Nos. 14-16942, 14-16943, 14-16944, 14-17047, 14-17048, 14-17185
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant-Cross-Appellee, and

SAN CARLOS APACHE TRIBE OF ARIZONA,
GILA RIVER INDIAN COMMUNITY,
Intervenors-Plaintiffs-Appellants-Cross-Appellees,
v.
GILA VALLEY IRRIGATION DISTRICT, et al.,
Defendants-Appellees-Cross-Appellants, and

FREEPORT MCMORAN CORPORATION
Defendant-Appellant-Appellee.

On Appeal from the United States District Court for the District of Arizona
District Court Nos. 4:31-cv-59-TUC-SRB, 4:31-cv-61-TUC-SRB

BRIEF OF AMICI CURIAE SALT RIVER VALLEY WATER USERS' ASSOCIATION AND SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT IN SUPPORT OF DEFENDANTS-APPELLEES-CROSS-APPELLANTS GILA VALLEY IRRIGATION DISTRICT, et al., AND DEFENDANT-APPELLANT-APPELLEE FREEPORT MCMORAN CORPORATION AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

The Salt River Project Agricultural Improvement and Power District is a political subdivision of the State of Arizona for which a corporate disclosure statement is not required pursuant to Federal Rule of Appellate Procedure 26.1. No publicly held corporation owns 10% or more of stock in the Salt River Valley Water Users' Association.

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BRIEF OF AMICI CURIAE SALT RIVER VALLEY WATER USERS' ASSOCIATION AND THE SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT[1]

INTERESTS OF AMICI CURIAE

Amici Curiae Salt River Valley Water Users' Association and the Salt River Project Agricultural Improvement and Power District (collectively, "SRP") operate and maintain the Salt River Project Federal Reclamation Project (the "Salt River Project"), one of the nation's oldest Federal Reclamation Projects. Pursuant to various contracts with the United States Secretary of the Interior, SRP operates six dams and reservoirs located on the Salt and Verde Rivers in central Arizona, and one dam and reservoir on East Clear Creek in northeastern Arizona, which collectively impound runoff from a 13,000-square mile watershed. The water stored in these reservoirs is delivered via Salt River Project canals, laterals and pipelines to municipal, industrial and agricultural water users in the Phoenix metropolitan area.

SRP holds and/or manages numerous pre-1919 water rights on both the Salt and Verde Rivers. First, SRP accounts for and manages its shareholder's water rights under what is known as the "Kent Decree." The Kent Decree is an

[1] No counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici and their counsel contributed money to fund the preparation or submission of this brief. All parties have consented to the filing of this Amicus Brief.

Arizona Territorial Court decision issued in 1910 by Territorial Judge Edward Kent, which adjudicated the relative water rights to the "normal flows" of the Salt and Verde Rivers for over 5,000 water users in the Salt River Valley. SRP is responsible for the proper accounting and delivery of water associated with the Kent Decree rights, which hold priority dates between 1869 and 1909. Second, SRP holds "storage rights" to surplus and flood waters of the Salt and Verde Rivers. These storage rights date back to at least 1893, 1901, and 1906 on the Salt River and 1914 on the Verde River. The Kent Decree rights and the storage rights all vested prior to the enactment of the 1919 Water Code. SRP has a strong interest in maintaining the certainty of these vested pre-1919 water rights, free from the threat that those rights would be subject to forfeiture under the subsequently-enacted 1919 Water Code.

ARGUMENT

In holding that the forfeiture provision of Arizona's 1919 Water Code did not apply to water rights vesting prior to 1919, the district court properly concluded that: (1) forfeiture of a water right by nonuse alone did not exist prior to 1919 under Arizona law; and (2) the savings provisions of the 1919 Water Code make it clear that the new forfeiture provision was not meant to apply to rights that vested prior to its enactment. ER 39-41.[2]

[2] "ER" refers to the Excerpts of Record filed by the United States.

