IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Gila River Indian Community, Plaintiff, v. Joyce Cranford, et al., Defendants.	No. CV-19-00407-TUC-SRB **ORDER**

Pending before the Court is Defendants Joyce Cranford, David Schoubroek, Eva Schoubroek, Donna Sexton, Marvin Sexton, and Patrick Sexton (collectively, "Defendants")' Rule 12(b)(1) Motion to Dismiss for Lack of Jurisdiction or to Abstain ("Motion") (Doc. 14, ("Mot.")).

I. BACKGROUND

Plaintiff Gila River Indian Community ("GRIC") is a sovereign Indian nation organized and federally recognized pursuant to § 16 of the Indian Reorganization Act of June 18, 1934. (Doc. 1, Compl. ¶ 7); 25 U.S.C. § 5123. GRIC is composed of members of the Pima and Maricopa Indian Tribes, historically known as the Akimel O'otham and Pee-Posh. (Compl. ¶ 7.)

The ancestral homeland of the Akimel O'otham and Pee-Posh came under United States sovereignty through the Treaty of Guadalupe Hidalgo in 1848 and the Gadsden Purchase of 1853. *Gila River Pima-Maricopa Indian Cmty. v. United States*, 494 F.2d 1386, 1388 (Ct. Cl. 1974). In 1859, Congress withdrew this land from the public domain

to establish what is now known as the Gila River Reservation. *Id.* From 1876 to 1915, seven Executive Orders[1] enlarged the Reservation to its current size of over 370,000 acres. *Id*. The United States continues to hold this land in trust for GRIC. *Gila River Indian Cmty. v. Henningson, Durham & Richardson*, 626 F.2d 708, 709 (9th Cir. 1980). Bisecting this land is the Gila River.

The Gila River originates in New Mexico and flows westward across Arizona through semi-arid and desert lands. *In re the Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, 127 P.3d 882, 885 n.1 (Ariz. 2006) ("*Gen. Adj. 2006*"). The Gila River and its tributaries, including the Salt, Verde, Agua Fria, Santa Cruz, and San Pedro Rivers, drain most of central and southern Arizona. Joseph M. Feller, *The Adjudication That Ate Arizona Water Law*, 49 Ariz. L. Rev. 405, 406 (2007). The Reservation is located near the confluence of the Gila and Salt Rivers, downstream of non-tribal landowners who settled along the Gila River after the Reservation's establishment. *See Gen. Adj. 2006*, 127 P.3d at 885; Feller, *The Adjudication That Ate Arizona Water Law*, 49 Ariz. L. Rev. at 414.

Throughout the early 1900s, increasing diversions of Gila River water by upstream landowners sharply decreased the amount of water available to those downstream. Feller, *The Adjudication That Ate Arizona Water Law*, 49 Ariz. L. Rev. at 414. In response, the federal government planned to dam the Gila River and construct a reservoir to store floodwaters for distribution during dry times (the "San Carlos Project"). *Gen. Adj. 2006*, 127 P.3d at 885; Feller, *The Adjudication That Ate Arizona Water Law*, 49 Ariz. L. Rev. at 414. Distribution required certainty as to who was entitled to what amounts of water. *See* Feller, *The Adjudication That Ate Arizona Water Law*, 49 Ariz. L. Rev. at 414.

The United States sought this certainty through the courts. *Gen. Adj. 2006*, 127 P.3d at 885; *San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1348 (Fed. Cir. 2011). In 1925, the United States brought suit in this Court on behalf of itself, GRIC, the San

[1] The most significant of these Executive Orders doubled the Reservation's size from 180,000 to 360,000 acres and was both authorized and ratified by Congress. *Gila River Pima-Maricopa Indian Cmty.*, 494 F.2d at 1388.

Carlos Apache Tribe, and other landowners, naming as defendants numerous individuals, irrigation districts, canal companies, and corporations, and seeking a comprehensive determination of rights to the waters of the Gila River ("Globe Equity Litigation"). *Gen. Adj. 2006*, 127 P.3d at 885.

Over the next ten years, the Court dismissed without prejudice all defendants with claims exclusively to waters of Gila River tributaries. *Id*. In 1935, the remaining parties stipulated to entry of the Globe Equity Decree (the "Decree"), a consent decree identifying and quantifying parties' claims and rights to waters of the Gila River mainstem[2] by listing priority dates, entitlement amounts, and associated lands. *See United States v. Gila Valley Irrigation Dist*., Globe Equity No. 59 (D. Ariz. June 29, 1935) ("*Globe Equity No. 59*"); Decree. The Decree, which continues to govern the use of Gila River water from its source in New Mexico to its confluence with the Salt River, is administered and enforced by a court-appointed water commissioner ("Gila Water Commissioner") authorized to cut off noncompliant water diversions. (*See* Decree at 112); Feller, *The Adjudication That Ate Arizona Water Law*, 49 Ariz. L. Rev. at 414. This Court's jurisdiction over the Decree continues to the present day. (*See* Decree at 113.)

