No. 23-2743

UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

GILA RIVER INDIAN COMMUNITY, a federally recognized Indian tribe,

Plaintiffs-Appellees,

v.

DAVID SCHOUBROEK, EVA SCHOUBROEK, DONNA SEXTON, MARVIN SEXTON and PATRICK SEXTON,

Defendant-Appellants.

On Appeal from the United States District Court for the District of Arizona
No. 4:19-cv-00407-SHR

REPLY BRIEF

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I. Introduction[1]

Plaintiffs claim that Defendants' wells pump subflow of the Gila River, violating a Decree to which Defendants are nonparties. The District Court's ruling results in the permanent closure of Defendants' family farms in rural Arizona. This Court should overturn the District Court's summary judgment ruling.

As nonparties, the Decree does not bind, and cannot be enforced against, Defendants. The Decree only enjoins the parties thereto. The Arizona Supreme Court affirmed a judgment (the "2007 Judgment") which binds all parties to the Adjudication (including Plaintiffs and Defendants), stating that "[d]isputes involving nonparties to the Globe Equity Decree regarding its enforcement shall be subject to the jurisdiction of the Gila River Adjudication Court." [4-ER-0789]. The District Court's ruling violates this controlling law and effectively and improperly enjoins the Adjudication Court from adjudicating Defendants' rights. The state Adjudication Court is the first court to take jurisdiction over Defendants' rights in this *quasi in rem* action. Under the prior exclusive jurisdiction doctrine, this action must be dismissed in favor of the Adjudication. Furthermore, this case must be dismissed as to GRIC because claim preclusion applies.

As to subflow, the District Court misapplied Arizona law and weighed evidence. Questions of material fact remain regarding the nature of Defendants'

[1] All defined terms are consistent with Defendants' Opening Brief.

pumped water. For the first time, Plaintiffs now argue that their Decree rights are federal reserved water rights and that such rights must be protected from Defendants' *groundwater* pumping *even if* the water is not subflow. This is incorrect. Plaintiffs' Decree rights are not federal reserved rights, they are contract rights agreed upon with parties other than Defendants. Moreover, Plaintiffs did not present any evidence justifying their enforcement of reserve rights, which must be supported by evidence relating to the needs of their reservations.

Finally, even if the District Court properly found that Defendants' wells pump some amount of subflow (they do not), it erroneously ordered that Defendants' wells must be sealed. Defendants still have the right to pump *groundwater* from these wells. Thus, the District Court should be overturned.

II. Non-Party Decree Enforcement Belongs In The Adjudication.

A. The Decree cannot be enforced against nonparties like Defendants.

The District Court misinterpreted the Decree. This Court reviews this interpretation *de novo*. *Jeff D. v. Otter*, 643 F.3d 278, 283 (9th Cir. 2011). The Decree is a contract which must be construed according to its plain language. [Opening Brief "Br." 13-14; Br. Addendum (Decree); 2-ER-0352]. The Decree only binds "the parties defendant" and only enjoins "the parties to whom rights to water are decreed" therein. [*Id.*] A consent decree cannot bind nonparties. [*Id.*]; *Gila VIII*, 224 P.3d at 188 ¶32; *Texas v. New Mexico*, 144 S. Ct. 1756, 1761 (2024)

("[P]arties who choose to resolve litigation through settlement may not dispose of the claims of a third party.") (quotation omitted); *see also United States v. Fallbrook Pub. Util. Dist.*, 347 F.2d 48, 58 (9th Cir. 1965).

Plaintiffs ignore the Decree language. Instead, they cite to inapposite cases in an attempt to bind Defendants to a contract to which they never agreed. The Tribe references *Gila VI*, arguing that the Decree is comprehensive as to all claims by any party. [Tribe. Br. at 7]. But *Gila VI* only references claims by a Decree party: the Tribe. *Gila VI*, 127 P.3d 882, 895 (Ariz. 2006). The court stated that the "Decree precludes all further claims to the mainstem of the Gila River **by the parties to the Decree**." *Id*. ¶46.[2] In fact, *because* the Tribe was not a direct party to the Decree litigation – its interests were represented by the United States – the Court analyzed "whether the [U.S.] and the Tribe were in privity in the Globe Equity litigation such that the Tribe is bound by the Decree." *Id*. ¶47. The Court found that privity existed and, therefore, the Decree bound the Tribe. *Id*. at 901 ¶73. If the Decree bound nonparties, that privity analysis would have been unnecessary.

[2] All emphasis is added unless otherwise noted.

B. The District Court's Judgment was effectively an injunction against the Adjudication Court.

Defendants' pending water right claims will be resolved in the Adjudication. [*Infra* §III; Br. 21-25]. Plaintiffs argue that Defendants are not claiming mainstem Gila River rights but rather claim that their wells pump groundwater. But Defendants claim both alternatively. Defendants wells pump groundwater, not subflow. However, the summons issued at the start of the Adjudication instructed all groundwater users to file Statements of Claimant ("SOC") "in the event that other claimants assert that" they are pumping appropriable subflow. *Gila I*, 830 P.2d at 450-51. The filing of Defendants' SOCs submitted their claims for adjudication. A.R.S. §45-254. If adjudicated, Defendants rights would not be incorporated into the Globe Equity Decree but into the forthcoming comprehensive Adjudication decree. A.R.S. §§45-257(B)(1), (B)(3). Decree rights will be incorporated into the Adjudication decree unless abandoned. *Id*.

Contrary to Plaintiffs' assertions, the Adjudication Court will reach this portion of the Gila River Watershed. [2-ER-0086; 2-ER-0105]. Plaintiffs are incorrect in arguing that this portion of the Adjudication will only relate to tributaries. The Adjudication relates to the entire river system (mainstem and tributaries) and all claims within it will be adjudicated. *Gila VIII*, 224 P.3d 178, 187 ¶29 (nonparties "remain free to assert their rights in the general stream adjudication"); *infra* §III. Any person who files an SOC is a party to the

Adjudication, as are their successors-in-interest. [2-ER-0296-0297]. Defendants' predecessors filed SOCs in the Adjudication many years before the instant action. [4-ER-0832-0838 (Schoubroek; 4-ER-0823-0831 (Sexton)].

