 U.S.C. §§ 323-328)

7
8
9 54. The Tribe hereby incorporates each of the preceding paragraphs as if
10 fully incorporated herein.

11 55. Congress authorized grants of rights-of-way over Indian lands
12 through the enactment of the IRWA, and, in doing so, empowered the Secretary to
13 establish implementing regulations detailing the scope of federal supervision of
14 those rights-of-way. Those regulations are codified at 25 C.F.R. pt. 169.

15 56. Pursuant to 25 U.S.C. Part 169, acquiring a new right-of-way,
16 including extending the term of an existing right-of-way, requires that an applicant
17 submit to the BIA office with jurisdiction over the land in question: (1) a
18 completed application; (2) bonds, insurance, and/or other security; (3) record that
19 notice of the right-of-way was provided to the Indian landowners; (4) the Indian
20 landowner's written consent to the right-of-way; (5) a valuation of the right-of-
21 way, if applicable; and (6) evidence of the payment of appropriate compensation
22 to the Indian landowner.

23 57. Since the expiration of the Easement, HWC has not fulfilled any of
24 the requirements of Part 169, and, therefore, does not have a valid right-of-way for
25 the use and occupancy of the Expired Easement Lands.

26 58. HWC's continued use and occupation of the Expired Easement Lands
27 without a valid easement violates the IRWA.
28

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 17 Filed 07/29/20 Page 16 of 21 Page ID #:347

1 59. An actual case and controversy now exists between the Tribe and the
2 HWC in that the Tribe maintains that the HWC's continued use and occupation of
3 the Expired Easement Lands without a valid easement violates the IRWA, while
4 the HWC maintains that it is not a violation.

5 60. Unless the Court declares that the HWC has no right to the use or
6 occupation of the Expired Easement Lands and that the HWC's use and
7 occupation of the Expired Easement Lands is a violation of the IRWA and orders
8 the HWC to vacate the Expired Easement Lands, the Tribe will suffer severe and
9 irreparable harm for which it has no plain, speedy or adequate remedy at law, in
10 that the Tribe will continue to be prevented from using its trust lands without
11 interference from the HWC.

THIRD CLAIM FOR RELIEF

(Violation of 25 U.S.C. § 5123(e))

14 61. The Tribe hereby incorporates each of the preceding paragraphs as if
15 fully incorporated herein.

16 62. Tribes that elected to organize under the IRA are entitled to prevent
17 the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or
18 other tribal assets without the consent of the tribe. 25 U.S.C. § 5123(e).

19 63. The Tribe's constitution was established pursuant to the IRA and
20 delegates to the Council the power to initiate, approve, grant, or reject any
21 acquisition, disposition, lease, encumbrance, or condemnation of tribal lands, and
22 to manage, protect, and preserve all of the Tribe's lands.

23 64. The HWC's continued use and occupation of the Tribe's trust lands
24 without the Tribe's consent violates 25 U.S.C. § 5123(e).

25 65. An actual case and controversy now exists between the Tribe and
26 HWC in that the Tribe maintains that HWC's continued use and occupation of the
27 Expired Easement Lands without a valid easement violates 25 U.S.C. § 5123(e),
28 while the HWC maintains that it is not a violation.

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 17 Filed 07/29/20 Page 17 of 21 Page ID #:348

1 66. Unless the Court declares that HWC has no right to the possession or
2 use of the Expired Easement Lands and that HWC's use and occupation of the
3 Expired Easement Lands is in violation of 25 U.S.C. § 5123(e) and orders HWC
4 to vacate the Expired Easement Lands, the Tribe will suffer severe and irreparable
5 harm for which it has no plain, speedy, or adequate remedy at law, in that the
6 Tribe will continue to be prevented from using its trust lands without interference
7 from HWC.

FOURTH CLAIM FOR RELIEF

(Interference with Tribal Self-Government)

8
9
10 67. The Tribe hereby incorporates each of the preceding paragraphs as if
11 fully incorporated herein.

12 68. Indian tribes have inherent powers of sovereignty that have never
13 been extinguished. Those powers include the power to regulate access to tribal
14 lands and to exclude persons from tribal lands.

15 69. The Expired Easement Lands are within the exterior boundaries of
16 the Reservation and title to the Expired Easement Lands is held by the United
17 States in trust for the Tribe. The Expired Easement Lands are both "Indian
18 country," as that term is defined in 25 U.S.C. § 1151, and "tribal land" as that
19 term is defined in 25 C.F.R. § 169.1(d).

20 70. The Tribe has the inherent sovereign power to exclude HWC from its
21 trust lands and Congress has not expressly provided that HWC can use and
22 occupy the Expired Easement Lands without obtaining a new easement pursuant
23 to the IRWA after the Easement expired.

24 71. HWC failed to obtain a new easement after the 1976 Easement
25 expired in accordance with applicable federal law.

26 72. An actual case and controversy now exists between the Tribe and
27 HWC in that the Tribe maintains that HWC's continued use and occupation of the
28 Expired Easement Lands without a valid easement violates the Tribe's inherent

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 17 Filed 07/29/20 Page 18 of 21 Page ID #:349

1 sovereign power to exclude HWC from its trust lands, while HWC maintains that
2 its occupation of the Expired Easement Lands is not in violation of the Tribe's
3 inherent sovereign power to exclude HWC from the Tribe's trust lands.

4 73. Unless the Court declares that HWC has no right to the possession or
5 use of the Expired Easement Lands and that HWC's use and occupation of the
6 Expired Easement Lands is in violation the Tribe's power of self-government and
7 orders HWC to vacate the Expired Easement Lands, the Tribe will suffer severe
8 and irreparable harm for which it has no plain, speedy, or adequate remedy at law,
9 in that the Tribe will continue to be prevented from using its trust lands without
10 interference from HWC.

FIFTH CLAIM FOR RELIEF

(Federal Common Law Trespass)

13 74. The Tribe hereby incorporates each of the preceding paragraphs as if
14 fully incorporated herein.

15 75. Federal common law governs actions for trespass on Indian lands.

16 76. A person or entity is liable for trespass if that person intentionally
17 causes a thing to enter or be placed on land in the possession of another or fails to
18 remove from the land a thing that the person is under a duty to remove.

19 77. No currently valid easement, conveyance, lease, or assignment of a
20 lease of the Tribe's trust lands to HWC has been approved by the Tribe or the
21 Secretary.

22 78. The Tribe has made demand upon HWC to cease its trespass and to
23 remove all pipes and any other equipment from the Tribe's trust lands.

24 79. HWC has failed to comply with the Tribe's demand and continues to
25 use and occupy the Tribe's trust lands.

26 80. As a proximate result of the HWC's acts, as alleged herein, the Tribe
27 has lost the use and possession of its trust lands, the potential rents derived from
28

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 17 Filed 07/29/20 Page 19 of 21 Page ID #:350

1 the Tribe's trust lands and the value of the affected lands have been diminished, in
2 an amount to be proven at trial.

3 81. Because HWC has continued to use and occupy the Expired
4 Easement Lands, and by virtue of HWC's continuing trespass, the Tribe has been
5 denied the use, benefit, quiet enjoyment, and occupation of its trust lands to its
6 damage and will continue to sustain damages as long as HWC continues to use
7 and occupy the Expired Easement Lands.

8 82. An actual case and controversy now exists between the Tribe and
9 HWC in that the Tribe maintains that HWC's continued use and occupation of the
10 Expired Easement Lands constitutes common law trespass to its trust lands, while
11 HWC maintains that its occupation of the Expired Easement Lands do not
12 constitute a common law trespass to the Tribe's trust lands.

13 83. Unless the Court declares that HWC has no right to the use or
14 occupation of the Expired Easement Lands and that HWC's use and occupation of
15 the Expired Easement Lands constitutes common law trespass to the Tribe's trust
16 lands and orders HWC to vacate the Expired Easement Lands, the Tribe will
17 suffer severe and irreparable harm for which it has no plain, speedy, or adequate
18 remedy at law, in that the Tribe will continue to be prevented from using its trust
19 lands without interference from HWC.

