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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Gila River Indian Community, a federally recognized Indian tribe,

Plaintiff,

v.

Clint Cranford; Tyrel D. Cranford, David Schoebroek; Eva Schoebroek; Donna Sexton; Marvin Sexton; and Patrick Sexton,

Defendants.

No. CV-19-00407-TUC-SHR

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON CLAIM PRECLUSION GROUNDS

(ORAL ARGUMENT REQUESTED)

Defendants file this Reply in support of their February 18, 2022 Motion for Summary Judgment on Claim Preclusion Grounds (Doc. 87) (the "Motion"). GRIC's April 1, 2022 Response, Doc. 101 (the "Response") narrows the issues by disputing only one element of claim preclusion: identity of claims. Response at 9:3. GRIC does not dispute and therefore concedes that the other elements have been satisfied - there has been a dismissal with prejudice entered against Defendants' predecessors based on the same allegations at issue here, i.e. that the same wells on the same properties unlawfully pump Gila River water.

As to identity of claims, the Court should reject GRIC's only Response arguments: (1) the claims in the 1702 Complaint are not the same as the claims here; and (2) the 2005 GRIC Agreement reserved GRIC's right to file this lawsuit. First, the claims are the same because in both cases GRIC alleged that pumping from the *same* wells on the *same* properties violates GRIC's *same* water rights in the *same* manner. In fact, the 1702 Complaint's allegations encompass the allegations in this case as they relate to Defendants' past, present, and *future* pumping. Second, GRIC provides no support for the proposition that the GRIC Agreement, to which Defendants are not parties, negates the legal effect of the dismissal with prejudice. Contrary to GRIC's contentions, the GRIC Agreement does not allow this lawsuit. Thus, the Motion should be granted.

I. FACTUAL BACKGROUND

As discussed in the Motion, since 1982 GRIC has filed multiple lawsuits against Defendants' predecessors-in-interest (i.e., the prior owners of the properties and wells at issue in this case) regarding alleged pumping of Gila River water. Motion at 2:13-3:14. GRIC does not dispute that each of the four wells challenged in this lawsuit were constructed before GRIC's 1982 Complaint. *See* RSOF ¶ 52.[1] GRIC is also unable to dispute that the official ADWR records show that the same wells were being utilized on

[1] Citations herein to "SOF" refer to Doc. 88 and to "RSOF" refer to Doc. 102. However, where statements of fact associated with other filings are referenced, the document numbers are used in the citation.

Defendants' properties in 1982 and were being used to irrigate a very similar number of acres. SOF ¶¶ 52, 53; *see also* SOF (Doc. 86) ¶¶ 4, 7 (explaining that the properties were being irrigated and farmed by the Defendants' respective predecessors).

In 2005, GRIC entered into the GRIC Agreement with various parties. SOF ¶ 27; RSOF ¶ 27. Neither Defendants nor their predecessors signed the GRIC Agreement or its exhibits such as the UV Forbearance Agreement ("UVFA").[2] GRIC received substantial monetary and non-monetary compensation through the GRIC Agreement. SOF (Doc. 90) ¶ 4; RSOF (Doc. 104) ¶ 4. In exchange, among other things, GRIC agreed to refile the 1982 Complaint in an identical form (the "1702 Complaint"), and then voluntarily dismiss the re-filed complaint with prejudice. SOF ¶ 32. GRIC does not dispute that it did just that. SOF ¶¶ 33, 34, 40; RSOF ¶¶ 33, 34, 40. Like the *Cranford* complaint, the 1702 Complaint sought an injunction based on allegations that each prior owner of Defendants' properties "used, is using, or claims a right to" pump Gila River water from their wells, interfering with GRIC's water rights. SOF ¶ 35, Ex. 54 at **DEX001506**, ¶¶ V-VII, IX). Thus, that complaint included claims regarding future pumping, including all claims raised in this case.

