No. 23-2743

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GILA RIVER INDIAN COMMUNITY, a federally recognized Indian tribe,
Plaintiff-Appellee,

and

SAN CARLOS APACHE TRIBE, a federally recognized Indian tribe,
Intervenor-Plaintiff-Appellee,

vs.

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
Hon. Scott H. Rash

SAN CARLOS APACHE TRIBE'S ANSWERING BRIEF

Alexander B. Ritchie (SBA #019579)
Jana L. Sutton (SBA #032040)
Bernardo M. Velasco (SBA #033746)
Laurel A. Herrmann (SBA #025623)
SAN CARLOS APACHE TRIBE
Office of the Attorney General
P.O. Box 40
San Carlos, Arizona 85550
(928) 475-3344
alex.ritchie@scat-nsn.gov
jana.sutton@scat-nsn.gov
bern.velasco@scat-nsn.gov
laurel.herrmann@scat-nsn.gov

Joe P. Sparks (SBA # 002383)
THE SPARKS LAW FIRM, P.C.
7503 East First Street
Scottsdale, Arizona 85251
(480) 949-1339
joesparks@sparkslawaz.com

Attorneys for the San Carlos Apache Tribe

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INTRODUCTION

This case addresses the enforcement of the Globe Equity No. 59 Decree against Appellants who divert waters of the Gila River mainstem, including its underground waters, through wells in violation of the Decree. Appellants bring this appeal to challenge the district court's decision to enforce and protect the federal reserved rights of the San Carlos Apache Tribe ("Tribe") and the Gila River Indian Community ("Community") to water of the mainstem of the Gila River as adjudicated under the Decree.

The Gila River rises along the west side of the Continental Divide in New Mexico and cuts its way through the heart of Arizona in search of the Colorado River. Approximately half of Arizona's land is a part of the Gila River watershed. For purposes of this dispute, the "mainstem" of the Gila River refers to that portion of the Gila River, excluding its tributaries, which starts ten miles east of the border between Arizona and New Mexico and ends at its confluence with the Salt River just southwest of Phoenix, Arizona. *In re Gen. Adjudication of All Rts. to Use Water in Gila River Sys. & Source* (*Gila VI*), 127 P.3d 882, 891 (Ariz. 2006) (quoting Amended Complaint, *United States v. Gila Valley Irr. Dist., et al.*, No. CV-31-00059 (D. Ariz. Dec. 5, 1927)). The mainstem includes the visible flow and the "underground waters" of the river. *See, e.g.*, *United States v. Gila Valley Irr. Dist.*, Globe Equity Decree No. 59 (D. Ariz. June 29, 1935) (the "Decree" or "Globe

Equity Decree"), art. IX (which referenced underground waters of the Gila River and authorized a specific defendant "to divert from the underground waters of the Gila River by means of its pumps . . . ."); 2-ER-0346 –0363. Today, the mainstem has been dammed, pumped, and diverted to the point that it rarely flows above ground anywhere west of the San Carlos Reservoir.

The mainstem runs directly through the reservations of the Tribe and the Community. Furthermore, for generations before these reservations were established, members of both the Tribe and the Community lived and irrigated land along the mainstem of the Gila River.[1] The Tribe's aboriginal territory includes land from as far east as its headwaters in modern day New Mexico, all of which was included in the land reserved to the Tribe as its permanent homeland. Treaty with the Apache Nation dated July 1, 1852, 10 Stat. 979; Exec. Order, Ulysses S. Grant (November 9, 1871) (ordering the Secretary of War to take action to reserve "certain tracts of country in Arizona and New Mexico" for the Apache people); Exec. Order, Ulysses S. Grant (December 14, 1872). Between 1873 and 1903, however, the

[1] *See* Rogers, Henry Darwin, and A. Keith Johnston (1857) Territory of New Mexico. John Murray, London. Engraved by W. & A.K. Johnston, Edinburgh. Available from the David Rumsey Map Collection, at http://www.davidrumsey.com/maps2414.html (indicating historic territory of Apache tribes prior to establishment of the San Carlos Apache Reservation); Ehrenberg, Herman (1858) Map of the Gadsden Purchase: Sonora and portions of New Mexico, Chihuaua & California. Middleton, Strobridge & Co. Available from the U. S. Library of Congress at http://hdl.loc.gov/loc.gmd/g4301s.fi000076.

federal government repeatedly tore away large swaths of the Tribe's land, pushed the Tribe west, and allowed other interests to take over the land that was once a part of the homeland that the Tribe irrigated, relied upon, and was promised. Accordingly, the Tribe soon found itself concentrated on land downstream from numerous individuals and entities, including Appellants, who have since moved to the area and begun to draw water from the Gila River in violation of the Decree.

