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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

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| Gila River Indian Community, a federally recognized Indian tribe,<br><br>Plaintiff,<br><br>v.<br><br>Joyce Cranford; David Schoebroek; Eva Schoebroek; Donna Sexton; Marvin Sexton; and Patrick Sexton,<br><br>Defendants. | No. CV-19-00407-TUC-SRB<br><br>**REPLY IN SUPPORT OF RULE 12(B)(1) MOTION TO DISMISS FOR LACK OF JURISDICTION OR TO ABSTAIN**<br><br>(Oral argument requested) |

Defendants' motion to dismiss or abstain should be granted. The question raised by the Community's Complaint is whether the wells utilized by defendants—none of whom is a party to the Globe Equity Decree ("Decree")—are pumping waters of the Gila River in contravention of that Decree. This Court has no subject matter jurisdiction to resolve that question for two reasons. First, the Community filed this action as a new case, and not as an enforcement proceeding in the Globe Equity case, No. CV31-0059-TUC-SRB. Only the Court presiding in that case retained continuing jurisdiction to administer and enforce the Decree. The fact that the District Judge presiding in this action also presides in the Globe Equity action does not expand jurisdiction in this action by osmosis. Second, even if the Court in this action had jurisdiction to administer and enforce the Decree, it could not do so

with respect to these defendants, who are not parties to the Decree (a fact that plaintiff does not dispute in the Complaint).

Further, even if this Court had subject matter jurisdiction over the Community's Complaint, it should refrain from exercising that jurisdiction while the state court general adjudication determines whether the defendants' wells capture subflow—a matter of purely state law that is being litigated in the on-going adjudication and that must be answered affirmatively before the question of any alleged violation of the Decree can be considered.

This Court should dismiss the Community's Complaint for lack of subject matter jurisdiction, or at a minimum, stay the action in deference to the state adjudication's determination of whether defendants' wells are pumping waters of the Gila River.

## I. LEGAL ARGUMENT

### A. The Community Failed to Establish This Court's Subject Matter Jurisdiction.

"Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, . . . which is not to be expanded by judicial decree, . . . . It is to be presumed that a cause lies outside this limited jurisdiction, . . . and the burden of establishing the contrary rests upon the party asserting jurisdiction . . . ." *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994) (citations omitted).

#### *1. The Community made no effort to establish the jurisdiction of this Court in this case to administer and enforce the Decree entered in a separate action.*

The Community asserts that "[t]his 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." Response at 1. It disregards the fact that it is presenting its claims in an action distinct from the Globe Equity litigation,[1]

[1] The Community also fails to explain how this "enforcement action" related to the Decree can be prosecuted without notice to all parties to the Decree, which would have been provided if the Complaint had been filed in the Globe Equity litigation.

which happens to be presided over by the same District Judge. A District Judge's subject matter jurisdiction in a specific case is framed by the allegations and law applicable to that case, not by the allegations and law applicable to the many other actions over which she presides. The Community cannot overcome the presumption that this Court lacks subject matter jurisdiction over this action.

***2. Even if this Court had jurisdiction to administer and enforce the Decree, it could not do so with respect to these defendants, who are not parties to the Decree.***

Even if the Complaint had been filed in the Globe Equity litigation, the Decree could not bind these defendants who are not parties to the Decree. "The 1935 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 Valley Irrigation Dist.*, 454 F.2d 219, 220 (9th Cir. 1972) (emphasis added). As to those persons and entities, the Decree is a comprehensive settlement of all rights to the mainstem of the Gila River. *See In re General Adjudication of All Rights to Use Water in Gila River System & Source*, 212 Ariz. 64, 66 ¶ 1, 127 P.3d 882, 884, *reconsideration denied*, 212 Ariz. 470, 134 P.3d 375 (2006) ("*Gila VI*"), *cert. denied*, 549 U.S. 1156 (2007).[2] Here, none of the defendants' land that is the subject of the Complaint is Decreed land. *See*