Appellants challenge this conclusion by arguing that forfeiture in fact existed under Arizona law prior to 1919, and that the 1919 Water Code merely formalized an existing form of relinquishment. Appellants argue that the removal of the savings clause originally included in the 1919 forfeiture provision, along with the Arizona Supreme Court's holding in *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 972 P.2d 179 (Ariz. 1999), demonstrates that forfeiture was a part of Arizona law prior to the enactment of the 1919 Water Code.

A careful review of Arizona's water law prior to 1919, however, reveals that the district court was indeed correct; before that date a vested water right could not be lost due to nonuse alone. The forfeiture provision enacted in the 1919 Water Code fundamentally changed and expanded the circumstance under which a water right could be lost under Arizona law. Moreover, contrary to Appellants' assertions, the removal of the specific savings clause associated with the forfeiture provision in 1928 was merely a legislative reorganization in favor of the comprehensive savings clause that was also included in the 1919 Water Code. Furthermore, as the district court correctly pointed out, the *San Carlos Apache Tribe* decision did not examine the nature of pre-1919 forfeiture law in Arizona. ER 39. Accordingly, the district court's adoption of the analysis set forth in *In re Manse Spring & Its Tributaries, Nye County*, 60 Nev. 280, 108 P.2d 311 (Nev.

1940), which is directly on point and which has been upheld by this Court on multiple occasions, is entirely appropriate. ER 40-41.

A. Prior to 1919 Appropriative Rights Were Not Subject to Forfeiture By Nonuse Alone.

As western water law evolved, the related theories of forfeiture and abandonment emerged regarding the relinquishment of an appropriative right. Although the terms "forfeiture" and "abandonment" were often used interchangeably by courts in discussing relinquishment,[3] as the law regarding prior appropriation became more sophisticated, an important difference between the two theories developed. Under the concept of forfeiture, an appropriative right may be relinquished simply by failing to use the right for a defined period of time. Abandonment of an appropriative right, on the other hand, requires some period of nonuse coupled with the right holder's intent to abandon the right.

As with other western states, in Arizona the legal concept of forfeiture developed and evolved over time. A review of the history of Arizona's water laws, and, in particular, the laws of forfeiture and abandonment, makes clear that the modern day concept of forfeiture, *i.e.*, the loss of an appropriative right due to

[3] *See State ex rel. Reynolds v. South Springs Co.*, 80 NM. 144, 452 P.2d 478 (1969) (acknowledging that "[w]e regret that forfeiture and abandonment have been used interchangeably. . . .").

simple nonuse, did not appear in Arizona prior to the enactment of the 1919 Water Code.

In 1893, the Legislature for the Territory of Arizona enacted the requirement that any person seeking to appropriate the waters of the territory must first post a notice of such intent at the point of diversion and file a copy of the notice of intent with the County Recorder's office. *See* 1893 Ariz. Sess. Laws No. 86, § 2. In addition, the laws of 1893 required that after posting and filing a notice of intent, would-be appropriators must:

> within a reasonable time thereafter construct their dam or dams, reservoir or reservoirs, canal or canals . . . and shall after such construction use reasonable diligence to maintain the same for the purpose in such notices specified, and on failure . . . within a reasonable time after posting and filing of such notice or notices as herein provided to construct such reservoir, dam or canal as in such notice specified or to use reasonable diligence after such construction to maintain the same, shall be held to work a forfeiture of such right to the water or waters attempted to be appropriated.

Id.

Section 2 of the 1893 Code was subsequently codified in 1913 as Section 5338 ("Section 5338"),[4] and provided for the "forfeiture" of rights to water "attempted to be appropriated" where a person had failed, within a reasonable

[4] Ariz. Laws 1913, § 5338. For consistency's sake, Section 5338 of the 1913 Code and Section 2 of the 1893 Code will be referred to as Section 5338, despite the fact that most of the cases addressing this section were decided prior to 1913.

time, to construct the necessary diversion works, or, thereafter, failed to exercise reasonable diligence in maintaining those works. Section 5338 was the first statute in Arizona state history to provide for the loss of water rights under any theory. Section 5338 remained in effect until the enactment of the 1919 Water Code, when the statutes were substantially rewritten to provide for the issuance of a permit as the sole means for acquiring an appropriative water right.[5]