PRAYER FOR RELIEF

20
21 WHEREFORE, the Tribe prays for relief as follows:

22 1. That the Court declare that HWC has no right to the use or
23 occupation of the Expired Easement Lands;

24 2. That the Court declare that HWC's continued and ongoing use and
25 occupation of the Expired Easement Lands after the expiration of the Easement on
26 June 22, 2006, violates 25 U.S.C. § 177, 25 U.S.C. §§ 323-328 and 25 U.S.C. §
27 5123(e);
28

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 17 Filed 07/29/20 Page 20 of 21 Page ID #:351

1 3. That the Court declare that HWC's continued and ongoing use and
2 occupation of the Expired Easement Lands constitutes an impermissible
3 interference with the Tribe's self-government;

4 4. That the Court declare that HWC's continued and ongoing use and
5 occupation of the Expired Easement Lands constitutes a trespass under federal
6 common law for which ejectment, accounting, and damages are proper remedies;

7 5. That the Court order HWC, its owners, officers, agents, employees,
8 assignees, and all persons acting in concert with HWC to vacate the Expired
9 Easement Lands by removing all pipes, equipment, and fixtures installed on the
10 Expired Easement Lands and restoring the property comprising the Expired
11 Easement Lands to their original condition;

12 6. That the Court preliminarily and permanently enjoin HWC, their
13 owners, officers, agents, employees, assignees, and all persons acting in concert
14 with HWC, from using, occupying, possessing, improving, entering upon, or
15 exercising any form of control over the Expired Easement Lands;

16 7. That the Court issue an order ejecting HWC, its owners, officers,
17 agents, employees, assignees, and all persons acting in concert with HWC, from
18 the Expired Easement Lands and requiring HWC to remove all of its pipelines,
19 pumps, and other equipment from the Expired Easement Lands;

20 8. That the Court order HWC to: pay for an accounting of the damages
21 incurred by the Tribe, to be performed by an expert of the Tribe's choice, and that
22 the accounting include, but not be limited to, the reasonable rental value of the
23 land from 2006—when HWC stopped paying rent for the use of the Expired
24 Easement Lands—to the date of HWC's removal from the Expired Easement
25 Lands; pay damages based on interference with the Tribe's use and quiet
26 enjoyment of the Expired Easement Lands as a result of HWC's continued and
27 ongoing use and occupation of the Expired Easement Lands without the consent
28

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 17 Filed 07/29/20 Page 21 of 21 Page ID #:352

1 of the Tribe, beginning from the date of the first trespass of which the Tribe
2 complains and ending on the date of entry of judgment herein;

3 9. That the Court award the Tribe damages in an amount consistent with
4 the accounting of damages;

5 10. For costs of suit and reasonable attorney's fees; and

6 11. For such other relief as the Court may be deemed appropriate.

7 DATED: July 28, 2020

Respectfully Submitted,
8 RAPPORT AND MARSTON

9
10 By: /s/ Lester J. Marston, Esq.
LESTER J. MARSTON, ESQ.
11 Attorney for Chemehuevi Indian Tribe

12 &
13 LATHOURIS LAW PLLC

14
15 By: /s/ Kostan R. Lathouris
KOSTAN R. LATHOURIS, ESQ.
16 Attorney for Chemehuevi Indian Tribe

17
18 Pursuant to L.R. 5-4.3.4(a)(2), the filer of this document attests that all other
19 signatories listed, and on whose behalf the filing is submitted, concur in the
20 filing's content and have authorized the filing.

21 LATHOURIS LAW PLLC
22 By: /s/ Kostan R. Lathouris
23 KOSTAN R. LATHOURIS, ESQ.
24 Attorney for Chemehuevi Indian Tribe

25
26
27
28

PROPOSED RESOLUTION

**Resolution W-5250
WD**

**January 27, 2022
Agenda ID #20211**

Appendix 2

Plaintiff's Opposition to Defendant's Motion for A Stay.

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 72 Filed 11/12/21 Page 1 of 5 Page ID #:1529

1 LESTER J. MARSTON
2 Email: ljmarston@rmlawoffice.net
3 *Attorney for Plaintiff, Chemehuevi Indian Tribe*
4 California State Bar No. 081030
5 RAPPORT AND MARSTON
6 405 West Perkins Street
7 Ukiah, California 95482
8 Telephone: 707-462-6846
9 Facsimile: 707-462-4235

10 KOSTAN R. LATHOURIS
11 Email: law@lathouris.com
12 *Attorney for Plaintiff, Chemehuevi Indian Tribe*
13 California State Bar No. 315329
14 LATHOURIS LAW PLLC
15 1447 Evening Song Ave
16 Henderson, NV 89012
17 Telephone: 702-473-0581

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

18 CHEMEHUEVI INDIAN TRIBE, a
19 federally recognized Indian tribe,

20 Plaintiff,

21 v.

22 HAVASU WATER COMPANY, et
23 al.

24 Defendants.

Case No. 5:20-cv-00471-GW-KK

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR A STAY

Date: December 2, 2021

Time: 8:30 a.m.

Courtroom: 16

Judge: Hon. George H. Wu

Trial Date: TBD

Action Filed: September 9, 2020

INTRODUCTION

25 Defendants argue that this Court should stay proceedings to allow the
26 California Public Utilities Commission ("CPUC") to exercise jurisdiction, under
27 state law, over the Plaintiff, Chemehuevi Indian Tribe ("Tribe"), the defendants

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 72 Filed 11/12/21 Page 2 of 5 Page ID #:1530

1 (“HWC”) and the land owned by the United States of America in trust for the
2 Tribe that is burdened by the alleged water pipeline easement. As will be
3 demonstrated below, this argument is meritless because the State of California,
4 acting through the CPUC, has no jurisdiction to enforce its laws against the Tribe
5 or its Chemehuevi Indian Reservation lands. The stay should, therefore, be denied.

6 **I. THE CALIFORNIA PUBLIC UTILITIES HAS NO**
7 **JURISDICTION IN THIS CASE.**

8 Courts have long recognized that Congress has “plenary and exclusive
9 authority” over Indian affairs. *Michigan v. Bay Mills Indian Cmty.* (2014) 572
10 U.S. 782, 788-90 [noting the breadth of congressional power and corresponding
11 judicial role of restraint].). This exclusive authority is rooted in the Indian
12 commerce clause (art. I, § 8, cl. 3) and the supremacy clause (art. VI, cl. 2) of the
13 Constitution, which gives Congress “the exclusive and absolute power to regulate
14 commerce with the Indian tribes, -- a power as broad and as free from restrictions
15 as that to regulate commerce with foreign nations.” *United States v. Forty-Three*
16 *Gallons of Whiskey*, 93 U.S. 188, 194 (1876); *Worcester v. Georgia* 31 U.S. 515,
17 551-57, 558-60 (1832); *Seminole Tribe v. Fla.* 517 U.S. 44, 62 (1996), [“This is
18 clear enough from the fact that the States ... have been divested of virtually all
19 authority over Indian commerce and Indian tribes.”].

20 Pursuant to this plenary authority, both Congress and the Supreme Court
21 have adhered to the general principle first articulated in *Worcester*: a state may not
22 regulate the property or conduct of Indians or tribes in Indian country. *See, e.g.,*
23 *McClanahan v. Arizona State Tax Comm’n*, 411 U.S. 164, 168 (1973) [“[T]he
24 policy of leaving Indians free from state jurisdiction and control is deeply rooted
25 in the Nation’s history.”] quoting (*Rice v. Olson* 324 U.S. 786, 789 (1945).);
26 (*Williams v. Lee*, 358 U.S. 217, 219 (1959) [“Over the years this Court has
27 modified [*Worcester*] in cases where essential tribal relations were not involved

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 72 Filed 11/12/21 Page 3 of 5 Page ID #:1531

1 and where the rights of Indians would not be jeopardized, but the basic policy of
2 *Worcester* has remained.].

3 In the absence of an act of Congress expressly granting a state the authority
4 to enforce its laws against Indians and tribes within Indian Country, the states
5 have no such authority. *McClanahan*, at 170-171 (“State laws are not applicable to
6 tribal Indians on an Indian Reservation except where Congress has expressly
7 provided that state laws shall apply.”). Likewise, local laws cannot be enforced on
8 reservations absent Congressional authorization. *Santa Rosa Band of Indians v.*
9 *Kings County*, 532 F.2d 655, 658-659 (9th Cir. 1975), *cert. denied*, 429 U.S. 1038
10 (1977).

