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-Appellee,

and

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

v.

GILA VALLEY IRRIGATION DISTRICT, *et al.*,
Defendants-Appellees-Cross-Appellants,

FREEPORT MINERALS 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

PRINCIPAL AND RESPONSE BRIEF OF APPELLEE-CROSS-APPELLANT FREEPORT MINERALS CORPORATION

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CORPORATE DISCLOSURE STATEMENT

Freeport Minerals Corporation, formerly known as Freeport-McMoRan Corporation, is a subsidiary of Freeport-McMoRan Inc., a publicly traded company. Freeport-McMoRan Inc. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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JURISDICTIONAL STATEMENT

Appellee and cross-appellant Freeport Minerals Corporation ("Freeport") agrees with the jurisdictional statement submitted by the Gila River Indian Community and the San Carlos Apache Tribe. The District Court entered final judgment on September 4, 2014, and Freeport timely filed a notice of appeal on October 6, 2014.

ISSUES PRESENTED FOR REVIEW

1. Did the District Court correctly determine that statutory forfeiture does not apply to vested rights established before the forfeiture statute was enacted as part of Arizona's 1919 Water Code?

2. Did the District Court correctly determine that evidence that agricultural fields were not irrigated because they were rendered unsuitable for cultivation is insufficient to prove by clear and convincing evidence that the water right holder intended to abandon the water right?

3. In holding that Freeport intended to abandon a portion of a water right, did the District Court err in applying legal presumptions against Freeport and in failing to evaluate Freeport's evidence of its intent to protect its water rights?

4. Did the District Court err in finding that Freeport's demonstration that the Tribe's rights are protected by its right to place a call on Freeport's junior rights and by the District Court's Water Quality Injunction was insufficient to meet Freeport's initial, *prima facie* burden of no harm?

5. Did the District Court abuse its discretion in denying Freeport's request to amend its applications to conform to the evidence that was fully and fairly litigated at trial?

"*Water litigation is a weed that flowers in the arid West*."[1]

STATEMENT OF THE CASE

In Arizona, as throughout the arid West, water is our lifeblood, our most cherished resource. The notion underlying Appellants' claims, that an entire community of farmers in eastern Arizona actually intended to relinquish their decreed water rights, should be viewed with great skepticism.

This appeal involves important issues of vested property rights and federal deference to state water law. Federal interests seek to deprive Arizona state law water users of water rights decreed to them 80 years ago. Their first step is to oppose efforts by water right holders to transfer their decreed irrigation water rights from lands that have been invaded by the Gila River during significant flooding events. As a result of the river's intrusion, these lands have become river bottom unsuitable for cultivation, and the water right holders seek to transfer the decreed rights to lands that can be cultivated.

The federal parties also seek to extinguish these decreed rights altogether. They do so by advocating a significant expansion of the application of forfeiture and abandonment rules under Arizona law. These federal parties urge these claims without risk to their own interests, because federal law shields their water rights from loss under state law concepts of forfeiture and abandonment.

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[1] *United States v. Orr Water Ditch Co.*, 256 F.3d 935, 940 (9th Cir. 2001).

To be clear, the federal parties ask this Court to change Arizona water law. When it introduced statutory forfeiture to Arizona water law, the Arizona Legislature expressly exempted existing vested rights. This exemption has been reaffirmed by the Legislature on multiple occasions, and to this day it remains an essential component of Arizona's Water Code. Despite the Legislature's clear intent, and contrary to the decisions of this Court, the federal parties advocate that forfeiture should apply to vested water rights that pre-date the Water Code.

The federal parties also seek to transform Arizona's law of abandonment. As declared by the Arizona Supreme Court, intent is the "paramount inquiry" of abandonment analysis under Arizona law.[2] Accordingly, neither nonuse nor lack of diligence results in abandonment unless it is proved, through clear and convincing evidence, that the right holder had an actual intent to abandon the right. However, the federal parties endeavor to uproot these fundamental principles of Arizona's law of abandonment, and replace them with a collection of legal presumptions that dispossess right holders of their vested property rights regardless of their actual intent to retain their water rights.

The United States Supreme Court and Congress have recognized the importance of affording significant deference in matters concerning state water law. *See, e.g., United States v. New Mexico*, 438 U.S. 696, 702 (1978). A decision

[2] *Gila Water Co. v. Green* ("*Green I*"), 232 P. 1016, 1019 (Ariz. 1925).

to dispossess Arizona water right holders of their decreed water rights would have wide-ranging, dire impacts throughout the state, and this is not the forum in which Arizona water law may be modified.

I. BACKGROUND

The proceedings below concerned 419 applications to sever and transfer decreed water rights established through the Globe Equity 59 Decree ("Decree"), a consent decree entered by the District Court in 1935 that quantifies rights to use certain waters of the Gila River. (E.R.2-3).[3]

On appeal, Freeport Minerals Corporation ("Freeport") appeals the District Court's denial of 17 applications to sever and transfer decreed water rights. Each of these applications would sever a decreed water right (or portion thereof) from one parcel (the "sever parcel") and transfer the water right to another parcel (the "transfer parcel") as provided for under the Decree. Freeport also appeals the District Court's determination that Freeport intended to abandon a portion of one of its decreed water rights.

Freeport also responds in opposition to the opening brief filed by the United States and the opening brief filed by the Gila River Indian Community (the "Community") and the San Carlos Apache Tribe (the "Tribe"). These federal parties, collectively referred to as the "Objectors," are the only parties that objected

[3] "E.R.2-3" refers to Appellants' Joint Excerpts of Record at pages 2-3.

to any of the 419 applications filed in 2008 seeking to sever and transfer Globe Equity water rights. As described below, the District Court correctly determined, consistent with extensive precedent from this Court, that statutory forfeiture does not apply to water rights initiated prior to the enactment of Arizona's 1919 Water Code. The District Court also correctly found that an incident outside of a landowner's control, *i.e.* an encroachment of the Gila River that renders a field unsuitable for cultivation, is insufficient to establish that the landowner intended to abandon the appurtenant decreed water right.

II. GLOBE EQUITY 59

In 1924, the United States Congress authorized the construction of Coolidge Dam across the Gila River to provide water to the San Carlos Irrigation Project ("SCIP"), which consists of approximately 50,000 acres of lands in the Community's reservation and 50,000 acres of land in the San Carlos Irrigation and Drainage District ("SCIDD"). 43 Stat. 475 (June 7, 1924); *see also* 39 Stat. 130 (May 8, 1916); *United States v. Gila Valley Irrig. Dist.*, 961 F.2d 1432, 1433 (9th Cir. 1992) ("*GVID IV*"). In 1925, the United States brought suit on its own behalf, and on behalf of the Community and the Tribe, to determine the relative rights of the parties to the main stem of the Gila River from 10 miles east of the Arizona border to the confluence of the Gila River with the Salt River. *GVID IV*, 961 F.2d at 1433; *see also Brooks v. United States*, 119 F.2d 636 (9th Cir. 1941). The

lawsuit came to be known as Globe Equity 59.

Many of the defendants named by the United States were farmers who had appropriated waters of the Gila River to irrigate their farmlands in the Safford Valley and the Duncan-Virden Valley. These lands extend eastward from Fort Thomas, Arizona to western New Mexico. These farming communities are known as the "Upper Valleys," and the defendant farmers and their successors (which include Freeport) are commonly referred to as "Upper Valley Defendants" or "UVDs."

The parties to Globe Equity 59 stipulated to a consent decree entered by the District Court on June 29, 1935. (S.E.R.768-890).[4] Among other provisions, the Decree establishes: (1) the parties' relative rights and priorities to use the natural flow of the mainstream of the Gila River; (2) the rights of the Community and SCIDD to water stored in San Carlos Reservoir; and (3) the apportionment rights of UVDs and certain other users to divert water in disregard of the rights of the United States, the Community, and SCIDD – but not in disregard of the Tribe's right – based on the amount of water stored in the reservoir. (*Id.*); *see also United States v. Gila Valley Irrig. Dist.* ("*GVID V*"), 31 F.3d 1428, 1437 (9th Cir. 1994); *United States v. Gila Valley Irrig. Dist.,* 920 F. Supp. 1444 (D. Ariz. 1996).

The Community is located the furthest downstream of the parties to the

[4] "S.E.R.768-890" refers to Freeport's Supplemental Excerpts of Record, filed concurrently herewith, at pages 768-890.

Decree. Its reservation is located south of Phoenix, Arizona, and upstream of the confluence of the Gila River and the Salt River. *In re Gen. Adjudication of All Rights To Use Water In the Gila River Sys. & Source* ("*Gila VIII*"), 224 P.3d 178, 183 (Ariz. 2010). The Community has the most senior right on the river, a time "immemorial" water right.

The Tribe's reservation is located just east of Globe, Arizona. The Tribe's 1846 priority water right is the second most senior decreed right on the river.

The UVDs' lands are upstream of the Community and the Tribe. The priorities of the UVDs' decreed rights range from the 1870s to the 1920s, junior to the rights of the Community and the Tribe.

Freeport was not an original party to the Decree. However, Freeport acquired various decreed water rights and appurtenant lands in the Upper Valleys beginning in 1997. As a UVD successor, all of Freeport's decreed rights are junior to the Tribe's decreed right.

III. THE DECREE

The Decree is organized by Articles. (S.E.R.768-890). Article V is the heart of the Decree. (S.E.R.780-853). For each decreed irrigation right, this Article sets forth the priority date and the number of acres that may be irrigated. For instance, Article V provides that the Community's decreed right has an "[i]mmemorial" priority date for the irrigation of "35,000" acres. (S.E.R.782).

Article V provides that the Tribe's decreed right has an "1846" priority date for the irrigation of "1,000" acres. (*Id*.).

The Community's appurtenant lands are described as the "Gila River Indian Reservation," and the Tribe's appurtenant lands are described as the "San Carlos Indian Reservation." (S.E.R.782). While their reservations are significantly larger than the 35,000 and 1,000 acreages to be irrigated by these parties' respective rights, the Decree does not describe the specific fields to which the rights are appurtenant. (*Id*.).

Similarly, the Decree describes the lands to which each UVD decreed right is appurtenant by the quarter-quarter section in which the farm is located, not by a legal description for a specific field. For instance, S.N. Holman, who is one of Freeport's predecessors in interest, was decreed a right to irrigate 20.70 acres of land located in the southeast quarter of the southwest quarter of Section 9, Township 7 south, Range 27 east, in Graham County, Arizona. (S.E.R.818). The Decree does not describe where S.N. Holman's appurtenant lands are located within the quarter-quarter section. (*Id*.).

Article VIII(3) addresses what is known as the Cosper's Crossing condition. (S.E.R.875). This Article authorizes UVDs to enter into an agreement that UVDs in the Duncan-Virden Valleys may irrigate with apportionment water in disregard of the apportionment rights of the downstream UVDs in Safford Valley. (*Id*.)

Article VIII(3) states that the right "of the United States to insist upon its priorities as defined and modified herein as against Duncan-Virden Valley Lands shall not be abridged by this provision." (*Id.*). Accordingly, "[i]f the Apaches issue an 1846 priority call, the Commissioner must cease diversions, as necessary, throughout the upper valleys until such call is satisfied." *Gila Valley Irrig. Dist.*, 920 F. Supp. at 1465, *aff'd*, 117 F.3d 425 (9th Cir. 1997).[5]

Article XI describes certain operational aspects of the Decree, including the method of calculating the amounts that can be diverted for each area "then being irrigated," and provisions allowing the rotation and stacking of water rights to create an adequate head for irrigation of fields. (S.E.R.880).

> Under this provision, UVDs are clearly entitled to stack water to which they are otherwise entitled so that an adequate head for irrigation results…. Thus, UVDs may engage in rotation with respect to water rights for fields "then being irrigated," by stacking water designated for several fields and using the water on one particular field….

United States v. Gila Valley Irrig. Dist., 804 F. Supp. 1, 18 (D. Ariz. 1992), *aff'd in part, vacated in part, GVID V*, 31 F.2d at 1438-40.

Article XI also specifically authorizes the sever and transfer of decreed rights. It allows landowners, "in accord with applicable laws and legal principles,

[5] The Decree includes additional restrictions on diversions in the Upper Valleys that protect the Tribe, including the requirement that the UVDs' actual consumptive use of decreed water shall not exceed 120,000 acre-feet per year. *Gila Valley Irrig. Dist.*, 920 F. Supp. at 1461 (describing protections contained in Article VIII(2)).

to change the point of diversion and the places, means, manner or purpose of the use of the waters to which they are so entitled or of any part thereof, so far as they may do so without injury to the rights of other parties as the same are defined herein." (S.E.R.880).

