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12 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**  
13 **IN AND FOR THE COUNTY OF YAVAPAI**

14 GEORGE W. HANCE, *et al.*,  
15 Plaintiff,  
16 vs.  
17 WALES ARNOLD, *et ux., et al.*,  
18 Defendants,  
19 In the matter of the VERDE DITCH  
20 COMPANY

No. P1300 CV4772

**SALT RIVER PROJECT'S  
JOINDER IN VERDE DITCH  
COMPANY'S MOTION TO DELAY  
FILING OF THE ORDER  
REGARDING PROCEEDINGS  
PURSUANT TO THE  
MEMORANDUM OF  
UNDERSTANDING**

(Assigned to the Hon. David L.  
Mackey)

21 The Salt River Project Agricultural Improvement and Power District and the Salt River  
22 Valley Water Users' Association (collectively, "SRP") hereby joins in the Verde Ditch  
23 Company's Motion to Delay Filing of the Order Regarding Proceedings Pursuant to the  
24 Memorandum of Understanding (October 19, 2015) ("VDC Motion"). In the time since the  
25 August 26 filing of the Court's order regarding the Memorandum of Understanding  
26  
27

1 (“MOU”),<sup>1</sup> the United States has filed a notice of appeal of that Order. *See* Notice of Appeal  
2 (September 23, 2015). The filing of that appeal raises jurisdictional questions that the Court  
3 should consider relating to what actions the Court can take while the appeal is pending,  
4 including whether the Court has jurisdiction to enter a procedural order. SRP therefore  
5 supports VDC’s motion to delay proceedings directly relating to the MOU during the  
6 pendency of the appeal. SRP submits this Joinder for purposes of setting forth other reasons,  
7 in addition to those outlined in the VDC Motion, why refraining from further proceedings on  
8 the MOU is prudent at this time.

9  
10 **I. The Filing of the United States’ Appeal Divests the Court of Jurisdiction to**  
11 **Further Address Issues Directly Relating to the August 26 Order While the**  
12 **Appeal is Pending.**

13 In its August 26 Order, the Court expressly found that, “pursuant to Rule 54(b) of the  
14 Arizona Rules of Civil Procedure, there is no just reason for delay.” *See* August 26 Order, at  
15 5. Rule 54(b) provides that, under certain circumstances, an order of the superior court can be  
16 immediately subject to appeal even though other claims or issues remain to be resolved in the  
17 case before the superior court. *See* ARCP 54(b).

18 Generally, an appeal divests the trial court of jurisdiction except for matters in  
19 furtherance of the appeal, and the trial court has no power to enter a new judgment related to  
20 the subject matter of a judgment pending an appeal. *See Lightning A Ranch Venture v.*  
21 *Tankersley*, 161 Ariz. 497, 499, 779 P.2d 812, 814 (App. 1989). Any action the court takes  
22 without jurisdiction after an appeal is perfected is void. *See In re Marriage of Johnson &*  
23 *Gravino*, 231 Ariz. 228, ¶ 6, 293 P.3d 504, 506 (App. 2012).

24 The law with respect to Rule 54(b) orders is somewhat different. An “appeal from an  
25 appealable intermediate or interlocutory order does not divest the trial court of jurisdiction to  
26 proceed in matters not involved in the appeal.” *Continental Cas. Co. v. Indus. Comm’n*, 111  
27 Ariz. 291, 294, 528 P.2d 817, 820 (1974) (quoting 4 Am.Jur.2d Appeal and Error, § 357

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<sup>1</sup> *See* Court’s Order filed August 26, 2015 (“August 26 Order”).

