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9 **IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**

10 **IN AND FOR THE COUNTY OF YAVAPAI**

11 GEORGE W. HANCE, *et al.*,

No. P1300CV4772

12 Plaintiffs

Division 1

13 v.

14 WALES ARNOLD, *et ux.*, *et al.*,

**THE UNITED STATES'
OBJECTIONS TO THE MOU
SUBMITTED BY THE VERDE
DITCH COMMISSIONERS FOR
APPROVAL**

15 Defendants

16 In the matter of the VERDE DITCH
17 COMPANY

18 **I. INTRODUCTION**

19
20
21 The United States objects to the attempt by The Salt River Valley Water Users
22 Association (“SRP”) and the Verde Ditch Company (“VDC”) to detour around the Maricopa
23 County Superior Court and adjudicate rights to use Verde River water in this Court through
24 execution of a “Memorandum of Understanding.”

25 In 1974, and pursuant to former A.R.S. §§ 45-231 to 45-245, SRP filed a petition with the
26 Arizona State Land Department to determine the nature and extent of rights to water held in the

1 Salt River above Granite Reef Dam (but excluding the Verde River).¹ Two years later, SRP filed
2 a similar petition with respect to the Verde River and its tributaries.² In 1979, former A.R.S. §§
3 45-231 to 45-245 were repealed and superseded by A.R.S. §§ 45-251 to 45-260. Two years
4 later, in 1981, and pursuant to A.R.S. §§ 45-251 to 45-260, the Arizona Supreme Court
5 consolidated SRP's abovementioned petitions and other Gila River system water right claims
6 into a single proceeding.³ The Court assigned this proceeding to the Maricopa County Superior
7 Court ("Gila Court"), and captioned it, *In re the General Adjudication of All Rights to Use Water*
8 *in the Gila River System and Source*, Nos. W-1, W-2, W-3 & W-4 (Consolidated) [Henceforth,
9 "the Gila Adjudication" or "the Adjudication"]. As its caption indicates, the Adjudication will
10 determine rights to use *all water* within the Gila River System and Source. For this reason, it is
11 large; it is ongoing; and it encompasses competing claims by SRP,⁴ the United States,⁵ the
12 Yavapai Apache Nation,⁶ the Verde Ditch Company,⁷ and other Verde River water users, to the
13 water at issue in this case.

14 Now, SRP and VDC ignore the Gila Adjudication, by seeking—through execution of a
15 "Memorandum of Understanding"—to adjudicate rights to use Verde River water in this Court.

16 The United States objects.

17 II. BACKGROUND

18 On March 23, 1909, this Court ("the Yavapai County Superior Court") issued a judgment
19 titled "Conclusions of Law and Judgment." Attached hereto as Exhibit 4. This judgment

20 ¹ *Matter of Rights to Use of Gila River*, 171 Ariz. 230, 232-33 (1992).

21 ² ADWR publication on General Adjudications: [http://www.azwater.gov/AzDWR/
22 SurfaceWater/Adjudications/GilaRiverandLittleColoradoRiverGeneralStreamAdjudications.htm](http://www.azwater.gov/AzDWR/SurfaceWater/Adjudications/GilaRiverandLittleColoradoRiverGeneralStreamAdjudications.htm).

23 ³ Consolidation was necessitated by practical considerations—chiefly, the interdependence of
24 individual allocations of water. See *Matter of Rights to Use of Gila River*, 171 Ariz. at 233 ("In a
25 state with vast amounts of arid desert land, and with insufficient water to provide all inhabitants
26 with all that they need-let alone desire-the allocation of water to one claimant, asserting rights to
27 a stream that is a tributary to another, will inevitably result in a smaller allocation to another
28 claimant to either the tributary or the main stream.").

⁴ See e.g., *In re Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source*, Nos.
W-1, W-2, W-3, W-4 (Consolidated) (Ariz. Super. Ct. Maricopa County Aug. 28, 2006) (minute
entry showing grant of summary judgment). See also Exhibit 8.

⁵ Attached hereto as Exhibit 1.

⁶ Attached hereto as Exhibit 2.

⁷ Attached hereto as Exhibit 3.

1 allocated interests in waters flowing through the Verde Ditch,⁸ and described such interests as
2 water “shares”. Exhibit 4, Page 2 (describing shares as “common co-ordinate right[s] equally
3 enjoyed by the several parties”).⁹ Eighty years later, this Court promulgated rules and
4 regulations, attached hereto as Exhibit 5, for administration of the ditch, and for delivery of
5 water, in shares, to the successors-in-interest of parties to the original judgment (“shareholders”).

