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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

GEORGE W. HANCE, et al.,) No. P1300CV4772

Plaintiffs,)

vs.)

WALES ARNOLD, et ex., et al.,)

Defendants.)

Division 1

**REPLY OF THE VERDE DITCH
COMPANY REGARDING
RESPONSES, OBJECTIONS AND
COMMENTS TO THE PROPOSED
AMENDED MEMORANDUM OF
UNDERSTANDING FILED JUNE 19,
2015**

In the matter of the VERDE DITCH
COMPANY

The Verde Ditch Company, through the duly authorized Commissioners and counsel L.

Richard Mabery, *L. Richard Mabery, P.C.*, files the following Reply.

I. PREFACE

The Verde Ditch Company sincerely appreciates the effort and interest by the shareholders¹

¹ While technically the Yavapai Apache Nation (YAN) is not the shareholder of record, the comments, suggestions and recommendations by YAN are included as YAN is an integral part of the Verde Valley and shares in the interest for the protection of historical water rights in the Verde Valley.

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and the Arizona Department of Water Resources (ADWR) in providing comments, objections, and suggestions to the Amended Memorandum of Understanding submitted June 19, 2015 (MOU).

While the Verde Ditch has existed for over 147 years, the Verde Ditch Company (VDC) was created as the result of the *Hance v. Arnold* litigation filed in 1907, and which culminated in the Judgment and Decree entered in 1909 by the territorial court regarding entitlement of water from the Verde Ditch (also known as the Woods Ditch) for parcels of land owned by the parties in litigation. The Yavapai County Court has exercised its jurisdiction since 1909 through various orders and directions.

In 1963 Judge Ogg, then serving as the Master of the Verde Ditch, issued Rules and Regulations, and those were superceded in 1989 by the current Rules and Regulations promulgated by Judge Anderson.²

Over the last 106 years, the number of shareholders has expanded from the original 11 users identified in the Decree, to nearly 600 shareholders presently owning lands receiving water, or are authorized to receive water from the Verde Ditch. While the shareholders of the Verde Ditch have some of the oldest rights to Verde River water, the ongoing Adjudication (*In Re the General Adjudication of All Rights to All Water in the Gila River System and Source*, which commenced in 1974), has yet to complete an adjudication in the first watershed. There is not a current estimate of when that process will be completed in the San Pedro basin, or commencement in the Verde watershed. Once the Verde analysis commences, it will undoubtedly take years to review.

While the VDC provides water from the Verde River to the successors in interest to the

² The tsunami of observations, objections, and comments that have been generated since the filing of the original Petition filed in December 2014, reflect the wisdom of the Court in establishing jurisdiction in 1909 and further substantiate that many of the same factors that required Court intervention in 1909 still exist.

original 11 litigants, it remains an unincorporated association comprised of the successors and assigns of the original plaintiffs and defendants in the *Hance v. Arnold* litigation.

The Verde Ditch Company, in order to protect and preserve the interests of the shareholders, prepared and filed a Statement of Claimant and Water Rights Registration based upon the records available to it. However, as the Adjudication has limped through the courts, the VDC recognized that the historical records regarding the Verde Ditch requires thousands of hours of time and increasingly expensive methodology to compile and document the lands served by the Verde Ditch.³

As new technology and public access to records became available, the VDC commenced the process to update and document the historical uses and places of use of water. It has become increasingly evident that the collection of data and information is, and will continue to be, expensive and expansive. Without any full-time staff or resources to retrieve, compile, and catalogue all of the available data, it became a herculean task. To aid in that effort, the Court entered an order propounding a special assessment to help offset the anticipated costs and expenses, and the Commissioners have exercised careful stewardship of those funds.⁴

The Salt River Project Agricultural Improvement and Power District and the Salt River Valley Water Users Association (collectively SRP) and the Verde Ditch Company commenced discussions as to possible collaborative efforts to document and provide protections for Verde Valley water users entitled to receive water from the Verde Ditch.⁵

The Commissioners sought approval from the Court to undertake the collection and

³ The exact number of acres served by the Verde Ditch has fluctuated over time, and the actual acreage currently served by the Verde Ditch is believed to be between 1,200 and 1,400 acres.

⁴ Since the inception of the special assessment fund in 2005, the Commissioners have requested and obtained an Order reducing the special assessment from the Court for nine years.