A 2007 Judgment from the Adjudication, unanimously affirmed by the Arizona Supreme Court, confirms that "[d]isputes involving nonparties to the [Decree] regarding its enforcement shall be subject to the jurisdiction of the [Adjudication Court]." [4-ER-0789]. Plaintiffs, who were parties to the matter resulting in the 2007 Judgment, have no substantive response. This 2007 Judgment is binding on all parties to the Adjudication, including Plaintiffs. *Gila VIII*, 224 P.3d at 188-89, ¶34. Thus, the District Court effectively *enjoined* the state court from enforcing the 2007 Judgment and from adjudicating Defendants' mainstem claims (and those of other nonparties) by ruling that nonparties are bound by the Decree, that it has exclusive jurisdiction over the Gila River mainstem, and that the Decree is the exclusive source of mainstem rights (discussed more *infra* §III). This is true even though the District Court's ruling was not labeled as an injunction against the Adjudication Court. This Court looks to the order's "substantial effect rather than its terminology." *Negrete v. Allianz Life Ins. Co.*, 523 F.3d 1091, 1097-1098 (9th Cir. 2008) ("[T]he mere form of [an] injunction does not describe its true reach").

C. The All Writs Act is limited by the Anti-Injunction Act and does not permit the District Court to enjoin the Adjudication Court as it did.

Plaintiffs argue that under the All Writs Act the District Court may protect its prior judgment (the Decree) from threats by nonparties. [GRIC Br. at 24]. Plaintiffs again ignore that the Decree, by its own terms, enjoins only parties thereto and defines the Decree parties' rights only "as against each other." [2-ER-0352]. It does not define the Decree parties' rights as against others. *Id.*; Br. at 13-15. As nonparties who are not enjoined, Defendants cannot threaten the Decree. The All Writs Act does not provide a basis for making a consent decree binding on nonparties, and doing so would be a clear violation of due process. Br. at 14-15.

Moreover, the Anti-Injunction Act restricts the All Writs Act and does not permit the District Court to enjoin the Adjudication Court. *Negrete*, 523 F.3d at 1100. The District Court did not mention the All Writs Act, 28 U.S.C. §1651(a), under which federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." But there are limits. Even a retention of exclusive jurisdiction, "standing alone, does not allow the district court to enjoin any proceeding it wants to enjoin." *Sandpiper Vill. Condo. Ass'n, Inc. v. Louisiana-Pac. Corp.*, 428 F.3d 831, 846 (9th Cir. 2005). Under the Anti-Injunction Act, 28 U.S.C. §2283, a federal court "may not grant an injunction to stay proceedings in a State court except as expressly

authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." *Negrete*, 523 F.3d at 1100. The phrase "proceedings in a State court" is comprehensive and includes all steps taken or that may be taken in court. *Id*. at 1100 n.14. Here, the Adjudication Court issued a summons at the commencement of the Adjudication. A.R.S. §45-253(a)(1). Accordingly, under the Anti-Injunction Act, the District Court was not permitted to enjoin the Adjudication Court. "Whether an injunction may issue under the Anti–Injunction Act is a question of law reviewed de novo." *Negrete*, 523 F.3d at 1096.

The Anti-Injunction Act exceptions do not apply here. The exceptions should not be enlarged by loose statutory construction. *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 287 (1970). "[T]he necessary-in-aid-of-jurisdiction exception applies to ***in rem*** proceedings where the federal court has jurisdiction over the res and the state court proceedings might interfere with that." *Negrete*, 523 F.3d at 1101. An injunction is only justified "where a parallel state action threatens to render the exercise of the federal court's jurisdiction nugatory." *Sandpiper*, 428 F.3d at 843-44. "Any doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." *Negrete*, 523 F.3d at 1101.

The necessary-in-aid exception does not apply as this is a *quasi in rem* action. [1-ER-0066]. Furthermore, the Adjudication Court is not impairing the federal court. The District Court does not have exclusive jurisdiction to the Gila mainstem. [*Infra* §III; Br. 12-20]. The Adjudication Court is bound to recognize Decree rights absent abandonment. A.R.S. §§45-257(B)(1), 45-261(A)(1).

The "protect or effectuate the district court's judgments" exception to the Anti-Injunction Act also does not apply. This is known as the "relitigation exception" and is based on res judicata principles. *Sonner v. Premier Nutrition Corp.*, 49 F.4th 1300, 1305, 1306 (9th Cir. 2022). "Importantly, there is a strong presumption against enjoining a state court proceeding under the relitigation exception." *Id*. at 1307. "An essential prerequisite for applying the Act's relitigation exception is that the claims or issues which the federal injunction insulates from state court litigation actually have been decided by the federal court." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 140 (1988). This prerequisite is "strict and narrow." *Id*. Here, the exception does not apply. The Decree rights are fixed and must be recognized by the state court absent abandonment. A.R.S. §45-257(B)(1).

The cases on which Plaintiffs rely are distinguishable. [GRIC Br. 24-25]. In *Klay*, unlike here, the court issued an injunction under the All Writs Act and explained how it differs from a "traditional injunction," which is based upon an

infringement of a legal right. *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1096 (11th Cir. 2004). Here, the All Writs Act does not apply and Plaintiffs claim that Defendants infringed a legal right (their Decree rights). In *United States v. New York Tel. Co*., 434 U.S. 159, 161-62 (1977), unlike here, the nonparty injunction was required so the FBI could comply with the district court order. There was no injunction against a state court proceeding, as there is here. Thus, the All Writs Act is inapplicable. The Decree cannot be enforced against nonparty Defendants.[3]

III. The Prior Exclusive Jurisdiction Doctrine Applies

Plaintiffs' claims against Defendants must be heard in the Adjudication Court because it has prior exclusive jurisdiction over Defendants' water rights. [Br. 10-26]. Under the prior exclusive jurisdiction doctrine, in an *in rem* or *quasi in rem* matter, the forum first exercising jurisdiction over the property at issue has "exclusive jurisdiction to proceed." In this *quasi in rem* action Defendants' water rights serve as the basis for jurisdiction. [1-ER-0066]. The Adjudication Court first took jurisdiction over Defendants' water rights decades before this action. [*Supra* §II(B); Br. 21-25].

[3] Plaintiffs also rely on *United States v. Gila Valley Irrigation District*, 345 F. App'x 281 (9th Cir. 2009), arguing that this Court already explained that the District Court retains jurisdiction against non-Decree rights holders. [GRIC Br. at 3]. First, that unpublished decision is not precedential. Second, this Court did not analyze the issue raised here. Plaintiffs are relying on dicta.

