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UNITED STATES DISTRICT COURT
 DISTRICT OF ARIZONA

Gila River Indian Community, a federally
 recognized Indian tribe,

Plaintiff,

v.

Joyce Cranford; David Schoebroek; Eva
 Schoebroek; Donna Sexton; Marvin
 Sexton; and Patrick Sexton,

Defendants.

No. CV-19-00407-TUC-SRB

**RULE 12(B)(1) MOTION TO
 DISMISS FOR LACK OF
 JURISDICTION OR TO ABSTAIN**

Pursuant to Fed. R. Civ. P. 12(b)(1), Defendants Joyce Cranford (“Ms. Cranford”), David Schoubroek, Eva Schoubroek (collectively with David, the “Schoubroeks”)¹, Donna Sexton, Marvin Sexton and Patrick Sexton (the “Sextons” and, collectively with Ms. Cranford and the Schoubroeks, “Defendants”) hereby move to dismiss the Complaint filed by the Gila River Indian Community (the “Community”) on August 14, 2019 (the “Complaint”). This Court lacks subject-matter jurisdiction and is required to abstain in deference to the ongoing Arizona general adjudication in accordance with the *Colorado River* and *Lusardi* decisions.² The Defendants’ land that is the subject of the Complaint is

¹ The last name of the Schoubroeks was misspelled in the Complaint.

² *Colorado River Water Conser. Dist. v. United States*, 424 U.S. 800, 819 (1976); *40235 Washington St. Corp. v. Lusardi*, 976 F.2d 587, 588 (9th Cir. 1992).

not Decreed land, and Defendants are not parties to the Globe Equity Decree as to the lands in question. The Arizona Superior Court has jurisdiction over non-Decree rights on the Gila River. The issues raised in the Complaint must be adjudicated in that state court proceeding.

I. FACTUAL BACKGROUND

Defendants all own separate parcels of land near Duncan, Arizona, in an area known as Sheldon. The Community asks this Court to “enjoin and declare unlawful the pumping of subflow of the Gila River without a Decree right and the irrigation of the [Defendants’] lands without an appurtenant Decree right.” *See* Complaint at ¶ 1. The Community alleges that it has identified the lands owned by Defendants through the Globe Equity Water Rights Database, and it purports to present those lands in maps attached to the Complaint as Exhibit A. *Id.* at ¶ 20. Based on its investigation, the Community alleges that Defendants’ lands have been irrigated with pumped well water that consists of Gila River Water. *Id.* at ¶¶ 23-24. The Community admits that Defendants’ lands, as shown on Exhibit A, *do not* have any Decree rights. *Id.* at ¶¶ 3, 22.

Defendants agree with the Community that the Defendants’ lands, as shown on Exhibit A, do not have Decree rights. It is precisely because those lands have no Decree rights that they are not subject to an enforcement action under the Decree. The lands are not *subject* to the Decree because they were never a part of the Decree. Therefore, as explained below, this matter belongs in the Gila River general stream adjudication because this Court lacks jurisdiction over lands not subject to the Decree and, in all events, is required to abstain from adjudicating water rights along the Gila River that are not subject to the Decree in favor of the Arizona general stream adjudication.

II. LEGAL ARGUMENT

A. Motion to Dismiss Standard.

On a motion to dismiss for lack of subject-matter jurisdiction, the non-moving party may not merely rest on the assertions in the Complaint. *Trentacosta v. Frontier Pac.*

1 *Aircraft Indus., Inc.*, 813 F.2d 1553, 1558-59 (9th Cir. 1987). If a motion to dismiss
 2 challenges the actual existence of subject-matter jurisdiction, “the pleading’s allegations are
 3 merely evidence on the issue.” *Id.* at 1558. “Since the party invoking the federal court’s
 4 jurisdiction has the burden of proving the actual existence of subject matter jurisdiction,
 5 regardless of the pleading’s allegations, the courts have held that the pleader must establish
 6 jurisdiction with evidence from other sources, such as affidavits or depositions.” *Id.* at
 7 1559. Similar to a summary judgment standard, the moving party should prevail “if the
 8 material jurisdictional facts are not in dispute and the moving party is entitled to prevail as
 9 a matter of law.” *Id.* at 1558.