⁵ SRP also contacted other ditches in the Verde Valley regarding possible cooperative efforts in documenting water uses and exchanges of information. It is believed that many of the other ditches are waiting and watching this process.

compilation of the information in regards to the lands entitled to receive Verde Ditch water. Subsequent discussions with SRP, as to the potential of some form of agreement and sharing of information, required the Commissioners to seek further direction from the Court to engage in such discussions with SRP and exchange such information.⁶ The Verde Ditch Commissioners further recognized that without a candid exchange of information and data, it would be impossible to develop some understanding of which parcels served by the Verde Ditch Company have potential challenges.

Lost in the rhetoric and histrionics since the original Petition was filed in December 2014, is the result of the cooperative effort that 87% of the acreage reviewed thus far, and served by the Verde Ditch, has historical water use. As to the remaining 13% of parcels originally identified as having challenged historical use, the VDC has continued to compile information and data from various sources and believes that a substantial portion from those parcels will be re-characterized (re-colored) utilizing the process outlined in the Amended MOU. The goal of the VDC in the negotiations and drafting of the Amended MOU has always been to ensure that all shareholders entitled to receive water from the Verde Ditch are protected and documented as to their historical use, and that the shares in the Verde Ditch are consistent with the current users with historical rights.⁷

For any shareholder that remains with a questionable historic use, the Amended MOU was designed to establish a process that could be utilized for a shareholder to correct any inaccuracies, or be able to proactively undertake appropriate steps to acquire historic rights that could be severed

⁶ The comments or suggestions that the Commissioners acted without authority or approval of the Court are simply incorrect.

⁷ The VDC recognizes that some will say “carefully drafted” and others by their Responses are less generous.

and transferred to substantiate and protect their current uses.⁸

Ultimately the Adjudication court will enter a judgment that decrees water rights. Those are owned by the landowner and will include all of the attributes required under the Adjudication, including but not limited to: priority, appurtenance, quantity of water, times and conditions of use, types of use, and points of diversion.⁹

The *Hance v. Arnold* Court, under its continuing jurisdiction, commencing under the territorial customs and laws and evolving statutes, is mandated to ensure the viability of the Verde Ditch for the shareholders entitled to receive water. To suggest that the Court abdicate its responsibility undertaken in 1909 is frankly unsupported by the record; comprises a threat to water users in the Verde Valley by suggesting that they should remain docile and dormant; and ignores the reality that a shareholder is entitled to know if there is a serious challenge to their historical use. More importantly for those shareholders that may have a disputed historical use, the Amended MOU provides a process allowing that shareholder to protect and preserve their current use and the ability to continue such use in the future.

The Amended MOU process provides for the ultimate determinations of a historical water use to be confirmed by the *Hance v. Arnold* Court. No shareholder is required to enter into any agreement with SRP if they choose not to do so, or forego any rights to object to other claims if they so chose.

The Amended MOU further outlines a process as the result of years of negotiations and

⁸ The wisdom of waiting until the Adjudication is fully engaged in the Verde Basin may be fairly debated. The ability to find and the ultimate cost to obtain an alternate historical right is unlikely to improve over time

⁹ The process outlined in the MOU does not prohibit other claimants from contesting or disputing a water right in the Adjudication. What it does do is provide a depository for critical documents and information to be compiled that supports, protects, and defends an historical use if any other challenges arise and allows the Court to properly administer the Verde Ditch under the *Hance v. Arnold* Decree

discussion, and embraces over fifty different versions of the MOU that have evolved. In all candor, there are portions of the Amended MOU that neither the Verde Ditch Company or SRP particularly like, but those remain in the Amended MOU as a compromise for consideration by the Court and shareholders.

The following portions of the VDC Reply will attempt to encompass the multitude of suggestions or criticisms that the VDC supports or believes are appropriate for the Court's consideration. Alternatively, while the VDC encourages every shareholder to express their objections or comments,¹⁰ some of the expressed objections or modifications VDC is unable to suggest to the Court as appropriate for consideration. Some of the factual statements are incorrect, or the positions asserted are not supported by the facts before the Court, and some are deemed unsupportable under the applicable case law or statutory provisions.

Accordingly, the VDC will comment as to the suggestions and comments or objections that the VDC believes should be considered by the Court in the course of the amendment of the MOU or proposed administrative order. As to the remainder, the VDC is unable to endorse or support.

II. COMMENTS/OBSERVATIONS TO VARIOUS SHAREHOLDERS

A. Phillips/Miller

Shareholders Karen Phillips and Leroy Miller filed identical objections. VDC endorses the concepts of transparent communication and due diligence for mutually beneficial relationships. The Amended MOU is the beginning of a process, that if approved, will continue to enhance and protect shareholders. Once a shareholder receives their packet regarding the compiled information relative to their parcel(s), the MOU process allows them to become directly involved to either approve the

¹⁰ Tampered by the necessity of compliance with the applicable Rules of Civil Procedure and Rules of Court for Yavapai County.

information that has been compiled or to provide information that may not only affect their historical use but that of other shareholders.