The District Court ruled that the prior exclusive jurisdiction doctrine is inapplicable because the Decree is the exclusive source of mainstem rights, even as to nonparties. [1-ER-0019]. GRIC, however, asserts that "this is a quintessential case of prior exclusive jurisdiction," citing the *Orr Ditch* and *Alpine Land* proceedings. [GRIC Br. at 31]. The *Orr Ditch* history demonstrates that the District Court erred. A federal water right decree, even one expected to be comprehensive, does not foreclose subsequent acquisition of water rights by nonparties.

In the *Orr Ditch* litigation, the United States named as defendants all water users on the Truckee River in Nevada to determine a tribe's right to the river under multiple legal theories. *Nevada v. United States*, 463 U.S. 110, 116, 140 (1983). "[E]veryone involved in *Orr Ditch* contemplated a comprehensive adjudication of water rights intended to settle once and for all the question of how much of the Truckee River each of the litigants was entitled to." *Id*. at 143. The *Orr Ditch* consent decree was entered on September 8, 1944. *Id*. at 118. However, appropriations of water from the Truckee River occurred after entry of the *Orr Ditch* Decree. *Id*. at 143. This is consistent with the "fundamental principle that adjudications of water rights" only confirm "pre-existing rights." *Southern Ute Indian Tribe v. King Consol. Ditch Co*., 250 P.3d 1226, 1234 (Colo. 2011). For example, the Kent Decree adjudicated Salt River rights only as to "completed appropriations" at the time of the decree and did not prevent nonparty upstream

landowners from initiating subsequent appropriations of Salt River waters. *White Mountain Apache Tribe v. United States*, 11 Cl. Ct. 614, 630 (1987), *aff'd per curiam,* 5 F.3d 1506 (Fed. Cir. 1993) (Table). Here, the Decree similarly only adjudicated rights "acquired" at the time of the Decree. [Br. at Addendum p. 12 (Decree Art. V)]. Subsequent appropriations by nonparties are not foreclosed.

This Court noted in *United States v. Orr Water Ditch Co*., 600 F.3d 1152, 1155 (9th Cir. 2010), that in 1998 the State Engineer granted the Pyramid Lake Tribe the right to all water remaining in the Truckee River after the *Orr Ditch* Decree rights and other rights were satisfied. This supplemental water right was based on state law, and had no effect on the tribe's *Orr Ditch* Decree rights. *Id*. The district court overseeing that decree had no jurisdiction over appeals from the State Engineer decision for those reasons. *Id*. at 1161. Accordingly, the Decree is not the exclusive source of Gila mainstem rights.

GRIC (at 32) relies on *United States v. Alpine Land & Reservoir Co*., 174 F.3d 1007 (9th Cir. 1999), for its contention that the District Court has exclusive jurisdiction, foreclosing Defendants' Adjudication claims. In *Alpine Land*, Churchill County appealed to the state district court a decision of the State Engineer to grant a change in use application for a ***decreed*** water right under the federal Alpine and Orr Ditch Decrees. 174 F.3d at 1010. This Court ruled that the appeal should have been filed in the federal district court because that court

"already asserted jurisdiction over the water rights in question . . . ." *Id*. at 1014; *see also id*. n.6. "[T]he district court had exclusive jurisdiction over appeals from decisions of the State Engineer ***regarding water rights adjudicated under the Alpine and Orr Ditch Decrees*** . . . ." *Id*. at 1015. Here, Defendants do not claim rights adjudicated under the Decree.

GRIC (at 32) relies upon *State Engineer v. South Fork Band*, 339 F.3d 804 (9th Cir. 2003). *State Engineer* is the reverse of *Alpine Land* because it involved a ***state court*** decree defining a tribe's water rights. *Id*. at 807-08. This Court found that the matter was *quasi in rem* because "it is the [parties'] interest[s] in the property that serve[ ] as the basis of the jurisdiction." *Id*. at 811. Like *Alpine Land*, the tribe's water rights were Humboldt Decree rights. *Id*. at 807-08. Here, Defendants do not claim Decree rights.

Gila VIII makes clear that Defendants are free to make their alternative Adjudication mainstem claims. That case involved state court approval of the GRIC Agreement decades after entry of the Decree. *Gila VIII*, 224 P.3d 178, 182 ¶1 (Ariz. 2010). Certain Gila River water users (the "LGWUs") argued against the GRIC Agreement because, in part, it was impossible to tell if water would be available to fulfill their water rights. *Id*. at 187 ¶29. The court disagreed. The LGWUs were not bound by the GRIC Agreement as nonparties. *Id*. The LGWUs

"remain[ed] free to assert their rights in the general stream adjudication." *Id*. The court did not limit its findings to tributaries.

Plaintiffs further incorrectly argue that *Gila VIII* is limited to the assertion of higher priority rights. Not so. Quoting the 2007 Judgment [*supra* §II(B)], the Court noted that all parties to the Adjudication may assert claims for "**any priority date** or quantity of water." *Gila VIII*, 224 P.3d at 188 ¶¶33-34. Nonparties to the GRIC Agreement are not "prevented from asserting their rights to Gila River water." *Id*. The court does not say the LGWUs can only claim higher priority. *Id*. at 189 ¶35. Here, even if Defendants' alternative Adjudication claims are lower priority, Defendants could be entitled to some amount of water under appropriate river conditions.[4]

In fact, this Court also recognized that the Decree was not intended as the exclusive source of mainstem rights. [Br. at 15-17 (citing *Brooks v. United States*, 119 F.2d 636 (9th Cir. 1941)]. Plaintiffs argue that when the *Brooks* Court stated that it did not have exclusive jurisdiction, it only meant that the court could adjudicate the rights of upstream out-of-state parties. [GRIC Br. at 34]. But this

[4] The District Court's comment that Gila River water rights are over-allocated is unsupported. [1-ER-0017]. Such a statement must be based on factual findings within this case as to the amount of available water. *See People v. United States*, 235 F.2d 647, 657-58 (9th Cir. 1956). The District Court's comment is also inconsistent with the Adjudication Court's refusal to find the Gila River system fully appropriated. *See* Order, https://www.superiorcourt.maricopa.gov/SuperiorCourt/GeneralStreamAdjudication/docs/ballinger-gord011604.pdf.