6 The stated purposes of these rules were:

- 7 (1) To “govern operation and maintenance of the Ditch”;
- 8 (2) To “insure adequate funding to defray operational costs”; and
- 9 (3) To ensure that “the water necessary for the welfare and needs of *all* of the Verde
10 Ditch shareholders [would] be available now and in the future.”

11 Exhibit 5, Page 1 (emphasis added).¹⁰ The rules did not provide for modification of the original
12 1909 judgment. Nor did the rules provide for alteration of the allocations of water that the
13 judgment decreed. Yet, agents of this Court—whose authority these rules govern—presently cite
14 the judgment as authority for modifying these allocations, through execution of an MOU with
15 SRP.

16 ⁸ In its earliest days, the Verde Ditch was sometimes called the Woods Ditch. It is a channel which
17 delivers Verde River water, in shares, to approximately 650 Verde Valley Residents.
18 (“shareholders”). See <http://verdeditch.com/page/about-us>, the Verde Ditch’s Information Page,
19 for more about the Verde Ditch.

20 ⁹ “The confusion concomitant with early attempts to apply the law with respect to use of water in
21 Arizona progressed through several stages, *including that where the right to use water appeared
22 to be vested in the owner of land whereby same could be traded, leased or sold in much the same
23 manner as other property.*” *Salt River Val. Water Users' Ass'n v. Kovacovich*, 3 Ariz. App. 28, 30
24 (1966) (emphasis added). Water “shares” are products of this stage—relics from the early
25 development of Arizona water law.

26 ¹⁰ The rules also provided:

- 27 (1) That shareholders would have access to ditch water, “except as prohibited by acts of
28 God” Exhibit 5, ¶ 4;
- (2) That shareholders’ are entitled to “a percentage of the water in the ditch at any time”
Exhibit 5, ¶ 8;
- (3) A process for appointment of a commission Exhibit 5, ¶ 1; and
- (4) That the members of said commission would operate as arms of the Yavapai Superior
Court.

Exhibit 5, Page 1.

III. THE MOU

1 The MOU referenced above, attached hereto as Exhibit 6, begins with a series of recitals.
2 These recitals reference Statements of Claimant filed in the Gila Adjudication,¹¹ and describe the
3 MOU as an attempt to settle respective entitlements to Verde River water¹²—a matter reserved
4 for the Gila Adjudication.¹³ Following these recitals, the MOU proceeds with a series of
5 Definitions, including one defining “Historic Water Use”,¹⁴ the matter that the MOU is intended
6 to resolve. See Exhibit 6, Recital H. “Historic Water Use” is subject to the parties’ “Working
7 Understandings”—another defined term, see Exhibit 6, ¶ 4.28, which is central to the MOU, and
8 is fleshed out in the MOU’s Section 5.¹⁵

9
10 ¹¹ Statements referenced include statements by SRP, Exhibit 6, Recital C; VDC, Exhibit 6, Recital
11 A; and unnamed others, Exhibit 6, Recital A.

12 ¹² Exhibit 6, Recital E (“In an effort to avoid the time and cost of extensive litigation regarding
13 entitlement to Verde River water and to reduce the frustration, expense and uncertainty for Verde
14 Ditch shareholders and SRP, the Parties have met in an attempt to come to a comprehensive
15 agreement...”)

16 ¹³ The recitals also contradict themselves. For instance, Recital E’s description of the MOU’s
17 purpose as “avoiding the time and cost of extensive litigation regarding entitlement to Verde River
18 water”, contradicts Recital H’s disclaimer that nothing in the MOU “is intended to provide a
19 guarantee to any VDC shareholder or water user that its right to use water ... may not be challenged
20 by parties other than VDC or SRP, in the [Gila] adjudication or otherwise.” A premise of this same
21 disclaimer—that VDC and SRP are adverse to VDC shareholders and water users in the Gila
22 Adjudication—also contradicts provisions stating and suggesting that VDC has authority to act
23 “on behalf of” shareholders and other water users, in the Gila Adjudication, Exhibit 6, Recital A,
24 and through the MOU. See generally, Exhibit 6, Recitals E, F, G. Taken at face value, the recitals
25 are incoherent and incohesive. But viewed more charitably, they evince SRP and VDC’s attempt
26 to craft a legal document that would enable the Court to settle a matter pending before the Gila
27 Court, to the extent that the law will allow. See Exhibit 6, Recital H (explaining that the MOU
28 “does not limit the *Hance v. Arnold* Court’s authority, to the extent such authority otherwise exists,
to address” issues “specifically left for resolution in some other forum”.)