1 (1962)); *see also* C.J.S., Appeal and Error § 507 (“C.J.S.”) (“Jurisdiction as to the entire cause  
2 is not transferred in an appellate proceeding for the review of an incidental or interlocutory  
3 matter, but the trial court or parties may still proceed in matters not involved in the appeal and  
4 which are entirely collateral to the part of the case taken up.”). “[T]rial courts generally  
5 retain jurisdiction to address matters unrelated to the appeal of a judgment properly certified  
6 as final.” *Southwest Gas Corp. v. Irwin ex rel. County of Cochise*, 229 Ariz. 198, 202, ¶ 23,  
7 273 P.3d 650, 654 (2012). “Another exception to complete appellate pre-emption of trial  
8 court jurisdiction pending review is recognized where, by reason of the peculiar nature of the  
9 subject matter involved, the trial court is vested with special powers of a continuing  
10 jurisdictional nature.” *Castillo v. Industrial. Comm’n*, 21 Ariz. App. 465, 468, 520 P.2d  
11 1142, 1145 (1974) (finding that appeal of Industrial Commission’s intermediate award  
12 establishing claimant’s average monthly wage did not deprive Commission of jurisdiction to  
13 continue with processing of other aspects of claim pending appellate review).

14 In the present case, the United States has appealed an interlocutory order certified for  
15 appeal pursuant to ARCP 54(b). Therefore, this Court retains jurisdiction to address matters  
16 pending before it that do not relate to the interlocutory order from which the appeal has been  
17 taken. *See Southwest Gas*, 229 Ariz. at 202, ¶ 10, 273 P.3d at 654 (“It is logical, if not  
18 axiomatic, that [Rule 54(b)] thereby permits the portion of the case that is not part of the  
19 appeal to proceed in the trial court while the appeal moves forward.”). On the other hand, the  
20 appeal arguably has divested the Court of its jurisdiction with regard to certain matters  
21 directly relating to the subject of the appeal, namely the Court’s authorization for VDC and  
22 the Commissioners to enter into the MOU with SRP.

23 Even though the United States has neither sought nor obtained a stay of the August 26  
24 Order, *see generally* ARCP 62, the Arizona law relating to the jurisdiction discussed above  
25 counsels in favor of this Court being cautious to remain within the bounds of its jurisdiction  
26 while the appeal is pending. Despite the ARCP 54(b) appeal, the Court retains jurisdiction  
27 “to proceed in matters not involved in the appeal” but arguably cannot proceed further on

1 “matters . . . involved in the appeal.” *Continental Cas.*, 111 Ariz. at 294, 528 P.2d at 82. At  
2 present, the scope of the United States’ appeal can be determined only based upon the one  
3 document that the United States has filed to date—i.e., its Notice of Appeal. In the Notice of  
4 Appeal, the United States asserts that it is appealing the Court’s “holding, *inter alia*, that the  
5 Court has historic authority to adjudicate the Verde River water use; that no action by any  
6 shareholder, Verde Ditch Commissioners or attorneys authorized by the Verde Ditch  
7 Commissioners, has divested the Court of that historic authority; and that the Court’s historic  
8 authority has not been modified by court decisions that did not specifically address it.” See  
9 Notice of Appeal, at 2.

10 The language of the Notice of Appeal provides little guidance to determine the precise  
11 basis for and scope of the appeal. As an exercise of caution, however, SRP suggests that the  
12 Court refrain from entering a procedural order at this time.<sup>2</sup> Entry of such an order might  
13 become more prudent at such time as the scope of the appeal is more precisely determined by  
14 the filing of briefs and other documents in the Court of Appeals or when the appellate process  
15 is completed. In the interim, SRP takes the position that the Court should not adopt a  
16 procedural order or take any other action specifically relating to the MOU while the appeal is  
17 pending.

18 It is clear, however, that the Court can proceed in its normal role as Master of the  
19 Verde Ditch during the pendency of the appeal. Issues relating to the day-to-day operations  
20 of the ditch fall within the scope of “matters not involved in the appeal and which are entirely  
21 collateral to the part of the case taken up.” See C.J.S., *supra*. Those operational issues also  
22 are an instance where the Court, “by reason of the peculiar nature of the subject matter  
23

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24 <sup>2</sup> Execution of the MOU itself is expressly authorized by the August 26 Order and requires no further  
25 action by the Court, so that act can occur despite the appeal. SRP contends that the MOU should be  
26 executed in the near future, even though the MOU could become void if the United States prevails on  
27 its appeal. Given the amount of time and effort the Court and the parties have spent regarding the  
specific language of the MOU, it makes sense to execute that document so that the proceedings can  
expeditiously resume if the August 26 Order is upheld on appeal.