Court unambiguously stated that the jurisdiction of the District Court was not exclusive and other courts were also available – there, the courts of New Mexico. *Brooks*, 119 F.2d at 640. Plaintiffs also argue that Defendants mischaracterized *Arizona v. California* because the State of New Mexico did not obtain a new right to use mainstem water. [GRIC Br. at 34]. Not so. New Mexico was awarded "in addition to the uses confirmed by the *Gila Decree*" the right to use domestic water "from the Gila River and its underground water sources" both on Decree lands *and* on lands "located adjacent" to such lands. *Arizona v. California*, 547 U.S. 150, 163, 164 (2006). The Decree did not include all possible mainstem claims.

Plaintiffs cite *United States v. Smith*, 625 F.2d 278 (9th Cir. 1980), for the proposition that the federal court has jurisdiction over Defendants' pumping "even if a state court also" has jurisdiction. [GRIC Br. at 37]. *Smith* is inapposite. The district court's jurisdiction was not at issue in *Smith*. *See Smith*, 625 F.2d at 279. Unlike here, the *Smith* defendant had no pending Adjudication claims. *Smith* was initiated in 1971, prior to the Adjudication (1974), and was decided in 1980, predating initial Adjudication claim-filing deadlines (mid-1980s). *See Gila I*, 830 P.2d at 444, 446 n.9, 450. The Court in *Smith* could not have addressed the prior exclusive jurisdiction doctrine.

Plaintiffs argue that the Adjudication is taking decades. It is a slow process. But this Court has deferred to the Adjudication in other matters regardless of

speed. *N. Cheyenne Tribe v. Adsit*, 721 F.2d 1187, 1189 (9th Cir. 1983); *San Carlos Apache Tribe v. Arizona*, No. CV-79-00186-PHX-DLR, 2022 WL 2047765, at *2 (D. Ariz. June 7, 2022) (after a 40 year stay, dismissing case without prejudice in favor of the state court).

The Adjudication complies with the McCarran Amendment's policy of comprehensive water adjudications, which avoids inconsistent results. *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 549 (1983). For example, the subflow zone will be decided in the Adjudication with the help of ADWR and the input of numerous parties.[5] Defendants' wells are thousands of feet from the Gila River. Some or all of Defendants' wells may be located outside of the subflow zone when the final version is approved. Moreover, if necessary in the alternative, Defendants rights to subflow would be determined in the same proceeding. The Adjudication Court and ADWR will delineate the upper Gila River subflow zone regardless of the outcome here. [2-ER-0086; 2-ER-0105].

IV. GRIC's Claims Are Precluded.

GRIC argues that claim preclusion is irrelevant because it does not apply to the Tribe and, accordingly, this Court's decision would not impact the scope of

[5] Plaintiffs' argument that A.R.S. §45-103(B) shows that the ADWR does not have power with respect to the mainstem is incorrect. Only the "distribution of water" reserved for the Gila Water Commissioner is outside the scope of ADWR. "Distribution of water" is not the same as ADWR's Adjudication role as technical advisor. A.R.S. §45-256.

judgment. Not so. If claim preclusion applies, GRIC is not entitled to any judgment. Courts analyze the effect of claim preclusion on a party-by-party basis and review the issue *de novo*. *See e.g.*, *Robi v. Five Platters, Inc.*, 838 F.2d 318, 321 (9th Cir. 1988) (reviewing claim preclusion *de novo* for each party). GRIC provides no support to argue that the Court can or should disregard this question.[6]

All elements of claim preclusion apply. [Br. at 26-37]. GRIC only argues that the dismissal with prejudice must be read in context with the GRIC Agreement and measured by the intent of the parties. [GRIC Br. at 40].[7] Strict application of claim preclusion is required. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981). Strict application is consistent with the parties' intent that the dismissal with prejudice protect Defendants' predecessors from re-litigation. [Br. at 27, 35-37; 4-ER-0766]. GRIC's argument (at 41) regarding "Hot Lands" is irrelevant. The

[6] GRIC cites *Northeast Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612 (6th Cir. 2016) ("*Ohio Coal.*") for the quote that this Court "need not opine" on claim preclusion. [GRIC Br. at 39]. But that quote referred to whether one of the multiple plaintiffs was bound by a prior ruling, not claim preclusion generally. *Id*. at 622. Additionally, unlike here, the plaintiff in *Ohio Coal.* did not raise claim preclusion before the district court. *Id*. at 623. Moreover, the case with preclusive effect in *Ohio Coal.* was only two weeks old at the time of the district court ruling. *Id*.

[7] In its footnote 9, GRIC also mentions that its conduct after 2016 cannot be precluded. The Court should not consider this argument as it is argued "only in passing" and does not contain "supporting argument." *United States ex rel. Kelly v. Serco, Inc.*, 846 F.3d 325, 335 (9th Cir. 2017). Regardless, Defendants preemptively responded to this argument in their Brief at 31-33.

"Hot Lands" procedures are from a sub-agreement to the GRIC Agreement to which Defendants are not parties. [GRIC Br. at 41]. There is no evidence that Defendants were on notice or given an opportunity to participate. GRIC's claims should be dismissed.

V. Fact Issues Remain Regarding The Nature Of Defendants' Pumped Water.

This Court reviews *de novo* the grant of summary judgment. The District Court erred because it weighed evidence and discounted Defendants' evidence. *Marable v. Nitchman*, 511 F.3d 924, 929 (9th Cir. 2007).

The complex question of whether Defendants' wells, located thousands of feet from the Gila River, pump subflow is "key to this case." [5-ER-0938 (map); 1-ER-0058 (Bolton Order), n.3]. "Subflow is a mixed question of law and fact controlled by Arizona law." [1-ER-0069 (Order at 16:8)]. Although the Tribe (at 18-19) criticizes Arizona law, state law is the substantive law controlling the primary issue. "[T]here is no federal water law." *United States v. U.S. Bd. of Water Comm'rs*, 893 F.3d 578, 595 (9th Cir. 2018). The Tribe's arguments regarding federal law and reserved rights are meritless. [*Infra*, §VI].

A. The District Court misapplied Arizona law.

The District Court erred in applying Arizona law. [Br. at §§III(B) and III(C)(2)]. Plaintiffs, and amicus Salt River Project ("SRP"), mischaracterize Arizona law.

i. Case-by-case analysis is needed for each river.

