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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Gila River Indian Community,

Plaintiff,

v.

Clint Cranford, et al.,

Defendants.

No. 4:19-cv-00407-SHR

Gila River Indian Community's Response in Opposition to Defendants' Motion for Summary Judgment on Claim Preclusion Grounds

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INTRODUCTION

The Gila River Indian Community (the "Community") hereby opposes the Defendants' motion for summary judgment on claim preclusion grounds. Claim preclusion does not bar any of the claims in this case because none of the claims could have been brought in any previous lawsuit. The complaint here challenges Defendants' pumping of Gila River water from 2016 to present. Pumping that did not occur until 2016 or later could not have formed the basis for any cause of action in 2007, when the Community filed the complaint that Defendants argue precludes this suit (the "2007 Complaint"). Under controlling law the Community previously cited (Doc. 78 at 34–35[1]) and Defendants fail to address, claim preclusion does not apply to claims seeking redress for wrongful conduct giving rise to a cause of action after the prior lawsuit was filed. "Claim preclusion generally does not bar claims that are predicated on events that postdate the filing of the initial complaint." *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 140 S. Ct. 1589, 1596 (2020) (citation omitted). "[C]laim preclusion does not apply to claims that were not in existence and could not have been sued upon—*i.e.*, were not legally cognizable—when the allegedly preclusive action was initiated." *Media Rights Techs., Inc. v. Microsoft Corp.*, 922 F.3d 1014, 1021 (9th Cir. 2019). This rule applies "even if [the claim] arises out of a continuing course of conduct that provided the basis for the earlier claim." *Frank v. United Airlines, Inc.*, 26 F.3d 845, 851 (9th Cir. 2000); *accord Media Rights*, 922 F.3d at 1021.

Defendants' claim preclusion argument stems from their mistaken idea that the Community's Settlement Agreement implicitly included an unconditional waiver of claims for all future pumping. They argue, in effect, that such a waiver was accomplished by the filing and dismissal of the 2007 Complaint pursuant to the Settlement Agreement, even though the Settlement Agreement contains no such waiver and instead specifically reserves the right to assert the claims in this lawsuit. When the Community settled its

[1] Page numbers for docket entries are to the ECF pagination in the header.

water rights claims and agreed to forgo certain claims for *past* pumping upstream, including claims for damages and unjust enrichment, it specifically reserved the right to protect its newly settled water rights from illegal upstream pumping. Claim preclusion applies only to claims in existence at the filing of the previous complaint, and accordingly the Community's filing and dismissal with prejudice of the 2007 Complaint as part of the Settlement resolved only claims based on conduct up to that point.

As to future conduct, the Settlement provided a specific, conditional framework for Defendants to continue pumping in compliance with the Agreement. Upper Valley landowners could sign the Upper Valley Forbearance Agreement ("UVFA") and sever and transfer Decree rights to their lands lacking Decree rights ("Hot Lands"). If properly filed sever and transfer applications were rejected, the lands could still be irrigated as "Special Hot Lands" in compliance with specified conditions. The Community specifically reserved its claims for future conduct against persons who, like Defendants, are pumping mainstream water without Decree rights and failed to seek Special Hot Lands status. Community's Statement of Material Facts (Doc. 79) ("SOF") ¶¶ 63, 64, Defendants' Response to SOF (Doc. 86) ("RSOF") ¶¶ 63, 64. The 2007 dismissal gave Defendants a clean slate by settling with finality the pumping claims in existence at that time. It did not grant indefinite immunity from suit, and the Defendants' pumping in violation of the Decree from 2016 to present is fully subject to this Court's Decree enforcement authority.

BACKGROUND

The Community's Past Complaints Against Upstream Pumping

As noted in the Community's motion for summary judgment, pumping of Gila River water upstream of the Community has been a longstanding Decree enforcement issue. *See* Doc. 78 at 10. On December 27, 1982, the Community moved to intervene in the Globe Equity litigation. Case No. 4:31-cv-0059 ("*GE 59*"), Doc. 1428. Three days later, on December 30, 1982, the Community filed in this Court a complaint (the "1982 Complaint") against various defendants seeking money damages and injunctive relief for

illegal diversions and pumping of Gila River water upstream of the Community in violation of the Community's prior and superior rights. The clerk's office docketed the 1982 Complaint separately as No. Civ. 82-2185-PHX-CAM. The Community voluntarily dismissed the 1982 Complaint without prejudice on April 18, 1983. Case No. 82-2185, Order dated April 18, 1983. On May 9, 1983, the Court granted the Community's motion to intervene in the Globe Equity proceedings for the purpose of Decree enforcement (*GE 59*, Doc. 1454), and on January 6, 1984, the Community filed its complaint in intervention (*GE 59*, Doc. 1462 ("Complaint in Intervention")). Count VIII of the Complaint in Intervention challenged illegal pumping in the Upper Valley. *GE 59*, Doc. 1462.