In *Gila Water Co. v. Green*, 27 Ariz. 318, 232 P. 1016 (Ariz. 1925), the Arizona Supreme Court had occasion to interpret Section 5338.[6] Defendant Gila Water Company's predecessor in interest had obtained a right to construct a dam across the Gila River after complying with the laws of the Territory of Arizona in 1893, and constructed the dam in 1893-94. *Green I*, 27 Ariz. at 322, 232 P. at 1017. The dam washed out, however, within one year after its construction. *Id*.

The dam site and its associated rights were conveyed to the Gila Water Company in 1901. *Id*. at 320-21, 232 P. at 1016. Gila Water Company then

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[5] Ariz. Rev. Stat. § 45-160 ("Section 45-160"), which was added in 1919, is the progeny of Section 5338. Section 45-160 currently provides that an appropriator must construct his diversion works beginning within two years after agency approval and ending no later than five years after agency approval. *Id*. As enacted in 1919, Ariz. Rev. Stat. § 45-160 required the construction of diversion works to begin within one year of agency approval. Ariz. Rev. Stat. § 45-160 (1919).

[6] The Arizona Supreme Court heard and decided the case twice. *See Gila Water Co. v. Green*, 27 Ariz. 318, 232 P. 1016 (Ariz. 1925) ("*Green I*"); *Gila Water Co. v. Green*, 29 Ariz. 304, 241 P. 307 (Ariz. 1925) ("*Green II*"). The factual background is set forth by the Court in *Green I*.

became involved in litigation over its predecessor's right to construct a dam under the 1893 Code, in both the territorial courts and federal courts. *Id*. at 322, 232 P. at 1017. This litigation was not concluded until 1913, and in 1919 Gila Water Company constructed a new dam at the site where the earlier dam had washed out. *Id*. at 322-23, 232 P. at 1017.

Thereafter, plaintiff filed suit against the Gila Water Company for damages caused by flooding of the plaintiff's land. *Id*. at 320, 232 P. at 1016. A trial was held on the following issues: ". . . whether or not the defendant Gila Water Company had a right to maintain, [or] had ever had a right to maintain a dam at the place indicated; and [whether] . . . if it ever did have a right to maintain a dam, such a dam as it now has at the point, that right has ever been lost by abandonment." *Id*. The case was submitted to a jury, which found in favor of plaintiff.

In *Green I*, the Court held that the defendant had a right to construct the original dam in 1893 "by compliance with the statutes of the territory relating to the appropriation of water and the actual construction of the first dam in 1893. When the predecessors in interest of the defendant . . . had done this, they had rights to the water and reservoir sites which the laws and the Courts of the territory recognized. . . ." *Green I*, 27 Ariz. at 323, 232 P. at 1017. In addition, the Court held that the defendant lacked the requisite intent to abandon its rights to the water

and dam site because defendant had "consistently and stubbornly fought for these rights through the territorial courts, the Supreme Court of the United States and the Department of Interior from the year 1902 . . . until the year 1913. . . ." *Id*. at 328, 232 P. at 1019. The Court failed to address the issue of whether, in failing to maintain the original dam or construct a new dam within a "reasonable time," the defendant lost its rights pursuant to Section 5338.

In *Green II*, the Supreme Court reaffirmed its earlier conclusions regarding the abandonment of defendant's water rights. *Green II*, 29 Ariz. at 306, 241 P. at 308. The Court noted, however, that the trial court failed to address the question of whether the defendant had forfeited its right to construct a new reservoir. *Id*. The Court therefore reversed and remanded the case for a new trial on that issue. In reaching its decision, the Court stated:

> While we adhere to the rules of law concerning abandonment as declared in the former opinion, yet there is another question which was not considered at all; that is, the question of forfeiture. There is a fundamental distinction between an abandonment and a forfeiture. While to create an abandonment there must necessarily be an intention to abandon, yet such an intention is not an essential element of forfeiture in that there can be a forfeiture against and contrary to the intention of the party alleged to have forfeited.
>
> . . .
>
> As to whether there has been a forfeiture there is no question of intention involved. It is merely a question of whether, as provided by paragraph 5338 . . . the appellant **since the destruction of the original dam has used due diligence**

