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

REPLY BRIEF OF APPELLEE-CROSS-APPELLANT FREEPORT MINERALS CORPORATION

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SUMMARY OF ARGUMENT

A. There Was No Intent to Abandon Water Rights

The District Court erred in ruling that Freeport abandoned a portion of a water right. The uncontroverted facts demonstrate that before implementation of the TBI regulations in 1997 all decreed water right holders, including Freeport and its predecessors, utilized the full volume of their decreed allocation to irrigate appurtenant land. The uncontroverted facts also show that Freeport's purchased its farms to acquire and preserve the water rights, and that Freeport took numerous actions to protect those rights. Any conclusion that Freeport *actually intended* to abandon its water rights is factually and legally erroneous.

Contrary to the Objectors' arguments, this Court's decisions in the "*Alpine*" line of cases do not support a finding that Freeport or its predecessors intended to abandon water rights. The *Alpine* cases involved a reclamation project under the administration of an irrigation district and farmers using water either without a water right or on non-appurtenant lands. None of those facts is applicable here. Freeport established that before 1997 the Decree was administered to deliver decreed right holders their entire water allocation, even if the water would be used on only a portion of the right holders' decreed lands. Water was not delivered for use on lands without decreed water rights. Furthermore, the Decree has at all times

been administered by the Water Commissioner – an officer of the court. Parties to the Decree were entitled to rely upon the Water Commissioner's interpretation and administration of the Decree.

Moreover, the *Alpine* line of cases stand for the proposition that a trial court must look at all of the surrounding circumstances (not just evidence of nonuse) to discern whether there was any *actual* intent to abandon. Here, the District Court failed to evaluate all of the relevant facts in making its abandonment determination.

B. Freeport Met its *Prima Facie* Burden to Show No Injury

The District Court also misapplied the legal standard for making a *prima facie* case when it granted the Tribe's Motion for Judgment as a Matter of Law. The evidence provided by Freeport establishing the legal protections available to the Tribe under its senior priority, the Decree, the call system, and the Water Quality Injunction was more than sufficient to satisfy Freeport's *prima facie* burden to show that the transfers would not harm the Tribe.

In their briefs, the United States and the Tribe misconstrue the nature of a *prima facie* case. Freeport was not required to prove with certainty that no harm could ever befall the Tribe. Freeport was only required to provide evidence to justify an inference that the Tribe's water rights would not be injured by the

proposed transfers. The evidence provided by Freeport met its *prima facie* burden.

C. The District Court Erred in Not Allowing Freeport to Amend its Applications

Finally, the District Court also erred in refusing Freeport's request to amend its applications under Rule 15, Federal Rules of Civil Procedure. Freeport disclosed revised information to resolve the objections to its applications, even using the Community's database to prepare new maps and legal descriptions. (Freeport Brief[1] pp. 22-25). The revised information was disclosed during discovery and fully litigated by all parties. Accordingly, the Objectors would not have been prejudiced by amendment of Freeport's applications.

The Objectors make two arguments against Freeport's appeal of the District Court's refusal to allow amendment under Rule 15. Notwithstanding their earlier positions to the contrary, and the District Court's clear instructions that the proceedings would be subject to the Federal Rules, the United States and the Community argue that Rule 15 is inapplicable. The Tribe contends that Freeport never moved to amend its applications. Both arguments are wrong. Rule 15 is clearly applicable and Freeport unquestionably moved to amend its applications at the close of the trial.

[1] Citations to "Freeport Brief" refers to Freeport's principal and response brief filed on April 16, 2015.

The District Court did not provide any justification for its denial of Freeport's motion to amend. Because there was no prejudice to the Objectors, the District Court's refusal to allow Freeport to amend its applications was an abuse of discretion under Rule 15.

ARGUMENT

I. FREEPORT NEVER INTENDED TO ABANDON 1.4 ACRES OF DECREED RIGHTS IN CONNECTION WITH SEVER PARCEL 147

The "paramount" inquiry for abandonment is the intent of the water right holder. *Gila Water Co. v. Green*, 27 Ariz. 318, 328, 232 P. 1016, 1019 (1925). The party asserting abandonment must prove that intent by clear and convincing evidence. *See United States v. Alpine Land & Reservoir Co.* ("*Alpine VI*"), 340 F.3d 903, 909 (9th Cir. 2003). Consideration of all the facts and circumstances leading up to the filing of Application 147 precludes a finding that Freeport *intended* to abandon its water right.

A. There Was No Evidence of Nonuse of Water Prior to 1997

The Objectors do not refute that before implementation of the TBI regulations in 1997, the Water Commissioner administered water deliveries under the Decree based upon total decreed acreage owned, rather than the number of decreed acres irrigated in a given year. *United States v. Gila Valley Irrig. Dist*., 804 F. Supp. 1, 16 (D. Ariz. 1992), *aff'd in part, vacated in part*, *United States v. Gila Valley Irrig. Dist*. ("*GVID V*"), 31 F.3d 1428 (9th Cir. 1994). The Objectors, nevertheless, argue that the previously approved practice of using all water under a Decree water right on less than all of the decreed acreage gives rise to an inference of intent to abandon.