II. LEGAL ANALYSIS

The dismissal with prejudice of the 1702 Complaint precludes the claims raised in the *Cranford* Complaint because the 1702 Complaint (1) involved the same claim; (2) reached a final decision on the merits; and (3) involved identical parties or privies. Motion at 7-16. GRIC only disputes one of these three elements, arguing that the claims in the 1702 Complaint are different because the present case relates only to pumping that occurred from "2016 to present" and the 1702 Complaint did not. Response at 8-13.[3] GRIC, however, does

[2] Defendants also are not parties to the Decree. SOF (Doc. 90) ¶ 1; RSOF (Doc. 104) ¶ 1.

[3] GRIC does not dispute that the element of a final judgment on the merits is satisfied by the dismissal with prejudice. Motion at 13-14. The element of "same parties or their privies" is satisfied because the 1702 Complaint included as defendants the prior owners of the current Defendants' properties. SOF ¶¶ 4-16, 18, 34. GRIC does not dispute the chains of title for the properties nor argue the other elements. RSOF ¶¶ 4-16.

not dispute that the actual *substance* of the claims is virtually identical, as demonstrated in the Motion. *See* Motion at 8-10 (Table). GRIC's "2016 to present" argument is unpersuasive because it ignores that the *Cranford* Complaint included all of Defendants' pumping, using temporal allegations only as an "example" of the conduct, and that the 1702 Complaint involved allegations relating to past, present ***and future*** pumping. Considering these facts, there can be no dispute that the claims are identical and claim preclusion is appropriate here.

A. GRIC does not dispute three of the four "same claim" criteria.

The Ninth Circuit considers four criteria to determine "[w]hether the two suits involve the same claim or cause of action": "(1) whether the two suits arise out of the same transactional nucleus of facts; (2) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (3) whether the two suits involve infringement of the same right; and (4) whether substantially the same evidence is presented in the two actions." *Mpoyo*, *v. Litton Electro-Optical Sys.*, 430 F.3d 985, 987 (9th Cir. 2005); Response at 9:11-13. GRIC argues the "transactional nucleus of fact" criterion and does not dispute that the other criteria are satisfied. Motion at 12:4-13:23. Thus, the three undisputed criteria weigh in favor of applying claim preclusion to this case.

B. The two suits arise from the same transactional nucleus of fact because a new claim did not accrue after the first action.

"Whether two elements are part of the same transaction or series depends on whether they are related to the same set of facts and whether they could be conveniently tried together." *Mpoyo*, 430 F. 3d at 987. Here, the 1702 Complaint and the *Cranford* Complaint are virtually identical and encapsulate each other. Motion at 8-10. In other words, *substantively*, the claims are the same – GRIC claimed in both cases that the same wells on the same properties pump from the same source (allegedly the Gila River), and the landowner claims the right to continue pumping such water, contravening the same GRIC water rights. A hypothetical trial on the claims would be identical, focusing on whether the

wells (the same wells) pump water that is "subflow" under Arizona law. GRIC does not dispute that the claims are the same in substance, requiring the same evidence to prove.

Instead, GRIC argues that the *Cranford* allegations, "from at least 2016 to present," distinguish the *Cranford* claims from the 1702 claims. Response at 7, 9. But these allegations have no substantive bearing on the *Cranford* claims: the evidence shows that Defendants and their predecessors have irrigated these lands with water from these same wells for many years before 2016. SOF ¶¶ 52-53. To support its argument, GRIC urges the Court to apply a "bright-line rule" that claim preclusion does not apply to events that post-date the first complaint. Response at 9. The cases GRIC relies on, however, are inapposite as they involve separate causes of action that accrued after the date of the first case, not, as here, a single cause of action that had accrued when the first complaint was filed. *Id.* For example, in *Howard v. City of Coos Bay*, 871 F.3d 1032, 1040 (9th Cir. 2017), claim preclusion did not apply because the retaliation allegations in the second suit related to defendant rejecting plaintiff for a position that she did not apply for *until after she filed the first lawsuit*. *Id*. Thus, the cause of action relating to the new position had not accrued when the first lawsuit was filed. In *Frank v. United Airlines, Inc.*, 216 F.3d 845, 848 (9th Cir. 2000), the Ninth Circuit reversed the district court's application of claim preclusion, because the discrimination claims at issue related to two different United Airlines' weight policies—a 1977 policy and a 1980 policy. *Id*. at 850, 851. Claims related to the 1980 policy could not have been sued upon in the 1979 case on which the trial court relied to find claim preclusion. *Id.* Similarly, in *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 328 (1955), an antitrust case, claim preclusion did not apply because the second suit alleged "a substantial change in the scope of the defendants' alleged monopoly" since the first suit.

