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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 Motion for Summary Judgment and Memorandum Of Law In Support

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Rules

Other Authorities

MOTION FOR SUMMARY JUDGMENT

The Gila River Indian Community (the "Community") hereby moves for summary judgment against all remaining defendants on Claims One and Two in the complaint and on all affirmative defenses to those claims. Claim One seeks a declaration that Defendants' wells are pumping the waters of the Gila River to irrigate lands without Globe Equity Decree rights. Claim Two seeks an order to the Gila Water Commissioner to cut off and seal Defendants' wells. One of the wells is on land owned by David and Eva Schoubroek (the "Schoubroek Well"), and the other three are on land owned by Marvin and Donna Sexton ("Sexton Well 1," "Sexton Well 2," and "Sexton Well 3"). *See* Gila River Indian Community's Statement of Material Facts ("SOF") ¶¶ 3, 9. As a matter of law, all four wells are pumping waters of the Gila River without a Decree right and must be shut down.

This case seeks enforcement of this Court's judgments and orders protecting "the waters of the Gila River" (Decree Art. XIII) from unlawful diversions. The Decree governs "the use of any water from the Gila River" (Decree Art. II), not only its surface flow but also its underground flow, including "subflow" as defined by Arizona law. "Pursuant to the Decree, the Court has jurisdiction over the waters of the Gila River. Those waters include the surface waters and 'subflow'. . . [t]he notation of 'subflow' . . . serves to mark a zone where water pumped from a well so appreciably diminishes the surface flow of a stream that it should be governed by the same law that governs the stream." *United States v. Gila Valley Irrigation Dist.*, No. CV 31-0061-TUC (D. Ariz.), Order dated Aug. 3, 2010 (Doc. 145) ("2010 Bolton Order") at 62–63, *aff'd in part, rev'd in part on other grounds*, 859 F.3d 789 (9th Cir. 2017) (citations omitted). "'The use of a well to pump subflow of the Gila River without an associated Decree water right is a violation of the Decree.'. . . And the remedy is for the Commissioner to shut off that well." *United States v. Gila Valley Irrigation Dist.*, No. CV 31-0059-TUC (D. Ariz.) ("*GE 59*"), Order dated Aug. 10, 2018 (Doc. 8113) ("2018 Bolton Order") at 6 (quoting 2010 Bolton Order at 63).

Defendants are violating this Court's orders protecting the waters of the Gila River

from unlawful diversions. Defendants admit that they do not have Decree rights. SOF ¶ 13. And there is no genuine dispute as to facts showing that each of the four wells in this case pumps water from the Gila River. As shown in the memorandum of law below, there are at least two ways it is undisputed that Defendants are pumping water from the Gila River. First, Defendants disclosed an expert report that admits that three of the wells—the Schoubroek Well and Sexton Wells 1 and 2—are pumping waters from the surface flow of the Gila River. SOF ¶¶ 16–18. Defendants' experts even propose unauthorized "mitigation" measures, thereby acknowledging that the wells are illegal. SOF ¶ 19. Yet this Court has already ruled that the required remedy when a well is pumping Gila River water without a Decree right is "for the Commissioner to shut off that well." 2018 Bolton Order at 6.

Second, there is no genuine dispute that all four wells pump subflow of the Gila River because undisputed facts show they are either pumping directly in the subflow zone (the Sexton Wells) or are depleting the subflow zone through a cone of depression[1] (the Schoubroek Well). SOF ¶¶ 33–35, 59–60. Indeed, it is undisputed that all four wells are reducing the flow of the Gila River by an amount equal to 98-99% of the water pumped. SOF ¶¶ 47, 49, 51, 56. All four wells violate the Decree and must be shut down.

MEMORANDUM OF LAW

PROCEDURAL BACKGROUND

The complaint (Doc. 1) was filed on August 14, 2019. After all defendants moved

[1] "The cone of depression is the funnel-shaped area around a well where the withdrawal of groundwater through the well has lowered the water table." *In re General Adjudication of All Rights to Use Water in the Gila River System and Source*, 9 P.3d 1069, 1081–82 n.9 (Ariz. 2000). A cone of depression "is caused by the groundwater in the aquifer moving toward the well"; it "become[s] larger" as "water is pumped continuously from the well," and may "cut into a surface stream," causing "less water to be available in the stream bed." *In re General Adjudication of All Rights to Use Water in the Gila River System and Source*, 989 P.2d 739, 743–44 (Ariz. 1999) (quoting John D. Leshy & James Belanger, *Arizona Law Where Ground and Surface Water Meet*, 20 Ariz. St. L.J. 657, 663–64 (1988)).

to dismiss for lack of subject-matter jurisdiction and in the alternative for abstention (Doc. 14), this Court denied the motion in a published order dated May 12, 2020 (Doc. 22). *Gila River Indian Cmty. v. Cranford* (*Cranford*), 459 F. Supp. 3d 1246 (D. Ariz. 2020). The Court held that it has exclusive subject-matter jurisdiction over this case, and that abstention in favor of state-court proceedings is not warranted. *Id.* Thereafter, all defendants answered the complaint. (Docs. 26, 34). In February 2021, the Court entered a stipulation of settlement in which defendants Clint and Tyrel Cranford agreed to permanently disable their high-capacity pump, cease agricultural irrigation, and record permanent covenants not to irrigate. Doc. 45. On November 9, 2021, the Court granted the remaining defendants' motion to amend their answer to add affirmative defenses. Doc. 70. Expert discovery closed on November 23, 2021. *See* Doc. 69.

As discussed further below, this case arises out of a long line of court orders that have developed the law governing pumping of the waters of the mainstem of the Gila River.

The Globe Equity Decree

The circumstances leading to the entry of the Globe Equity Decree by this Court have been described previously. *See, e.g., United States v. Gila Valley Irrigation Dist.* (*GVID IV*), 31 F.3d 1428, 1430 (9th Cir. 1994); *Gila River Indian Cmty. v. 99 Ranch*, No. CV 20-0103-TUC (D. Ariz.), Order filed Dec. 8, 2020 (Doc. 248) at 1–2; *Cranford*, 459 F. Supp. at 1248–49. Like other western states, Arizona follows the law of prior appropriation, which gives priority of water use to those who first put the water to beneficial use. *See, e.g., Arizona v. California*, 283 U.S. 423, 459 (1931). But "[t]hroughout the early 1900s, increasing diversions of Gila River water by upstream landowners sharply decreased the amount of water available to [priority users] downstream." *Cranford*, 459 F. Supp. 3d at 1248. "In 1925, the United States brought suit on behalf of the [Community] and the San Carlos Apache Tribe, seeking to adjudicate the water rights of the Gila River." *99 Ranch*, Doc. 248 at 1 (footnote and citation omitted). The case was brought in equity in Globe, Arizona, to adjudicate and protect the Indians'

federally derived rights to the waters of the Gila River "against all non-Indian users of the Gila River water." *GVID IV*, 31 F.3d at 1430; *see Cranford*, 459 F. Supp. 3d at 1249. This "Globe Equity" litigation was resolved in 1935 by this Court's entry of a "consent decree, known as the Globe Equity Decree . . . , to govern the distribution of water among the Community, the Tribe, and various other landowners." *United States v. Gila Valley Irrigation District* (*GVID VI*), 859 F.3d 789, 794 (9th Cir. 2017); *accord 99 Ranch*, Doc. 248 at 1–2. Under the Decree, the Community has the senior-most water right, which dates from time immemorial. *GVID VI*, 859 F.3d at 794. The Community's water rights adjudicated by the Decree are federally derived rights held in trust by the United States and subject to federal law. *See Cranford*, 459 F. Supp. 3d at 1252–53.