The Objectors seek to impose a legal presumption rather than prove any actual intent to abandon prior to 1997. They ignore the following undisputed facts: (1) before TBI regulation, all decreed water rights holders exercised their full rights to irrigate less than all decreed acres associated with a water right; (2) no evidence established that water was used on lands other than those listed in the Decree; (3) no evidence established that Freeport or its predecessors ever used this water right on lands outside the fields shown on the 1920s Maps; and (4) for over 60 years, the use of Decree rights on less than all of the decreed acreage was authorized by the Water Commissioner. Based on these facts, the District Court erred by inferring Freeport or its predecessors intended to abandon water rights based upon pre-1997 aerial photography.

The United States' and Community's arguments comparing the *Alpine* line of cases to the pre-TBI regulation administration of the Decree do not support a finding of abandonment. (U.S. Brief pp. 42-47;[2] Community Brief pp. 30-33). *Alpine II* did not involve decreed parties using all of their decreed water on some, but not all, of their decreed lands. *United States v. Alpine Land & Reservoir Co*. ("*Alpine II*"), 878 F.2d 1217, 1222 (9th Cir. 1989). In that case, the farmers had used water despite having "had no contract or certificate entitling them to do so."

[2] Unless otherwise stated, citations to Objectors' briefs refer to their response briefs filed on June 12, 2015.

Id. This Court reversed the district court's erroneous holding that Nevada's law of abandonment was inapplicable to these water rights, and remanded the matter for an evaluation of the State Engineer's finding that there was no intent to abandon the water rights. *Id.* at 1219, 1229. Nothing in *Alpine II* supports the contention that Freeport intended to abandon its decreed water rights.

Nor does *Alpine V* support the Objectors' position. *United States v. Alpine Land & Reservoir Co*. ("*Alpine V*"), 291 F.3d 1062, 1075-76 n. 18 (9th Cir. 2002). Unlike this appeal, *Alpine V* addressed claims of abandonment directed at water rights that were used outside of the appurtenant lands. *Id.* Furthermore, this Court reaffirmed "that 'abandonment is to be determined from all the surrounding circumstances.'" *Id.* at 1072 (quoting *United States v. Orr Water Ditch Co.*, 256 F.3d 935, 946 (9th Cir. 2001)). This Court once again remanded the matter for factual determinations concerning whether there was any *actual* intent to abandon. *Id.* at 1077-78.

The Objectors seize upon the Court's statement in *Alpine V* that transfer applicants that used water on non-appurtenant land "did so 'at their own risk ….'" *Id.* at 1077. However, the Objectors fail to acknowledge that, unlike these *Alpine* cases, the pre-1997 administration of the Decree did not result in delivery of water to non-appurtenant lands. The Objectors presented no evidence showing that

Freeport or its predecessors used water outside of the fields depicted on the 1920s Maps, much less outside of the quarter-quarter sections described under the Decree. For instance, Attachment 23 to the August 3, 2010 order (E.R.102),[3] which the District Court relied upon in making its ruling, clearly shows that all irrigated areas on Freeport's property are within the field location shown on the 1920s Maps. Freeport's predecessor used all of its water on decreed lands. Any "inference" of intent to abandon is simply wrong.

Moreover, unlike the Newlands Reclamation Project, which was administered by an irrigation district, the Globe Equity Decree has at all times been overseen directly by the Water Commissioner – an officer of the court pursuant to Article XII of the Decree. (E.R.497-498). The Decree authorizes the Water Commissioner to administer and enforce the Decree. (*Id*.). While the manner in which the Decree is administered was later changed, decreed parties were entitled to rely upon the Water Commissioner's interpretation and administration of the Decree prior to that change.

The United States and the Community also argue that Freeport's predecessors were on notice that they could not exercise their water rights on less than all their decreed acres following the District Court's 1992 decision on the

[3] "E.R.102" refers to Appellants' Joint Excerpts of Record at page 102.

"then being irrigated" language in the Decree. The argument ignores the history surrounding the promulgation of the TBI regulations.

In 1992, the Water Commissioner's long-standing practice of allowing diversion based on total decreed acreage was found to be an incorrect interpretation of the Decree. For the first time, after 57 years of Decree administration, the District Court interpreted Article V of the Decree (E.R.406) to preclude a decreed party from diverting the full extent of the decreed right if less than the full decreed acreage was under cultivation. *Gila Valley Irrig. Dist.*, 804 F. Supp. at 15-16.

