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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

REPLY TO SAN CARLOS APACHE TRIBE'S RESPONSE IN OPPOSITION TO DEFENDANTS' RULE 12(b)(1) MOTION TO DISMISS

Defendants David Schoubroek, Eva Schoubroek, Donna Sexton, Marvin Sexton and Patrick Sexton ("Defendants") hereby reply to San Carlos Apache Tribe's ("Tribe") Response In Opposition ("Response") to Defendants' Rule 12(B)(1) Motion To Dismiss (Dkt. 111, "Motion"). The Response fails to address the primary thrust of the Motion: that the ***plain language*** of the Globe Equity No. 59 Decree ("Decree") is ***entirely consistent*** with the ***plain language*** of the binding 2007 Judgment and Decree entered by the Gila Adjudication Court ("Adj. Court"). Both documents demonstrate that disputes with non-parties to the Decree (such as this) must be heard before the Adj. Court, not this Court. Contrary to the Tribe's argument, Defendants are ***not*** arguing that the Judgment and Decree revises or modifies the jurisdiction of this Court. This jurisdictional split has always existed.

The Tribe ignores Defendants' plain language arguments and focuses instead on incorrect procedural arguments that are addressed below and in Defendants' Response to Plaintiffs' Joint Motion to Strike and for Sanctions (Dkt. 116). At bottom, the Tribe offers nothing to change the fact that this Court must dismiss this case under the prior exclusive jurisdiction doctrine. *Chapman v. Deutsche Bank Nat. Tr. Co.*, 651 F.3d 1039, 1043 (9th Cir. 2011) (the doctrine is "mandatory"); *see also* Fed. R. Civ. P. 12(h)(3).

I. The 2007 Judgment and Decree is consistent with the Decree: this Court does not have jurisdiction over disputes with nonparties to the Decree.

Although the Tribe (at 12) baldly asserts that the 2007 Judgment and Decree "does not say what Defendants claim," the Tribe fails to engage with the plain language of that document. The Judgment and Decree acknowledges that jurisdiction over disputes relating to Decree enforcement is split between this Court and the Adj. Court, depending on whether nonparties to the Decree are involved:

> The Globe Equity Decree court shall continue to have jurisdiction over disputes among parties to the Globe Equity Decree regarding its enforcement. Disputes involving nonparties to the Globe Equity Decree regarding its enforcement shall be subject to the jurisdiction of the Gila River Adjudication Court.

Ex. F ¶ 14. The Judgment and Decree also acknowledges that all parties to the Gila River Adjudication ("Adjudication") who are not also parties to the Decree are free "to assert any priority date or quantity of water for Water Rights claimed by such Party." *Id*. ¶ 24; *In re Gen. Adjudication of All Rts. To Use Water In the Gila River Sys. & Source*, 224 P.3d 178, 188, ¶ 34 (2010) ("*Gila VIII*") (defining "Party" to include all parties to the Adjudication). The Adj. Court retained jurisdiction to enforce the Judgment and Decree, "including the entry of injunctions, restraining orders or other remedies under law or equity." **Ex. F** ¶ 26.

The clear import of these provisions is that: (1) the Adj. Court, not this Court, has jurisdiction over disputes involving nonparties to the Decree regarding its enforcement; (2) parties to the Adjudication are permitted to assert all of their water rights claims; and (3) the Adj. Court maintains jurisdiction to handle disputes with nonparties to the Decree and to enforce injunctions and all terms of the Judgment and Decree.

The Tribe asserts (e.g., Response at 11, 13) that Defendants are attempting to use the Judgment and Decree to "deprive this Court of [its] jurisdiction." Not so. The Judgment and Decree changed nothing about this Court's retention of jurisdiction under the plain language of the Decree. The Decree ***does not affect nonparties***. Motion at 2, 12. It enjoins only the "parties to whom rights to water are decreed" from "asserting or claiming – as against any of the parties herein" any additional rights to water of the Gila River and from interfering with the rights of other Decree-right holders. Motion **Ex. A** (Decree excerpts) at 113, § XIII; *see also* Motion at 2:11-15 (citing other authorities acknowledging that the Decree does not bind nonparties). This is consistent with the general due process proposition that a consent decree is not enforceable against nonparties. *See* Motion at 9:15-22 (citing authorities).