GRIC also argues that this case is similar to *Media Rights*, a copyright infringement case, and unlike the *Turtle Island* case discussed in the Motion. Response at 11:14-15; Motion at 11:13. But the holding of *Media Rights* is based upon the "separate-accrual rule,"

which runs a separate statute of limitations for "successive violations ***of the Copyright Act***" so that each instance of infringement is "a new wrong." *Media Rts. Techs., Inc. v. Microsoft Corp.*, 922 F.3d 1014, 1023 (9th Cir. 2019) (emphasis added). GRIC provides no authority that the separate accrual rule applies outside of statutory Copyright or RICO Act claims. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 671 (2014); *Grimmett v. Brown*, 75 F.3d 506, 511 (9th Cir. 1996). Instead, federal courts "generally apply a discovery accrual rule when a statute is silent on the issue." *Rotella v. Wood*, 528 U.S. 549, 555 (2000). Under the discovery rule, a claim accrues when the plaintiff discovers knowledge sufficient to recognize the existence of the wrong that caused the injury. *Zadrozny v. Bank of New York Mellon*, 720 F.3d 1163, 1173 (9th Cir. 2013). In *Media Rights*, the court applied both rules to different claims with different results. The discovery rule *precluded* "pre-filing copyright infringement claims," DMCA claims, and breach of contract claims because the plaintiff reasonably could have discovered the alleged wrong at the time of the first lawsuit. *Media Rts. Techs., Inc.*, 922 F.3d at 1024, 1026, 1030-31. It was *only* "post-filing copyright infringement claims" that were *not* precluded *because of* the separate accrual rule. *Id*. at 1024. In fact, *Media Rights* specifically distinguished itself from the *Turtle Island* case ***because of*** the separate-accrual rule. *Id*. ("Unlike here, where the separate-accrual rule applies, the new events in *Turtle Island* did not establish an independent cause of action.").

As argued in the Motion, this case is like *Turtle Island Restoration Network v. U.S. Dep't of State*, 673 F.3d 914 (9th Cir. 2012), not *Media Rights.* There is no authority for applying the separate-accrual rule here. In *Turtle Island*, the plaintiff argued that its second suit should not be precluded because it raised challenges to "2009 certification decisions," which occurred after the earlier suit. *Id.* at 918. The Ninth Circuit rejected this argument, finding that the plaintiff's 2009-related allegations were only an "example" of a "long-standing practice of non-compliance" with the law. *Id*. No new claim accrued because the substance of the original allegations did not depend on a specific year. *Id.* Similarly, here,

GRIC was well aware of the alleged wrong at issue in the *Cranford* Complaint – pumping and the Defendants' predecessors' claimed rights to continue pumping – long before filing the 1702 Complaint, as evidenced by its filing of the 1982 Complaint. GRIC's allegations regarding pumping from 2016 to present are just examples of that long-standing conduct.

The *Yagman* case is in accord. *Yagman v. Garcetti*, 743 F. App'x 837, 839 (9th Cir. 2018). The plaintiff filed three suits, each challenging a city's procedures for contesting parking tickets. *Id*. at 838. In the third suit, the plaintiff again challenged the same procedures but argued that the new case was not precluded because it was based on a 2015 parking ticket issued after the filing of the prior suits. *Id*. at 839. Like GRIC, the plaintiff relied on *Howard*, 871 F.3d at 1040. The Ninth Circuit disagreed, finding that the plaintiff in *Yagman* "overstates the holding in *Howard*: a new factual event does not necessarily give rise to a new legal claim where the challenge is to the same ongoing procedure or policy and the new factual event is alleged only as an example of a long-standing practice of non-compliance with [the law]." *Id*. at 839-40 (quoting *Turtle Island*). "[T]o avoid the preclusive effect of [the prior lawsuits], [plaintiff] must identify a factually different procedure distinct from and occurring after the one alleged in his earlier complaints." *Id*. at 840.