In 1981, the Arizona Supreme Court consolidated several petitions seeking a determination of water rights to various rivers, including the Gila River, into a general stream adjudication in Maricopa County Superior Court (the "Gila Adjudication"). *Matter of Rights to Use of Gila River*, 830 P.2d 442, 445 (Ariz. 1992); *see Gen. Adj. 2006*, 127 P.3d at 886 n.3 (listing cases describing history of Gila River general stream adjudication). The stated purpose of the Gila Adjudication is to "determine all rights to the use of water obtained from the Gila River Basin System in the State of Arizona." (Doc. 14-2, Ex. B, Maricopa Super. Ct. 5/29/2086 Pre-Trial Order at 1.) Gila Adjudication orders are enforceable by the director of the Arizona Department of Water Resources ("ADWR"), in whom Arizona law vests "general control and supervision of surface water." *United States*

[2] That the Globe Litigation concerned only mainstem rights is reflected in the Decree and expressly recognized by the Arizona Supreme Court. *Gen. Adj. 2006*, 127 P.3d at 894.

v. Verde Ditch Co., No. 1 CA-CV 15-0690, 2017 WL 1364860, at *4 (Ariz. Ct. App. Apr. 13, 2017); A.R.S. § 45-103(B). Excluded from the ADWR director's authority is power over the "distribution of water reserved to special officers appointed by courts under existing judgments or decrees." A.R.S. § 45-103(B).

Defendants are individuals who own land near the Gila River upstream of the Reservation. (Compl. ¶¶ 26, 34, 45–46.) GRIC alleges that since at least 2016, Defendants have irrigated their lands with well water consisting in whole or in part of waters of the Gila River. (*Id.* ¶¶ 23, 24.) Because Defendants' lands were not cultivated at the time of the Globe Equity Litigation, neither Defendants nor their predecessors-in-interest are parties to the Decree. (*Id.* ¶¶ 1, 28, 36, 49; Doc. 15, Resp. in Opp'n to Mot. ("Resp.") at 6; Doc. 15-2, Ex. B, 1935 Aerial Image; Decree.) Consequently, Defendants' lands lack Decree rights. (Compl. ¶¶ 1, 28, 36, 49; Mot. at 2.)

On August 14, 2019, GRIC filed a Complaint in this Court alleging that Defendants are unlawfully pumping Gila River water in derogation of its rights. (Compl. ¶¶ 1–6.) GRIC requests that the Court: (1) declare that Defendants are irrigating their lands with waters of the Gila River without associated Decree rights; (2) declare specifically which of Defendants' wells are pumping Gila River water; (3) order that the Gila Water Commissioner cut off and seal Defendants' wells; and (4) enjoin Defendants from diverting Gila River water to irrigate their lands. (*Id.* at 10–11.)

On September 26, 2019, Defendants filed their Motion, arguing that (1) the Court lacks jurisdiction to hear GRIC's claims, and (2) in the alternative, the Court must abstain in deference to the ongoing Gila Adjudication. (Mot. at 1.) On October 28, 2019, GRIC filed its Response, arguing that (1) the Decree confers exclusive jurisdiction over the waters of the Gila River mainstem, (2) the Gila Adjudication court lacks authority to issue an order inconsistent with the Decree, and (3) abstention is neither permitted nor warranted. (Resp. at 1, 5–15.) Because neither party's filings addressed 28 U.S.C. § 1362, the Court ordered additional briefing on the scope of jurisdiction it confers. (Doc. 17, 3/18/20 Order.) On April 3, 2020, parties filed supplemental briefs presenting arguments based on § 1362. (*See*

Doc. 21, Supp. Br. of GRIC in Opp'n to Mot. ("GRIC Supp."); Doc. 20, Defs.' Supp. Br. Pursuant to 3/18/20 Order ("Defs.' Supp.").) This Order responds to all arguments.