The Decree adjudicated all rights to water from the Gila River, including underground water. *See United States v. Gila Valley Irrigation Dist.*, No. CV 31-0059-TUC (D. Ariz.) ("*GE 59*"), Order dated Mar. 29, 2005 (Doc. 6383) ("2005 Bolton Order"). Arizona law distinguishes between appropriable underground water and non-appropriable water. *See Cranford*, 459 F. Supp. 3d at 1250 n.3. It identifies appropriable water beneath and adjacent to surface streams with a legal term, "subflow," defined as the underground waters within an area loosely described as the "sand and gravel constituting the bed of the stream, or the lands under or immediately adjacent to the stream." *Maricopa Cnty. Mun. Water Conservation Dist. No. 1 v. Southwest Cotton Co.*, 4 P.2d 369, 380 (Ariz. 1931). "[T]he test is always the same: Does drawing off the subsurface water tend to diminish appreciably and directly the flow of the surface stream? If it does, it is subflow, and subject to the same rules of appropriation as the surface stream itself . . . ." *Id.* at 380–81. "[T]here can be no question that at the time of entry of the Gila Decree, the parties were aware that their state law based claims to the waters of the Gila River did not include merely those visible waters in the stream but the subflow as defined in *Southwest Cotton*." 2005 Bolton Order at 6–7. A few parties received pumping rights in the Decree. *See, e.g.*, Decree Art. XI(1) (granting a right "to divert from the underground waters of the Gila River by means

of . . . pumps"). And this Court, the Ninth Circuit, and the Supreme Court of Arizona have all recognized that the Decree identifies *all* rights to divert waters of the mainstem of the Gila River. "[T]he Decree was intended to resolve all claims to the Gila River mainstem. The United States included as defendants in the Globe Equity litigation all those with claims to the mainstem of the Gila River, and the Decree includes all water rights theories that the parties could have asserted. Thus, as to the mainstem of the Gila River, the Decree is comprehensive." *99 Ranch*, Doc. 248 at 2 (quoting *In re Gen. Adjudication of All Rts. to Use Water In Gila River Sys. & Source*, 127 P.3d 882, 902 (Ariz. 2006)).

Expansion of Pumping in the Upper Valley

After the Decree was entered in 1935, farmers in the Upper Valley were required to limit their surface diversions. *See, e.g., Gila Valley Irr. Dist. v. United States,* 118 F.2d 507, 510 (9th Cir. 1941) (rejecting argument that "upper valley water users" were "entitled . . . to use the waters of the Gila River as they had been theretofore accustomed . . . without regard to the rights of all others in the stream"). Farmers in the Upper Valley subsequently drilled hundreds of wells and installed pumps in areas near the river to supplement their surface diversions. *See United States v. Gila Valley Irr. Dist.*, 920 F. Supp. 1444, 1450 (D. Ariz. 1996) (noting that "[t]he amount of water pumped prior to the entry of the Decree was . . . quite small," that in 1938 there were 30 wells in the upper valleys, and by 1958 there were 900 wells). The Gila Water Commissioner made some initial enforcement efforts to stop this pumping, but a lack of clarity in Arizona law made such enforcement difficult. Without clear legal rules or sufficient hydrological knowledge of the connections between the subsurface waters and the surface flow of the Gila River, enforcement efforts were ineffective in the decades following entry of the Decree, and pumping in the Upper Valley of the Gila River continued to increase. For example, in 1971, the United States sued to enjoin pumping at one well near the Gila River. *See United States v. Smith*, 625 F. 2d 278, 279 (9th Cir. 1980). But the district court held that the United States failed to show the interconnection of the subsurface waters pumped by that particular well to the waters

of the Gila River, and the injunction was denied. *Id.* at 280–81. The Ninth Circuit based its affirmance narrowly on the district court's factual finding, on the evidence before it, that the water table near the well was not connected to the river and that "[p]umping the Smith well does not directly and appreciably diminish the water of the Gila River." *Id.* at 280. The Ninth Circuit emphasized that the case was "not a test case to decide whether Arizona landowners may pump from underground wells with impunity and thereby divert Gila River water." *Id*. Where pumping from a well does "directly and appreciably diminish the water of the Gila River," it is pumping subflow and must be shut down. *Id.*

A Precise Definition of Subflow in the Gila Adjudication (*Gila IV*)

Between 1981 and 2000, Arizona courts issued several important rulings that refined the definition of subflow, culminating in the Arizona Supreme Court's precise definition of subflow in *In re General Adjudication of All Rights to Use Water in the Gila River System and Source* (*Gila IV* or *Gila River IV*), 9 P.3d 1069, 1081 (Ariz. 2000). The cases that led to *Gila IV* were filed in the mid-1970s, under Arizona statutes that authorize and provide procedures for general adjudications of all water rights within a river system. *See Cranford*, 459 F. Supp. 3d at 1257–58 n.19. In 1981, the Arizona Supreme Court created a consolidated docket captioned *In re the General Adjudication of All Rights to Use Water in the Gila River System and Source* (*Gila Adjudication*), Nos. W-1, W-2, W-3, and W-4 , consolidating petitions filed in 1974 and 1978 for the adjudication of water rights on the Gila, Salt, Verde, and San Pedro Rivers. The case was assigned to the Superior Court of Maricopa County. *See Cranford*, 459 F. Supp. 3d at 1249.

The Gila Adjudication's jurisdiction is limited by statute to "appropriable water" and "all water subject to claims based on federal law." *In re General Adjudication of All Rights to Use Water in the Gila River System and Source* (*Gila III*), 989 P.2d 739, 742 (Ariz. 1999) (citing A.R.S. § 45-251(4)). Because subflow is "appropriable water," the Gila Adjudication's jurisdiction includes wells pumping subflow of a surface stream, but not wells pumping only "percolating" (*i.e.* non-appropriable) groundwater. *See Cranford*,

459 F. Supp. 3d at 1257 & n.19. Thus, efforts to delineate the jurisdiction of the Gila Adjudication require distinguishing the wells pumping subflow from those that are not. In defining subflow more precisely than had been done previously, the Gila Adjudication relied on advances in the hydrological understanding of the relationship of surface water to underground waters that had occurred since *Southwest Cotton*. *See, e.g.*, *Gila IV*, 9 P.3d at 1079 (noting the Arizona Supreme Court's "reaching in the direction of the facts, and, so far as possible under [prior] decisions, conforming to hydrological reality").

In *Gila IV*, the Arizona Supreme Court reiterated that subflow "is not a scientific, hydrological term," but rather a legally defined area of underground water that is "considered part of the surface stream." *Id.* at 1073. *Gila IV* more specifically defined this area of subflow, which had been described in *Southwest Cotton* 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." *Id*. (quoting *Southwest Cotton*, 4 P.2d at 380.) *Gila IV* defined this area of subflow as the waters within a specific, stable geologic feature upon which and within which the river flows, namely, the floodplain Holocene alluvium ("FHA"). *Id.*

In *Gila IV*, the Arizona Supreme Court did not merely affirm the results reached by the superior court; it "affirmed the trial court's order . . . in all respects." *Id.* at 1083. Therefore, *Gila IV* must be read in tandem with that order, by Judge Stanley Z. Goodfarb, dated June 30, 1994 ("Goodfarb Order"). As the superior court noted, although the facts it examined arose in the San Pedro Watershed (one of the tributaries of the Gila River), "the issues to be decided pertain to watersheds all over the Gila River watershed . . . ." Goodfarb Order at 12. Before arriving at a definition of subflow, the superior court's order delineated uncontested hydrologic principles (*id.* at 22–31), reviewed the requirements for subflow articulated in *In re General Adjudication of all Rights to Use Water in the Gila River System and Source* (*Gila II*), 857 P.2d 1236 (Ariz. 1993) (*discussed in* Goodfarb Order at 31–34), and distilled a list of "general principles" "to define subflow and still be consistent with

'Southwest Cotton' and science," *id.* at 34, 35–36. It then applied these principles to four competing definitions for subflow: (1) water within the "edge of the principal dynamic channel" of the river; (2) water within an area called the "post-1880 entrenchment and deposition" of the river; (3) water within a riparian zone identified by the Nature Conservancy; and (4) water within the saturated FHA. *Id.* at 36–59.

After applying the general principles it had distilled from legal precedent and science, the court concluded that the FHA is the only stable geologic feature in which to "enwrap" the legal concept of subflow. *Id.* at 31, 57–58. "[T]he only true geologic unit which is beneath and adjacent to the stream is the floodplain Holocene alluvium." *Id.* at 57; *see id.* at 56 (FHA "is the only stable geologic unit which is beneath and adjacent to most rivers and streams, except those in the mountains where bedrock surrounds the flow"). "*After consideration of* flow direction, water level elevation, the gradation of water levels over a stream reach, the chemical composition if available, and lack of hydraulic pressure from tributary aquifer and basin fill recharge which is perpendicular to stream and 'subflow' direction, *the Court finds the most accurate of all the markers is the edge of the saturated floodplain Holocene alluvium.*" *Id.* at 56 (emphasis added). The superior court added the qualifier "saturated" to describe the subflow zone, explaining: "in order to fulfill the definition of 'subflow,' the geologic unit must be saturated *because of the need for a hydraulic connection between the stream and the 'subflow,'*" so that drawing off the subflow diminishes the flow of the stream. *Id.* (emphasis added); *accord Gila IV*, 9 P.3d at 1076; *Gila Adjudication,* Order filed September 28, 2005 ("2005 Ballinger Order") at 14 & n.29, *review denied*, No. WC-05-001-IR (Ariz. May 23, 2007). The court noted that such a hydraulic connection is present "between nearly all groundwater and the surface flow in its area" except in two situations: (1) if "substantial impervious layers" create a "confined aquifer" that is "sealed off" from the river, or (2) if a groundwater aquifer is beneath an ephemeral stream and there is a "'vadose' dry zone" between the bottom of the stream bed and the top of the aquifer's water table. Goodfarb Order at 8.