Thus, the Judgment and Decree does not modify jurisdiction or the Decree – it acknowledges that when the GE59 Court retained jurisdiction to enforce the Decree, it only retained jurisdiction to enforce ***the injunction among the parties to the Decree***. Nonparty claims were directed to the Adj. Court, which is statutorily required to accept the Tribe's

Decree rights absent a finding of abandonment. A.R.S. § 45-257(B)(1). The Adj. Court is therefore fully capable of determining the nature of Defendants' pumped water and Defendants' associated rights under Arizona law, and then taking into account the Decree rights, if applicable.

The Tribe understood this process and the meaning of ¶ 14 of the Judgment and Decree when it explained to the Arizona Supreme Court that the Tribe must "go to the [Adj. Court] for enforcement, if a water user, diverting by canal or well, is not party to the [Decree]." Motion at 5; **Ex. G** at 34-35. The Tribe (at 13:3) admits that this is the same interpretation that Defendants assert here but argues that the Adj. Court "necessarily rejected" this interpretation when it found that the GRIC Agreement will not affect the Tribe's water rights. But the Adj. Court did not expressly *or* impliedly reject the interpretation because nothing in Defendants' interpretation (the Tribe's "former" interpretation) *will* affect the Tribe's rights. To the contrary, the Tribe retains the right to enforce its Decree rights against Decree parties in the GE59 Court and the right to enforce its Decree rights against nonparties in the Adj. Court. The Tribe asserts its rights in the Adj. Court regularly. Motion at 14, n. 6. The court's entry of the Judgment and Decree over the Tribe's objections shows that the court found that the division of jurisdiction between the two courts did ***not*** have any substantive effect on the Tribe's rights – and that the division was consistent with the Decree. This is a question of jurisdiction, not of substantive rights. Thus, the Tribe's repeated arguments that its rights were unaffected by the Judgment and Decree or the GRIC Agreement are irrelevant.

The Tribe also incorrectly argues (at 13-14) that the *Feldman* case is inapplicable here because the Tribe is only asking this Court to reject Defendants' interpretation of a state court judgment, not the judgment itself. As explained above, Defendants' "interpretation" of the Judgment and Decree is based on its plain language and is consistent with the Decree. Consequently, the Tribe is asking this Court to reject a state court

judgment, which has been affirmed by the state's highest court. *Feldman* thus applies and the Tribe is bound by the Judgment and Decree. This Court lacks jurisdiction to review and reject the plain language of the Judgment and Decree. *District of Columbia Ct. of App. v. Feldman*, 460 U.S. 462, 482 (1983); *see* Motion at 14-15.[1]

II. The Tribe's cited authority does not support jurisdiction over nonparties.

Rather than address the plain language arguments, the Tribe cites to authorities that do not address the issue of jurisdiction over ***nonparties*** to the Decree. The Tribe (at 9) relies on *Arizona v. California*, 373 U.S. 546 (1963), and a related Special Master report from 1960, both of which relate to the overall rights to lower basin Colorado River water among several states. The Supreme Court accepted the Special Master's approval of a compromise between New Mexico and Arizona embodied in Parts IV(A), (B), (C) and (D) of the decree in that case. *Id*. at 595; *Arizona v. California*, 547 U.S. 150, 160-63 (2006).[2] The Tribe quoted part of a discussion regarding whether pumped water is also governed by the Decree. Report of Special Master, dated December 5, 1960 ("1960 Report") at 329. The Special Master declined to decide that question, stating that "the interpretation of the Decree is left to" the Globe Equity Court. *Id*. But there is no dispute that such question would be left to the Globe Equity Court; in fact, Judge Bolton already ruled on that issue in 2005. But that question is not at issue in this case; outside of this jurisdictional argument, this case does not turn on an interpretation of the Decree. Rather, this case involves a question of the nature of the water pumped by Defendants, which will be resolved by the Adj. Court.