GRIC (at 46-47) and SRP (at 12-15) argue that the saturated FHA is the subflow zone in every location, and that the District Court was therefore not required to perform an analysis of the *Gila IV* factors to define the subflow zone. But this is not the law. [Br. at 38-39]. In *Gila IV*, the Arizona Supreme Court analyzed the trial court's findings as to the San Pedro River, not the Gila. *Gila IV*, 9 P.3d 1069, 1081 ¶33 (Ariz. 2000). The trial court had applied detailed criteria established in *Gila II* and identified the subflow zone for the San Pedro with extensive factual findings—findings never made for the Gila. *Id*. at 1077 ¶18.

The Court affirmed the finding that the FHA "as found by ADWR" defines the subflow zone in a given area. *Id*. ¶35. However, in the very next sentence, the Court cautioned: "[i]n the effort to determine that [subflow] zone **in other areas**, **the detailed criteria set forth in the trial court's order**, insofar as they apply and are measurable, **must be considered**." *Id*. Furthermore, the Court did "not preclude the consideration of other criteria that are geologically and hydrologically appropriate for the particular location." *Id*.; *see also Gila II*, 857 P.2d 1236, 1246 (Ariz. 1993) (criteria must be analyzed differently "depending on the area under analysis.").

This required analysis cannot be squared with Plaintiffs' position. Consistent with *Gila IV*, ADWR individually assesses *each river* prior to delineating its initial

subflow zone. This is followed by an iterative process with input from numerous parties and, eventually, the Adjudication Court will approve the zone for every given area.[8] Here, neither Plaintiffs nor the Court performed any of this analysis for the area of Defendants' wells. [Br. at 51-52].

Similarly, the *entire* saturated FHA is not necessarily the subflow zone. The only "part of the floodplain alluvium which qualifies as a 'subflow' zone [is] where the pressure of side recharge from adjacent tributary aquifers or basin fill is so reduced that it has no significant effect on the flow direction." *Gila IV*, 9 P.3d at 1077 ¶18. The subflow zone only encompasses that part of the alluvium where "flow direction, water level elevations, the gradations of the water level elevations and the chemical composition of the water" are substantially the same as the stream. *Id*. It is insufficient to point to the FHA and end the analysis.

ii. ADWR must initiate the subflow zone analysis.

The Adjudication Court must finally approve the subflow zone. But the Adjudication Court's starting point is ADWR's disinterested, detailed analysis and proposed subflow zone based on new Arizona Geological Survey ("AZGS") mapping, which is not yet available near Defendants' wells. [Br. at 48-49; 2-ER-0369 ¶21]. Subsequently, numerous parties provide comments on the proposed

[8] ADWR's technical subflow zone delineation reports, demonstrating its case-by-case analysis, are available at: https://www.azwater.gov/az-cities/subflow. [*See also* 3-ER-0538–0553].

subflow zone. [*Id*.]. An accurate subflow zone boundary is vital. *Gila IV*, 9 P.3d at 1074 ¶6. Defendants' wells are thousands of feet away from the river and some of the wells are very close to even *Plaintiffs'* proposed boundary. [5-ER-0938 (map showing location of Sexton Well 3 (eastern-most well) with respect to Plaintiffs' alleged subflow boundary)].

The Court erred by not waiting for ADWR and the Adjudication Court to complete the subflow zone here. The subflow zone determination is Arizona substantive law, which controls. [1-ER-0069 (Bolton Order at 16:8)]. The Arizona Supreme Court defined the subflow zone "as found by ADWR." *Gila IV*, 9. P.3d at 1081 ¶35. Only ADWR's delineation of the subflow zone, developed through the Adjudication's iterative procedures, meets the high bar of "clear and convincing evidence," justifying a permanent injunction. [Br. at 47-49].

Plaintiffs and SRP raise just one purported example to support its position that a court can make subflow zone decisions without ADWR—the *NBJ Ranch* case.[9] That case, which was in the Adjudication Court, is distinguishable. In *NBJ Ranch*, SRP filed three applications against several parties for *provisional* (not permanent) relief based on the likelihood that certain wells in the Verde River

[9] *In re SRP Application for Injunctive Relief Against NBJ Ranch Ltd.*, Nos. W-1 – W-4 (Maricopa Cnty. Super. Ct. Mar. 25, 2010) ("*NBJ Ranch*"). The Adjudication orders relating to *NBJ Ranch* are available at https://www.superiorcourt.maricopa.gov/SuperiorCourt/GeneralStreamAdjudication/gila.asp under "In re Applications of the Salt River Project – Verde River Watershed."

valley pumped subflow. *See NBJ Ranch*, Order dated August 11, 2004. The Adjudication Court granted only that provisional remedy and required SRP to file a bond and participate in a hearing on whether relief should continue. *NBJ Ranch*, Order dated Mar. 25, 2010 as 2. SRP's relief was pending the Adjudication's final resolution of the subflow zone. Here, Plaintiffs were granted permanent relief.

Critically, the *NBJ Ranch* court stated its rulings would not allow parties to avoid the Adjudication and would not be precedential:

> The Court is committed to ensuring that *neither SRP nor any other claimant can avoid the general adjudication process and obtain judicial determination of the extent and priority of competing water rights claims on a preferential basis*. The court will not consider a request for provisional relief that requires it to decide factual or legal matters *that might be used as precedent for resolving disputes involving claimants that will not be parties to the hearings on SRP's applications.*

NBJ Ranch, Order dated August 11, 2004. The provisional relief was based on a cursory consideration of "only legal issues" and "final resolution" would be reached in the Adjudication. *NBJ Ranch*, Order filed March 25, 2010 at 2. The case ultimately was dismissed with prejudice based on a stipulation. *NBJ Ranch*, Order filed June 9, 2011. *NBJ Ranch* was an interlocutory order and does not support Plaintiffs' position.

iii. Saturation cannot be presumed.

The Court erred by assuming the entire FHA is saturated. [Br. at 49]. Only the *saturated* FHA can be part of a purported subflow zone. *Gila IV*, 9 P.3d at 1081

¶¶35-36. The saturation *presumption* is only employed in the Adjudication *by ADWR* for purposes of establishing the court's *jurisdiction* over certain wells, which are subject to further proceedings to determine the nature of the water. [Br. at 49].