11 Furthermore, it is indisputable that the United States maintains a trust
12 relationship with Indian tribes. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831);
13 *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942), [“Under a
14 humane and self-imposed policy which has found expression in many acts of
15 Congress and numerous decisions of this Court, [the United States] has charged
16 itself with moral obligations of the highest responsibility and trust.”].

17 Based upon the trust responsibility, it is also undisputed that the United
18 States of America owns the lands that comprise an Indian reservation in trust for
19 the tribe for whom the reservation was created and no person, organization or
20 entity can acquire any interest in reservation trust lands without the consent of
21 Congress. 25 U.S.C. § 177. See also, *County of Oneida v. Oneida Indian Nation*,
22 470 U.S. 226 (1985). Thus, whether there has been a conveyance of any interest in
23 Indian reservation lands to a third party is exclusively a matter of federal, not
24 state, law. *Id.* at 247-48.

25 Applying these principles, in *California v. Cabazon Band of Indians*, 480
26 U.S. 202 (1987), the Supreme Court held that 18 U.S.C § 1162 and 28 U.S.C. §

27
28

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 72 Filed 11/12/21 Page 4 of 5 Page ID #:1532

1 1360, did not grant California the authority to enforce its civil regulatory law
2 against Indians and Indian Tribes on their reservations.

3 Likewise, the CPUC, an agency of the State of California, would have no
4 jurisdiction to enforce state law against the Tribe, which also enjoys sovereign
5 immunity from suit, (*Chemehuevi Indian Tribe v. State Board of Equalization*,
6 757 F. 2d 1047 (9th Circuit 1985), or its reservation trust lands. *McClanahan v.*
7 *Arizona State Tax Comm'n*, 411 U.S. 164, 168 (1973).

CONCLUSION

8
9 The CPUC has no jurisdiction over the Tribe and its Reservation lands.

10 For this reason and the reasons stated above, the HWC's motion for a stay
11 must be denied.

12 DATED: November 12, 2021

Respectfully Submitted,
RAPPORT AND MARSTON

14 By: /s/ Lester J. Marston, Esq.
15 LESTER J. MARSTON, ESQ.
16 Attorney for Chemehuevi Indian Tribe

17 LATHOURIS LAW PLLC

18 By: /s/ Kostas R. Lathouris
19 KOSTAN R. LATHOURIS, ESQ.
20 Attorney for Chemehuevi Indian Tribe

21 Pursuant to L.R. 5-4.3.4(a)(2), the filer of this document attests that all
22 other signatories listed, and on whose behalf the filing is submitted, concur in the
23 filing's content and have authorized the filing.

24 LATHOURIS LAW PLLC

25 By: /s/ Kostas R. Lathouris
26 KOSTAN R. LATHOURIS, ESQ.
27 Attorney for Chemehuevi Indian Tribe

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 72 Filed 11/12/21 Page 5 of 5 Page ID #:1533

CERTIFICATE OF SERVICE

I am employed in the County of Mendocino, State of California. I am over the age of 18 years and not a party to the within action; my business address is that of rapport & Marston, 405 West Perkins Street, Ukiah, CA 95482.

I hereby certify that I electronically filed the below listed documents with the Clerk of the United States District Court for the Central District of California by using the CM/ECF system on November 12, 2021, which generated and transmitted a notice of electronic filing to the CM/ECF registrants in this matter.

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION FOR A STAY.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct; executed on November 12, 2021, at Ukiah, California.

/s/ Ericka Duncan

ERICKA DUNCAN, Declarant

PROPOSED RESOLUTION

**Resolution W-5250
WD**

**January 27, 2022
Agenda ID #20211**

Appendix 3

**Havasú's Memorandum of Points and Authorities in Support of Motion to Stay
Action.**

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 70-2 Filed 11/04/21 Page 1 of 17 Page ID #:1439

Patrick D. Webb, Esq. State Bar No. 82857

WEBB & CAREY

402 West Broadway Ste 400

San Diego CA 92101

Tel 619-236-1650

Fax 619-236-1283

Attorneys for HWC Defendants

**UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

CHEMEHUEVI INDIAN TRIBE,

Plaintiff,

v.

HAVASU WATER COMPANY et al.,

Defendants.

Civ. No. 5: 20-cv-471-GW-KK

**HWC'S MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
MOTION TO STAY THIS ACTION**

Date: December 2, 2021

Time: 8:30 a.m.

Judge: Hon. George H. Wu

TABLE OF CONTENTS

1. CPUC Obtained Jurisdiction over the Easement upon HWC's filing of a General Rate Case on October 21, 2021	6
2. This Action Must be Stayed Pursuant to Cal. P.U.C. Section 1759's Mandatory Bar of Private Actions against Public Utilities During Pending Rate Making Proceedings before the CPUC.	8
3. Even If Cal. P.U.C. Section 1759 was not Mandatory, this Action Should be Stayed Pursuant to the Federal Doctrine of Primary Jurisdiction	12
Conclusion	17

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 70-2 Filed 11/04/21 Page 2 of 17 Page ID #:1440

TABLE OF AUTHORITIES

1		
2	Cases	
3	<i>Alfalfa Solar I LLC v. Portland Gen. Elec. Co.</i> ,	
4	No. 3:18-cv-40-SI (D. Or. May 31, 2018)(Casetext).....	15
5	<i>Barnett v. Delta Lines, Inc.</i> ,	
6	137 Cal.App.3d 674 (1982).	9
7	<i>Barrera v. Comcast Holdings Corp.</i> ,	
8	No. 14-cv-00343-TEH, (N.D. Cal. May 12, 2014)(Casetext).	10, 14
9	<i>Bernhardt v. County of Los Angeles</i> ,	
10	279 F.3d 862 (9th Cir. 2002).	12
11	<i>Big Lagoon Rancheria v. California</i> ,	
12	789 F.3d 947 (9th Cir. 2015).	12
13	<i>Brown v. MCI WorldCom Network Servs., Inc.</i> ,	
14	277 F.3d 1166 (9th Cir.2002).	13, 16
15	<i>Busalacchi v. Arizona Pub. Serv. Co.</i> ,	
16	Case No. 12-cv-00298, ECF Doc. #21, page 12-13 (S.D. Cal. July 27, 2012)	
17	(Casetext).	14
18	<i>Camp Meeker Water System v. P.U.C., (Camp Meeker)</i>	
19	51 Cal.3d 845 (1990).	6, 7, 10
20	<i>City and County of San Francisco v. Uber Technologies, Inc.</i>	
21	36 Cal.App.5th 66 (2019).	9
22	<i>Clark v. Time Warner Cable</i> ,	
23	523 F.3d 1110 (9th Cir. 2008).	14
24	<i>Consumers Lobby Against Monopolies v. Public Utilities Com.</i> ,	
25	25 Cal.3d 891 (1979).	16
26	<i>Coppola v. Smith</i> ,	
27	935 F. Supp. 2d 993 (E.D. Cal. 2013).	12
28	<i>Davel Comm'ns, Inc. v. Qwest Corp.</i> ,	
	460 F.3d 1075 (9th Cir. 2006).	14
	<i>Emrich v. Touche Ross & Co.</i> ,	
	846 F.2d 1190 (9th Cir. 1988).	12
	<i>Far East Conference v. United States</i> ,	
	342 U.S. 570 (1952)..	10, 14
	<i>Farmers Ins. Exchange v. Superior Court</i> ,	
	2 Cal.4th 377 (Cal. 1992)..	10, 13, 16
	<i>F. P. C. v. Colorado Interstate Gas Co.</i> ,	
	348 U.S. 492 (1955)..	11

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 70-2 Filed 11/04/21 Page 3 of 17 Page ID #:1441