In 1993, the District Court adopted a rule governing the sever and transfer of decreed water rights ("Change in Use Rule"). (E.R.209-214). All of Freeport's applications were filed pursuant to Article XI and the Change in Use Rule.

IV. ADMINISTRATION OF THE DECREE

The Water Commissioner has administered the Decree since its entry. In addition to using the Decree itself, the Water Commissioner uses "Decree Cards" to administer the Decree. (S.E.R.496-498). The Water Commissioner's office created a Decree Card for each decreed right, and each Decree Card sets forth the information from the Article V Schedule of Rights for that right. Like the Decree, the Decree Cards describe each UVD water right by the quarter-quarter section. (*Id*.). When a transfer occurs, the Water Commissioner records the information on the applicable Decree Card and identifies the new place of use by quarter-quarter section. (S.E.R.499-500).

Until recently, the Water Commissioner always administered decreed water rights using only the quarter-quarter section legal descriptions in the Decree. (S.E.R.497-498, 906). In doing so, the Water Commissioner ensured that

landowners do not irrigate more acres with Gila River surface water in a quarter-quarter section than provided for under the Decree. (S.E.R.498).

Shortly after the Decree was entered, the first Water Commissioner considered preparing maps depicting the decreed lands. (E.R.8). He learned that the State Water Commissioner had prepared maps in the 1920s depicting irrigated fields in the Upper Valleys (the "1920s Maps"). The 1920s Maps had been incorporated into state court decrees known as the Jenckes Decree and the Ling Decree, but they were not mentioned in or incorporated by the Globe Equity Decree. (E.R.7).

Since acquiring the 1920s Maps, the Water Commissioner has used the 1920s Maps only to hand draw the locations of water transfers and for no other purpose. (S.E.R.512). The Decree Cards have always been the official record of water right transfers, not the 1920s Maps. (S.E.R.496-497, 499-500).

V. THEN BEING IRRIGATED

From the Decree's entry in 1935 until 1997, the Water Commissioner allowed each party to receive diversions based on decreed acreage, even if the party was not irrigating all of the decreed acreage at that time. *See Gila Valley Irrig. Dist.,* 804 F. Supp. at 16. Therefore, decreed parties were permitted to apply their full allocations to the portions of their decreed fields that were under cultivation. *Id.*

In 1992, the District Court held that parties could only receive diversions based on their respective decreed lands "then being irrigated" ("TBI"). *Id.* The District Court, "mindful of the fact that its determination of the issues [would] work a substantial change in the administration of the Decree," referred the issue to a rules committee to propose implementation procedures. *Id.* at 19. This process culminated in promulgation of "TBI regulations" that became effective in 1997. The TBI regulations provide that diversions are only allowed for decreed lands reported as "then being irrigated." (S.E.R.744-745). Notably, nothing in the TBI regulations required that parties conform their irrigation to the 1920s Maps.

The administration of the Decree was very different prior to the promulgation of TBI regulations. Before 1997, each farmer diverted the full amount of water for the farmer's full number of decreed acres, to the extent sufficient water was available, regardless of how many acres of the decreed land were actually being farmed. (S.E.R.520-521). This means that, for over 60 years, the Decree was administered such that if the Gila River encroached upon a party's field rendering a portion of it unsuitable for cultivation, that party was permitted to, and did, continue to receive the party's full entitlement to water under the Decree. This practice was the same for all parties, including the UVDs, SCIDD, the Community, and the Tribe. (S.E.R.520-524).

VI. THE WATER QUALITY INJUNCTION

In 1996, the District Court entered a Water Quality Injunction to ensure that water reaching the Tribe's reservation is of sufficient quality to grow moderately salt sensitive crops. (S.E.R.891). If water quality triggers certain thresholds, the Water Commissioner is directed to take steps to ensure that the decreed irrigators in the Safford Valley limit their diversions in accordance with the mandates of the injunction. (*Id.*).[6]

VII. THE PUMPING LITIGATION

In 1976, the United States filed a post-decree complaint against the UVDs alleging that they were pumping water from wells in violation of the Decree ("Pumping Complaint"). *GVID IV*, 961 F.2d at 1434. The Community and the Tribe intervened as plaintiffs. *Id.; GVID V*, 31 F.3d at 1432. Proceedings to determine whether the UVDs' pumping was in violation of the Decree were stayed until the Arizona Supreme Court ruled on issues concerning subflow, which involves the distinction between percolating groundwater and underground water closely associated with a stream that is treated as appropriable surface water. *United States v. Gila Valley Irrig. Dist.* ("*GVID III*"), 959 F.2d 242 (9th Cir. 1992).

[6] The Water Quality Injunction does not apply to the Duncan-Virden Valleys.

In 2000, the District Court lifted the stay on the Pumping Complaint after the Arizona Supreme Court issued a decision concerning subflow. (59-5034).[7] After a trial and motions for summary judgment were filed, the District Court ruled that the Supreme Court's decision on subflow applied to the Globe Equity 59 proceedings. (E.R.170). Most parties focused their efforts on completing a comprehensive settlement with the Community rather than litigating the Pumping Complaint.

VIII. THE GILA RIVER INDIAN COMMUNITY SETTLEMENT

Even before 1997, and continuing through 2004, numerous parties, including Freeport, other UVDs, and the Community, attempted to negotiate a comprehensive settlement of the Community's various water rights claims. (S.E.R.603-604). These efforts culminated in the Arizona Water Settlements Act of 2004, Pub. L. 108-451, which approved settlement of the Community's claims. (E.R.11). One component of the settlement is the UV Forbearance Agreement, an agreement among the Community, the United States on behalf of the Community, SCIDD, and the UVDs, including Freeport, that sought to resolve a myriad of issues relating to water uses in the Upper Valleys. (E.R.333-393; S.E.R.750-765). The UV Forbearance Agreement provides, in part, that the UVDs agree to limit certain water uses in the Upper Valleys, and that the Community, the United States

[7] "59-5034" refers to the Globe Equity 59 docket (4:31-cv-59-TUC-SRB) at Document Number 5034.

on behalf of the Community, and SCIDD agree to refrain from challenging certain groundwater pumping by the UVDs. (E.R.379-392; S.E.R.750-765). Over the Tribe's objections, the UV Forbearance Agreement was approved by the District Court on August 24, 2007. (59-6595). The Tribe sought appellate review, and this Court affirmed the District Court's approval of the UV Forbearance Agreement. *United States v. Gila Valley Irrig. Dist.* ("*GVID VII*"), 345 F. App'x 281, 284 (9th Cir. 2009).

The UV Forbearance Agreement authorized the UVDs to file applications within six months of the enforceability date to sever decreed water rights from lands not currently being cultivated, and to transfer the rights to so-called "Hot Lands." (E.R.393(¶11)). Hot Lands are non-decreed lands in the Upper Valleys that had been irrigated by decreed right holders for a defined period of years with water pumped from wells. (E.R.339(¶2.15)).[8] If a sever and transfer is successful, the Hot Lands that comprise the transfer parcel will become decreed lands. If an

[8] The Community asserts that Hot Lands "had been illegally irrigated" because they had no decreed rights. Brief p. 9. This is incorrect. Under Arizona's bifurcated water rights system, use of surface water is governed by the prior appropriation system. "Percolating groundwater, on the other hand, is not appropriable and may be pumped by the overlying landowner" in accordance with the doctrine of reasonable use. *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source* ("*Gila IV*"), 9 P.3d 1069, 1073 (Ariz. 2000). While the Community contends that Hot Lands had been irrigated with appropriable subflow, "[u]nderground waters are presumed to be percolating" groundwater, and "[o]ne who asserts that underground water is a part of a stream's subflow must prove that fact by clear and convincing evidence." *Id.* at 335, 9 P.3d at 1074.

application is unsuccessful, the UVDs agree to limit the amount of pumping to irrigate the Hot Lands. (E.R.347(¶2.32), 380-381(¶6.3)). This provision of the UV Forbearance Agreement was an important component of the consideration negotiated by the UVDs in exchange for their agreement to reduce various water uses in the Upper Valleys.

IX. FREEPORT'S LANDS AND APPLICATIONS

In 1997, Freeport began purchasing farmlands in the Upper Valleys. (E.R.287-88). Freeport purchased these lands for the sole purpose of obtaining decreed water rights, and Freeport has consistently acted to protect and maintain the decreed water rights associated with its farmlands. (S.E.R.539-540).

Freeport leases its lands to various farmers, and every lease requires that the farmer maintain and preserve the appurtenant decreed water rights. (*Id*.). Freeport has at all times paid all of its water assessments, has maintained its ditches, and has paid all operational costs for its decreed rights. (E.R.11). Freeport has also litigated to protect its decreed water rights in post-decree proceedings in the District Court. (*Id*.). These facts are all uncontested.

Freeport began working on its applications to sever and transfer water rights under the UV Forbearance Agreement no later than January 2008. (E.R.11). The Gila Valley Irrigation District ("GVID") and the Franklin Irrigation District ("FID"), which are the irrigation districts that serve the Upper Valleys, gave a

presentation to the UVDs about the sever and transfer application process. Based on this presentation, Freeport initially prepared its applications describing the lands in the same manner as the Decree, *i.e.* by quarter-quarter section. (E.R.291-293; S.E.R.533-534).

However, shortly before the deadline to file applications in accordance with the UV Forbearance Agreement, Freeport learned that the Water Commissioner would require more detailed descriptions and maps with each application. (E.R.293-294). The Water Commissioner did not, however, require that the maps and legal descriptions correspond to the 1920s Maps. (S.E.R.507-510).

Upon learning that more specific maps would be required, Freeport contracted with B.J. Raval, a consultant with GIS Southwest, to prepare maps containing metes and bounds descriptions for more than 100 sever and transfer parcels. (E.R.294-298).

Mr. Raval had previously been under contract with the Community to contribute to a mapping database of the Upper Valleys. (S.E.R.566-568, 587-588). Using information prepared for the Community, Mr. Raval worked with Freeport to attempt to identify inactive decreed acres, and to create maps and legal descriptions of specific sever and transfer parcels. (E.R.294-298).

Freeport filed 59 sever and transfer applications by the deadline provided in the UV Forbearance Agreement. In all, various UVDs filed a total of 419

applications to sever and transfer decreed water rights. The Community, the Tribe, and the United States on behalf of the Tribe (but not on behalf of the Community) objected to all of Freeport's applications, and to most or all of the applications filed by the other UVDs. (E.R.17).

The Community did not object on the basis of injury to its water rights. (E.R.75). Accordingly, the only party asserting injury from the proposed severs and transfers is the Tribe, whose Globe Equity right is (1) senior to all UVD water rights, (2) immune from UVD apportionment of stored water in disregard of priorities, and (3) protected by the Water Quality Injunction.

X. THE COMMUNITY DATABASE

The Community engaged consultant James Hardee to create a global information system ("GIS") database of irrigated lands in the Upper Valleys. (S.E.R.579-582). Mr. Hardee's work was, in part, a continuation of GIS and mapping work that Mr. Raval performed for the Community. (S.E.R.587-590). The database consists of several layers of information, including a grid reference system that is tied to township, range, section, and quarter-quarter section ("TRSQQ") line work, (S.E.R.547-548, 593), boundary line work from the Graham and Greenlee County assessor's offices, (S.E.R.598-599), aerial photography of the Upper Valleys, (S.E.R.548, 585), and the 1920s Maps. (S.E.R.549-550, 579-582).

The purpose of the database was to allow the Community to map sever and transfer parcels for the purpose of objecting with respect to parcels that did not match the 1920s Maps. (S.E.R.579-581).

XI. OBJECTIONS AND RULINGS CONCERNING SPECIFICITY, AND FREEPORT'S REVISED MAPS AND LEGAL DESCRIPTIONS

Over the course of several months, the Water Commissioner processed many of the 419 applications. In accordance with the Change in Use Rule, this process included the preparation and publication of a notice for each application, identifying, among other information, the decreed right, the sever parcel, and the transfer parcel. Consistent with the descriptions contained in the Decree, the sever parcel and the transfer parcel are identified only by quarter-quarter section. (S.E.R.511). This means that if an amendment to a sever parcel or a transfer parcel is made that reconfigures the parcel within the same quarter-quarter section, the land description contained in the Water Commissioner's notice remains accurate.

In May 2009, the District Court halted processing of the remaining applications. (E.R.152-153). Many of the objections to the processed applications involved allegations of forfeiture and abandonment. The Objectors also argued that the 1920s Maps are controlling with respect to the location of decreed acres.

The District Court decided to hear Freeport's applications first, and consolidated all of Freeport's applications into a sub-case of the Globe Equity proceeding referred to as "Globe Equity 61," Case Number CV-31-00061-SRB.