Both the Tribe and the Community have absolute federal rights to water from the Gila River mainstem. The Tribe's rights have a priority date of 1846, and the Community's rights have priority dates ranging from "time immemorial" to 1924. These federal reserved water rights under the Decree are held by the United States in trust for the Tribe and the Community and are appurtenant to reservation lands, which are also held by the United States in trust for the Tribe and Community. The United States District Court for the District of Arizona recognized those rights in 1935 and memorialized them in the Globe Equity Decree. In its Decree, the federal district court retained ongoing jurisdiction and, using that jurisdiction, has continued to enforce the Decree. Decree, art. XIII ("[T]he Court retains jurisdiction hereof for the limited purposes above described, this decree otherwise being deemed a final determination of the issues in this cause and of the rights herein defined."); Decree, art. XII ("[A] Water Commissioner shall be appointed by this Court to carry out and enforce the provisions of this Decree."); *United States v. Gila Valley Irr. Dist.*, 859

F.3d 789, 794 (9th Cir. 2017) ("The district court has continuing jurisdiction to enforce and to interpret the Decree, which provides for the appointment of a Water Commissioner for such enforcement purposes."); *see generally United States v. Gila Valley Irr. Dist.*, No. CV-31-00059 (D. Ariz.).

Appellants, by comparison, are newcomers; they own land in the Duncan Valley, an area along the mainstem near the border between New Mexico and Arizona—part of the Tribe's aboriginal territory and a part of its original Reservation from which the Tribe was removed. Exec. Order, Ulysses S. Grant (November 7, 1871). Appellants do not have, by decree or otherwise, any rights to draw water from the Gila River. Yet between 1940 and 1978, Appellants drilled four wells along the mainstem. By pumping water from their wells, Appellants diminish and degrade the Gila River's flow, which damages the Tribe's and Community's federal reserved rights to water from the Gila River mainstem and violates the federal Decree. *United States v. Gila Valley Irr. Dist.*, 920 Fed. Supp. 1444, 1450 (D. Ariz. 1996) ("The effect of pumping on salt load and salinity is difficult to overstate.")

Accordingly, the Community filed its complaint against Appellants in the District of Arizona seeking, among other things, to enjoin Appellants' unauthorized pumping. 5-ER-1017–1044. After discovery, the Community filed a motion for summary judgment arguing that Appellants' own evidence establishes that each well pumps mainstem water, and therefore there is no genuine dispute of material fact for

trial. 5-ER-0999–1003. The Tribe intervened and joined the Community's motion, 5-ER-1004–1012, which the district court granted. 1-ER-0008–0053.

This Court should determine that the district court properly (1) exercised jurisdiction over this case; and (2) ordered the Appellants' wells disabled until they obtain Decree rights for the wells. Intervenor-Appellee the San Carlos Apache Tribe joins in the Brief of Plaintiff-Appellee Gila River Indian Community. The Tribe's Answering Brief describes the exclusive nature of the Globe Equity Decree and the federal court's exclusive jurisdiction over the Gila River mainstem, an interstate river over which the federal court has original jurisdiction. *See Arizona v. California*, 376 U.S. 40 (1964); *Arizona v. California*, 373 U.S. 546 (1963). The Tribe respectfully asks this Court to affirm the district court.

ISSUES PRESENTED

The Brief of the Gila River Indian Community recites the issues presented in this appeal. The Tribe will not repeat these issues here.

STATEMENT OF JURISDICTION

The Tribe does not dispute Appellants' Jurisdictional Statement. Opening Brief at 2.

STATEMENT OF CASE

The Community provides a comprehensive Statement of Case in its Answering Brief, which the Tribe joins. The following statement briefly gives the key background central to this appeal, including: (1) the litigation that the United States initiated on behalf of the Tribe and Community in the 1920s resulted in a federal decree which quantified, prioritized, and continues to enforce the Tribe's and Community's federal rights to water from the Gila River mainstem; and (2) Appellants themselves disclosed evidence in this case that establishes that there is no dispute of material fact that the four wells they drilled along the Gila River mainstem improperly pump water from the mainstem.

I. Globe Equity Decree No. 59

"In 1925, the United States, on its own behalf and on the behalf of the [Community] and [Tribe] (Lower Valleys Users), sued certain irrigation districts, canal companies, and individuals (Upper Valleys Users) whose lands, irrigated by the river's waters, lie above the Coolidge Dam, the San Carlos Reservoir, and the Indian lands, to determine their respective water rights." *United States v. Gila Valley Irr. Dist.*, 454 F.2d 219, 220 (9th Cir. 1972). The parties to this early litigation, now known as Globe Equity, included "all the canal companies and water users along the River so far as they could be ascertained." *Gila Valley Irr. Dist. v. United States,* 118 F.2d 507, 508 (9th Cir. 1941); *In re Adjudication of All Rts. to Use Water in*

Gila River Sys. & Source (*Gila River VI*), 127 P.3d 882, 902 (Ariz. 2006) (the Globe Equity litigation joined "all those with claims to the mainstem of the Gila River").