However, the District Court, "mindful of the fact that its determination of the issues [would] work a substantial change in the administration of the Decree," did not issue an injunction or order a change in the administration of the Decree. *Id*. at 19. Rather, the court referred the issue to a rules committee to propose implementation procedures. Pending the appeal that followed, the work of the rules committee, and the implementation of the TBI regulations, the Water Commissioner continued to administer the Decree as he had been doing since 1935.[4] All parties – including the Objectors – continued to use their decreed rights

[4] The Community contends that Water Commissioner Allred's testimony may not relate to practices preceding his appointment as Water Commissioner. (Community Brief p. 27). However, Commissioner Allred's tenure in the Water

in full even if not all decreed acres were irrigated until 1997. (S.E.R.502).

B. Freeport Did Much More than Pay Taxes and Assessments

Even if the TBI regulations had been implemented earlier, the District Court's application of this Court's precedent would still be in error. This Court has recognized that where there is both a "substantial period of nonuse" and an "improvement which is inconsistent with irrigation," the payment of taxes and assessments "alone" will not defeat a finding of abandonment. *Orr Water Ditch*, 256 F.3d at 946. Accordingly, when payment of taxes and assessments is joined by additional evidence, an intent to abandon cannot be inferred. In applying this rule, the District Court was required to consider "all of the surrounding circumstances." *Orr Water Ditch*, 256 F.3d at 946; *see also Alpine V*, 291 F.3d at 1072; *Landers v. Joerger*, 15 Ariz. 480, 482, 140 P. 209, 210 (1914).

Freeport presented evidence that it bought the properties for the water rights, required lessees to protect those water rights, defended those water rights against the Pumping Complaint, negotiated the UV Forbearance Agreement, litigated

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Commissioner's office dates back to 1980, and he was keenly aware about how the Decree was administered at all relevant times. (S.E.R.502;913-915). For instance, Allred's 1991 testimony, at a time when George Greiner was the Water Commissioner, supported the District Court's finding "that the water commissioner allows diversions without considering whether land is 'then being irrigated.' Rather, diversions are based simply on the decreed acreage." *Gila Valley Irrig. Dist.*, 804 F. Supp. at 16. The court's finding was also based on Commissioner Greiner's testimony. *Id.*

approval of that agreement in state and federal court, and then filed its sever and transfer applications in accordance with that agreement.[5] It is undisputed that Freeport took numerous steps beyond the mere payment of taxes and assessments to protect its water rights. (Freeport Brief pp. 51-53). In consideration of this evidence, there is no basis to conclude that Freeport intended to abandon its water right.

Furthermore, in accordance with the rule announced by this Court in *Alpine VII*, there can be no finding of abandonment where Freeport acquired the property from the prior owners "before an abandonment would otherwise be found" and "presented evidence of a lack of intent to abandon the water rights." *United States v. Alpine Land & Reservoir Co*. ("*Alpine VII*"), 510 F.3d 1035, 1039 (9th Cir.

[5] The Community erroneously contends that Freeport's litigation efforts were not related to Freeport's water rights that the Objectors have asserted have been abandoned. (Community Brief p. 35). However, the negotiations leading up to the UV Forbearance Agreement, which date back to 1997 and before, specifically involved Freeport's inactive decreed acres. The UV Forbearance Agreement authorized the UVDs, including Freeport, to file applications to sever the water rights appurtenant to inactive decreed acres and transfer them to so-called "Hot Lands," (E.R.393(¶11)), which were implicated in the Pumping Complaint litigation. This provision of the UV Forbearance Agreement was an important component of the consideration negotiated by Freeport and the other UVDs in exchange for their agreement to reduce water uses in the Upper Valleys and settle the Pumping Complaint litigation. (Freeport Brief pp. 14-17). Accordingly, Freeport's efforts to defend and settle the Pumping Complaint litigation are directly related to the water rights that the Objectors assert have been abandoned, as these efforts culminated in an agreement that provided for the sever and transfer of the water rights from these very same inactive decreed acres.

2007).

As the Objectors acknowledge, the District Court based its abandonment ruling solely upon three limited facts: (1) a period of nonuse assumed to extend back to 1991 based on photos provided by the Objectors (ignoring pre-TBI Decree administration); (2) the existence of an improvement inconsistent with irrigation located within the water right area shown on the 1920s Maps prepared by the Objectors; and (3) the absence of a transfer application until 2008. (E.R.1:48). Because the District Court failed to evaluate all relevant facts, its ruling was in error under this Court's abandonment rules and must be reversed.