(E.R.152-153). The District Court then ordered that ten "test" applications be tried to the Court for purposes of establishing guidance on the disposition of the remaining applications filed by Freeport and the other UVDs. (E.R.300-304). The Court established that the Federal Rules of Civil Procedure "shall apply to all proceedings concerning this case." (E.R.300-301).

During this same timeframe, the District Court issued significant rulings in Globe Equity 59. In January 2009, GVID and FID filed a notice of termination identifying 1,000 acres to be permanently retired from irrigation. (S.E.R.61-77). This action was to fulfill one of the UVDs' obligations to the Community under the UV Forbearance Agreement. (E.R.358(¶5.2)). The lands to be retired were described in the notice using the identical quarter-quarter descriptions contained in the Decree. The Community, the Tribe, and the United States objected to the notice of termination because the descriptions of the decreed acres were not more specific. (59-7131, 7132, 7133).

On August 26, 2009, the Court denied the notice of termination without prejudice, ruling that it is necessary to identify the retired acres with greater specificity:

> Even though the [Globe Equity Decree's] Schedule [of water rights] does not describe the location of the acreage of land with more specificity than within a quarter-quarter section, the Decree does not state that the water rights established therein are not appurtenant to specific parcels of land. A Decree water right is not, and never has been, a right that floats within a tract of land larger than the land

through the irrigation of which the right was originally obtained.

(E.R.298). The UVDs, including Freeport, sought reconsideration of this ruling, relying on the descriptions contained in the Decree and case law indicating that water rights appropriated for purposes of farming, while appurtenant to land, are not necessarily restricted to a particular strip within the parcel. (59-7297,7298,7299,7301).[9]

In the meantime, however, Freeport set out to conform its sever and transfer applications to the District Court's post-application ruling about the specificity of the location of appurtenant lands, which would also address, and Freeport hoped would resolve, the mapping objections to the applications. Freeport representatives met multiple times with the Community's consultants to discuss the parties' respective mapping approaches. (S.E.R.597). The Community's consultants gave a presentation on the Community database, and arranged for a copy of the database to be provided to Freeport. (S.E.R.546A-553).

Using the Community's database, Freeport revised its sever and transfer maps and legal descriptions by reference to the 1920s Maps. (S.E.R.553-559). Freeport's new maps and legal descriptions were disclosed during the discovery phase of Globe Equity 61. (E.R.1:15). The revisions resulted in some reductions

[9] While irrigation water rights are appurtenant to specific land, water rights for municipal and industrial uses are not. (*See, e.g.,* Decree Art. V p. 57 (describing right decreed to Nevada Consolidated Copper Company) (S.E.R.825)).

of acreage and the elimination of some parcels, but all of the decreed rights remained the same. (*See e.g.*, E.R.24(¶67), 25(¶74) (Application138); E.R.28(¶107), 29(¶112) (Application 150); E.R.32(¶151), 33(¶157) (Application 162)). Moreover, all revised sever parcels and transfer parcels remained in the same quarter-quarter sections.

Because all sever parcels and transfer parcels remained in the same quarter-quarter sections, the land descriptions provided in the Water Commissioner's previously published notices for each of these applications remained accurate. If a new notice had been published, it would have contained the same description of the decreed right and the same descriptions of the sever and transfer parcels that were included in the original notice.

On November 17, 2009, the Objectors requested a status conference to discuss Freeport's revisions. (S.E.R.374). In response, Freeport detailed its efforts to prepare amended maps and legal descriptions following consultation with the Community's consultants and receipt of the database. (S.E.R.440). In their replies, the Objectors referenced the District Court's repeated rulings that the Federal Rules of Civil Procedure apply to the Globe Equity 61 proceedings, and asserted that Rule 15 was the appropriate mechanism to introduce the revised maps and legal descriptions. (S.E.R.475, 480, 486).

Noting that "the Objecting Parties have repeatedly requested more precise

legal descriptions," the Court denied the Objectors' request for a status hearing, stating that "one of the purposes of the discovery process is for the Objecting Parties to obtain the more precise legal descriptions," and directed the parties to continue with discovery. (S.E.R.491).

Thereafter, the Objectors' expert witnesses prepared supplemental expert reports addressing all of Freeport's revised maps and legal descriptions, including maps comparing the original parcels to the revised parcels, and maps depicting the revised parcels in relation to the 1920s Maps. (S.E.R.593-597, 611-612) .

The District Court conducted a bench trial from February 9 through 25, 2010. A significant portion of Freeport's case-in-chief was devoted to testimony concerning Freeport's revised legal descriptions and maps, including the rationale for selecting each parcel and the process of creating the revisions using the Community database. Likewise, the Objectors' experts testified at length concerning Freeport's revised maps and legal descriptions. (S.E.R.593-597).

In sum, Freeport's revised maps and legal descriptions were fully and fairly litigated. During closing argument, Freeport made a Rule 15 motion to amend its applications to conform to the evidence presented at trial, including with respect to the revised maps and legal descriptions. (S.E.R.642-643).

On August 3, 2010, the District Court issued an order ("August 2010 Order") denying all ten test case applications. (E.R.75-79). Freeport filed a notice

of appeal on September 2, 2010. (61-151).[10] No other party filed an appeal or cross-appeal from the August 2010 Order at that time. As the District Court recognized, the procedural setting posed a complex question concerning when district court orders "become final and appealable in post-decree adjudications." (61-158). Freeport's appeal was ultimately dismissed for lack of jurisdiction. (Memorandum dated March 19, 2012, Case No. 10-16968, p. 3). Final judgment has now been rendered on all 419 applications.

XII. FREEPORT'S APPLICATIONS AND WATER RIGHTS SUBJECT TO THIS APPEAL

After the District Court entered its August 2010 Order, Freeport executed and provided to GVID and FID two separate covenants not to irrigate certain lands ("Covenants"). (*E.g.* S.E.R.301). The Covenants, dated January 7, 2011 and December 29, 2011, were executed pursuant to the UV Forbearance Agreement, which required that the UVDs reduce the total number of "TBI Eligible Acres" in the Upper Valleys. Under the Covenants, Freeport agreed to retire certain decreed water rights and to refrain from irrigating certain lands. As a result of the Covenants, seven of the ten test case applications are now moot and are not subject to this appeal. These are Applications 2008-115, -118, -122, -133, -147, -151 and -166. Freeport seeks reversal of the District Court's denial of the other three test

[10] "61-151" refers to the Globe Equity 61 docket (4:31-cv-61-TUC-SRB) at Document Number 151.

case applications, which are Applications 2008-138, -150, and -162.

Of Freeport's 49 sever and transfer applications that were not among the 10 test cases, 35 are now moot because they were impacted by the Covenants or have otherwise been withdrawn. The remaining 14 applications were dismissed consistent with the District Court's August 2010 Order, with a full reservation of appellate rights, (E.R.254-258), and Freeport appeals from the dismissal of these applications. These are Applications 2008-114, -117, -121, -126, -131, -132, -134, -135, -146, -148, -149, -153, -155 and -156.

Freeport also appeals the District Court's ruling that Freeport abandoned 1.4-acres of the decreed water right that was the subject of Application 2008-147.

SUMMARY OF ARGUMENT

This Court should affirm the District Court's determination that statutory forfeiture for nonuse does not apply to vested water rights established prior to Arizona's 1919 Water Code. The Arizona Legislature included a savings clause stating that nothing in the 1919 Water Code would impair existing vested rights, and this Court's precedent establishes that such a provision exempts pre-code water rights from statutory forfeiture.

This Court should also affirm the District Court's determination that Freeport did not intend to abandon water rights appurtenant to lands that were invaded by Gila River when it changed course during significant flooding. These

river bottom lands have been rendered unsuitable for cultivation by acts of nature outside of Freeport's control, yet this is the Objectors' only evidence that Freeport intended to abandon these water rights. The evidence presented at trial establishing a contrary intent to protect and maintain these rights was overwhelming: Freeport purchased the farms to acquire their appurtenant decreed water rights; Freeport obligated its lessees by contract to protect the water rights; Freeport paid all taxes and assessments and maintained all of its ditches and canals; and Freeport has engaged in litigation and settlement efforts to protect its decreed rights.

However, in finding that Freeport abandoned a portion of one water right, the District Court erred by ignoring the forgoing evidence, and by imposing an improper legal presumption of abandonment for failure to file a transfer application within five years of construction of an improvement on Freeport's property. The District Court also erred in basing its erroneous legal presumption on aerial photography depicting uncultivated fields prior to 1997, and based on field configurations depicted on the 1920s Maps. The undisputed evidence establishes that, prior to 1997, all decreed right holders received their full allocations of water even if portions of their fields were uncultivated, and that the Decree was never administered according to the 1920s Maps. Freeport never intended to abandon these water rights.

The District Court also erred in denying Freeport's applications to sever and transfer water rights. First, the District Court created and imposed a new standard for presenting an initial *prima facie* case of no injury to the Tribe. Freeport satisfied its initial burden by presenting evidence concerning the significant protections afforded to the Tribe's senior right. The Tribe may place a call that results in a cessation of diversions by Freeport and all other UVDs as necessary in order for the Tribe to receive its water. The Tribe is immune from diversions based on apportionment rights, and the Tribe is also protected by the Water Quality Injunction entered by the District Court.

Second, the District Court also erred in imposing a cumulative impacts analysis that was derived, not from the Decree or the Change in Use Rule, but from a case discussing inapplicable standards under the National Environmental Policy Act ("NEPA").

Finally, the District Court erred in failing to allow Freeport to amend its applications to conform to the evidence that was fully and fairly litigated at trial.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RECOGNIZED THAT WATER RIGHTS PREDATING ARIZONA'S 1919 WATER CODE ARE NOT SUBJECT TO FORFEITURE

A. Standard Of Review

This Court reviews *de novo* the District Court's legal determination that forfeiture for nonuse does not apply to water rights initiated prior to enactment of

the 1919 Water Code. *Ortiz v. Bank of Am. Nat. Trust & Sav. Ass'n*, 852 F.2d 383, 387 (9th Cir. 1987) (interpretation of state law is reviewed *de novo*).

B. Forfeiture For Nonuse Did Not Exist In Arizona Until Enactment Of The 1919 Water Code

In their objections, the Objectors contended that Freeport forfeited numerous decreed water rights as a result of five years of consecutive nonuse pursuant to A.R.S. § 45-141(C). (*See, e.g.*, S.E.R.17, 85, 99). The District Court correctly denied these objections because Freeport's water rights were established prior to the 1919 Water Code's introduction of statutory forfeiture for nonuse.

Prior to the enactment of statutory forfeiture, water rights in Arizona could only be lost by abandonment or adverse possession. *See, e.g., Gould v. Maricopa Canal Co.*, 76 P. 598, 601 (Ariz. 1904). In *Gould*, the Territorial Supreme Court expressly held that a water right "may be lost by abandonment, or it may be lost to another by adverse user on the part of the other continued for the period of the statute of limitations, and in no other way." *Id.*

Forfeiture for nonuse was first introduced to Arizona water law through the enactment of the 1919 Water Code. The Code provided that a surface water right could be forfeited if the owner of the "right shall cease or fail to use the water appropriated for a period of five (5) successive years…." Laws of Ariz., ch. 164, §

1 (1919).[11]

The Arizona Legislature included an express "savings clause" in the statute, providing that the new forfeiture statute would not operate "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." Laws of Ariz., ch. 164, § 1 (1919). The Arizona Legislature also enacted a general savings clause in Section 56 providing that "*[n]othing in this act* contained, *shall impair the vested rights* of any person, association or corporation *to the use of water*." Laws of Ariz., ch. 164, § 56 (1919) (emphasis added). While the Section 1 savings clause was removed in 1928 to reduce length and redundancy (*see* Section I.E., *infra*), the general savings clause persists to this day. *See* A.R.S. § 45-171 (present codification of savings clause).

By enacting a savings clause as part of the newly enacted forfeiture provision and a savings clause concerning the act in its entirety, the Arizona Legislature evinced a clear intent that existing vested rights would not be subject to this impairment. Laws of Ariz., ch. 164, §§ 1 and 56 (1919). As discussed below, several Ninth Circuit opinions and decisions of Nevada courts interpreting

[11] The United States refers to earlier provisions relating to forfeiture for certain failures to diligently construct or maintain improvements. 1893 Ariz. Sess. Laws, No. 86, § 1; Ariz. Civ. Code §§ 5337, 5338 (1913). These statutes did not provide for forfeiture for nonuse of a water right once it was exercised. The concept of forfeiture for nonuse was first introduced through the enactment of the 1919 Water Code. Laws of Ariz., ch. 164, § 1 (1919).

Nevada's analytically identical forfeiture statute and savings clause support the District Court's determination that forfeiture for nonuse does not apply to pre-1919 water rights in Arizona.