[2] The Community cites *Gila VI* to support the proposition that the only rights to the mainstem of the Gila River as to <u>*any party*</u> (whether or not a party to the Decree) are those set forth by the Decree. *See* Response at 5:20-6:8. That mischaracterizes *Gila VI*. The issue before the Arizona Supreme Court was "whether claims advanced by the [San Carlos Apache] Tribe (and the United States on the Tribe's behalf) are precluded by [the Decree]." *Gila VI*, 212 Ariz. at 66 ¶ 1, 127 P.3d at 884. The Court concluded "that the decree precludes the Tribe's claims to additional water from the Gila River main stem, but not to water from tributaries of the Gila." *Id*. In other words, the Decree was comprehensive as to the Tribe's rights to the Gila River mainstem because it was bound by the United States' stipulation to the consent decree as the Tribe's Trustee. The Arizona Supreme Court had no occasion to consider whether the Decree bars claims to the Gila River mainstem by claimants who are not parties to the Decree. If the Decree bound the entire universe of water users regardless of whether they are parties to the Decree, as the Community suggests, there would have been no reason for the Supreme Court to consider whether nonparties are entitled to assert the Decree's preclusive effect against parties to the Decree and their successors. *See id*. 212 Ariz. at 84 ¶ 76, 127 P.3d at 902.

Declaration of Herbert Dishlip P.E. in Support of Reply in Support of Motion to Dismiss ("Dishlip Declaration"), attached as Exhibit 1 hereto.[3] Therefore, the Decree is not comprehensive as to the defendants' rights to the mainstem of the Gila River. The Court should dismiss the complaint for lack of subject matter jurisdiction.

***3. The Community's response assumes the truth of its legal conclusions.***

The Community claims (Response at 3) that it does not have an affirmative obligation to support its jurisdictional allegations with proof because defendants are purportedly only making a *facial* attack on jurisdiction (not a factual attack), and the Court therefore must accept as true the Community's allegation that defendants' wells are pumping waters of the Gila River (i.e., subflow). But the Court does not accept the truth of legal conclusions simply because they are cast in the form of factual allegations. *Doe v. Holy See*, 557 F.3d 1066, 1073 (9th Cir. 2009) (per curiam), *cert. denied*, 561 U.S. 1024 (2010). Previously, the Decree Court declined to decide in the summary judgment context whether specific wells were pumping subflow. *United States v. Gila Valley Irrigation Dist.*, Order (D. Ariz. signed March 29, 2005) at 3, 9 (Dkt. 6383). It also declined to determine whether the upper valley defendants had a right to recapture and reuse water they legally diverted, noting that the issue may involve mixed questions of fact and law. *Id.* at 8.

Determination of whether a well in Arizona is pumping appropriable water—in any context—is a mixed question of law and fact, inevitably with expert assistance to determine the facts. *See In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. &*

[3] The Community has not alleged that the defendants own Decreed land. Upon information and belief, they do not. But even if they did (which counsel has no reason to believe they do) that would not change this analysis. The Community argues that somehow a defendant's ownership of unrelated lands affects whether the Court has jurisdiction over a dispute about water rights on different lands. If this idea is taken to its logical conclusion there would be no geographical limit to the Decree Court's jurisdiction. A person's mere ownership of unrelated Decreed land would automatically subject that person to the jurisdiction of the Decree Court for disputes over water use on the non-Decreed land.

*Source*, 175 Ariz. 382, 388, 857 P.2d 1236, 1242 (1993) (quoting *Maricopa Cty. Mun. Water Conservation Dist. No. 1 v. Sw. Cotton Co.*, 39 Ariz. 65, 96, 4 P.2d 369, 380 (1931), *reh'g denied and opinion modified*, 39 Ariz. 367, 7 P.2d 254 (1932)) (stating that the application of a test to determine whether underground water is appropriable subflow is "a matter of fact and law."). The Arizona Supreme Court noted numerous areas in which factual determinations are required before the law can be applied to those facts. In *In re General Adjudication of All Rights to Use Water in Gila River System & Source*, 198 Ariz. 330, 344 ¶ 48, 9 P.3d 1069, 1083 (2000) ("*Gila IV*"), *cert. denied*, 533 U.S. 941 (2001), the Court affirmed "in all respects" the trial court's subflow rulings. Among those rulings were the following: 1) the subflow zone does not include any part of an adjacent tributary aquifer or basin-fill aquifer, even if there is a hydraulic connection between them and the floodplain alluvium (*id*. 198 Ariz. at 338 ¶ 18, 9 P.3d at 1077); 2) that part of the floodplain alluvium that qualifies as the subflow zone must be that part of the geologic unit where the flow direction, water level elevations, gradations of water level elevations and chemical composition of the water are substantially the same as the water level, elevation and gradient of the stream (*id*.; *see also id*. 198 Ariz. at 340 n.5, 9 P.3d at 1079); and 3) that part of the floodplain alluvium that qualifies as the subflow zone must also be where the pressure of side recharge from adjacent tributary aquifers or basin fill is so reduced that it has no significant effect on the flow direction of the floodplain alluvium (*id*.). Once the Department of Water Resources determines that a well is located within the subflow zone using these court-approved criteria, the burden shifts to the well owner to show, by a preponderance of evidence, that the well is either outside the subflow zone or is not pumping subflow. *Id*. 198 Ariz. at 343 ¶¶ 41, 43, 9 P.3d at 1082; *see also id*. 198 Ariz. at 338 ¶ 18, 9 P.3d at 1077.