B. Peter J. Mollick

Many of Mr. Mollick's objections and concerns have been addressed by the Court in the July 24, 2015, Minute Entry. Many of the remaining objections are not supportable by the facts or applicable statutory or case law (or perhaps Mr. Mollick is unaware of the ADWR filings regarding the concurrent jurisdiction of this Court).

1. Objection to SRP approval of severance and transfers.

After ADWR presented its position to the Court as to the concurrent jurisdiction of this Court, VDC attempted to negotiate out the provision for approval by SRP of any severance and transfer utilizing the judicial process rather than the administrative process through ADWR. SRP was adamant in the maintenance of the provisions under A.R.S. § 45-172(A)(5), but did provide a covenant of good faith. SRP had agreed to the addition of a provision allowing termination of the MOU for "good cause" shown to the Court, and the MOU already contained a termination clause in the event of an uncured breach by any party. Additionally a protection was built into the MOU requiring the approval of the *Hance v. Arnold* Court of any severance and transfer. While VDC understands the angst and prefers that approval by SRP for a judicial severance and transfer be deleted, there are other safeguards built into the MOU to protect a shareholder with a legitimate severance and transfer request from being treated in an arbitrary, capricious, or unreasonable manner by SRP.

2. "Purple" designations.

The concerns by Mr. Mollick (and others), and the language proposed by SRP to alleviate those concerns, should eliminate any misunderstanding of the "purple" classification regarding

abandonment and forfeiture. Mr. Mollick's proposed additional sentence "all transactions between the landowners for severance and transfer will be voluntary" while duplicative, is not objectionable.

3. Notice.

VDC welcomes Mr. Mollick's suggestions for appropriate notice to shareholders as that question has arisen several times in the past. While not addressed by Mr. Mollick, it is recommended that such notice be provided in the administrative order.

4. Other objections.

The remainder of Mr. Mollick's objections are confusing, inconsistent, or unsupportable under applicable law. As such, the VDC is unable to recommend them to the Court for consideration.¹¹ The VDC believes that the amended MOU requires serious consideration by those that are genuinely concerned about their property values and protection of historical water uses. While Mr. Mollick's passion is clearly evident, his mastery or recall of the events and applicable law remain disputed.¹²

C. Bradford Gordon

To the extent Mr. Gordon proposes the removal of SRP's consent to severance and transfers through the judicial process, the VDC does not object. But as previously stated, the VDC does not believe that the consent question issue should endanger the entire concept of the MOU.

¹¹ Mr. Mollick's vitriolic statements regarding motives of SRP or VDC conspiracies; and his personal ad hominem attacks on VDC Commissioners, staff or counsel, reflect on Mr. Mollick's credibility and motives.

¹² The Court in the July 24, 2015, Minute Entry deferred the question of a vote of shareholders to the Verde Ditch Commissioners. At this time the request is deemed premature. Until the Court makes a determination on the Amended MOU, it is unclear what would be voted upon. Secondly, it is unclear at this time as to what a vote of shareholders at the next annual meeting would accomplish. The process for such a vote adds considerable cost to the VDC. It is unclear whether a vote of the shareholders would be a plebiscite, advisory in some manner, or binding on the Court. It is not believed that a vote of the shareholders would limit the Court in the exercise of its jurisdiction to interpret and enforce the *Hance v. Arnold* Decree. Conversely, approval by the shareholders of the MOU would not limit the Court's jurisdiction in the exercise of the enforcement and interpretation of the *Hance v. Arnold* Decree. It is questionable that the shareholders could give the authority to the Commissioners to negotiate or execute documents on behalf of the VDC. It is likely that the Verde Ditch Commissioners will ask the Court for further clarification.

D. ADWR Comments

The entrance of ADWR into this discussion has been very helpful in helping to further expand the consideration of the benefits of the process envisioned by the Amended MOU and the exercise of the Court's concurrent jurisdiction.

1. ADWR's comments regarding establishment of more criteria in regards to any severance or transfers are not objected to, but VDC submits those should be set forth in an administrative order by the Court and not within the Amended MOU. VDC concurs that if additional language would be helpful in defining HWU lands reduces any confusion regarding forfeiture or abandonment, the language previously suggested should be added. All of the colorizations that are in the Amended MOU are preliminary and subject to further review. During the course of the last couple of years, the Verde Ditch Commissioners have expended a great deal of energy and time to compile the documents and information that is available to make every shareholder a "green". Those efforts have not stopped and continue today. Those preliminary designations must be available to the shareholders owning their parcels of property which would include the information that has been reviewed in order to make initial colorizations possible. The very reasons that the colorizations are preliminary and that the Amended MOU continues for a number of years is to allow a process to document historical water use and to provide an opportunity for every shareholder to work cooperatively, if they so choose, to protect their claimed use.