C. Ninth Circuit Precedent Construing Directly Analogous Nevada Statutory Forfeiture Law Demonstrates That Forfeiture Does Not Apply to Pre-Code Water Rights

Judge Bolton was the first judge to address the forfeiture issue when she held that Arizona water rights that vested prior to 1919 are not subject to statutory forfeiture. (E.R.39, 42). However, Judge Bolton's holding is solidly based on this Court's repeated holdings that Nevada water rights that were initiated prior to 1913 are not subject to the statutory forfeiture provision of Nevada's 1913 Water Code. *See, e.g., United States v. Alpine Land & Reservoir Co.* ("*Alpine III*"), 983 F.2d 1487, 1495 (9th Cir. 1993); *United States v. Orr Water Ditch Co.*, 256 F.3d 935, 941-42 (9th Cir. 2001); *United States v. Alpine Land & Reservoir Co.* ("*Alpine VI*"), 340 F.3d 903, 914 (9th Cir. 2003); *United States v. Alpine Land & Reservoir Co.* ("*Alpine VII*"), 510 F.3d 1035, 1039 (9th Cir. 2007).

The introduction of statutory forfeiture for nonuse in Nevada through its 1913 Water Code is strikingly similar to the 1919 enactment of statutory forfeiture for nonuse in Arizona. Like Arizona, Nevada common law provided for abandonment of water rights, but did not recognize forfeiture for nonuse. *In re Manse Spring & Its Tributaries, Nye County* ("*Manse Spring*"), 108 P.2d 311, 315

(Nev. 1940) (recognizing that "prior to 1913 the law said that the water users … would have and hold the use of such water until the same should be abandoned."); *compare to Gould*, 76 P. at 601. As Arizona did with its 1919 Water Code, Nevada introduced forfeiture to its water law through its 1913 Water Code. Like Arizona's 1919 Water Code, Nevada's new law provided that a water right would be forfeited after five years of consecutive nonuse. Laws of Nev., ch. 140, § 8 (1913). Also as in Arizona, Nevada's Water Code contained a savings clause stating that "[n]othing contained in this chapter 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 chapter where appropriations have been initiated in accordance with law prior to March 22, 1913." Laws of Nev., ch. 140, § 84 (1913). As the District Court recognized, the Nevada savings clause is functionally equivalent to the savings clauses included in Arizona's 1919 Water Code. (E.R.40, 41).

In analyzing the effect of the savings clause, the Nevada Supreme Court concluded in *Manse Spring* that the forfeiture statute did not apply to water rights that vested prior to enactment of the 1913 statute, because that would impermissibly "impair" those water rights. 108 P.2d at 314-16. Rather, as in Arizona, preexisting rights could only be lost in accordance with the law in existence at the time of enactment of the 1913 Water Code, *e.g.* through intentional

abandonment. *Id.* at 316. The court reasoned that applying forfeiture to water users who had acquired their water rights at a time when those rights could only be lost through intentional abandonment "takes away much of the stability and security of the right to the continued use of such water." *Id.* The court recognized that the Nevada legislature included the savings clause in order to "refrain from infringing upon rights which had accrued at that time, so as to avoid any question of constitutionality of the [1913 Water Code]." *Id.* at 315.[12]

In *Eureka v. Office of State Engineer*, the Nevada Supreme Court reaffirmed its *Manse Spring* analysis, reiterating that "a forfeiture statute cannot be applied retroactively to impair vested water rights when, prior to the enactment of the forfeiture statute, those rights could have been lost only through abandonment." 826 P.2d 948, 951 (Nev. 1992) (*citing Manse Spring*, 108 P.2d at 315).

On several occasions, this Court has held that Nevada's forfeiture statute

[12] The United States cites *Texas Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 650 (Tex. 1971) for its rejection of *Manse Spring*. The Texas law applied in that case departs sharply in multiple respects from the relevant laws of Arizona and Nevada. First, whereas Arizona and Nevada expressly exempted existing rights from statutory forfeiture through the enactment of savings clauses, the Texas legislation did not include a savings clause, and the court determined that the Texas legislature's intent was that the new forfeiture law apply retroactively to prior vested rights. 464 S.W.2d at 648. Second, Texas law allows the legislature to enact a statute that "has a retroactive effect," including by retroactively changing the legal consequences of prior events. *Id.* at 648-49 (deeming it acceptable that a portion of the period of nonuse occurred prior to enactment of the legislation). This sort of retroactive legislation is unconstitutional under Arizona law. *See San Carlos Apache Tribe v. Superior Court*, 972 P.2d 179, 190 (Ariz. 1999) (discussed, *infra*).

does not apply to water rights that were initiated before enactment of Nevada's 1913 Water Code. The Ninth Circuit rendered its *Alpine III* opinion in 1993, recognizing that "a water right that can be lost through mere nonuse is something less than a water right that may be lost only through intentional abandonment," and that, as evidenced by inclusion of the savings clause, "[t]he Nevada legislature did not want to diminish pre-1913 rights." 983 F.2d at 1496.

In 2001, the Ninth Circuit decided *Orr Water Ditch*, and addressed the justifications for exempting prior rights from statutory forfeiture. 256 F.3d at 941-42. The Court cited concerns about fairness, recognizing that,

> [f]or water right holders whose rights had vested by 1913, … the new forfeiture statute could work unfairly because these holders had obtained … their rights on the understanding that those rights would not be subject to forfeiture.

Id. The Court also noted that the operation of forfeiture statutes to pre-code rights raised constitutional concerns, and could amount to an unconstitutional taking:

> To the extent that a water right could be lost more easily after the passage of the forfeiture statute, one 'stick' in the 'bundle of sticks' that had previously comprised that water right had been taken away…. Indeed, with respect to those individuals, the statute could be more than just unfair; it could even be unconstitutional, for its removal of one stick from the bundle of sticks comprising a water right could be seen as an unconstitutional taking of property.

Id.

This Court determined that the legislature had addressed these fairness and constitutional concerns by including the savings clause exempting vested water

rights from forfeiture. *Id.*[13] Specifically, this Court found that the savings provision in N.R.S. § 533.085 protected right holders whose investment-backed expectations would be violated by the statutory forfeiture provision. *Id.*

This Court was presented with the issue yet again in *Alpine VI* and once more in *Alpine VII*. In both instances, this Court confirmed that forfeiture does not apply to water rights that were vested prior to enactment of the 1913 Water Code. *Alpine VI*, 340 F.3d at 914; *Alpine VII*, 510 F.3d at 1039.

In the proceedings below, the District Court correctly determined that there is no basis to distinguish pre-code Arizona water rights from pre-code Nevada water rights. Neither state applied forfeiture to water rights at common law, both states introduced forfeiture for nonuse as part of the water codes, and both states included express, functionally identical savings clauses to ensure that the change in law would not impair existing rights that were free of the operation of statutory forfeiture. The District Court correctly concluded that, under the same reasoning that has been applied concerning pre-code water rights in Nevada, "Arizona's forfeiture provision does not apply to pre-1919 water rights by the terms of the 1919 Water Code; pre-1919 water rights can only be lost in accordance with the

[13] The Arizona Legislature's decision to include a savings clause exempting pre-code rights from forfeiture may have been guided in part by constitutional concerns in light of the Arizona Constitution's specification that "[a]ll existing rights to the use of any of the water in the State for all useful or beneficial purposes are hereby recognized and confirmed." Ariz. Const. art. XVII, § 2 (1913).

law that was in place in Arizona before 1919-the law of abandonment and adverse possession." (E.R.41). Applying forfeiture to pre-1919 rights in Arizona would operate as a significant impairment of those rights contrary to the express intent of the Arizona Legislature.

D. The Objectors Misplace Their Reliance On *San Carlos Apache Tribe v. Superior Court*

The Objectors attempt to distinguish this Court's repeated holdings that statutory forfeiture does not apply to pre-code rights by contending that Arizona law is different than Nevada law. The Objectors rely heavily upon *San Carlos Apache Tribe v. Superior Court* to support this contention. 972 P.2d 179, 190 (Ariz. 1999). Their reliance is misplaced.

In *San Carlos Apache Tribe*, the Arizona Supreme Court determined that several legislative amendments to Arizona's water code were unconstitutional because they sought to "retroactively alter vested substantive rights" in violation of the due process clause of the Arizona Constitution. 972 P.2d at 189. Among the amendments invalidated by the court were amendments to the forfeiture provisions of A.R.S. § 45-141.

In determining that the 1995 legislative amendments to A.R.S. § 45-141 were unconstitutional, the Arizona Supreme Court did *not* evaluate whether pre-1919 water rights are subject to forfeiture. *San Carlos Apache Tribe*, 972 P.2d at 190. Instead, the court recognized that the amendment was intended to define the

legal consequences of occurrences prior to the 1995 amendment and was therefore unconstitutional. *Id.* The court based its determination on the principle that "[t]he consequences of failure to make use of appropriated water on all of the appropriator's land must be determined on the basis of the law existing at the time of the event, not on the basis of subsequently enacted legislation that *may* change the order of priority." *Id.* (emphasis added). The court did not evaluate whether the retroactive amendment actually altered the existing law that applies to pre-1919 rights. *Id.*

In her August 2010 Order, Judge Bolton expressly recognized "that the Arizona Supreme Court did not consider in *San Carlos Apache Tribe*… whether the terms of the 1919 Water Code actually permitted the five-year forfeiture provision to be applied to pre-1919 water rights in the first place, notwithstanding the Legislature's 1995 amendments." (E.R.39). The Objectors disagree with Judge Bolton, but they are unable to point to any relevant analysis in *San Carlos Apache Tribe* that supports their position.

The Objectors fail to acknowledge the important fact that the Arizona Supreme Court's decision in *San Carlos Apache Tribe* was, "[f]or the most part," an agreement and affirmation of the analysis and findings of Judge Bolton, who presided over the trial court proceedings in the Gila River general stream adjudication prior to being appointed as a United States District Court judge. 972

P.2d at 186. Specifically, the Arizona Supreme Court affirmed each of Judge Bolton's holdings concerning the unconstitutionality of the 1995 amendments to the forfeiture provisions of A.R.S. § 45-141. *Id.* at 190. As the trial court judge whose analyses and holdings were analyzed and affirmed in *San Carlos Apache Tribe*, Judge Bolton was uniquely situated to appreciate that the analysis giving rise to the conclusion that the amendments were unconstitutional did not involve a determination concerning whether statutory forfeiture applies to pre-1919 water rights.

E. The Savings Clause Continues To Exempt Pre-1919 Rights From Statutory Forfeiture

The Objectors incorrectly assert that the removal of the savings clause from the forfeiture statute in 1928 eliminated pre-1919 water rights' exemption from forfeiture. To the contrary, the 1919 Water Code contained two savings clauses that protected prior vested rights from impairment, and they were consolidated in 1928 to reduce the length of the Water Code and to minimize redundancy. From 1919 through the present, Arizona's Water Code has always included a savings clause protecting pre-1919 rights from impairment.

In the 1919 Water Code, the savings clause contained in Section 1 was joined by a general savings clause in Section 56 that provided broadly that "*[n]othing in this act* contained, *shall impair the vested rights* of any person, association or corporation to the use of water." Laws of Ariz., ch. 164, § 56 (1919)

(emphasis added). The 1919 Water Code also included a third savings clause relating the power of eminent domain. Laws of Ariz., ch. 164, § 58 (1919).

In 1928, these three savings clauses were consolidated in the Revised Code into a single savings clause providing that nothing in the code "*shall impair vested rights to the use of water*…" Revised Code of Arizona § 3317 (1928). This savings clause persists to this day, and is currently codified as A.R.S. § 45-171. With respect to its prohibition on impairment of vested water rights, the savings clause has remained substantively unchanged.[14]

The consolidation that occurred in 1928 was the result of the Arizona Legislature's appointment of a commissioner to "revise and codify the laws of the State of Arizona." *See* Laws of Ariz., ch. 35, § 3 (1925). The Legislature provided that the "Commissioner shall not, however, undertake to make any change of existing laws, but shall harmonize where necessary, reduce in language, and remove inconsistencies …." *Id*.

Accordingly, the Arizona Supreme Court has repeatedly recognized that, in adopting the 1928 Revised Code, the Legislature intended to minimize length and redundancy, not to substantively change Arizona law. *In re Sullivan's Estate*, 300 P. 193, 195 (Ariz. 1931); *Arizona Newspapers Ass'n v. Superior Court*, 694 P.2d

[14] The lineage of the savings clause is as follows: Laws of Ariz., ch. 164, §§ 1 and 56 (1919); Revised Code of Arizona § 3317 (1928); Arizona Code § 75-138 (1939); A.R.S. § 45-171 (1955).