To resolve the Globe Equity litigation, the district court entered the Globe Equity Decree, 2-ER-0345–0363, which quantified and prioritized appropriations for all those with ascertainable rights to water from the Gila River mainstem, led to the creation of a detailed call system[2] overseen by a court-appointed Water Commissioner, and reserved ongoing jurisdiction in the federal district court. *United States v. Gila Valley Irr. Dist.*, 859 F.3d 789, 794 (9th Cir. 2017). The Decree is elaborate and comprehensive. *United States v. Gila Valley Irr. Dist.*, 454 F.2d 219, 220 (9th Cir. 1972) ("An elaborate consent decree was entered on June 29, 1935 . . . ."); *Gila River VI*, 127 P.3d at 902 ("[A]s to the mainstem of the Gila River, the Decree is comprehensive."). Interpretation of the Decree has been the subject of ongoing, extensive litigation in the federal court ever since it was entered.[3]

[2] A call system is a method of distributing water according to the relative priorities of water users. *See United States v. Gila Valley Irr. Dist.*, 920 F. Supp. 1444, 1478 (D. Ariz. 1996), *aff'd sub nom. United States v. Gila Valley Irr. Dist.*, 117 F.3d 425 (9th Cir. 1997).

[3] An incomplete list would include: *Gila Valley Irr. Dist. v. United States*, 118 F.2d 507 (9th Cir. 1941); *United States v. Gila Valley Irr. Dist.*, 454 F.2d 219 (9th Cir. 1972); *United States v. Gila Valley Irr. Dist.*, 959 F.2d 242 (9th Cir. 1992); *United States v. Gila Valley Irr. Dist.*, 31 F.3d 1428 (9th Cir. 1994); *United States v. Gila Valley Irr. Dist.*, 117 F.3d 425 (9th Cir. 1997); *United States v. Gila Valley Irr. Dist.*, 859 F.3d 789 (9th Cir. 2017).

Under the Decree, the court recognized the Tribe's and the Community's quantified, prioritized mainstem water rights, which predate all others. These rights include all the Tribe's and Community's rights to water from the Gila River mainstem, including their federal reserved rights. *Gila River VI*, 127 P.3d at 895, 898 (noting that although the United States may have "produced less than desirable results for the Tribe," it nonetheless litigated and resolved "all of the Tribe's water rights, under all theories, to the Gila River mainstem.").

By contrast, Appellants have no enforceable water rights to the mainstem under the Decree or otherwise. Neither Appellants nor their predecessors were using mainstem water at the time the Globe Equity litigation began or when the Decree was entered, and therefore they had no reason to be joined in that case. The earliest potential priority date any Appellant has identified is 1940.[4] 3-ER-0495–0511.

Accordingly, because Appellants have no cognizable rights to any amount of mainstem water, the only relevant question below was whether Appellants' wells pump any water from or affecting the Gila River mainstem, thereby infringing on the Tribe's and Community's federal reserved rights and violating the Decree. The

[4] Appellants' Statements of Claimant, which they filed in state court under state law, list priority dates for their water claims even though their claims are allegedly for groundwater only. 3-ER-0495–0511. Under Arizona law, groundwater claims are claims for usufructuary rights that are not assigned priority dates, *In re Gen. Adjudication of All Rts. to Use Water in Gila River Sys. & Source*, 9 P.3d 1069, 1073 (*Gila River IV*) (Ariz. 2000).

evidence presented at summary judgment established that there is no dispute: Appellants are pumping mainstem water, and this Court should affirm the district court's order which ordered the Gila Water Commissioner to direct the Appellants to cut off and seal their wells.

II. Appellants' Violations of the Decree

Appellants drilled four wells after the Decree was entered: (1) Sexton Well 1; (2) Sexton Well 2; (3) Sexton Well 3; and (4) the Schoubroek Well. 3-ER-0373. Each well is located near the Gila River mainstem. 3-ER-0383. The Community offered evidence on summary judgment, through its experts, that each of the four wells was drawing water from the Gila River mainstem. Appellants' experts did not meaningfully rebut the Community's experts. To the contrary, Appellants' experts conceded that the three Sexton wells are located in the floodplain Holocene alluvium ("FHA")[5] of the Gila River mainstem, 3-ER-0861–0862 (Appellants' expert agreeing that "the three Sexton wells are located in the Gila River Holocene – the floodplain Holocene alluvium"), and three of the wells (the Schoubroek Well and Sexton Wells 1 and 2) draw water "directly from" the Gila River. 3-ER-0381–0382 (creating a model to "determine the percentage of water that was reaching the well