¹⁴ The MOU defines “Historic Water Use” as:

Use of the waters of the Verde River System through the Verde Ditch that was (a)
commenced on a particular parcel prior to June 12, 1919 or (b) commenced after June 12,
1919 pursuant to a certificate of water right issued by ADWR or other state agency of
similar jurisdiction prior to June 1, 2014 or pursuant to a severance and transfer of a pre-
1919 right approved under applicable law.

Exhibit 6, ¶ 4.11.

¹⁵ See Exhibit 6, Section 5. See also Exhibit 6, ¶ 4.15 (defining the parties to the MOU as SRP and
VDC).

IV. THE PARTIES' "WORKING UNDERSTANDINGS"

1 By way of summary, the parties' "Working Understandings" derive from SRP's analysis
2 of questionably declassified Verde Ditch Shareholder information.¹⁶ Through this analysis, SRP
3 has decided, and VDC—if permitted by this Court—is prepared to agree that:

- 4 (1) VDC has a duty to serve some shareholders who use water, Exhibit 6, ¶ 5.3.02
(identifying such users as owning "Green Lands");
- 5 (2) VDC has no duty to serve other shareholders who use water, Exhibit 6, ¶ 5.3.04
6 (identifying such users as owning "Orange Lands"); and
- 7 (3) VDC has a duty to serve some shareholders that do not use water, Exhibit 6, ¶ 5.3.03
8 (identifying such users as owning "Purple Lands").

9 SRP's analysis is admittedly incomplete. See Exhibit 6, ¶ 5.2; ¶ 5.4. For instance, SRP provides
10 no analysis of the status of its own lands.¹⁷ Yet, if approved, the MOU will place the burden of
11 further developing SRP's analysis, *not on SRP*, but on Verde Ditch shareholders. Exhibit 6, ¶
12 5.4.¹⁸ Worse still, as explained further below, the MOU arbitrarily distributes this burden

13 ¹⁶ Specifically, VDC, without authority under its own rules and regulations; without authority
14 under the *Hance v. Arnold* judgment; without this Court's knowledge or permission; and without
15 permission from the Superior Court in Maricopa County—*before which SRP is adverse to VDC*
16 *and to the people VDC serves, in the Gila Adjudication*—submitted private shareholder
17 information to SRP, for SRP to analyze. See Exhibit 6, ¶ 5.1.

18 ¹⁷ SRP was not a party to the original *Hance v. Arnold* judgment. See Exhibit 4. Yet, SRP purports
19 to be a Verde Ditch Shareholder. SRP, through the MOU, posits that Historic Water Use should
20 serve as the basis for determining which shareholders—successors in interest to the parties of the
21 original *Hance v. Arnold* Judgment—VDC has a duty to continue serving. See Exhibit 6, ¶ 12.4.
22 Yet, neither the MOU, nor the working understandings under the MOU, account for SRP's Historic
23 Water Use, and classify SRP's lands in the manner that other shareholders' lands, including those
of the United States and Yavapai Apache Nation, are classified.

¹⁸ This is peculiar, because Verde Ditch shareholders are parties to neither the MOU, nor the
Working Understandings for which the MOU provides. See Exhibit 6, ¶ 4.15 (defining parties).
Shareholders have expressed their displeasure with the MOU to the Court—see e.g., the numerous
Objection documents filed by Peter Mollick, one of which requests an opportunity for shareholders
to vote on the MOU—and at least one shareholder has indicated that his interests have been
misrepresented to the Court by counsel for VDC.

24 To my knowledge, our attorney, L. Richard Mabery, has not raised any objections to SRP's
25 version of the MOU and does not seem to be representing the interests of the Verde Ditch
26 Shareholders. Please replace him with someone who will.

unevenly among shareholders.¹⁹

1 **V. CONSEQUENCES OF CLASSIFICATION AS “ORANGE, PURPLE OR GREEN”**
2 **UNDER THE MOU AND WORKING UNDERSTANDINGS**

3 The MOU provides that those who the Working Understandings classify as owning
4 “Green Lands”²⁰ may sign a “Historic Water Use agreement” with SRP, in which case:

- 5 (1) SRP will agree not to challenge the signing parties’ right to use water, Exhibit 6,
6 Section 7;
7 (2) VDC will agree not to prevent water from reaching the signing parties’ lands;
8 (3) the signer will be permitted to sever and transfer his or her right to use water from
9 lands to which said use appertains, to other lands and to other landowners, Exhibit
10 6, Section 8; and
11 (4) *notwithstanding the pendency of the Gila Adjudication*,²¹ the real property
12 records of the Yavapai County Recorder will be amended.