2. A deliberate attempt was made to ensure that the scope of the Amended MOU was limited in the attributes that would be considered by the Court in regards to any historical water use. In drafting the Amended MOU the intention was not to attempt, in this agreement, to specify the details or limitations the Court would review in consideration of future severance and transfers. Based upon prior comments, the Amended MOU was purposefully drafted to provide that a notice and

opportunity to be heard will be set forth as deemed appropriate by the *Hance v. Arnold* Court. Other than the provisions contained in the Amended MOU for a cooperative coordination of combined filings of severance and transfer applications, the Amended MOU specifically deferred to the Court to establish the process for review of future severance and transfers. The VDC agrees with ADWR that at some point the Court will need to establish the parameters of its consideration of any proposed severance and transfer. However, the VDC suggests that that determination of what those parameters are and the exercise of its jurisdiction would be better set forth in the administrative order.

3. VDC accepts that the preliminary color designations have become a great source of consternation. While the color designations have been repeatedly marked preliminary and subject to change, VDC believes that a number of the “purples” and “oranges” will be recolorized based upon the information that continues to be compiled. To eliminate further confusion; or concern that some of the designations become evidence of a forfeiture or abandonment; or attempted to be used by someone to challenge an historic water use (or ultimately a water right), predicated upon some color determination reflecting lack of current use, the proposed revision by SRP as set forth in their Exhibit “1” is acceptable.

4. Likewise, the purposed suggestion to include language not to contest the HWU’s for parcels colorized as “purple” lands, or for “green” or “orange” lands for which an severance and transfer has been executed are appropriate, and these changes proposed to § 6.1 by SRP in Exhibit “1” address that issue.

5. VDC concurs that the Court will need to establish the scope of a review of future judicial severance and transfers in the administrative/procedural order but not in the Amended MOU.

6. VDC’s understanding of the Amended MOU under § 7.2 recognizes the limitation of the

Court in the enforcement and interpretation of the *Hance v. Arnold* Decree as it relates to the Amended MOU. SRP has agreed not to contest that a water use is appurtenant to a particular piece of property, and the place of use, but not other attributes of a water right. The other attributes of a water right which could be determined by the Adjudication include priority date, quantity, purpose of use, point of diversion, or time of use, and those issues remain subject to contest.

7. ADWR proposed that a form of the HWU agreement be approved by the Court, perhaps as an exhibit to the Amended MOU. In fact, early on there was an attempt to provide such an agreement. However, VDC insisted that the individual shareholder should have the flexibility to negotiate with SRP on other provisions that might be included within the agreement. Each parcel of land is unique and VDC did not feel comfortable in attempting to force every shareholder to utilize a single form of agreement, but that a shareholder should have flexibility.

8. ADWR is correct that § 8 of the Amended MOU does not provide specifics of what has been severed and transferred. The language was intended to provide flexibility for a shareholder that desires to propose a severance and transfer to the Court, what attributes the Court will consider in the approval process, and that process remains to be determined in the appropriate administrative/procedural order.

9. One of the multitude of issues and considerations involved in the attempt to develop appropriate wording in the Amended MOU is highlighted by the proposal made by ADWR, converting the language in §§ 9.1 and 9.2 to water rights instead of historical water uses. Within the Verde Ditch, § 8 of the Amended MOU provides the process for consideration to be as appurtenance/place of use, simply because it is referring to severance and transfers from parcels presently served or entitled to be served with water from the VDC. However, the severance and transfers set forth in § 9 are not designed to be inter-ditch transfers, but more likely to be off-ditch

severance and transfers. VDC suggests that the Court should leave open that option to approve an off-ditch severance and transfer. Given the possible impact of the Court's consideration of an off-ditch severance and transfer, it would be important for the procedural administrative order to address those concerns because it goes to the jurisdiction of the Court under *Hance v. Arnold*.