10 In this case, there can be no dispute that the Defendants’ lands described by the
 11 Community in the Complaint are not subject to the Decree. The Community admits that
 12 the lands have no Decree rights. *See* Complaint at ¶¶ 3, 22. Moreover, as to the lands in
 13 question, Defendants are not parties to the Decree. Accordingly, based on the law as set
 14 forth below, this Court lacks subject-matter jurisdiction and must dismiss the Complaint.

15 **B. Under Applicable Arizona Law, this Court Lacks Jurisdiction to**
 16 **Adjudicate Water Rights for Non-Decreed Land.**

17 **1. This Court lacks jurisdiction to enforce the Decree against Non-**
 18 **Parties to the Decree.**

19 The Community claims that Defendants are using waters of the Gila River without a
 20 Globe Equity No. 59 Decree (“GE59 Decree” or the “Decree”) right. However, the
 21 Defendants’ lands at issue in the Complaint are not Decreed land and the Defendants are
 22 not parties to the Decree as to those lands. *See* Complaint at ¶¶ 3, 22. Although the Court
 23 has continuing jurisdiction over the GE59 Decree, the Court does not have jurisdiction over
 24 claims against non-parties to the Decree. One is not bound by a judgment in personam in
 25 a suit in which he is not designated as a party or to which he is not made a party by service
 26 of process. *Taylor v. Sturgell*, 553 U.S. 880, 884 (2008); *Zenith Radio Corp. v. Hazeltine*
Research, Inc. 395 U.S. 100, 110 (1969); *Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940). For

1 that reason, “a judgment or decree among parties to a lawsuit resolves issues as among
 2 them, but it does not conclude the rights of strangers to those proceedings.” *Sandpiper*
 3 *Village Condo. Ass’n, Inc. v. Louisiana-Pacific Corp.*, 428 F.3d 831, 849 (9th Cir. 2005),
 4 *cert. denied*, 548 U.S. 905 (2006).³

5 Therefore, persons or entities that are not parties to the Decree – and do not own land
 6 on which there are Decree rights – cannot have the Decree enforced against them. *Blue*
 7 *Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975) (“[A] well-settled line of
 8 authority from this Court establishes that a consent decree is not enforceable directly or in
 9 collateral proceedings by those who are not parties to it even though they were intended to
 10 be benefitted by it.”); *United States v. Gila Val. Irr. Dist.*, 454 F.2d 219, 220 (9th Cir. 1972)
 11 (“The 1935 decree sets forth the full measure, extent, and limits of the rights of all the
 12 ***signatory parties and their successors in interest*** to divert and utilize the waters of the Gila
 13 River.”) (Emphasis added).

14 **2. Arizona law governs all other water rights issues through the general**
 15 **adjudication.**

16 Claims related to the rights to use the waters of a particular river or source that are
 17 not subject to the Decree should be adjudicated in the Arizona general adjudication court.
 18 *See Yavapai-Apache Nation v. Fabritz-Whitney*, 227 Ariz. 499, 509, 260 P.3d 299, 309
 19 (App. 2011) (hereinafter “*Fabritz-Whitney*”) (finding that the court did not have jurisdiction
 20 to adjudicate certain water rights because the general adjudication was inclusive of all issues
 21 raised in the complaint); *Gabel v. Tatum*, 146 Ariz. 527, 528, 707 P.2d 325, 326 (App. 1985)
 22 (finding that the court lacked jurisdiction to adjudicate certain water rights because “[a]
 23 general adjudication of the nature, extent and relative priority of the water rights of all
 24 persons in the river system” was sufficient to sort out the water rights raised by the

25 ³ There are exceptions to this rule, but none apply here. *See Taylor v. Sturgell*, 553 U.S. at
 26 893-95.

complaint).⁴ The Arizona Legislature empowered the Superior Court to “adjudicate any interest in or right to use the water of the river system and source” in a “general adjudication.” *See* A.R.S. § 45-257(B)(1). Any water user for a particular river system or source may file a petition in the general adjudication to have determined the “nature, extent and relative priority of the water rights of all persons in the river system and source.” *See* A.R.S. § 45-252(A).

