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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Gila River Indian Community,

Plaintiff,

v.

Joyce Cranford et al.,

Defendants.

No. 4:19-cv-00407-SRB

RESPONSE IN OPPOSITION TO MOTION TO DISMISS

The Gila River Indian Community (the "Community") hereby opposes the defendants' motion to dismiss the complaint. This Court's Globe Equity Decree (the "Decree") is comprehensive and exclusive as to the waters of the Gila River, including subflow. This Court has jurisdiction to enjoin all unauthorized uses of the waters of the Gila River, including jurisdiction to enjoin the defendants from using the waters of the Gila River without a Decree right.

BACKGROUND

In the Globe Equity No. 59 litigation that led to entry of the Decree, the United States joined as defendants all landowners with claims to the main stem of the Gila River. The Decree was adopted by this Court on June 29, 1935, and identified and quantified all rights to use the waters of the main stem. The Schedule of Rights and Priorities in Article V of the Decree identifies rights upstream of the San Carlos Reservoir, including in the area along the Gila River where the defendants' lands are located. None of the defendants' lands have Decree rights.

The complaint alleges that the defendants' lands are being irrigated with subflow of the Gila River pumped from wells. Doc. 1 ¶¶ 1, 4, 22-25, Ex. A. It seeks orders to enjoin and declare unlawful the pumping of subflow of the Gila River without a Decree right to irrigate defendants' lands, and to direct the Gila Water Commissioner to cut off and seal the wells pumping subflow. *Id.* at pp. 8-11.

Defendants filed a motion to dismiss under Fed. R. Civ. P. 12(b)(1) for lack of subject-matter jurisdiction. Doc. 14. For purposes of their motion to dismiss, the defendants do not dispute the allegation that they are pumping subflow of the Gila River to irrigate their lands. Further, "[d]efendants agree with the Community that the Defendants' lands, as shown on Exhibit A, do not have Decree rights." Doc. 14 at 2. On that undisputed premise, defendants raise two grounds for dismissal. First, they argue that this Court's jurisdiction under the Decree is limited to lands that have Decree rights: "this matter belongs in the Gila River general stream adjudication because this Court lacks jurisdiction" to enjoin the use of Gila River water on lands that lack Decree rights. *Id.* Second, defendants argue that this Court "is required to abstain . . . in favor of the Arizona general stream adjudication," *id.*, under *Colorado River Water Conserv. Dist. v. United States,* 424 U.S. 800, 819 (1976). For the reasons set out below, this Court has exclusive jurisdiction over the complaint and cannot abstain. The motion to dismiss must be denied.

ARGUMENT

The defendants' attack on this Court's jurisdiction over the complaint boils down to the assertion that this Court is powerless to stop the owners of non-Decree lands from irrigating with pumped subflow of the Gila River if the pumps are located on non-Decree lands. They contend that so long as a pump is located outside Decreed lands, anyone *lacking* Decree rights can take Decree water by pumping subflow. The motion disregards—and fails even to cite—contrary precedents from this Court, the United States Court of Appeals for the Ninth Circuit, the United States Supreme Court, and the Arizona Supreme Court. As shown further below, this Court obtained and has continued to exercise exclusive jurisdiction over the waters of the main stem of the Gila River under the Globe Equity Decree, and has jurisdiction to enjoin landowners who lack Decree rights from irrigating with those waters.

I. DEFENDANTS' MOTION IS A FACIAL ATTACK RAISING ONLY LEGAL ISSUES, NOT A FACTUAL ATTACK ON JURISDICTION

Despite defendants' reliance on the standard of review for factual challenges to jurisdiction (*see* Doc. 14 at 2-3), their motion is a facial challenge raising only legal issues. "A Rule 12(b)(1) jurisdictional attack may be facial or factual. In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction. By contrast, in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "[A] factual attack contests the *truth* of the plaintiff's factual allegations, usually by introducing evidence outside the pleadings. Only upon a factual attack does a plaintiff have an affirmative obligation to support jurisdictional allegations with proof." *NewGen, LLC v. Safe Cig, LLC*, 840 F.3d 606, 614 (9th Cir. 2016) (citations, internal quotation marks omitted; emphasis original). "[A]t the pleading stage, allegations of jurisdictional fact need not be proven unless challenged." *Id.*; *accord, e.g., Ehrman v. Cox Comm'ns, Inc.*, 932 F.3d 1223, 1228 (9th Cir. 2019).