13 Those who the Working Understandings classify as possessing “Orange lands”, however, must
14 either:

- 15 (1) prove their entitlement to use water to the Court, Exhibit 6, ¶ 5.4; and sign a
16 Historic Water Use agreement with SRP; or
17 (2) secure water use rights from their Green neighbors, Purple neighbors or others,
18 and sign a Historic Water Use agreement with SRP, Exhibit 6, Sections 8 and 9.

19

Objection of Bradford C. Gordon, filed June 25, 2015.

20 ¹⁹ In effect, the burden of proof falls squarely on those shareholders that SRP has singled out as
21 possessing “Orange Lands”. Purple and Green land holders have no incentive to refine SRP’s
22 analysis, because VDC’s duty to serve them, under the Working Understandings, would remain
23 intact. Those classified as possessing Orange lands, however, have such an interest, because failure
24 to challenge and to change their status will, under the terms of the MOU, result in termination of
25 their access to water.

26 ²⁰ The MOU contemplates no Purple landowner corollary to the Historic Water Use agreements
27 referenced, but provides that Purple landowners may, like Green landowners, sever and transfer
28 rights; and that once they have, the owner of a receiving property may enter into a Historic Water
Use agreement with SRP.

²¹ See Exhibit 6, ¶ 7.3. If the MOU were to be approved, parties adverse to VDC and VDC
shareholders in the Gila Adjudication would bear the costs and burdens of uncovering pre-
modification Yavapai County property records, to the extent that said records are relevant to their
competing claims to Verde River Water. This would be extremely prejudicial to these parties. Yet,
to date, they have not been given notice of the MOU or of the pending proceedings.

1 Failure to do either—notwithstanding prior fees and assessments paid to VDC, *including special*
2 *assessments used to fund development of the MOU*—will terminate these shareholders’ access to
3 water. Exhibit 6, ¶ 12.4.

4 V. THE COURT’S ROLE UNDER THE MOU

5 The MOU contemplates “evidentiary hearings” through which improperly classified
6 landowners may prove their proper classification to the Court. Exhibit 6, ¶ 5.4. The MOU also
7 contemplates a process for judicial approval of severances and transfers, though which those
8 adjudged to have no right to water, may secure (likely purchase) new rights. See, e.g., Exhibit 6,
9 ¶ 12.1. The MOU does not define the procedural contours of these processes, but approval of the
10 MOU would commit the Court to adjudicating the issues that these processes will, pursuant to
11 the MOU, address.

12 VI. ARGUMENT

13 The United States Objects to the MOU’s approval for three reasons. First, the MOU will
14 require the Court to adjudicate rights to use Verde River water in a procedurally deficient
15 manner. Second, the Superior Court in Maricopa County is the only Arizona Superior Court
16 with authority to adjudicate rights to use the water at issue in this case. Third, even if the Court
17 finds that it may lawfully duplicate the work pending before the Maricopa County Superior
18 Court, the circumstances warrant a discretionary stay.

19 A. The MOU Will Require the Court to Adjudicate Rights to Use Verde 20 River Water In a Procedurally Deficient Manner.

21 The MOU, by its own terms, is intended to resolve “Historic Water Use.”²² Historic
22 water use is a defined term, which means “[u]se of the waters of the Verde River System...”
23 subject to certain qualifications.²³ Under Arizona law, surface water use—including use of the
24 waters of the Verde River System—is governed by the doctrine of prior appropriation.²⁴ Under
25 this doctrine, the first to divert water and put it to beneficial use on a particular tract of land, has
26 a right to continue beneficially using said water on said tract, and may prevent subsequent water
27 users from depleting the water so used, absent “forfeiture” or “abandonment” of this use right,
28

24 ²² Exhibit 6, Recital H.

25 ²³ See Exhibit 6, ¶ 4.11 for qualifications.

26 ²⁴ *In re Gen. Adjudication of All Rights To Use Water In the Gila River Sys. & Source*, 223 Ariz.
27 362, 368 (2010) (“Arizona follows the doctrine of prior appropriation....”).

through non-use. See *In re Gen. Adjudication of All Rights to Use Water In Gila River Sys. & Source*, 231 Ariz. 8, 13 (2012); Ariz. Const. art. 17; *In re the Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source (Gila IV)*, 198 Ariz. 330, 334 ¶¶ 3–5 (2000). See also *Phelps Dodge Corp. v. Arizona Dep't of Water Res.*, 211 Ariz. 146, 151 (Ct. App. 2005) (“Forfeiture occurs when the right is not used for a period of time and there is no intent to abandon... A water right is deemed abandoned if the holder intends to abandon the right and a period of non-use occurs.”) citing *Gila Water Co. v. Green*, 29 Ariz. 304, 306 (1925) & *Gould v. Maricopa Canal Co.*, 8 Ariz. 429, 448 (Terr.1904).