[5] The floodplain Holocene alluvium refers to the area consisting of sedimentary deposits (loose clay, silt, sand, and gravel) deposited by and along a river during the current geological epoch. *In re Gen. Adjudication of All Rts. to Use Water in Gila River Sys. & Source (Gila River IV),* 9 P.3d 1069, 1073 n.2 (Ariz. 2000).

directly from the Gila River" and concluding that "from 2008 to 2019, the defendants [sic] wells pumped low percentages of Gila River water."). On this record, the district court properly concluded that the wells were drawing water from the Gila River mainstem without an associated Decree right and ordered that Appellants' wells be cut off and sealed. This Court should affirm.

ARGUMENT SUMMARY

The district court had jurisdiction to consider the Tribe's and Community's claims, did not err in granting summary judgment in their favor, and ordered an appropriate remedy.

(1) The *res* of the federal district court's jurisdiction in equity is the waters of the Gila River mainstem ("*Res*"). The district court first exercised *in rem* jurisdiction over the Gila River mainstem in the 1920s and has exercised exclusive jurisdiction over that *Res* ever since. That court therefore has comprehensive and exclusive jurisdiction over claims regarding wells that drain water from the mainstem, such as the ones here, because it involves the very same *Res*.

(2) Whether viewed from the perspective of federal or state rights, the evidence conclusively establishes that Appellants' wells draw water from the Gila River mainstem. Accordingly, summary judgment in favor of the Community and the Tribe was appropriate and this Court should affirm.

Although there was no genuine dispute of material fact below that Appellants' wells pump "subflow" under Arizona law, for purposes of the Tribe's and Community's federal reserved rights, it does not matter whether the water Appellants usurp is characterized as surface water, subflow, or groundwater. As the Arizona Supreme Court has recognized, a tribe's federal rights are protected from *all* other uses—including groundwater pumping.

In other words, because the Decree adjudicated the Tribe's and Community's federal rights to the Gila River mainstem, those rights are not limited by the idiosyncratic, unscientific strictures of state law. Rather, even if there was a dispute of fact regarding whether each well pumps "subflow" as defined under Arizona law—which there is not—this Court should still affirm because there is no dispute that each well pumps water from the Gila River mainstem, and therefore diminishes and degrades the water available in the mainstem to satisfy the federal, decreed rights of both the Tribe and the Community. Appellants are violating the Decree, and their pumping must stop.

(3) As Appellants cannot pump water from their existing wells without drawing water from the Gila River mainstem, to which they have no right, the district court did not abuse its discretion when it concluded that Appellants' wells must be sealed.

ARGUMENT

I. The federal district court has jurisdiction over claims related to the Gila River mainstem.

The district court did not err when it concluded that it has jurisdiction over the Tribe's and Community's complaint asking that the district court enforce its Decree, and it did not err by concluding that the prior exclusive jurisdiction doctrine did not require it to abstain from exercising jurisdiction in this case. Under Appellants' own description of the prior exclusive jurisdiction doctrine, the district court—which has ongoing jurisdiction over claims to water from the Gila River mainstem under the Decree—has exclusive jurisdiction over this litigation.

As a preliminary matter, the district court first concluded that it "unequivocally" has jurisdiction under 28 U.S.C. § 1362 and "[a]dditionally and alternatively" under 28 U.S.C. § 1331. 1-ER-0062–0063, 1-ER-0065–0066 ("Because jurisdiction lies under either §§ 1362 or 1331, the Court need not determine whether the Decree itself confers continuing or ancillary jurisdiction in this matter."). Appellants do not contest the district court's application of §§ 1362 and 1331, nor do they contest the court's discretionary decision not to abstain under *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976).

Instead, Appellants only appeal the district court's application of the prior exclusive jurisdiction doctrine. That doctrine applies when there are parallel state

and federal *in rem* or *quasi in rem* proceedings regarding the same *res*. *United States v. PetroSaudi Oil Servs. (Venezuela) Ltd.*, 70 F.4th 1199, 1208–09 (9th Cir. 2023) (district court had jurisdiction to control an arbitration award fund when it was the first and only court to exercise *in rem* jurisdiction over that *res*). In such cases, the first court of competent jurisdiction to obtain "possession, custody, or control" of the *res* asserts jurisdiction over it and no other court may step in to usurp jurisdiction. *State Eng'r of State of Nevada v. S. Fork Band of Te-Moak Tribe of W. Shoshone Indians of Nevada*, 339 F.3d 804, 809 (9th Cir. 2003) (quoting 14 Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, *Federal Practice and Procedure* § 3631, at 8 (3d ed.1998)).[6]