Here, the defendants dispute the sufficiency of the complaint's allegations to invoke federal jurisdiction, and have not disputed the truth of any jurisdictional facts alleged in the complaint. The complaint alleges subject-matter jurisdiction based on this Court's "continuing jurisdiction over all uses of the waters of the main[]stem of the Gila River." Doc. 1 ¶ 16. It alleges in this regard that "[d]efendants are each subject to this Court's jurisdiction in that they own lands that, on information and belief, have been irrigated with waters of the Gila River, which waters are subject to this Court's continuing jurisdiction under the Decree." *Id.* ¶ 17. The defendants do not dispute for purposes of their motion that they are pumping waters of the Gila River to irrigate their lands. They argue instead that the general adjudication court "will have to determine [their] rights" "to pump Gila River water from the wells on their properties" and "will have to determine Defendants' rights to divert Gila River water in general, without reference to the Decree or its supporting agreements." Doc. 14 at 7. They argue that because they are not parties to the Decree and their lands lack Decree rights, this case concerns "non-Decree rights on the Gila River," that is, "water rights along the Gila River that are not subject to the Decree," and therefore that "this matter belongs in the Gila River general stream adjudication." Doc. 14 at 2. These are legal arguments raising a facial challenge to the complaint, unsupported by any factual allegation or evidence to contradict the Community's jurisdictional allegations that the defendants are irrigating their lands with the waters of the Gila River.

Moreover, even if the Court were to hold that the motion raises a factual attack, the Court must deny the motion to that extent, because the jurisdictional facts are intertwined with the merits. Liability and jurisdiction are both premised on the allegation that the defendants are pumping subflow of the Gila River. "A jurisdictional finding of genuinely disputed facts is inappropriate when the jurisdictional issue and substantive issues are so intertwined that the question of jurisdiction is dependent on the resolution of factual issues going to the merits of an action." *Safe Air*, 373 F.3d at 1039 (citations, alterations, and quotation marks omitted). "'Where the defendant's challenge to the court's jurisdiction is

also a challenge to the existence of a federal cause of action, the proper course of action for the district court ... is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case.'" *Id.* at 1039 n.3 (quoting *Williamson v. Tucker,* 645 F.2d 404, 415 (5th Cir. 1981)).

In any event, although evidence is unnecessary at this stage, the Community is including a declaration by Dr. Peter Mock stating his preliminary assessment that the wells being used to irrigate the defendants' lands are pumping the waters of the Gila River. *See* Exhibit A.

"[J]urisdictional dismissals in actions predicated on federal questions are 'exceptional,'" and may be granted "only if: (1) 'the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction'; or (2) 'such a claim is wholly insubstantial and frivolous.'" *Leeson v. Transamerica Disability Income Plan*, 671 F.3d 969, 974–75 (9th Cir. 2012) (quoting *Bell v. Hood*, 327 U.S. 678, 682–83 (1946)). Neither is the case here, and therefore to the extent the Court might construe the motion to dismiss as raising a factual challenge, that challenge must be denied at this stage and addressed with the merits.

II. THIS COURT HAS EXCLUSIVE JURISDICTION OVER THE WATERS OF THE MAIN STEM OF THE GILA RIVER, INCLUDING JURISDICTION TO CUT OFF DIVERSIONS BY NON-PARTIES

A. This Court's jurisdiction over the waters of the main stem of the Gila River is comprehensive and exclusive.

The Decree adjudicated all rights to the waters of the main stem of the Gila River and designated the only lands to which such rights were appurtenant. No other lands may be irrigated with the waters of the main stem. As this Court has noted, and as the Arizona Supreme Court has explained,

> [T]he Decree was intended to resolve *all claims* to the Gila River mainstem. The United States included as defendants in the Globe Equity litigation *all those with claims to the mainstem* of the Gila River, and the Decree includes all water rights theories that the parties could have asserted. Thus, *as to the mainstem of the Gila River, the Decree is comprehensive*.