The 1960 Report then discusses pumping of water "from lands outside the Gila

[1] The Tribe argues (at 8, n. 2) that the Motion is a facial (not factual) attack on jurisdiction, but states that it "makes no difference." Defendants agree that it makes no difference because the Court has the duty to dismiss if jurisdiction is lacking. Fed. R. Civ. P. 12(h)(3). In any event, the Motion explains (at 6-7) that it is a factual attack because it uses outside evidence (e.g., Statements of Claimant) to demonstrate that the Court cannot exercise jurisdiction here, contrary to the allegations of the Tribe's complaint. Dkt. 112 at ¶¶ 12-16.

[2] The Special Master's report has no precedential value as the Special Master was merely characterizing a settlement. *Arizona v. California*, 373 U.S. at 595.

Decree" and states that the U.S. can protect itself from injury if it can show that such pumping impairs its Decree rights. *See* 1960 Report at 330. First, this does not specify which forum the U.S. must use. Second, this language refers to "lands" outside of the Decree, but not to nonparties. The Decree binds ***parties*** to the Decree from asserting or claiming additional rights to Gila River water than those set forth in the Decree. **Ex. A** at 113, § XIII. It is undisputed that the Tribe, as a Decree party, can assert a claim ***in the GE59 Court*** if it is injured by a ***Decree party*** pumping subflow from ***non-Decree land***. This says nothing about a dispute involving a ***nonparty*** to the Decree. Similarly, the Tribe's cite to *Arizona v. California*, 547 U.S. 150, 161-62 (2006) is inapposite. There, the U.S. Supreme Court enjoined New Mexico from diverting Gila River water for non-Decreed lands, with certain exceptions, unless such excepted uses are determined "by a court of competent jurisdiction" to infringe Decree rights. Again, this says nothing about nonparties to the Decree because ***New Mexico is a party to the Decree***. **Ex. A** at 4:15-16. Additionally, a "court of competent jurisdiction" demonstrates that more than one court may decide a particular dispute.

The Tribe (at 10) also wrongly insists that the Decree was comprehensive as to all mainstem rights, even as to nonparties. *See Gila VIII*, 224 P.3d at 188-89, ¶34-35 (finding that, even after entry of the Decree, non-settling claimants in the adjudication are **not** "prevented from asserting their rights to Gila River water," they are only prohibited from denying the rights and priority dates in prior decrees). The Tribe (at 10) attempts to distinguish Defendants' arguments about the Orr Ditch Decree (Motion at 12), which allowed appropriations that post-dated the decree, by stating that the Orr Ditch Decree expressly excluded rights acquired after 1926. But the Decree here also includes an express limitation: it only enjoins ***Decree parties***. Motion **Ex. A** at 113, § XIII (enjoining only "all of the parties to whom rights to water are decreed").

The Tribe (at 11) also argues that this case is like *Catlin* and not like *Hanley*. In *Hanley*, the Ninth Circuit found that a nonparty to a water right decree approved in federal

court could pursue his claims in a state-court adjudication. Motion at 12 (citing *Hanley v. Pacific Live Stock Co.*, 234 F. 522, 527-28 (9th Cir. 1916)). The Tribe claims that *Hanley* is distinguishable because the *Hanley* decree did not include the water right claims at issue in that case. But that's exactly the case here: Defendants did not have their rights set forth in the Decree, making them nonparties, like in *Hanley*. Contrary to the Tribe's arguments, the *Catlin* case is very different. *State v. Catlin*, 21 Wash. 423, 423, 58 P. 206, 207 (1899). In *Catlin*, the appellant was charged with violating a decree ***to which he was a party***. *Id*. The appellant was allegedly "using 100 inches of water more than he was allowed under the terms of the decree." *Id*. He argued that he acquired ***additional*** rights from a grantor outside of the decree, but the court rejected that argument because of a lack of evidence that the grantor had any rights. *Id*. Unlike *Catlin*, here Defendants here are not parties to the Decree, and, as stated above, only ***parties*** are enjoined from "asserting or claiming" any rights other than those set forth in the Decree. Motion **Ex. A** at 113, § XIII.