II. LEGAL STANDARD

Federal courts must dismiss claims over which they lack subject-matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). "A Rule 12(b)(1) jurisdictional attack may be facial or factual." *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). A facial attack "asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction." *Id.* A factual attack "contests the truth of the plaintiff's factual allegations, usually by introducing evidence outside the pleadings." *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (citing *Safe Air for Everyone*, 373 F.3d at 1039). In either instance, the party asserting jurisdiction bears the burden of proof. *Industrial Tectonics, Inc. v. Aero Alloy*, 912 F.2d 1090, 1092 (9th Cir. 1990). Where abstention is requested, the party opposing jurisdiction bears the burden of proof. *Lao v. Wickes Furniture Co.*, 455 F. Supp. 2d 1045, 1057 (C.D. Cal. 2006).

Defendants' Motion presents a facial attack on the Court's jurisdiction. Although Defendants contest the factual accuracy of GRIC's allegation that Defendants are impermissibly pumping Gila River subflow,[3] their jurisdictional challenge is not based on this alleged inaccuracy. (*See* Mot. at 3.) Defendants maintain that even if they are pumping subflow, the Court lacks jurisdiction to determine whether this pumping is lawful. Such an argument attacks the sufficiency of the allegations in the complaint, not the truth of the factual allegations. The Court thus accepts GRIC's allegations as true, including the allegation that Defendants are pumping subflow, and considers whether these allegations

[3] "Subflow," a legal fiction, is defined as "those waters which slowly find their way through the sand and gravel constituting the bed of the stream, or the lands under or immediately adjacent to the stream, and are themselves a part of the surface stream." *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 9 P.3d 1069, 1073 (Ariz. 2000) ("*Gen Adj. 2000*"). Subflow pumping is governed by the same law that governs the surface stream. *Id.* Groundwater pumping is governed by a different doctrine. *Id.* (groundwater pumping governed by doctrine of reasonable use). Because the boundary between surface and groundwater "is not at all clear," identifying subflow "turns ultimately on resolution of factual questions." *Id.* at 1073, 1076. Whether Defendants' wells are pumping subflow is key to this case but not to this Order.

suffice to invoke the Court's jurisdiction. *See Leite*, 749 F.3d at 1121; (Compl. ¶¶ 24, 31, 40, 42, 56, 58, 60, 62, 64.) The issues squarely before the Court are: (1) whether the Court has jurisdiction over an action brought by a tribe to enjoin non-tribal landowners, who are not parties to the Decree and whose lands lack appurtenant Decree rights, from pumping Gila River mainstem subflow; and (2) if so, whether the Court must or should abstain in deference to the ongoing Gila Adjudication.

III. JURISDICTION

As a court of limited jurisdiction, this Court may only hear cases as permitted by Congress and the Constitution. *Kokkonen v. Guardian Life Ins.*, 511 U.S. 375, 377 (1994). Jurisdiction is presumed lacking until the plaintiff proves otherwise. *Id.* GRIC's Complaint asserts four independent bases for jurisdiction: subject-matter jurisdiction under (1) 28 U.S.C. § 1362 and (2) 28 U.S.C. § 1331; (3) continuing jurisdiction over the interpretation, administration, and enforcement of the Decree; and (4) inherent or ancillary jurisdiction to manage the Court's proceedings, vindicate its authority, and effectuate its decrees. (Compl. ¶¶ 13–17.) The Court first considers whether subject-matter jurisdiction exists under §§ 1362 or 1331.

A. 28 U.S.C. § 1362

Section 1362, 28 U.S.C., confers jurisdiction over cases brought by tribes that "aris[e] under the Constitution, laws, or treaties of the United States." It provides in full:

> The 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. At the time Congress passed § 1362, 28 U.S.C. § 1331 granted jurisdiction over cases "aris[ing] under the Constitution, laws, or treaties of the United States," whose amount in controversy "exceeds . . . $10,000."[4] Section 1362 has the

[4] Section 1331 provided in pertinent part:

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises

purpose and effect of eliminating § 1331's $10,000 amount-in-controversy requirement in cases brought by tribes. *Hous. Auth. of City of Seattle v. State of Wash., Dep't of Revenue*, 629 F.2d 1307, 1312 (9th Cir. 1980). As the Ninth Circuit recently recognized, subsequent removal of this requirement[5] rendered § 1362 "largely superfluous" to § 1331. *Coeur d'Alene Tribe v. Hawks*, 933 F.3d 1052, 1055 (9th Cir. 2019).

Section 1362, however, is not wholly superfluous to § 1331. Before § 1362, tribes were "relegated . . . to state court" unless the United States chose to protect a tribe's rights in federal court by suing in its capacity as tribal trustee under 25 U.S.C. § 175.[6] *See Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 559 n.10 (1983). As tribes perceived state courts as "inhospitable to Indian rights,"[7] this was troubling. *Id.* at 577 n.8 (Stevens, J., dissenting). Responding to this situation, Congress enacted § 1362 to "open 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" and thus "assure[] [tribes] of the same judicial determination whether the action is brought in their behalf by the Government or by their own attorneys." *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 472 (1976) (quoting H.R. Rep. No. 2040, 89th Cong., 2d Sess., 2–3 (1966), U.S. Code Cong. & Admin. News 1966, p. 3147); *Nisqually Indian Tribe v. Gregoire*, 623

> under the Constitution, laws, or treaties of the United States. . . .