In re Gen. Adjudication of All Rights to Use Water In Gila River Sys. & Source ("*Gila VI*"), 127 P.3d 882, 902 (Ariz. 2006) (en banc) (emphasis added)[1]; *accord Gila River Indian Comm. v. Freeport Minerals Corp.*, Case No. 4:17-cv-626-SRB, Order dated July 20, 2018 (Doc. 62) ("7/20/2018 Order") at 3 (D. Ariz). The only rights to the waters of the Gila River are those granted by the Decree that have not been extinguished. As a matter of law, because the defendants lack Decree rights, they can make no claim to the waters of the main stem of the Gila River. As a matter of law, any use of such waters by the defendants is in derogation of the rights of the parties to the Decree, including the Community.

Defendants argue that the Court is powerless to enjoin the use of Gila River water by non-parties to the Decree on lands that do not have Decree rights, because "lands [that] have no Decree rights . . . are not subject to an enforcement action under the Decree." Doc. 14 at 2. This badly misconceives the scope of the Decree, which is directed not at a specific set of lands as such, but at determining all rights to the waters of the main stem of the Gila River, as the Arizona Supreme Court has plainly stated. When this Court entered the Decree in 1935, it determined that none of the defendants' lands had appurtenant rights to the waters of the main stem (none of these lands were cultivated in 1935, *see* Exhibit B).

The United States Supreme Court has explained that water decrees such as the Globe Equity Decree are in effect actions *in rem* over the adjudicated waters, even in cases originally litigated *in personam*. "[E]ven though quiet title actions are *in personam* actions, water adjudications are more in the nature of *in rem* proceedings." *Nevada v. United States*, 463 U.S. 110, 143–44 (1983); *accord U.S. v. Alpine Land & Reservoir Co.*, 174 F.3d 1007, 1013–14 (9th Cir. 1999). The Court's enforcement authority here follows from the *in rem* nature of the Decree and the doctrine of ancillary jurisdiction. It is inherent in the Decree's comprehensive nature that this Court has jurisdiction to protect Decreed rights by enjoining unauthorized uses of the adjudicated res, the waters of the Gila River. "This Court has

[1] Defendants fail to cite this controlling adverse authority.

jurisdiction to manage its proceedings, vindicate its authority, and effectuate its decrees. The Decree is no exception." 7/20/2018 Order at 3 (quoting *Kelly v. Wengler*, 822 F.3d 1085, 1094 (9th Cir. 2016), and *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 380 (1994), and citing *United States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007, 1012 n.5 (9th Cir. 1999)). Under the doctrine of ancillary jurisdiction, "[s]o long as the dispute in this case is related to the district court's earlier Decree[], the district court retains jurisdiction to adjudicate the dispute." *Alpine,* 174 F.3d at 1012 n.5. Accordingly, by virtue of the Court's jurisdiction over the waters at issue, it has the authority to enjoin the defendants from using such waters on lands that lack Decree rights, even if they are not parties to the Decree by succession (*i.e.*, by virtue of owning Decree rights). This Court has subject-matter jurisdiction to enjoin them from interfering with the adjudicated res, and they do not dispute that this Court has *in personam* jurisdiction over them in this proceeding pursuant to validly served summonses.

Moreover, this Court's jurisdiction over administration and enforcement of the Decree against parties and non-parties alike is exclusive. In reasoning that is controlling here, the Ninth Circuit has held that the federal district court administering the Alpine and Orr Ditch Decrees has exclusive jurisdiction over the adjudicated waters, for two reasons. *See Alpine,* 174 F.3d at 1012–14.[2] First, retention of continuing jurisdiction by a federal court in a complex, comprehensive water adjudication, without expressly providing for concurrent state jurisdiction, implies exclusive jurisdiction. *Id.* Because "the Alpine and Orr Ditch Decrees were complex and comprehensive water adjudications for which conflicting federal and state constructions would be entirely unworkable, the district court's retention of jurisdiction was intended to be exclusive." *Id.* at 1013. Second, exclusivity is inherent in a federal water Decree because jurisdiction "is best characterized as *in rem* jurisdiction." *Id.* Both these reasons apply equally here.