1174, 1177 (Ariz. 1985); *Tanner Companies v. Superior Court*, 601 P.2d 599, 601-02 (Ariz. 1979). For instance, in *In re Sullivan's Estate*, the Arizona Supreme Court recognized that

> [i]t is well known that it was the object of the code commissioner and the Legislature in preparing the Revised Code of 1928 to change the legal meaning of the existing law as little as possible … We should therefore presume that *when a word, phrase, or a paragraph from the 1913 Code is omitted form 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*.

300 P. at 195 (emphasis added). The Legislature consolidated the savings clauses for the purposes of minimizing length and redundancy under the water code, not to extinguish the protections that had been established for pre-1919 water rights.

F. A Successor In Interest Enjoys The Same Rights As Its Predecessor Under The Decree

The Community argues that the legislative protections provided to pre-1919 rights through the savings clause do not apply to Freeport because Freeport is a successor in interest that acquired the decreed rights after 1919. The Community relies on *Colville Confederated Tribes v. Walton*, 647 F.2d 42 (9th Cir. 1981), an inapposite decision concerning the transfer of Indian federal reserved rights to non-Indians. In *Colville,* the Court determined that Indian allottees may convey their rights to non-Indians. *Id.* at 51. However, the Court also determined that – under federal law pertaining to federal reserved rights – non-Indian purchasers can lose their rights as a result of nonuse because, unlike their predecessors, the non-Indians

are "under no competitive disability vis-a-vis other water users…." *Id.*

While *Colville Confederated Tribes* did not address what attributes of a state law appropriative water right are transferred to a successor in interest such as Freeport, this Court has had occasion to address the "basic tenent of western water law" that, when real property is conveyed, the new owner acquires the appurtenant water rights, which carry with them the same attributes enjoyed by the original right holder. *See, e.g., United States v. Anderson*, 736 F.2d 1358, 1363 (9th Cir. 1984) (confirming no change in priority).

This basic tenet certainly applies to water rights in Arizona. Under Arizona law, a water right holder may convey a water right to another, and the water right is in no way diminished by the conveyance. *See, e.g., Adams v. Salt River Valley Water Users' Ass'n*, 89 P.2d 1060, 1066 (Ariz. 1939). This follows from the general principle that "[a] successor in interest retains the same rights as the original owner, with no change in substance." *Black's Law Dictionary* 1832 (10th ed. 2014).

This principle was expressly incorporated into the Decree. The Decree provides that "nothing herein shall prejudice the rights of any of the parties hereto or of their grantees, assigns or successors in interest," and that "the provisions of this Decree shall bind, and inure to the benefit of, the grantees, assigns and successors in interest of the owners of rights and the parties hereto, whether

substituted as parties or appearing in this case or named herein or not…." (S.E.R.881). Accordingly, the Community, along with all other parties to the Decree, agreed that successors in interest, like Freeport, would enjoy the same rights decreed to their predecessors. (*Id*.).

Specifically, when a pre-code vested right is transferred to a successor in interest, the water right continues to be exempt from forfeiture. In *Manse Spring*, the court ruled "that *rights* acquired before 1913 could only be lost in accordance with the law in existence at the time of the enactment of said 1913 statute, namely intentional abandonment." 108 P.2d at 316 (emphasis added). Accordingly, the court found that the vested rights had not been forfeited for nonuse, even though the period of nonuse occurred after enactment of Nevada's forfeiture statute, and during a time when the vested rights had already passed to successors in interest. *Id.* at 313-14.

The plain language of the savings clauses included in Nevada's and Arizona's water codes dictate this result. Like Nevada's, Arizona's savings clause protects "vested rights" from impairment by any provision of the Water Code. Laws of Ariz., ch. 164, § 56 (1919); A.R.S. § 45-171. Vested water rights would be significantly impaired if they were stripped of their exemption from forfeiture upon a transfer to a successor in interest. *See, e.g., Orr Water Ditch*, 256 F.3d at 941-42 (a stick is removed from the bundle of sticks comprising the vested right if

the right is rendered more susceptible to loss); *Manse Spring*, 108 P.2d at 316.

G. The United States Incorrectly Asserts That Forfeiture For Nonuse Existed In Arizona Under The Common Law

The United States asserts that water rights could be forfeited for nonuse under Arizona common law, because nonuse "is not beneficial use by the owner, and, as long as the right remains the property of the owner, the nonuse effectively precludes appropriation and beneficial use by others." Brief p. 29.

The United States is incorrect for several reasons. First, the United States' assertion is irreconcilable with the Supreme Court's holding in *Gould*, 76 P. at 601.

Second, the United States is incorrect that a junior water user cannot appropriate and make beneficial use of water that a senior appropriator does not divert for beneficial use. A junior appropriator may make beneficial use of available water, but the right holder will remain subject to call by a senior appropriator. *See, e.g., Clough v. Wing*, 17 P. 453, 455 (Ariz. 1888);[15] *accord United States v. Ahtanum Irrig. Dist.*, 236 F.2d 321, 335 (9th Cir. 1956), *cert. denied*, 352 U.S. 988 (1957) (recognizing that non-Indians could divert waters when Indians did not exercise their senior water rights). This is the reason that there is a priority system for competing uses of the same water. *In re Gen.*

[15] Notably, United States quotes *Clough* for this very proposition as part of a separate discussion, recognizing "that a subsequent appropriator may take and 'acquire a right' to the use of any water 'not needed or used' by a prior appropriator…." Brief p. 33 (*quoting Clough*, 17 P. at 455).

Adjudication of All Rights to Use Water in Gila River Sys. & Source ("*Gila V*"), 35 P.3d 68, 71 (Ariz. 2001) (under the priority system, "preference is given according to the appropriation date, allowing senior holders to take their entire allotments of water before junior appropriators receive any at all.").

Third, the United States misconstrues the doctrine of beneficial use. It is of course true that, under Arizona law, beneficial use is "the basis, measure and limit to the use of water." A.R.S. § 45-141(B). However, the United States conflates limitations on the quantification and the use of a right, on the one hand, with the notion of extinguishment of a vested right for nonuse, on the other. The doctrine does not operate to terminate vested water rights that are not exercised for some period of time; instead, the doctrine of beneficial use places limits on the quantity of water that may appropriated and diverted for use. *See, e.g., In the Matter of the Rights to the Use of the Gila River* ("*Gila I*"), 830 P.2d 442, 451 (Ariz. 1992) ("Under the Arizona system of water law, … [w]ater rights can only be established through proper legal appropriation and putting the water to actual beneficial use.").

Fourth, the United States fails to show any meaningful distinction between Arizona law and Nevada law in its efforts to distance itself from this Court's precedent concerning Nevada's 1913 Water Code and Nevada's savings clause. Like Arizona, the doctrine of beneficial use is central to Nevada's appropriative rights system. *See, e.g., Alpine III*, 983 F.2d at 1493. As in Arizona, the doctrine

of beneficial use operates in Nevada as a limitation on the quantity of water that can be appropriated and diverted for use, *id.*, but not as mechanism for the forfeiture of an existing vested water right.

II. SUBSTANTIAL EVIDENCE SUPPORTS THE DISTRICT COURT'S DETERMINATION THAT FREEPORT HAD NO INTENT TO ABANDON WATER RIGHTS FOR LANDS INVADED BY THE GILA RIVER

A. Standard Of Review

The District Court determined, as a matter of fact, that Freeport had no actual intent to abandon decreed rights appurtenant to lands that suffered encroachment by the river. (E.R.47). This factual determination is reviewed for clear error. *Landers v. Joerger*, 140 P. 209, 210 (Ariz. 1914); *Manse Spring*, 108 P.2d at 317.

B. The Evidence Clearly Demonstrates That Freeport Had No Intent To Abandon Its Water Rights

Whether a water right has been abandoned "'depends upon the facts and circumstances surrounding each particular case.'" *Landers*, 140 P. at 210 (quoting Kinney on Irrigation and Water Rights, § 1116, vol. 2). The intent of the water right holder is the "paramount object" of the abandonment inquiry. *Green I*, 232 P. at 1019.

Accordingly, a party's contention that a water right holder should have acted more diligently in resuming the beneficial use of water is unavailing if that party is unable to establish that the right holder actually intended to abandon the water

right. *Id.* As this Court has recognized, because the relevant question is one of actual intent, "[i]t is well settled that lapse of time does not of itself constitute an abandonment…." *Valcalda v. Silver Peak Mines*, 86 F. 90, 95 (9th Cir. 1898). This Court's discussion in *Valcalda*, which concerned California law, is equally applicable to Arizona's law of abandonment. *See, e.g., Green I*, 232 P. at 1019.

Moreover, the party must establish by clear and convincing evidence that the right holder actually intended to abandon its water right. *Strawberry Water Co. v. Paulsen*, 207 P.3d 654, 661 (Ariz. App. 2008); *Alpine VI,* 340 F.3d at 909.

The Objectors rely upon a partial quotation from *Green I* to support their argument that prolonged nonuse alone is enough to demonstrate an intent to abandon. To the contrary, the Arizona Supreme Court's analysis in *Green I* illustrates that the District Court correctly determined that Freeport did not intend to abandon water rights appurtenant to fields encroached upon by the river.

In *Green I*, the court noted that "[Mr. Green] makes much over the fact that 25 years elapsed from the time the original dam washed out" prior to the Gila Water Company reinstituting diversions, and agreed "that this fact unexplained would be very strong evidence of an intention to abandon…." *Green I*, 232 P. at 1019. However, this does not end the inquiry. The *Green I* court recognized that the Gila Water Company had participated in legal proceedings to protect its water rights during the period of nonuse, and that it had subsequently constructed a

replacement dam after resolving disputes about title. The court held that these facts "irrefutably establish the fact that [the Gila Water Company] never intended to abandon these rights," notwithstanding the prolonged period of nonuse. *Id.*

As Judge Bolton recognized, nonuse as a result of the river's encroachment was the Objectors' "*only*" evidence of an intent to abandon rights appurtenant to river bottom lands. (E.R.46-47 (emphasis added)). Freeport's uncontroverted countervailing evidence, summarized below, established conclusively that Freeport never had any intent to abandon any of its decreed water rights.

First, the evidence is undisputed that, prior to promulgation of the TBI regulations in 1997, Freeport's predecessors exercised the full extent of their rights, even after encroachment of the river on certain fields. Accordingly, there was no nonuse of decreed water prior to 1997, even where encroachment by the Gila River occurred in 1991.

Second, when Freeport began purchasing its farmlands in 1997, it did so for the sole purpose of acquiring the appurtenant decreed water rights. (S.E.R.541-542). Consistent with this intent, Freeport ensured that each of its lessees was contractually obligated to take necessary measures to protect and maintain the decreed water rights. (S.E.R.539-540). Freeport has also always paid all taxes and assessments, and has maintained all of its ditches and canals. (E.R.11(¶¶26-27); S.E.R.539-540, 564-565).

Freeport has also conscientiously undertaken legal efforts to protect and preserve its decreed rights throughout the period of nonuse, just like the Gila Water Company in *Green I*. Upon acquiring its decreed water rights, Freeport engaged in extensive negotiations with the Community and other parties to the Decree to resolve the Community's adverse water rights claims. (E.R.11). Those efforts culminated in the Arizona Water Settlements Act of 2004 and the UV Forbearance Agreement, which provided for the sever of inactive decreed water rights and their transfer to lands suitable for cultivation. (E.R.393). Freeport then filed 59 applications in 2008 seeking to transfer inactive decreed rights to viable farmlands, and Freeport has actively participated in the processing and litigation of the applications ever since.[16]

In summary, Freeport has, at every turn, demonstrated its clear intent to preserve its decreed water rights, not to abandon them. The evidence is uncontroverted that Freeport's only intent concerning its Upper Valley farms – Freeport's sole purpose for purchasing these farms, and its reasons for going to such great lengths to negotiate water rights settlements, defend its water rights in litigation, and pursue sever and transfer applications – is to protect its decreed

[16] Freeport has agreed to abandon certain of its decreed rights when called for pursuant to the terms of water rights settlements. (S.E.R.301; 59-7745; 59-7500). When this has occurred, Freeport has clearly expressed its intent to abandon, while at the same time discontinuing its efforts to protect these specific rights, *e.g.* by withdrawing applicable sever and transfer applications and discontinuing litigation concerning abandoned rights. (S.E.R.312-315).

water rights, not to abandon them. The District Court's finding with respect to inactive river bottom lands should be affirmed.

III. THE DISTRICT COURT ERRED IN DETERMINING THAT FREEPORT INTENDED TO ABANDON A PORTION OF ONE WATER RIGHT

A. Standard Of Review

The District Court's error in determining that Freeport intended to abandon a portion of one water right arises from a misapplication of the law of abandonment, and this Court's review is therefore *de novo*. *See, e.g., Alpine VII*, 510 F.3d at 1037-38.