In 1990, this Court stayed all claims against illegal pumping, including Count VIII of the Complaint in Intervention and claims filed separately by the United States and the San Carlos Apache Tribe (the "Tribe"). *GE 59*, Doc. 3348. After the Arizona Supreme Court announced its decision in *Gila IV* on September 22, 2000, this Court lifted the stay of pumping claims on December 21, 2000. *GE 59*, Doc. 5034. But rather than allow proceedings on the pending, stayed complaints, the Court ordered the Community, the Tribe, and the United States to file a new complaint "on the pumping issue only," which they did on March 16, 2001 (the "2001 Complaint"). *Id.* On August 20, 2001, the Court dismissed without prejudice defendants "who are not pumping from decreed land" without providing any reason. *GE 59*, Doc. 5291. After a trial on the 2001 Complaint, the trial judge withdrew without ruling, again without providing any explanation. *GE 59*, Order dated Mar. 29, 2005 (Doc. 6383) ("2005 Bolton Order") at 1. In 2005, the newly assigned judge, Judge Bolton, ruled as a matter of law that *Gila IV* defines subflow for purposes of the Globe Equity Decree. *Id.* at 7. In 2010, the Court reaffirmed that ruling and held that "pumping subflow of the Gila River, like diverting surface flow, requires a Decree water right. The use of a well to pump subflow of the Gila River without an associated Decree water right is a violation of the Decree." *United States v. Gila Valley Irrigation Dist.,* No. 4:31-cv-0061-TUC (D. Ariz.), Order dated Aug. 3, 2010 (Doc. 145)

("2010 Bolton Order") at 63.

The Community's Water Settlement Agreement

As a general matter, the Gila River Indian Community Water Rights Settlement Agreement ("Settlement Agreement" or "SA") settled past and present claims for injury to the Community's water rights, including claims for illegal pumping that were pending in this Court in 2007. The Settlement Agreement wiped the slate clean for past pumping in the Upper Valley by the specified defendants (some of the defendants in the 1982 Complaint were excluded from the 2007 Complaint). That is, the Community agreed not to seek damages, sue for unjust enrichment, or seek any other redress from the specified 2007 Complaint defendants or their successors in interest for the decades of illegal pumping upstream of the Community and irrigation of lands lacking Decree rights. The Settlement Agreement required that the Community re-file and dismiss with prejudice the allegations in the 1982 Complaint, which had sought, among other things, an accounting of past water usage and compensatory and punitive damages. *See* SA ¶ 25.17.1 and Exh. 25.17.1A.[2] The Community did so. As to claims for future illegal pumping, the Settlement Agreement expressly reserved the Community's right to bring them, but also provided conditions under which the Community would agree to *forbear* from bringing certain claims *within its reserved rights*. This conditional forbearance was the subject of the UV Forbearance Agreement, wherein the Community agreed that, for those pumpers who complied with the requirements of the UVFA, the Community would forbear from exercising certain of its retained Decree enforcement rights.[3]

The Settlement Agreement specifically addressed, in great detail, which claims and rights were being waived and settled, and which were being reserved. In the more than thirty pages of reservations of rights, the Community reserved all claims for violations of the Decree, subject to Paragraph 26.0 and Exhibits 26.1 through 26.5:

[2] The Settlement Agreement is available on the *GE 59* Docket at Docs. 6459–6481 and online at https://digitalrepository.unm.edu/gricwrs/.

[3] The UVFA is available on the *GE 59* Docket at Doc. 6482.

25.12 Reservation of rights and retention of claims by the Community and the United States.

25.12.1 Notwithstanding the waiver of claims and release described in Subparagraph 25.2 and Exhibit 25.2, *the Community* on behalf of itself and its Members (but not Members in their capacity as Allottees) and the United States on behalf of the Community and Members (but not Members in their capacity as Allottees) *shall retain any right to:*

25.12.1.3 Subject to Paragraph 26.0 and Exhibits 26.1 through 26.5, *assert claims for injuries to, and seek enforcement of, the rights of the Community and Members under the Globe Equity Decree* including, but not limited to, the judgment and decree entered by the Globe Equity Enforcement Court, the form of which is attached as Exhibit 25.18B . . . .