The Arizona Supreme Court has underscored the importance of determining priorities and quantifying water rights “in a single proceeding in which all substantial claimants are before the court so that all claims may be examined, priorities determined, and allocations made.” *United States v. Superior Court*, 144 Ariz. 265, 270, 697 P.2d 658, 663 (1985). Resolution of water rights subject to the general stream adjudication in that single proceeding is the public policy of the State. *See Fabritz-Whitney*, 227 Ariz. at 509 ¶ 49; *Gabel*, 146 Ariz. at 529.

Federal case law is in accord and requires that federal courts abstain or dismiss a Complaint when there is an ongoing state proceeding. Congress passed the McCarran Amendment to permit the United States to be joined as a defendant in any suit for the adjudication of rights to use the water of a particular river system or source. 43 U.S.C. § 666. The U.S. Supreme Court has found that the McCarran Amendment embraces a policy favoring comprehensive general stream adjudications, such as the one in Arizona. *Colorado River Water Conser. Dist. v. United States*, 424 U.S. 800, 819 (1976) (hereinafter, “*Colorado River*”) (“The clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system.”). The *Colorado River* court affirmed a dismissal of a complaint based on this McCarran Amendment policy. *Id.* at 820-21.

⁴ Federal decree courts are obliged to follow state water law. *See United States v. U.S. Board of Water Comm’rs*, 893 F.3d 578, 595 (9th Cir. 2018).

1 When the San Carlos Apache Tribe, among other tribes, argued that adjudication of
 2 their water rights claims should occur in federal court, the U.S. Supreme Court again
 3 stressed that the McCarran Amendment expressed Congress' preference for adjudication of
 4 these claims in a comprehensive state court general stream adjudication:

5 The McCarran Amendment, as interpreted in *Colorado River*, allows and
 6 encourages state courts to undertake the task of quantifying Indian water
 7 rights in the course of comprehensive water adjudications. Although
 8 adjudication of those rights in federal court instead might in the abstract be
 9 practical, and even wise, it will be neither practical nor wise as long as it
 creates the possibility of duplicative litigation, tension and controversy
 between the federal and state forums, hurried and pressured decision-making,
 and confusion over the disposition of property rights.

10 *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 569, 103 S. Ct. 3201, 3215
 11 (1983). As in *Colorado River*, and based upon this policy, the Supreme Court concluded
 12 “that the District Courts were correct in deferring to the state proceedings.” *Id.* at 570
 13 (“[T]he most important consideration in *Colorado River*, and the most important
 14 consideration in any federal water suit concurrent to a comprehensive state proceeding,
 15 must be the policy underlying the McCarran Amendment.”).

16 In *Gabel*, owners of real property in Gila County filed a complaint, seeking equitable
 17 and legal declarations of rights with respect to waters from Tonto Creek, a tributary of the
 18 Salt River. *Gabel*, 146 Ariz. at 528, 707 P.2d at 326. The appellees, dozens of other
 19 property owners, asked the court to dismiss the complaint for lack of jurisdiction pursuant
 20 A.R.S. § 45-252, *et seq.*, the General Adjudication of Water Rights Act. *Id.* The court
 21 agreed that it lacked subject matter jurisdiction because there was already a pending action
 22 in the general adjudication court for the adjudication of the water rights in the Salt River
 23 watershed. *Id.* The court stated that even though the parties involved in the *Gabel* suit were
 24 not named parties in the Salt River general adjudication, “the naming of all actual or
 25 potential users as parties is not contemplated” by the general adjudication statutes. *Id.* The
 26 court found that although the general adjudication action was not the same action as the