Henningson, Durham & Richardson, 626 F.2d at 709.

[5] Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96–486, 94 Stat. 2369 (1980).

[6] Section 175, 25 U.S.C., provides in full:

> In all States and Territories where there are reservations or allotted Indians the United States attorney shall represent them in all suits at law and in equity.

[7] This perception was not unjustified. *See San Carlos Apache Tribe*, 463 U.S. at 575 (Stevens, J., dissenting) ("States and their citizens may well be more antagonistic toward Indian reserved rights than other federal reserved rights, both because the former are potentially greater in quantity and because they provide few direct or indirect benefits to non-Indian residents."); *e.g., Heckman v. United States*, 224 U.S. 413, 430 (1912) (noting that "[t]he continued presence of the Eastern Cherokees gave rise to serious controversies and oppressive legislation in the states where they resided"); *id.* at 431–32 (describing "[state] legislation which contemplated the dissolution of the tribal organizations and the distribution of the tribal property").

F.3d 923, 930–31 (9th Cir. 2010). Because of this history, a tribe's ability to sue under § 1362 is understood to be "at least in some respects as broad as that of the United States suing as the tribe's trustee." *Moe*, 425 U.S. at 473.

The full extent of § 1362's reach, however, is "less than clear." *Henningson, Durham & Richardson*, 626 F.2d at 712. No court has ever held that a tribe's ability to sue under § 1362 is in *all* respects as broad as the United States' is under § 175. Nor could a court so hold: unlike § 175, § 1362 is limited to cases "arising under" federal law. *See* 25 U.S.C. § 175. Because § 1362's "arising under" requirement appears disharmonious with its purpose of opening federal courts to tribes for cases that could have been brought by the United States, the outer boundaries of its jurisdictional grant are not readily discernable. *See Henningson, Durham & Richardson*, 626 F.2d at 712.

But with time, clarity has emerged. Courts have identified two categories of claims that are (1) clearly within, and (2) clearly outside of, § 1362's scope. Claims clearly within § 1362's scope are those brought by a tribe "to protect its federally derived property rights." *See Fort Mojave Tribe v. Lafollette*, 478 F.2d 1016, 1018 (9th Cir. 1973); *Henningson, Durham & Richardson*, 626 F.2d at 714; *see also Mescalero Apache Tribe v. Martinez*, 519 F.2d 479, 482 (10th Cir. 1975) (jurisdiction under § 1362 "premised" on "finding a federally derived right"). Federally derived property rights include "possessory rights of the tribes to tribal lands" that are "granted and governed by federal treaties and laws[.]" *Henningson, Durham & Richardson*, 626 F.2d at 714. Claims clearly outside of § 1362's scope are "run-of-the-mill" contract claims in which neither a tribe's "possessory right to [] land" nor "any rights granted under any federal treaty or statute" are at issue. *See Cabazon Band of Mission Indians v. Wilson*, 124 F.3d 1050, 1055 (9th Cir. 1997); *Henningson, Durham & Richardson*, 626 F.2d at 714.

GRIC's claims fall into the first category. GRIC's water rights, which are held in trust by the United States, were "impliedly reserve[d]" when Congress established the Reservation in 1859. *See In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 35 P.3d 68, 72 (Ariz. 2001) ("*Gen. Adj. 2001*") (citing *United States v. New*

Mexico, 438 U.S. 696, 700 (1978), *Cappaert v. United States*, 426 U.S. 128, 138 (1976), and *Arizona v. California*, 373 U.S. 546, 598–99 (1963)). As the Supreme Court explained, Congress reserved these rights pursuant to its power under the Constitution:

> Reservation of water rights is empowered by the Commerce Clause, Art. I, [§] 8, which permits federal regulation of navigable streams, and the Property Clause, Art. IV, [§] 3, which permits federal regulation of federal lands. The [implied-reservation] doctrine applies to Indian reservations and other federal enclaves, encompassing water rights in navigable and nonnavigable streams.

Cappaert, 426 U.S. at 138 (1976). The Constitution is, of course, federal law. *See Marbury v. Madison*, 5 U.S. 137, 178 (1803). GRIC's water rights are thus derived from federal law. Because GRIC brought suit to protect these federally derived property rights, GRIC's claims fall clearly within the scope of § 1362.