Application of the doctrine of prior appropriation requires prioritization and quantification of water uses over time, and thus, can only be accomplished in “a single proceeding in which *all substantial claimants* are before the court so that all claims may be examined, priorities determined, and allocations made.” See *Matter of Rights to Use of Gila River*, 171 Ariz. at 232 (emphasis added) (citing *United States v. Superior Court In & For Maricopa Cnty.*, 144 Ariz. 265, 270 (1985)). Nothing short of such a proceeding suffices.²⁵

To be sure, the MOU does not purport to apply the doctrine of prior appropriation to determination of rights to use Verde River water. If it did, then the deficiency of its proposed processes would be clear, for want of the trappings of a general adjudication. Instead, the MOU goes to great lengths to distinguish its work from that of an adjudication. It protests (perhaps too much) that its fruit “...shall not be deemed an adjudication of... water rights...” Exhibit 6, ¶ 12.1. But this disclaimer is misguided at best, and misleading at worst. A close reading of the MOU makes unequivocally clear that its approval would commit the Court to adjudicating rights to use Verde River water in at least three ways.

First, the MOU contemplates a judicial process for approval of severances and transfers of rights to use Verde River water—basically, movement of rights from the lands to which they appertain, to other, new lands. See, e.g., Exhibit 6, ¶ 12.1. Under Arizona law, rights to use water on particular lands are, generally, incapable of being “*made to do duty to any other land...*” *Salt River Val. Water Users' Ass'n v. Kovacovich*, 3 Ariz. App. 28, 30 (1966) (emphasis added).

²⁵ See *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 175 Ariz. 382, 393 (1993) (acknowledging the Federal view that any water rights decree would be of little value unless it joined all parties owning rights to a stream or water source).

Exceptions may apply, but the MOU does not provide for the application of these exceptions.

1 Nor does the MOU explain how the Court could possibly—pursuant to Exhibit 6, Sections 8, 9
2 and 12—approve severances and transfers of water uses, without first determining the legal
3 validity of uses in the first instance—in other words, *adjudicating rights to such use*.²⁶

4 Second, Paragraph 12.4 of the MOU provides for Court approval of a final settlement
5 agreement, which would trigger a prohibition, pursuant to which VDC “will not undertake any
6 actions to permit or allow water from the Verde Ditch to serve any lands that do not have
7 Historic Water Use.” Exhibit 6, ¶ 12.4. In effect, this provision’s approval would commit the
8 Court to prohibit some Verde Valley residents’ Verde River water use. Such would be
9 tantamount to adjudication of these residents’ rights to use Verde River.²⁷ And even if this were
10 not so, Paragraph 12.4’s approval and application would obstruct existing appropriative rights,
11 both by potentially forcing their forfeiture, and by preventing their present-day exercise.²⁸

12 Finally, the MOU contemplates a judicial process, through which aggrieved landowners
13 may prove their Verde River water rights to the Court. Exhibit 6, ¶ 5.4. Through this process,
14 the Court would conduct “evidentiary hearings” to determine whether SRP and VDC’s
15 Working Understandings rightfully classify landholders’ lands as “Green, Purple or Orange.”
16 Exhibit 6, ¶ 5.4. Other terms in the MOU mandate that judicial classification of any lands as
17 Orange would force the owners of those lands to either (1) secure (likely, purchase) new water
18 right, Exhibit 6, Section 9; or (2) succumb to the prohibition provided in Exhibit 6, ¶ 12.4
19 (discussed above). This choice between Scylla and Charybdis would be a direct result of the
20 Court having taken evidence and having determined that some shareholders, who failed to
21 prove otherwise, have no right to use Verde River water. It would be a direct consequence of an

22 ²⁶ One cannot move something that does not exist. And the Court cannot sever and transfer rights,
23 without first engaging the logically antecedent matter of the existence of the rights to be moved.

24 ²⁷ There is no substantive difference between “a judicial prohibition of water use,” and an
25 “adjudication of one’s right to use (no) water.” Arizona surface water rights have long been
26 understood to be usufructary, see *Phelps Dodge Corp. v. Arizona Dep’t of Water Res.*, 211 Ariz.
27 146, 149 (Ct. App. 2005) (discussing use as a cornerstone of appropriative rights based on Arizona
28 Law), and if the Court prohibits Orange landowning shareholders from using water, its action
would be tantamount to adjudication of their right to do so.