Comprehensive water rights proceedings are either *in rem* or *quasi in rem*, and therefore, the prior exclusive jurisdiction doctrine applies. *South Fork Band*, 339 F.3d at 810–11 (contempt action regarding a prior water rights decree "is quasi in rem . . . and the doctrine of prior exclusive jurisdiction fully applies"); *United States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007, 1013 (9th Cir. 1999) (district court had exclusive jurisdiction to hear the appeal of a decision by state engineer to

[6] The prior exclusive jurisdiction doctrine is well-established federally and has been applied by Arizona courts as well. *UMB Bank, NA v. Parkview Sch., Inc.*, 523 P.3d 1261, 1266 (Ariz. Ct. App. 2023) (adopting the prior exclusive jurisdiction doctrine in Arizona and concluding that it would be "illogical, impractical, and inequitable" to ignore the ruling of another court that had already exercised jurisdiction over the same *res*).

permit the transfer of water rights "because its jurisdiction is best characterized as *in rem* jurisdiction").

Alternatively, a court may obtain exclusive jurisdiction by reserving continuing jurisdiction over its judgment. *Alpine Land & Reservoir Co.*, 174 F.3d at 1013 ("[T]o construe these Decrees so that the district court does not retain exclusive jurisdiction would render the retention of jurisdiction a nullity."). Continuing jurisdiction is presumed to be exclusive because "it would make no sense for the district court to retain jurisdiction to interpret and apply its own judgment to the future conduct contemplated by the judgment, yet have a state court construing what the federal court meant in the judgment." *Flanagan v. Arnaiz*, 143 F.3d 540, 545 (9th Cir. 1998); *Alpine Land & Reservoir Co.*, 174 F.3d at 1013. This is particularly true in the case of water rights litigation, where piecemeal allocation of rights has long been recognized as unworkable. *See Alpine Land & Reservoir Co.*, 174 F.3d at 1013 (concluding exclusive jurisdiction was implied when "conflicting federal and state constructions" of complex and comprehensive water rights decrees "would be entirely unworkable").

There is no dispute that this proceeding is either *in rem* or *quasi in rem*, and therefore the prior exclusive jurisdiction doctrine applies. Here, the federal district court first exercised jurisdiction over the *Res*, which is the Gila River mainstem, in 1925, while the Gila River General Stream Adjudication began to take shape decades

later. *See Matter of Rts. to Use of Gila River*, 830 P.2d 442, 444 (Ariz. 1992) (noting that the Salt River Valley Water Users Association initiated an adjudication regarding the Salt River in 1974, which was followed by several other piecemeal adjudications before they were consolidated into one general adjudication). The federal district court was the first to exercise jurisdiction over the Gila River mainstem. Accordingly, the district court has exclusive jurisdiction over the mainstem, as well as the Tribe's and Community's efforts to enforce those rights in this litigation.

Appellants do not dispute that the district court reserved ongoing jurisdiction over the Gila River mainstem through its Decree. Indeed, the district court not only reserved ongoing jurisdiction to enforce the Decree, it did so by providing in the Decree itself that it would employ and oversee a Water Commissioner "to carry out and enforce the provisions of this decree, and the instructions and orders of the Court." Decree, art. XII (further providing that the Water Commissioner "is hereby empowered and authorized to cut off the water" from anyone who violates the Decree or disobeys "orders, rules, or directions" of the Water Commissioner, and permitting "any person feeling aggrieved by an action or order of the Water Commissioner" to file complaints with the Water Commissioner and the district court for resolution). As such, the district court expressly reserved jurisdiction for itself over all claims related to the Gila River mainstem and the Decree going

forward. Decree, art. XIII ("[T]he Court retains jurisdiction hereof for the limited purposes above described, this decree otherwise being deemed a final determination of the issues in this cause and of the rights herein defined."). The state court's general stream adjudication that began decades later did not and could not deprive the district court of its continuing, exclusive jurisdiction.

The district court did not err when it determined that it has exclusive jurisdiction over this case, in which it determined that Appellants are draining water from the Gila River mainstem in violation of the Tribe's and Community's decreed rights.

II. The district court did not err in determining Appellants' wells pump water from the Gila River mainstem without an associated Decree right.