Similarly, here, GRIC overstates the holding in *Howard* because, as in *Turtle Island* and *Yagman*, the "2016 to present" allegations are merely an example of a long-standing practice allegedly not in compliance with the law. The substance of GRIC's claim is that Defendants' wells take water from the Gila River without authorization, and that Defendants wrongly claim the right to do so, thereby injuring GRIC's water rights. Similar to plaintiff's third-suit allegations in *Yagman*, there is no necessary temporal component to GRIC's claims. The "2016 to present" allegations could have been replaced with *any* time period without changing the substance of the claim. GRIC demonstrates this by alleging that Defendants' properties "have been irrigated with pumped well water in one or more irrigation years from **at least** 2016 to present." Complaint (Doc. 1) ¶ 23 (emphasis added).

Moreover, as mentioned above, the 1702 Complaint alleged injury from past, present, ***and future*** pumping, as well as the claimed right to do so, encompassing all of the allegations in the *Cranford* Complaint. Ex. 54 at **DEX001506**, ¶¶ V-VII. The 1702 Complaint's claim against Defendants' predecessors arises out of "defendant's use of or claimed right to use water from within the Gila River Watershed [that] interferes or would, if exercised [*i.e.,* if the use occurred in the future], interfere with [GRIC's] use of water." **Ex. 54** (1702 Complaint) at **DEX001506,** ¶ VII. The 1702 Complaint repeatedly refers to each defendant's "use of [*i.e.*, present use] or claimed right to use [*i.e.*, future use]" of Gila River water. *Id*. at ¶¶ V, VI. The 1702 Complaint also alleges that the harm to GRIC "will continue [*i.e.*, into the future] until [GRIC's] rights to use water from the Gila River watershed are protected against defendants." *Id*. at ¶ X. Moreover, in its Motion to Dismiss the 1702 Complaint, GRIC sought dismissal of its claims against "all defendants named in the Complaint . . . and their respective predecessors and successors in interest, with prejudice . . .." SOF ¶ 37, Ex. 51, **DEX001474** at 2:25-27.[4] Seeking a dismissal with prejudice against successors-in-interest would serve no purpose if the claim only related to past pumping as such parties would have no liability for such claims. Indeed, GRIC asserted that "the dismissal of all Defendants with prejudice will result in a final resolution for all parties involved ***with respect to the water rights at issue***." SOF ¶ 39, Ex. 51, **DEX001483** at 11:7-9 (emphasis added). The water rights at issue were the defendants' alleged current pumping of Gila River water *or their claimed right to pump such water in the future*, as well as GRIC's Decree rights. GRIC cannot credibly claim that "final resolution" means anything other than the plain language of those words.

GRIC failed to allege a set of events "factually different" from the 1702 case. The wells were constructed between 1940 and 1978. SOF ¶ 52; RSOF ¶ 52. The wells were used

[4] The 1702 Case Dismissal Order granted the requested dismissal with prejudice against "all defendants named in the Complaint . . . and their respective predecessors and successors in interest." SOF (Doc. 88) ¶ 40, **Ex. 55**, **DEX001511** at 1:16-19.

for irrigation of a similar number of acres in 1982 as they are now.[5] SOF ¶ 53. The properties were irrigated for many years prior to Defendants' own irrigation. SOF (Doc. 86) ¶¶ 4, 7. GRIC discovered the alleged injury to its water rights from the pumping of these very wells decades ago, which lead to the 1982 Complaint. No separate cause of action accrued after 1982 and, therefore, the claims arise out of the same transactional nucleus of fact.