> **under all circumstances of the case to reconstruct and maintain the same.**

Id. (emphasis added). As interpreted by the court in *Green II*, a forfeiture could only occur under Section 5338 if the appropriator failed to use due diligence to construct and maintain the works required to put the water to beneficial use. If forfeiture due to nonuse alone was authorized under Arizona law at the time *Green II* was decided then it certainly would have applied as the water had not been put to beneficial use for a period of approximately **twenty-six** years (1893-1919). Clearly this was not the case, and forfeiture under Section 5338 could only occur as stated in *Green II*.

Although a few Arizona cases decided prior to the *Green* decisions generally address the issues of abandonment of water rights or loss by adverse possession, no judicial decision before or after the *Green* decisions directly have interpreted the language of Section 5338, which was the only statute prior to 1919 that allowed for the forfeiture of a water right, or otherwise analyzed forfeiture under Arizona law. *See, e.g., Gould v. Maricopa Canal Co.*, 8 Ariz. 429, 76 P. 598 (Ariz. 1904) ("[A right of appropriation] may be lost by abandonment, or it may be lost to another by adverse use on the part of the other, continued for a period of the statute of limitations, and in no other way"); *Sullivan v. Jones*, 13 Ariz. 229, 108 P. 476 (Ariz. 1910) (holding that defendant had not abandoned his water rights, despite a period of nonuse after defendant's dam was destroyed by floods). Although

Section 2 of the 1893 Code existed when *Gould* and *Sullivan* were decided, neither case makes reference to the existing statute. Because the *Green* cases address both common law abandonment and "forfeiture" under Section 5338, they represent the best picture of the law of forfeiture vis-à-vis other theories prior to the enactment of the 1919 Surface Water Code.[7]

Based on the review of the law as it existed prior to 1919, an appropriative right could be relinquished due to abandonment, which required intent to abandon the right coupled with an undefined term of nonuse, adverse possession, or by failing to utilize due diligence to construct or maintain the works required to put the right to beneficial use. No provision in any statute or court decision in any case allowed for the forfeiture of a vested water right through nonuse alone.

B. The Disclaimer Provisions in the 1919 Water Code Make it Clear that the Forfeiture Provisions Were Not Intended to Apply to Vested Pre-1919 Rights.

Section 45-141(C) of the Arizona Revised Statutes ("Section 45-141(C)") was enacted as part of the 1919 Water Code. As originally enacted in 1919, Section 45-141(C) provided that "[w]hen the owner of a right to use the water ceases or fails to use the water appropriated for five years, the rights to the use

[7] Two more recent decisions cite *Green II* for the distinction between abandonment and forfeiture under Arizona law. *See San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 207, 972 P.2d 179, 191 n.7 (Ariz. 1999); *Phelps Dodge Corp. v. Department of Water Resources*, 211 Ariz. 146, 151, 118 P.3d 1110, 1115 (Ariz. Ct. App. 2006).

shall cease, and the water shall revert to the public and shall again be subject to appropriation." Unlike "forfeiture" as it existed under Section 5338 and *Green II*, Section 45-141(C) is by its terms a pure forfeiture statute in that simple nonuse of a water right for a period of five years results in the loss of an appropriator's water right.

As originally enacted in 1919, Section 45-141(C) included a disclaimer immediately following the five-year nonuse provision: "But nothing herein contained shall be so construed as to take away or impair the vested rights which any person, firm, corporation or association may have to any water at the time of passage of this act." Ariz. Rev. Stat. § 45-141(C) (1919). A similar disclaimer, intended to apply to the entire 1919 Water Code, was concurrently enacted as in Ch. 164, § 56.[8] This second provision, which is now codified in Section § 45-171 of the Arizona Revised Statues ("Section 45-171"), read as follows:

> Nothing in this act contained, shall impair the vested rights of any person, association or corporation of the use of water. . . . Nor shall the rights of any person, association or corporation to take and use water be impaired or affected by any of the provisions of this act where appropriations have been initiated prior to the filing of this act in compliance with laws then existing. . . .[9]

[8] 1919 Ariz. Sess. Laws.