B. The District Court's Ruling That A Water Right Can Be Presumed Abandoned If A Transfer Application Is Not Filed Within Five Years Of An Improvement Is Contrary To Arizona Law And Ninth Circuit Precedent

The Objectors had the burden to prove by clear and convincing evidence that Freeport intended to abandon its water rights. This is a question of actual intent, and must be judged in the context of all of the relevant "facts and circumstances" relating to a particular instance of nonuse. *Landers*, 140 P. at 210. Evidence of prolonged nonuse is not enough to establish an intent to abandon where a water user has engaged in other acts that manifest an intent to maintain the water right. *See, e.g., Green I*, 232 P. at 1019.

In considering Freeport's Application 2008-147, the District Court held that Freeport abandoned the portion of decreed water right that is appurtenant to 1.4

acres that include a road and canal. Rather than evaluate Freeport's actual intent, the District Court erroneously applied legal presumptions against Freeport. (E.R.49-50). Specifically, the District Court erred in holding that a pre-1919 decreed right is presumed abandoned if the decreed right holder fails to file a transfer application within five years of the construction of an improvement inconsistent with irrigation. (E.R.49-50). The District Court erred both in applying an erroneous legal presumption, and in ignoring Freeport's significant evidence establishing that it never intended to abandon its decreed right.

This Court has considered abandonment of water rights under Nevada law, which parallels Arizona's law on abandonment, on several occasions in the *Alpine* line of cases. *See, e.g., Alpine VII*, 510 F.3d at 1038-39; *Alpine VI,* 340 F.3d at 916-17; *Orr Water Ditch*, 256 F.3d at 946. In *Alpine VII,* this Court outlined a nonexclusive list of the types of evidence that could establish lack of intent to abandon a water right despite a period of nonuse: (1) proof of beneficial use of water on the parcel to which the water right was attached; (2) proof of use of water on another parcel together with evidence of an attempted transfer or inquiry about transferring the water right; (3) payment of taxes and assessments and lack of improvements inconsistent with irrigation of the land to which the water right was attached; or (4) evidence that a prior owner sold the water rights before an abandonment would be found and evidence that the new owner had a lack of intent

to abandon the water rights. 510 F.3d at 1038-39. Throughout its various decisions, this Court has consistently recognized that claims of abandonment must be determined after consideration of all of the surrounding circumstances. *See, e.g., Alpine VII*, 510 F.3d at 103; *Orr Water Ditch*, 256 F.3d at 946.

Although the District Court discussed the *Alpine* cases, it misapplied their analyses in creating a presumption of abandonment. First, the District Court erred in finding an application to transfer was the only means of establishing a lack of intent to abandon after a structure inconsistent with irrigation is constructed on a water right parcel. An application to transfer a water right is but one potential indication of intent.

Second, the District Court misconstrued this Court's holding in *Orr Water Ditch* concerning improvements inconsistent with irrigation. This Court stated in *Orr Water Ditch* that "[w]here there is evidence of both a substantial period of nonuse, combined with evidence of an improvement which is inconsistent with irrigation, the payment of taxes or assessments, *alone*, will not defeat a claim of abandonment." *Orr Water Ditch*, 256 F.3d at 946 (emphasis added) (quoting *United States v. Alpine Land and Reservoir Co*., 27 F. Supp. 2d 1230, 1244-45 (D. Nev. 1998)). Implicit in this ruling is the recognition that a lack of abandonment can be demonstrated through other evidence. *Id.* (reaffirming that "[a]bandonment is to be determined 'from all the surrounding circumstances….'") (quoting *Revert*

v. Ray, 603 P.2d 262 (Nev. 1979)); *accord Landers*, 140 P. at 210; *Green I*, 232 P. at 1019.

However, the District Court failed to consider the substantial evidence establishing Freeport's lack of intent to abandon the decreed right appurtenant to the 1.4 acre parcel. This evidence includes the following:

- Freeport bought its farmlands for the express purpose of acquiring the decreed water rights. (S.E.R.541-542).
- Freeport required each lessee to protect and maintain the water rights. (S.E.R.539-540).
- Freeport maintained all of its ditches and canals and paid the operational costs, taxes and assessments relating to its decreed water rights. (E.R.11(¶¶26-27); S.E.R.539-540, 564-565).
- Since acquiring its decreed water rights, Freeport engaged in extensive negotiations with the Community and other parties to the Decree to resolve the Pumping Complaint and water rights claims of the Community. (E.R.11(¶29)).
- Freeport's negotiations, in part, led to the Arizona Water Settlements Act of 2004 and the UV Forbearance Agreement, which allowed the sever and transfer of decreed water rights to Hot Lands without objection by the Community – the same applications now before this Court. (E.R.393).
- Freeport has actively litigated to protect its water rights by participating in post-decree litigation concerning its decreed rights, by seeking to have the District Court approve the UV Forbearance Agreement, and by pursuing its sever and transfer applications. (E.R.11(¶¶28-31)).

Although the District Court found these facts elsewhere in its opinion, it ignored them in connection with its determination that "payment of fees or taxes

alone does not defeat a finding of abandonment" when there is an improvement inconsistent with irrigation. (E.R.45, 49-50). Freeport established far more than the payment of fees or taxes "alone." The District Court failed to consider all surrounding facts and circumstances, and therefore erred in determining that Freeport had abandoned a portion of its water right.

C. The District Court Erred In Accepting Pre-1997 Evidence As Freeport's Intent To Abandon Water Rights

The District Court also erred in its heavy reliance on pre-1997 evidence to support an intent to abandon decreed rights. In determining that the period of nonuse began in 1991 or earlier, (E.R.49), the District Court disregarded the manner in which the Globe Equity Decree was administered before 1997.

From 1935 until implementation of the TBI regulations in 1997, the Globe Equity Decree was administered to deliver to all decreed right holders the full amount of water under their decreed water rights, to the extent water was available, regardless of the number of decreed acres actually irrigated in a given year. (S.E.R.502, 528-529). Because all parties received the full amount of water available to them under the Decree prior to 1997, without regard to the number of acres actually irrigated, the Objectors' pre-1997 photographs do not establish any nonuse of decreed water before 1997. Therefore, the District Court erred in inferring intent to abandon based on those photographs. (*See e.g.*, E.R.27(¶91), 49-50). All decreed parties whose fields were impacted by encroachment by the river

continued to make full use of their water rights until at least 1997.

The Arizona Supreme Court's analysis in *Gould* demonstrates that ongoing exercise of a water right undermines a finding of an intent to abandon. 76 P. 598. Mr. Gould had discontinued the use of his ditch in favor of a ditch operated by the Maricopa Canal Company. *Id.* at 599. After several years of using Maricopa Canal Company's ditch, the canal company refused to deliver Gould water, and he brought suit for the purpose of compelling the delivery of water to him. *Id*. The Arizona Supreme Court considered possible application of Arizona's law of abandonment to Gould due to the earlier change in his mode of diversion. *Id*. at 601. The Supreme Court found that *intent* to abandon could not be inferred from Gould's use of an alternative ditch. *Id.* The Supreme Court found that "(s)uch an inference would be unjust to him and not warranted by the facts." *Id*.

All holders of decreed irrigation rights relied on the pre-1997 practice of the Water Commissioner, which allowed annual diversion of the full quantity of decreed water regardless of the actual acreage irrigated in a given quarter-quarter section in any given year. While the "then being irrigated" phrase of the Decree was later interpreted in a manner that prompted a change in Decree administration, it is uncontested that no prolonged nonuse of water occurred prior to 1997. No intent to abandon can be inferred from these facts.

D. The 1920s Maps Do Not Demonstrate An Intent To Abandonment Because The Decree Was Never Administered According To Those Maps

Use of the 1920s Maps to determine whether or not a decreed party has or has not exercised its water rights is also contrary to the historical administration of the Decree on a quarter-quarter section basis. At trial, the Water Commissioner testified that the Decree had always been administered according to the quarter-quarter legal descriptions provided in the Decree. (S.E.R.496-501, 503-506, 511).

In finding that Freeport had abandoned 1.4 acres of a decreed water right, the District Court relied on a map prepared by using the Community's database. The Community's map superimposes a re-creation of Freeport's sever parcel from Application 2008-147 over aerial photograph and a digital reproduction of the 1920s Maps. (E.R.49, 103). Based upon the overlap of a 1.4-acre area of road and canal shown on the aerial photograph and the water right location shown on the 1920s Maps, the District Court determined that Freeport had abandoned 1.4 acres of its water right.

Since the time that Freeport filed its applications in 2008, the District Court has issued a series of rulings establishing that future administration of the Decree will be based, in part, on the 1920s Maps. However, this change in administration of the Decree cannot be used to find that Freeport *intended* to abandon inactive acres prior to this change in Decree administration. Farming consistent with the

field locations shown on 1920s Maps was never required in the prior 75 years of Decree administration. To the contrary, parties had always been permitted to divert all of their decreed water within the quarter-quarter section set forth in the Decree without reference to the 1920s maps. Accordingly, the 1920s Maps cannot serve as a basis to establish that Freeport actually intended to abandon its decreed rights. There was no intent to abandon, because the decreed rights were exercised to their full extent.

IV. THE DISTRICT COURT ERRED IN FINDING THAT FREEPORT FAILED TO MEET ITS *PRIMA FACIE* BURDEN TO SHOW NO INJURY TO THE WATER RIGHTS OF THE TRIBE

A. Standard Of Review

Typically, "[t]his court reviews a judgment as a matter of law de novo." *Perry v. Los Angeles Police Dept.,* 121 F.3d 1365, 1367-68 (9th Cir. 1997). In the context of Rule 52(c), Federal Rules of Civil Procedure, "this court reviews the district court's findings of fact for clear error and its legal conclusions de novo." *Dubner v. City and County of San Francisco*, 266 F.3d 959, 964 (9th Cir. 2001). Mixed questions of fact and law are reviewed *de novo*. *In re Bammer*, 131 F.3d 788, 792 (9th Cir. 1997). A district court's interpretation of the *prima facie* burden is also a question of law reviewed *de novo*. *Hagans v. Clark*, 752 F.2d 477, 480 (9th Cir. 1985).

B. The District Court Erred In Finding That Freeport Did Not Meet Its *Prima Facie* Burden To Show No Injury

Section 4 of the Change in Use Rule addresses "Proceedings Before the Court," and provides, in part, that

> [t]he applicant shall have the burden of establishing a *prima facie* case of no injury to the rights of other parties under the Gila Decree and a right to transfer. Upon making such a *prima facie* showing, the burden of proof of proof [sic] will shift from the applicant to the objecting party to demonstrate that injury will result from the proposed change or that the applicant has no right to the proposed transfer.

(E.R.213-214).

The Tribe moved for judgment as a matter of law at the close of Freeport's case-in-chief. The District Court took the motion under advisement, and then heard testimony concerning injury, first from the Tribe in response to Freeport's *prima facie* case, followed by expert testimony from Freeport's expert witness, Eric Harmon, on rebuttal. While the Tribe's evidence consisted only of generalized concerns, (S.E.R.573-574, 613-614, 640-641), Mr. Harmon described his harm analysis and explained why the transfers would not injure the Tribe. (S.E.R.615-626).

However, the District Court never resolved whether the Tribe's evidence was sufficient to demonstrate that it would be injured, and, if so, whether Mr. Harmon's expert testimony was sufficient to rebut the Tribe's evidence. Instead, the District Court granted the Tribe's motion for judgment as a matter of law in the

August 2010 Order, finding that Freeport failed to establish a *prima facie* case of non-injury to the Tribe. (E.R.58-59).

In granting the Tribe's motion, the District Court held that, to meet its *prima facie* burden, Freeport was obligated to introduce expert opinions demonstrating that the proposed transfer will not result in a diminution of water quantity reaching the Tribe's reservation through (1) a significant decrease in return flows to the Gila River, (2) an exacerbation of the Cosper's Crossing condition, or (3) a time-lag depletive effect on the stream if pumping is the new means of diversion. (E.R.60). The District Court also held that Freeport was required to offer expert opinions that transfers would not deteriorate water quality to the point where the Water Quality Injunction could not be met. (*Id*.).

