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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

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In re: )

No. CV 05-2045-PHX-JAT

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Michael Keith Schugg, dba Schuburg )  
Holsteins, )

**ORDER**

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Debtor. )

BK No. 2-04-13226-PHX-GBN  
BK No. 2-04-19091-PHX-GBN

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In re: )

ADV. No. 2-05-ap-00384-GBN

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Debra Schugg, )

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Debtor. )

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G. Grant Lyon, in his capacity as Chapter )  
11 Trustee of the bankruptcy estate of )  
Michael Keith Schugg and Debra Schugg; )  
16 Wells Fargo Bank, N.A., )

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Plaintiffs, )

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vs. )

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Gila River Indian Community, )

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Defendant. )

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Pending before the Court are the Gila River Indian Community's Motion for Entry  
23 of Final Judgment and Memorandum in Support (Doc. 321) and the Trustee's Motion to Set  
24 Rule 16 Hearing and Postpone Entry of Judgment (Doc. 320). The Gila River Indian  
25 Community also made an oral Motion to Strike during oral argument on this matter on May  
26 21, 2012, which the Court took under advisement, and the GRIC later filed a written Motion,  
27 incorporating their oral Motion to Strike (Doc. 328). The Court now rules on the Motions.

1 **I. BACKGROUND**

2 This case was filed by G. Grant Lyon acting solely in his capacity as Chapter 11  
3 Trustee of the bankruptcy estate of Michael Keith Schugg and Debra Schugg (the “Trustee”).  
4 The Defendant/Counter-Plaintiff Gila River Indian Community (“GRIC”) is a federally-  
5 recognized Indian Community organized under Section 16 of the Indian Reorganization Act,  
6 25 U.S.C. § 461, *et seq.* GRIC is based on the Gila River Indian Reservation (the  
7 “Reservation”), which consists of approximately 372,000 acres in south-central Arizona, and  
8 includes members of the federally-recognized Akmil O’odham (“Pima”) and Peeposh  
9 (“Maricopa”) Tribes.

10 Between 2001 and 2003, S&T Dairy (the “Dairy”) was constructed on land known as  
11 Section 16 of Township 4 South, Range 4 East in Pinal County, Arizona, comprising  
12 approximately 657 acres (“Section 16”). In or about September 2003, Michael Schugg and  
13 Debra Schugg (the “Schuggs”) acquired title to Section 16. Section 16 is located wholly  
14 within the Reservation and is physically accessible by Smith-Enke Road and Murphy Road.  
15 In 2004, the Schuggs made a request to amend the Pinal County land use designation from  
16 “Rural” to “Transitional” (allowing a higher-density housing development). The GRIC  
17 objected to the amendment to the land use designation and Pinal County ultimately rejected  
18 the application.

19 In 2004, the Schuggs declared bankruptcy and listed Section 16 as their largest asset.  
20 During the bankruptcy proceedings, the GRIC filed a proof of claim asserting that it had an  
21 exclusive right to use and occupy Section 16, it had authority to impose zoning and water use  
22 restrictions on Section 16, and a right to injunctive and other relief for trespass on reservation  
23 land and lands to which it held aboriginal title. The Trustee then initiated an adversary  
24 proceeding seeking a declaratory judgment that the Schuggs’ estate had legal title and access  
25 to Section 16. In 2005, Plaintiffs and Defendants stipulated that the reference should be  
26 withdrawn to this Court. (Docs. 29 & 30).

1 In 2007, this Court presided over a bench trial, where the issues to be resolved by the  
2 Court were generally as follows: (1) whether there was an easement or right-of-way via  
3 Smith-Enke Road or Murphy Road for access and utilities to Section 16; (2) whether Murphy  
4 Road was an Indian Reservation Road that must remain open for public use; (3) whether  
5 Smith-Enke Road and/or Murphy Road were public rights-of-way under Revised Statute  
6 2477 that must remain open for public use; (4) whether the easement and/or right-of-way  
7 access (if any) to Section 16 included the right to improve the easements or install additional  
8 utilities thereon; (5) whether GRIC had the power to regulate zoning on Section 16; and (6)  
9 whether the Trustee, the Debtors, representatives of the S & T Dairy and/or their respective  
10 invitees, employees, assignees, agents or representatives trespassed on tribal or allotted lands  
11 within the Gila River Indian Community's reservation.