Paragraph 26.0 provides for certain limited safe harbors, but only for "Non-GE 59 Water Users," a defined term that excludes those who, like Defendants here, are "in the Gila River watershed above Ashurst-Hayden Diversion Dam" and divert Gila River water for irrigation uses. *See* SA ¶ 26.8.2.1; *id.* ¶ 2.124B (safe harbors not available to "persons . . . located in the Gila River watershed above Ashurst-Hayden Diversion Dam who now or in the future Divert Water from within the Gila River Impact Zone for Irrigation Use").

Among the sub-agreements included as Exhibits 26.1 through 26.5, the only one that Defendants were eligible to sign is Exhibit 26.2, the UV Forbearance Agreement. Upper Valley landowners who signed the UVFA "could sever and transfer water rights from decreed lands to certain 'Hot Lands,' which had been irrigated but were not covered by the Decree." *United States v. Gila Valley Irr. Dist. (GVID VI)*, 859 F.3d 789, 795 (9th Cir. 2017). "If property owners filed such good faith applications within six months of the enforceability date of the UVFA, they could continue to irrigate these Hot Lands while their applications were pending." *Id.* The Community "agreed not to object to properly filed applications." *Id.* And if properly filed applications were rejected, the land could still be irrigated as "Special Hot Lands" if the owners signed the UVFA and met other conditions. The Enforceability Date occurred on December 14, 2007. *See Statement of Findings: Gila River Indian Community Water Rights Settlement Act of 2004*, 72 Fed.

Reg. 71143 (Dec. 14, 2007). Defendants do not dispute that they had lands eligible for Special Hot Lands status and that they did not sign the UVFA or seek Special Hot Lands status. SOF ¶¶ 63, 64; RSOF ¶¶ 63, 64.

Paragraph 4.9 of the UVFA also contains specific reservations of rights for the Community and the United States for cases such as this one, including for the following:

> 4.9.2 Except for acts or omissions that are In Compliance with this Agreement, assert claims for injuries to, and seek enforcement of, their respective rights under: (i) the Globe Equity Decree, or, (ii) the judgment entered by the Globe Equity Enforcement Court [approving the UVFA, *GE 59* Doc. 6596];
>
> * * *
>
> 4.9.4 Assert any claims available against all persons or entities acting in a manner Not in Compliance with this Agreement or failing to act in a manner as would have been required if such person or entity had executed this Agreement, regardless of whether such person or entity has actually executed this Agreement . . . .

GE 59, Doc. 6482 at 33. Defendants did not seek Special Hot Lands status under the UV Forbearance Agreement or do anything else to act in compliance with it.

The Settlement Agreement became enforceable when certain conditions were met, one of which was the entry of an order by this Court approving the Settlement Agreement. This Court reviewed and approved only the UVFA, holding that the issue of illegal pumping of mainstem water was within its Decree enforcement jurisdiction. *GE 59*, Memorandum & Order dated Aug. 24, 2007 (Doc. 6595) ("2007 Bolton Order") at 3–4. This Court's order approving the UVFA dismissed without prejudice the 2001 Complaint, and specifically stated that it could be refiled as to lands that "are Hot Lands that are not Special Hot Lands within six (6) months after the Enforceability Date." *GE 59*, Order Pursuant to Stipulation dated Aug. 24, 2007 (Doc. 6596) ("Stip. Order") at ¶ 4. The order then, for good measure, specifically preserves the Community's right to bring this lawsuit "[n]otwithstanding any other provision of this Order":

> Notwithstanding any other provision of this Order, the Plaintiff Stipulators may take any enforcement action available to them against any owner of Hot Lands with respect to such Hot Lands that has not executed the UV Forbearance Agreement by six (6) months after the Enforceability Date, with respect to the Hot Lands regarding which such owner has not signed the UV Forbearance Agreement.