The district court did not err when it concluded that there is no dispute of material fact that Appellant's wells each pump water of the mainstem in violation of the Decree. It does not matter whether the water Appellants pump is defined as "subflow" under state law, because the federal court, in enforcing its federal decree, has expressly retained jurisdiction over the "underground waters" of the Gila River mainstem, and federal reserved water rights are entitled to protection against **all pumping** that impairs federal reserved rights. The Tribe's and Community's rights to water from the Gila River mainstem are both chronologically prior to, and substantively superior to, Appellants' allegation of a right or privilege to pump water. Accordingly, this Court should affirm. *United States v. Smith*, 625 F.2d 278,

280 (9th Cir. 1980) (the Court "may affirm a judgment for any reason that finds support in the record, . . . and there is ample support in this record for the findings of fact").

A. Arizona courts recognize that federal water rights are entitled to heightened protection.

Arizona water law is idiosyncratic in that it "differentiates groundwater users from surface water users." *In re Gen. Adjudication of All Rts. to Use Water in Gila River Sys. & Source* (*Gila River IV*), 9 P.3d 1069, 1073 (Ariz. 2000). The use of surface water is limited by "the doctrines of prior appropriation and beneficial use," and the use of groundwater is limited by "the doctrine of reasonable use, . . . **and the federal reserved water rights doctrine** in [*In re the General Adjudication of All Rights to Use Water in the Gila River System and Source* (*Gila River III*), 989 P.2d 739, 743 (Ariz. 1999)]." *Id.* (internal citation omitted *and* emphasis added); *accord Gila River III*, 989 P.2d at 742 ("The pertinent waters within a 'river system and source' are (1) those subject to prior appropriation and (2) those subject to claims based on federal law.").

If Appellants' wells pump **surface water** from the Gila River mainstem, their pumping must cease because they have no right to appropriate surface water from the Gila River mainstem and, even if they established such a right, it would be junior to the Community's and Tribe's prior Decree rights to that water. *See infra* Section II.B. If Appellants' wells pump **groundwater**, then their pumping must cease

because it infringes on the Community's and Tribe's federal reserved water rights as established in the Decree because the evidence conclusively demonstrates that such pumping diverts water from the mainstem. *See infra* Section II.C. Either way, the district court did not err in ordering Appellants' wells to be cut off and sealed and this Court should affirm.

B. Appellants are violating the Decree by pumping surface water from the Gila River mainstem.

Appellants' pumping violates the federal Decree and federal law applies without need for the application of state law. However, if the Court were to apply Arizona law to the pumping in this case, it would come to a similar conclusion to the application of federal law, because Appellants' own evidence establishes that they are pumping "subflow" of the Gila River mainstem as defined by state law, and therefore are infringing on the Community's and Tribe's federal reserved water rights under Arizona law.

To put it charitably, Arizona's state water law is imperfect—it is born of inertia and flaunts science. *In re Gen. Adjudication of All Rts. to Use Water in Gila River Sys. & Source* (*Gila River II*), 857 P.2d 1236, 1240, 1243 (Ariz. 1993) (noting that Arizona alone refuses to recognize the hydrological connection between surface and groundwater but continues that error because "[w]e believe it is too late to change"). Rather than acknowledging the connection between groundwater and surface water, the Arizona Supreme Court continues to treat the two distinctly. To

mark the baseless line between groundwater and surface water, the court cobbled together a legal fiction it calls "subflow." *See Maricopa Cnty. Mun. Water Conservation Dist. No. 1 v. Sw. Cotton Co.*, 4 P.2d 369, 377 (Ariz. 1931). When the Arizona Supreme Court created this fiction in 1931, it introduced the term "subflow" after stating that a claim to water should be assessed "without resort to scientific speculation or surmise" but instead by "indications as men of ordinary powers could with reasonable diligence ascertain" such as by listening for "the sound of water passing underneath the earth." *Id.* *Southwest Cotton* has not been expressly overruled.

Because Arizona continues to use the precarious notion of "subflow" to delineate between surface water (which is subject to prior appropriation under state law), and groundwater (which is subject to reasonable use under state law)[7], defining "subflow" has become a contentious topic. Yet due to the unscientific, if not *anti*scientific, origins of "subflow," Arizona courts have struggled to align it with the scientific evidence that litigants have provided in support of their real-world claims more than ninety years later. *See generally Gila River IV*, 9 P.3d 1069, 1079.

Despite the fabricated complexity of Arizona's water law, the district court prudently illustrated that under state law the evidence before the court demonstrated

[7] Both surface water and groundwater are subject to federal reserved rights under federal law.

that Appellants' wells pumped subflow. 1-ER-0038—0048. Appellants, through their experts, conceded that the three Sexton wells were located within the lateral bounds of the FHA, and then failed to identify evidence they could present at trial that anything blocks the wells from diverting water from the mainstem. To the contrary, Appellants' expert noted that "in the younger alluvium area . . . hydraulic conductivity values are very high." 3-ER-0418–0419. In other words, their own evidence is conclusive—the Sexton wells draw water from the Gila River mainstem and therefore violate the Decree.

