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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

SUPPLEMENTAL BRIEF OF PLAINTIFF GILA RIVER INDIAN COMMUNITY IN OPPOSITION TO MOTION TO DISMISS

Section 1362 fully supports this Court's jurisdiction over this action by the Gila River Indian Community (the "Community") to enforce its rights in the main stem of the Gila River under the Globe Equity Decree. A wealth of authority recognizes that 28 U.S.C. § 1362 permits a federally recognized Indian tribe like the Community to bring suit in federal court to vindicate federal property rights where the United States itself could have, but has not, proceeded on the tribe's behalf. The Community's action meets those straightforward requirements. The Decree is a federal judgment recognizing the Community's immemorial rights to the waters of the Gila River main stem—rights the United States continues to litigate to this day. Moreover, the United States previously brought, and this Court adjudicated, a suit on behalf of Indian tribes challenging alleged pumping of subflow of the Gila River by a landowner lacking any Decree rights—the same issue presented by this case. *United States v. Smith*, 625 F.2d 278, 279-80 (9th Cir. 1980).

That any *factual* dispute about whether defendants are pumping subflow of the Gila River main stem "involves a state-law issue," Doc. 17 at 1, hardly deprives this Court of jurisdiction. The jurisdictional analysis under § 1362 looks to whether "the matter in controversy *arises under*" federal law based on the well-pleaded complaint, without regard to state-law defenses. Here, the complaint asserts federal rights to the waters at issue, and "the matter in controversy arises under" a federal Decree, born of the federal government's longstanding interest in protecting the Community's irrigation of a reservation established by federal statute. The United States holds the Community's Decree rights in trust pursuant to the Arizona Water Settlements Act, Pub. L. No. 108-451, §§ 203(a), 204(a)(2), 118 Stat. 3478, 3499, 3501 (2004). Given the unmistakable federal interest in the Community's Decree rights, this case squarely presents a federal question over which this Court has jurisdiction under § 1362. Defendants cannot deprive this Court of that jurisdiction over the well-pleaded complaint by raising a state-law defense.

The Court's jurisdiction under § 1362 is unaffected by the McCarran Amendment because the Community is not asking this Court to determine in the first instance the Community's rights to the waters of the Gila River. Nor is it asking the Court to declare

the extent and nature of any rights defendants may have under state law. Instead, the Community seeks *enforcement* of *existing* Decree rights to waters over which this Court already has exclusive jurisdiction under federal law. The complaint seeks relief only to the extent defendants are using waters of the main stem subject to the Court's jurisdiction under the federal Decree. The Court necessarily has jurisdiction to determine whether defendants are doing so, in violation of the Community's Decree rights. This does nothing to impede the Gila River general adjudication. The purpose of that proceeding is to declare the rights of parties in the watershed of the Gila River, taking as a given the Decree's settlement of rights in the main stem. Defendants have not asserted, and Arizona courts could not adjudicate, any claim of right to pump the waters of the main stem in derogation of the Community's immemorial Decree rights.

ARGUMENT

I. THIS COURT HAS JURISDICTION UNDER 28 U.S.C. § 1362

A. Section 1362 Extends Beyond Section 1331 To Confer Federal Jurisdiction Over Tribal Suits Invoking Federal Water Rights When The United States Declines To Sue

Section 1362 provides that federal "district courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1362. That statutory provision "granted sweeping federal-court jurisdiction where an Indian tribe was a party." *Ark. v. Farm Credit Servs. of Cent. Ark.*, 520 U.S. 821, 828 (1997).