[2] Defendants fail to cite this controlling adverse authority.

Indeed, the defendants admit that jurisdiction over the Gila River is *in rem*. They correctly cite the rule that as between federal and state court adjudicating rights to water, the first court to acquire jurisdiction over the water has exclusive jurisdiction. *See* Doc. 14 at 9 (quoting *Goncalves ex rel. Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1253 (9th Cir. 2017)). But they somehow fail to note that this Court acquired jurisdiction over the main stem of the Gila River and adjudicated all rights thereon decades before the general adjudication in state court began. Plaintiffs instead erroneously rely on the date of filing of the complaint in this enforcement action, which is irrelevant, because the complaint invokes the Court's *existing* jurisdiction over the waters of the Gila River. *See* Doc. 1 at ¶¶ 13–17 ("This Court has continuing jurisdiction over all uses of the waters of the main[]stem of the Gila River."). Here, as in *Alpine*, the "state court could not have exercised *in rem* jurisdiction first because the federal district court had already asserted jurisdiction over the water rights in question when it adjudicated the [Decree] and because it continued to retain such jurisdiction." *Alpine,* 174 F.3d at 1014. The exclusivity rule cited by the defendants *supports* this Court's jurisdiction over the complaint and requires that their motion be denied.

The various cases cited by the defendants to avoid enforcement of the Decree against them (Doc. 14 at 3-4) stand only for the inapposite proposition that "one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Taylor v. Sturgell*, 553 U.S. 880, 884 (2008) (quoting *Hansberry v. Lee*, 311 U.S. 32, 40, (1940)). As the Ninth Circuit has held and the defendants themselves admit, a water adjudication is in effect an action *in rem*, not merely a judgment *in personam* binding only on the designated parties. When the Ninth Circuit observed that the Decree "sets forth the full measure, extent, and limits of the rights of all the signatory parties and their successors in interest to divert and utilize the waters of the Gila River," *United States v. Gila Val. Irr. Dist*., 454 F.2d 219, 220 (9th Cir. 1972) (cited in Doc. 14 at 4), it was simply describing all those with rights to "divert and

utilize the waters of the Gila River," not implicitly recognizing some inchoate category of undeclared rights to the same res already adjudicated in the Decree.

This Court's exclusive jurisdiction includes the power to enjoin any violations of the Decree, without regard to whether those enjoined are parties to the Decree. Consistent with principles of ancillary jurisdiction, the All-Writs Act, 28 U.S.C. § 1651, recognizes federal courts' authority to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." "The power conferred by the [All Writs] Act extends, under appropriate circumstances, to persons who, though not parties to the original action or engaged in wrongdoing, are in a position to frustrate the implementation of a court order or the proper administration of justice, and encompasses even those who have not taken any affirmative action to hinder justice." *United States v. New York Tel. Co.*, 434 U.S. 159, 173–74 (1977) (citations omitted). "[I]t does not follow because the jurisdiction in mandamus [now included in § 1651] is ancillary merely that it cannot be exercised over persons not parties to the judgment sought to be enforced." *Id.* at 174 n.20 (quoting *Labette County Comm'rs v. Moulton*, 112 U.S. 217, 221 (1884)).[3]

Defendants do not assert that they have filed claims to the waters of the main stem of the Gila River in the state court adjudication. But if they had, this Court would have jurisdiction to enjoin them. Federal courts' authority to protect judgments such as the Decree includes the power to enjoin any state-court litigation that would interfere or potentially conflict with the Court's administration of the Decree. "Federal courts are empowered by the All Writs Act, 28 U.S.C. § 1651, to enjoin state court proceedings that interfere with federal judgments." *Alpine*, 174 F.3d at 1015. So fundamental is this principle that it is reflected in an express exception to the Anti-Injunction Act. "[T]he necessary-in-aid-of-jurisdiction exception [in the Anti-Injunction Act, 28 U.S.C. § 2283]

