

Nos. 14-16942, 14-16943, 14-16944, 14-17047, 14-17048, 14-17185

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

GILA RIVER INDIAN COMMUNITY and
SAN CARLOS APACHE TRIBE OF ARIZONA,
Intervenors-Plaintiffs-Appellants-Cross-Appellees,

v.

FREEPORt MINERALS CORP.,
Defendant-Appellee-Cross-Appellant,

GILA VALLEY IRRIGATION DISTRICT, et al.,
Defendants-Appellees.

*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*

**JOINT SUPPLEMENTAL BRIEF OF APPELLANTS
GILA RIVER INDIAN COMMUNITY, SAN CARLOS APACHE
TRIBE OF ARIZONA, AND UNITED STATES OF AMERICA**

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INTRODUCTION

On January 26, 2017, this Court directed the parties to “identify[] the specific sever and transfer applications and objections that have not been voluntarily withdrawn and, thus, over which this court may have jurisdiction apart from any certification issues under Federal Rule of Civil Procedure 54(b).” As detailed below, Appellants Gila River Indian Community (“Community”), San Carlos Apache Tribe of Arizona (“Tribe”), and the United States of America represent that of the 419 sever and transfer applications originally filed by various parties, the district court’s adjudication of the following 24 applications and/or counterclaims related to those applications are before this Court on appeal: Applications 114, 115, 117, 118, 121, 122, 126, 131, 132, 133, 134, 135, 138, 146, 147, 148, 149, 150, 151, 153, 155, 156, 162, and 166. The remaining 395 applications and related counterclaims were voluntarily withdrawn, voluntarily dismissed without prejudice, or not appealed.

ARGUMENT

This Court has jurisdiction to review the district court’s denial of 17 of the 59 applications filed by Cross-Appellant Freeport Minerals Corporation (“Freeport”) and to review the district court’s adjudication of counterclaims that were filed in the form of objections by the Community, the Tribe, and the United States related to 10 of Freeport’s applications.

In its August 2010 Order, the district court denied the ten Freeport “test” applications on various grounds, and (with one exception) denied Appellants’ forfeiture and abandonment counterclaims related to those applications. *See* Appellants ER75-79; Community & Tribe Principal Br. 11-15. Following the withdrawal of 29 other Freeport applications, Appellants ER255 n.1, the district court in September 2011 denied Freeport’s remaining 20 applications based on certain grounds set forth in the district court’s August 2010 Order, *id.* at 256-258. In January 2014, Appellants voluntarily dismissed the counterclaims associated with those 49 withdrawn or denied applications. *Id.* at 141.

At issue on appeal are applications and related counterclaims that fall into two partially overlapping categories. *First*, Appellants appeal the denial of counterclaims to the ten applications adjudicated in the district court’s August 2010 Order. *Second*, Freeport cross-appeals with respect to 18 applications: 17 for the denial of the application (*i.e.*, for reasons unrelated to forfeiture and abandonment); and 1 for the partial grant of an abandonment counterclaim.

1. Appellants appealed the denial of forfeiture counterclaims associated with Applications 115, 118, 122, 133, 138, 147, 150, 151, 162, and 166—*i.e.*, the ten applications adjudicated in the district court’s August 2010 Order. *See* Appellants ER38-42, 75.

The appeal also concerns the denial of abandonment counterclaims associated with five of those ten applications. *See* Appellants ER42-50, 75-79. Specifically, the Community, the Tribe, and the United States appealed on abandonment with respect to Applications 122, 151, and 162. The United States additionally appealed on abandonment with respect to Applications 147 (partially denied) and 150. *See* Community & Tribe Principal Br. 13 & n.3; United States Principal Br. 19-20.¹

¹ Freeport states in its principal brief (at 25-26), as clarified by errata, that it chose not to appeal the denial of six of the ten applications—*i.e.*, Applications 115, 118, 122, 133, 151, and 166—because after trial it executed covenants not to irrigate the parcels from which rights would be severed. This does not affect the appeal of the *counterclaims*, which *are* before the Court, consistent with the district court’s (unchallenged) ruling that a counterclaim is preserved where an application is withdrawn, *see* Appellants ER257. While Freeport characterizes its decision not to appeal as a question of “moot[ness],” Freeport Principal Br. 25, the counterclaims have not been “moot[ed].” As Freeport admits, its covenants are attempts to comply with “the UV Forbearance Agreement, which required that the [Upper Valley Defendants] *reduce* the total number of [irrigable acres] in the Upper Valleys.” *Id.* (emphasis added). To the extent the Court holds that Decree rights covered by Freeport’s covenants had already been abandoned or forfeited at the time of trial, Freeport’s subsequent covenants will not have reduced the number of irrigable acres in the Upper Valleys, and Freeport and the Upper Valley Defendants will be required to identify additional lands not to irrigate in order to comply with the UV Forbearance Agreement.

In any event, because there are no covenants associated with Applications 138, 147, 150, and 162, it is undisputed that this Court has jurisdiction to resolve the forfeiture and abandonment issues raised by Appellants by virtue of the counterclaims related to those applications. Therefore, this Court can leave for the district court to address in the first instance how this Court’s rulings on the legal issues of abandonment and forfeiture apply with respect to other applications.

2. Freeport's cross-appeal concerns the district court's rulings related to 18 applications: Applications 114, 117, 121, 126, 131, 132, 134, 135, 138, 146, 147, 148, 149, 150, 153, 155, 156, and 162.

Specifically, Freeport cross-appeals the denial of 17 of those applications (*i.e.*, all but Application 147). Three of those applications (138, 150, and 162) were denied in the district court's August 2010 Order. Fourteen of those applications (114, 117, 121, 126, 131, 132, 134, 135, 146, 148, 149, 153, 155, and 156) were denied by the district court in September 2011.²

With respect to Application 147, Freeport's cross-appeal is limited to the district court's (partial) grant of the abandonment counterclaim associated with that application in the August 2010 Order; Freeport does not challenge denial of the application itself. *See* Freeport Errata 1.

CONCLUSION

For the foregoing reasons, this Court has jurisdiction over the appeal of the district court's denial of counterclaims relating to Applications 115, 118, 122, 133, 138, 147, 150, 151, 162, and 166. This Court also has jurisdiction over the cross-appeal of the district court's denial of Applications 114, 117, 121, 126, 131, 132, 134, 135, 138, 146, 148, 149, 150, 153, 155, 156, and 162, as well as the cross-

² Although the district court in September 2011 denied 20 applications, *see* p. 2, *supra*, Freeport limited its cross-appeal from that ruling to 14 applications. *See* Freeport Principal Br. 26.

appeal of the district court's partial grant of the abandonment counterclaim associated with Application 147.

February 9, 2017

Respectfully submitted,

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Pursuant to Circuit Rule 25-5(f), I attest
that Appellants San Carlos Apache Tribe
of Arizona and United States of America
concurs in the content of this filing.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation set by the Court in its January 26, 2017 Order because this brief contains 1,011 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/Pratik A. Shah

Pratik A. Shah

CERTIFICATE OF SERVICE

I hereby certify that, on February 9, 2017, I electronically filed the foregoing Supplemental Brief with the Clerk of the Court 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/Pratik A. Shah

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