10. ADWR's stated position, that it would defer to the Court's concurrent jurisdiction in reviewing severance and transfers, required a substantial revision in the original MOU. The revisions were intended to provide flexibility for a VDC shareholder to use the discretion of whether to undertake the ADWR statutory process (which still requires the *Hance v. Arnold* Court's approval), or to allow a shareholder in their discretion to utilize the judicial process only. Sections 8.5, 8.7, and 9.5 were modified to specifically provide additional accommodations to shareholders as the Court previously addressed in the April 8 Minute Entry. One of the roles of the VDC has been to provide as much flexibility for every shareholder to make independent determinations in the event that an historical water use became identified as disputed or challenged. In a similar vein, VDC has attempted to streamline the severance and transfer process that could be utilized by shareholders to minimize cost and maximize efficiency. Accordingly, VDC recommends that the provisions remain, subject to modification by the Court if deemed appropriate.

11. VDC has no objection to consideration of revisions in § 11.1. VDC believes that the current wording of historical water use is appropriate.

12. VDC believes that the inclusion of "purple" lands, for which SRP will agree in the final settlement agreement not to contest, is appropriate.

E. YAN Objections.

In regards to the first objections proposed by YAN regarding SRP statutory consent rights, VDC does not concur with SRP's position. However as previously explained, that issue became a

deal breaker and was therefore included within the Amended MOU.

1. VDC has carefully considered the implications of A.R.S. § 45-171 and does not adopt or concur with the argument or interpretation of the statutes proposed by YAN or opposed by SRP. In fact, VDC has strenuously argued that *Hance v. Arnold* is a decreed right. However, once again economics dictate that if there is a way to protect the Verde Ditch shareholders which does not require years of litigation, the uncertainty of litigation, and the expense of litigation, then the shareholders may be better served by pursuing that avenue. In the Amended MOU, that philosophy and desire was a guiding principle in the development and review of the options available. Furthermore, the practical aspects are that if one was to litigate all of those issues and spend the hundreds of thousands of dollars and years which would be required to obtain a final determination, the bottom line is still that the *Hance v. Arnold* Court will, at some point in time by necessity, have to engage in the very process of confirming which parcels are entitled to receive water from the Verde Ditch.

2. YAN raises an interesting question regarding colorization of various parcels, or lack of colorization. For the VDC an essential purpose of the process commenced with the decision by the Commissioners that the Statement of Claimant needed to be updated, and to correlate and confirm the shares in the Verde Ditch to specific parcels of land. The records of the Verde Ditch reflect several instances where a property owner claims a right to receive water from the Verde Ditch which is not necessarily consistent with the prior records of historic use as to a particular parcel. The process established requires that all lands, including SRP's and now the United States', will be reviewed for a historical water use appurtenant to each parcel served or claiming a right to receive water.

3. YAN objection number 3 has been addressed previously, and VDC concurs with the

modification proposed.

4. In response to YAN objection number 4, the exhibits have not changed from the original MOU.

5. YAN objection number 5 is appropriate. VDC concurs that when the time arises for consideration of a final settlement agreement it should be submitted to the Court and all shareholders.

6. YAN objection number 6 consists of two points. VDC does not object to the additional language to be added to the definition "historical water use," but does not join in the suggestion to remove "under applicable law."

7. YAN objection number 7 reflects questions on presumptions and burdens of proof. VDC does not object to the additional language proposed to remove any lingering questions of unintended presumptions or burdens of proof.

8. All color designations are preliminary and the Amended MOU provides that the Court has the final determination. If further clarification is deemed necessary, VDC has no objection.

9. The VDC believes that all of the information to be provided to a shareholder regarding their individual parcel will not require any additional fees. However, the VDC remains concerned that "fishing expeditions," given the volume of records compiled, could easily overwhelm the resources that are available and become over burdensome for the VDC to process.

The current request form utilized by the VDC provides for a basic search charge and the ability of the VDC to estimate the cost associated with production of any requested documents. VDC is further sensitive that some shareholders do not want information on their parcel to be released. VDC believes that the Court will need to provide guidance and establish a fee schedule.

10. VDC supports the change to include the "purple" lands. VDC does not believe that the

Amended MOU establishes or opens a door for judicial recourse that is otherwise barred.

11. The determination of whether a shareholder finds a benefit to enter into a HWU agreement is entirely up to the shareholder.

12. VDC believes that the objection has been previously addressed.

13. One of the areas of compromise of the Amended MOU is the inclusion of the VDC in the HWU agreements. VDC preferred not to be a signatory, but understands the position of SRP. To the extent that VDC is involved, the Court will be called upon to approve any VDC execution.

14. VDC believes that the Amended MOU is clear that severance and transfers are voluntary agreements between the transferor and transferee, but remains subject to the Court's approval. The suggested language proposed by YAN is not supported by VDC.

15. YAN continues the previous argument over the applicability of A.R.S. § 45-172(A)(5). The VDC has accepted SRP's continuing representation of its unwillingness to eliminate the statutory provision. As previously explained, VDC did seek and obtain other concessions.