12 At the conclusion of the trial, the Court determined that Plaintiffs were entitled to  
13 legal access to Section 16 due to an implied easement over Smith-Enke Road and a right of  
14 access over Murphy Road, either because of an implied easement or because the relevant  
15 portion of the road was Indian Reservation Road that must remain open for public use, that  
16 Defendant is not entitled to exercise zoning authority over Section 16, and that no trespass  
17 occurred. The Court also determined that the GRIC's assertion of authority to control the  
18 zoning of Section 16 was not ripe for adjudication.

19 The GRIC then appealed to the Ninth Circuit Court of Appeals. The GRIC appealed  
20 the Court's judgment that the United States was not an indispensable party to the action, the  
21 Trustee's rights of access to Section 16, and the rejection of the Community's assertions of  
22 aboriginal title and zoning authority over Section 16. The Trustee cross-appealed the District  
23 Court's finding that Smith-Enke Road and Murphy Road were not public roads under  
24 Revised Statute 2477. The Court of Appeals affirmed in part, but remanded for further  
25 consideration of whether Murphy Road was a public Road in light of ongoing proceedings  
26 before the Bureau of Indian Affairs regarding the issue of whether Murphy Road was an  
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1 Indian Reservation Road open to the public.

2 After remand, the Parties filed a Joint Status Report (Doc. 314) informing the Court  
3 that the Trustee had withdrawn his appeal to the Bureau of Indian Affairs regarding the status  
4 of Murphy Road as a public road. The Parties agreed that, in light of this dismissal, the  
5 question of whether Murphy Road was an Indian Reservation Road open to the public was  
6 no longer subject to dispute in this case. In the Joint Status Report, the Parties represented,  
7 “the parties agree that there are no longer any issues to be decided by this Court on remand.”  
8 (Doc. 314 at 2).

9 The Court then directed the Parties to jointly submit a proposed form of judgment that  
10 “will close this case.” (Doc. 315). When the Parties represented to the Court that they were  
11 unable to agree on a proposed form of judgment, the Court ordered that each party should  
12 separately file a proposed form of judgment or “motions as to why judgment should not be  
13 entered at this time.” (Doc. 319). Thereafter, the GRIC filed its Motion for Entry of Final  
14 Judgment with a proposed form of judgment (Doc. 321) and the Trustee filed a Motion to Set  
15 Rule 16 Hearing and Postpone Entry of Judgment (Doc. 320).

16 In the Motion to Set Rule 16 Hearing, the Trustee argues that entry of final judgment  
17 is no longer appropriate in this case because the issue regarding the scope of the easements,  
18 which this Court and the Ninth Circuit Court of Appeals previously ruled was not ripe for  
19 adjudication, has recently become ripe for adjudication. The Trustee requests that the Court  
20 set a Rule 16 conference to discuss the presentation of evidence on this now-ripe issue. In  
21 the alternative, the Trustee requests that if the Court enters a final judgment, the Court  
22 reserve jurisdiction over the issue concerning the scope of the implied easements. In  
23 Response, the GRIC argues that this case is still not ripe for adjudication and a determination  
24 that this case is now ripe would run afoul of the law of the case and the Ninth Circuit’s  
25 mandate. The GRIC requests that the Court deny the Motion to Set a Rule 16 Hearing and  
26 enter its proposed Final Judgment. Accordingly, to resolve the two motions currently  
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1 pending before the Court, the Court must determine whether it may decide the ripeness issue,  
2 and, if so, whether the issue regarding the scope of the easements is currently ripe for  
3 adjudication.

4 **II. GRIC’S MOTION TO STRIKE**

5 During oral argument, GRIC moved to strike (1) the Declaration of Paul E. Gilbert,  
6 attached to the Trustee’s Motion for Hearing (Doc. 320, Exhibit 1), (2) the Declaration of  
7 Michael K. Schugg, attached to the Trustee’s Response to the Motion for Final Judgment  
8 (Doc. 323, Exhibit 1), (3) the Declaration of Paul E. Gilbert, attached to the Trustee’s  
9 Response to the Motion for Final Judgment (Doc. 323, Exhibit 2), and (4) the Declaration  
10 of Neal T. Pascoe attached to the Notice of Filing (Doc. 326, Exhibit 1). GRIC argues that  
11 these declarations must be stricken because they are unsworn and, thus, not in compliance  
12 with 28 U.S.C. § 1746.<sup>1</sup> At oral argument, the Court asked the GRIC why they were raising  
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15 28 U.S.C. § 1746 provides,