Further supporting this conclusion is that the United States could have brought this case in its capacity as trustee. The United States—not GRIC—owns these water rights, much like the United States—not GRIC—owns the reserved land to which these water rights are appurtenant. *See Gen. Adj. 2001*, 35 P.3d at 72 (United States acquires reserved water rights vesting on date reservation is established); *Henningson, Durham & Richardson*, 626 F.2d at 709 (United States holds title to reservation lands). Indeed, in *United States v. Smith*,[8] the United States brought claims identical to those brought here. In *Smith*, the United States, "acting on its own behalf and on behalf of Indian tribes which have rights to the natural flow of the [Gila] river[,]" sued an individual who owned land "near the Gila River" and whose well was allegedly "tak[ing] water from the river" without any Decree rights. 625 F.2d at 279. Had the district court found the landowner to be pumping Gila River subflow, the Ninth Circuit recognized, the United States would have been entitled to "injunctive and monetary relief."[9] *Id.* This case tracks *Smith* in all but one respect: GRIC, not the United States, has sued.

GRIC's claims are unequivocally covered by § 1362, and exercising jurisdiction

[8] 625 F.2d 278, 279 (9th Cir. 1980).
[9] The district court's finding that the landowner was not pumping subflow is of no consequence, aside from illustrating the court's jurisdiction to make this finding.

over these claims permits GRIC to bring "the kind of claims that could have been brought by the United States as trustee, but for whatever reason were not so brought." *See Moe*, 425 U.S. at 472. The Court has jurisdiction under § 1362.

B. 28 U.S.C. § 1331

Additionally and alternatively, the Court holds that § 1331 confers jurisdiction over this action. Section 1331, 28 U.S.C., provides in full:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Courts have tended to construe §§ 1331 and 1362 in tandem, finding jurisdiction existing under both[10] or lacking under either.[11] Where a tribe asserts jurisdiction only under § 1331, the analysis is limited to that provision.[12] The Court is unaware of any case finding jurisdiction conferred by one provision but not the other. Until such a case surfaces, the precise degree of overlap between §§ 1331 and 1362 will remain unclear.

In the Ninth Circuit, courts have jurisdiction over a tribal suit brought under § 1331 when the case "presents a substantial issue of federal law." *Coeur d'Alene Tribe*, 933 F.3d at 1054, 1057 (rejecting district court's inquiry of whether complaint on its face places "federal statute or law . . . in dispute"). A case presents a substantial issue of federal law when its resolution requires recourse or reference to federal law. *See id.* at 1060; *Ariz. Pub. Serv. Co. v. Aspaas*, 77 F.3d 1128, 1132 (9th Cir. 1995). *Coeur d'Alene Tribe* and *Aspaas* illustrate this analysis.

In *Coeur d'Alene Tribe*, a tribe filed suit under § 1331 to enforce a tribal court judgment against a non-member for encroachment without a permit, a violation of tribal law. *Coeur d'Alene Tribe*, 933 F.3d at 1054, 1055 n.3. The Ninth Circuit's § 1331 analysis began with the recognition that "[t]ribal sovereignty . . . 'exists only at the sufferance of Congress and is subject to complete defeasance.'" *Id.* at 1056 (quoting *United States v.*

[10] *E.g.*, *Oneida Indian Nation v. Cty. of Oneida*, 414 U.S. 661 (1974); *Kialegee Tribal Town v. Zinke*, 330 F. Supp. 3d 255, 264 (D.D.C. 2018).
[11] *E.g.*, *Mescalero*, 519 F.2d at 480; *Henningson, Durham & Richardson*, 626 F.2d at 709.
[12] *E.g.*, *Coeur d'Alene Tribe*, 933 F.3d at 1060.

Wheeler, 435 U.S. 313, 323 (1978)). This is important, the Ninth Circuit explained, because it means that "federal law defines the outer boundaries of an Indian tribe's power over non-Indians[.]" *Id.* (quoting *Nat'l Farmers Union Ins. v. Crow Tribe of Indians*, 471 U.S. 845, 851 (1985)). An action to enforce a tribal court judgment requires "a showing of [the tribe's] authority over nonmembers." *Id.* at 1059 (quotation omitted). Because such a showing would rest on federal law defining tribal authority, the case presented "a substantial issue of federal law" sufficient to confer jurisdiction under § 1331. *Id.* at 1056–57 (quoting *Plains Commerce Bank v. Long Family Land & Cattle Co.*, 554 U.S. 316, 324 (2008)).