In doing so, the District Court disregarded the significant protections afforded the Tribe's senior rights under law and under the Decree, and created a new evidentiary standard that is incongruous with the traditional requirements of a *prima facie* burden.[17]

[17] In connection with a different subset of the 419 applications, the Objectors relied upon language from the August 2010 Order to argue that the *prima facie* proof required by the District Court must be submitted at the time that a sever and transfer application is filed. (S.E.R.360, 364). The District Court clarified that the Change in Use Rule only requires an applicant to "make a prima facie case of no injury to other rights holders after another right holder makes a legitimate objection to an application." (S.E.R.365). In other words, if there is a "legitimate" injury objection, the applicant must make its *prima facie* case of no injury when the applications and the objections are tried to the court. Freeport satisfied this

A *prima facie* case is one that is "sufficient to establish the fact, and if not rebutted, remains sufficient for that purpose." *Nille v. Winstanley*, 145 P. 246, 248 (Ariz. 1914). In other words, if the evidence is "sufficient to justify, although not necessarily compel," an inference of the fact asserted, the party has satisfied its *prima facie* burden. *See, e.g., City of Glendale v. Farmers Ins. Exchange*, 613 P.2d 278, 280 (Ariz. 1980); *accord United States v. Park*, 421 U.S. 658, 673-674 (1975) ("[T]he Government establishes a *prima facie* case when it introduces *evidence sufficient to warrant a finding by the trier of the facts* that the defendant had" authority to prevent the violation) (emphasis added); *Black's Law Dictionary* 1805 (10th ed. 2014) (a "*prima facie* case" means "[t]he establishment of a legally required rebuttable presumption" or "[a] party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor.").

A district court analyzing a transfer under a similar water decree recognized that injury in a water transfer "is analyzed by comparing the impact of a proposed change against a baseline of existing conditions." *United States v. Orr Water Ditch Co.*, 309 F. Supp. 2d 1245, 1253 (D. Nev. 2004). There, as here, the "existing condition was that the Tribe had and has a superior right to use water in the place, manner, and amount decreed . . . ." *Id.* The United States Supreme Court has recognized that a senior appropriator has the right to have its appropriation

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process by establishing that the Tribe will not be injured because the Tribe enjoys extensive legal protections under the Decree and the Water Quality Injunction.

"fulfilled entirely before these junior appropriators' rights get any water at all." *Montana v. Wyoming*, 131 S. Ct. 1765, 1772 (2011).

Here, in both the existing condition and the proposed condition, the Tribe's right is senior to all decreed rights in the Upper Valleys, including all of the rights that Freeport seeks to transfer. As a result, under the priorities established in the Decree, if the Tribe makes a call, Freeport, as well as all other decreed parties upstream of the Tribe, must cease diverting "as necessary" to satisfy the Tribe's call. *See, e.g., Gila Valley Irrig. Dist.*, 920 F. Supp. at 1465. Because *all* upstream water rights are junior to the Tribe's decreed right, upstream diversions must *always* cede as necessary to satisfy the Tribe's call. This remains true whether Freeport's place of use is the decreed sever parcel or the proposed transfer parcel.

The District Court's concern with the Cosper's Crossing condition was misplaced. The Cosper's Crossing condition is addressed in Article VIII(3), which authorizes an agreement to allow UVDs in the Duncan-Virden Valley to divert Gila River water under their apportionment rights in disregard of the rights of the UVDs in the Safford Valley ("Cosper's Crossing agreement"). (S.E.R.875); *Gila Valley Irrig. Dist.*, 920 F. Supp. at 1462. The District Court found that to transfer rights from below Cosper's Crossing to above Cosper's Crossing, the applicant must show that the transfer will not cause Cosper's Crossing to be dry for a period that will injure the rights of senior downstream appropriators.

However, it has been clearly established that the Cosper's Crossing agreement cannot operate to the Tribe's detriment:

> [T]he Court agrees with plaintiffs that, to the extent that the diversion of the stream pursuant to the Cosper's Crossing agreement diminishes the flow such that an 1846 call by the Apaches is compromised, it is in violation of Article VIII(3). *If the Apaches issue an 1846 priority call, the Commissioner must cease diversions, as necessary, throughout the upper valleys until such call is satisfied*.

Id. at 1465 (emphasis added). This determination by the District Court demonstrates that the Cosper's Crossing argument is a red herring. The Tribe's rights are protected because, if the Tribe places a call, the Water Commissioner must cease *all diversions in the Upper Valleys as necessary*, including those in the Duncan-Virden Valley that might otherwise be permitted under the Cosper's Crossing agreement.

Nevertheless, the District Court denied Freeport's applications, stating that the lag-time effect on the stream may cause the Gila River to become dry at Cosper's Crossing at a later time, and that this could injure the senior rights of the Tribe. (E.R.63). The District Court failed to recognize that the Water Commissioner must cease all diversions in the Upper Valleys as necessary when the Tribe places a call. If changes in points of diversion result in a time-lag effect impacting flows at a different time or for a longer time, this simply means that the Tribe's call may occur at a different time or for a longer time. The Tribe is not injured, however, because it can make its call for water whenever depletions occur,

and for however long.

The District Court also found that Freeport was required to show that the "proposed transfers would not result in a deterioration of water quality to the point that the requirements of the Court's Water Quality Injunction cannot be met." (E.R.60). Again, the District Court erred in determining this showing was necessary for Freeport to meet its *prima facie* burden of proof.

In 1996, the District Court entered the Water Quality Injunction after a trial. *Gila Valley Irrig. Dist.*, 920 F. Supp. at 1456. The injunction is designed to allow the Tribe to receive water of sufficient quality to grow moderately salt-sensitive crops. *Id*. The injunction sets up a mechanism whereby diversions in the Safford Valley are reduced depending on the quality of the water reaching the reservation. (S.E.R.891-905). Freeport's proposed transfers cannot affect the requirements of the injunction. (S.E.R.518-519). The Water Quality Injunction will apply and limit diversions in the Safford Valley when the thresholds are triggered. (S.E.R.518-519, 891-905).

In other words, even assuming, *arguendo*, that the transfers cause a lower water quality in the Gila River, the Water Quality Injunction will trigger at the applicable thresholds, and UVD diversions will be curtailed as necessary to protect the Tribe.

C. The District Court Erred In Ruling That Applicants Must Perform A Cumulative Injury Analysis

The District Court ruled that "Freeport must provide evidence that the cumulative impacts of the proposed transfers do not cause injury to other water right holders as required by the Decree." (E.R.66). This ruling is erroneous.

The Change in Use Rule provides for individual treatment of each right to be transferred, not cumulative treatment. The Change in Use Rule unambiguously provides that "[a] separate application must be filed for each water right affected by the proposed change or changes." (E.R.211(§1.E)). The application form asks "[i]n your opinion, will the change in point of diversion, place, means, manner or purpose of use affect any other users?" – this is again specific to the individual right at issue in that application. (*See e.g.*, S.E.R.680). Similarly, each notice published by the Water Commissioner is application-specific, and therefore individual to one right to be transferred. (E.R.212-213(§2)). If a right holder chooses to object, the objection is filed to an individual application involving a single right. (E.R.213(§3)). If no objection to an application is filed, "the commissioner shall grant or deny the application on the basis of the information contained in the notice" for that single right. (E.R.213(§3.D)). If an objection is filed, the Change in Use Rule describes finality and appealability in terms of the decision on a single application: "[t]he decision of the court regarding a Change in Use Application shall not take effect until the court enters an order approving the

change . . . The applicant or objecting party shall have the right to appeal the order in accordance with the Federal Rules of Appellate Practice." (E.R.214).

In sum, both the Change in Use Rule and the Water Commissioner's application form treat each right to be transferred individually, not cumulatively, and it is improper and prejudicial for the District Court to retroactively graft a cumulative injury analysis requirement into the Change in Use Rule.

In addition to being contrary to the Change in Use Rule, the District Court's cumulative injury analysis requirement is unsupported by law. The District Court relies entirely upon *Te-Moak Tribe of Western Shoshone of Nevada v. United States Dept. of Interior*, 608 F.3d 592, 606 (9th Cir. 2010). *Te-Moak Tribe* is inapposite. This Court was asked to review the sufficiency of an Environmental Assessment ("EA") under the National Environmental Policy Act ("NEPA"). EAs are prepared to determine whether a proposed federal action will significantly affect the quality of the human environment, in which case an Environmental Impact Statement ("EIS") is required. *Id*. at 599. Whether an EIS is required hinges on whether the environmental impacts will be significant. As provided for in NEPA's implementing regulations, "[s]ignificance exists if it is reasonable to anticipate a *cumulatively* significant impact on the environment." 40 CFR §1508.27 (emphasis added); *see also* 40 CFR §1508.7. Accordingly, under NEPA, the federal agency must assess cumulative impacts when preparing an EA.

Freeport's applications for sever and transfer do not arise under NEPA and, unlike the regulations that govern implementation of NEPA, the Change in Use Rule specifically provides that rights to be transferred are to be treated individually. The District Court's *ad hoc* imposition of a cumulative impacts requirement should be reversed.

V. THE DISTRICT COURT ABUSED ITS DISCRETION BY DENYING FREEPORT'S MOTION TO AMEND ITS APPLICATIONS TO CONFORM TO THE EVIDENCE

A. Standard Of Review

A district court's ruling on a Rule 15(b) motion to amend is reviewed for an abuse of discretion. *See Madeja v. Olympic Packers*, 310 F.3d 628, 635 (9th Cir. 2002).

B. The District Court Abused Its Discretion In Denying Freeport's Request to Amend Its Applications To Reflect Freeport's Revised Maps And Legal Descriptions

The District Court erred by refusing to consider Freeport's request to amend its applications to conform to the evidence presented at trial. Rule 15(b)(1) provides:

> (b) Amendments During and After Trial.
>
> (1) Based on an Objection at Trial. If, at trial, a party objects that evidence is not within the issues raised in the pleadings, the court may permit the pleadings to be amended. *The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits*. The court may grant a continuance to

enable the objecting party to meet the evidence.

(Emphasis added). Rule 15(b) embraces a policy of liberally allowing amendment of pleadings at any time to conform to the evidence offered at trial. The amendment relates back to the date of the original pleading when the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out in the original pleading. *See* Fed.R.Civ.P. 15(c).

"An amendment that seeks to conform the pleadings to proof introduced at trial is proper under Rule 15(b) unless it results in prejudice to one of the parties." *Galindo v. Stoody Co*., 793 F.2d 1502, 1513 (9th Cir. 1986). The party opposing amendment bears the burden of showing prejudice. *See DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987). "Prejudice under the rule means undue difficulty in prosecuting a lawsuit as a result of a change of tactics or theories on the part of the other party." *Deakyne v. Commissioners of Lewes*, 416 F.2d 290, 300 (3rd Cir. 1969). Rule 15(b) requires the opposing party to show that it will be "actually prejudiced" and "some serious disadvantage" by granting the motion to amend. *Hodgson v. Colonnades, Inc*., 472 F.2d 42, 48 (5th Cir. 1973). "[I]t is not enough that (the objecting party) advances an imagined grievance or seeks to protect some tactical advantage." *Id*. (citing Wright & Miller, Federal Practice and Procedure: Civil §1495).

The directive in Rule 15(b)(1) that leave to amend is to be "freely" given "is

a mandate to be heeded," and "*refusal to grant the leave without any justifying reason is an abuse of discretion.*" *Stiles v. Gove,* 345 F.2d 991, 994 (9th Cir. 1965) (emphasis added) (*citing Foman v. Davis,* 371 U.S. 178, 182 (1962)).

In denying Freeport's Rule 15 motion to amend, the court made no finding of prejudice as required by Rule 15. This constitutes an abuse of discretion. *Id.*

Indeed, the District Court failed to address Rule 15 at all in its Order. Instead, the court created its own "material change" test, announcing, for the first time, that "an applicant may not make a material change to an application once the Commissioner has published the application for review by other Decree parties." (E.R.70-72).[18]

The court's "material change" test is inconsistent with Rule 15 and the Federal Rules of Civil Procedure, and has no basis in the Decree or the Change in Use Rule. (E.R.71) (acknowledging that "[t]he Change in Use Rule does not address whether or how applicants may make amendments to applications that have already been published by the Commissioner."). Nor does the "material change" test derive from any other prior ruling of the Court. To the contrary, the

[18] Had Judge Bolton evaluated Rule 15, notice concerns would not have justified a refusal to allow amendment. It is undisputed that the Water Commissioner uses the Decree's quarter-quarter section descriptions when publishing notices of applications. Accordingly, revising the sever parcel or the transfer parcel within the same quarter-quarter sections has no impact on the contents of the published notice, aside from in some instances reflecting a reduction in acreage to be transferred.

Court's holding stands in direct contradiction to its earlier rulings that the Federal Rules apply. Accordingly, the District Court's refusal to analyze Freeport's motion pursuant to Rule 15 constitutes an abuse of discretion. Fed.R.Civ.P. 15(b)(1); *Stiles*, 345 F.2d at 994.

Had the District Court applied Rule 15, Freeport's motion would have been granted. When Freeport disclosed its revised maps and legal descriptions, and the Objectors requested a status hearing, the District Court directed the parties to complete discovery, and that is exactly what they did. The Objectors disclosed supplemental expert reports addressing the revisions, the trial went forward as scheduled with no delays, and all parties presented evidence concerning the revisions at trial. The revisions were litigated after actual notice, and Rule 15 therefore provides for amendment of the applications.