16. VDC concurs that the administrative/procedural order is the appropriate document to address this concern.

17. While the issue of pre 1919 transfers remains unanswered, the focus of VDC remains to find a process that allows shareholders to find solutions to challenges to their historical water use which are economical and timely. A shareholder under the MOU, retains the discretion to proceed through an administrative process via ADWR, or judicially through the Court. Once again, VDC supports that that is a discretionary call by the shareholder and may be fact sensitive to a shareholder's parcel.

YAN's suggestion that the VDC should update the Statement of Claimant is appropriate, as that was the genesis of the VDC's efforts which morphed to the proposed Amended MOU.

However, in order to complete such a task, all of the records have to be updated, including, but not limited to, approved severances and transfers.

18., 19., 20., 21., and 22. VDC does not believe that further discussion is required on these objections.

23. VDC agrees that "SRP rights" is not intended to be open to future claims. The language change in § 4.21 proposed by SRP is acceptable.

24. VDC does not support changing the language proposed by YAN, as the current language was negotiated to enhance the protection for a shareholder, and reduce the time and expense if everybody is in agreement on the colorization.

25., and 26. VDC concurs that the reconciliation of shares is strictly a function of the Court under *Hance v. Arnold*. The proposed language by YAN as to the Court's authority is without objection, however the administrative/procedural order is the most appropriate document to address not only the process but the notice required.

VDC has no objection to the language proposed for § 20.

27. As previously stated, the Commissioners will be seeking further guidance from the Court regarding a shareholder's vote at the annual meeting.

VDC does not believe that any shareholder is required to engage in the Amended MOU, but every shareholder must be clear that the Court will be working through the process exercising its discretion of interpretation and enforcement of the *Hance v. Arnold* Decree, and that process does have requirements for the VDC.

28., and 29. YAN's objection 28 appears to be addressed previously in objection number 7. In regards to the questions of conversion of irrigated land to other uses, those have been a topic of discussion and possibly a way to change colorizations. However every parcel is unique and requires

a complete review of the parcel as contemplated by the Amended MOU.

F. UNITED STATES OBJECTIONS

The Response filed by the US is similar in tone and approach to their previous filings in this matter. The gist of the US position appears to be that Verde Valley water users are better served by waiting for the Adjudication, and basically ignores the reality that the Court can't walk away from its jurisdiction commenced in 1909 in the enforcement and interpretation of the *Hance v. Arnold* Decree.

It is not disputed that the Adjudication, when and if it comes, will be the forum for determination of water rights and all the attributes (previously discussed) applicable for the determination of water rights (unless other exceptions apply under the Adjudication statutes). VDC is unable to support the United State's position that the passage of time is beneficial to Verde Valley water users who unfortunately find themselves sandwiched between competing demands for water. To suggest that Verde Valley water users (or specifically Verde Ditch shareholders) should not be proactive in the protection of their historical rights, or that Washington will be here to help them when the Adjudication does arrive, is not supported by history or past performance.

1. This Court has Jurisdiction.

The Court has previously determined (Minute Entry dated April 9, 2015) that it has continuing jurisdiction over the Verde Ditch and that the Adjudication court does not have exclusive jurisdiction in the consideration of historical water uses.

During the discussions with SRP in regards to a possible agreement as authorized by the Court, it appeared then and remains now, the belief that the parties could contractually enter into the agreements that could be acceptable to the *Hance v. Arnold* Court and would still be useful in the Adjudication.

For the VDC, the determination and confirmation of the parties entitled to receive water from the Verde Ditch, because they have an historical water use, remains the primary focus. Neither the *Hance v. Arnold* Court, nor the proposed Amended MOU, attempt to undertake consideration of all the other attributes of a water right that the Adjudication Court will consider. VDC accepts that there are limitations under the holding in *Gabel v Tatum*, 146 Ariz. 527, 407 P. 2d 325 (1985), and the various *Gila River* determinations by the Arizona Supreme Court.

2. This Court will not adjudicate water rights.

The Amended MOU does not provide, and no one has suggested, that the criteria for this Court should include all the other attributes for the entitlement of a water right. If all the other attributes of a water right are not before the *Hance v. Arnold* Court, VDC is unable to support the argument that this Court will therefore be adjudicating water rights.

The US insists that this Court will be adjudicating water rights as a result of:

1. Reviewing and approving severance and transfers;
2. Court approval of a settlement agreement and prohibition on delivery of water; and
3. Colorization constitutes adjudication.