The analysis in *Aspaas* proceeded similarly. Plaintiff, a non-tribal utility company who operated an electric plant on a reservation, had previously been ordered by a tribal court to comply with the tribe's anti-discrimination laws. *Aspaas*, 77 F.3d at 1129–30. The utility sued tribal officials under § 1331, contesting the tribe's authority to regulate its policies. *Id.* In rejecting the tribe's jurisdictional challenge, the Ninth Circuit traced the tribe's authority to its root in federal law. The court explained:

> The federal texture of an inquiry into a tribe's authority over a non-member can be explained by the historical evolution of Indian authority: "At one time [tribes] exercised virtually unlimited power over their own members as well as those who were permitted to join their communities. Today, however, the power of the federal government over the Indian tribes is plenary."

Id. at 1132–33 (quoting *Nat'l Farmers*, 471 U.S. at 851). Because tribal authority stems from the federal government's plenary power over tribes, an issue involving tribal authority must ultimately be answered "by reference to federal law." *Id.* at 1132. Such recourse made the issue sufficiently "federal [in] nature" to invoke jurisdiction under § 1331. *Id.* at 1132, 1134.

A case brought by a tribe to protect its water rights will nearly always require recourse to federal law. Tribal water rights are created by the federal government and rooted in federal law. *See supra* Section II(A). To ascertain the existence and extent of water rights "[f]or Indian reservations, courts look to the treaties, executive orders, and

statutes that set aside reservation land for the tribe in question." *Navajo Nation v. Dep't of the Interior*, 876 F.3d 1144, 1155 (9th Cir. 2017). Treaties, executive orders, and statutes are federal law. *See Terry v. Northrup Worldwide Aircraft Servs., Inc.*, 786 F.2d 1558, 1560–61 (11th Cir. 1986) (stating that when "federal law controls the enforcement and construction of executive order" at issue, suit "arise[s] under federal law" for jurisdictional purposes). Cases brought to protect tribal water rights will thus always raise a "substantial issue of federal law."

This case, specifically, will require recourse to federal law. The United States owns the land comprising the Gila River Reservation. *Henningson, Durham & Richardson*, 626 F.2d at 709. GRIC's rights to this land—and, by extension, to the water rights appurtenant to this land—are "granted and governed by federal treaties and laws[.]" *See Henningson, Durham & Richardson*, 626 F.2d at 714; *see Cappaert*, 426 U.S. at 138 (United States' land reservation includes reservation of water rights). In the Globe Equity Litigation, this Court looked to federal law to identify and quantify these rights. *See Globe Equity No. 59.* These rights remain "subject to complete defeasance" by Congress. *See Coeur d'Alene Tribe*, 933 F.3d at 1056. While the Decree will serve as *evidence* of the extent of GRIC's entitlement, and Defendants' lack of entitlement, to Gila River water, only recourse to federal law—including the 1859 reservation of land, subsequent executive enlargements, and any additional post-Decree legislation affecting GRIC's rights—can fully establish the continued existence of GRIC's rights. The Arizona Supreme Court recognized as much in in the context of groundwater rights, when it held that

> once a federal reservation establishes a reserved right to groundwater, it may invoke federal law to protect its groundwater from subsequent diversion to the extent such protection is necessary to fulfill its reserved right.

In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source, 989 P.2d 739, 750 (Ariz. 1999). This case presents a substantial issue of federal law, and the Court has jurisdiction under §1331.[13] Because jurisdiction lies under either §§ 1362 or 1331, the

[13] The analyses in *Coeur d'Alene Tribe*, *Aspaas*, and this case suggest an explanation for courts' tendency to construe §§ 1331 and 1362 in tandem. If a tribe sues to protect a

Court need not determine whether the Decree itself confers continuing or ancillary jurisdiction over this matter.

IV. ABSTENTION

"Comity or abstention doctrines may . . . permit or require the federal court to stay or dismiss the federal action in favor of the state-court litigation." *Chapman v. Deutsche Bank Nat'l Tr. Co.*, 651 F.3d 1039, 1043 (9th Cir. 2011) (quoting *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 292 (2005)). Defendants argue that two doctrines warrant dismissal: (1) the prior exclusive jurisdiction doctrine and (2) the *Colorado River* doctrine. (Mot. at 4–11; Defs.' Supp. at 7.)