Although § 1362 and 28 U.S.C. § 1331 both concern questions that "arise[] under" federal law, "it is clear that section 1362 authorizes at least some actions that could not be brought under section 1331." 1 Felix Cohen, *Cohen's Handbook of Federal Indian Law* § 7.04[1][a] (2019). In enacting § 1362, Congress "open[ed] the federal courts to the kind of claims that could have been brought by the United States as trustee, but for whatever reason were not so brought." *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 472 (1976); *see Nisqually Indian Tribe v. Gregoire*, 623 F.3d

923, 931 (9th Cir. 2010) ("[*Moe*] recognizes a tribe's right to bring a claim in federal court which could otherwise be brought by the United States acting as trustee."); Charles A. Wright & Arthur R. Miller, 13D *Federal Practice & Procedure* § 3579 (3d ed. 2019). Section 1362 reflects that "[c]ases involving Indian tribes as plaintiffs present special considerations." *Hous. Auth. of Seattle v. Wash. Dep't of Revenue*, 629 F.2d 1307, 1312 (9th Cir. 1980). In particular, "[t]he moral and legal obligations of the United States toward Indian tribes place the tribes in a special posture when seeking relief in federal courts." *Id.* Congress "codifie[d]" that "special posture" in § 1362 not only by eliminating the need for Indian tribes to satisfy § 1331's (since-repealed) amount-in-controversy requirement, but also by "giv[ing] tribes the right to sue on their own behalf in any controversy involving tribal property or matters of tribal sovereignty where the United States declines to do so on a tribe's behalf as trustee." *Id.* (internal quotation marks omitted).

Although the precise scope of § 1362 has been debatable at the margins, jurisdiction is clear in this case. On the one hand, the Ninth Circuit has clarified that federal jurisdiction does not extend to "every instance where the United States can bring an action on behalf of the Tribe under 25 U.S.C. § 175," which authorizes the United States to represent "reservations or allotted Indians." *Gila River Indian Cmty. v. Henningson, Durham & Richardson*, 626 F.2d 708, 710 n.5, 714 (9th Cir. 1980). Thus, a "run-of-the-mill contract claim[] brought by Indian tribes" does not fall within § 1362. *Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1055 (9th Cir. 1997). But on the other hand, courts have long recognized that suits to vindicate federally derived property rights come within § 1362. Summarizing several examples, the Ninth Circuit observed that "[t]he common thread running through these cases . . . is that they all involved possessory rights of the tribes to tribal lands," which "were granted and governed by federal treaties and laws." *Gila River*, 626 F.2d at 714. For nearly half a century, Ninth Circuit precedent has made clear that "Congress intended by § 1362 to authorize an Indian tribe to bring suit in federal court to protect its federally derived property rights in those situations where the United States declines to act." *Fort Mojave Tribe v. Lafollette*, 478 F.2d 1016, 1018 (9th Cir.

1973); *see* Wright & Miller, *supra*, § 3579 ("[T]here is jurisdiction under § 1362 whenever a covered Indian tribe is suing to protect federally derived property rights and the United States has declined to sue on behalf of the Indians."). An Indian tribe's action regarding federally derived water rights is no exception. *See id.* at n.18 ("District court had jurisdiction to hear suits brought both by United States and by Indian tribes seeking adjudication of water rights.") (citing *Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545, 566-67 (1983)).

In this case, there can be no doubt that the United States could have brought suit to enjoin defendants from pumping subflow of the Gila River main stem without a right to do so under the Decree. The Ninth Circuit adjudicated exactly that kind of action in *Smith*, 625 F.2d 278. There, the federal government sued "a landowner near the Gila River . . . acting on its own behalf and on behalf of Indian tribes which have rights to the natural flow of the river," based on the allegation that the landowner had "obtained no Gila River Water rights" yet "t[ook] water from the river" in violation of the Decree. *Id.* at 279. Ultimately, the Ninth Circuit upheld on the merits a finding that the pumped water did not come from subflow of the Gila River. It did not dismiss for lack of jurisdiction. Rather, the court explained "that if [the landowner's well] takes water from the river the government may have injunctive and monetary relief," and advised that "[s]hould others drill wells near the river the government may seek appropriate legal action." *Id.* at 279-80. Resolving the water's source requires "scientific factual determinations" adjudicated by the federal court, not just a "state law presumption without basis in fact." *Id*. at 280 n.3.