The superior court further held, based on expert testimony at trial, that a surface stream's subflow zone must be distinguished from adjoining, hydraulically connected aquifers by using "setback[s]." *Id.* at 65. In areas where a tributary aquifer (typically the alluvium of a tributary stream) meets and is hydraulically connected to the river's FHA, the subflow zone boundary must be set 200 feet inside the outer edge of the river's FHA. *Id.* And in areas where adjoining "basin-fill aquifer[s]" are hydraulically connected to the river (such as where drainage from mountain fronts flows into the FHA), the subflow zone must be set 100 feet inside the outer edge of the river's FHA. *Id.*

Gila IV upheld the superior court's definition of subflow as the water within the saturated FHA. *See Gila IV,* 9 P.3d at 1073. It approved of this "workable and reasonably accurate definition of subflow" as appropriately "separating appropriable subflow from percolating groundwater." *Id.* at 1080 & n.6; *see also, e.g.*, *id.* at 1081 (referring to "the trial court's definition of subflow" as waters within "the saturated floodplain Holocene alluvium"). Under *Gila IV*, water within the subflow zone is protected in two ways. First, any well within the lateral limits of the subflow zone is pumping subflow, unless the well owner proves by a preponderance of the evidence that the well is pumping from beneath an impermeable layer that precludes hydrologic connection with the river and its floodplain Holocene alluvium. *Id.* at 1077, 1082, 1083; Goodfarb Order at 65–66. Second, wells outside the subflow zone that deplete the subflow zone through their cones of depression are also pumping subflow, unless the well owner shows by a preponderance of the evidence that the well is not pumping subflow. *Gila IV,* 9 P.3d at 1077, 1082.

This Court's 2005 Ruling Adopting the *Gila IV* Subflow Zone and Cone of Depression Test

The Arizona Supreme Court's decision in *Gila IV* prompted this Court to adopt the same definition of subflow for purposes of administering and enforcing the Decree in Arizona. As this Court has noted, "[i]t was the issuance of the Supreme Court's decision in *Gila River IV* that prompted this Court to address the issue of pumping by parties to the

Gila Decree." 2005 Bolton Order at 4. Challenges to pumping in the Upper Valley were tried in March 2002, but the trial judge withdrew without ruling in 2003, and the case was transferred to a different judge. *Id.* at 1. This Court then received motions for summary judgment, and on March 29, 2005, it ruled on issues of law only, without adjudicating the legality of pumping from any specific wells. *Id.* at 1–9.

In its 2005 ruling, this Court held that the "subflow" of the Gila River is governed by the Decree, that subflow is defined by the "precise" test for subflow in *Gila IV*, and that pumping subflow of the Gila River requires a Decree right. *Id*. The Court described how in *Gila IV*, "the Arizona Supreme Court defined with precision the limits of subflow": "the entire saturated floodplain Holocene alluvium" is the subflow zone, and wells pumping subflow include not only wells directly in the subflow zone but also any well outside the subflow zone if the well's "cone of depression caused by its pumping has now extended to a point where it reaches an adjacent subflow zone, and by continual pumping will cause a loss of such subflow as to affect the quantity of the stream." *Id*. at 5 (citations and internal quotation marks omitted). The Court then ruled that "the Arizona Supreme Court's test for subflow set out in *Gila River IV* defines for the Gila Decree when wells are pumping subflow and when they are pumping percolating ground water not governed by the Gila Decree." *Id*. at 7.

The 2010 Orders Dismantling Four Wells Pumping Subflow

In 2010, this Court applied its 2005 ruling to four specific wells in the Upper Valley, holding that the wells were pumping subflow and must be shut down. 2010 Bolton Order at 62–63. The issue arose in proceedings to adjudicate the United States', the San Carlos Apache Tribe's, and the Community's objections to ten applications by Freeport McMoRan Corporation ("Freeport") to sever and transfer Decree rights to new locations of use and different points of diversion. Three of the applications sought to transfer Decree rights to lands irrigated by a total of four wells. This Court held that "[b]y applying for a Decree right for water pumped from a well, Freeport concedes that the water is subflow of

the Gila River for which a Decree right is required, a proposition that was confirmed by the expert testimony at the evidentiary hearing." *Id.* at 64. The Court also briefly summarized the law of subflow under the Globe Equity Decree, stating:

- "Pursuant to the Decree, the Court has jurisdiction over the waters of the Gila River. Those waters include the surface waters and subflow, which under Arizona law 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."
- "The notation of subflow . . . serves to mark a zone where water pumped from a well so appreciably diminishes the surface flow of a stream that it should be governed by the same law that governs the stream."
- "This Court has already ruled 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."
- "[P]ursuant to the Court's jurisdiction over the flow of the Gila River, the Commissioner does have the authority to shut off a well that is pumping subflow of the Gila River without an associated Decree water right."

Id. at 62–63 (citations and internal quotation marks omitted). The Gila Water Commissioner thereafter issued an order shutting down the four wells and requiring that Freeport "forthwith remove the meters from the electrical power connection to the wells," "sever the pipes leading from the pumps to the irrigation delivery system," and "weld a metal cap onto the pipe where it has been severed" (but allowing one electrical meter to stay in place for unrelated usage). *GE 59*, Water Commissioner's Order Directing Freeport McMoRan Corporation to Cease Pumping from Wells Determined by the Court to Be Pumping Sub-flow of the Gila River, Oct. 8, 2010, at 3 (Doc. 7393).

The 2018 *Howard* Ruling

In 2018, this Court denied a motion by landowners Ronald G. Howard and Janice A. Howard to dismiss anti-pumping counterclaims to an application to sever and transfer a Decree right. *See* 2018 Bolton Order. The Court held that even though the Decree right in the application was abandoned by stipulation, the United States' and the San Carlos Apache Tribe's counterclaims challenging the Howards' pumping of subflow in violation of the

Decree could be repleaded. *Id.* at 3–7. The Howards argued that the Tribe could not show that the pumping injured the Tribe. *Id.* at 3. Citing U.S. Supreme Court precedent, this Court held that the Decree is enforceable by any party to the Decree without any additional showing that the violation has injured that party. *Id.* at 4–5. The Court reiterated that "[i]f unauthorized diversions are indeed taking place, the prescribed remedy is to shut them down." *Id.* at 5 (citing 2010 Bolton Order at 63). "'The use of a well to pump subflow of the Gila River without an associated Decree water right is a violation of the Decree.' And the remedy is for the Commissioner to shut off that well." *Id.* (quoting 2010 Bolton Order at 63) (citation omitted).

As the Court noted at oral argument on the Howards' motion, the Court has its own independent interest, in the exercise of its enforcement authority over the waters of the Gila River under the Decree, in ensuring that illegal pumping of subflow is not permitted. "[T]he Water Commissioner and I care deeply as to whether or not there's illegal pumping going on. . . . [W]e care a lot about whether or not there are wells pumping the subflow or what would have otherwise been surface flow of the Gila River." *GE 59*, Tr. at 17:4–17:15 (Comments of the Court) (Doc. 8063). The Water Commissioner's counsel echoed this concern and requested that the Court identify a subflow zone within which wells must be shut down. "Now, you're right, we don't want to see a well pumping [in the] subflow zone. . . . It would be better off if you established a bright line of your own and told us any well within that bright line, Mrs. Commissioner, you are to shut down and we'll do that." *Id.* at 48:19–48:20, 49:15–49:17 (Comments of B. Moody). Proceedings to shut down the Howard wells are still pending, but are stayed at the parties' request pending resolution of the Daley/Goodwin Wash matter. *See GE 59*, Order dated Jan. 24, 2020 (Doc. 8293).

2019 Tyler enforcement action and stipulation

On August 19, 2019—four days after the complaint in this case was filed—the Community filed a motion on the main Globe Equity docket seeking to stop the irrigation of the non-Decree lands immediately to the north of the Sextons' lands in this case, as well

as other nearby lands. *See GE 59*, Motion to Enforce Provisions of the UV Forbearance Agreement, filed Aug. 19, 2019 (Doc. 8231). The motion was brought on two parallel, alternative grounds: (1) that the irrigation of non-Decree lands with water pumped from within the "UV Impact Zone" was prohibited by the Upper Valley Forbearance Agreement (or "UVFA"), a settlement agreement to which the landowner was a signatory and which is enforced by the Globe Equity court; and (2) that the irrigation of non-Decree lands with water pumped from the subflow zone of the Gila River was prohibited by the Globe Equity Decree. On November 19, 2019, the motion was settled by a joint stipulation, entered by this Court, in which the landowner acknowledged that the motion had merit and agreed to cut off and seal three of the wells at issue. *GE* 59, Order dated Nov. 19, 2019 (Doc. 8267).