The Adjudication's comprehensive procedures and safeguards, including input from the neutral ADWR, allow a saturation presumption. SRP argues (at 15-16) that the saturation presumption is consistent with the 2005 Ballinger decision that "predevelopment conditions" be considered for the subflow zone. SRP ignores that such analysis requires substantial evidence and the discretion of *ADWR*. ADWR must consider predevelopment streamflow conditions "existing during an identifiable chronological year or range of years immediately prior to regular, discernable diversion or depletion…resulting from human activity." [2-ER-0255]. "[ADWR] may find the appropriate predevelopment period differs even within various watersheds due to the quantity and quality of available data. [ADWR] ***may use its discretion*** in excluding from its analysis human generated depletions or diversions it concludes were minimal." [*Id.*]. This analysis balances the rights of surface water users with the "legal protections supplied groundwater users." [*Id.*]. Here, ADWR never collected data or completed a predevelopment condition analysis and Plaintiffs presented no evidence on the subject. Therefore, it was error

for the District Court to apply a saturation presumption in the absence of ADWR's input and further error to do so for a decision on the merits.

B. Defendants' experts did not concede the wells pump subflow.

The CCA Model was not a subflow concession. [Br. at §III(C)(1)]. Determining the nature of pumped water under Arizona law is complex and applies science to a non-scientific legal framework. *Gila IV*, 9. P.3d at 1073 ("subflow is not a scientific, hydrological term"); [Tribe's Br. at 18-19]. To address this, Defendants disclosed experts from different disciplines to opine on various scientific principles.

CCA created a large-scale computerized model to simulate how water might flow underground throughout the entire valley based on the model's numerous assumptions. This model demonstrated the *highest possible* percentage of water derived originally from the river (not necessarily subflow) that *could be* pumped by Defendants' wells based on conservative assumptions which favor Plaintiffs. [2-ER-0368]. Hydrogeologist Dr. Lipson conducted a field investigation of Defendants' wells and opined on well-specific details, not captured in CCA's Model, such as saturation of the FHA and existence of clay layers. [5-ER-0912]. His work provides evidence that the percentage of "river water" pumped by Defendants' wells is likely zero. But, as subflow is a legal question, Defendants' experts did not determine whether any particular water is subflow. [Br. at 44–46].

Plaintiffs suggest that Defendants sowed division among their experts to create an issue of fact. Not so. The District Court ruled against Defendants based on "soundbites" from Defendants' expert work without context or explanation. It should have allowed Defendants to present their expert work at trial where the experts could explain their analysis in detail.[10]

i. Statements regarding "direct" river water pumping are not subflow concessions – the water is pumped from the groundwater system.

Plaintiffs argue that Defendants' experts admitted that the Schoubroek Well and Sexton Wells 1 and 2 pump water "directly" out of the Gila River mainstem. But Plaintiffs misinterpret the CCA Model, which "runs" for 100 simulated years to determine how three sources of water might mix over time (according to various conservative assumptions): (1) water from the river (which included all water in the younger alluvium regardless of whether it would be legally considered subflow or groundwater); (2) tributary groundwater; and (3) agricultural recharge water. [2-ER-0366-67; Br. at 42-43].

[10] GRIC (at 44) argues Defendants cannot create a dispute of fact by attacking their own experts, citing *Bouman v. Block*, 940 F.2d 1211, 1226 (9th Cir. 1991). As mentioned, Defendants are not attacking their experts. Regardless, *Bouman* does not support this proposition. The phrase GRIC quotes ("own experts") is unrelated to a party "attacking" its own expert. The court in *Bouman* was reciting a party's expert evidence and explaining how it supports the opposite position. *Bouman* was also decided after a trial, not on summary judgment. *Id*.

Key to understanding the CCA model is the fact that not all subsurface water in the younger alluvium is subflow. Subflow is a narrow concept. *Gila IV*, 9 P.3d 1069, 1073 ¶4 (2000) (subflow is water flowing under "the bed of the stream, or the lands under or immediately adjacent to the stream"). Arizona law does not classify water that is within the groundwater system as "subflow" even if it is on its way to the river or originally came from the river. *Gila II*, 857 P.2d at 1246 (*Sw. Cotton* "sought to identify subflow in terms of whether the water at issue was part of the stream **or was percolating water on its way to or from the stream**."); *Maricopa Cnty. Mun. Water Conservation Dist. No. 1 v. Sw. Cotton Co.*, 4 P.2d 369, 381 (Ariz. 1931). Thus, a hydraulic connection alone is insufficient to find subflow. *Id*.

The CCA Model "simulated the development of baseline conditions by initially **assuming that all subsurface water** present in the younger alluvium originated from the Gila River." [2-ER-0367]. This was a conservative starting position (*i.e.*, it favors Plaintiffs) that did not take into account water from other sources. Thus, the CCA Model was not determining whether water was being pumped "directly" out of the river in the sense of the pump removing river water as the pump is running. CCA opted to assume at the start *that all* of the subsurface water was *originally at some point in the past* from the river and then tracked how the mix changed based on other water entering the system. [4-ER-0864]. This

alone is not a subflow analysis. It is a baseline for understanding how different types of water may flow in proximity to the river and Defendants' wells based on the science and model assumptions. To understand the real-world water system, evidence from Dr. Lipson must be analyzed as to Defendants' wells – and then a legal analysis must apply the science to the legal subflow test.

GRIC argues that the "river water" percentages from the CCA Model are "averages," not "worst-case scenarios." But both are true. The percentages are based, in part, on averaging data, like pumping rates.[11] [e.g., 3-ER-0412 (§8.3)]. However, the CCA Model as a whole made *conservative* assumptions that would result in a *greater* percentage of "river water" than if other assumptions had been made. [2-ER-0368 (¶17); CommunitySER-21-22 at 33:25-34:12 (explaining some of the conservative assumptions)]. GRIC's argument (at 52) that Defendants' wells deplete the river by up to 97.5% is completely unfounded. It was based upon faulty use of the CCA Model by GRIC's expert and did not represent realistic conditions. [2-ER-0369-70 (¶24)].

Similarly, Defendants' presentation of "mitigation" measures to offset river water pumping is not a subflow concession. Parties may argue alternative positions. *C.f.*, *Hillis v. Heineman*, 626 F.3d 1014, 1018-19 (9th Cir. 2010). CCA

[11] GRIC's comment (at 45) that the CCA Model understates the pumping impact by not including actual pumping rates is false. [3-ER-0412 (§8.3)].

presented ideas to mitigate subflow pumping if the "river water" percentages included subflow. But Plaintiffs failed to prove by clear and convincing evidence that Defendants pump subflow. No mitigation is necessary.

ii. Defendants' experts did not concede that all Sexton wells are within the FHA – more analysis is necessary under Arizona law.