[9] *Id*. Currently, the disclaimer in Section 45-171 reads in relevant part: "Nothing in this chapter shall impair vested rights to the use of water [or] affect relative priorities to the use of water determined by a judgment or decree of a court."

The purpose of the two disclaimers is clear when considering the sweeping changes ushered in by the 1919 Water Code. The 1919 Water Code drastically changed the legal requirements for acquiring an appropriative right to begin with and set a much stricter standard through which water rights could be lost by forfeiture. The Legislature recognized the need for a "grandfather clause" to protect the vested rights of those who had relied upon pre-existing appropriation laws. Accordingly, the Legislature specifically added the disclaimer in Section 45-141(C) to permanently exempt prior rights from the forfeiture provision, and added the more comprehensive disclaimer to protect against the impairment of pre-code rights by the other newly enacted provisions of the Code.

The vested rights disclaimer contained in Section 45-141(C) was subsequently removed from the Water Code in 1928 as part of a legislative reorganization, leaving only the general disclaimer that is now contained in Section 45-171 (albeit in a modified form). However, as explained below, the removal of the disclaimer as part of the 1928 reorganization was not intended to modify the law in any way. In 1925, the Legislature approved legislation to appoint a Code Commissioner to "revise and codify the laws of the State of Arizona. . . ." *See* 1925 Ariz. Sess. Laws, Ch. 35, p. 106. The 1925 legislation permitted the Commissioner to "harmonize [the law] where necessary, reduce in language and remove inconsistencies"; however, the Commissioner was prohibited from

exercising "legislative power." *Id*. Accordingly, the Code revision process was not designed to change the intent or content of the prior law. *See Washington v. Maricopa County, Arizona*, 152 F.2d 556, 559, *cert. denied*, 327 U.S. 799 (9th Cir. 1945) ("[T]he purpose of the 1928 code was to condense language and avoid redundancy. The presumption has been indulged that when a word, a phrase or a paragraph from the 1913 code is omitted from the code of 1928, the intent is rather to simplify the language without changing the meaning, than to make a material alteration in the substance of the law itself"); *State v. Glenn*, 60 Ariz. 22, 28-29, 131 P.2d 363, 366 (Ariz. 1942) ("We have held repeatedly that unless a change in the language of the 1928 code clearly shows that the legislature intended to make a change in the meaning of a previous law, it will be presumed that the change was in form only and that the substance of the previous law was still in effect").

Thus, the Legislature's removal of the disclaimer in Section 45-141(C) was not designed to lessen the protection provided vested pre-1919 rights, which remained protected against forfeiture by the remaining general disclaimer provision now contained in Section 45-171.

C. *San Carlos Apache Tribe* did not Address Section 45-141(C)'s Applicability to Vested Pre-1919 Rights.

In 1995, the Legislature amended numerous portions of the Water Code. Section 45-141(C) was amended by adding the sentence: "This subsection or any

other statutory forfeiture by nonuse shall not apply to a water right initiated before June 12, 1919."

In *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195 (1999), the Supreme Court dealt with the constitutionality of the 1995 amendments. Regarding the amendment to Section 45-141(C) the Court held:

> Section 45-141(C) eliminates any possibility of forfeiture for rights initiated before June 12, 1919. If applied retrospectively, this too creates a new and unconstitutional protection for pre-1919 water rights, that may have been forfeited and vested in others under the law existing prior to 1995. Forfeiture and resultant changes in priority must be determined under the law as it existed at the time of the event alleged to have caused the forfeiture.

Id. at 206, 972 P.2d at 190.