Id. at ¶ 8. It is undisputed that the Defendants' lands in this case are "Hot Lands regarding which [Defendants] have not signed the UV Forbearance Agreement." They were identified as such by the Settlement Technical Committee, and the Defendants agree that they were eligible for Special Hot Lands status. SOF ¶¶ 63, 64 (citing STC Decision re Determination of Special Hotlands (SOF Exhibit 24, Doc. 79-15)); RSOF ¶¶ 63, 64.

In its "Memorandum and Order" entered simultaneously with the form order approving the UVFA, this Court explained that illegal pumping of mainstem water would still be subject to Decree enforcement in this Court. "The UV Forbearance Agreement also attempts to resolve concerns about the wells being pumped by landowners without rights under the Gila Decree whose wells are likely pumping sub-flow. . . . 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." 2007 Bolton Order at 5.

This Lawsuit

The Community filed the complaint on August 14, 2019 (Doc. 1). It alleges with respect to each of the Defendants' parcels at issue that it was "irrigated during one or more irrigation years from 2016 to present." *Id.* ¶¶ 37–38, 50–54. It also has a general allegation that the Defendants' parcels "have been irrigated with pumped well water in one or more irrigation years from at least 2016 to present." *Id.* ¶ 23. The aerial photographs in the complaint are from "2016, 2017, 2018, and 2019, as noted on the maps." *Id.* ¶ 21 and Exh. A. There are no allegations relating to any years prior to 2016, and the complaint does not seek any relief for years prior to 2016. The complaint seeks declaratory and injunctive relief, including a declaration that operation of the wells is unlawful, and an order to the Gila Water Commissioner to disable the wells.

On September 30, 2019, Defendants filed a motion to dismiss for lack of subject-matter jurisdiction or to abstain (Doc. 14). On May 12, 2020, this Court denied the

motion, holding that it has exclusive subject-matter jurisdiction to determine whether Defendants are pumping the waters of the mainstem of the Gila River (Doc. 22). Defendants subsequently filed their answer on June 26, 2020 (Doc. 26), and amended answer on November 12, 2021 (Doc. 71), which included claim preclusion as an affirmative defense (*id.* at 10, ¶ 5). On January 7, 2022, the Community filed its motion for summary judgment against Defendants on Claims One and Two in the complaint and all affirmative defenses to those claims, including claim preclusion (Doc. 78 at 33-35). On February 18, 2022, in addition to filing a response to the Community's motion for summary judgment (Doc. 85) and statement of facts (Doc. 86), Defendants also filed two cross-motions (Docs. 87, 89) and two separate statements of facts (Doc. 88, 90). The cross-motion addressed here seeks summary judgment on claim preclusion (Doc. 87).

ARGUMENT

Under controlling Supreme Court and Ninth Circuit law, the Community's claims in this lawsuit are not subject to claim preclusion based on the dismissal of the 2007 Complaint, because the claims here seek redress for conduct occurring after 2007. By suing Defendants for unlawfully pumping Gila River water from 2016 to present, the Community asserts claims that were not in existence, and could not have been raised, litigated, or decided on the merits in any prior judgment. As shown below, these claims were specifically preserved in the Community's Settlement Agreement and could be brought at any time if, six months after the Enforceability Date, the Defendants had not acquired Special Hot Lands status.

I. DEFENDANTS' PUMPING IS NOT IMMUNIZED BY CLAIM PRECLUSION.

This case is not barred by dismissal of the 2007 Complaint, because, as a matter of law, the claims in this case are not the same and could not have been brought in 2007. Federal common law governs whether claim preclusion applies here. *See Media Rights*, 922 F.3d at 1021 n.6. Defendants' motion must be denied because "[c]laim preclusion

generally does not bar claims that are predicated on events that postdate the filing of the initial complaint." *Lucky*, 140 S. Ct. at 1596.

Defendants' motion falters on the first element of claim preclusion. "Claim preclusion requires '(1) an identity of claims, (2) a final judgment on the merits, and (3) privity between the parties.'" *Howard v. City of Coos Bay*, 871 F.3d 1032, 1039 (9th Cir. 2017) (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1077 (9th Cir. 2003)). The party invoking claim preclusion has the "burden to establish that preclusion applies." *Media Rights*, 922 F.3d at 1021. Defendants cannot establish the first factor—identity of claims. In the Ninth Circuit, courts "employ four criteria to evaluate whether claims are identical," including