The United States brought a similar case in its own name in *Cappaert v. United States*, 426 U.S. 128, 145 (1976). In *Cappaert*, the Supreme Court held that, irrespective of state law, a federal court could enjoin groundwater pumping that was hydrologically connected to the surface waters of a federal reservation (the Devil's Hole Monument). If, as alleged in the complaint, defendants are diverting waters of the main stem, that pumping infringes on the Community's downstream diversions for its federal reservation, and jurisdiction lies in this Court to enjoin it. "For federal law, the question is one of hydrology,

not legal compartmentalization." *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 989 P.2d 739, 750 (1999) (citation and internal quotation marks omitted). Addressing "whether a federal reservation may invoke broader protection than state law provides if state law turns out to be inadequate," the Arizona Supreme Court has held that "*Cappaert* provides an explicit answer to that question. . . . [I]t tells us that 'the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater.'" *Id.* at 749 (quoting *Cappaert*, 426 U.S. at 143). "[W]e may not defer to state law where to do so would defeat federal water rights." *Id.* at 747. That is no less true here where the federal reservation is an Indian reservation, the rights are held in trust by the United States, and the plaintiff is an Indian tribe invoking § 1362.

B. Section 1362 Confers Jurisdiction Here Because The Suit "Arises Under" Federal Law Due To The Federal Nature Of The Tribal Interest

That § 1362 extends beyond § 1331 for actions like this one is reason enough to deny the motion to dismiss. But in any event, the Community's suit to enforce this Court's Decree "arises under" federal law because that analysis "can best be understood as an evaluation of the nature of the federal interest at stake." *Cabazon*, 124 F.3d at 1056. Beyond the fact that the Decree is a federal court judgment, the Decree rights that the Community seeks to enforce are held in trust by the United States and are inextricably intertwined with federal interests. The establishment of the Community's reservation by federal statute in 1859 was intended to preserve the ability of the Community's members to continue cultivating their land with water from the Gila River, as they had done since time immemorial. *See Gila River Pima-Maricopa Indian Cmty. v. United States*, 684 F.2d 852, 854-56 (Ct. Cl. 1982). Over time, settlement upstream from the Community's reservation led to "water . . . being rapidly diverted from the Gila." *Id.* at 856-58. In the early twentieth century, the United States undertook construction of a dam and reservoir at San Carlos—out of a sense of "plain duty"—to "restor[e] the water of which the Indians for many years have been illegally deprived," *id.* at 858, and "for the purpose . . . of providing water for the irrigation of lands allotted to Pima Indians on the Gila River Reservation," *United States v. Gila Valley Irrigation Dist.*, 454 F.2d 219, 220 (9th Cir.

1972).

To that end, the United States filed suit in this Court and secured the Decree "in its trustee capacity on behalf of the Gila River Indian Community." *United States v. Gila Valley Irrigation Dist.*, 31 F.3d 1428, 1430 (9th Cir. 1994) ("*GVID IV*"). As the Supreme Court has confirmed, federal jurisdiction clearly lay over the federal government's suit to secure the Decree: "Federal water rights are not dependent upon state law or state procedures and they need not be adjudicated only in state courts; federal courts have jurisdiction under 28 U.S.C. § 1345 to adjudicate the water rights claims of the United States." *Cappaert*, 426 U.S. at 145; *see* Cohen, *supra*, § 19.05[1] ("Federal courts have jurisdiction to adjudicate Indian claims to water rights. Because reserved rights are created and defined by federal law, federal district courts may determine those rights under federal question jurisdiction.") (footnote omitted).

The federal interest in the Community's Decree rights has not diminished. To the contrary, the Community's federal water rights—including Decree rights—have since been confirmed by federal statute and are "held in trust by the United States on behalf of the Community." Arizona Water Settlements Act, §§ 203(a), 204(a)(2), 118 Stat. at 3499, 3501; *see Cabazon*, 124 F.3d at 1056. It is therefore unsurprising that the United States continues to appear in Decree proceedings both "in its capacity as trustee" for tribes, *e.g.*, *GVID IV*, 31 F.3d at 1432, and in its own right, *see United States v. Gila Valley Irrigation Dist.*, 859 F.3d 789, 795 (9th Cir. 2017) (noting that United States acted "as plaintiff" and "not . . . in its capacity as trustee"). In the face of the manifest federal interests implicated by the Community's enforcement of its Decree rights, it would be error to hold that this action does not "arise[] under" federal law.