II. THE DISTRICT COURT ERRED IN FINDING THAT FREEPORT DID NOT MEET ITS *PRIMA FACIE* BURDEN TO SHOW NO INJURY TO THE TRIBE'S WATER RIGHTS

A. Freeport's Evidence Was More Than Sufficient to Meet Its Initial *Prima Facie* Burden of No Injury

The United States and the Tribe[6] misconstrue the nature of a *prima facie* case and what is required to overcome a motion for judgment as a matter of law.[7]

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[6] In observance of the UV Forbearance Agreement, the Community did not raise the issue of injury, either in the District Court or in this Appeal. (E.R.393(¶11)).

[7] Because the District Court found that Freeport did not meet its initial *prima facie* burden, it did not reach the merits of the United States' and the Tribe's harm objections or the evidence presented in the their cases-in-chief or in Freeport's rebuttal. However, even if the District Court had reached the parties' evidence on the injury issue, the United States and the Tribe failed to carry their burden to establish that the transfers would harm the Tribe's decreed right. The Tribe's

The United States argues that Freeport did not meet its *prima facie* burden because, "[w]hile a senior user's ability to call upon upstream junior rights can help protect the senior user," the Globe Equity Decree and the call system do not provide an absolute "failsafe against injury to the senior user's rights." (U.S. Brief p. 54). The Tribe asserts similar arguments. (*See, e.g.,* Tribe Brief p. 33).

However, Freeport was not required to prove, as a matter of factual certainty, that no injury could ever befall the Tribe. Rather, Freeport was only required to make a *prima facie* showing of evidence[8] sufficient to justify, but not necessarily compel, an inference that the Tribe would not be injured as a result of the proposed water right transfer. *See, e.g., City of Glendale v. Farmers Ins.*

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expert witness only described generalized concerns and did not identify any real injury that would occur because of the transfers. (S.E.R.573-574, 613-614, 640-641). In contrast, Freeport's rebuttal expert described his harm analysis and established that the transfers would not injure the Tribe. (S.E.R.615-626).

[8] Despite the United States' and the Tribe's protestations to the contrary, the Decree, its Schedule of Rights and Priorities, the call system, and the Water Quality Injunction are evidence. *See, e.g.*, Black's Law Dictionary (9th ed. 2009), evidence ("Something, (including testimony, documents and tangible objects) that tends to prove or disprove the existence of an alleged fact.... Evidence is any matter of fact which is furnished to a legal tribunal, otherwise than by reasoning or a reference to what is noticed without proof, as the basis of inference in ascertaining some other matter of fact.'" (quoting James B. Thayer, *Presumptions and the Law of Evidence*, 3 Harv. L. Rev. 141, 142 (1889)). Indeed, as the legal underpinnings of these proceedings, the Decree, its Schedule of Rights and Priorities, the call system, and the Water Quality Injunction are more forceful than other forms of evidence.

Exchange, 126 Ariz. 118, 120, 613 P.2d 278, 280 (1980); *United States v. Park*, 421 U.S. 658, 673-74, 95 S.Ct. 1903, 1912 (1975). Freeport's evidence admitted at trial met this burden.

The United States does not address these legal authorities, but instead relies on this Court's opinion in *Zannaras v. Bagdad Copper Corp*., 260 F.2d 575 (9th Cir. 1958). However, the issue addressed in *Zannaras* was the trial court's placement of the burden of proof regarding injury on the wrong party. In contrast, the issue in this case is not which party bears the initial burden, but rather what proof is required to meet that *prima facie* burden — an issue not addressed in *Zannaras*.

Furthermore, the senior appropriator in *Zannaras* did not have the same protections enjoyed by the Tribe, namely senior water rights under a decree and a call system actively administered by a Water Commissioner. (U.S. Brief p. 54). Indeed, the United States notes that "[a] senior appropriator's ability to call upon upstream junior rights can help protect the senior user," and that this protection applies even if the change in use "places greater demands on the river." (*Id.*). The Tribe's right under the Decree is senior to all decreed rights in the Upper Valleys. Accordingly, if the Tribe makes a call for its water, Freeport, as well as all other decreed parties upstream of the Tribe, must cease diverting water as necessary to

satisfy the Tribe's senior call. *See e.g.*, *United States v. Gila Valley Irrig. Dist*., 920 F. Supp. 1444, 1465 (9th Cir. 1996).

The United States and the Tribe devote a significant portion of their responses asserting that there are times when the Tribe does not receive its call. However, this alleged injury is not caused by Freeport's proposed change in use, but is a function of Arizona's arid environment. The relevant rule is clear, and it is inflexible: if the Tribe makes a call, all upstream diversions – whether associated with their current locations or in new locations after completion of a transfer – must cease as necessary to satisfy the Tribe's call.[9]

Under the United States' and the Tribe's rationales, the Tribe is essentially able to block all transfers on the grounds that, at certain times, it does not receive all of its water. However, the applicable standard is whether the proposed change in use *causes* injury to the Tribe's water rights, not whether the Tribe is adversely impacted by naturally occurring conditions such as reduced flows in the river during the hot summer months – a condition that exists regardless of the place of

[9] It is for this reason that the Tribe's and the United States' reliance on the Cosper's Crossing condition is misplaced. The UVDs in the Duncan-Virden Valley may not divert Gila River water under their apportionment rights in disregard of the rights of the UVDs in the Safford Valley if these diversions would negatively impact the Tribe. *Gila Valley Irrig. Dist.*, 920 F. Supp. at 1465 (holding 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)").

use of a junior water right holder such as Freeport.