2020 Order denying the motion to dismiss this case

In 2020, in denying Defendants' motion to dismiss this case, this Court held that it has exclusive jurisdiction to determine the subflow zone of the Gila River and to identify wells pumping Gila River subflow. *Cranford*, 459 F. Supp. 3d at 1257–58 (this Court has jurisdiction, and the Gila Adjudication lacks jurisdiction, over the "rights at issue here," namely, "whether Defendants are pumping mainstem subflow"). This motion now addresses on the merits the central question remaining for decision: whether the remaining defendants' wells are pumping the waters of the Gila River.

STATEMENT OF FACTS

This case concerns pumping of water from four wells with high-capacity pumps in the Apache Grove (or Sheldon) area of the Gila River, for irrigating agricultural lands without Decree rights. The Apache Grove area is located about halfway between Duncan and Clifton in Duncan Valley, Arizona. As described in the separate statement of material facts filed with this motion, the undisputed facts here are straightforward. Defendants David and Eva Schoubroek have been irrigating approximately 14.17 acres of non-Decree land using water pumped from one irrigation well on their property that produces approximately 600 gallons per minute. SOF ¶¶ 2–4, 13. Defendants Marvin and Donna

Sexton have been irrigating at least 153.88 acres of non-Decree land using water pumped from three wells on their property that produce 300, 1000, and 150 gallons per minute. SOF ¶¶ 7–13. All four wells are located in unconsolidated alluvial sediments along the Gila River and are hydraulically connected to the Gila River. SOF ¶¶ 38–41. All four wells deplete the flow of the Gila River. SOF ¶¶ 47–52, 56–57.

Defendants' experts, Doug Bartlett and Paul Plato of Clear Creek Associates, concluded that some of the water pumped from the Schoubroek Well, from Sexton Well 1, and from Sexton Well 2 travels from the surface flow of the Gila River to the wells. SOF ¶¶ 16–18. Further, at least three of the wells (the Sexton Wells) are located directly in the Gila River's aquifer, the floodplain Holocene alluvium within which the river flows. SOF ¶¶ 33–35. And although there is a dispute about whether the Schoubroek Well is located within the FHA, there is no dispute that its cone of depression intersects with the Gila River and that pumping the well depletes the river's flow. SOF ¶¶ 55–61.

SUMMARY JUDGMENT STANDARD

Upon a party's motion brought under Rule 56, a court "shall grant summary judgment" as to any claim or defense or any parts thereof "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986). A genuine dispute exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," and material facts are those "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

ARGUMENT

I. WELLS PUMPING WATERS OF THE GILA RIVER WITHOUT A DECREE RIGHT MUST BE SHUT DOWN.

The Globe Equity Decree prohibits pumping of the waters of the Gila River without a Decree right to do so. Under Arizona law, any waters that legally constitute "subflow"

of a surface stream such as the Gila River are legally part of that stream and are governed by the same legal rules. *See Cranford*, 459 F. Supp. 3d at 1250 n.3. Therefore, just as diverting the surface flow of the Gila River without a Decree right violates the Decree, "[t]he use of a well to pump subflow of the Gila River without an associated Decree water right is a violation of the Decree." 2010 Bolton Order at 63. "And the remedy is for the Commissioner to shut off that well." 2018 Bolton Order at 6.

Because this case involves unauthorized diversions of the waters of the Gila River, it is within the Court's continuing "jurisdiction over the Decree," which "continues to the present day." *Cranford*, 459 F. Supp. 3d at 1249; *accord, e.g., GVID VI*, 859 F.3d at 794 ("The district court has continuing jurisdiction to enforce and to interpret the Decree . . . ."). As this Court held in denying Defendants' motion to dismiss, the Court has exclusive jurisdiction to identify subflow of the mainstem of Gila River: "the Gila Adjudication is *not* adjudicating the rights at issue here—mainstem rights." *Cranford*, 459 F. Supp. 3d at 1257. In the Gila Adjudication, the Superior Court for Maricopa County has jurisdiction over subflow and has tasked the Arizona Department of Water Resources ("ADWR") with providing subflow zone recommendations that are then commented on by the parties and adjudicated by the court. *See, e.g., In re Subflow Technical Report, Verde River Watershed*, Order dated Nov. 27, 2017; *see also* A.R.S. § 45-256(A). But it is this Court, not the Gila Adjudication or ADWR, that will delineate the subflow zone for the mainstem of the Gila River. "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." *Id.* at 1256 n.14. Thus, if Defendants "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." *Id.* at 1257.

Under the Decree, the Court applies Arizona law to determine subflow. "The legal

issue presented here—whether Defendants' well pumping is lawful—will turn on whether Defendants are pumping mainstem subflow." *Id.* at 1258. Whether a well is pumping subflow "is a mixed question of law and fact controlled by Arizona law." *Id.*[2]

II. DEFENDANTS ADMIT THAT THREE WELLS ARE PUMPING WATERS OF THE GILA RIVER.

Defendants admit that they lack Decree rights for their pumping. This Court can shut down a well without a Decree right as soon as it is known that the well pumps waters of the Gila River—with or without delineating a subflow zone first. Article II and Article XIII of the Decree make clear that all water from the Gila River is protected by the Decree and reserved exclusively for parties to the Decree accordingly to its terms. In 2010, this Court held that four wells were diverting subflow of the Gila River based on admissions by the well owner, without first delineating a subflow zone. "By applying for a Decree right for water pumped from a well, Freeport concedes that the water is subflow of the Gila River for which a Decree right is required, a proposition that was confirmed by the expert testimony at the evidentiary hearing." 2010 Bolton Order at 64. The Gila Water Commissioner then ordered that the wells be shut down and sealed. *GE 59*, Oct. 8, 2010 Order (Doc. 7393).

Defendants here have made a similar concession. Their experts, Doug Bartlett and

[2] This Court and the Ninth Circuit have both left open the question of whether federal law protects underground waters of the Gila River from diversion beyond what state law provides. The Ninth Circuit specifically declined to address this question in *Smith.* *See Smith*, 625 F.2d at 280–81 & n.3. And as this Court has noted, the Ninth Circuit has held that federal law may be more protective than state law of waters reserved to Indian tribes under a federal decree; under at least one federal decree, underground waters hydrologically connected to the river that were not protected by state law could nevertheless be protected from diversion to secure federal rights. 2010 Bolton Order at 63 n.42 (citing *United States v. Orr Water Ditch Co.*, 600 F.3d 1152, 1154, 1158 (9th Cir. 2010)). The Arizona Supreme Court has likewise noted that "upon evidence that federal water rights were being depleted because the groundwater and surface water are physically interrelated as integral parts of the hydrologic cycle, . . . the United States can protect its water from subsequent diversion, whether the diversion is of surface or groundwater." *Gila III*, (quoting *Cappaert v. United States*, 426 U.S. 128, 142 (1976)) (cleaned up). Deciding whether federal law is more protective than state law in this case is unnecessary because the Defendants' wells are pumping subflow under Arizona law.

Paul Plato of Clear Creek Associates, created a computerized, three-dimensional groundwater flow model to simulate the hydrologic system in the area where the Defendants' wells are located. SOF ¶ 14. And based on the model, Messrs. Bartlett and Plato admit that at least some of the water in the Schoubroek Well, Sexton Well 1, and Sexton Well 2 is water from the surface flow of the Gila River. SOF ¶¶ 16–18. "Our analysis found that for the period from 2008 to 2019, Defendants' wells pumped low percentages of Gila River water, with the two largest wells owned by Marvin Sexton (55-616761 and 55-616762) pumping water derived from the Gila River between 0.7 and 3.6 percent with an average of 2.6 and 2.1 percent, respectively (Table 11-1). . . . The Schoubroek well (55-612784) pumps between 0.3 and 0.8 percent Gila River water with an average of 0.6 percent (Table 11-1)." Exhibit 9 to SOF (Report of Clear Creek Associates dated July 16, 2021) at p. ES-2 (CC-CRAN000010), cited in SOF ¶¶ 16–18. By proffering this testimony, Defendants frankly admit that these wells pump waters of the Gila River.