II. JURISDICTION UNDER § 1362 AGAINST NON-PARTIES TO THE DECREE IS CONSISTENT WITH THIS COURT'S RETAINED JURISDICTION TO ENFORCE ITS OWN DECREE

That this Court has jurisdiction under § 1362 is reinforced by the targeted relief the Community seeks: *enforcement* of a Decree water right. In the initial exercise of its jurisdiction, the Court comprehensively determined the rights to use the waters of the Gila

River main stem and "retained jurisdiction to enforce and interpret the Decree." *GVID IV*, 31 F.3d at 1431. This included the jurisdiction to protect and vindicate the Decree rights of the tribes in whose behalf the original action was brought. As discussed above, this Court has jurisdiction to vindicate Decree rights by enjoining a landowner who is allegedly pumping Gila River subflow *without a Decree right*—even if the court ultimately determines that the landowner is not pumping waters subject to the Decree or otherwise appreciably diminishing the water of the Gila River. *See Smith*, 625 F.2d at 279-80. A "district court's jurisdiction over disputes arising under a [federal water rights decree] is both continuing and exclusive." *United States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007, 1011 (9th Cir. 1999). "So long as the dispute . . . is *related* to the district court's earlier Decrees, the district court *retains* jurisdiction to adjudicate the dispute" under "the equitable doctrine of ancillary jurisdiction, which allows a court to adjudicate related claims to manage its proceedings, vindicate its authority, and effectuate its decrees." *Id.* at 1012 n.5 (emphases added) (internal quotation marks omitted).

The Supreme Court has placed beyond question that actions to quiet title to water rights are considered *in rem*, even if technically litigated *in personam*. *See id.* at 1014 ("[A]lthough equitable actions to quiet title are technically *in personam* actions, 'water adjudications are more in the nature of *in rem* proceedings.'" (quoting *Nevada v. United States*, 463 U.S. 110, 143-44 (1983)); *id.* ("[T]he Decrees are properly analogized to *in rem* proceedings."). Water rights are therefore subject to the "well-established proposition that the first court to gain jurisdiction over a *res* exercises exclusive jurisdiction over an action involving that *res*," such that "when one [court] takes into its jurisdiction a specific thing, that *res* is as much withdrawn from the judicial power of the other, as if it had been carried physically into a different territorial sovereignty." *Id.* at 1013. Given the Decree, the "first court to gain jurisdiction" over the water of the Gila River main stem is indisputably this Court. *See id.* at 1014 ("The Nevada 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 . . . Decrees and because it continued to retain such

jurisdiction.").

There is no shortage of examples in which district courts—including this Court—have exercised jurisdiction to enforce federal water rights decrees as *in rem* proceedings. *See, e.g.*, Doc. 15 at 11-13. In *United States v. Orr Water Ditch Co.*, the federal government "filed an action in 1913 to quiet title to all water rights in the [Newlands Reclamation] Project area," which resulted in a 1944 decree recognizing the Pyramid Lake Paiute Tribe of Indians' senior-most water rights on the Truckee River. 600 F.3d 1152, 1154-55 (9th Cir. 2010). When several parties applied for new groundwater allocations in a basin that, in the tribe's view, "would reduce the base flow of the Truckee River" and "interfere . . . with decreed water rights," the Ninth Circuit reversed the district court's jurisdictional decision that the allocations should be reviewed in state court. *Id.* at 1155-56, 1160-61. The district court had jurisdiction "insofar as the allocation of groundwater rights [wa]s *alleged* to affect adversely the Tribe's decreed water rights." *Id.* at 1161 (emphasis added).

This case is no different. As in *Orr Water Ditch*, the United States brought an action to quiet title to, and determine comprehensively, rights to certain waters. And as in *Orr Water Ditch*, the Community has alleged that actions taken by others—here, defendants' pumping subflow of the Gila River main stem—adversely affects and interferes with the Community's Decree rights. Nothing more is required to trigger this Court's retained jurisdiction to adjudicate whether the Community's claims have merit. A contrary conclusion would be untenable both as a legal and practical matter. A "district court implicitly retain[s] exclusive jurisdiction" over waters adjudicated in a decree unless otherwise specified, lest the "retention of jurisdiction" be rendered "a nullity." *Alpine*, 174 F.3d at 1013. Indeed, "it would make no sense for the district court to retain jurisdiction to interpret and apply its own judgment to the future conduct contemplated by the judgment, yet have a state court construing what the federal court meant in the judgment. Such an arrangement would potentially frustrate the federal district court's purpose." *Id.* (internal quotation marks omitted).