The United States and the Tribe assert that the Water Quality Injunction cannot be used as *prima facie* evidence of no injury to the Tribe's rights because the Water Commissioner occasionally has difficulty satisfying the injunction,[10] and the possibility therefore exists that Freeport's proposed transfers could injure the Tribe's rights. Again, the Objectors misconstrue the level of proof required for Freeport to satisfy its *prima facie* burden and essentially argue that the existing water quality conditions prevent any transfers.

The Tribe also asserts that the Water Quality Injunction cannot be used as *prima facie* evidence of no injury because farmers in the Upper Valleys switch to pumping groundwater when the injunction is triggered, which the Tribe alleges exacerbates water quality issues. (Tribe Brief pp. 16-17). However, the Tribe's argument again confuses the issue of whether Freeport met its *prima facie* burden to show no injury *from the proposed transfers* with injury that the Tribe may experience from unrelated circumstances. Moreover, the pumping and use of percolating groundwater is governed under Arizona's doctrine of reasonable use,

[10] Notably, the District Court did not agree that its Water Quality Injunction is ineffective. The District Court noted "that there was some testimony at the evidentiary hearing that the requirements of the Court's water quality injunction are difficult to meet presently, but this testimony was not supported by other evidence." (E.R.60 n.38).

not the Decree. *See Davis v. Agua Sierra Res., L.L.C.*, 220 Ariz. 108, 110, ¶ 10, 203 P.3d 506, 508 (2009). Water quality impacts from other water uses, particularly those outside the scope of the Decree, are irrelevant to an analysis of potential harm from Freeport's proposed transfers of decreed water rights.

Freeport met its burden by comparing "the impact of the proposed change against a baseline of conditions." *United States v. Orr Water Ditch Co.*, 309 F.Supp.2d 1245, 1253 (D. Nev. 2004). When a decree like the Globe Equity Decree is in operation, that baseline condition is the "*existing condition*" where the Tribe "had and has superior right to use water in the place, manner, and amount decreed...." *Id*. (emphasis added). That existing condition includes the protections of the Globe Equity Decree, the call system, and the Water Quality Injunction. Freeport is only seeking to sever and transfer water rights *equal* to the amount it already has the right to use and which are all upstream of the Tribe; therefore, the conditions remain the same, and there is no injury. Accordingly, Freeport met its *prima facie* burden by presenting evidence of protections enjoyed by the Tribe that are more than sufficient to support an inference of no injury.

B. Objectors Inappropriately Attempt to Expand Freeport's Burden in a Manner that is Inconsistent with the Change in Use Rule

Both the United States and the Tribe assert that the District Court did not err in requiring Freeport to show that its separate transfer applications would not have

a cumulative impact on the Tribe's water rights. They both fail to provide any authority for this proposition and disregard the clear mandate of the 1993 Order: "[a] separate application must be filed for each water right affected by the proposed change or changes." (E.R.25:4). The Change in Use Rule neither requires nor allows multiple applications be grouped together for a cumulative injury analysis or otherwise. No authority exists to support such a requirement. Likewise, there is no basis for significantly altering the parties' respective burdens under the Change in Use Rule merely because, administratively, the District Court decided to designate a separate cause number for Freeport's applications.

The only authority cited by the District Court for imposing a cumulative injury analysis was an opinion applying, not water law principles, but the National Environmental Policy Act ("NEPA"). *Te-Moak Tribe of Western Shoshone of Nevada v. United States Dep't of Interior,* 608 F.3d 592, 606 (9th Cir. 2010). However, NEPA is irrelevant to transfer proceedings under the Decree and Change in Use Rule, which do not require a cumulative impacts analysis. (Freeport Brief pp. 63-65). The District Court's *ad hoc* application of a cumulative impacts requirement was erroneous and must be reversed.

III. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT DENIED FREEPORT'S MOTION TO AMEND ITS APPLICATIONS TO CONFORM TO THE EVIDENCE

A. The Objectors Tacitly Acknowledge the Legal Principles That Demonstrate That the District Court Abused Its Discretion

In their response briefs, the Objectors fail to address the legal standard for amendment; specifically, an amendment under Rule 15 is proper unless the objecting party proves actual prejudice and would suffer a serious disadvantage. *Galindo v. Stoody Co*., 793 F.2d 1502, 1513 (9th Cir. 1986); *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187 (9th Cir. 1987); *Hodgson v. Colonnades, Inc*., 472 F.2d 42, 48 (5th Cir. 1973). The "freely given" requirement "is a mandate to be heeded" – "*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) (citing *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 230 (1962)) (emphasis added).