Wells located outside the subflow zone are presumed not to be pumping subflow. *Id*. 198 Ariz. at 342 ¶ 38, 9 P.3d at 1081. No well outside the subflow zone is deemed to

be capturing subflow unless the cone of depression caused by its pumping has extended to the subflow zone and by continual pumping will cause a loss of subflow to affect the quantity of the stream. *Id*. 198 Ariz. at 338 ¶ 18, 9 P.3d at 1077. The Department of Water Resources "may seek to establish that a well located outside the limits of the saturated floodplain alluvium is in fact pumping subflow . . . by showing that the well's cone of depression extends into the subflow zone and is depleting the stream." *Id*. 198 Ariz. at 343 ¶ 40, 9 P.3d at 1082. The Court acknowledged that the cone of depression test may indicate that "only part of a well's production" is appropriable. *Id*.

The Adjudication Court has already spent years developing the tests necessary to determine whether a particular well is taking subflow. *See, e.g.*, Motion at Exhibit A. Many parties, including the Community, are participating in the development of these important tests that will be utilized state-wide to determine water rights related to wells.

Neither the Decree nor the Globe Equity Court has made any of these determinations with respect to the lands and wells at issue in this case.[4] "The Upper Valley irrigators who have rights to divert water of the Gila River also have wells. Landowners 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." *United States v. Gila Valley Irrigation Dist.*, Memorandum and Order (D. Ariz. signed Aug. 24, 2007) at 5 (Dkt. 6595). The general stream adjudication is the method designated by state law to answer these state law questions. It is the state court's determination of these state law issues that governs. *See Montana v. Wyoming*, 563 U.S. 368, 377 n.5 (2011) ("The highest court of each State, of course, remains the 'final arbiter of what is state law.'"); *United States v. Gila Valley*

[4] The only instance in which an upper valley well has been found to be pumping sub-flow is when Freeport filed for a change in point of diversion from a river surface diversion to a well, thus conceding that the well was pumping sub-flow. *See Globe Equity 61*, Order (D. Ariz. signed August 3, 2010) at 63 (Dkt. 145).

*Irrigation Dist.*, 31 F.3d 1428, 1443, n.12 (9th Cir. 1994) (applying Arizona law to define the term "natural flow" as used in the Decree).

Under the Decree, the state water rights of the Arizona parties and the New Mexico parties were determined pursuant to state law. "For Arizona parties to the Decree the 'waters of the Gila River' are defined in *Southwest Cotton* as interpreted in *Gila River II* and *Gila River IV*." (Dkt. 6383 at 8). *Gila IV* "defines for well owners in Arizona with state water rights claims whether their rights are governed by surface water prior appropriation law or whether their water rights are to groundwater owned by the overlying land owner." *Id.* at 6; see also *United States v. Gila Valley Irrigation Dist.*, Order (D. Ariz. signed Aug. 3, 2010) at 63 n.42 (Dkt. 145). In contrast, "[u]nder New Mexico law 'a prior appropriator from a stream may enjoin one from obstructing or taking waters from an underground source which would otherwise reach the stream and which are necessary to serve the stream appropriators' prior right.'" *Id.* at 8 (citation omitted; error in quotation corrected). "To the extent that the New Mexico Defendants are pumping Gila River water because they are pumping waters which would otherwise reach the Gila River and water necessary to satisfy prior rights, their rights to this pumping are also limited by the Gila Decree." *Id.* But New Mexico state law has no application to the Arizona defendants the Community chose to sue here.