In the face of these authorities, there is no basis for Defendants' view that "[t]he

general adjudication is inclusive of all of the Community's claims" or that the state court "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. Arizona law provides "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." A.R.S. § 45-257(B)(1); *see also id*. § 45-261(A)(1), (3) (requiring that court "shall accept information in an applicable prior decree," even "[i]f information in a prior decree conflicts with information in one or more applicable prior filings"). The Community is seeking to enforce *existing* Decree rights, not to secure *new* rights in the general adjudication. Defendants do not claim, and the state court in the general adjudication cannot grant, any rights that would impair the Community's Decree rights. If the state court attempted to do so, the Community would invoke the All Writs Act, 28 U.S.C. § 1651, to enjoin that aspect of the state court proceeding, which "by definition . . . impairs the federal court's jurisdiction" over the *res*. *Alpine*, 174 F.2d at 1015.

The Community's complaint simply requires a determination that the water at issue is Gila River main stem water as to which this Court has already decreed rights and for which Community has a prior right under the Decree. Defendants do not claim any prior right to the waters of the main stem. If, as the Community alleges, the waters at issue here are waters of the main stem to which the Community has an immemorial right under the Decree, the Court has the power to enjoin defendants from using them, whether or not they are parties to the Decree.

Even though state law may inform adjudication of the *merits* of the Community's claim—namely, whether the waters at issue are the waters of the Gila River main stem to which the Community has a Decreed right—there can be no dispute that a federal court has jurisdiction to make such a determination in cases brought to vindicate the federal rights of tribes for water for their federal reservations. In *San Carlos Apache*, the Supreme Court held that the district court had jurisdiction under § 1362. *See* 463 U.S. at 559 & n.10.

Although it ultimately upheld deference to a pending state court adjudication to avoid duplication and inconsistency, *see id.* at 570, it did so where the tribe's claims had not previously been adjudicated and where the federal court did not have prior jurisdiction over the *res* under a federal decree. And it emphasized that such federal court deference to concurrent state court adjudication of Indian water rights is not "always" appropriate. *Id.* at 569-70. Critically, unlike *San Carlos Apache*, this case is predicated on enforcement of a federal Decree that has already determined the Community's water rights and exercised exclusive jurisdiction over the main stem.

Defendants' invocation (Doc. 16 at 11) of *United States v. Adair*, 723 F.2d 1394 (9th Cir. 1983), similarly ignores the comprehensive nature of the Decree and its relationship to the general adjudication. In *Adair*, the United States filed suit seeking a declaration of the Klamath Tribe's "federal water rights," and the Ninth Circuit deemed the tribe's intervention "quite proper" in view of § 1362. *Id.* at 1407. Finding that "[p]lainly, the district court had jurisdiction" to decide "federal water rights questions," the Ninth Circuit agreed with the tribe that "the district court decision addresses a discrete water rights issue in a context that does not fragment the state general stream adjudication." *Id.* at 1400, 1404. So too here. A determination that defendants are pumping waters of the Gila River main stem does no more than vindicate the rights this Court has already recognized and quantified—and which the state court is bound to respect.

In fact, the *Smith* case provides a ready example in which a district court answered the precise question posed here: whether "[t]he waters of [the defendants'] well[s] are . . . from the subflow of the Gila River," such that their use by a landowner who "obtained no Gila River water rights" would tread on the rights of "Indian tribes . . . to the natural flow of the river" under the Decree. 625 F.2d at 279-80. This Court has that same jurisdiction here. And in any event, ultimately *Cappaert* makes clear that federal rights—and federal jurisdiction to enforce them—cannot be defeated by state law.

CONCLUSION

Defendants' motion to dismiss should be denied.

DATED this 3rd day of April 2020.

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