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

Howard, 871 F.3d at 1039 (quoting *Harris v. Cnty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012)). These criteria are not applied "mechanistically." *Id*. Here, there is no identity of claims as a matter of law because this action seeks redress for pumping conduct that occurred after the 2007 Complaint was filed. "[T]he inquiry about the same transactional nucleus of facts *is the same inquiry as* whether the claim could have been brought in the previous action." *Howard*, 871 F.3d at 1039 (quoting *United States v. Liquidators of European Fed. Credit Bank*, 630 F.3d 1139, 1151 (9th Cir, 2011)) (emphasis and alterations original). "To answer this question," the Ninth Circuit and "a number of other circuits have adopted a bright-line rule that *res judicata* [*i.e.*, claim preclusion] does not apply to events post-dating the filing of the initial complaint." *Id.* (internal quotation marks omitted). "The rule in this circuit, and others, is that 'claim preclusion does not apply to claims that accrue after the filing of the operative complaint' in the first suit." *Media Rights*, 922 F.3d at 1021 (quoting *Howard*, 871 F.3d at 1039–40).

Under the Ninth Circuit's "bright-line rule," claim preclusion does not apply to the complaint because it is based on events occurring after the previous litigation was filed. It makes no difference that similar conduct was at issue in the prior litigation. "A substantially single course of activity may continue through the life of a first suit and beyond. The basic claim-preclusion result is clear: a new claim or cause of action is created as the conduct continues." *Media Rights*, 922 F.3d at 1022 (quoting 18A Charles Alan Wright et al., *Federal Practice & Procedure* § 4409 (3d ed. 2018 update)). "A claim arising after the date of an earlier judgment is not barred, even if it arises out of a continuing course of conduct that provided the basis for the earlier claim." *Id.* at 1024 (quoting *Frank*, 216 F.3d at 851). Nor does it matter if the prior litigation sought prospective relief. *Id.* at 1025 (citing *Lawlor v. Nat'l Screen Serv. Corp.,* 349 U.S. 322, 328 (1955)).

The Ninth Circuit's analysis in *Media Rights* applies equally here. In that case, Media Rights Technologies, Inc. ("MRT") brought suit alleging Microsoft's software infringed four of MRT's patents. 922 F.3d at 1019. After a court in a separate proceeding declared one of the patents invalid, MRT voluntarily dismissed the first suit with prejudice. *Id.* at 1017. MRT later filed a second action claiming Microsoft's software "contains a copy of and/or is a derivative work of" the MRT software and thus infringed MRT's copyrights, along with other claims. *Id.* at 1019. The district court dismissed the second suit, reasoning—much like Defendants do here—that "*MRT I* and *MRT II* arose from the same nucleus of facts, the suits would share much of the same evidence, allowing *MRT II* to proceed could impair rights established by *MRT I*, and both *MRT I* and *MRT II* concerned intellectual property rights in the MRT Software." *Id.* at 1020. The Ninth Circuit reversed as to claims for conduct occurring after filing of the operative complaint in *MRT I*, even though the same claims for conduct occurring *before* the complaint was filed were precluded. "Because those claims arose after MRT filed the operative complaint in *MRT I* and MRT could not have sued on them when it filed *MRT I*, they are

not precluded[.]" *Id.* at 1024.

In *Media Rights,* the Ninth Circuit rejected the same argument Defendants make in reliance on *Turtle Island Restoration Network v. U.S. Department of State*, 673 F.3d 914 (9th Cir. 2012). Like Defendants here, Microsoft cited *Turtle Island* for the proposition that "one cannot evade claim preclusion by relying on events that occurred after judgment when the plaintiff knew of nearly identical events that occurred *before* judgment and did nothing." *Media Rights*, 922 F.3d at 1024. The Ninth Circuit distinguished *Turtle Island* because the plaintiffs in that case alleged subsequent conduct only as another "example" of the same government process, the validity of which they had already challenged in the prior suit. They did not allege subsequent facts that formed an adequate, independent basis for another cause of action. "[T]he new events in *Turtle Island* did not establish an independent cause of action. . . . 'A claim arising after the date of an earlier judgment is not barred, even if it arises out of a continuing course of conduct that provided the basis for the earlier claim.'" *Id.* (quoting *Frank*, 216 F.3d at 851). This case is like *Media Rights* and unlike *Turtle Island*, because the Defendants' later occurring conduct—illegal diversion of waters of the Gila River in one or more irrigation years from 2016 to present without a Decree right—supports an independent cause of action, regardless of any illegal pumping they may have done before 2007.