²⁸ One cannot use water to which one does not have access, and forfeiture occurs when an
appropriative right is not used for a period of time. *Phelps Dodge Corp.*, 211 Ariz. at 151.

“adjudication” of these shareholders’ rights to use water. A plain language dictionary definition
1 of “adjudication” makes clear that this would, in fact, take place:

2 Adjudication: The formal giving or pronouncing a judgment or decree in a cause; also,
3 the judgment given. The entry of a decree by a court in respect to the parties in the
4 case. It implies a hearing by a court, after notice, of legal evidence on the factual
5 issue(s) involved. And contemplates that the claims of all the parties thereto have been
6 considered and set at rest.

7 Black's Law Dictionary. 43 (8th ed. 2009). In short, the MOU does not, and cannot, avoid
8 adjudication of the rights of Verde Ditch shareholders to use Verde River water.²⁹ The
9 MOU requires such adjudication, but does not apply the doctrine of prior appropriation—
10 *through a single proceeding in which all substantial claimants are before the court, on*
11 *equal footing, so that all claims may be examined, priorities determined, and allocations*
12 *made—thereto.*³⁰ Rather, it contemplates judicial participation in a procedurally unfair
13 process—a process that began with SRP’s analysis of questionably declassified shareholder
14 information;³¹ that developed into “Historic Water Use” classifications under the parties’
15 “Working Understandings;” that arbitrarily disadvantages some Verde River water users
16 (those classified as Orange); advantages others (those classified as “Purple and Green”); and
17 can hardly serve as the starting point for depriving Verde Valley residents of access to
18 water. See Exhibit 6, ¶ 12.4. SRP should not be permitted to embrace the Court in such a
19 process. The MOU should be disapproved.³²

20 ²⁹ The MOU comes fairly close to conceding this. See Exhibit 6, ¶ 4.11. (defining “Historic Water
21 Use” as, in part, “use of the waters of the Verde River System...”) See also March 8th Hearing
22 Transcript, attached hereto as Exhibit 7, Page 36 (Mr. McGinnis, Counsel for SRP, explains that
23 the MOU “is drafted the way it is” because SRP and VDC understand the Jurisdictional issues at
24 play) (“That’s why the approval comes to [the Court] under whatever jurisdiction [the Court]
25 ultimately [has].”).

26 ³⁰ The MOU’s failure to account for “quantity” and “priority” would not prevent the MOU from
27 effectively adjudicating rights to use water. As shown, rights to use water will be determined. But
28 the failure *would* impermissibly prevent the Court, by operation of the MOU, from determining
them in a manner consistent with the doctrine of prior appropriation.

³¹ See Exhibit 7, Pages 59-66 (discussing nature and scope of information that VDC provided to
SRP).

³² The pendency of the Gila Adjudication emphasizes the truth of this statement. The Gila
Adjudication was designed to do properly, what the MOU would require the Court to do

B. The Superior Court in Maricopa County is the Only Arizona Superior Court Authorized to Adjudicate Rights to Use the Water at Issue in this Case.

1. The Court of Appeals has Held that the Gila Court’s Jurisdiction Over Adjudication of Water Rights in the Gila River System and Source is Exclusive.

A general adjudication is pending. This adjudication will allocate the water that the MOU addresses. The United States, VDC, SRP and Yavapai Apache Nation have all been noticed as claimants in this adjudication, the Gila Adjudication. And, where, as here, “a general adjudication of water rights is already pending, and a party has been noticed as a claimant in the action, *that general adjudication is the exclusive forum in which the noticed party may adjudicate the water rights at issue in that action.*” *Yavapai-Apache Nation v. Fabritz-Whitney*, 227 Ariz. 499, 509 (Ct. App. 2011) (emphasis added). See also *Gabel v. Tatum*, 146 Ariz. 527 (App. 1985) (holding that the Gila Adjudication’s jurisdiction over determination of rights to use water in the Gila River System deprived the Superior Court of subject matter jurisdiction over determination of those same rights). The MOU should be disapproved.

2. The State Legislature Has Provided for the Exclusive Jurisdiction of the Gila Court Over The Adjudication of Rights To Use Water In The Gila River System and Source.

Arizona’s general adjudication statutes have long authorized determination of “the nature, extent and relative priority of the water rights of *all persons in [a given] river system and source.*” A.R.S. § 45-252(A) (*emphasis added*). Pursuant to these statutes and their predecessors, A.R.S. §§ 45-231 to 45-245 (repealed and superseded by A.R.S. §§ 45-251 to 45-260), “a consolidated general adjudication of *all water rights* in the Salt, Verde, Gila, Agua Fria, Upper Santa Cruz, and San Pedro River watersheds,” *Matter of Rights to Use of Gila River*, 171 Ariz. 230, 232 (1992)(*emphasis added*) is pending in Maricopa County, “the superior court in the county in which the largest number of potential claimants resides.” Ariz. Rev. Stat. Ann. § 45-252. This Court is not the superior court in the county in which the largest number of Gila River

improperly.