[3] The All-Writs Act "does not operate to confer jurisdiction ..., since it may be invoked by a district court only in aid of jurisdiction which it already has." *Westinghouse Elec. Corp. v. Newman & Holtzinger, P.C.*, 992 F.2d 932, 937 (9th Cir. 1993); *Stafford v. Superior Court*, 272 F.2d 407, 409 (9th Cir. 1959).

applies to in rem proceedings where the federal court has jurisdiction over the res and the state court proceedings might interfere with that." *Negrete v. Allianz Life Ins. Co. of N. Am.*, 523 F.3d 1091, 1101 (9th Cir. 2008); *accord, e.g., Pence v. Nw. Tr. Servs. Inc.*, No. CV-14-02587-PHX-ROS, 2015 WL 13119396, at *1 (D. Ariz. May 22, 2015) (enjoining state court action). Given that this Court could enjoin an action by defendants in state court, it certainly can enjoin them from irrigating with the waters of the Gila River.

The foregoing discussion assumes that the defendants, who admit that their lands named in the complaint lack Decree rights, do not own any *other* lands that *do* have Decree rights. Such ownership would make them parties to the Decree by succession. Although it is unfathomable that the defendants would file a motion to dismiss for lack of jurisdiction if they are already parties to the Decree, the defendants seem to carefully avoid denying that they own Decree rights for other lands. They state, "Defendants are not parties to the Globe Equity Decree *as to the lands in question*," Doc. 14 at 2 (emphasis added); "*as to the lands in question*, Defendants are not parties to the Decree," *id.* at 3 (emphasis added); "the Defendants' lands at issue in the Complaint are not decreed land and the Defendants are not parties to the Decree *as to those lands*," *id.* If the defendants own Decree rights for *other* lands, then as successors to original Decree parties, they are *already*

> forever enjoined and restrained from asserting or claiming . . . any right, title or interest in or to the waters of the Gila River except the rights specified, determined and allowed by this decree, and . . . are . . . perpetually restrained and enjoined from diverting, taking or interfering in any way with the waters of the Gila River . . . so as in any manner to prevent or interfere with the diversion, use or enjoyment of said waters by the owners of prior or superior rights therein as defined and established by this Decree.

Decree Art. XIII. Although the defendants do at one point imply that they are not among the "signatory [Decree] parties and their successors in interest," Doc. 14 at 4, they should candidly disclose in their reply brief whether they own any Decree rights for lands not

named in the complaint. Either way, their motion must be denied, but the basis for the Court's jurisdiction will differ somewhat depending on their answer.

B. This Court has already expressly articulated its authority to prevent those without Decree rights from pumping subflow of the Gila River.

The principles set out above are already reflected in this Court's precedents. In reviewing and eventually approving the UV Forbearance Agreement, this Court has referred to the pumping of Decree water in the Upper Valley by landowners lacking Decree rights as "in violation of the Decree." GE No. 59, Order dated Aug. 24, 2007 (Doc. 6595) at 5. The Court noted, "[l]andowners in the Upper Valley *without rights under the Gila Decree* also have wells. Many of these wells are likely pumping sub-flow of the Gila River *in violation of the Decree* but some of the wells may only be pumping percolating ground water." *Id*. (emphasis added). The Court explained that the UV Forbearance Agreement attempted to address this problem by providing an opportunity for landowners such as the defendants here to avoid a suit such as this one:

> The UV Forbearance Agreement . . . attempts to resolve concerns about the *wells being pumped by landowners without rights under the Gila Decree whose wells are likely pumping sub-flow*. In the UV Forbearance Agreement, the parties to that agreement have agreed to make attempts to persuade these landowners to obtain Gila Decree water rights through severance and transfer proceedings. To the extent these landowners are able to obtain rights through severance and transfer, *the problem of unauthorized taking of water through pumping by parties without rights under the Decree* would be resolved. . . . For those landowners pumping wells thought to be Gila River water who do not attempt to seek legitimate rights to Gila River water through severance and transfer, no promises are made with respect to proceedings being brought against them to enjoin well pumping.

Id. (emphasis added). Of course, none of the defendants here complied with this aspect of the UV Forbearance Agreement, and this suit is a predictable consequence.