III. The Tribe did not rebut most of Defendants' *Colorado River* arguments.

As explained in the Motion (at 15-17), other factors support abstention based on the *Colorado River* doctrine. Rather than rebut most of the arguments, the Tribe merely refers to prior briefing, to which Defendants already responded and will not do so again here. *See* Dkt. 108. However, the Tribe's argument that there is no duplication of issues is false. The Tribe (at 15) refers to Judge Bolton's ruling on Defendants' first motion to dismiss, in which Judge Bolton stated that the Decree will determine if Defendants have any rights to Gila River water and those rights "cannot be redetermined in state court." But the issue here is not only Defendants' rights but ***whether and to what extent*** Defendants' pumps ***actually*** pump river water. Quoting Judge Bolton (at 15), the Tribe asserts that there "is little risk of an inconsistent determination of water rights" and then states, without quotation, "because this Court is competent to determine whether a well pumps the waters of the Gila River and its underground sources." But Judge Bolton never said the latter part of that sentence. The

question of whether the Decree lists any rights for Defendants is different than the factually-intensive question of whether a well pumps subflow.

As explained in Defendants' motions, the Adj. Court will actually determine whether and to what extent Defendants' wells are pumping subflow of the Gila River and will then adjudicate any associated rights. *See* Motion at 13; **Ex. F** (Judgment and Decree) ¶ 24 (all Adjudication parties may assert their water rights); *Gila VIII*, 224 P.3d at 188 ¶ 34 ("Party" in the Judgment and Decree refers to all Adjudication parties); *Gila VIII*, 224 P.3d at 188 ¶ 35 (allowing a party to assert higher priority rights to Gila River water). The Upper Gila sub-basin is within the scope of the Adjudication and Defendants' predecessors filed Statements of Claimant regarding these very wells, which submits the associated water rights claims for Adjudication. *See* Motion at 13; *see also* Motion at 3-4 (citing A.R.S. § 45-254(F)).[3] As the Adj. Court has done for the San Pedro River and is now doing for the Verde River, it will direct ADWR to delineate a subflow zone for the Gila River with river-specific data based on an iterative process, with input from dozens of parties. The ADWR will also develop a cone of depression test and a subflow depletion test to be applied in this area, which, after approval by the Adj. Court, will be applied to all wells in the basin. *See generally* Dkt. 85 (Defendants' Response to GRIC's Motion for Summary Judgment) at 13, 17; *see also* Dkt. 115 (Notice of Supplemental Authority) at Ex. 1.

Considering the work that will be done in the Adj. Court, there is significant risk of

[3] The Tribe claims that Defendants' Statements of Claimant "make no difference." Response at 14. But the Tribe does not actually argue the point. Instead, the Tribe takes issue with Defendants characterizing the manner in which they discovered the Statements of Claimant as having been through discovery. *Id*. The Tribe complains that Defendants sent a public records request. *Id*. Defendants have never attempted to hide the fact that they discovered these Statements through a public records request and have produced the documents showing such requests. Receiving documents through third-party requests still constitutes "discovery." DISCOVERY, Black's Law Dictionary (11th ed. 2019) ("The act or process of finding or learning something that was previously unknown" or "Compulsory disclosure, at a party's request, of information that relates to the litigation"). The fact of the matter is that Defendants did not have these documents or know of their existence until just before they were requested from the ADWR, as evidenced by the requests.

inconsistent rulings if a subflow zone delineated by this Court differs from the subflow zone delineated by the Adj. Court. The Tribe argues (at 9) that the Adj. Court will have to recognize the preclusive effect of this Court's judgment on the subflow issue. Not so. The Adj. Court must only accept water ***rights and priority dates*** from prior decrees. A.R.S. § 45-257(B)(1). This Court's ruling on the subflow zone would be an issue of state water law, which the Adj. Court is not bound to follow. Dkt. 22 at 16:8-9 ("Subflow is a mixed question of law and fact controlled by Arizona law."); *Dube v. Likins*, 167 P.3d 93, 104, ¶ 37 (Ariz. App. 2007) ("[F]ederal decisions on state law issues do not bind us."). Due to this risk of inconsistent rulings, this Court left the door open to "stay these proceedings" if a relevant legal aspect of Arizona subflow law is being determined by the Adj. Court. Dkt. 22 at 16:11.[4] Accordingly, the *Colorado River* doctrine factors support abstention here.