System and Source water users resides. Thus, this Court does not meet the statutory requirements for adjudicating rights to use water in the Gila River system and source.

3. The Res at Issue is Already Under the Jurisdiction of the Gila Court.

In Arizona, it is well-settled that “the pendency of a prior action between the same parties for the same cause in a state court of competent jurisdiction gives grounds for the abatement of a subsequent action either in the same court or in another court of the state having like jurisdiction.” *Allen v. Superior Court of Maricopa County*, 86 Ariz. 205, 209 (1959).³³ See also *Beard v. Greer*, 116 Ariz. 536, 537 (Ariz. App. 1977) (“*To hold otherwise would encourage judge and forum shopping...*”) (emphasis added). This doctrine applies with particular force in cases in the nature of *in rem* proceedings.

The rationale for exclusive jurisdiction is that there is only one res and the first court to assume jurisdiction over it withdraws it from the judicial power of the *other as if it had been carried physically into a different territorial sovereignty*. *Tonnemacher v. Touche Ross & Co.*, 186 Ariz. 125, 129 (Ariz. App. Div. 1, 1996) (emphasis added) (citing cases); accord *United States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007, 1013 (9th Cir. 1999) (“[T]he first court to gain jurisdiction over a res exercises exclusive jurisdiction over an action involving that res.”) (citing *Kline v. Burke Constr. Co.*, 260 U.S. 226, 229 (1922); *Bergeron v. Loeb*, 100 Nev. 54 (1984)).

General adjudications are in the nature of *in rem* proceedings. *Nevada v. United States*, 463 U.S. 110, 144 (1983). Thus, when a general water adjudication begins, and a court assumes jurisdiction over the *res* that is the subject of the adjudication, it withdraws it from the judicial power of other courts as if said *res* had been carried physically into a different territorial sovereignty.

Here, the *res* in which the Court, through the MOU, would determine rights to use water—the Verde River—is already under to the exclusive jurisdiction of the Superior Court in

³³ *Allen* illustrates this principle. There, the Maricopa County Superior Court had attempted to exercise jurisdiction in divorce proceedings involving, inter alia, child custody and maintenance questions, although prior proceedings had been instituted in the Cochise County Superior Court. In granting its writ prohibiting Maricopa County Superior Court from assuming jurisdiction, the Arizona Supreme Court held that the court first acquiring jurisdiction (Cochise County) retained it to the exclusion of the Maricopa County Superior Court. Abatement can also result in dismissal without prejudice. See *Sierra v. Perry*, 121 Ariz. 437, 438 (Ariz. 1979).

1 Maricopa County. The MOU should be disapproved because it would require the Court to
2 adjudicate rights in a *res* over which it lacks jurisdiction to do so.³⁴

3 **C. Even If the Court Finds That It Has Authority to Undertake the Work of**
4 **the Gila Adjudication, Strong Reasons Militate in Favor of Staying the**
5 **Proceedings That the MOU Would Otherwise Require.**

6 The Superior Court has discretion to stay an action. *Tonnemacher* 186 Ariz. at 130, 920
7 (citing *Landis v. North American Co.*, 299 U.S. 248, 254 (1936)). Reasons for doing so include:

- 8 1) avoiding increased costs; 2) preventing harassment by repeated suits involving the
9 same subject matter; 3) avoiding extra cost and burden to judicial resources; 4) avoiding
10 piecemeal litigation; 5) avoiding unusually difficult questions of federal law that bear
11 upon important policy issues; and 6) avoiding conflicting judgments by state and federal
12 courts.

13 *Id.* (citations omitted). Here, these bases, especially the fourth, fifth and sixth, militate in favor
14 of staying the judicial proceedings that the MOU would otherwise require. Crucially, federal
15 participation in such proceedings, and concurrent participation in the Gila adjudication, would be
16 piecemeal, would conflict with federal authorities governing the scope of the United States’
17 waiver of sovereign immunity under the McCarran Amendment, and, would jeopardize
18 continued federal participation in the largest and longest running judicial proceeding in the Gila
19 Adjudication.³⁵