1 Gabel action, the general adjudication was “inclusive of all issues raised in appellants’
 2 complaint” and was sufficient to determine the specific water rights at issue in the Gabel
 3 action. *Id.* at 529, 707 P.2d at 327. Therefore, the court lacked subject matter jurisdiction
 4 and the trial court properly dismissed the case. *Id.*

5 **3. *The Community’s claims must be dismissed because of the pending***
 6 ***Gila River general adjudication.***

7 In this case, the Defendants are not signatories to the Decree and the Defendants’
 8 lands identified in Exhibit A to the Complaint are not subject to the Decree. This is
 9 confirmed in paragraph 3 of the Complaint, which alleges that “[t]here are no Decree rights
 10 appurtenant to the lands in Exhibit A.” Therefore, Defendants are not bound by the Decree
 11 and it cannot be enforced against Defendants. *Taylor v. Sturgell*, 553 U.S. 880, 884 (2008);
 12 *Blue Chip Stamps*, 421 U.S. at 750. Since this Court is only charged with enforcing the
 13 Decree, *United States v. Gila Valley Irrigation Dist.*, No. CV31-0059-TUC-SRB, 2007 WL
 14 9724930, at *2 (D. Ariz. Aug. 24, 2007), it lacks subject matter jurisdiction to decide the
 15 claims raised in the Complaint.

16 The Community’s claims must be determined according to the Arizona general
 17 adjudication procedure. In the Complaint, the Community asks this Court to determine
 18 Defendants’ rights – or lack of rights – to pump Gila River water from the wells on their
 19 properties. *See* Complaint at ¶ 6. The general adjudication is inclusive of all of the
 20 Community’s claims. *See Gabel*, 146 Ariz. at 529, 707 P.2d at 327. To determine
 21 Defendants’ rights in this regard, a court will have to determine Defendants’ rights to divert
 22 Gila River water in general, without reference to the Decree or its supporting agreements.
 23 To do so, the court will need to decide whether, and to what extent, Defendants’ wells
 24 capture Gila River water versus water from other sources. This will require the court to
 25 analyze such issues as the subflow zone, the cone of depression, and subflow depletion
 26 issues. *See, e.g., In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. &*

1 *Source*, 195 Ariz. 411, 415, ¶ 9, 989 P.2d 739, 743 (1999) (explaining the cone of
 2 depression test in relation to issues of pumping water from a well). For non-Decree waters
 3 and lands, that analysis is the exclusive jurisdiction of the Arizona general adjudication.
 4 *Yavapai-Apache Nation*, 227 Ariz. at 509; *Gabel*, 146 Ariz. at 528.

5 Arizona's general adjudication has already begun to adjudicate the rights to Gila
 6 River water, the source of water at issue in the Complaint. *See, e.g., In re Gen. Adjudication*
 7 *of All Rights to Use Water in Gila River Sys. & Source*, 175 Ariz. 382, 384, 857 P.2d 1236,
 8 1238 (1993) ("This case is a consolidated general adjudication brought under A.R.S. § 45–
 9 251, *et seq.*, to determine the extent and priority of the rights of all persons to use water in
 10 the Gila River system and source."). In various contested cases within the general
 11 adjudication, the Superior Court has dealt with the very issues that the Community now
 12 asks this Court to decide. For example, in the contested case *In re San Pedro River Subflow*
 13 *Technical Report*, the court is developing the subflow depletion test that will be used
 14 throughout the adjudication to determine when a particular well is taking water from the
 15 Gila River (as the Community alleges regarding Defendants' wells). *See, e.g.*, August 5,
 16 2019, Minute Entry in *In re: San Pedro River Subflow Technical Report, No. W1-103*, at 2,
 17 attached as **Exhibit A**. The subflow depletion test follows efforts of the adjudication court,
 18 and the Arizona Department of Water Resources, over the past two years to develop a cone
 19 of depression test. *Id.* These issues are still ongoing and all parties, including the
 20 Community, are being included in their development. *Id.*