C. The GRIC Agreement does not allow this lawsuit.

GRIC asserts that it reserved the right to file this lawsuit in the GRIC Agreement. Response at 13-14. Defendants are not parties to the GRIC Agreement or its exhibits, such as the UVFA. SOF ¶ 27; RSOF ¶ 27. However, Defendants' predecessors *were* named in the 1702 Complaint, which was dismissed with prejudice. SOF ¶ 34. Claim preclusion flows from that dismissal, not from the GRIC Agreement itself. *In re Marino*, 181 F.3d 1142, 1144 (9th Cir. 1999) ("a dismissal with prejudice has res judicata effect."). GRIC provides no authority for the proposition that terms of the GRIC Agreement insulate GRIC from the legal effect of the dismissal with prejudice as to non-parties to the GRIC Agreement. The dismissal order itself did not include any exceptions related to Defendants. SOF ¶ 40.

Moreover, contrary to GRIC's suggestions, the GRIC Agreement terms do not alter the preclusive effect of the dismissal with prejudice. GRIC agreed to refile and then dismiss with prejudice the 1702 Complaint pursuant to § 25.17.1 of the GRIC Agreement. *Id*. ¶ 32 (Ex. 50). That paragraph expressly reserves rights ***only as to*** certain corporate defendants – not Defendants (or their predecessors). *Id*. GRIC argues that § 25.12 reserved its right to avoid claim preclusion and file this case. Response at 5:1, 13:25. However, the entire reservation of rights section, § 25.12, is preceded only with the language "[n]otwithstanding the waiver of claims and release described in Subparagraph 25.2 and Exhibit 25.2." Subparagraph 25.2 and Exhibit 25.2 are unrelated to the dismissal with prejudice within

[5] Since the 1702 Complaint was a refiled version of the 1982 Complaint, the relevant date for this analysis is 1982.

§ 25.17.1. Likewise, GRIC points the Court to the UVFA ¶ 4.9.2. Response at 13:25. But, again, that section only reserves rights "[n]otwithstanding the waiver and release of claims described in Subparagraph 4.3." UVFA ¶ 4.9. Subparagraph 4.3 is unrelated to the § 25.17.1 dismissal with prejudice. The drafters knew how to expressly reserve rights with respect to the releases but ***did not*** reserve rights with respect to the § 25.17.1 dismissal with prejudice. *Arizona v. Tohono O'odham Nation*, 818 F.3d 549, 561 n.7 (9th Cir. 2016) (applying the contract interpretation tool "the expression of one thing is the exclusion of the other" and finding that the fact that there was one express limitation in an agreement supported the argument that other limitations were not meant to be included). Nothing in these agreements limits the preclusive effect of the dismissal with prejudice.[6]

Additionally, GRIC's claim that it intended to limit the effect of the dismissal with prejudice contradicts its representations at the time. SOF ¶¶ 30, 39. In its motion to dismiss the 1702 Complaint, GRIC stated that the settlement would eliminate the litigation "for all parties" and that there would be no prejudice to defendants because the dismissal with prejudice ensures that the claims could not be reasserted. *Id*. (Ex. 51). Thus, GRIC's intent was for claim preclusion to apply. GRIC also stated that the dismissal as to "all Defendants *with prejudice* will result in a final resolution for all parties involved with respect to the water rights at issue." *Id*. ¶ 39. The water rights at issue in both cases are the same: the landowners' claimed right to pump water into the future and GRIC's Decree rights. It would not make sense, and would contravene claim preclusion policy, if GRIC could sue again for an alleged violation of the *same* rights based on the *same* irrigation of the *same* properties from the *same* wells that was occurring at the time of the dismissal with prejudice. *Amadeo v. Principal Mut. Life Ins. Co.*, 290 F.3d 1152, 1160 (9th Cir. 2002) ("Preclusion doctrine

[6] GRIC mentions several times that Defendants failed to follow procedures to make their lands "Special Hot Lands." But, again, Defendants were not parties to the GRIC Agreement and there is no evidence that they even knew about the Special Hot Lands procedures. In any event, this argument does not alter the legal effect of the dismissal with prejudice.

is intended to promote judicial efficiency and the finality of judgments"); *Nevada v. United States,* 463 U.S. 110, 129, n.10 (1983) ("The policies advanced by the doctrine of *res judicata* perhaps are at their zenith in cases concerning real property, land and water.").