In *Media Rights,* the Ninth Circuit explained that claim preclusion does not apply in cases such as this one because it is not a form of immunity for future wrongs:

> Taken to its logical conclusion, Microsoft's proposed rule violates basic claim preclusion principles. . . . Suppose that a jury found that Microsoft infringed one of MRT's copyrights and awarded MRT damages. Under Microsoft's logic, if Microsoft sold a product with the infringing . . . software two years later and MRT then brought an infringement action, claim preclusion would bar that action because nearly identical events gave rise to the two suits: Microsoft copied the MRT Software to create its . . . software and then sold products containing that software. The earlier judgment against Microsoft would in effect immunize Microsoft against all suits concerning infringements of the same copyright in a similar way. This is not the law of claim preclusion. The filing of a suit does not

> entitle the defendant to continue or repeat the unlawful conduct with immunity from further suit.

922 F.3d at 1024–25 (cleaned up). Defendants' argument that "dismissal of the [2007] Complaint insulated [them] from future challenges by the Community" must be rejected for the same reasons. *See* Mot. (Doc. 87) at 15.

Defendants mistakenly argue that "[r]efusing to apply claim preclusion" here "would allow a plaintiff to sue every year for the exact same conduct, even if such plaintiff lost every time." Doc. 87 at 14. Their argument ignores the differences between issue preclusion and claim preclusion. Issue preclusion prevents relitigation of issues that were *actually decided* in a prior action and essential to the judgment. By contrast, claim preclusion does not bar future litigation of issues that were not actually decided. In *Media Rights*, the Ninth Circuit explained this very point. It "stress[ed] that [its] analysis does not mean that courts will be forced to continually relitigate copyright infringement claims. Issue preclusion 'bars successive litigation of an issue of fact or law . . . actually litigated and resolved in a valid court determination essential to the prior judgment.'" *Media Rights*, 922 F.3d at 1025 (quoting *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008)). Defendants do not argue issue preclusion applies here, for good reason: here, as was the case in *Media Rights,* the prior voluntary dismissal did not actually decide the issue of illegal pumping. "A voluntary dismissal of a claim prior to any adjudication and without any stipulated findings of fact does not actually litigate any issue." *Amadeo v. Principal Mut. Life Ins. Co.,* 290 F.3d 1152, 1159 (9th Cir. 2002) (citing *Lawlor,* 349 U.S. at 327).

Defendants' confusion between issue preclusion and claim preclusion is illustrated by their reliance on *In re Dual-Deck*, an issue preclusion (collateral estoppel) case involving alleged antitrust violations. Defendants ignore that in *Dual-Deck*, the Ninth Circuit explained the claim preclusion principles that govern this case: "We agree that the judgment in the [first case] 'cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous

case.'" *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 11 F.3d 1460, 1463 (9th Cir. 1993) (quoting *Lawlor*, 349 U.S. at 328). "The defendants, by winning [the] first lawsuit, 'did not acquire immunity in perpetuity from the antitrust laws.'" *Id.* (quoting *Harkins Amusement Enters. v. Harry Nace Co.*, 890 F.2d 181, 183 (9th Cir. 1989)). Here, Defendants did not acquire immunity from Decree enforcement upon dismissal of the 2007 Complaint. The defendants in *In re Dual-Deck* were able to avoid successive litigation because *issue* preclusion applied: the first lawsuit "already answered the question of whether the alleged conspiracy was formed, and said it was not." *Id.* at 1464. Here, the dismissal did not actually decide any issue.

Supreme Court and Ninth Circuit precedent require denial of the Defendants' motion. Claim preclusion does not apply because the Community's claims here are based on conduct that occurred *after* the 2007 Complaint was filed. *Lucky*, 140 S. Ct. at 1596; *Howard*, 871 F.3d at 1040; *Media Rights*, 922 F.3d at 1024; *Frank*, 216 F.3d at 851.

II. THE COMMUNITY'S SETTLEMENT AGREEMENT EXPRESSLY RECOGNIZED THAT DISMISSAL WITH PREJUDICE OF THE 2007 COMPLAINT WOULD NOT BAR THIS CASE.

Defendants' characterization of the 2007 dismissal with prejudice not only runs afoul of claim preclusion principles, but also is refuted by the Community's Settlement Agreement. Defendants argue as though claim preclusion *must* apply because, in their view, the Settlement Agreement contemplated that dismissal of the 2007 Complaint would bar all future claims based on similar conduct. But the Settlement Agreement expressly states just the opposite. It *preserved* future claims for Decree enforcement against those who, like the Defendants, failed to qualify for Special Hot Lands status.