1	<i>Goncharov v. Uber Techs., Inc. (Goncharov),</i>	
	19 Cal.App.5th 1157 (2018).	9, 12
2		
3	<i>Gravquick A/S v. Trimble Navigation Int'l, Ltd.,</i>	
	323 F.3d 1219 (9th Cir. 2003).	8
4	<i>GTE.Net LLC v. Cox Commc'ns, Inc.,</i>	
	185 F. Supp. 2d 1141 (S.D. Cal. 2002).	15
5		
6	<i>Hall v. Tesero High Plains Pipeline Co.,</i>	
	478 F. Supp. 3d 834 (D.N.D. 2020).	12
7	<i>Hart v. Comcast of Alameda,</i>	
	No. 07-6350, 2008 WL 2610787, at *2 (N.D. Cal. June 25, 2008).	14
8		
9	<i>Hartwell Corp. v. Superior Court,</i>	
	27 Cal.4th 256, 260 (2002).	12
10	<i>Industrial Communications Systems, Inc. v. Pacific Telephone & Telegraph Co.,</i>	
	505 F.2d 152 (9th Cir. 1974).	10, 14, 16
11		
12	<i>Kachadoorian v. Calwa Co. Water Dist.,</i>	
	96 Cal.App.3d 741 (1979).	11
13	<i>Kairy v. Super Shuttle Int'l.,</i>	
	660 F.3d 1146 (9th Cir. 2011).	8, 9
14		
15	<i>Matlock v. United Healthcare Services, Inc.,</i>	
	2014 WL 1155541 (E.D. Cal. Mar. 20, 2014).	15
16	<i>McNeil v. United States,</i>	
	508 U.S. 106 (1993).	11
17		
18	<i>Mendoza v. Unitedhealth Group Inc.,</i>	
	No. C 13-1553 PJH (N.D. Cal. Jan. 6, 2014)(Casetext).. . . .	15
19	<i>People ex Rel. Orloff v. Pacific Bell,</i>	
	31 Cal.4th 1132 (2003).	9, 12
20		
21	<i>Reiter v. Cooper,</i>	
	507 U.S. 258, 268, 113 S.Ct. 1213, 122 L.Ed.2d 604 (1993).	13, 14, 15, 16
22	<i>San Diego Gas & Elec. Co. v. Superior Court (Covalt),</i>	
	13 Cal. 4th 893 (Cal. 1996).	6, 9, 11, 16
23		
24	<i>Sarale v. Pacific Gas,</i>	
	189 Cal.App.4th 225 (Cal. 2010).	9, 11
25	<i>Shell Cal. Pipeline Co. v. Compton,</i>	
	35 Cal.App.4th 1116 (1995).	10
26		
27	<i>Stevenson v. Allstate Ins. Co.,</i>	
	Case No.: 15-cv-04788-YGR (N.D. Cal. Mar. 17, 2016)(Casetext).	15
28		

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 70-2 Filed 11/04/21 Page 4 of 17 Page ID #:1442

1	<i>Syntek Semiconductor Co., Ltd. v. Microchip Tech. Inc.,</i>	
	307 F.3d 775 (9th Cir. 2002).	14
2		
3	<i>Tahoe Vista Conc. Cit. v. Co. Placer,</i>	
	81 Cal.App.4th 577 (2000).	11
4	<i>United States v. Culliton,</i>	
	328 F.3d 1074 (9th Cir. 2003).	14
5		
6	<i>United States Navigation Co. v. Cunard S. S. Co.,</i>	
	284 U.S. 474 (1932).	14
7	<i>United States v. Gen. Dynamics Corp.,</i>	
	828 F.2d 1356 (9th Cir. 1987).	
8		
9	<i>United States v. Western Pac. R. Co.,</i>	
	352 U.S. 59 (1956).	13
10	<i>West Coast Home Builders. v. Aventis Cropscience USA Inc.,</i>	
	No. C 04-02225 SI (N.D. Cal.2006)(Casetext).	15
11		
12	<i>Westlake Community Hosp. v. Superior Court,</i>	
	17 Cal.3d 465 (1976).	10
13	<i>Wind River Mining Corp. v. United States,</i>	
	946 F.2d 710 (9th Cir. 1991).	12
14		
	Statutes and Rules	
15	28 U.S.C. §2401(a).	11, 12
16	43 C.F.R. §4.411.	11
17	Fed. R. Civ. P. 12(h)(3).	12
18	Cal. Const., Art. XII, §§ 1–6.	15
19	Cal. Const., Art. XII, §§2, 4, 6.	15
20	Cal. Civil Code §1066 et seq.. . . .	7
21	Cal. Code of Civil Proc. §§1857.	7
22	Cal. Code of Civil Proc. §2077.	7
23	Cal. H.S.C. §116555 (a)(3).	7, 13
24	Cal. P.U.C. §201.	16
25	Cal. P.U.C. §§216(a).	8, 12
26	Cal. P.U.C. §454	7
27	Cal. P.U.C. §455.	15
28		

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 70-2 Filed 11/04/21 Page 5 of 17 Page ID #:1443

1	Cal. P.U.C. §489.	15
2	Cal. P.U.C. §701.	16
3	Cal. P.U.C. §701.10.	8, 12
4	Cal. P.U.C. §728.	15
5	Cal. P.U.C. §729.	15
6	Cal. P.U.C. §768.	8, 12
7	Cal. P.U.C. §1351-54.	8, 12
8	Cal. P.U.C. §1405.1.	8, 12
9	Cal. P.U.C. §1708.	7, 8
10	Cal. P.U.C. §1757.	16
11	Cal. P.U.C. §1759.	6, 8, 9, 11, 12
12	Cal. P.U.C. §1760.	16
13	Cal. P.U.C. §2101.	8, 12
14	Cal. P.U.C. §2701.	8, 12
15	Cal. P.U.C. §6265.	9, 12
16	CPUC General Order 96-B, Rules 1.1, 4.7, and 7.6.2.	7
17	CPUC General Order 96-B, Rules 7.4.1, 7.4.3, 7.5.2,	8
18	CPUC Water Industry Rules 1.7, 7.3.3(5), and 8.2.	7
19	CPUC Decision 92-03-093, March 31, 1992, Ordering Paragraph 9.	7
20	CPUC July 2012 Standard Practice for Processing Informal General Rate Cases of Water and Sewer System Utilities.	7
21	Miscellaneous	
22	Commission-Wide Advice Letter Summary Statistics as of	
23	Sept. 30, 2021, https://apps.cpuc.ca.gov/apex/f?p=404:3:0:::	8
24	https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M023/K381/23381302.PDF , adopted by	
25	Decision (D.) 01-07-026 (July 12, 2001), D.02-01-038 (January 9, 2002), D.05-01-032 (January	
26	13, 2005), D.07-01-024 (January 25, 2007), D.07-09-019 (September 6, 2007), D.08-05-019 (May	
27	15, 2008), Resolution ALJ-221 (August 21, 2008), Resolution W-4749 (March 26, 2009), and	
28	D.09-04-005 (April 16, 2009) Resolution T-17327 (January 12, 2012), Resolution ALJ-346	
	(May 10, 2018).	8

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 70-2 Filed 11/04/21 Page 6 of 17 Page ID #:1444

6Patrick D. Webb, Esq. State Bar No. 82857
WEBB & CAREY
402 West Broadway Ste 400
San Diego CA 92101
Tel 619-236-1650
Fax 619-236-1283

Attorneys for HWC Defendants

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

CHEMEHUEVI INDIAN TRIBE,)	Civ. No. 5: 20-cv-471-GW-KK
)	
Plaintiff,)	HWC'S MEMORANDUM OF POINTS
)	AND AUTHORITIES IN SUPPORT OF
v.)	MOTION TO STAY THIS ACTION
)	
HAVASU WATER COMPANY et al.,)	Date: November 29, 2021
)	Time: 8:30 a.m.
)	Judge: Hon. George H. Wu
Defendants.)	
)	

This action must be stayed since the Plaintiff CHEMEHUEVI INDIAN TRIBE (CIT)'s claims are within the primary jurisdiction of the California Public Utilities Commission (CPUC)'s pending general rate case initiated by HAVASU WATER CO. (HWC). This motion is brought pursuant to the mandatory duties in Cal. Public Utilities Code (P.U.C.) Section 1759, the rules and procedures of the CPUC, the California Supreme Court's holding in *San Diego Gas & Elec. Co. v. Superior Court (Covalt)*, 13 Cal. 4th 893 (Cal. 1996), and the discretionary duties under the federal doctrine of primary jurisdiction.