A. Prior Exclusive Jurisdiction

The prior exclusive jurisdiction doctrine is based on concerns of comity. *Sexton v. NDEX W., LLC*, 713 F.3d 533, 536 (9th Cir. 2013). It provides that "if a state or federal court 'has taken possession of property, or by its procedure has obtained jurisdiction over the same,' then the property under that court's jurisdiction 'is withdrawn from the jurisdiction of the courts of the other authority as effectually as if the property had been entirely removed to the territory of another sovereign.'" *Id.* (quoting *State Eng'r v. S. Fork Band of Te–Moak Tribe of W. Shoshone Indians*, 339 F.3d 804, 809 (9th Cir. 2003)). Otherwise stated, "when 'one court is exercising *in rem* jurisdiction over a *res*, a second court will not assume *in rem* jurisdiction over the same *res*.'" *Id.* at 536 (quoting *Chapman*, 651 F.3d at 1043). This doctrine applies equally to actions that are *quasi in rem*. *State Eng'r*, 339 F.3d 811. An action is *quasi in rem* where "it is the parties' interests in the property that serve as the basis of the jurisdiction[.]" *Id.* (citation omitted) (quoting Black's Law Dictionary 1245 (6th ed. 1990)).

This action is *quasi in rem* because parties' water rights serve as the basis of the Court's jurisdiction. If a state court is presently determining these same water rights, then,

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property right that is federally derived—thus invoking jurisdiction under § 1362—the court must look to that right's origin in federal law to determine the existence and scope of that right. Just as federal law provides the source and defines the scope of tribal power, federal law provides the source and defines the extent of tribal property interests. By virtue of being federally derived, then, tribal property rights raise a substantial issue of federal law.

this Court will dismiss. Defendants argue that because the "[Gila] Adjudication already exercised jurisdiction over the *res*—the waters of the Gila River System and Source[,]" this Court's exercise over some of that *res* creates an impermissible overlap. (Defs.' Supp. at 8; Mot. at 4.) The Court disagrees.

First, Defendants misapprehend the scope of the Gila Adjudication. As the Arizona Supreme Court recognized in 2006, the Gila Adjudication is determining only "[t]he rights of those with claims to the Gila River tributaries," not those with mainstem claims. *Gen. Adj. 2006*, 127 P.3d at 893–94. It is *this* Court that has jurisdiction over claims to mainstem waters, which began with the Globe Equity Litigation and continues to this day. *Id.* at 885; (Decree at 113). The Gila Adjudication court lacks jurisdiction to determine mainstem rights. Since this case involves Defendants' alleged use of mainstem water, this Court has exclusive jurisdiction.[14]

Further, Defendants do not contend that their rights are actually being adjudicated in the Gila Adjudication. (*See* Mot. at 4–11.) Citing *Gabel v. Tatum*,[15] Defendants suggest that their actual participation in the Gila Adjudication is not required because the Gila Adjudication is inclusive of the issues raised here. (*Id.* at 6–7.) In *Gabel*, a plaintiff whose property abutted a ditch diverting waters from Tonto Creek sued ninety families in county court, seeking a declaration of water rights to the ditch. 707 P.2d at 326. At the time of filing, a general stream adjudication for the Salt River Watershed ("*In Re Salt River*"), which encompassed the Salt River's mainstem and tributaries, including Tonto Creek, was underway. *Id.* (citing *In Re Adjudication of Conflicting Claims to the Salt River and Its Tributaries*, Maricopa County Cause No. W–1). *In Re Salt River* was "inclusive of all issues raised" by plaintiff because its geographic scope included the ditch and its resolution would dispose of plaintiffs' claims. *Id.* at 327. Given this overlap, dismissal was warranted. *Id.*

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[14] The Gila Adjudication's limited scope tracks the ADWR director's limited authority, which does not extend to the "distribution of water reserved to special officers appointed by courts under existing judgments or decrees." A.R.S. § 45-103(B). This carve-out includes distribution of mainstem water, which is overseen by the Gila Water Commissioner pursuant to the Decree. (Decree at 112.)

[15] 707 P.2d 325 (Ariz. Ct. App. 1985).

Gabel's factual differences render its rationale inapplicable. Unlike the general adjudication in *Gabel*, the Gila Adjudication is *not* adjudicating the rights at issue here—mainstem rights. Therefore, the Gila Adjudication is not inclusive of the issues raised by this case.[16] Defendants' remaining arguments are without merit.[17] Because Defendants have failed to demonstrate that the rights at issue here are presently being litigated in state court, the prior exclusive jurisdiction doctrine does not apply.