16 Wherever, under any law of the United States or under any rule,  
17 regulation, order, or requirement made pursuant to law, any  
18 matter is required or permitted to be supported, evidenced,  
19 established, or proved by the sworn declaration, verification,  
20 certificate, statement, oath, or affidavit, in writing of the person  
21 making the same (other than a deposition, or an oath of office,  
22 or an oath required to be taken before a specified official other  
23 than a notary public), such matter may, with like force and  
24 effect, be supported, evidenced, established, or proved by the  
25 unsworn declaration, certificate, verification, or statement, in  
26 writing of such person which is subscribed by him, as true under  
27 penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: “I declare (or certify,  
verify, or state) under penalty of perjury under the laws of the  
United States of America that the foregoing is true and correct.  
Executed on (date).

1 this issue for the first time at oral argument, despite the Motions having been fully briefed  
2 for over two months. The GRIC responded that they had only discovered the deficiency on  
3 the eve of oral argument.

4 After oral argument, the GRIC then filed a written Motion to Strike reiterating the  
5 arguments made at oral argument. The Trustee filed a Response, disputing the Motion to  
6 Strike, and filing declarations in conformance with 28 U.S.C. § 1746.

7 Because Declarations that are in compliance with 28 U.S.C. § 1746 have now been  
8 filed, the Court finds that the issue is now moot. However, the Court will consider the  
9 Declarations in compliance with 28 U.S.C. § 1746 (Doc. 331, Exhibits 1-4) to be the  
10 controlling documents for the purposes of analyzing the Motions pending before the Court  
11 and will consider the “non-compliant” Declarations stricken. The Court finds that this  
12 decision cannot possibly prejudice the GRIC because it admitted that it did not even discover  
13 the alleged defect until two months after briefing was completed on the Motions.

### 14 **III. LEGAL STANDARDS & ANALYSIS**

#### 15 **A. The Mandate Rule**

16 GRIC argues that the Ninth Circuit’s mandate expressly addresses the issue of  
17 ripeness and, thus, this Court cannot revisit the issue of whether the scope of the easements  
18 issue is ripe in this case. District Courts “are not free to decide issues on remand that were  
19 previously decided either expressly or by necessary implication on appeal.” *Michandani v.*

20 \_\_\_\_\_  
21 (Signature)”.

22 (2) If executed within the United States, its territories,  
23 possessions, or commonwealths: “I declare (or certify, verify, or  
24 state) under penalty of perjury that the foregoing is true and  
correct. Executed on (date).

25 (Signature)”.

26 28 U.S.C.A. § 1746.

1 *United States*, 836 F.2d 1223, 1225 (9th Cir. 1988). “The mandate is controlling as to all  
2 matters within its compass, but leaves the district court any issue not expressly or impliedly  
3 disposed of on appeal.” *Id.*

4 **B. Law of the Case**

5 GRIC also argues that this Court’s prior opinion that any ruling on scope of easements  
6 would be a speculative, advisory opinion that was not ripe, and the Ninth Circuit’s  
7 affirmance of that ruling, is the law of the case and thus, this issue cannot be decided by the  
8 Court in the same case. “The law of the case doctrine ordinarily precludes a court from  
9 re-examining an issue previously decided by the same court, or a higher appellate court, in  
10 the same case,” but “it does not bar a district court from acting unless an appellate decision  
11 has issued on the merits of the claim sought to be precluded. *U.S. v. Caterino*, 29 F.3d 1390,  
12 1395 (9th Cir. 1994), *overruling on other grounds recognized by United States v. Scarano*,  
13 76 F.3d 1471 (9th Cir. 1996).

14 The Ninth Circuit Court of Appeals affirmed this Court’s finding that the issues  
15 regarding the scope of the easements were not ripe as follows:

16  
17 The Trustee asked the district court to opine on the scope  
18 of any easement. The district court held that there was no actual  
19 controversy regarding the scope of the Trustees’ easement, and  
properly declined to issue an advisory opinion on that subject.  
*See generally Lujan v. Defenders of Wildlife*, 504 U.S. 555,  
559–61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

20 The Trustee has not shown that there is a live controversy  
21 with regard to the scope of any easement. There is no indication  
22 that the roads or utilities as they currently exist are inadequate  
23 to support the current use of Section 16, or that the Trustee has  
24 any intent to improve the roads or utilities. The parties may  
disagree in principle over what activities the Trustee may  
undertake on those roads, but there is as yet no particularized or  
imminent injury arising out of that disagreement.