Instead, the Objectors oppose Freeport's appeal of the District Court's refusal to permit amendment in two ways. The United States and the Community acknowledge that Freeport moved to amend its applications,[11] but they argue that Rule 15 is inapplicable. The Tribe, on the other hand, contends that Freeport never moved to amend. The Objectors' respective positions cannot withstand scrutiny.

[11] U.S. Brief p. 10; Community Brief p. 45.

B. Freeport Appropriately Moved to Amend Its Applications to Conform to the Evidence

Among the Objectors, only the Tribe asserts that Freeport did not move to amend. (Tribe Brief p. 33). The Tribe selectively excerpts from the dialogue between Freeport's counsel and the District Court during closing argument, (*id*. at pp. 33-34), and misleadingly terminates its quotations with the remark "We're not going to ask..." (*Id*. at p. 34).

The trial transcript demonstrates that Freeport did request to amend its applications under Rule 15. (S.E.R.642-643). The dialogue begins with the District Court raising the issue of amendment, and Freeport's counsel explaining that "*part of our hope here is* ***under Rule 15*** *where you hear the evidence at trial you can amend them* [the applications] *back.*" (S.E.R.642) (emphasis added). After discussion with the District Court, Freeport requested leave to amend its applications pursuant to Rule 15 to conform to the evidence:

> That's correct, Your Honor. And so the first is we think that's the way it is if you reject [processing sever and transfer applications based on the Decree's quarter-quarter description] which you have. And you said you're not sympathetic to that and I do understand that. Then, yes, that would be it.
>
> And *our view at trial would be, and our Findings of Fact and Conclusions of Law are based on the acreages in the revised legal descriptions. And* ***under Rule 15****, that would be what we would say if you're going to continue to hold the position on that.* And that's why we did it is to meet the objections.
>
> * * *
>
> So there's very few objections, really, based on the revised legal

> descriptions that still exist. There's a couple of discrepancies that I'll go over, *but yes*, *Freeport's alternative is, and that's in the Findings of Fact, is to, yes, go with the revised legal descriptions and* ***that's what they would request***.
>
> Because it does -- what Freeport wanted to do is, Okay, here are the objections. They didn't like the map. We'll use your database. Try and get it more accurate. And I think that you've heard the testimony. There's very few minor issues on a couple of them. Then there's the pivot parcel I will talk about in a moment and the Clonts parcel, ***but yes, that is the request of Freeport, Your Honor***.

(S.E.R.642-643) (emphasis added).

As the United States and the Community acknowledge, Freeport certainly moved to amend its applications pursuant to Rule 15.

C. Because the Federal Rules of Civil Procedure Apply to The Globe Equity 61 Proceedings, The District Court Abused its Discretion in Refusing to Evaluate Freeport's Rule 15 Motion

Rule 1, Federal Rules of Civil Procedure, provides that "[t]hese rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81."[12] Consistent with Rule 1, the District Court repeatedly confirmed throughout the Globe Equity 61 proceedings that "[t]he Fed.R.Civ.P. as amended December 1, 2008, shall apply to all proceedings concerning this case." (E.R.300-301; *see also* S.E.R.371-372). For instance, the District Court provided that the sever and transfer applications would be treated as complaints under the Federal Rules of Civil Procedure, and that objections would

[12] None of the exceptions listed in Rule 81 is relevant.

be treated as counterclaims. (S.E.R.372).[13]

The United States and the Community contend that Rule 15 is inapplicable. (U.S. Brief p. 49; Community Brief p. 46). In the District Court, however, both the United States and the Community recognized the applicability of the Federal Rules and argued that Rule 15 was the appropriate mechanism for amending Freeport's applications. While briefing the District Court on the Objectors' request for a pretrial status conference to discuss Freeport's revisions, the United States argued that

> it has been this Court's consistent admonition that the Parties are to follow the Federal Rules of Civil Procedure in all respects regarding the Applications for Change in Use....
>
> * * *
>
> At a minimum, Freeport is obligated to notify the Court and seek its leave to amend. Fed.R.Civ.P.15.

(S.E.R.476-477).[14] In its separate reply, the Community argued that

> [Freeport] does not deny in its Response that it has significantly amended two of its applications.... This Court has made clear that the Parties are to follow the Federal Rules of Civil Procedure in all respects regarding these applications.... However, [Freeport] has not noticed its amendments to the Objecting Parties, the Court or other parties to the Decree as would be the case with a formal motion to amend, Fed.R.Civ.P.15(a)(2),

[13] It is particularly puzzling, therefore, why the United States would assert that a sever and transfer application "is not a 'pleading' under the Federal Rules of Civil Procedure." (U.S. Brief p. 49 (quoting Fed.R.Civ.P. 7(a)).