1. CPUC Obtained Jurisdiction over the Easement upon HWC's filing of a General Rate Case on October 21, 2021

As the Court learned at the October 28, 2021 scheduling conference, on October 4, 2021, Jason Reiger, an attorney with the CPUC, wrote to HWC and the CIT, stating that the CPUC has "the authority to construe property interests for the purpose of rate making" when "a rate case is currently before the CPUC," citing *Camp Meeker Water System v. P.U.C.*, (Camp Meeker) 51 Cal.3d 845 (1990).

On October 21, 2021, the CPUC obtained primary jurisdiction over the claims in this action when HWC filed Advice Letter 48-W, invoking the CPUC's rate making authority, and seeking

HWC'S P&A IN SUPPORT OF MOTION TO STAY ACTION

6

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 70-2 Filed 11/04/21 Page 7 of 17 Page ID #:1445

1 “a rate increase based on a claim that in order to meet the needs of its customers for water [HWC]
2 would have to lease additional wells on the [government’s land],” pursuant to the holding in *Camp*
3 *Meeker*.

4 HWC’s Advice Letter 48-W was filed pursuant to General Order 96-B, Rules 1.1, 4.7, and
5 7.6.2, Water Industry Rules 1.7, 7.3.3(5), and 8.2, Commission Decision 92-03-093, March 31,
6 1992, Ordering Paragraph 9, July 2012 Standard Practice for Processing Informal General Rate
7 Cases of Water and Sewer System Utilities for the 350 Class D (small) water utilities like HWC
8 with less than 500 connections, California Health and Safety Code Section 116555 (a)(3), Public
9 Utilities Code Sections 454 and 1708, and the California Supreme Court’s decision in *Camp*
10 *Meeker*, to insure that HWC can provide a reliable and adequate supply of water to its customers.

11 Just as in *Camp Meeker*, HWC seeks “a rate increase based on a claim that in order to meet
12 the needs of its customers for water [HWC] would have to lease additional wells on the
13 [government’s land].” 51 Cal.3d 845, 850-51. Just as in *Camp Meeker*, the Commission’s rate
14 making authority and jurisdiction has now been formally initiated to determine that HWC “owns
15 an easement that permits it to obtain water” from Lake Havasu via a pipeline through the
16 government’s land and therefore need not drill new wells on the government’s land in lieu of the
17 “exercise of the easement.” 51 Cal.3d 845, 851-52. In *Camp Meeker*, the Supreme Court found:

18 In November 1983, CMWSI sought a rate increase based on a claim that in order
19 to meet the needs of its customers for water CMWSI would have to lease additional
20 wells on the Chenoweth parcel. After extended hearings, and a rehearing, in
21 decision No. 89-10-033, the commission concluded that CMWSI owns an easement
22 that permits it to obtain water from the entire 600-acre Chenoweth watershed, and
23 therefore is not obligated to compensate the Chenoweths for its exercise of that
24 easement, or to pass on the cost of future well site use to the ratepayers. *Camp*
25 *Meeker* at 850-51.

26 Similarly, here the CIT erroneously claims that in order to meet the needs of HWC’s
27 customers for water, HWC must lease additional wells on the government’s property, since the
28 extension of the easement in perpetuity by the San Bernardino Board of Supervisors (BOS)
allegedly should not be enforced. FAC ¶¶4, 20-32, Webb Dec. Ex. E; Cal. Water Board SRF
Project Number 3610017-004G, Scope of Project, pages 3, 5-7. Just as in *Camp Meeker*, the
Commission is now authorized to “exercise... its rate making authority...[to] construe deeds

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 70-2 Filed 11/04/21 Page 8 of 17 Page ID #:1446

1 conveying real property and easements to [HWC]....in the same manner that a court or agency
2 construes any written instrument (see Civil Code §1066 et seq.; Code of Civil Proc. §§1857, 2077)
3 for the purpose of ascertaining facts relevant to the merits of the application for increased rates...,”
4 51 Cal.3d 845, 850, and likewise to determine that HWC is “not obligated to compensate the [CIT]
5 for its exercise of [its] easement, or to pass on the cost of future well site use to the ratepayers.” 51
6 Cal.3d 845, 850-51.

7 Once an advice letter initiates a Tier 3 general rate case, as here, it generally takes 90 days
8 for the CPUC to complete review and issue a decision, pursuant to General Order 96 B,¹ Rules
9 7.4.1, 7.4.3, 7.5.2, according to the Commission-Wide Advice Letter Summary Statistics as of Sept.
10 30, 2021, <https://apps.cpuc.ca.gov/apex/f?p=404:3:0:::>

11 **2. This Action Must be Stayed Pursuant to Cal. P.U.C. Section 1759's Mandatory Bar**
12 **of Private Actions against Public Utilities During Pending Rate Making Proceedings**
13 **before the CPUC**

14 Public Utilities Code (P.U.C.) Section 1759(a) provides:

15 (a) No court of this state, except the Supreme Court and the court of appeal, to the
16 extent specified in this article, shall have jurisdiction to review, reverse, correct, or
17 annul any order or decision of the commission or to suspend or delay the execution
18 or operation thereof, or to enjoin, restrain, or interfere with the commission in the
19 performance of its official duties, as provided by law and the rules of court.

20 The California Supreme Court holds that P.U.C. section 1759 bars private actions against
21 utilities, as here, where the relief granted would undermine the regulatory regime established by
22 the CPUC, which includes supervising and regulating California public utilities. *San Diego Gas*

23 ¹ <https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M023/K381/23381302.PDF>,
24 adopted by Decision (D.) 01-07-026 (July 12, 2001), D.02-01-038 (January 9, 2002), D.05-01-032
25 (January 13, 2005), D.07-01-024 (January 25, 2007), D.07-09-019 (September 6, 2007), D.08-05-
26 019 (May 15, 2008), Resolution ALJ-221 (August 21, 2008), Resolution W-4749 (March 26, 2009),
27 and D.09-04-005 (April 16, 2009) Resolution T-17327 (January 12, 2012), Resolution ALJ-346
28 (May 10, 2018). “This General Order contains General Rules... and Water Industry Rules. The
General Rules govern advice letters ...submittals to the Commission by public utilities that are
...water...corporations, as defined in the Public Utilities Code... The General Rules also govern
applications for rehearing and petitions for modification of a resolution regardless of whether the
resolution was initiated by advice letter...The General Rules and Industry Rules shall be liberally
construed to secure just, speedy, and inexpensive handling of informal matters, as set forth in this
General Order...The advice letter is subject to Public Utilities Code Section 1708, which states in
pertinent part that the Commission may, ‘upon notice to the parties, and with opportunity to be heard
as provided in the case of complaints, rescind, alter or amend any order or decision made by it.’”

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 70-2 Filed 11/04/21 Page 9 of 17 Page ID #:1447

1 & Elec. Co. v. Superior Court (Covalt), 13 Cal. 4th 893 (Cal. 1996).² Here, the CPUC has
2 jurisdiction over the regulation of the easement under Cal. P.U.C. §§216(a), 701.10, 768, 1351-54,
3 1405.1, 1759, 2101, 2701, and 6265, and a rate making proceeding has been commenced to
4 determine that HWC's easement has been extended in perpetuity.

5 In determining when an action is barred, the Supreme Court asked: "(1) whether the
6 [CPUC] had the authority to adopt a regulatory policy on the subject matter of the litigation; (2)
7 whether the [CPUC] had exercised that authority; and (3) whether action in the case before the
8 court would hinder or interfere with the [CPUC's] exercise of regulatory authority." *Kairy*, 660
9 F.3d at 1151 (citing *Covalt*, 13 Cal. 4th at 922-25); *City and County of San Francisco v. Uber*
10 *Technologies, Inc.* 36 Cal.App.5th 66, 79 (2019), quoting *Goncharov v. Uber Techs., Inc.*
11 (*Goncharov*), 19 Cal.App.5th 1157, 1170 (2018).

12 Since P.U.C. Section 1759 bars court actions that may hinder or interfere with the exercise
13 of regulatory authority by the CPUC, *Covalt*, 13 Cal.4th 893, 918 fn. 20, "[A]n action for damages
14 against a public utility...is barred by section 1759 not only when an award of damages would
15 directly contravene a specific order or decision of the commission, ...but also when an award of
16 damages would simply have the effect of undermining a general supervisory or regulatory policy
17 of the commission, i.e., when it would 'hinder' or 'frustrate' or 'interfere with' or 'obstruct' that
18 policy."