Notably, the Defendants' own experts have proposed "mitigation" for the Decree violations by the Schoubroeks and the Sextons. SOF ¶ 19 (citing Exhibit 9 to SOF (Report of Clear Creek Associates dated July 16, 2021) at p. ES-2 (CC-CRAN000010) (positing "[m]itigation for the small percent of pumped water derived from the Gila River")). This is an express acknowledgment of their violation of the Decree. *No* waters of the Gila River may be diverted without a Decree right, and the remedy for a well pumping water without a Decree right is to shut it down. When the Howards made a similar argument, arguing that they would provide mitigation water to compensate for water pumped in violation of the Decree, this Court rejected the argument summarily. By definition there is no right to violate the Decree and then "mitigate" for the violations: "If unauthorized diversions [by pumping] are indeed taking place, the prescribed remedy is to shut [the wells] down." 2018 Bolton Order at 5 (citing 2010 Bolton Order at 63.)

To be clear, as a matter of law, it is not necessary to show that water travels from

the river to the well, because all water within the subflow zone is subflow. "[T]he geologic unit which defines 'subflow' is the 'saturated floodplain Holocene alluvium.'" Goodfarb Order at 56; *accord Gila IV*, 9 P.3d at 1073 ("[T]he trial court defined 'subflow' as the 'saturated floodplain Holocene alluvium' . . . ."). Nevertheless, while such a showing is not *necessary*, Defendants' concession that water from the Gila River is traveling to the Schoubroek Well, Sexton Well 1, and Sexton Well 2 is certainly *sufficient* to show that these wells pump "water from the Gila River" protected by the Decree. Decree Art. II.

The conclusiveness of Defendants' concession that they are pumping water from the Gila River from these three wells is not diminished by Messrs. Bartlett and Plato's assertion that less than 100% of the water pumped travels from the surface flow of the Gila River all the way to the wells. (As explained in section III below, Defendants' concession is misleadingly narrow, because undisputed facts show that two of these wells are in the subflow zone as a matter of law, and the other fails a cone of depression test, depleting the river by 97.5% of its pumping.) Defendants' concession simply ends the case as to those three wells, because *any* pumping of Gila River water without a Decree right is illegal *under the Decree*. The Decree contains no provision that would allow Defendants *any* diversion of waters of the Gila River for use on non-Decree lands. There is no percentage or volume of water from the Gila River that can lawfully be pumped without a Decree right. And there is no such thing as a permissible violation of the Decree that can be allowed to continue if "mitigated." The Decree and this Court's rulings are unequivocal. "If unauthorized diversions [by pumping] are indeed taking place, the prescribed remedy is to shut [the wells] down." 2018 Bolton Order at 5 (citing 2010 Bolton Order at 63).

In addition, as explained in the next section, undisputed facts show that the Sexton Wells are in the subflow zone, and that the Schoubroek Well (at a minimum) fails the cone of depression test—so all four wells are pumping subflow as a matter of law.

III. UNDISPUTED FACTS SHOW THAT ALL FOUR WELLS ARE PUMPING SUBFLOW UNDER THE *GILA IV* TEST.

Under the "precise" *Gila IV* test for subflow, all four wells in this case pump subflow, as shown by facts not subject to dispute.

A. The *Gila IV* Test for Subflow

This Court has adopted the *Gila IV* test for defining whether a well is pumping subflow. "As a matter of law, . . . the Arizona Supreme Court's test for subflow set out in *Gila River IV* defines for the Gila Decree when wells are pumping subflow and when they are pumping percolating ground water not governed by the Gila Decree." 2005 Bolton Order at 7. *Gila IV* "precisely defines the limits of subflow and sets out a specific test for when wells are pumping subflow . . . ." *Id.* *Gila IV* "more precisely described the *Southwest Cotton* rule so that wells that were pumping subflow could be identified . . . ." *Id.*

As noted above, under the *Gila IV* test, there are two ways to show that well is pumping subflow. Both of these recognize that subflow is defined as the waters within the saturated FHA. "[T]he geologic unit which defines 'subflow' is the 'saturated floodplain Holocene alluvium.'" Goodfarb Order at 56; *accord Gila IV*, 9 P.3d at 1073 ("[T]he trial court defined 'subflow' as the 'saturated floodplain Holocene alluvium' . . . ."). First, a well is pumping subflow if it is within the lateral boundaries of the river's "subflow zone," unless the well owner shows that the well is pumping from a completely separate aquifer beneath an impermeable layer. "All wells located in the lateral limits of the 'subflow' zone" pump appropriable water "no matter how deep or where [the wells'] perforations are located. However, if the well owners prove that perforations are below an impervious formation which preclude[s] 'drawdown' from the floodplain alluvium, then that well will be treated as outside the 'subflow' zone." *Gila IV,* 9 P.3d at 1077 (quoting Goodfarb Order at 65–66).

Second, if a well is outside the lateral extent of the subflow zone, it is presumed not to be pumping subflow unless its cone of depression "reaches the 'subflow' zone and the

drawdown from the well affects the volume of surface and 'subflow' in such an appreciable amount that it is capable of measurement." *Id.* at 1081-82 (quoting Goodfarb Order at 36). In that situation, then the well owner may attempt to show that the well is *not* pumping water from the subflow zone by means of its cone of depression. *Id.* at 1082.

A well owner's burden for rebutting either showing—(1) that a well is in the subflow zone or (2) that a well outside the subflow zone is pumping from the subflow zone by reason of its cone of depression—is a preponderance of the evidence. "When DWR determines and establishes [1] that a well is in the subflow zone by using the pertinent criteria or [2] that it is pumping subflow by reason of its cone of depression," the burden "shifts to the well owner to show that a well is either [1] outside the subflow zone or [2] is not pumping subflow" by reason of its cone of depression. *Gila IV*, 9 P.3d at 1082.

The two parts of the *Gila IV* test are applied further below. Section B addresses the subflow zone and shows that the Sexton Wells are pumping subflow under the first part of the *Gila IV* test. Specifically, Section B.1 below discusses in more detail how a subflow zone is delineated. Section B.2 then shows that the three Sexton Wells are within the lateral limits of the subflow zone even under Defendants' experts' analysis. Section B.3 demonstrates that the presumption that these wells pump subflow cannot be rebutted by showing that they pump from a separate aquifer beneath an impermeable layer, because there is no genuine dispute of fact that the Sexton Wells are hydrologically connected to the river and are depleting the river. Section C shows that the Schoubroek Well is pumping subflow under the second part of the *Gila IV* test, the cone of depression test. The Schoubroek Well fails that test and is depleting the Gila River regardless of where the subflow zone boundary is located.

B. Undisputed facts show that the Sexton Wells are within the subflow zone.

1. The subflow zone is the saturated FHA.

Under *Gila IV*, "the subflow zone is defined as the saturated floodplain Holocene

alluvium," a "geologic unit which is beneath and adjacent to the stream" that "is readily identifiable . . . ." *Gila IV*, 9 P.3d at 1076, 1081, 1083. Subflow is defined as the waters in the FHA so as to protect downstream users from depletion of a surface stream. In *Gila IV,* the Court explained that "the concept of subflow serves to protect appropriable surface water rights against interference caused by the pumping of groundwater." *Id.* at 1073–74. By choosing the saturated FHA as the subflow zone, Arizona courts have defined subflow in a way that "conform[s] to hydrological reality" "so far as possible" without departing from precedents like *Southwest Cotton*. *Id.* at 1079. Thus, the subflow zone is the area where "*drawing off the subsurface water tend[s] to diminish appreciably and directly the flow of the surface stream.*" *Id.* at 1080 (quoting *Southwest Cotton*, 4 P.2d at 380) (emphasis in *Gila IV*). It is a "broad and deep subterranean volume of water" that "is probably much greater in volume in some cases than the water upon the surface." *Id*. at 1073 (quoting 2 Clesson S. Kinney, *A Treatise on the Law of Irrigation and Water Rights* § 1161, at 2106–07 (2d ed. 1912)). It is the "zone where water pumped from a well so appreciably diminishes the surface flow of a stream that it should be governed by the same law that governs the stream." *Id.* (quoting *Gila III*, 989 P.2d at 743).

The FHA is an alluvial aquifer hydrologically connected to the river. SOF ¶¶ 21–22. An aquifer is "a water-bearing stratum of permeable rock, sand or gravel," and an alluvial aquifer is comprised of alluvium, which is "clay, silt, sand, gravel, or similar detrital material deposited by running water." "Aquifer," *Merriam-Webster.com Dictionary*, https://www.merriam-webster.com/dictionary/aquifer; "Alluvium," *Merriam-Webster.com Dictionary,* https://www.merriam-webster.com/dictionary/alluvium. The FHA is an area of relatively loose and porous material deposited by erosional processes during the Holocene epoch. SOF ¶ 21. During the Holocene epoch, "flood caused rivers to carry and deposit certain materials that originated from erosion of bedrock and basin fill deposits. The 'Holocene alluvium,' also referred to as the younger or floodplain alluvium, is the sedimentary material in a river valley that resulted from that process." *Gila IV,* 9

P.3d at 1073 n.2 (citation omitted). The river flows within the FHA. *See, e.g.*, Goodfarb Order at 28 (diagram of "[g]eneralized cross-section of [alluvial] valley stream segments," showing stream flowing within the "younger alluvium"). As an aquifer, the FHA both receives water from the river and supplies water to the river, depending on varying water table conditions. *See* SOF ¶ 22 (citing Exhibit 16 to SOF (Report of Peter Mock dated May 20, 2021) at Figure 4 (diagram showing "[g]aining stream" and "[l]osing stream" reaches, both within the "[s]hallow aquifer")).