[14] The Tribe joined in the United States' arguments about the applicability of the Federal Rules and Rule 15. (S.E.R.486-489).

and as [Freeport] did previously.

(S.E.R.481(n.1)).

In denying the Objectors' request for a status conference, the District Court recounted that "the Objecting Parties have repeatedly requested more precise legal descriptions," and that "one of the purposes of the discovery process is for the Objecting Parties to obtain the more precise legal descriptions they have requested." (S.E.R.491). Accordingly, the District Court directed the parties to continue with discovery. *Id.*

Despite repeatedly holding that the proceedings would be governed by the Federal Rules of Civil Procedure, the District Court ignored Rule 15 in rejecting Freeport's request. Rather than evaluating Freeport's motion to amend, the court imposed its "material change" test that prohibits any "significant" amendment, even in the absence of any prejudice to the parties. (E.R.1:70-73). The material change test is irreconcilable with Rule 15; the court must freely permit an amendment requested during or after trial unless an objecting party can demonstrate the amendment would prejudice that party. Fed.R.Civ.P. 15(b)(1).

D. Because The Objectors Failed to Demonstrate Any Prejudice, The District Court Abused Its Discretion by Not Allowing Freeport to Amend Its Applications to Conform to the Evidence

In failing to address Freeport's Rule 15 motion to amend, the court abused

its discretion:

> A simple denial of leave to amend without any explanation by the district court is subject to reversal. Such a judgment is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

See, e.g., Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003) (internal citations and quotations omitted); *see also Hum v. Retirement Fund Trust of Plumbing, Heating and Piping Industry of Southern California*, 648 F.2d 1252, 1254 (9th Cir. 1981) ("denial without stated reasons, where the reasons are not readily apparent, constitutes an abuse of discretion.") (internal citations omitted).

The Objectors did not demonstrate prejudice at trial, and they do not argue on appeal that they would have been prejudiced by amendment to conform to the evidence. The United States merely asserts that "the alleged absence of prejudice to the Objecting Parties in this case is not determinative." (U.S. Brief p. 51).[15] Likewise, neither the Community nor the Tribe attempts to establish prejudice. (Community Brief pp. 45-48; Tribe Brief pp. 33-35).

The Objectors do not argue prejudice, because the amendments were fully and fairly litigated at trial, and Rule 15(b)(1) expressly contemplates and allows

[15] As discussed above, the absence of prejudice is, in fact, determinative.

amendments occurring "during or after trial." The law is clear that when notice is given and issues are actually litigated, there is no prejudice:

> The whole thrust of modern pleading is towards fulfillment of a notice-giving function and away from the rigid formalism of the common law. It is now generally accepted that *there may be no subsequent challenge of issues which are actually litigated*, *if there has been actual notice and adequate opportunity to cure surprise.* If it is clear that the parties understand exactly what the issues are when the proceedings are had, they cannot thereafter claim surprise or lack of due process because of alleged deficiencies in the language of particular pleadings. Actuality of notice there must be, but the actuality, not the technicality, must govern.

Kuhn v. C.A.B., 183 F.2d 839, 841-42 (D.C. Cir. 1950) (citing Rule 15(b)) (emphasis added); *accord Nielson v. Armstrong Rubber Co.,* 570 F.2d 272, 276 (8th Cir. 1978).

Here, Freeport disclosed revised information; the District Court directed the parties to continue with discovery; discovery was taken on the revisions; the Objectors disclosed supplemental expert reports addressing the revisions; the trial went forward as scheduled with no delays; and the parties all actively litigated the revised information. As tacitly conceded by the Objectors, and as shown by these uncontroverted facts, the Objectors suffered no prejudice through the revisions, and the refusal to allow amendment was therefore an abuse of discretion.

E. The Objectors' Purported Concern about Appropriate Notice to Other Decreed Parties Is a Red Herring

The Objectors rely heavily upon purported concern about notice to other decreed parties. However, the record establishes that Freeport's requested amendments do not implicate notice concerns under either the Change in Use Rule or Due Process.

In 1992, in connection with development of the Change in Use Rule, the District Court specifically determined that it was not necessary to provide direct notice of each application to every decreed party. *Gila Valley Irrig. Dist*, 804 F. Supp. at 12. The court noted that Arizona's transfer "statute makes no provisions relevant to the larger type of network involved in the Decree," and that "the UVDs and the State [of Arizona] argue that it would be too burdensome to require parties to notify all parties connected to the suit for each water transfer." *Id*. (citing A.R.S. § 45-172). The court determined that Arizona's process would be modified to limit direct notice to only a few entities. *Id*. Consistent with this ruling, the Change in Use Rule only requires direct notice to handful of interested parties, including the Objectors. (E.R.212(§2(B)).