25 *Lyon v. Gila River Indian Cmty.*, 626 F.3d 1059, 1074 (9th Cir. 2010).

26 **C. Analysis**

1           While the Court agrees that the procedural posture of this case is unusual, if, in the  
2 course of the case, the scope of the issue has become ripe, neither the mandate rule or the law  
3 of the case doctrine prevent this Court from deciding whether circumstances have rendered  
4 a previously unripe decision ripe. This is because whether an issue is ripe “is peculiarly a  
5 question of timing” that can change throughout the case. Because “ripeness is assessed based  
6 on the facts as they exist at the present moment,” law of the case does not prevent a Court  
7 from revisiting whether an issue in the case has become ripe. *Western Radio Servs. Co. v.*  
8 *Qwest Corp.*, 530 F.3d 1186, 1205 (9th Cir. 2008). While it is true that this Court and the  
9 Ninth Circuit Court of Appeals both considered whether the scope of easements claim was  
10 ripe, neither court ever decided the merits of the scope of the easements claim. Accordingly,  
11 there is no mandate or law of the case that prevents the Court from deciding the scope of the  
12 easements.

13           GRIC argues that, if the Ninth Circuit Court of Appeals had not remanded an issue  
14 unrelated to the scope of the easements, then judgment would have entered immediately after  
15 remand and, thus, this case would be closed and the Trustee would not be able to argue that  
16 the issue regarding the scope of the easements is now ripe for review. However, even if  
17 judgment had entered immediately, Federal Rule of Civil Procedure 60(b) would have given  
18 the Trustee an avenue through which he could have brought the issue of new evidence and  
19 changed circumstances regarding ripeness to the attention of the Court.

20           Even after a mandate has issued directing the District Court to enter judgment, the  
21 District Court is free to consider motions made under Rule 60(b). *See Gould v. Mutual Life*  
22 *Ins. Co. of New York*, 790 F.2d 769, 773 (9th Cir. 1986) (holding that once the appellate  
23 mandate has issued, the district court may consider motions made under Rule 60(b));  
24 *Standard Oil Co. of California v. United States*, 429 U.S. 17, 18-19 (1976) (same). Federal  
25 Rule of Civil Procedure 60(b) governs the reconsideration of final orders of the district court.  
26 The Rule permits a district court to relieve a party from a final order or judgment on various  
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1 grounds, including 1) mistake, inadvertence, surprise, or excusable neglect; 2) newly  
2 discovered evidence; 3) fraud or misconduct by an opposing party; or 4) any other reason that  
3 justifies relief from the judgment. FED.R.CIV.P. 60(b). The motion for reconsideration must  
4 be made within a reasonable time, and with respect to the first three grounds, no more than  
5 a year after the entry of the judgment, order, or proceeding. *Id.*

6 Similarly, a district court abuses its discretion in applying the law of the case  
7 doctrine if (1) the first decision was clearly erroneous; (2) an intervening change in the law  
8 occurred; (3) the evidence on remand was substantially different; (4) other changed  
9 circumstances exist; or (5) a manifest injustice would otherwise result. *Ingle v. Circuit City*,  
10 408 F.3d 592, 594 (9th Cir. 2005) (internal citation omitted).

11 In this case, the Trustee argues that there is new evidence on the issue of ripeness, the  
12 circumstances regarding ripeness have changed, and a manifest injustice would result if the  
13 Court does not consider the now ripe issue in this case. At the outset of this case and  
14 throughout the appeal, the Owners of Section 16 wanted to develop the property to have three  
15 houses per acre. In order for this to occur, Pinal County needed to approve a change in the  
16 zoning designation for Section 16 from Rural (allowing one house per 1.25 acres) to  
17 Transitional (allowing a higher density housing development). Pinal County eventually  
18 rejected the application to amend the land-use designation for Section 16. Based on these  
19 facts, the Court found that there were not current plans to sell Section 16 or to construct  
20 homes on Section 16 and thus, any decision about the scope of the easements to  
21 accommodate such construction would be advisory.