19 "The [commission] has exclusive jurisdiction over the regulation and control of utilities,
20 and once it has assumed jurisdiction, it cannot be hampered, interfered with, or second-guessed by
21 a concurrent ...court action addressing the same issue," *Sarale v. Pacific Gas*, 189 Cal.App.4th 225,
22 230 (Cal. 2010), quoting *Barnett v. Delta Lines, Inc.*, 137 Cal.App.3d 674, 681 (1982), where
23 section 1759 barred the court from exercising jurisdiction over the Sarales' claims because to do
24 so would interfere with "an ongoing supervisory or regulatory program over which the
25 [commission] has sole jurisdiction;" "In short, challenges to PGE's [use of its easement] as

26
27 ² "In a case requiring a federal court to apply California law, [as here] the court 'must apply
28 the law as it believes the California Supreme Court would apply it.'" *Kairy v. Super Shuttle Int'l.*,
660 F.3d 1146, 1150 (9th Cir. 2011), quoting *Gravquick A/S v. Trimble Navigation Int'l, Ltd.*, 323
F.3d 1219, 1222 (9th Cir. 2003).

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 70-2 Filed 11/04/21 Page 10 of 17 Page ID #:1448

1 unreasonable, unnecessary, or excessive lie within the exclusive jurisdiction of the commission to
2 decide;" *People ex rel. Orloff v. Pacific Bell*, 31 Cal.4th 1132, 1146 (2003), "the action would
3 interfere with and hinder the ongoing regulatory efforts undertaken by the PUC in connection with
4 this subject matter, and section 1759 thus precluded the civil action;" *Goncharov* at 1174, "A
5 judicial determination on these issues would directly infringe upon the CPUC's ongoing rule
6 making in this area. As such, the claims in the SAC are barred by section 1759."

7 Another reason for deferring to the PUC is the need to obtain the benefit of that
8 agency's expertise in ascertaining, interpreting and distilling the facts and
9 circumstances underlying the legal issues. Where an agency is charged with
10 responsibility for regulating a complex industry, it is much better equipped than the
11 courts, "by specialization, by insight gained through experience, and by more
flexible procedure," to gather the relevant facts that underlie a particular claim
involving that industry. See *Far East Conference v. United States*, 342 U.S. 570,
575 (1952). *Industrial Communications Systems, Inc. v. Pacific Telephone &
Telegraph Co.*, 505 F.2d 152, 157 (9th Cir. 1974).

12 [E]ven if . . . ultimate resort to the courts [is] inevitable [citation], the prior
13 administrative proceeding will still promote judicial efficiency by unearthing the
14 relevant evidence and by providing a record which the court may review...and we
15 dismiss as unsupported conjecture the suggestion that prior resort to the
administrative process will unduly delay or frustrate resolution of the issues.
Farmers Ins. Exchange v. Superior Court, 2 Cal.4th 377, 400 (Cal. 1992), citing
Westlake Community Hosp. v. Superior Court, 17 Cal.3d 465, 476 (1976).

16 [T]he Court does not find that potential delay in awaiting a definitive ruling from
17 the FCC on this highly relevant issue outweighs issuance of the stay. Issuing a
18 decision in the interim that may be undermined by an anticipated ruling of the FCC
would run counter to the policy animating the primary jurisdiction doctrine itself.
Barrera v. Comcast Holdings Corp., No. 14-cv-00343-TEH, at *7 (N.D. Cal. May
12, 2014), staying the action for 180 days.

19 This Court must therefore dismiss this action without prejudice, or stay the action until such
20 time as the CPUC has rendered a decision in general rate case 48-W. Just as the California
21 Supreme Court affirmed the CPUC's exercise of its primary jurisdiction in a general rate case in
22 *Camp Meeker*, 51 Cal.3d 845, 850-51, the CPUC must also be allowed to exercise its rate making
23 authority here, to find that no rate increase is needed, because the HWC utility has an easement to
24 distribute Lake Havasu water that was extended in perpetuity by the San Bernardino BOS in 1981.
25 Webb Dec. ¶¶26-31, Exs. C, D & E. In fact, the CPUC Water Industry Rule 8.2 provides that: "A
26 Utility may submit an advice letter [as HWC has submitted on October 4, 2021] requesting
27 approval, authorization, or other relief similar to that accorded another Utility by Commission
28

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 70-2 Filed 11/04/21 Page 11 of 17 Page ID #:1449

1 order, [as was granted in *Camp Meeker*]. The advice letter shall cite each decision or resolution
2 relied upon, and shall demonstrate that the Utility submitting the advice letter is similarly situated
3 in all material respects, and is requesting the same relief and relying on the same justification as
4 in the cited order(s).”

5 Here, HWC, like Shell Cal. Pipeline Co., “surrendered the benefits associated with private
6 control of its pipeline and subjected itself to regulation by the CPUC. With this burden comes the
7 benefit of... “the history of [more than 40 years] continuous use of” “31,152 feet of pipelines
8 through the city streets of Carson and South Central Los Angeles” “in their present location [which]
9 indicates [a] public necessity for continuation of the existing use.” *Shell Cal. Pipeline Co. v.*
10 *Compton*, 35 Cal.App.4th 1116, 1124-26 (1995), citing *Kachadoorian v. Calwa Co. Water Dist.*,
11 96 Cal.App.3d 741, 749 (1979). Here, HWC has similarly established a public necessity for the
12 continued use of its easement, since it has continuously operated the pipeline for more than 60
13 years without incident.

14 Until the parties have exhausted their administrative remedies before the CPUC, the Court
15 is precluded from issuing any rulings on the issues raised therein. P.U.C. §1759; *Covalt*, at 918;
16 *Sarale v. Pacific Gas*, 189 Cal.App.4th 225, 230-31 (2010). Here, neither HWC, nor the CIT, has
17 exhausted its administrative remedies before the CPUC, the U.S. Department of Interior and its
18 Bureaus of Land Management, Reclamation and Indian Affairs, and the San Bernardino
19 CountyBOS. Where, as here, exhaustion of administrative remedies is required by both state and
20 federal statute, it is mandatory and precludes the court from exercising its jurisdiction, until such
21 remedies are exhausted. *McNeil v. United States*, 508 U.S. 106, 113 (1993); *F. P. C. v. Colorado*
22 *Interstate Gas Co.*, 348 U.S. 492, 500 (1955), “If he so fails he is precluded from judicial review
23 by the application of the time-honored doctrine of exhaustion of administrative remedies...”

24 The purpose of the rule of exhaustion of administrative remedies is to provide an
25 administrative agency with the opportunity to decide matters in its area of expertise
26 prior to judicial review....Here, the exhaustion requirement comports with section
27 1759's intent to allow the commission to act effectively in safeguarding people and
28 property from danger. *Sarale* at 243.

27 Moreover, since San Bernardino County Resolution No. 81-134 was timely noticed, and
28 was unanimously adopted without opposition from the United States or the CIT, they have waived

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 70-2 Filed 11/04/21 Page 12 of 17 Page ID #:1450

1 any claim that the easement was not extended in perpetuity. Nor was there any appeal of the grant
2 of the easement within 30 days of it being granted by the United States on June 22, 1976, or
3 extended on May 4, 1981, as required for such an appeal by 43 C.F.R. §4.411, and *Tahoe Vista*
4 *Conc. Cit. v. Co. Placer*, 81 Cal.App.4th 577, 594 (2000), finding plaintiff failed to exhaust
5 administrative remedies, after timely notice of the Board of Supervisors' agenda.