This Court has repeatedly warned that *any* pumping of the subflow of the Gila River requires a Decree right. In 2010, the Court explained, "[t]his Court has already ruled that pumping subflow of the Gila River, like diverting surface flow, requires a Decree water right." Case No. CV 31-0061-TUC-SRB, Order dated August 3, 2010 (Doc. 145) at 63

(citing Case No. CV 31-0059-TUC-SRB, Doc. 6383, Mar. 29, 2005 Order at 7-8.)). "The use of a well to pump subflow of the Gila River without an associated Decree water right is a violation of the Decree." *Id.* And the Court has been absolutely clear about its and the Commissioner's authority to halt such violations, without making any distinction as to whether the violator owns Decree rights elsewhere:

> To be clear, *pursuant to the Court's jurisdiction over the flow of the Gila River*, the Commissioner does have the authority to shut off a well that is pumping subflow of the Gila River without an associated Decree water right. If the Commissioner knows that an individual or entity is pumping subflow of the Gila River without an associated Decree water right, and the individual or entity has not filed an application to transfer a Decree water right to cover the subflow pumping, the Commissioner is directed to request that the Court issue an Order to Show Cause why the pumping should not be stopped until the individual or entity obtains an associated Decree water right.

8/3/2010 Order at 63–64 (emphasis added). Similarly, in discussing the Court's authority to stop illegal pumping of subflow by those without Decree rights, the Court has also noted that "the Water Commissioner in his administration of the Decree has the authority and responsibility to insure that illegal diversions are not being made from the Gila River and if they are to bring that matter to the Court's attention if it is not voluntarily stopped upon discovery." Case 4:31-cv-00059-SRB, Order dated 8/24/07 (Document 6595) ("8/24/07 Order") at 7.[4]

[4] The defendants are represented by counsel personally familiar with the rulings their motion directly contradicts. One of defendants' counsel, Mr. Caster, is counsel of record for ASARCO in Globe Equity No. 59 and appeared as co-counsel for ASARCO at the hearing over the UV Forbearance Agreement that led to the Court's order approving the agreement. *See, e.g.*, Hearing Transcript, Aug. 2, 2007 (Doc. 6587) at 2. Indeed, Mr. Caster's co-counsel at that hearing petitioned the Court to preserve ASARCO's rights to challenge illegal diversions by upstream parties such as the defendants here—"to indicate in writing under [*sic*] your signature that this settlement does not authorize depletions of upstream water that would not otherwise be allowed under the decree or would not [*sic*] otherwise be preventable under ASARCO's existing rights." Doc. 6588 at 6. The Court did exactly that, stating expressly, "The Court's approval of the UV Forbearance Agreement . . . does not condone or approve those wells pumping Gila River water whose owners have no Gila River decreed rights." Doc. 6595 at 6. The present motion now challenges this Court's jurisdiction over a complaint to shut down "wells whose owners have no Gila River decreed rights," without acknowledging the Court's prior order or the direct conflict with prior arguments to the Court.

Indeed, this Court has recognized that *any* pumping that adversely affects a federally decreed water right may well be within the Court's jurisdiction to enjoin, without respect to Arizona's distinction between subflow and percolating groundwater. *See* Order dated August 3, 2010 at 63 n.42. This Court quoted the Ninth Circuit's holding in *United States v. Orr Water Ditch Co*., 600 F.3d 1152, 1154, 1158 (9th Cir. 2010), that, under principles of *federal* law, the Orr Ditch Decree "forbids groundwater allocations that adversely affect the Tribe's decreed rights to water flows in the river," and that "as a result of its jurisdiction over the decree, the district court has jurisdiction over groundwater allocations under Nevada state law that adversely affect the Paiute Tribe's decree water rights." The complaint in this case does not currently sweep that broadly or ask the Court to apply such reasoning here[5], relying instead on the allegation that the defendants' wells are pumping subflow. But the Ninth Circuit's broader reasoning in *Orr Ditch* that could reach groundwater in this case illustrates this Court's authority to enjoin non-parties from pumping *subflow* of the Gila River in derogation of the Community's Decree rights.