The Supreme Court's decision in *San Carlos Apache Tribe*, which invalidated the 1995 amendments to Section 45-141(C) and other provisions of the Water Code, was compelled by the court's conclusion that "[s]ubstantive rights and consequent priorities cannot be determined by statutes subsequently enacted, especially those enacted while the case is pending before the court." 193 Ariz. at 206, 972 P.2d at 190. Applying this principle, the Court held that pre-1919 Arizona law, not the 1995 amendment, must be applied to determine whether nonuse of water before 1919 would result in the loss of a water right. *Id*. Contrary to Appellants' assertions, the Court did not attempt to interpret pre-1919 Arizona law, and, specifically, did not explore the parameters of the law of abandonment

and forfeiture before enactment of the 1919 Water Code. Therefore, the Court did not address whether a pre-1919 water right might be subject to forfeiture under the provisions of Section 45-141(C), or whether the right was subject to "forfeiture" as that term was defined in the 1893 Code, Section 5338. These questions were left to the trial courts (including the Globe Equity court) to decide, in the context of live controversies with particularized facts.[10] Accordingly, *San Carlos Apache Tribe* provides no guidance on the question of whether Section 45-141(C) applies to vested pre-1919 rights.

D. The District Court Correctly Relied on *Manse Spring.*

In *In re Manse Spring and its Tributaries*, 60 Nev. 280, 108 P.2d 311 (Nev. 1940), the Supreme Court of Nevada refused to apply a forfeiture statute enacted in 1913 to pre-existing water rights. The Nevada statute at issue in *Manse Spring* contained a "vested rights" disclaimer very similar to that set forth in Section 45-141(C):

> Nothing in this act contained shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this act where appropriations have been initiated

[10] In choosing to invalidate the provision, the court may have been concerned that the 1995 Amendment, which shielded pre-1919 rights from "any" form of forfeiture, might result in the revival of inchoate rights initiated before 1919 but lost under Section 5338 for failure to construct or maintain dams or other works. However, in the absence of a specific, pending claim or dispute triggering the application of these statutory provisions, the decision in *San Carlos Apache Tribe* refrained from construing any provision of pre-1919 Arizona water law.

> in accordance with law prior to the approval of this act. Any and all appropriations based upon applications and permits now on file in the state engineer's office, shall be perfected in accordance with the laws in force at the time of their filing.

The Court relied upon the vested rights disclaimer as a basis for exempting preexisting rights from the 1913 statute, reasoning:

> [T]he simple question here is: Can a right be impaired by providing a different method for its loss than had heretofore existed? We think it will be conceded that loss by forfeiture presents a much stricter and more absolute procedure than loss by abandonment. Prior to 1913 the law said that the water users of that day would have and hold the use of such water until the same should be abandoned, and . . . in abandonment the intent of the water user is controlling. To substitute and enlarge upon that by saying that the water user shall lose the water by failure to use it for a period of five years, irrespective as to intent, certainly takes away much of the stability and security of the right to the continued use of such water.

Id. at 285, 108 P.2d at 316. The district court's reliance on *Manse Spring* is entirely appropriate as it is directly on point with the questions raised in this matter.[11] In *Manse Spring*, the Court refused to apply a stricter standard of statutory forfeiture to vested rights that previously had only been subject to abandonment, as such an application would be destabilizing. Here, the district court correctly concluded that applying Section 45-141(C) to vested pre-1919 rights that were only subject to "forfeiture" where the right holder failed to construct or maintain its works would be equally destabilizing.

[11] As noted by the district court, this Court has upheld the decision in *Manse Spring* on multiple occasions. ER 41.

In concluding that the vested rights provision of the 1913 statute precluded the application of forfeiture principles to preexisting water rights, the Nevada Court cautioned that its holding did not exempt such rights from the requirement of beneficial use. Rather, the Court emphasized that "such rights have been left in a condition where courts must determine the intent of the claimant, and in determining such intent, as to whether abandonment has taken place, may take such nonuse and other circumstances into consideration, and have the right to and will check a continued wanton and willful waste of water." *Id*.

E. Article 17, Section 2 of the Arizona Constitution Protects Rights That Vested Prior to 1912 From Forfeiture under Section 45-141(C).