6 Nor was the easement challenged under the Administrative Procedure Act, per 28 U.S.C.
7 §2401(a), within 6 years of the June 22, 1976 granting of the easement, the May 4, 1981 Resolution
8 No. 81-134 extending the easement in perpetuity, or within 6 years of June 22, 2006, when the
9 easement would have expired but for the 1981 extension in perpetuity. Nor can the CIT make a
10 collateral attack upon the United States' agreement to extend the easement more than 6 years after
11 these administrative and legal remedies have expired, per 28 U.S.C. §2401(a). *Wind River Mining*
12 *Corp. v. United States*, 946 F.2d 710, 716 (9th Cir. 1991), *Big Lagoon Rancheria v. California*, 789
13 F.3d 947, 953 (9th Cir. 2015)(en banc), and *Hall v. Tesero High Plains Pipeline Co.*, 478 F. Supp.
14 3d 834 (D.N.D. 2020).

15 Even if HWC had not raised the CPUC's primary jurisdiction in its status report and this
16 motion, federal courts are required *sua sponte* to examine such jurisdictional issues. Fed. R. Civ.
17 P. 12(h)(3). Subject matter jurisdiction is not waivable. *Emrich v. Touche Ross & Co.*, 846 F.2d
18 1190, 1194 (9th Cir. 1988). "If the court determines at any time that it lacks subject-matter
19 jurisdiction, the court must dismiss the action," *Bernhardt v. County of Los Angeles*, 279 F.3d 862,
20 868 (9th Cir. 2002), or under these circumstances, stay the action until such time as the agency has
21 acted on the CPUC's pending general rate case concerning HWC's Advice Letter 48-W.

22 Further, judicial action at this time in this case would hinder and interfere with the CPUC's
23 exercise of its regulatory authority. Just as in *Goncharov, v. Uber Techs., Inc.*, 19 Cal.App.5th
24 1157, 1174 (2018), allowing the CIT's FAC to proceed would require the trial court to make factual
25 findings regarding the easement and its extension in perpetuity, and, which regulations would apply
26 to HWC's operations.

27 A judicial determination on these issues would directly infringe upon the CPUC's ongoing
28 rule making in this area. As such, the Court is precluded from exercising jurisdiction of the claims

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 70-2 Filed 11/04/21 Page 13 of 17 Page ID #:1451

1 in the FAC at this time by P.U.C. section 1759. *Goncharov*, 1174; *Hartwell Corp. v. Superior*
2 *Court*, 27 Cal.4th 256, 260 (2002), reaffirming *Covalt*, 918, fn. 20, 922-25; *Sarale*, 230; *Barnett*
3 *v. Delta Lines, Inc.*, 137 Cal.App.3d 674, 681 (1982); and *People ex Rel. Orloff v. Pacific Bell*, 31
4 Cal.4th 1132, 1146 (2003). As held in *Hartwell*, “each of [Plaintiff’s] state law claims are
5 preempted.” *Coppola v. Smith*, 935 F. Supp. 2d 993, 1026 (E.D. Cal. 2013).

6 **3. Even If Cal. P.U.C. Section 1759 was not Mandatory, this Action Should be Stayed**
7 **Pursuant to the Federal Doctrine of Primary Jurisdiction**

8 Regardless of California’s mandatory bar of this action against a public utility during rate
9 making proceedings under P.U.C. §1759, this Court should still stay this action pursuant to the
10 Federal doctrine of primary jurisdiction.

11 As noted above, the CPUC has exclusive primary jurisdiction over the regulation of the
12 easement under P.U.C. §§216(a), 701.10, 768, 1351-54, 1405.1, 1759, 2101, 2701, and 6265.
13 Moreover, the parties have expressly agreed that the CPUC has the authority to determine that the
14 easement in question has been extended in perpetuity in order to provide a reliable and adequate
15 supply of potable water to HWC’s customers, as required by California Health and Safety Code
16 Section 116555 (a)(3). See, ECF Doc. 37-7, page 24 of 76, and Webb Dec. Exs. C & D.

17 Neither the CIT, nor HWC, have exhausted their administrative remedies to have the CPUC
18 make the determination, both parties expressly agreed that it had the primary jurisdiction to make,
19 i.e., that the San Bernardino County BOS determined that the easement should be extended in
20 perpetuity on May 4, 1981. Contrary to the CIT’s misrepresentation at the scheduling conference
21 on October 28, 2021, the CPUC continues to exercise primary jurisdiction to determine that the
22 easement was lawfully extended in perpetuity on May 4, 1981, as the United States, the CIT and
23 HWC expressly agreed in their 1976 settlement agreement and grant of the easement. Webb Dec.,
24 and Exs C-E, which evidence the fact that the easement was explicitly excluded from the land
25 patent granted to the CIT by the U.S. in 2010, and therefore remains within the CPUC’s primary
26 jurisdiction over the public utility’s easement to distribute water.

27 “‘Primary jurisdiction,’ . . . applies where a claim is originally cognizable in the courts, and
28 comes into play whenever enforcement of the claim requires the resolution of issues which, under

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 70-2 Filed 11/04/21 Page 14 of 17 Page ID #:1452

1 a regulatory scheme, have been placed within the special competence of an administrative body;
2 in such a case the judicial process is suspended pending referral of such issues to the administrative
3 body for its views.” *United States v. Western Pac. R. Co.*, 352 U.S. 59, 63-65 (1956), cited by
4 *Farmers Ins. Exch. v. Superior Court*, 2 Cal.4th 377, 391 (1992), finding “the primary jurisdiction
5 doctrine advances two related policies: it enhances court decision making and efficiency by
6 allowing courts to take advantage of administrative expertise, and it helps assure uniform
7 application of regulatory laws.”

8 The primary jurisdiction doctrine is “a doctrine specifically applicable to claims . . . that
9 contain some issue within the special competence of an administrative agency” such that the
10 claims should be referred to that agency. *Reiter v. Cooper*, 507 U.S. 258, 268, 113 S.Ct. 1213,
11 122 L.Ed.2d 604 (1993); *see also Brown v. MCI WorldCom Network Servs., Inc.*, 277 F.3d 1166,
12 1172 (9th Cir.2002).

13 Finding a stay appropriate under similar circumstances, Southern District of Cal. Judge
14 Marilyn Huff held that: “The doctrine of primary jurisdiction ‘is a prudential doctrine under
15 which courts may, under appropriate circumstances, determine that the initial decision
16 making responsibility should be performed by the relevant agency rather than the courts.’
17 *Davel Comm’ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1086 (9th Cir. 2006); *see also United*
18 *States v. Culliton*, 328 F.3d 1074, 1082 (9th Cir. 2003). The doctrine of primary jurisdiction
19 ‘requires the court to enable a ‘referral’ to the agency, staying further proceedings so as to
20 give the parties reasonable opportunity to seek an administrative ruling.’ *Reiter v. Cooper*,
21 507 U.S. 258, 268 (1993).” *Busalacchi v. Arizona Pub. Serv. Co.*, Case No. 12-cv-00298, ECF
22 Doc. #21, page 12-13 (S.D. Cal. 2012)(Casetext).

23 [U]nder [the primary jurisdiction] doctrine a court should stay proceedings which
24 are properly within the jurisdiction of, and are in fact presently under consideration
25 by, an agency with extensive regulatory powers over the subject matter and parties
26 involved. *Industrial Communications Systems, Inc. v. Pacific Telephone &*
27 *Telegraph Co.*, 505 F.2d 152, 156 (9th Cir. 1974), citing *Far East Conference v.*
28 *United States*, 342 U.S. 570, (1952); *Radio Corporation of America*, 358 U.S. at
346-347; *United States Navigation Co. v. Cunard S. S. Co.*, 284 U.S. 474, 483-485
(1932).

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 70-2 Filed 11/04/21 Page 15 of 17 Page ID #:1453

1 Although there is no fixed formula in applying the doctrine of primary jurisdiction, the
2 Ninth Circuit has generally determined the doctrine applicable when there is, as here: "(1) [a] need
3 to resolve an issue that (2) has been placed by [the Legislature] within the jurisdiction of an
4 administrative body having regulatory authority (3) pursuant to a statute that subjects an industry
5 or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in
6 administration." *Syntek Semiconductor Co., Ltd. v. Microchip Tech. Inc.*, 307 F.3d 775, 785 (9th
7 Cir. 2002); see also *Clark v. Time Warner Cable*, 523 F.3d 1110, 1115 (9th Cir. 2008); and *United*
8 *States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir. 1987).