D. GRIC's procedural arguments are incorrect.

Defendants' SOF does not violate the local rules. The SOF sets forth the material facts on which Defendants rely and refers to specific portions of the admissible record as support. L.R.Civ. 56.1. GRIC's RSOF includes various incorrect assertions that certain statements of fact are not facts. For example, SOF ¶¶ 17-21 relate to the 1982 Complaint, which is material to the Motion. GRIC did not admit or deny these statements, stating only that they are "characterizations of a legal document that speaks for itself" and that discussion "should be included in briefing." First, this is not a proper response under L.R.Civ. 56.1(b) because it does not indicate if there is a dispute. Second, the contents of filings such as the 1982 Complaint *are* facts on which Defendants rely and discussion of those facts *is* included in the briefing. GRIC also argues that certain portions should be stricken, Response at 14:23, but does not specify which portions.

GRIC also makes disclosure objections to Defendants' Exhibits 30, 38, 64, and 92. First, GRIC's arguments are irrelevant in light of GRIC's admissions in the RSOF to the facts that those exhibits support. Second, any untimeliness is harmless. Fed. R. Civ. P. 37(c)(1). Exhibits 30 and 38 are declarations from title company employees that performed chain-of-title research of Defendants' properties. These declarations were created for convenience to make it easier to understand the chain-of-title. Each fact for which Exs. 30 and 38 are cited is *also* supported by the official certified deeds. SOF ¶¶ 4-16. GRIC does not object to those deeds, nor did it object to Defendants' Request for Judicial Notice as to those exhibits. ***More importantly, GRIC admitted to the chain-of-title for Defendants' properties, making the contents of the exhibits undisputed and the objections moot.*** RSOF ¶¶ 4-16. Exhibits 30 and 38 were disclosed on July 7, 2021, *prior to* the close of discovery.

See GRIC Ex. 36 ¶¶ 2, 3. GRIC could have sought discovery on these witnesses but did not. GRIC had the declarations for over 7 months before the Motion. There is no prejudice.

Exhibit 64 contains ADWR certified Statements of Claimant filed by Defendants' predecessors. As official documents of a state agency, they are self-authenticating and subject to Defendants' Request for Judicial Notice, which GRIC did not oppose. SOF ¶ 52. These documents support facts already supported by Ex. 63, to which GRIC does not object. *Id*. GRIC received these documents on December 13, 2021, GRIC Ex. 36 ¶ 7, soon after Defendants received them, and two months before the Motion. There is no prejudice.

Finally, Ex. 92 is a declaration of Wade Sexton who was timely disclosed and deposed by GRIC. GRIC objects that Ex. 92 contains new testimony. But Ex. 92 was only used in the Motion to support the chain-of-title for the Sexton property. SOF ¶ 12. GRIC did not dispute SOF ¶ 12, making this objection irrelevant and moot. RSOF ¶ 12. Moreover, GRIC had the deeds for Defendants' properties at the time that Wade Sexton was deposed but decided not to ask any questions about them at the deposition. There is no prejudice.[7]

III. CONCLUSION

Defendants' predecessors, who lived on the same land, pumped from the same wells, and irrigated the same acres, were sued by GRIC over the exact same activity: allegedly pumping Gila River water. Those claims (which included allegations relating to future pumping) were dismissed with prejudice and GRIC received substantial monetary and nonmonetary compensation in exchange. GRIC now wants more: to go back and shut down the same wells, thereby permanently closing Defendants' family farms. But no new cause of action has accrued. Claim preclusion applies and the Motion should be granted.

[7] GRIC argues that the Court should deny the Motion under Fed. R. Civ. P. 56(d)(1) if it does not ignore the exhibits to which GRIC objects. Response at 15:18. GRIC admitted to the facts that these exhibits support. In any event, GRIC's Rule 56(d)(1) request is improper because GRIC failed to "show[] by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition." GRIC's Ex. 36 declaration does not specify any reasons why it cannot oppose the Motion. This request should be denied.

DATED this 6th day of May, 2022.

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