22 The Trustee asserts that the following events occurred after remand from the Ninth  
23 Circuit Court of Appeals that make this issue ripe for adjudication: The Owners of Section  
24 16 developed a plan to develop Section 16 at 1 house per 1.25 acres, allowed by the current  
25 zoning of the property. The Owners obtained an agreement from Johnson Utilities to provide  
26 water and sewer access to Section 16 when the property is developed at one house per 1.25

1 acres. However, in order to comply with Pinal County regulations for obtaining development  
2 permits and a subdivision plat from Pinal County, the owners must provide paved access to  
3 the subdivision and install additional utility lines along the implied easements. Such  
4 requirements must be fulfilled before submission of the plat map to Pinal County to obtain  
5 the development permits will be allowed.

6 On December 5, 2011, the Owners met with representatives of the GRIC. At the  
7 meeting, the Owners told GRIC that they want to develop Section 16 and plan to pave the  
8 easements and add utility lines. The GRIC representatives responded by telling the Owners  
9 that they would not allow the implied easements to be paved and would not allow the  
10 easements to be used to support the traffic that would result if Section 16 is developed  
11 consistent with its currently zoned use of one house per 1.25 acres. The GRIC offered to buy  
12 Section 16 at its current value based on its current use as undeveloped farm land. The  
13 Owners refused to sell Section 16 at its current value because they believe they are entitled  
14 to develop Section 16 at one house per 1.25 acres and that the land will be much more  
15 valuable once this is completed.

16 The Trustee argues that it would be manifestly unjust for the Court to refuse to decide  
17 the ripeness issue because, in any future action, the GRIC will be able to assert sovereign  
18 immunity, thereby preventing the Owners from ever determining the scope of the easements.<sup>2</sup>  
19 Without deciding whether it would be a manifest injustice for the Court to review the  
20 question of ripeness, the Court finds that the Trustee has presented enough facts supporting  
21 a change in circumstances to allow the Court to decide whether the issue relating to the scope  
22 of the easements is now ripe.

23 Accordingly, neither the Ninth Circuit's mandate or the law of the case prevent this  
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25 <sup>2</sup> The Court previously found that the GRIC waived sovereign immunity in this action  
26 when it filed a proof of claim in the bankruptcy court contesting the Owner's access rights  
27 to Section 16.

1 Court from deciding whether the issue regarding the scope of the easements is now ripe.

2 **C. Ripeness**

3 The ripeness inquiry has a constitutional component rooted in the “case or  
4 controversy” requirement of Article III, and a prudential component that focuses on whether  
5 the record is adequate to ensure effective review.

6 **1. The Constitutional Component**

7 “The constitutional ripeness of a declaratory judgment action depends upon whether  
8 the facts alleged, under all the circumstances, show that there is a substantial controversy,  
9 between parties having adverse legal interests, of sufficient immediacy and reality to warrant  
10 the issuance of a declaratory judgment.” *In re Coleman*, 560 F.3d 1000, 1005 (9th Cir. 2009)  
11 (internal quotation and citations omitted). “Under the strictest interpretation of the ripeness  
12 doctrine, all declaratory judgment claims would be suspect, because declaratory relief  
13 involves plaintiffs seeking to clarify their rights or obligations before an affirmative remedy  
14 is needed. The Supreme Court has rejected that strict conception [rather,] Article III requires  
15 that there be a substantial controversy of sufficient immediacy and reality to warrant the  
16 issuance of a declaratory judgment.” *Aydin Corp. v. Union of India*, 940 F.2d 527, 528 (9th  
17 Cir. 1991) (internal quotations and citations omitted).