At this time the criteria to be used in the approval process for severance and transfers remains to be determined in the administrative/procedural order. However, it cannot be disputed that since 1909, the Court has entered orders directing or prohibiting delivery of water, approving transfers of water, and even directing that the VDC not deliver water if there are certain violations of the Rules and Regulations. The review of severance and transfers is critical to the ability of the VDC to deliver water. Given that ADWR concedes that the Court has concurrent jurisdiction, and that even if ADWR approved a severance and transfer, it still could be objected to in the Adjudication, this Court exercising its jurisdiction doesn't change it to an adjudication. Once the Court gives or adopts a colorization in a parcel, it only signifies an historic water use. The approval of the Settlement

Agreement only reflects the parties agreement and only binds the parties that sign and successors.

Furthermore, the colorizations do not, and have never pretended to be an adjudication of water rights. As has been previously emphasized, the colorizations remain preliminary.

No authority has been found, or cited to the Court, which suggests that this Court's determinations since 1909 are beyond the jurisdiction of the *Hance v. Arnold* Court. Having said that, VDC fully anticipates that all parties will be mindful that if the proposed Amended MOU process continues, it requires special attention to ensure that the elements which have been set forth so far do not change and inadvertently trip into an adjudication of water rights.

In many ways the Verde Ditch is unique and there are no reported cases found that mirror this unique situation in which the Verde Ditch finds itself in 2015. A Superior Court of general jurisdiction has exercised continuing jurisdiction over the Verde Ditch which predates any adjudication statutes. More importantly, no one has seriously suggested that the Master of the Verde Ditch should be transferred to Phoenix to the Adjudication Court. To suggest that the Adjudication Court in Phoenix has the resources or is prepared to deal with and assume control of 18 miles of ditch from a hundred miles away, and without any understanding of the burdens that the Yavapai Superior Court undertakes as Master of the Verde Ditch, is impractical.

3. A stay is not appropriate.

The alternate argument of the US basically provides that even if the Court has jurisdiction, it should stay the MOU proceedings. While the US is silent as to how long the proposed stay should be in place, one can only presume that US suggests a stay until the Adjudication reaches the Verde.

The stay request is further silent as to how the VDC would function in the interim. The US proposal ignores the reality that in order to be prepared for an adjudication, every water user in the Verde Valley needs to complete and maintain their due diligence to substantiate their historical water

use and all the other attributes to protect their claim of a water right. VDC recognized even before SRP filed the Orders to Show Cause in the Adjudication, that the protection of the Verde Ditch shareholders required significant resources and expenditures to document and compile the records and information (and establish a retrieval system once the data was compiled) to ensure that the VDC was delivering water to those shareholders entitled. The duty and necessity of compiling all of that information remains, regardless of when the Adjudication may occur.

Furthermore, if this Court were to issue a stay, it would be abdicating its jurisdiction necessary to properly operate the Verde Ditch. Without a determination of an historic water use how will the Court or Commissioners be assured that the water is delivered to the appropriate parcels, or that an assessment is correct?

Certainly, there are some that propose to “kick the can down the road” since the Adjudication has stagnated, but such an approach is contrary and inconsistent with the oversight *Hance v. Arnold* requires, and the purposes and goals that the MOU was designed to accomplish.

The blizzard of pleadings that have been filed in this matter truly reflect the wide range of opinions that the unique situation engenders, and further is a microcosm (mini-me) of what to expect when the Adjudication does make it to the Verde.

The VDC believes that this is an unexpected opportunity that has opened given the SRP change of heart that focuses on cooperation and collaboration being more beneficial than litigation. It would be unfortunate and extremely detrimental to the shareholders to be deprived of the ability to obtain clarity and protection for their historical water uses. One might argue that a stay does not prevent or limit the gathering of the information, but the truth is that a stay strictly limits the ability for the information to be useful to the Court in the operation of the Verde Ditch.

4. Unfounded Allegations.

The allegations by the US that the VDC violated or provided private or confidential information is simply without merit. The VDC has been extremely sensitive to and protective of any information that might be considered proprietary or confidential.¹³

Furthermore, the allegation is unfounded as the Master of the Verde Ditch has been apprised over the years of various administrative and management issues, and authorized the sharing of information with SRP in order to compare records of historical water use. The US and YAN demanded that they be allowed to review Verde Ditch records, which the Court approved over VDC's objection. What the Court directed, VDC followed.

VDC remains adamant that the compiled information at the Verde Ditch office should be available to every shareholder in regards to their parcel(s), and only their parcel. The information in regards to a shareholder's parcel should not be available to others without filling out an information request form stating the purpose, and estimated costs. As the parties are aware, the Court directed that any further requests for information be directed to the Court. There have been two such requests made to the VDC which have been forwarded for review and direction by the Court.