Appellants also presented evidence that three of their wells (the Schoubroek well and Sexton wells 1 and 2) each pump Gila River water "directly." 3-ER-0426 In sum, Appellants themselves presented sufficient evidence that each well was drawing water either from the river itself or from the river's subflow, *i.e.*, an area so near the river that it is "closely associated with" the river and "appreciably and directly" diminishes the flow of the river. *Gila River IV*, 9 P.3d at 1080 (quoting *Gila River II*, 857 P.2d at 1246).

Appellants argue on appeal that just because their wells draw water from the Gila River, that does not mean they draw from the *subflow* of the Gila River. This stands the analysis on its head. It is only necessary to determine whether a well is located in the subflow of a river if there is a dispute about whether a well draws water from that river in the first instance. Even leaving aside that the Community

presented ample evidence to establish that the wells draw water from the subflow of the Gila River, Appellants' own experts conceded that there is "water that was reaching the well[s] *directly from the Gila River*" in specific, measurable amounts. 3-ER-0382 (emphasis added). Appellants' experts then offered potential ways to mitigate their use of Gila River water, thus acknowledging that they are pumping water from the river without a right to do so. *Id.* Accordingly, if Appellants are pumping mainstem water, then their pumping must cease in light of the Tribe's and Community's prior, decreed rights.

C. Appellants' use of groundwater from the Gila River mainstem must yield to the Community's and Tribe's federal reserved rights to the same water.

State law cannot usurp federal protections for federal reserved rights. *Gila River III*, 989 P.2d at 744–45 ("Arizona courts must afford federal claimants the benefit, when state and federal law conflict, of federal substantive law."). The Arizona Supreme Court has itself acknowledged that state landowners' use of groundwater is subject to federal reserved rights. *Id.*; *Gila River IV*, 9 P.3d at 1073 (percolating groundwater is subject to the federal reserved water rights doctrine); *see also In re Gen. Adjudication of All Rts. to Use Water in Gila River Sys. & Source* (*Gila River V*), 35 P.3d 68, 77 (Ariz. 2001) ("Indian rights 'are given broader interpretation in order to further the federal goal of Indian self-sufficiency'"); *Gila River III*, 989 P.2d at 750 ("We recognize that our determination that reserved water

rights may encompass groundwater threatens to disrupt the assumptions that underlie state law uses. . . . Yet there long has loomed the need—sometimes noted, sometimes wished away—for [Arizona's agricultural, industrial, mining, and urban interests] to accommodate themselves to the water claims of the vast federal land holdings that surround them."). The Community's and Tribe's Decree rights include federal reserved rights, and the state's bifurcated water system cannot undermine federal protection of those rights.

Under federal law, the question is not what water is "appropriable," but rather what water is reserved to support permanent tribal homelands. *Gila River III*, 989 P.2d at 745 (citing *Cappaert v. United States,* 426 U.S. 128, 138 (1976) and *Winters v. United States,* 207 U.S. 564 (1908)). The federal government initiated the Globe Equity litigation on behalf of the Community and the Tribe, and as a result the district court memorialized their federal rights in the Decree. Under the Decree, the Tribe is entitled to 6,000 acre-feet per year from the Gila River mainstem, and the Community is entitled to more than 210,000 acre-feet per year from the Gila River mainstem.

The evidence submitted below establishes there is no question that Appellants are certainly pumping water that is hydrologically connected to, and negatively

impacting, the flow of the Gila River mainstem.[8] 3-ER-0373–0490; 3-ER-0861–862; 4-ER-0864. Accordingly, there is no dispute that Appellants' wells are reducing and degrading the availability of water in the Gila River mainstem, thus violating the Decree and the Tribe's and Community's federal, decreed rights.

III. The federal district court's remedy was appropriate.

The district court's order was appropriate and necessary to protect the Community's and Tribe's rights, sovereignty, homeland, and livelihood. The district court appropriately exercised its equitable discretion when it fashioned its remedy.

Appellants do not even indicate that the district court abused its discretion in issuing its order shutting down their wells. Rather, they open their argument with a blatant falsehood: they allege, without citation, that they have "a constitutionally-protected property right to groundwater." Opening Brief at 56. They have no such right. *See Town of Chino Valley v. City of Prescott*, 638 P.2d 1324, 1330 (Ariz. 1981) (limiting the use of groundwater "does not deny appellants due process of law and does not require that they be paid compensation for any possible diminution of their rights"); *see Gila River IV*, 9 P.3d at 1083 ("[B]ecause landowners have no legally recognized property right in potential, future groundwater use . . . the constitutional argument is substantively without merit." (citations and internal

[8] As Appellants have no rights under the Decree, drawing any amount of water from the mainstem violates the Decree and impairs the Tribe's and Community's federal rights as recognized in the Decree.

quotation marks omitted)). At best, Appellants may access "the usufruct of the water" beneath their land. *Chino Valley*, 638 P.2d at 1330. Their access to the usufruct of water is limited by, and must yield to, the Tribe's and Community's federal reserved water rights.