In applying *Gila IV*, the Gila Adjudication court has addressed in more detail how to delineate the subflow zone. Although a full discussion of these rulings is not necessary to this case, a few points bear noting here for context. First, the entire lateral extent of the FHA must be included in the subflow zone even in areas where the FHA is buried under other materials—where the surficial geological unit is not FHA but the FHA is present beneath the surface. *See, e.g.*, *Gila Adjudication*, Order dated Oct. 12, 2012 ("2012 Ballinger Order") at 2; *accord Gila Adjudication*, Order dated July 13, 2017 ("2017 Brain Order"). In particular, a subflow zone delineation must "appropriately take into account the fact that extensive alluvial fans cover much of the floodplain and adjacent basin fill." 2017 Brain Order at 1 (quoting 2012 Ballinger Order at 2). This means that determining the lateral extent of the FHA should be done not merely with surficial geologic maps, but rather by analysis of the erosional processes that led to the carving of the trough within which the FHA was deposited by the river in the Holocene epoch. *See, e.g.*, 2017 Brain Order at 4 (noting reliance on "the geomorphic development and evolution of the San Pedro River valley"); *id.* (noting that the "known and inferred distribution of the FHA" is related to the width of the San Pedro River's inner valley, the erodibility of the bounding geologic units, and the linearity of the bounding topography"); 2012 Ballinger Order at 5. This includes in many instances drawing the edge of the FHA at the bounding topography—typically bluffs—carved by the river during that epoch. 2017 Brain Order at 3–6.

Second, the method for applying the 100-foot and 200-foot setbacks required by

Gila IV has been refined, so that, for example, the setbacks may not result in the exclusion of the active river channel from the subflow zone. *See* 2012 Ballinger Order at 4.

Third, it is "assume[d] that the entire lateral extent of the floodplain Holocene alluvium is saturated" in delineating the subflow zone. 2005 Ballinger Order at 11–12. This is because saturation of the FHA fluctuates due to "Arizona's river systems' dynamic nature," and "any temporally limited measurement would be arbitrary." *Id.* at 16 n.34. The thickness of the FHA is highly variable, the water table is highly variable, and there is a lack of reliable data to measure saturation. *Id.* at 11–18. This simplifying "assumption is reasonable, practical, and consistent with the goal of permitting" subflow to be identified expeditiously. *Id.* at 17.

Fourth, identifying subflow should be done assuming "predevelopment" conditions, to avoid having the determination of subflow affected by human depletion of water resources in the areas in question. *See* 2005 Ballinger Order at 18–24; *see also Campbell v. Willard*, 42 P.2d 403, 404 (Ariz. 1935) ("[I]n order to determine whether waters are of the class subject to appropriation under the law we must consider them in their natural state, and not as developed artificially."). The predevelopment conditions used to determine subflow should be "an identifiable chronological year or range of years immediately prior to regular, discernable diversion or depletion of stream flows resulting from human activity." 2005 Ballinger Order at 21. This should be "the earliest predevelopment timeframe for which accurate and reliable data is available." *Id.*

2. Undisputed facts show that the Sexton Wells are within the Gila River's FHA, after excluding tributaries.

In this case, it is undisputed that Sexton Wells 1, 2, and 3 are within the lateral limits of the Gila River's FHA, after excluding tributaries, and are hydraulically connected to the river. Therefore, they are in the subflow zone.

Dr. Peter Mock identified the subflow zone using the methods approved in *Gila IV* and subsequent decisions in the Gila Adjudication. That is, he delineated the full extent of

the FHA by analyzing topographic breaks and erosional processes and then applied 100-foot and 200-foot setbacks to exclude tributary water. SOF ¶¶ 31–32. By contrast, Messrs. Bartlett and Plato identified the FHA using aerial photography and surficial mapping. SOF ¶ 20. They also used the UV Impact Zone, which took into account only the surficial geology and excluded tributaries. SOF ¶¶ 26–28. By including only surficial FHA minus tributary water, Bartlett and Plato's Figure 11-1 is narrower than the full subflow zone. SOF ¶ 25. But the Court need not decide how far beyond the surficial FHA the subflow zone extends, because undisputed facts show that Sexton Wells 1, 2 and 3 are within the surficial FHA, which is narrower than the subflow zone.

Further, the entire extent of the FHA is presumed saturated. *See* 2005 Ballinger Order. The requirement of saturation under *Gila IV* serves to ensure that the water being pumped is connected to the river, and as discussed further in the next section, undisputed facts show such a connection here.

3. Undisputed facts show that all three Sexton Wells are hydrologically connected to the Gila River and are depleting the surface stream.

Under *Gila IV*, "[w]ells which are located in but perforated below the saturated floodplain alluvium aquifer are to be included in the 'subflow' component unless these perforations are proven by their owners to be below a confining zone of impermeable material such as clay" that prevents a hydraulic connection with the FHA and surface flow, because "the inevitable 'draw-down' of the well must affect the 'subflow zone' above the perforation." Goodfarb Order at 36; *see also id*. at 48–49 (Noting admission that "any well which has perforations below [the FHA] and in the basin fill will quite quickly draw down water from the Holocene. The water pulled from any 'subflow' zone will quickly affect the volume of the surface stream above.").

Undisputed facts show that these wells are not pumping from beneath an impermeable confining layer. SOF ¶¶ 42–45. Defendants' own groundwater model demonstrates a hydraulic connection between each well and the Gila River. SOF ¶¶ 38–

41. Defendants' experts, Bartlett and Plato, describe a consensus among geologists that no impermeable clay layers formed in the area of the Defendants' wells:

> The geologic history of the valley enumerated by several authors (Gootee, et al, 2021; Reid and Buffler, 2002; and Morrison, 1965) suggests the conditions for forming a widespread clay deposit in the valley never developed. Thick clay would require the presence of a persistent lake. Only intermittent lakes were present in Duncan Valley.

SOF ¶ 45 (citing Exhibit 9 to SOF (Report of Clear Creek Associates dated July 16, 2021) at p. 4-3 (CC-CRAN000014)). Dr. Mock used Defendants' model to show that the three Sexton wells and the Schoubroek Well deplete the Gila River by between 97.5% to 99.5% of the water pumped. SOF ¶¶ 47, 49, 51, 56. In reliance on Clear Creek's model, another of Defendants' experts, Herb Dishlip, concluded that pumping from the Schoubroek Well and from the three Sexton Wells reduces the flow of the river and has adverse effects on downstream users, including the Community. SOF ¶¶ 53–54, 61–62.

C. Undisputed facts show that the Schoubroek Well pumps waters from the subflow zone of the Gila River and depletes the stream.

Although there is a genuine factual dispute between the parties as to the facts needed to determine the precise location of the edge of the subflow zone in the area near the Schoubroek Well, it is unnecessary to resolve that dispute to decide this case and order the well shut down. Whether or not the Schoubroek Well is located within the subflow zone, there is no dispute that pumping the well depletes the Gila River and its subflow zone. As noted previously, Bartlett and Plato state that the well pumps water that has traveled all the way from the surface flow of the Gila River. SOF ¶ 16. But what is more, the Schoubroek Well fails a cone of depression test under any standard, no matter where the subflow zone is drawn: Defendants' own groundwater model shows that drawdown of the area of the river bed itself is more than one-tenth of a foot. SOF ¶¶ 58–60.

Gila IV affirmed the superior court's holding that "a well located outside the limits of the saturated floodplain alluvium is in fact pumping subflow" if "the well's cone of

depression extends into the subflow zone and is depleting the stream." *Gila IV,* 9 P.3d at 1082. "The cone of depression is the funnel-shaped area around a well where the withdrawal of groundwater through the well has lowered the water table." *Id.* at 1081 n.9 (citation omitted). As the well pumps, the water table is lowest near the well, but the lowering of the water table expands outward as the well continues to pump, and the cone of depression can span miles, demonstrating "the destructive ability of wells upon basin and range streams." Goodfarb Order at 59. As Judge Goodfarb noted, "'cones of depression' have long-term effects even after the wells are shut down." *Id.* at 60. "All of the principal witnesses agreed that even wells located outside of a stream's 'subflow' could, over time, build up extensive 'cones of depression' which could severely affect the volume of stream flow and the 'subflow' which supported it." *Id.*

As this Court has summarized the cone of depression test, a well outside the subflow zone "is pumping subflow if its cone of depression caused by its pumping has now extended to a point where it reaches an adjacent subflow zone, and by continual pumping will cause a loss of such subflow as to affect the quantity of the stream." 2005 Bolton Order at 5 (quoting *Gila IV* at 1082 (internal quotation marks omitted)). Under this standard, it is undisputed here that the pumping of the Schoubroek Well reaches the subflow zone and depletes the stream. SOF ¶¶ 59–60.