21 Accordingly, both Arizona and federal policy demonstrate that this Court should
 22 dismiss this case to allow the Superior Court to complete its adjudication of all water rights
 23 in the Gila River system. If this Court permits the Community's claims to move forward
 24 here, it will implicate the United States Supreme Court's concerns over duplicative
 25 litigation, and controverting or confusing decisions. *San Carlos Apache Tribe of Arizona*,
 26 463 U.S. at 569. It would result in piecemeal litigation where some of the rights to use Gila

1 River water are decided in the general adjudication court under certain tests and standards
 2 while other rights to use Gila River water are decided by this Court using, potentially,
 3 different tests and standards. *Colorado River*, 424 U.S. at 819 (“The clear federal policy
 4 evinced by [the McCarran Amendment] is the avoidance of piecemeal adjudication of water
 5 rights in a river system”). Instead, as in *Gabel*, this Court should find that it lacks subject
 6 matter jurisdiction and dismiss the Complaint.

7 **C. Alternatively, this Court Must Abstain from Exercising Jurisdiction.**

8 Closely tied to the question of subject matter jurisdiction is the “prior exclusive
 9 jurisdiction doctrine,” which requires federal courts to abstain in favor of concurrent state
 10 court proceedings regarding water rights. *See Goncalves By & Through Goncalves v. Rady*
 11 *Children’s Hosp. San Diego*, 865 F.3d 1237, 1253 (9th Cir. 2017) (“The prior exclusive
 12 jurisdiction doctrine is a “**mandatory** jurisdictional limitation” that prohibits federal and
 13 state courts from concurrently exercising jurisdiction over the same *res*.”) (emphasis
 14 added). This doctrine was created based upon the *Colorado River* abstention test first set
 15 forth by the U.S. Supreme Court. *See Colorado River*, 424 U.S. 813. Based upon *Colorado*
 16 *River*, the Ninth Circuit articulated six factors to determine whether a federal court must
 17 abstain from exercising jurisdiction due to a state court having concurrent jurisdiction.
 18 *40235 Washington St. Corp. v. Lusardi*, 976 F.2d 587, 588 (9th Cir. 1992) (hereinafter,
 19 “*Lusardi*”). A court must analyze: (1) whether either the state or federal court has exercised
 20 jurisdiction over a *res*; (2) the inconvenience of the federal forum; (3) the desirability of
 21 avoiding piecemeal litigation; (4) the order in which the forums obtained jurisdiction; (5)
 22 whether federal or state law controls the decision on the merits; and (6) whether the state
 23 court can adequately protect the rights of the parties. *Id.* (citing *Colorado River* and *Moses*
 24 *H. Cone*, 460 U.S. 1, 24, 27, 103 S.Ct. 927, 941, 943 (1983)).

25 However, the Ninth Circuit and the U.S. Supreme Court have found that where the
 26 proceedings in question are *in rem* or *quasi in rem*, the fourth factor *is dispositive*: the forum

1 that first exercises jurisdiction over the property in question has “exclusive jurisdiction to
 2 proceed.” *Id* at 589; *Donovan v. City of Dallas*, 377 U.S. 408, 412, 84 S. Ct. 1579, 1582
 3 (1964); *Goncalves By & Through Goncalves*, 865 F.3d at 1253; *Chapman v. Deutsche Bank*
 4 *Nat. Tr. Co.*, 651 F.3d 1039, 1043 (9th Cir. 2011) (“The prior exclusive jurisdiction doctrine
 5 holds that “when one court is exercising *in rem* jurisdiction over a *res*, a second court will
 6 not assume *in rem* jurisdiction over the same *res*.”). An *in rem* or *quasi in rem* proceeding
 7 is one in which “jurisdiction is based on the court’s power over property within its territory.”
 8 *Shaffer v. Heitner*, 433 U.S. 186, 199, 97 S. Ct. 2569, 2577 (1977).⁵