As the Community has noted elsewhere, *see, e.g.,* Doc. 78 at 35–38, the Community specifically reserved the right to bring a lawsuit under these circumstances. SA ¶ 25.12.1.3. Paragraph 4.9.2 of the UVFA provides: "Except for acts or omissions that are In Compliance with this Agreement," the Community "shall retain any right to . . . assert claims for injuries to, and seek enforcement of, [its] respective rights under []

the Globe Equity Decree." Defendants do not and cannot claim they are acting in compliance with the UVFA.[4] As noted above, the UVFA provided a procedure by which Upper Valley landowners—including Defendants—could sign the UVFA and "sever and transfer water rights from decreed lands to certain 'Hot Lands,' which had been irrigated but were not covered by the Decree." *GVID VI*, 859 F.3d at 795. The Defendants' lands are "Hot Lands," but they did not sign the UVFA or seek to sever and transfer Decree rights within the deadline, and therefore their Hot Lands were not designated as Special Hot Lands. SOF ¶¶ 63, 64; RSOF ¶¶ 63, 64. Because Defendants are using Gila River water to irrigate lands without Decree rights that did not qualify as Special Hot Lands, their conduct is inconsistent with the Settlement Agreement and falls squarely within the Community's retention of rights under Paragraphs 4.9.2 and 4.9.4 of the UVFA.

When the Community filed and dismissed the 2007 Complaint, the Defendants had a clean slate and a six-month window to sign the UVFA and seek Special Hot Lands status. They did neither. From 2016 to present, they have pumped waters of the Gila River without Decree rights. That conduct, all of which occurred after the 2007 Complaint was filed, violates the Decree, and is within the Community's reservations of rights in the Settlement Agreement and in the UVFA. These reservations of rights all recognize that the dismissal with prejudice required by Settlement Agreement ¶ 25.17.1 and Exh. 25.17.1A did not provide immunity for the Defendants' subsequent conduct.

III. DEFENDANTS' STATEMENT OF FACTS VIOLATES FEDERAL AND LOCAL RULES

A. Defendants' separate statement of facts violates LRCiv 56.1.

Defendants' separate statement of facts violates LRCiv 56.1, contains improper explanations, inferences, legal arguments, and/or conclusions that must be stricken or disregarded, circumvents the page limits for briefing, for reasons explained in section

[4] In the UVFA, "In Compliance with this Agreement" shall mean acting in a manner that is consistent with, not in violation of, and not contrary to any of the terms, conditions, limitations, requirements, and provisions of this Agreement regardless whether the person or entity so acting is a UV Signatory." UVFA § 2.16A.

VI.A. of the Community's reply brief, which discussion is incorporated here by reference. Most of the statement of facts is effectively a supplemental brief, quoting, citing, and arguing from various court orders and legal filings, rather than making any assertion of material fact. The Community's specific objections are stated in its controverting statement of facts in the paragraphs to which they relate.

B. Defendants cannot rely on materials not properly disclosed.

Under Rule 37(c)(1), Defendants are "not allowed to use" witnesses or information that were not disclosed "as required by Rule 26(a) or (e) . . . to supply evidence on a motion, . . . unless the failure was substantially justified or is harmless." The discussion in section VI.C. of the Community's reply brief filed today is incorporated by reference here. As relevant here, the Community's specific objections under Rule 37(c)(1) are stated in its controverting statement of facts in the paragraphs to which they relate, and concern Exhibits 30, 38, 64, and 92. Defendants have not made any showing to justify their failure to make timely disclosures. Although the newly disclosed information is immaterial in light of the arguments the Community has made above, the Court should also disregard these materials, and any citations thereto, under Rule 37(c)(1). If the Court does not agree that the information is immaterial and does not disregard it, it should deny Defendants' motion under Fed. R. Civ. P. 56(d)(1), because the Community has not had an opportunity to depose witnesses or otherwise seek discovery regarding these materials.

CONCLUSION

The Court should deny Defendants' motion for summary judgment on claim preclusion grounds and grant the Community's motion for summary judgment as to the claim preclusion defense (*see* Doc. 78 at 33–35).

RESPECTFULLY SUBMITTED this 1st day of April 2022.

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