***4. The Mock Declaration is impermissible expert testimony.***

The Community argues in its Response that defendants' wells capture subflow and, therefore, this Court has jurisdiction, citing the conclusory Declaration of Peter A. Mock ("Mock Declaration"). The Mock Declaration is a series of assumptions followed by an impermissible legal conclusion and should be stricken.[5] The standard for whether or not a

[5] As the Community concedes (Response at 5), the Mock Declaration is merely a "preliminary assessment." It lacks probative value for that reason alone. Moreover, it either states a legal opinion or states a conclusion derived by applying the law to assumed (but unproven) facts. In either event, it is impermissible expert testimony. *Pinal Creek Grp. v. Newmont Mining Corp.*, 352 F. Supp. 2d 1037, 1043 (D. Ariz. 2005) ("The Ninth Circuit

well is taking Gila River water—and, therefore, whether or not the Globe Equity Court has jurisdiction over a particular well—is not simply whether Mr. Mock decides that a well is pumping subflow. Mr. Mock's conclusory Declaration cannot supplant the Arizona General Adjudication, which is developing standards for determining subflow across the state. If this Court were to adopt Mr. Mock's conclusion, or even were to make its own independent determination of whether defendants' wells pump subflow of the Gila River, there is a significant risk of inconsistent results with the state court's determination of the same (state law) issue. In such circumstances, federal policy favors avoiding piecemeal litigation related to water rights. *Colorado River Water Conser. Dist. v. United States*, 424 U.S. 800, 819 (1976) (hereinafter, "*Colorado River*") ("The clear federal policy evinced by [the McCarran Amendment] is the avoidance of piecemeal adjudication of water rights in a river system."). As the Supreme Court explained in *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 569, 103 S. Ct. 3201, 3215 (1983), "[a]lthough adjudication of those rights in federal court instead might in the abstract be 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." The Court should therefore dismiss this case in favor of the state court adjudication to determine whether the wells in question are pumping waters of the Gila River.

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has also excluded legal expert testimony concerning both what the law is and how it should be applied to the facts of a case.") (citing *Aguilar v. Int'l Longshoremen's Union Local No. 10*, 966 F.2d 443, 447 (9th Cir. 1992). Expert testimony stating legal opinions invades the province of the Court. 352 F. Supp. 2d at 1043-44. Opinions applying law to the facts invade the province of the fact finder, in this case, the Court. *Wichansky v. Zowine*, No. CV-13-01208-PHX-DGC, 2016 WL 6818945, at *6 (D. Ariz. March 22, 2016) (citing cases from the Ninth Circuit, Eighth Circuit, Eleventh Circuit and Second Circuit); *see also Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1059 (9th Cir. 2008).

***5. Allowing the Adjudication Court to continue development of the subflow test will not interfere with Decree rights.***

The Community argues that the General Adjudication court cannot interfere with the rights under the Decree. That statement is correct as far as it goes, as illustrated by the deference shown the Decree in *Gila VI* as a matter of comity. *See* 212 Ariz. at 80 ¶ 61, 127 P.3d at 898; 212 Ariz. at 472 ¶ 11, 134 P.3d at 377. But it misses the point. State law, as determined in the state court adjudication, will determine which wells are capturing subflow.[6] That determination will not change or affect rights under the Decree; it merely defines the applicable state-law based water rights.

**B. Abstention Is Proper Because the Adjudication First Took Up the Subflow Issue.**

At a minimum, Ninth Circuit precedent requires that the Court abstain from exercising jurisdiction in this case because it is an action *in rem*. *See Goncalves By & Through Goncalves v. Rady Children's Hosp. San Diego*, 865 F.3d 1237, 1253 (9th Cir. 2017) ("The prior exclusive jurisdiction doctrine is a "*mandatory* jurisdictional limitation" that prohibits federal and state courts from concurrently exercising jurisdiction over the same *res*."); *see* Motion at 9:7-11:18. The Community agrees (Response at 6, 8) that this is an action *in rem*. Under the prior exclusive jurisdiction doctrine, the court that first exercises jurisdiction over the *res* in question has exclusive jurisdiction to proceed. *40235 Washington St. Corp. v. Lusardi*, 976 F.2d 587, 589 (9th Cir. 1992); *Chapman v. Deutsche Bank Nat. Tr. Co.*, 651 F.3d 1039, 1043 (9th Cir. 2011). This is a mandatory rule in this Circuit. *Chapman*, 651 F.3d at 1044.