C. The District Court Abused Its Discretion If It Denied The Test Applications On Alternative Grounds

In addition to the revised maps and legal descriptions, the Court should have permitted amendment of the applications with respect to the other evidence exchanged during discovery and presented at trial, including (1) the Assessor's Parcel Numbers ("APNs") for the underlying lands (which were disclosed by Freeport and by the Community through its database), (2) more specific locations of diversion points, and (3) historical use of the water rights. (S.E.R.591, 592). There was no prejudice associated with these amendments.

It is not entirely clear whether the District Court denied Freeport's test applications on any of these alternative grounds. The August 2010 Order contains language suggesting that may have been the case. For instance, in the same paragraph in which the District Court denied the ten test applications, the District Court continues by finding that "[a]ll ten Applications fail to identify the relevant Assessor Parcel Numbers" or "the locations of the diversion points with a map and legal description." (E.R.75). Relying on this language, the Objectors have argued that the District Court did, in fact, deny the test cases on at least some of these alternative bases. (S.E.R.352, 356).

However, the District Court's subsequent orders indicate that these amendments were considered minor, *i.e.* they were not alternative grounds for denying the applications. When the District Court lifted the stay on the processing of the remaining 419 applications following issuance of the August 2010 Order, the Objectors filed objections to six applications filed by the Householder Family Limited Partnership ("Householder Applications"). (S.E.R.360, 363). The Objectors contended that the Householder Applications should be denied because they did not include Assessor's Parcel Numbers or maps of points of diversion, and they relied heavily on the language from the August 2010 Order to support these objections. (S.E.R.352, 356). However, the District Court dismissed both objections, explaining that "the Court will allow any party to amend an application

to include the required APN because such an amendment is minor," and that parties would be permitted to cite to points of diversion compiled by the Water Commissioner. (S.E.R.367-370).

Freeport requests clarification that, if the District Court did deny the applications on these alternative bases, or if Objectors argue that the ruling may be upheld on that basis, the denial of amendment is reversed. This is warranted because Freeport satisfied the Rule 15 standard, as discussed above. Moreover, if these components of the application form served as alternative bases for denial, that would necessarily mean that Freeport was held to a different standard than other sever and transfer applicants in violation of equal protection and due process. U.S. Const. amend. XIV, § 1; Ariz. Const. art. II, §§ 4, 13.

CONCLUSION

The District Court correctly determined that forfeiture does not apply to pre-code water rights, and that prolonged nonuse is insufficient to demonstrate an intent to abandon. The District Court should be affirmed in these regards.

However, the District Court erred in determining that a portion of one water right was abandoned. The District Court applied improper legal presumptions against Freeport, and failed to consider Freeport's evidence of intent to protect its decreed rights.

The District Court also erred in denying Freeport's applications to sever and transfer water rights. Freeport met its initial *prima facie* case of no injury to the Tribe's senior water rights, and the District Court erred by failing to consider Freeport's Rule 15 motion to amend.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Freeport states that it is unaware of any pending cases in this Court related to this one.

CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Rules 28.1(e)(2) and 32(a)(7)(c), Fed. R. App. P., and Circuit Rule 32-1, the foregoing Principal and Response Brief of Appellee-Cross-Appellant Freeport Minerals Corporation is proportionately spaced, has a typeface of 14 points or more, and contains 15,838 words according to the Microsoft Word word count function, excluding the portions of the brief exempted by Rule 32(a)(7)(B)(iii).

RESPECTFULLY SUBMITTED: April 16, 2015.

s/ Sean T. Hood
Attorney for Freeport Minerals Corporation

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Principal and Response Brief of Appellee-Cross-Appellant Freeport Minerals Corporation with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 16, 2015.

All participants are registered CM/ECF users and will be served via the CM/ECF system.

s/ Sean T. Hood
Attorney for Freeport Minerals Corporation

STATUTORY ADDENDUM

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Ariz. Rev. Stat. § 45-141. Public nature of waters of the state; beneficial use; reversion to state; actions not constituting abandonment or forfeiture.

A. The waters of all sources, flowing in streams, canyons, ravines or other natural channels, or in definite underground channels, whether perennial or intermittent, flood, waste or surplus water, and of lakes, ponds and springs on the surface, belong to the public and are subject to appropriation and beneficial use as provided in this chapter.

B. Beneficial use shall be the basis, measure and limit to the use of water. An appropriator of water is entitled to beneficially use all of the water appropriated on less than all of the land to which the water right is appurtenant, and this beneficial use of the water appropriated does not result in the abandonment or forfeiture of all or any portion of the right.

C. Except as otherwise provided in this title or in title 48, when the owner of a right to use of water ceases or fails to use the water appropriated for five successive years, the right to the use shall cease, and the water shall revert to the public and shall again be subject to appropriation. This subsection or any other statutory forfeiture by nonuse shall not apply to a water right initiated before June 12, 1919.

D. Underground water storage, pursuant to chapter 3.1 of this title, for future beneficial use of waters appropriated pursuant to this chapter does not constitute an abandonment or forfeiture.

E. The following water exchange arrangements or substitutions do not constitute an abandonment or forfeiture of all or any portion of a right to use surface water:

1. Exchanging surface water for groundwater, effluent, Colorado river water, including water delivered through the central Arizona project, or another source of surface water pursuant to chapter 4 of this title.

2. Substituting groundwater, effluent, Colorado river water, including water delivered through the central Arizona project, or another source of surface water for surface water.

Ariz. Rev. Stat. § 45-171. Effect of chapter on vested water rights.

Nothing in this chapter shall impair vested rights to the use of water, affect relative priorities to the use of water determined by judgment or decree of a court, or impair the right to acquire property by the exercise of the right of eminent domain when conferred by law. The right to take and use water shall not be impaired or affected by the provisions of this chapter when appropriations have been initiated under and in compliance with prior existing laws and the appropriators have in good faith and in compliance with such laws commenced the construction of works for application of the water so appropriated to a beneficial use and prosecuted the work diligently and continuously, but the rights shall be adjudicated as provided in this chapter.

Arizona Code § 75-138 (1939). Vested rights not affected.

Nothing herein contained shall impair vested rights to the use of water, affect relative priorities to the use of water determined by decree of the court, nor impair the right to acquire property by the exercise of the right of eminent domain whenever conferred by law; nor shall the right to take and use water be impaired or affected by the provisions hereof where appropriations have been initiated under and in compliance with previous laws then existing, and such appropriators have, in good faith and in compliance with the laws then existing, commenced the construction of works for the application of the water so appropriated to a beneficial use and prosecuted such work diligently and continuously, but such rights shall be adjudicated as herein provided.

Revised Code of Arizona § 3317 (1928). Vested rights not affected.

Nothing herein contained shall impair vested rights to the use of water, affect relative priorities to the use of water determined by decree of the court, nor impair the right to acquire property by the exercise of the right of eminent domain whenever conferred by law; nor shall the right to take and use water be impaired or affected by the provisions hereof where appropriations have been initiated under and in compliance with previous laws then existing, and such appropriators have, in good faith and in compliance with the laws then existing, commenced the construction of works for the application of the water so appropriated to a beneficial use and prosecuted such work diligently and continuously, but such rights shall be adjudicated as herein provided.

Laws of Arizona, Chapter 35 (1925).

LAWS OF ARIZONA

CHAPTER 35.

(House Bill No. 229)

AN ACT

PROVIDING FOR THE REVISION AND CODIFICATION OF THE LAWS OF THE STATE OF ARIZONA; PROVIDING FOR THE APPOINTMENT OF COMMISSIONER; DEFINING HIS DUTIES; AND MAKING APPROPRIATION THEREFOR.

Be It Enacted by the Legislature of the State of Arizona:

Section 1. The Governor shall, by and with the advice and consent of the Senate, immediately upon this Act taking effect, appoint a Code Commissioner, who shall be learned in the law.

Section 2. The said Commissioner before entering upon the duties of his office, shall give bond in the sum of Five Thousand Dollars ($5,000.00), payable to the State of Arizona, for the faithful discharge of the duties by this Act imposed.

Section 3. After thus qualifying, the said Commissioner shall at once proceed to revise and codify the laws of the State of Arizona, such revision and codification to be thorough and complete. The said Commissioner shall not, however, undertake to make any change of existing laws, but shall harmonize where necessary, reduce in language, and remove inconsistencies where the same are found to exist; it being the intention of this Act that said Commissioner shall in no manner assume to exercise legislative power, but shall otherwise seek to bring about a thorough revision and codification of the laws. The Commissioner shall prepare, or cause to be prepared, a full index to said Code, and annotations thereto. The Commissioner shall prepare proposed legislation wherever necessary to harmonize and make effective the laws of the state. The Commissioner shall complete his duties under this Act on or before February 1st, 1926.

Section 4. Upon the completion of the work by the said Commissioner, said Commissioner shall file with the Governor his report. Said report shall contain

the completed work of such revision and codification, including such proposed legislation. The Governor shall thereupon transmit to the next Session of the Legislature, regular or special, the report of such Commissioner.

Section 5. The said Commissioner shall receive a salary of Ten Thousand Dollars ($10,000.00) the year, and shall have power to employ such clerical and stenographic assistance as may be necessary.

The said Commissioner shall determine the Best. manner and means of publishing the Code, and for this purpose may enter into negotiations with publishing houses looking to the publication of such Code, when completed, and shall report to the Governor the result of his determination and of his negotiations.

Section 6. There is hereby appropriated out of any money in the State Treasury, not otherwise appropriated, the sum of Thirty-Two Thousand Dollars ($32,000.00), which sum, or so much thereof as may be necessary to carry out the purpose of this Act, shall be paid by the State Treasurer upon the orders of said Commissioner from time to time as the same may be required.

Section 7. All acts and parts of acts in conflict with the provisions of this act are hereby repealed.

Section 8. WHEREAS, the laws of the Slate of Arizona are in many instances confusing and conflicting, and an early operation of this Act is required to preserve the public peace, health and safety, there is hereby declared to exist an emergency, and this act shall be in full force and effect from and after its passage and approval by the Governor, and is hereby exempted from the operation of the referendum provisions of the State Constitution.

Approved March 16, 1925.

Laws of Arizona, Chapter 64, § 1 (1919).

The water of all natural streams, or flowing in any canyon ravine or other natural channel, or in definite underground channel, and of springs and lakes, belongs to the public, and is subject to beneficial use as herein provided. Beneficial use shall be the basis and the measure and the limit to the use of water in the State and whenever hereafter the owner of a perfected and developed right shall cease or fail to use the water appropriated for a period of five (5) successive years the right to use shall thereupon cease and revert to the public and become again subject to appropriation in the manner herein provided. 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.

Laws of Arizona, Chapter 64, § 56 (1919).

Nothing in this act contained, shall impair the vested rights of any person, association or corporation to the use of water.

Nor shall anything in this act contained, affect relative priorities to the use of water between or among parties to any decree of the courts rendered in causes determined or pending prior to the taking effect of this act.

Nor shall the right 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, and such appropriators, their heirs, successors or assigns shall, in good faith and in compliance with the laws existing at the time of the filing of this act in the office of the Secretary of State, commence the construction of works for the application of water so appropriated to a beneficial use and thereafter prosecute such work diligently and continuously to completion, but all such rights be adjudicated in the manner provided in this act.

Laws of Arizona, Chapter 64, § 58 (1919).

Nothing herein contained shall be construed to deprive the State or any City, municipal water district, irrigation district, or political subdivision of the State or any person, company or corporation, of any rights which under the law of this State they may have, to acquire property by or through eminent domain proceedings.

Ariz. Const., Art. XVII, § 2 (Current).

Section 2. 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.

Ariz. Const., Art. XVII, § 2 (1913).

Section 2. All existing rights to the use of any of the water in the State for all useful or beneficial purposes are hereby recognized and confirmed.

Laws of Nevada, Chapter 140, § 8 (1913).

Rights to the use of water shall be limited and restricted to so much thereof as may be necessary, when reasonable and economically used for irrigation and other beneficial purposes, irrespective of carrying capacity of the ditch; and all the balance of the water not so appropriated shall be allowed to flow in the natural stream from which such ditch draws its supply of water, and shall not be considered as having been appropriated thereby; and in case the owner or owners of any such ditch, canal or reservoir shall fail to use the water therefrom for beneficial purposes for which the right exists during any four successive years, the right to use shall be considered as having been abandoned, and they shall forfeit all water rights, easements and privileges appurtenant thereto, and the water formerly appropriated by them may be again appropriated for beneficial use, the same as if such ditch, canal or reservoir had never been constructed.

Laws of Nevada, Chapter 140, § 84 (1913).

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 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.