IV. The Tribe's procedural arguments are unavailing.

The Tribe makes two procedural arguments that do nothing more than distract from the question of whether this Court *in fact* may exercise jurisdiction over this case. The Tribe argues that Defendants' Motion is a motion to reconsider the Court's order granting the Tribe's Motion to Intervene and that jurisdiction is the law of the case. But the Tribe never addresses the fact that this Court ***must*** dismiss if it lacks jurisdiction due to the prior exclusive jurisdiction doctrine, no matter how the issue is raised. *Chapman*, 651 F.3d at 1043 (9th Cir. 2011); *see also* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action."). Similarly, the Tribe's arguments that the Court already found that it has jurisdiction, which it claims is law of the case, are unpersuasive. As a rule of comity, the prior exclusive jurisdiction doctrine should be reexamined as necessary to determine if jurisdiction is lacking. *Cooper*

[4] If the Court denies Defendants' motions, a stay would be the next best way to ensure there is no risk of inconsistent rulings. *See generally* Dkt. 115 (Notice of Supplemental Authority) at Ex. 1 (explaining that the subflow depletion test is still in development and is required to determine the extent to which a well pumps subflow of a river).

v. Tokyo Elec. Power Co., Inc., 860 F.3d 1193, 1210 (9th Cir. 2017); *Cooper v. Tokyo Elec. Power Co. Holdings, Inc.*, 960 F.3d 549, 568 (9th Cir. 2020). Similarly, the defense of subject matter jurisdiction "can never be forfeited or waived" and federal courts have "an ***independent obligation*** to determine whether subject-matter jurisdiction exists, ***even in the absence of a challenge from any party***." *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 501 (2006) (emphasis added); *Leeson v. Transamerica Disability Income Plan*, 671 F.3d 969, 976, n. 12 (9th Cir. 2012) (same, describing it as a "continuing" independent obligation). Accordingly, the fact that Defendants did not raise specific jurisdictional arguments in their Response to the Motion to Intervene is irrelevant – this issue can never be waived. Moreover, this is not merely repetitive argument, as the Tribe argues. Defendants herein (and in Dkt. 89) raise evidence and arguments relating to the Judgment and Decree and the Statements of Claimant that have ***never*** been ruled upon by this Court.

For these reasons, the Tribe's citations to motion for reconsideration cases are wholly irrelevant. The Tribe (at 4) cites to the *Taylor* and *Ross* cases[5] to argue that the Motion should be construed as a motion for reconsideration. But neither of those cases relate to the prior exclusive jurisdiction doctrine or subject matter jurisdiction. Moreover, the Motion does not ask the Court to reconsider its grant of intervention. The Tribe also cites to *Stuart*, *Konarski*,[6] and *Proctor* to argue that the Motion, which it considers a motion for reconsideration, is untimely. *Stuart* and *Konarski* do not relate to jurisdiction. The *Proctor* case relates to a motion to reconsider a district court's decision to not exercise supplemental jurisdiction over state law claims. *Proctor v. Corr. Corp. of Am.*, No. CIV 11-0754-PHX-RCB, 2012 WL 1987180, at *1 (D. Ariz. June 4, 2012). In that case, a true motion for

[5] *Taylor v. Cnty. of Pima*, No. CV-15-00152-TUC-RM, 2021 WL 2318755, at *1 (D. Ariz. June 7, 2021); *Ross v. Arpaio*, No. CV054177PHXMHM, 2008 WL 2705562, at *1 (D. Ariz. July 10, 2008).