18 In this case, in a meeting with the GRIC, the Owners expressed their intention to pave  
19 the easements and add utility lines to the easements. The Owners assert that the GRIC  
20 refused to allow the implied easements to be paved and told the Owners that they have no  
21 legal right to pave the easements or use them for the planned development. The GRIC does  
22 not deny that this meeting occurred and that this was their position. Rather, the GRIC argues  
23 that the development is still too hypothetical for there to be an actual case or controversy for  
24 this Court to rule on. However, short of beginning to pave the easements or install the utility  
25 lines on the easements, the Court can ascertain no next step that the Owners could take before  
26 an actual case or controversy exists without potentially infringing the GRIC’s rights to the

1 easements. The ripeness doctrine does not require a party to possibly infringe on another's  
2 rights before an actual case or controversy exists. *See Hunt v. Richardson*, 216 Ariz. 114,  
3 125 (Ariz. Ct. App. 2007) (Where Defendants alleged that Plaintiffs were responsible for  
4 maintaining an easement, but refused Defendants' demand to contribute toward maintenance  
5 (and Plaintiffs admitted those allegations), declaratory relief regarding responsibility of  
6 maintaining easement was ripe for review); *Excel Reality Servs., Inc. v. Sutter*, No. CA-CV  
7 10-0599, 2011 WL 5009513, at \*4 (Ariz. Ct. App. Oct. 20, 2011) (finding that current action  
8 was not ripe for review, but stating that, "[i]f, at some point in the future, the [Plaintiffs]  
9 attempt to improve the remainder of the easement, and such attempt is met with resistance  
10 by the [Defendants], the matter will be ripe for adjudication."); *Tashakori v. Lakis*, 126  
11 Cal.Rptr.3d 838, 845-846 (Cal. Dist. Ct. App. 2011) (Where Defendants told Plaintiffs that  
12 they considered any use of shared driveway to be trespassing that would subject the user to  
13 legal action, matter was ripe for judicial review). Accordingly, there is now a substantial  
14 controversy of sufficient immediacy and reality to warrant the issuance of a declaratory  
15 judgment in this case.

## 16 **2. The Prudential Component**

17 Under the prudential component of ripeness, the Court must evaluate (1) the fitness  
18 of the issues for judicial decision and (2) the hardship to the parties of withholding court  
19 consideration. *Principal Life Ins. Co. v. Robinson*, 394 F.3d 665, 670 (9th Cir. 2005)  
20 (internal citations omitted).

### 21 **i. The Fitness Test**

22 "The purpose of the 'fitness' test . . . is to delay consideration of the issue until the  
23 pertinent facts have been well-developed in cases where further factual development would  
24 aid the court's consideration." *In re Coleman*, 560 F.3d at 1009. The GRIC argues that the  
25 Trustee's plans for development of the farm land are too generalized and contingent for this  
26 to be a live dispute. (Doc. 322 at 5). In response, the Trustee argues that it can present  
27



1 improve the easements in possible violation of the GRIC's rights. Accordingly, the Owners  
2 will suffer hardship without review of the scope of the easements.

3 Accordingly, the Court finds that the issue regarding the scope of the easements is  
4 now ripe for review.

5 **IV. CONCLUSION**

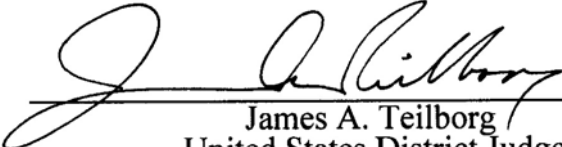
6 Based on the foregoing,

7 **IT IS ORDERED** that the GRIC's oral motion to strike and Motion to Strike (Doc.  
8 328) is granted in part and denied in part as set forth herein. The Clerk of the Court shall  
9 strike (1) the Declaration of Paul E. Gilbert, attached to the Trustee's Motion for Hearing  
10 (Doc. 320, Exhibit 1), (2) the Declaration of Michael K. Schugg, attached to the Trustee's  
11 Response to the Motion for Final Judgment (Doc. 323, Exhibit 1), (3) the Declaration of Paul  
12 E. Gilbert, attached to the Trustee's Response to the Motion for Final Judgment (Doc. 323,  
13 Exhibit 2), and (4) the Declaration of Neal T. Pascoe attached to the Notice of Filing (Doc.  
14 326, Exhibit 1).

15 **IT IS FURTHER ORDERED** that Gila River Indian Community's Motion for Entry  
16 of Final Judgment and Memorandum in Support (Doc. 321) is denied.

17 **IT IS FURTHER ORDERED** that the Trustee's Motion to Set Rule 16 Hearing and  
18 Postpone Entry of Judgment (Doc. 320) is granted. A Rule 16 Conference will be set by  
19 separate Order of the Court.

20 DATED this 25th day of May, 2012.

21  
22  
23   
24 James A. Teilborg  
25 United States District Judge  
26  
27