The cone of depression test is determinative of whether a well is pumping subflow without regard to whether water molecules are flowing from the stream all the way to the well. "The *Gila IV* court's affirmance of the Goodfarb Order . . . mandates that it is the effect on a stream and its subflow, not additions to a well's output, that is to be measured when deciding which wells" outside the subflow zone pump appropriable subflow. 2005 Ballinger Order at 32. Pumping creates changes in the underground flow of water, pulling large volumes of water out of the river long before the gradient between the river and the well is reversed. Because the cone of depression created by a well is filled by water from adjacent areas, "[i]t is beyond dispute that even before the gradient [i.e. water flow

direction] is reversed [i.e. before water flows from the river to the well], a measurable drawdown at the stream's 'subflow' zone necessarily results in water leaving the zone in order to fill the void which has been created by the well." Goodfarb Order at 61. Judge Goodfarb rejected groundwater pumpers' "molecule and gradient arguments" that actual water molecules must travel from the river to the well, because "[i]f we wait until actual water molecules from the San Pedro River are discharged from the many wells which surround it but are not in the 'subflow' zone, there may not be sufficient stream flow left to justify this entire adjudication." *Id.* at 62–63. He therefore held that "any well located outside the 'subflow' zone that now pumps any percentage of water **either from the stream itself or its 'subflow' zone**, should be included in the adjudication and the total amount of water withdrawn subjected to this proceeding." *Id.* (emphasis added).

Further state court decisions applying *Gila IV* have refined the cone of depression test and confirm this result. The Gila Adjudication court has held that a well outside the subflow zone pumps appropriable subflow if, in computer simulations run at steady state, the well's "simulated cone of depression" results in drawdown at the edge of the subflow zone of at least one-tenth (0.1) of a foot. 2005 Ballinger Order at 27. This "is an affordable, delay-avoiding, adaptable method of determining cones of depression that provides an acceptable degree of reliability and accuracy." *Id.* at 29. In implementing this standard, "a well with a cone of depression reaching the subflow zone" is pumping appropriable water "if the extent of the well's current or prospective depletive effect on the stream is measurable by reasonably accurate means." *Id.* at 36.

Dr. Mock used Defendants' groundwater model to show that the drawdown for the Schoubroek Well is at least one-tenth of a foot at the active channel of the Gila River as well as within the subflow zone (because the "Impact Zone" boundary, where drawdown exceeds 0.1 feet, is inside the subflow zone even under Defendants' experts' analysis). SOF ¶¶ 25, 58–60. And all of the wells in this case, including the Schoubroek Well, deplete the waters of the Gila River by nearly the entire amount pumped. SOF ¶¶ 47, 49, 51, 56.

IV. AS A MATTER OF LAW, THE COMMUNITY IS ENTITLED TO AN ORDER SHUTTING DOWN THE SCHOUBROEK AND SEXTON WELLS.

The Community is entitled to an order shutting down the Schoubroek Well, Sexton Well 1, Sexton Well 2, and Sexton Well 3 because they pump waters of the Gila River without a Decree right. When a Decree violation has been shown, "[a] more specific, measureable harm is unnecessary." 2018 Bolton Order at 4. "In an enforcement action, the plaintiff need not show injury. When the alleged conduct is admitted, the only question is whether that conduct violates a right established by the decree." *Nebraska v. Wyoming*, 507 U.S. 584, 592 (1993); *accord* 2018 Bolton Order at 4. Here, Defendants admit they are irrigating lands without Decree rights. SOF ¶¶ 2–3, 7–9, 13. As shown above, this irrigation violates the Decree because it is accomplished with water from the Gila River. Because Defendants' pumping violates the Decree, the Community is entitled to the relief it seeks in Claims One and Two of the complaint.[3] "If unauthorized diversions are indeed taking place, the prescribed remedy is to shut them down." 2018 Bolton Order at 5; *cf. Salt River Valley Water Users' Ass'n v. Kovacovich*, 411 P.2d 201, 204 (Ariz. Ct. App. 1966) ("The right to injunctive relief with respect to enforcement of water rights has been heretofore clearly established. Extensive discussion of this point is not believed necessary in the light of the established decisions with respect to use of injunctive relief.").

V. DEFENDANTS' AFFIRMATIVE DEFENSES FAIL AS A MATTER OF LAW.

The Community is also entitled to judgment as a matter of law on the Defendants' affirmative defenses.

A. Claim preclusion does not apply to the claims in this case.

Defendants' assertion that the Community's claims are barred by claim preclusion (Amended Answer at 10, ¶ 5) (Doc. 71) is baseless because the claims in this case were not

[3] Although Claim Three in the complaint seeks an injunction against future pumping by these defendants, summary judgment on Claim Three is unnecessary so long as Defendants have not indicated an intention to use water from other new or existing wells to replace water from wells shut down under Claim Two.

and could not have been brought in any prior action. Here, the Community challenges Defendants' use of wells to pump waters of the Gila River and irrigate lands without Globe Equity Decree rights "from at least 2016 to present." Complaint at 4, ¶ 23 (Doc. 1). Every time Defendants pumped their wells from 2016 to present, a new cause of action for a violation of the Decree accrued. Claims for conduct in 2016 or later accrued *after* all prior litigation. Claim preclusion does not bar successive litigation for newly accrued claims. Rather, "[c]laim preclusion bars a party in successive litigation from pursuing claims that 'were raised or could have been raised in [a] prior action.'" *Media Rights Techs., Inc. v. Microsoft Corp.*, 922 F.3d 1014, 1020 (9th Cir. 2019) (quoting *Owens v. Kaiser Found. Health Plan, Inc.*, 244 F.3d 708, 713 (9th Cir. 2001)) (alteration original). "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 rule in [the Ninth 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).

For example, even assuming, only for the sake of argument, that claims challenging illegal pumping by Defendants were dismissed with prejudice in 2007, that dismissal would not give Defendants a free pass to pump in violation of the Decree in the *future*. After-accruing claims are not barred by prior actions, even when a single course of conduct continues from before the prior action. The doctrine of claim preclusion does not act as a waiver of future claims that have not yet accrued at the time of the prior action. *See Media Rights*, 922 F.3d at 1021 ("[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.").

Defendants' continued, unauthorized use of Gila River water before prior litigation through the present does not insulate their illegal pumping from this suit. "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." *Frank v. United Airlines, Inc.*, 216 F.3d 845, 851 (9th Cir. 2000). "A substantially single course of activity may continue through the life of the 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 18 Charles Alan Wright et al., *Federal Practice & Procedure* § 4409 (3d ed. 2018 update)). Because Defendants are pumping *after* prior cases concluded, claim preclusion has no application here.

B. The Community's Settlement Agreement does not waive the claims in this case, and the Defendants' attempts to evade the terms of the Settlement fail as a matter of law.

1. The plain language of the Settlement Agreement protects the Community's right to enforce the Globe Equity Decree in this case.

Defendants' reliance on the Community's Settlement Agreement as a defense to this action (Amended Answer at 10–11, ¶¶ 7–8) fails as a matter of law under the express terms of the Settlement.[4] Interpretation of the Settlement Agreement, to which the United States is a party and Congress has "authorize[d], ratif[ied], and confirm[ed]" through the Arizona Water Settlements Act, Pub. L. No. 108-451, 118 Stat. 3478 (2004), is governed by federal law. *See Smith v. Central Ariz. Water Conservation Dist.*, 418 F.3d 1028, 1034 (9th Cir. 2005) ("Federal law governs the interpretation of contracts entered into pursuant to federal law and to which the government is a party."). "A written contract must be read as a whole and every part interpreted with reference to the whole, with preference given to reasonable interpretations." *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999). "Contract terms are to be given their ordinary meaning, and when the terms of a contract are clear, the intent of the parties must be ascertained from the contract itself. Whenever possible, the plain language of the contract should be considered first." *Id.*

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

(citations omitted).

The plain language of the Settlement Agreement contains no protections for these Defendants' violations of the Decree. To the contrary, the Agreement expressly reserves the Community's right to file this lawsuit. Defendants conceded this point in previous briefing: "Defendants are ***not*** arguing that the terms of the GRIC Agreement directly and expressly state that Defendants can continue irrigating their lands." Reply in Support of Motion to Amend (Doc. 61) at 2 (emphasis original).