9 In situations where, as here, an agency's pending decision applies to the precise
10 issue presented by the litigation, application of the primary jurisdiction doctrine to
11 stay the case is appropriate. See, e.g., *Hart v. Comcast of Alameda*, No. 07-6350,
12 2008 WL 2610787, at *2 (N.D. Cal. June 25, 2008) (finding FCC had primary
13 jurisdiction and staying case where two petitions had been filed on the precise issue
14 before the court...; *Clark*, 523 F.3d at 1113-14 (holding that the FCC had primary
15 jurisdiction over the plaintiffs' claim because the FCC's notice of proposed
16 rulemaking... [involved] the precise issue addressed before the court)...Here, the
17 Court likewise finds that a stay in this case is warranted under the primary
18 jurisdiction doctrine...whether liability under the TCPA attaches... is already under
19 submission before the FCC in two pending petitions. *Barrera v. Comcast Holdings*
20 *Corp.*, No. 14-cv-00343-TEH, at *5-6 (N.D. Cal. May 12, 2014)(Casetext), citing
21 *Matlock v. United Healthcare Services, Inc.*, 2014 WL 1155541, at *1 (E.D. Cal.
22 Mar. 20, 2014).

23 See also, *West Coast Home Builders. v. Aventis Cropsience USA Inc.*, No. C
24 04-02225 SI, at 7* (N.D. Cal.2006)(Casetext) granting a stay, and *Mendoza v. Unitedhealth*
25 *Group Inc.*, No. C 13-1553 PJH, at *1 (N.D. Cal. Jan. 6, 2014) finding:

26 The [primary jurisdiction] doctrine is furthermore appropriate where conduct
27 is alleged which is "at least arguably protected or prohibited by a regulatory
28 statute," and agency resolution of an issue "is likely to be a material aid to
any judicial resolution." See, e.g., *GTE.Net LLC v. Cox Commc'ns, Inc.*, 185
F. Supp. 2d 1141, 1144 (S.D. Cal. 2002) (granting motion to stay on primary
jurisdiction grounds).

These are precisely the types of claims that implicate 'questions involving []
rate making [that] pose issues for which specialized agency fact-finding and
expertise is needed in order to both resolve complex factual questions and
provide a record for subsequent judicial review.' Id. at 397. Were this Court
'to rule on such matters without benefit of the views of the agency charged
with regulating the insurance industry' an unavoidable 'risk of inconsistent
application of the regulatory statutes' would arise. Id. at 398. *Stevenson v.*
Allstate Ins. Co., Case No.: 15-cv-04788-YGR, at *13-14 (N.D. Cal. Mar. 17,
2016), granting a stay of the action pending the agency's action.

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 70-2 Filed 11/04/21 Page 16 of 17 Page ID #:1454

1 Because primary jurisdiction is a prudential doctrine, “referral of the issue to the
2 administrative agency does not deprive the court of jurisdiction; it has discretion either to
3 retain jurisdiction or, if the parties would not be unfairly disadvantaged, to dismiss the case
4 without prejudice.” *Reiter*, 507 U.S. at 268-69.

5 Given the PUC's expertise in evaluating the contents and relevance of its previous
6 orders to the parties' understanding of the PPA, the need for the disputed term to be
7 interpreted uniformly, and the reduced risk of delay causing further harm to
8 Plaintiff, it is appropriate for the Court to defer to the PUC's primary jurisdiction
9 over this case. Because the Court has subject matter jurisdiction over Plaintiffs'
10 claim, dismissal is not mandatory. The Court therefore exercises its discretion to
11 stay the proceedings pending resolution of PUC Docket No. UM 1931. *Alfalfa*
12 *Solar I LLC v. Portland Gen. Elec. Co.*, No. 3:18-cv-40-SI, at *17 (D. Or. May 31,
13 2018)(Casetext).

14 “The [CPUC] commission is a state agency of constitutional origin with far-reaching duties,
15 functions and powers. (Cal. Const., Art. XII, §§ 1–6.) The Constitution confers broad authority on
16 the commission to regulate utilities, including the power to fix rates, establish rules, hold various
17 types of hearings, award reparation, and establish its own procedures. (*Id.*, §§ 2, 4, 6.) ‘The PUC's
18 regulatory authority over rates, practices, and services is likewise both pervasive and continuing.
19 Cal. Public Utilities Code (P.U.C.) §§ 455, 489, 728, 729. And, in addition to its extensive
20 specifically enumerated powers, the CPUC is vested with omnibus authority to do all things
21 necessary to the exercise of its powers and jurisdiction over public utilities. P.U.C. § 701.’”
22 *Industrial Communications Systems, Inc. v. Pacific Telephone & Telegraph Co.*, 505 F.2d 152, 157
23 (9th Cir. 1974); *Covalt* at 914-15, quoting *Consumers Lobby Against Monopolies v. Public Utilities*
24 *Com.*, 25 Cal.3d 891, 905 (1979). Pursuant to these constitutional provisions the Legislature
25 enacted the Public Utilities Act, P.U.C. § 201 et seq., which vests the CPUC with broad authority
26 to “supervise and regulate every public utility in the State.” P.U.C. § 701.

27 Furthermore, judicial review of CPUC decisions is limited to determining the legal question
28 “whether the commission has regularly pursued its authority (P.U.C. § 1757); except when a federal
constitutional challenge is raised (P.U.C. § 1760), the commission's findings and conclusions on
questions of fact—including ultimate facts and determinations of reasonableness and
discrimination—‘shall be final and shall not be subject to review’ (P.U.C. § 1757).” *Covalt* at 915.

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

Case 5:20-cv-00471-GW-KK Document 70-2 Filed 11/04/21 Page 17 of 17 Page ID #:1455

1 Therefore, because the claims alleged in the CIT's FAC fall squarely within the special
2 competence and primary jurisdiction of the CPUC, are of first impression concerning the parties'
3 agreement that the CPUC exercise its jurisdiction to determine that the easement has been
4 extended, and because HWC's general rate case is already pending before the CPUC which is
5 investigating the underlying events, a stay of this action, or in the alternative a dismissal without
6 prejudice, is appropriate in this matter. *See Reiter v. Cooper*, 507 U.S. 258, 268 (1993); *Brown v.*
7 *MCI WorldCom Network Servs., Inc.*, 277 F.3d 1166, 1172 (9th Cir.2002); *Farmers Ins. Exchange*
8 *v. Superior Court*, 2 Cal. 4th 377, 391 (1992).

9 Conclusion

10 For all of these reasons, the Court should either dismiss this action without prejudice, or
11 stay this action until such time as the CPUC has rendered a decision in HWC's general rate case
12 48-W.

13 Dated: November 4, 2021

WEBB & CAREY APC
/s/Patrick D. Webb
Patrick D. Webb for HWC
Defendants

PROPOSED RESOLUTION

Resolution W-5250
WD

January 27, 2022
Agenda ID #20211

CERTIFICATE OF SERVICE

I certify that I have by either electronic mail or postal mail, this day, served a true copy of Proposed Resolution No. W-5250 on all parties in these filings or their attorneys as shown on the attached lists.

Dated December 24, 2021 at San Francisco, California.

/s/Levi Goldman

Levi Goldman

Parties should notify the Division of Water and Audits, Third Floor, California Public Utilities Commission, 505 Van Ness Avenue, San Francisco, CA 94102, of any change of address to ensure that they continue to receive documents. You must indicate the Resolution number on which your name appears.

PROPOSED RESOLUTION

**Resolution W-5250
WD**

**January 27, 2022
Agenda ID #20211**

HAVASU WATER COMPANY

2312 Park Ave. #152, Tustin, CA 92782
Telephone: 949-523-0900

ADVICE LETTER 48-W SERVICE LIST

Sean McCarthy, P.E.
CA Dept of Public Health
DDWEM
464 W. Fourth Street, Suite 437
San Bernardino, CA 92401

Colorado River Board of California
770 Fairmont Avenue
Suite 100
Glendale, CA 91203-106

LAFCO
215 N. "D" Street, Suite 204
San Bernardino, CA 92415

Land Use Services
San Bernardino County
385 N. Arrowhead Avenue
San Bernardino, CA 92415

San Bernardino Fire Authority
620 South "E" Street
San Bernardino, CA 92415

David G. Brownlee
City of Needles
817 Third Street
Needles, CA 92363