20 ³⁴ The 1909 *Hance v. Arnold* judgment neither authorized nor contemplated the proceedings that
21 the MOU, if approved, would require the Court to initiate. Nor do VDC’s rules and regulations,
22 which the Gila Adjudication precedes. Initiation of such proceedings would be a new occurrence,
23 *in 2015*—a new adjudication that would take place during the pendency of another which began
24 in the 1970s. Moreover, if the alternative were true—if this Court were to determine that the 1909
25 *Hance v. Arnold* judgment gave it prior and exclusive jurisdiction over a subset of rights to use
26 water in the Gila River System and source—it would follow that the Gila Adjudication is
27 incomprehensive. Such a holding would raise significant and difficult questions of state and federal
28 law bearing on continued federal participation in the largest and longest running judicial
proceeding in Arizona history. See *infra* note 35. It would be extremely problematic, *and*, for
reasons discussed above, would be at-odds with (1) the directives of the state legislature, see A.R.S.
§§ 45–251 to 45–260; and (2) the holdings of Arizona Court of Appeals, see *Fabritz-Whitney*, 227
Ariz. at 509; *Gabel*, 146 Ariz. at 529.

³⁵ The United States is a party to the Gila Adjudication under the McCarran Amendment, through
which Congress provided consent for the United States to be joined as a defendant in any suit “for
the adjudication of rights to the use of water of a river system.” 43 U.S.C. § 666(a). The

The other factors listed above—avoiding harassment, increased costs and preserving judicial resources—also favor a stay. With respect to the first factor, the MOU will require many Verde Ditch shareholders to acquire (likely purchase) new water rights of questionable validity, Exhibit 6, Section 9, and to relitigate their interdependent water allocations in the Gila Adjudication. Exhibit 6, Recital H. With regard to the second factor, SRP has a long and well-documented history of opposing the water rights of Verde Valley residents; this case is just the latest chapter in their saga. With respect to the third factor, the Gila Adjudication will address the matter presently before the Court. It has been addressing such matters for nearly forty years, and duplication of its efforts would create extra costs to judicial resources.

There is no showing that the claims raised in the present litigation cannot adequately be resolved in the general adjudication...

Gabel, 146 Ariz. at 529. See also, generally, *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) (dismissing federal action against 1,000 water users during the pendency of a subsequently initiated McCarran Amendment adjudication of same rights at issue in federal suit).

VII. CONCLUSION

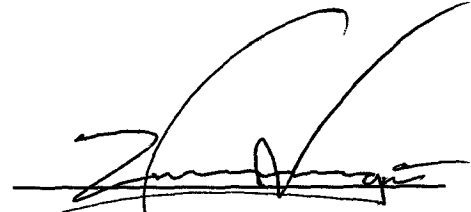
For the reasons stated above, the United States respectfully requests that the Court deny the Verde Ditch Company's request to enter into a Memorandum of Understanding with the Salt River Project modifying interests decreed under this Court's prior judgment, and allocating water

Amendment, "as interpreted [by the Supreme Court], allows and encourages state courts to undertake the task of quantifying Indian water rights in the course of comprehensive water adjudications." *Arizona v. San Carlos Apache Tribe of Arizona*, 463 U.S. 545, 569 (1983). It embodies a "clear federal policy" of "avoiding piecemeal litigation", *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976), and like Arizona's adjudication statutes, permits courts to "accomplish in *one forum* the general settlement of water rights of many users of a river system or other source." *Jicarilla Apache Tribe v. United States*, 601 F.2d 1116, 1130 (10th Cir.1979) (*emphasis added*). Where a state court seeks to adjudicate the rights of fewer than all claimants to water rights in a single source, there is no federal consent to the jurisdiction of that state court to do so. *Wagoner Cnty. Rural Water Dist. No. 2 v. Grand River Dam Auth.*, 577 F.3d 1255, 1260 (10th Cir. 2009) (Put another way, the "United States has not consented to suits in which fewer than all claimants to water rights are made parties.").

currently under the jurisdiction of the Superior Court in Maricopa County.³⁶

1
2 Respectfully submitted this 17th day of July, 2015.

3
4 Sincerely,

5 
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16 **ORIGINAL and One Copy** of the foregoing
17 sent by Federal Express this 16th day of July 2015
18 for filing to:

19 Clerk of the Superior Court
20 Yavapai County, Division 1
21 120 South Cortez Street
22 Prescott, Arizona 86303

23 **COPIES** of the foregoing sent by first-class
24 mail this 16th day of July 2015 to:
25 Honorable David L. Mackey (jjaramil@courts.az.gov)
26 Judge of the Superior Court and Master of the Verde Ditch
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28 Prescott, Arizona 86303

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³⁶ The United States incorporates all previous objections made during these proceedings herein by reference.

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