Plaintiffs argue that Defendants' experts conceded the three Sexton Wells are within the subflow zone because they are within the lateral extent of the FHA. But the location of a well within the lateral extent of the FHA, as drawn by an individual, interested expert, is not sufficient to find that the well pumps subflow. [*Supra*, §V(A)(i-ii)]. To provide the clear and convincing evidence to rebut the presumption that the well is pumping groundwater, it must be determined that the well is in the final subflow zone, which will be delineated in the Adjudication Court using the technical expertise of ADWR, approved AZGS geologic maps, and an iterative process designed to ensure representation of all affected parties. [2-ER-0369 (¶21)]. Additionally, other analysis must be completed by ADWR, like evaluating flow direction and side recharge from tributary aquifers. *Gila IV*, 9 P.3d at 1077 ¶18; *supra* §V(A). That analysis was not completed here. Plaintiffs' expert did not conduct any field investigation nor analyze tributary aquifers or any of the other relevant factors. [4-ER-0906; 5-ER-0920-22]. CCA itself did not map the extent of the FHA because the historical FHA mapping was inconsistent. [2-ER-

0368-0369; Br. 51-52]. Approved AZGS maps are needed before the location of the wells as to the FHA can be determined. Without them, there is a question of fact as to the location of the FHA.

In addition, Sexton Well 3 is not active in Layer 1 of the CCA Model. [4-ER-0866; 2-ER-0369]. Layer 1 is the shallow alluvium layer, which contains multiple geological features, including FHA. [*Id*.] This means that, even if Sexton Well 3 was within the FHA (which has not been conceded), water is not pumped from the FHA. The CCA Model found that Sexton Well 3 pumps zero "river water." [3-ER-0382].

iii. Defendants presented rebuttal evidence showing their wells do not pump subflow.

Even if Defendants' wells were within the subflow zone, Defendants need only show by a **preponderance of the evidence** that they do not pump subflow. *Gila IV*, 9. P.3d at 1082 ¶43. This is a lower bar than Plaintiffs' hurdle of clear and convincing evidence. *Id*. at 1074 ¶6. Defendants' evidence raises genuine issues of fact. [Br. at 50-55].

Plaintiffs argue that Defendants' evidence of clay layers is insufficient to create a question of fact because it does not show the existence of a continuous impermeable clay layer. [GRIC Br. at 52]. But Dr. Lipson found evidence of localized clay layers at Defendants' wells: the well drill logs expressly state there was "clay." [5-ER-0962-0963]. Mr. Bartlett (of CCA) testified that localized clay

layers *can* act as confining units, disrupting the flow of water from below the clay. [2-ER-0368 (¶17)].[12] This alone is a sufficient question of fact.

Moreover, *any* evidence showing that a well does not pump subflow is relevant; it is not restricted to evidence of an impermeable layer. *Gila IV*, 9 P.3d at 1082 ¶41. As to Sexton Well 3, a percentage of **zero** from the CCA Model is strong evidence that it does not pump subflow. [3-ER-0382]. Defendants also presented evidence that if any FHA exists at *any* of Defendants' wells, it is not saturated. [Br. at 50]. Plaintiffs' expert admittedly did not investigate saturation. [4-ER-0889]. The only evidence on this topic is that if there is FHA around Defendants' wells, it is likely unsaturated. [5-ER-0962-63; 2-ER-0369]. Wells that are not within saturated FHA cannot be within a subflow zone. *Gila IV*, 9 P.3d at 1081 ¶35. There is a genuine dispute of fact regarding whether the purported FHA is saturated that should preclude summary judgment. [1-ER-0042 (the District Court finding a dispute of fact as to saturation but improperly applying the saturation presumption); *supra* §V(A)(iii) (saturation cannot be presumed)]. The District Court erred by weighing evidence and granting summary judgment.

[12] Contrary to Plaintiffs' arguments, CCA's opinion on this topic was not created in a post-deposition declaration. Mr. Bartlett testified at deposition that CCA did not include a confining layer in the CCA Model because of the large-scale at which they were creating the model and because they wanted to be conservative. [CommunitySER-21–22 (at 33:22–34:12)]. CCA admitted that the reality might differ outside the simulation. [*Id.*]

VI. Plaintiffs' Federal Rights Arguments Are Legally and Factually Baseless.

A. Plaintiffs' Decree rights are not federal reserved rights.

Plaintiffs never alleged that their Decree rights are federal reserved rights; their Complaints allege only that Defendants' purported subflow pumping contravenes the Decree. Now, Plaintiffs argue that *even if* Defendants do not pump subflow, the judgment should be affirmed because Defendants' pumping of *any* water allegedly interferes with Plaintiff's federal reserved rights. [Tribe Br. at 17, 21].

This argument is incorrect. Although Plaintiffs' Decree rights *originated* with *claims* under multiple legal theories, "[t]he Decree does not expressly grant any aboriginal or federal reserved water rights" to Plaintiffs. *San Carlos Apache Tribe v. United States*, 639 F.3d 1346, 1351 (Fed. Cir. 2011). The Decree is a "compromise and settlement," which included Plaintiffs "giv[ing] up" certain rights. *Gila River Pima-Maricopa Indian Cmty. v. United States*, 684 F.2d 852, 865 (Ct. Cl. 1982); *see also United States v. Gila Valley Irrigation Dist.*, 31 F.3d 1428, 1431 (9th Cir. 1994). "The mere fact that the decree may have given up some rights previously claimed by the Indians does not vitiate the compromise—that is the nature of most consent decrees based on compromise and settlement." *Id*. 684 F.2d at 865.

Plaintiffs' Decree rights are also inconsistent with federal reserved rights. *See e.g.*, *Gila River Pima-Maricopa Indian Cmty. v. United States,* 29 Ind. Cl. Comm. 144, 161 (1972). A federal reserved water right is established when the United States withdraws land from the public domain and reserves it for a federal purpose. *Cappaert v. United States*, 426 U.S. 128, 138 (1976). The priority date of such right is the date on which the reservation was established, or the date of a reservation addition with respect to rights for that addition. *Arizona v. California*, 373 U.S. 546, 600 (1963); *Arizona v. California*, 460 U.S. 605, 641 (1983).