Appellants then insist without valid support that the district court should defer to remedies applied by the state court when it is faced with unauthorized wells that pump both ground and surface water. Opening Brief at 56–57. The Court should reject that argument.

As noted, the distinction between groundwater and surface water is simply not relevant when it comes to protecting federal reserved rights. Whether the district court or the state court is the appropriate forum, the law that applies is the same: those who hold federal reserved water rights "can protect [their] water from subsequent diversion, whether the diversion is of surface or groundwater." *Gila River III*, 989 P.2d at 749 (quoting *Cappaert v. United States*, 426 U.S. 128, 143 (1976)). Because the Decree adjudicated federal reserved rights, courts "may not defer to state law where to do so would defeat federal water rights." *Id.* at 747. *See* Ariz. Const. art. 20 § 4 ("all lands lying within said boundaries owned or held by any Indian or Indian tribes . . . shall be, and remain, subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States");

Arizona-New Mexico Enabling Act, Act of June 20, 1910, Pub. L. No. 219, ch. 310, 36 Stat. 557, § 20.

Finally, Appellants allege that the district court erred as a matter of law by considering the connection between surface water and groundwater as an additional basis for its remedy. Appellants once again ignore the fact that Arizona has already recognized that federal reserved rights, such as those rights reserved for the Tribe and the Community by the Decree, are exempt from Arizona's bifurcated system. *Gila River III*, 989 P.2d at 749. Furthermore, the court, sitting in equity, is entitled to consider the real-world consequences of its order.

The district court did not err in its application of the law and did not abuse its discretion. This Court should affirm the district court's order.

CONCLUSION

The district court correctly concluded that it has jurisdiction over the Gila River mainstem and thus all disputes related to water taken from that *Res*. The court then properly recognized that Appellants themselves provided evidence that they are pumping water directly from the Gila River mainstem and otherwise have drilled into the FHA surrounding the mainstem, which allows each of their four wells to drain water from the Gila River. Appellants' use of water from the Gila River mainstem—in any amount—violates the Globe Equity Decree and must cease. The

district court did not err in ordering Appellants' wells shut down, and the Tribe respectfully requests that this Court affirm.

Respectfully submitted this 28th of June, 2024.

THE SPARKS LAW FIRM, P.C.

By: s/ Joe P. Sparks
Joe P. Sparks
7503 First Street
Scottsdale, Arizona 85251
Attorneys for the San Carlos Apache Tribe

Alexander B. Ritchie
Jana L. Sutton
Bernardo M. Velasco
Laurel A. Herrmann
SAN CARLOS APACHE TRIBE
P.O. Box 40
San Carlos, Arizona 85550
Office of the Attorney General for the San Carlos Apache Tribe

STATEMENT OF RELATED CASES

I am one of the attorneys for Intervenor-Appellee the San Carlos Apache Tribe. I am unaware of any related cases currently pending in this Court.

THE SPARKS LAW FIRM, P.C.

By: s/ Joe P. Sparks
Joe P. Sparks
7503 First Street
Scottsdale, Arizona 85251
Attorneys for the San Carlos Apache Tribe

Alexander B. Ritchie
Jana L. Sutton
Bernardo M. Velasco
Laurel A. Herrmann
SAN CARLOS APACHE TRIBE
P.O. Box 40
San Carlos, Arizona 85550
Office of the Attorney General for the San Carlos Apache Tribe

CERTIFICATE OF COMPLIANCE

I am one of the attorneys for Intervenor-Appellee the San Carlos Apache Tribe.

The San Carlos Apache Tribe's Answering Brief contains 6,133 words, excluding the items exempted by Federal Rule of Appellate Procedure 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that the San Carlos Apache Tribe's Answering Brief complies with the word limit of 9th Cir. R. 32-1.

THE SPARKS LAW FIRM, P.C.

By: s/ Joe P. Sparks
Joe P. Sparks
7503 First Street
Scottsdale, Arizona 85251
Attorneys for the San Carlos Apache Tribe

Alexander B. Ritchie
Jana L. Sutton
Bernardo M. Velasco
Laurel A. Herrmann
SAN CARLOS APACHE TRIBE
P.O. Box 40
San Carlos, Arizona 85550
Office of the Attorney General for the San Carlos Apache Tribe