Defendants' concession is compelled by the express terms of the Settlement Agreement. Paragraph 25.12.1 provides that the *only* waivers of any of the Community's rights to enforce the Decree are in Paragraph 26.0 and Exhibits 26.1 through 26.5:

> Notwithstanding the waiver of claims and release described in Subparagraph 25.2 and Exhibit 25.2, the Community . . . shall retain any right to:
>
> 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.

Here, the Community "seek[s] enforcement of[] the rights of the Community . . . under the Globe Equity Decree." *Id.*; *see* Complaint at 2, ¶ 1. And, as shown below, Paragraph 26.0 and Exhibits 26.1 through 26.5 do not apply to Defendants. Accordingly, this action falls squarely within the Community's express reservation of rights.

Paragraph 26.0 provides for certain limited safe harbors, but only for "Non-GE 59 Water Users," a defined term that expressly excludes Defendants. "[T]he term 'Non-GE 59 Water User' shall not include" any "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 with respect to such Diversion." Settlement Agreement ¶ 2.124B. "Irrigation Use" is "the use of Water on two (2) or more acres of land to produce plants or parts of plants for sale or human consumption, or for use as feed for livestock or poultry." Settlement Agreement ¶ 2.107. This exclusion describes each of the diverting Defendants: it is undisputed that they are located in the Gila River watershed

above the Ashurst-Hayden Diversion Dam and divert water from within the Impact Zone for Irrigation Use, that is, use on two or more acres of land to produce plants for sale or human consumption, or for use as feed for livestock.[5] SOF ¶¶ 1–2, 5–7, 25, 33–35. And even if the Defendants were diverting water from outside the UV Impact Zone, that would make no difference: ¶ 2.124B also excludes "persons . . . located in the Gila River watershed above Ashurst-Hayden Diversion Dam who now or in the future Divert Water from outside an Impact Zone with respect to such Diversion."

Likewise, Exhibits 26.1 through 26.5 do not apply to Defendants. The only one of these ancillary settlements that by its terms could have applied to Defendants is Exhibit 26.2, the UVFA, but these Defendants failed to sign it.[6] The UVFA provided a narrow, strict procedure by which Upper Valley landowners who signed it as parties "could 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. "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 lands could still be irrigated as "Special Hot Lands" if the owners signed the UVFA and met other conditions. "[A] total of 419 sever and transfer applications were filed," but none by Defendants here. *GVID VI*, 859 F.3d at 795; SOF ¶¶ 63–64. Defendants here did not even try to take advantage of the Special Hot Lands provision which, properly utilized, would have eliminated the need for this lawsuit. Yet they want the benefits of this provision without signing the UVFA or

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[5] Defendant Patrick Sexton owns a small parcel adjacent to the larger Sexton property. Although a portion of Patrick Sexton's parcel is irrigated with water pumped from one of the three wells on the larger Sexton parcel, there is no well on his property. SOF ¶¶ 6, 9.

[6] The UVFA is available on the GE 59 docket at Doc. 6482 and online at https://digitalrepository.unm.edu/gricwrs/.

satisfying any of its requirements. This Court rejected such reasoning when it approved the UVFA, noting that owners of lands lacking Decree rights who did not seek a severance and transfer of Decree rights to those lands would be subject to full enforcement of the Decree:

> The Court's approval of the UV Forbearance Agreement . . . does not condone or approve those wells pumping Gila River water whose owners have no Gila River decreed rights. . . . To the extent that those landowners do not agree to attempt to obtain Gila River decreed rights, there is no change from the situation that presently exists.

GE 59, Order dated Aug. 24, 2007 (Doc. 6595), at 6. This Court has already rejected Defendants' attempt to read into the UVFA and Settlement Agreement an unstated windfall benefit for themselves to violate the Decree with impunity—a windfall that nobody bargained for, which the Community never agreed to provide, and which would injure all downstream parties to the Decree.

2. Defendants' attempt to evade the plain language of the Settlement Agreement, by alleging a "broad settlement plan" contrary to the terms of the Agreement itself, fails as a matter of law.

Defendants allege that "[s]ome or all of the Community's claims against Defendants are barred, precluded, waived, or estopped because the Community entered into a broad settlement plan under which it agreed to allow landowners who had been irrigating their lands" to continue such irrigation. Amended Answer at 10, ¶ 8. In making this argument, Defendants—who are not parties to the Settlement Agreement, not third party beneficiaries of the Agreement, and not signatories to the UVFA—attempt to obtain a benefit from the Agreement contrary to its plain language. They offer a kitchen sink of legal terms ("barred, precluded, waived, or estopped") and inappropriately point to extrinsic evidence to evade the language of the Agreement, which expressly denies what they seek here.

Defendants' maneuver is prohibited by the Agreement itself and by federal law. Paragraph 30.2 provides: "This Agreement constitutes the entire understanding among the Parties. Evidence of conduct or statements made in the course of negotiating this Agreement, including, but not limited to previous drafts of this Agreement, is inadmissible

in any legal proceeding other than one for approval or confirmation of this Agreement." And federal common law prohibits reliance on extrinsic evidence to contradict the terms of the integrated Agreement: "[A] contract[] must be discerned within its four corners, extrinsic evidence being relevant only to resolve ambiguity in the [contract]." *United States v. Asarco, Inc.*, 430 F.3d 972, 980 (9th Cir. 2005). There is no ambiguity here. As explained above, Paragraph 25.12.1 of the Settlement Agreement explicitly reserves the Community's right to "assert claims for injuries to, and seek enforcement of, the rights of the Community and Members under the Globe Equity Decree," and there is no exception applicable to these Defendants.

The result would be the same even applying Arizona's more liberal parol evidence rule. *See Taylor v. State Farm Mut. Auto. Ins. Co.*, 854 P.2d 1134, 1140 (Ariz. 1993) (in Arizona, parol evidence may not be used to interpret a contract if it "contradict[s] or var[ies] the meaning of the agreement"); *Two Bros. Distrib. Inc. v. Valero Mktg. & Supply Co.*, 270 F. Supp. 3d 1112, 1122 (D. Ariz. 2017) ("[A] proponent of parol evidence cannot completely escape the confines of the actual writing.") (citation omitted)).

Defendants cannot rely on extrinsic evidence to show what they now claim the Community supposedly "agreed to" in the Settlement Agreement or some "broad settlement plan" they would cobble together. The terms of the Agreement explicitly provide which claims the Community waived and which it retained. The Community agreed to those express terms—no more, and no less. The Community expressly retained the right to seek enforcement of the Decree against those, like Defendants, who divert Gila River water above the Ashurst-Hayden Diversion Dam for irrigation purposes. That express reservation precludes Defendants' defenses based on the Settlement Agreement.

Nor does Arizona law support their argument. The statute they cite, A.R.S. § 45-2641, is by its very terms a state-law "prohibit[ion]" on bringing "new lands" into irrigation after 2005; it does not and could not excuse any irrigation in violation of the federal Decree.

C. Defendants' "no damages" defense is meritless.

Defendants also allege that the Community has not suffered damages and is therefore not entitled to relief. Amended Answer at 10, ¶ 6. The Community does not seek damages, so this defense is inapposite. To the extent Defendants might argue that "damages" means "injury" more generally, the defense is equally baseless. As noted above, this Court has already rejected this argument as a matter of law. A violation of a federal decree is itself inherently a cognizable, redressable harm. The Defendants have violated the Decree by pumping waters of the Gila River to irrigate lands without appurtenant Decree rights, in violation of the Decree. "In an enforcement action," like this one, "the plaintiff need not show injury." *Nebraska v. Wyoming*, 507 U.S. at 592. And, in any event, Defendants' own expert has acknowledged that the Defendants' pumping harms downstream users, including the Community. SOF ¶¶ 53–54, 61–62.

D. Defendants' other defenses have already been rejected.

Defendants' amended answer also pleads challenges to venue and this Court's subject-matter jurisdiction. Amended Answer at 11, ¶ 9. The Court has already rejected these defenses. As this Court has previously stated:

> It is *this* Court that has jurisdiction over claims to mainstem waters [of the Gila River], which began with the Globe Equity Litigation and continues to this day. 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.

Cranford, 459 F. Supp. 3d at 1259. This Court has already confirmed that it is the only court that can hear this case. Defendants' challenges to venue and subject-matter jurisdiction fail.

CONCLUSION

The Community is entitled to judgment as a matter of law on Claims One and Two and on all affirmative defenses to those claims.

RESPECTFULLY SUBMITTED this 7th day of January 2022.

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