Aside from the district court's analysis regarding the application of Section 45-141(C) to pre-1919 rights, an additional reason exists that Section 45-141(C) cannot apply to rights vesting prior to the ratification of Arizona's Constitution in 1912. Article 17, Section 2 of the Arizona Constitution ("Section 2") reads: "All existing rights to the use of any of the waters in the state for all useful or beneficial purposes are hereby recognized and confirmed." There is no case law interpreting the provision; however, the records of the 1912 Constitutional Convention provide some insight into its meaning. In a speech before the Convention, Mr. Orme, the primary author of Section 2, made the following comments:

> In drawing this bill, I went to the legal lights of the territory, the men who have passed upon all the cases of water rights in the

> territory, Judge Kent for one, and other judges. They drew these articles as you see them, according to every decision that has been rendered in this territory, and it is those decisions that we wish to protect and forever bar such litigation as that with which we have been burdened for years and years.
>
> . . .
>
> There is nothing in the whole proposition that any man can take exception to. It is all fundamental law pure and simple. . . . All the laws in this territory [regarding water appropriations] are purely judicial and this ratifies and confirms all of the judicial rulings heretofore.[12]

Based upon the comments of Mr. Orme and the language of Section 2 itself, there are two interpretations of this provision that would protect rights that vested prior to 1912 from forfeiture under Section 45-141(C). The first interpretation would view Section 2 as freezing Arizona water law as of 1912. Under this view, any subsequent legislation inconsistent with the state of the law in 1912 would be invalid. Because the forfeiture of water rights as set forth in Section 45-141(C) was not recognized in 1912 water law, the Legislature's subsequent enactment of that provision in 1919 would be invalid and unconstitutional.

A second, and more likely, interpretation of Section 2 is that the provision "constitutionalized" water rights existing in 1912 such that these rights could not be abrogated by subsequent legislation. Under this interpretation, Section 45-141(C) would be invalid to the extent that it impairs water rights existing in 1912. This interpretation is supported by the fact that the drafters of Section 2 apparently

[12] *Arizona Constitutional Convention Journal*, at 484, 515 (1925).

sought to preserve the validity of judicial decisions regarding water law made prior to 1912. The comments of Mr. Orme suggest that the drafters were also interested in establishing certainty regarding existing water rights. It follows that the drafters would have wanted to prevent subsequent legislation from calling into question past water use practices or eroding the laws that had been relied upon in acquiring their water rights. Accordingly, to the extent that Section 45-141(C) abrogates or impairs the legal principles under which a water right was acquired or maintained prior to 1912, Section 45-141(C)'s application to that right would be unconstitutional under Section 2.

Under either interpretation, the provisions of Section 2 would protect pre-1912 vested rights from application of Section 45-141(C).

CONCLUSION

The 1919 Water Code fundamentally changed the law of forfeiture in Arizona. Prior to its enactment, a water right was subject to forfeiture only if the water right holder failed to construct or maintain its associated works. After 1919, a water right was subject to forfeiture simply due to five years of nonuse. Recognizing this fundamental change, the Legislature intended to protect pre-1919 vested water rights with two separate savings clauses in the 1919 Water Code. Although the savings clause specifically included with the forfeiture provision was later merged with the comprehensive savings clause, the intent remained to protect

pre-1919 vested rights from the forfeiture provision of the 1919 Water Code. Moreover, water rights vesting prior to 1912 are afforded additional protection against forfeiture under the Arizona Constitution. For these reasons, this Court should therefore uphold the district court's decision in this regard.

Respectfully submitted.

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April 22, 2015

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)B) because this brief contains 5716 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2010 with 14-point Times New Roman font.

/s/ John B. Weldon Jr.
John B. Weldon, Jr.

April 22, 2015

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I certify that, on April 22, 2015, I electronically filed the foregoing Brief of Amici Curiae with the Clerk of the court of for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served via the CM/ECF system.

/s/ John B. Weldon Jr.
John B. Weldon, Jr.

April 22, 2015