Here, the priority dates for Plaintiffs listed in the Decree do not correspond with the dates Plaintiffs' reservations were established. GRIC's Decreed right has a "time immemorial" priority. [GRIC Br. at 9; Decree, Art. VI(1) at 86]. But a federal reserved right for GRIC's reservation could not have a priority date earlier than 1859, the year of GRIC's reservation establishment. [GRIC Br. at 5]; *Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1066 (9th Cir. 2010). Similarly, the Tribe's Decreed right has a priority date of 1846. [GRIC Br. at 9; Decree, Art. VI(2) at 86]. A federal reserved right for the Tribe's reservation could not have a priority date earlier than 1872, the year of its reservation's establishment. [GRIC Br. at 5]; *Gila IV*, 127 P.3d 882, 885 ¶2 (2006). Thus, Plaintiff's rights are not federal reserved rights.

B. Plaintiffs' federal rights arguments are unsupported by Evidence.

The Tribe argues that *even if* Plaintiffs' wells only pump groundwater, then the pumping must cease because it infringes upon Plaintiffs' federal reserved rights. [Tribe Br. at 17–18]. The Tribe claims that the pumped water is "hydrologically connected to, and negatively impacting, the flow of the Gila River mainstem." [*Id*. at 22–23]. But the Tribe only points to the CCA Report and certain excerpts of a CCA expert deposition, none of which supports this argument.

A federal reserved right only extends to groundwater "when groundwater is necessary to accomplish the purpose of a federal reservation." *Gila III*, 989 P.2d 739, 750 ¶37 (Ariz. 1999). "[O]nce a federal reservation establishes a reserved right to groundwater, it may invoke the federal law to protect its groundwater from subsequent diversion ***to the extent such protection is necessary to fulfill its reserved right***." *Id*. But the law does not require "a zero-impact standard of protection for federal reserved rights." *Id*. ¶38. "The Supreme Court has repeatedly acknowledged that the reserved rights doctrine 'reserves only that amount of water necessary to fulfill the purpose of the reservation, no more.'" *Id*. (quoting *Cappaert v. United States*, 426 U.S. 128, 141 (1976)). Thus, even where an injunction is warranted, relief is tailored to a reservation's minimal need.

Here, there is no evidence: (1) of the amount of water necessary to fulfill Plaintiffs' alleged reserved rights (which, as explained above, do not actually exist

under the Decree); or (2) that Defendants' pumping impacts those rights to the extent that Plaintiffs cannot fulfill the purposes of their reservations. In fact, Plaintiffs can point to no evidence at all suggesting that Defendants' pumping disrupts Plaintiffs' water uses on their lands. Accordingly, Plaintiffs' federal reserved water rights arguments are unsupported by law and evidence.

VII. Any Relief Granted Must Consider Defendants' Groundwater Rights.

Defendants have a right to pump and reasonably use groundwater from beneath their lands and such water is not subject to Plaintiffs' appropriation. *Gila IV*, 9 P.3d at 1073. Defendants' wells cannot be entirely shut down where the evidence shows that these wells – located thousands of feet from the river – pump *at least* 97% groundwater (if not entirely groundwater, as argued above). [2-ER-0367]. If the District Court's ruling that Defendants are improperly taking subflow is upheld, then, at most, only the *subflow* pumping constitutes an unauthorized diversion.[13] Less drastic remedies would be appropriate, such as ordering Defendants to reduce pumping or farmed acreage. [3-ER-0382].

Plaintiffs (GRIC Br. at 59) argue that Defendants have no legal right to groundwater and cite cases where the groundwater users claimed there was an unconstitutional taking. Although water rights generally are constitutionally-

[13] The overbreadth of the District Court's injunction was caused, in part, by its disregard for Arizona's bifurcated water law system. [Br. at 57-58].

protected property rights (*Gila I*, 830 P.2d 442, 447 (Ariz. 1992)), Defendants do not make a Takings Clause argument here. Plaintiffs also cite to *Gila IV*, stating that there is no property right to "potential, future groundwater use." [GRIC Br. at 59, citing *Gila IV*, 9 P.3d at 1083]. But Defendants are not seeking protection for "potential, future" groundwater use.[14]

Defendants have a right to continue their current, preexisting groundwater use. Arizona law has a history of protecting preexisting groundwater uses. In *Town of Chino Valley*, cited by Plaintiffs, the court described how the 1980 Groundwater Management Act defined "certain usages of groundwater previously being made and allow[ed] these usages to continue." *Town of Chino Valley v. City of Prescott*, 638 P.2d 1324, 1326 n.* (Ariz. 1981). The court affirmed a denial of an injunction to stop an existing groundwater use. *Id*. at 1330. In *Sw. Eng'g Co. v. Ernst*, the Arizona Supreme Court upheld legislation establishing a method for determining critical groundwater areas. After a critical groundwater area was designated, drilling of new irrigation wells within the area was prohibited with certain exceptions. Pumping from existing wells was allowed to continue to their full capacity. 291 P.2d 764, 767-69 (Ariz. 1955).

[14] The Tribe also argues (at 24) that, at best Defendants have a usufructuary right to groundwater. But *all* water rights in Arizona are usufructuary rights no matter the source of water. *Strawberry Water Co. v. Paulsen*, 207 P.3d 654, 660 n.4 (Ariz. App. 2008).

Here, the District Court's injunction, which will result in the complete closure of Defendants' family farms, is drastic and unsupported by Arizona law.[15] Arizona law recognizes that a well may pump both groundwater and appropriable water. *Gila II*, 857 P.2d at 1245. Judge Bolton in this case already stated that relevant aspects of Arizona subflow law that are not yet decided may require this matter be stayed. [Br. at 56-57]. The regulation of wells that pump groundwater *and* appropriable subflow has not been decided. If the Court concludes that Defendants are violating the Decree by pumping some non-zero amount of subflow, it should require the matter be stayed until an appropriate remedy is fashioned under Arizona law.

VIII. Conclusion.

The judgment of the District Court should be overturned.

Respectfully submitted this 19th day of August, 2024.

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[15] Plaintiffs' claims that Defendants can simply purchase Decree rights is an oversimplification and entirely speculative.

CERTIFICATE OF COMPLIANCE WITH NINTH CIRCUIT RULE 32

I am one of the attorneys representing Defendants-Appellants.

This brief contains 8,730 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief complies with the word limit of Cir. R. 32-1.

Respectfully submitted this 19th day of August, 2024.

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