[6] The Legislature directed the general adjudication court to accept water rights and dates of appropriation as found in prior decrees unless the rights have been abandoned. A.R.S. § 45-157(B)(1). Retaining the right to make such an abandonment finding does not interfere with the prior decree, but is within the adjudication court's authority to craft its own decree.

Here, the Community disagrees with what constitutes the "*res*" and, thus, which court first exercised jurisdiction over that *res*. The Community argues (Response at 8) that the *res* is the water of the mainstem of the Gila River, meaning that the District Court exercised jurisdiction first by issuing the Decree. But, again, the Community misses the point that this is not a Gila River surface water case; this is a pumping case. Whether the wells at issue pump waters of the Gila River is a question that cannot be determined without setting out a standard and delineating the subflow zone, which is what the General Adjudication Court is currently doing. Therefore, the *res* cannot be the waters of the mainstem of the Gila River here because we do not know if those waters are involved in this case.

Instead, the *res* is the non-Decreed land that is at issue here. By definition, the Decree does not extend to non-Decreed land, and this Court has never exercised jurisdiction over these properties. Rather, the Arizona Superior Court first exercised jurisdiction by initiating the general stream adjudication decades prior to the Community's filing of the Complaint. *See, e.g.*, Exhibit B to the Complaint (May 30, 1986 Pre-Trial Order No. 1 Re: Conduct of Adjudication, *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*). Through the General Adjudication, the Superior Court is developing the tests needed to determine whether the wells at issue in this case are pumping subflow and applying that test to adjudicate water rights. In keeping with the federal policy of avoiding piecemeal adjudication of water rights, this Court must abstain to allow the General Adjudication court to finish what it has started.

It is also noteworthy that state court decrees predated the Decree. The first adjudication of the right to use the waters of the Gila River in the Safford valley was made in what was commonly known as the Doan decree in the last years of the 19th Century or the very early years of the 20th Century. *Olsen v. Union Canal & Irrigating Co.*, 58 Ariz. 306, 309, 119 P.2d 569, 570 (1941). The Doan, Jenckes, Lockwood, and Ling decrees were

largely folded into the Globe Equity Decree. In addition, the Schoubroek defendants still own 3.62 acres of land with water rights decreed under the state court's Ling Decree for diversion from Apache Wash. That land is targeted in the Complaint. *See* Dishlip Declaration at ¶ 6.

Finally, the Ninth Circuit has applauded cooperative task sharing between a federal district court and a state court in the context of water right litigation. In *United States v. Adair*, 723 F.2d 1394, 1403-04 n.7 (9th Cir. 1983), *cert. denied*, 467 U.S. 1252 (1984), that court approved the district court's limitation of its ruling to issues governed by federal law, leaving other issues to be resolved in the state courts:

> We commend this effort to coordinate federal and state resolution of water rights. Any generality in the district court's order resulted from these coordinating efforts not from the abstract nature of the controversy. Unlike the situation in *Wycoff*, the plaintiff's request for relief was not one for "preliminary findings and conclusions intended to fortify the litigant against future regulation." 344 U.S. at 246, 73 S.Ct. at 241. Rather, the district court properly decided those elements of a ripe controversy that were governed by federal law, while leaving state law issues necessarily involved in a detailed resolution of the controversy to subsequent state proceedings in order to harmonize the concurrent federal and state jurisdiction mandated by the McCarran Amendment, 43 U.S.C. § 666 (1976).

This Court should adopt the same cooperative approach here.

## II. CONCLUSION

This Court lacks subject matter jurisdiction and should dismiss this action. Even if it concludes that it has jurisdiction, however, it should refrain from prejudging the outcome of state law issues currently before the state general adjudication court.

DATED this 12th day of November, 2019.

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