1 involved, . . . is vested with special powers of a continuing jurisdictional nature.” *Castillo*, 21  
2 Ariz. App. at 468, 520 P.2d at 1145.

3 **II. SRP Proposes to Continue to Work with Verde Ditch Landowners While the**  
4 **Appeal is Pending to Resolve Certain Issues Not Dependent upon the MOU.**

5 Although SRP submits that the Court should not enter a procedural order or take other  
6 actions specifically relating to the MOU while the current appeal is pending, that does not  
7 mean that all work to resolve issues as between SRP and individual Verde Ditch landowners  
8 needs to come to a halt. Section 7 of the MOU relates to the negotiation of Historic Water  
9 Use (“HWU”) Agreements among SRP, VDC, and individual owners of Green and Purple  
10 Lands. *See* MOU § 7.2. Because VDC and the Commissioners effectively function as an arm  
11 of the Court, prudence suggests that VDC and the Commissioners might refrain from  
12 executing HWU Agreements while the appeal is pending.

13 The legal authority of SRP and individual landowners to enter into HWU Agreements  
14 is not dependent upon the existence of the MOU, however. SRP and the landowners had the  
15 ability to enter into private agreements even before the MOU was proposed, and they retain  
16 such ability regardless of whether the August 26 Order is upheld on appeal. Therefore, SRP  
17 proposes that the time while the appeal is pending can be used for SRP to meet with the Green  
18 and Purple landowners and begin negotiating and executing two-party agreements along the  
19 lines of what is contemplated in Section 7 the MOU. Although VDC and the Commissioners  
20 perhaps should not execute the HWU Agreements while the appeal is pending, SRP intends to  
21 perform any continuing work on those agreements in full consultation with the  
22 Commissioners.

23 Because the legal authority for any agreements between SRP and individual  
24 landowners is not dependent upon the MOU or the August 26 Order, those agreements will  
25 remain valid as between the parties thereto regardless of the outcome of the appeal. If the  
26 August 26 Order is upheld on appeal, VDC and the Commissioners can consider whether to  
27 become a party to those agreements at that time. If the August 26 Order is struck down on

1 appeal, those private agreements should remain intact as between SRP and the respective  
2 landowner. In this manner, SRP can help to continue to make some progress in resolving the  
3 overall issues while the appeal is pending. Resolution by the Court of any disputes relating to  
4 Orange Lands (or disagreements about which lands are Green or Purple), for example, would  
5 await completion of the appeal and restoration of the Court's jurisdiction over the MOU.

6 **III. Summary and Requested Action**

7 It is unfortunate that the filing of the appeal of the August 26 Order will serve to  
8 impede the significant progress that has been made over the past several years relating to the  
9 MOU and will cause delay in further progress being made. Parties have a right to appeal,  
10 however, and Arizona law is relatively clear regarding the effect of a Rule 54(b) appeal on the  
11 superior court's jurisdiction to proceed on issues relating to the appeal. Therefore, although  
12 SRP contends that the MOU can and should be promptly executed, prudence weighs in favor  
13 of no other action being taken by this Court directly relating to the MOU while the appeal is  
14 pending.

15 During the pendency of the appeal, SRP proposes to continue to work with owners of  
16 Green and Purple Lands in an effort to negotiate and execute private, two-party agreements  
17 regarding Historic Water Use on those lands. Those efforts will provide benefits to those  
18 Verde Ditch landowners, regardless of the ultimate outcome of the appeal.

19 DATED this 20th day of October, 2015.

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1 ORIGINAL of the foregoing mailed  
2 for filing this 20th day of October, 2015 with:

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7 AND COPY e-mailed this  
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