Contrary to the defendants' suggestion that this case is premature, it is overdue. As this Court has recognized, the principles for identifying subflow have already been defined with precision. "In 2000, the Arizona Supreme Court defined with precision the limits of subflow in *In re The General Adjudication of All Rights to Use Water in the Gila River System and Source*. 198 Ariz. 330; 9 P.3d 1069 (2000) (*Gila River IV*)." Doc. 6383, Order dated Mar. 29, 2005, at 5. "[T]he Arizona Supreme Court's test for subflow set out in Gila River IV defines for the Gila Decree when wells are pumping subflow and when they are pumping percolating ground water not governed by the Gila Decree." *Id.* at 7. In 2007, the Court noted that "[t]he issue concerning whether the numerous wells pumping in the Upper Valley are pumping percolating ground water or sub-flow of the Gila River has been

[5] Such a theory would appear to be unnecessary here, but in the event that discovery shows one or more of the defendants' wells is not diverting subflow but is nonetheless adversely affecting the Community's Decreed water rights, the Community may seek leave to amend the complaint to conform to the evidence.

an issue for decades but in that time there has been little, if any, effort made to identify the wells and to categorize the wells as legally pumping owned water underlying the property or as wells pumping sub-flow of the Gila River." 8/24/07 Order at 1. Twelve years later, this is one such suit, to identify and categorize the Defendants' wells as pumping Gila River subflow.

C. The general adjudication court does not and could not assert any valid authority to issue a decree inconsistent with the Globe Equity Decree.

Arizona decisional and statutory law acknowledge that state courts lack jurisdiction over the waters of the main stem of the Gila River and that this Court has exclusive jurisdiction over such waters, notwithstanding the McCarran Amendment. As noted above, the Arizona Supreme Court has already held that rights being determined in the adjudication do not include any new rights on the main stem because the Decree is "comprehensive." *Gila VI*, 127 P.3d at 902. The Arizona Supreme Court has explained, "[t]he McCarran Amendment did not itself deprive the Globe Equity court of jurisdiction to enforce and interpret the 1935 consent decree. . . . [T]he amendment *confers* state court jurisdiction, rather than *withdrawing* federal jurisdiction." *Gila VII*, 134 P.3d 375, 377 (Ariz. 2006) (emphasis in original). "There is simply no warrant for concluding that the Globe Equity court has somehow been deprived by the McCarran Amendment, or by the cases interpreting the Amendment, of the ability to consider attacks on the validity of the 1935 Decree." *Id.*

Further, A.R.S. § 45-257(B)(1) requires that "when rights to the use of water or dates of appropriation have previously been determined in a prior decree of a court, the court *shall* accept the determination of such rights and dates of appropriation as found in the prior decree unless such rights have been abandoned." (Emphasis added.) And A.R.S. § 45-261(A) likewise requires that the general adjudication court "*shall* accept information in an applicable prior decree as prescribed by section 45-257, subsection B, paragraph 1"; "[i]f information in a prior decree conflicts with information in one or more applicable

prior filings, the court *shall* accept the information in the prior decree as prescribed by section 45-257, subsection B, paragraph 1." (Emphasis added.) Moreover, as this Court has recently noted, Arizona law does not purport to regulate "distribution of water reserved to special officers appointed by courts under existing judgments or decrees." A.R.S. § 45-103(B); *accord* 7/20/2018 Order at 4. Defendants' arguments that the general adjudication court has superior jurisdiction here are baseless.

III. ABSTENTION IS NEITHER PERMITTED NOR WARRANTED

In light of this Court's prior exclusive jurisdiction over the waters of the main stem of the Gila River, there is no basis for abstention under *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976). As defendants admit, the prior exclusive jurisdiction doctrine is controlling in this case because jurisdiction is *in rem*. *See* Doc. 14 at 9–11. This Court continues to exercise prior exclusive jurisdiction over the waters of the main stem of the Gila River and can issue appropriate orders to protect those waters from the defendants' unlawful diversions. Defendants' demand for abstention amounts to an assertion that this Court must abdicate its exclusive jurisdiction so that they can pursue claims in state court that impermissibly conflict with the Decree.

CONCLUSION

The motion to dismiss should be denied.

DATED this 28th day of October 2019.

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