The only general notice required by the Change in Use Rule is publication by the Water Commissioner. However, the Water Commissioner does not publish each application. (E.R.212(§2(C)). Rather, the Commissioner publishes a "notice"

of each application. (*Id*.). As the Objectors acknowledge, because Freeport's revisions involved exactly the same water rights (*i.e*. same line item from Article V) and exactly the same quarter-quarter sections, *new notices would have been entirely identical* to those originally published by the Commissioner.

Nevertheless, the Objectors' argue that certain Decree parties might have sought more specific information if they were provided notice of the amended applications. (Community Brief p. 48; U.S. Brief p. 51). However, the only reason that other Decree parties would be interested in the revised applications is if they believed the proposed transfers would harm their water rights. Given that the revised applications involved the same quarter-quarter sections of land, and that the volume of water rights stayed the same or was reduced, there is no basis to assume that a new notice, identical to the original notice, would have triggered any additional objections to Freeport's proposed transfers.

F. There Is No Alternative Ground for Affirming the District Court's Refusal to Permit Amendment

The Community argues that Freeport failed to appeal all of the bases on which the applications were denied. (Community Brief pp. 28-31). This argument is incorrect.

First, the Community asserts that Freeport's position below, that the Decree's quarter-quarter section descriptions were sufficient for severance and

transfer, is an alternative basis to affirm. (Community Brief pp. 44-45). To the contrary, Freeport's position in the trial court that the Decree's quarter-quarter section legal descriptions control was an alternative basis to grant the applications. Freeport revised its maps and legal descriptions to comply with the series of rulings in which the District Court established that certain aspects of Decree administration will be based on the field configurations depicted by the 1920s Maps rather than the Decree's quarter-quarter sections. (*See, e.g.,* Freeport Brief pp. 22-25). Freeport manages its farmlands in observance of these rulings and has elected not to assert this alternative basis for reversing the District Court. This issue, which Freeport has not raised on appeal, certainly provides no alternative basis for affirming the District Court, because Freeport's revised applications conform to the District Court's rulings about the 1920s Maps.

The Community also claims that "Freeport has not appealed the independently sufficient grounds for denying its applications." (Community Brief p. 43). The Community is mistaken. As described in Freeport's Brief (p. 69), the August 2010 Order includes language that suggests that the test applications may have been denied for the alternative reasons that they did not include Assessor's Parcel Numbers or the locations of diversion points. (E.R.75). Irrefutably, Freeport did, in fact, raise this issue in its appeal and "request[ed] 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." (Freeport Brief pp. 68, 70).

The Community next argues, apparently in the alternative, that Freeport never requested to amend these aspects of the applications. Contrary to the Community's assertions, Freeport requested to amend its applications to conform to the evidence presented at trial (S.E.R.642-643), and Freeport has raised these alternative bases in its appeal. This information was exchanged during discovery and was entered as evidence at trial. (*See e.g.*, S.E.R.389-390;916-933). Because there was no prejudice to the Objectors, to the extent that the District Court denied the applications on these alternative grounds, amendment should have been permitted pursuant to Rule 15. *See Galindo*, 793 F.2d at 1513.

Notably, none of the Objectors addresses Freeport's discussion of the subsequent proceedings that suggest that these amendments were considered minor under the District Court's *ad hoc* "material change" test and were not alternative grounds for denying the applications. (Freeport Brief pp. 68-70). As discussed in Freeport's Brief, the Objectors relied on the August 2010 Order to argue that certain UVD applications should be denied because they did not include Assessor's Parcel Numbers or maps of points of diversion. (S.E.R.352,356). The District

Court dismissed both objections, clarifying that "the Court will allow any party to amend an application to include the required APN because such an amendment is minor," and that applicants are permitted to rely upon points of diversion compiled by the Water Commissioner. (S.E.R.367-370).

Accordingly, Freeport's revised applications should be considered on either of two grounds. First, Freeport easily satisfied the Rule 15 standard. Second, Equal Protection and Due Process demand that Freeport enjoy the same standard applied to other decree parties who filed sever and transfer applications in 2008. U.S. Const. amend. XIV, § 1; Ariz. Const. art. II, §§ 4, 13.

CONCLUSION

For the reasons set forth above and in Freeport's Principal and Response Brief, Freeport respectfully requests that this Court reverse and remand this case to the District Court.

RESPECTFULLY SUBMITTED: July 10, 2015.

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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 Reply Brief of Appellee-Cross-Appellant Freeport Minerals Corporation is proportionately spaced, has a typeface of 14 points or more, and contains 6,967 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: July 10, 2015.

s/ Sean T. Hood
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Reply 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 July 10, 2015.

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

s/ Sean T. Hood
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