B. *Colorado River*

Defendants argue the Court should abstain under *Colorado River Water Conservation District v. United States*[18] and progeny "for the sake of conserving judicial resources while ensuring claims are comprehensively adjudicated." (Mot. at 8.) "The *Colorado River* doctrine is an exception to the general rule that where a district court has statutory jurisdiction, it has a 'virtually unflagging obligation' to exercise that jurisdiction." *United States v. Adair*, 723 F.2d 1394, 1400–01 (9th Cir. 1983) (citing *Colorado River*, 424 U.S. at 817). *Colorado River* and its progeny "counsel abstention in the interest of 'wise judicial administration' . . . in the majority of water rights adjudications." *Id.* at 1401. Federal courts should abstain from deciding water-rights cases where doing so will avoid: (1) duplicative proceedings, (2) "inconsistent dispositions of property," or (3) "an unseemly and destructive race to see which forum can resolve the same issues first[.]" *San Carlos Apache Tribe*, 463 U.S. at 567 (quoting *Colorado River*, 424 U.S. at 819).

Abstention is not warranted here. Defendants have not proved that the issues raised here are duplicative of those in the Gila Adjudication. If GRIC is correct that Defendants

[16] Defendants' arguments based on *Yavapai-Apache Nation v. Fabritz-Whitney*, in which the Arizona Court of Appeals applied *Gabel* to a similar fact pattern, are rejected for the same reasons. (Mot. at 4); 260 P.3d 299, 309 (Ariz. Ct. App. 2011).

[17] The Court rejects Defendants' argument that the Court should follow Arizona's "public policy" of litigating water rights in general stream adjudications because "the jurisdiction of the [federal] court . . . is not subject to State limitation[.]" (Mot. at 5); *State Eng'r*, 339 F.3d at 808 (quoting *Ry. Co. v. Whitton's Adm'r*, 80 U.S. (13 Wall.) 270, 286 (1871)). Defendants' emphasis that this case turns on state law has no bearing on the applicability of the prior exclusive jurisdiction doctrine. (Mot. at 7–9.) Defendants' remaining arguments are considered in connection with the *Colorado River* doctrine. (*See* Mot. at 5–7.)

[18] 424 U.S. 800, 817 (1976).

are pumping mainstem water, then the Decree will determine if Defendants have any rights to the water; these rights cannot be redetermined in state court. If Defendants correctly assert that they are *not* pumping mainstem water, then they are pumping groundwater. Defendants' groundwater rights are not within the purview of the Gila Adjudication, whose stated and statutory purpose is to determine surface water rights.[19] Further, there is little risk of an inconsistent determination of water rights. The legal issue presented here—whether Defendants' well pumping is lawful—will turn on whether Defendants are pumping mainstem subflow. Subflow is a mixed question of law and fact controlled by Arizona law. *See Gen Adj. 2000*, 9 P.3d at 1073. Concerns of the Court applying Arizona law inconsistent with the Gila Adjudication court are unfounded. If a legal aspect of Arizona's subflow test is presently being determined by the Gila Adjudication court, and that aspect is relevant to this case, the Court can stay proceedings until it is finalized. There is no race to hash out the contours of the subflow test. Because no *Colorado River* circumstance applies, abstention is unwarranted.

V. CONCLUSION

The Court has jurisdiction under 28 U.S.C. § 1362 and alternatively, under 28 U.S.C. § 1332. Neither the prior exclusive jurisdiction doctrine nor any abstention doctrine apply.

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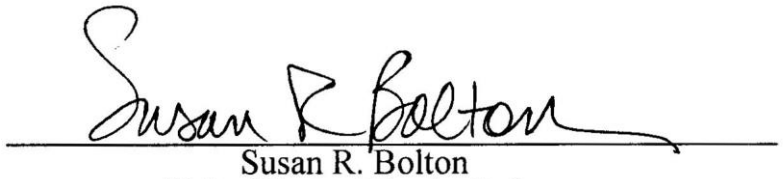
[19] General stream adjudications exist to determine the "nature, extent and relative priority" of water rights in a "river system and source." A.R.S. § 45-252(A). The stated purpose of the Gila Adjudication is to "determine all rights to the use of water obtained from the Gila River Basin System in the State of Arizona." (Doc. 14-2, Ex. B, Maricopa Super. Ct. 5/29/2086 Pre-Trial Order at 1.). Arizona's bifurcated system of water rights, unlike that other western states, continues to treat surface and groundwater as distinct concepts governed by distinct laws. *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 857 P.2d 1236, 1240 (Ariz. 1993); *Silver v. Pueblo Del Sol Water Co.*, 423 P.3d 348, 352 (Ariz. 2018) (surface water usage governed by prior appropriation; groundwater usage governed by reasonable use).

IT IS ORDERED denying Defendants' Rule 12(b)(1) Motion to Dismiss for Lack of Jurisdiction or to Abstain (Doc. 14).

Dated this 12th day of May, 2020.



Susan R. Bolton
United States District Judge