[6] *Stuart v. City of Scottsdale*, No. CV-20-00755-PHX-JAT, 2021 WL 5232333, at *1 (D. Ariz. Nov. 10, 2021); *Konarski v. Tucson*, No. CV-11-00612-TUC-LAB, 2018 U.S. Dist. LEXIS95142.

reconsideration was filed but it was 20 days late and the court denied it. *Id*. Timing was relevant because the court did not exercise jurisdiction, which does not trigger its obligation to assess whether it has jurisdiction over the case. Conversely, here, the Court has exercised jurisdiction and has a continuing obligation to verify that new circumstances do not change its decision. *Supra* at 8-9. Timeliness is irrelevant here.[7]

Similarly, the Tribe's "law of the case" arguments fail. Response at 6-8. First, whether to apply the law of the case doctrine is within the discretion of the Court. *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000) ("Application of the doctrine is discretionary."); *Ferreira v. Borja*, 93 F.3d 671, 674 (9th Cir. 1996) ("the law of the case is not a doctrine of inescapable application."). Second, the doctrine generally does not bar a court from reassessing its own legal rulings in the same case before a final judgment; "[t]he doctrine applies most clearly where an issue has been decided by a higher court." *Askins v. U.S. Dep't of Homeland Sec*., 899 F.3d 1035, 1042 (9th Cir. 2018).

Third, the Tribe's cited authorities are unpersuasive with respect to issues of prior exclusive jurisdiction or subject matter jurisdiction. The *Christianson* case related to jurisdiction with respect to *transfer* decisions: the court was concerned with creating a "vicious circle of litigation." *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816 (1988). The court noted that the case raised a "peculiar jurisdictional battle between the" Federal Circuit and the Seventh Circuit courts of appeal, where each court "adamantly disavowed jurisdiction over the case." *Id*. at 803. That is not the case here. Similarly, the *LaShawn A* case related to "pendent" jurisdiction. *LaShawn A. v. Barry*, 87 F.3d 1389, 1396 (D.C. Cir. 1996). The court distinguished pendent jurisdiction from subject matter jurisdiction, the latter of which "may be raised *sua sponte* at any stage and [] is capable of

[7] For the reasons explained above, the Tribe's arguments that Defendants do not meet the standard for reconsideration are irrelevant and do not require further response. However, the Tribe is wrong when it claims (at 5) that there is no newly discovered evidence at issue here. As explained above, the Judgment and Decree and the Statements of Claimant were discovered by Defendants after the first motion to dismiss.

aborting prior federal court proceedings." *Id.* (citing *Mayor of City of Philadelphia v. Educ. Equal. League*, 415 U.S. 605, 627 (1974)). The *Ferreira* case cited by the Tribe is also distinguishable because there the jurisdiction argument was already raised and rejected ***on a prior appeal***. *Ferreira*, 93 F.3d at 674 ("The current appeal is not the place to redetermine what was decided on the prior appeal."). Likewise, in *Williams*, the district court refused to find subject matter jurisdiction lacking because the Ninth Circuit already affirmed a prior judgment in the matter. *Williams v. Warden For Nevada, Women's Corr. Facility*, 489 F. Supp. 2d 1171, 1178 (D. Nev. 2007). It would have been inconsistent with that appellate court action for the district court to then dismiss. *Id.* Here, there have been no appellate decisions. Not even this Court has yet ruled on jurisdiction as to the new arguments and evidence, as explained above and in the Motion. The Tribe's arguments fail.[8]

V. Conclusion

Plaintiffs, through the Response and the Motion to Strike, attempt to take the Court's eye off the ball. It is entirely proper for the Court to analyze whether it has jurisdiction over this action based on the Court's own independent obligation to do so. The Adj. Court issued a binding Judgment and Decree that acknowledges the division of jurisdiction for Decree enforcement actions depending on whether the case involves a nonparty to the Decree. Defendants' wells will be analyzed in the Adjudication, which will determine the nature of the water coming from those wells and their associated rights. This Court should dismiss the Complaint-in-Intervention and allow the Adjudication to proceed. The Tribe can protect its rights in that forum.

. . .

[8] The Tribe (at 7-8) references "exceptions' to the law of the case doctrine. For the reasons stated as to the "motion for reconsideration" arguments, these exceptions are irrelevant. The Court has an independent obligation to verify that it has jurisdiction. In any event, the new evidence and related arguments discussed herein have never been ruled upon. There is sufficient reason to revisit the jurisdictional question.

DATED this 4th day of August, 2022.

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