If the US has any factual basis for the allegation of improper disclosure of any confidential information, such information should be placed in writing with specificity and allow the VDC or a court officer to fully investigate such allegation to determine if there is any factual basis.¹⁴

5. Classification of Lands.

As has been previously explained, there are lands that have not received colorization for a

¹³ Since the VDC is under the jurisdiction of the Court, and the Commissioners are court officers, it is difficult to imagine what information VDC possesses that would not be subject to shareholder review as a public record, except perhaps shareholder payment records or legal matters that would be protected by privilege or other restrictions

¹⁴ Non-factual allegations may be acceptable in Washington DC, but are not acceptable before the Yavapai Superior Court, or to the Commissioners of the Verde Ditch.

variety of reasons. SRP has already explained the lack of color on its property and further clarification does not seem necessary.

6. MOU recitals.

Unfortunately the thrust of the US Response remains clouded by the impression that the Response simply attempts to find fault or conflict. VDC is unable to find any substance to the US comments or objections regarding the Recitals and therefore does not support the US comments. Without suggestion by the US to correct whatever it finds to be objectionable makes it difficult to address. If the US has suggestions, or proposes language to whatever it finds “incoherent and incohesive” it failed to provide such language for consideration.

7. Working Understandings.

The criticism by the US of the “working understandings” portion of the Amended MOU fails to recognize that the colorizations (or lack of colorizations) were and remain preliminary, and subject to further review. Furthermore, the Amended MOU provides that in the event that the VDC and SRP disagree¹⁵ as to a colorization, the disagreement and determination of the proper colorization will be decided by the Court. To the extent that the US complains that SRP has financial resources, professional staff, and decades of records, those cannot be disputed. The only other shareholder known with similar abilities and unlimited resources is the US. The VDC has yet to undertake a review of the information pertaining to the US since the US was intentionally deleted in the original MOU. It should further be noted that utilizing the process undertaken thus far has provided VDC access to information and records virtually unavailable from any other source. By utilizing the information received from SRP and coupling that information complied by the VDC (admittedly

¹⁵ SRP and VDC have disagreed and undoubtedly will in the future. The Commissioners are further aware that several shareholders have additional information that VDC believes will be material to a change of colorization. More importantly, SRP has been willing to consider and has agreed to change the colorization on several parcels. Those reviews and discussions continue.

with far more modest resources), the historical water use information compiled is extremely beneficial to the shareholders and will be available to them for use when the Adjudication arrives.

The United State's comments, assertions, or characterizations of nefarious actions, on P. 5 of its Objections, appear to be inconsistent with the 1909 *Hance v. Arnold* Decree, or the fundamental understanding that the VDC has a duty to serve lands that have historical uses, and has a duty not to serve lands that are not entitled.

8. Burden on Adjudication Parties.

Interestingly, the United States seems to take umbrage that as a consequence of the MOU, all other parties in the Adjudication will have to incur a cost and burden to uncover Yavapai County records. One can only presume that the United States is complaining that it intends to object to water rights or historical water uses pertaining to other shareholders, and that as a result of the collaborative efforts between SRP and VDC, it is somehow being disadvantaged. It is hard to imagine that VDC, with its meager resources and limited budget, in undertaking actions to protect the shareholders by compiling all the records available, somehow creates a burden for the United States. Frankly, the VDC did not perceive that its actions to compile all of the information available to allow the Court to make determinations within its jurisdiction and which further protect the shareholders of the Verde Ditch is somehow unfair or unreasonable. Obviously if the intent of the US is to challenge other Verde Ditch shareholders, the burden it bears to undertake that action is the same with or without the Amended MOU. If the objection by the United States is that the recording of a document such as an HWU agreement is a burden, then it should provide proposed language for consideration in the Amended MOU.

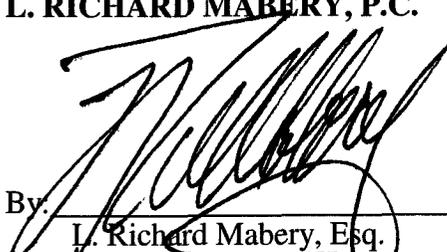
III. CONCLUSION

The Verde Ditch Company believes that there are modifications or amendments to the

Amended MOU that are justified for consideration for addition to the MOU and an administrative order in order to implement the Amended MOU.

RESPECTFULLY SUBMITTED this 31 day of July, 2015.

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2015 with:

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Yavapai County Court
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to:

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Judge of the Yavapai County Superior Court
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