9 The Ninth Circuit has underscored that this doctrine is, in fact, **mandatory** in this
 10 circuit. *Chapman*, 651 F.3d at 1044 (“Whether the [prior exclusive jurisdiction] doctrine is
 11 described as a rule of comity or subject matter jurisdiction . . . courts in this circuit are
 12 bound to treat the doctrine as a mandatory rule, not a matter of judicial discretion.”).
 13 Moreover, in determining whether an action is *in rem* or *quasi in rem* versus *in personam*,
 14 courts in this circuit “should not exalt form over necessity” but should “look behind the
 15 form of the action to the gravamen of a complaint and the nature of the right sued on.” *Id.*
 16 (internal quotations omitted). “If the action is not *strictly* in personam . . . then the doctrine
 17 ordinarily applies.” *Id.* (internal quotation omitted) (emphasis in original). “Accordingly,
 18 where parallel state and federal proceedings seek to determine interests in specific property
 19 as against the whole world (*in rem*), or where the parties’ interests in the property serve as
 20 the basis of the jurisdiction for the parallel proceedings (*quasi in rem*), then the doctrine of
 21 prior exclusive jurisdiction fully applies.” *Id.* (internal quotations omitted).

22 An analysis of the *Lusardi* and *Colorado River* factors weigh heavily in favor of this

23 ⁵ The differences between *in rem* and *quasi in rem* proceedings involves whether or not
 24 judgments are binding against the world (*in rem*) or only binding as between parties and
 25 their privies (*quasi in rem*). See *Scherbenske v. Wachovia Mortg., FSB*, 626 F. Supp. 2d
 26 1052, 1056 (E.D. Cal. 2009). This distinction is not relevant for purposes of the prior
 exclusive jurisdiction test, which applies equally to cases of *in rem* and *quasi in rem*
 jurisdiction. *Lusardi*, 976 F.2d at 589.

1 Court abstaining from exercising jurisdiction to allow the Arizona general stream
 2 adjudication to determine the water rights related to Defendants' lands described in the
 3 Complaint.⁶ However, the fact that the state court general adjudication initiated long before
 4 the Community filed the Complaint *requires* that this Court abstain in this case. *Lusardi*,
 5 976 F.2d at 589. The Arizona Superior Court initiated the Gila River general stream
 6 adjudication several decades prior to the Community's filing of the Complaint. *See, e.g.*,
 7 May 30, 1986 Pre-Trial Order No. 1 Re: Conduct of Adjudication, *In re the General*
 8 *Adjudication of All Rights to Use Water in the Gila River System and Source*, attached as
 9 **Exhibit B**. In so doing, and in-line with the McCarran Amendment's purpose of avoiding
 10 piecemeal adjudication, the Court exercised jurisdiction over *all* property using water from
 11 the Gila River Basin System in Arizona. *Id.* at 1:23-25 ("The purpose of this adjudication
 12 is to determine *all rights* to the use of water obtained from the Gila River Basin System in
 13 the State of Arizona.") (emphasis added). The general adjudication is an action either *in*
 14 *rem* or *quasi in rem* because the state court's jurisdiction is based upon the court's power
 15 over the properties appurtenant to the Gila River. *Shaffer*, 433 U.S. at 199. Accordingly,
 16 binding federal precedent dictates that this Court must abstain from exercising jurisdiction
 17 under the prior exclusive jurisdiction doctrine and dismiss this case. *See Colorado River*,
 18 424 U.S. at 820-21 (affirming dismissal of the complaint).

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 24 ⁶ For example, the Supreme Court in *Colorado River* found that the federal policy
 25 underlying the McCarran Amendment was the "most important" demonstration of the
 26 "desirability of avoiding piecemeal litigation" (factor 3). *Colorado River*, 424 U.S. at 819.
 Furthermore, the fact that federal decree courts are obliged to follow state water law
 demonstrates that state law will control the decision on the merits (factor 5). *See United*
States v. U.S. Board of Water Comm'rs, 893 F.3d 578, 595 (9th Cir. 2018).

1 **III. CONCLUSION**

2 For the foregoing reasons, Defendants respectfully ask this Court to dismiss the
3 Complaint.

4 DATED this 26th day of September, 2019.

5 FENNEMORE CRAIG, P.C.

6
7 By: s/ Mario C. Vasta

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