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

IN THE

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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

and

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

v.

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

*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*

# RESPONSE AND REPLY BRIEF OF APPELLANT-CROSS-APPELLEE GILA RIVER INDIAN COMMUNITY

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## TABLE OF CONTENTS

STATEMENT OF CROSS-APPEAL ISSUES .....1

INTRODUCTION .....2

SUMMARY OF ARGUMENT .....3

ARGUMENT .....6

I. THIS COURT HAS JURISDICTION .....6

A. Section 1291 Finality In Consent Decree Cases Turns On The Specific Post-Judgment Proceeding .....7

B. The District Court's Order Resolves All 419 Applications In The Post-Judgment Proceeding .....9

C. The Irrigation Districts' Other Arguments Against Jurisdiction Fail As A Matter Of Fact And Law .....11

II. PRE-1919 WATER RIGHTS ARE NOT FOREVER IMMUNE FROM FORFEITURE .....16

A. The Arizona Supreme Court Has Recognized That Pre-1919 Water Rights May Be Forfeited .....16

B. Freeport Does Not Stand In The Shoes Of Appropriators Who Held Water Rights In 1919 .....21

III. FREEPORT'S PROLONGED PERIOD OF NON-USE OF WATER ON LAND INCOMPATIBLE WITH IRRIGATION, COUPLED WITH NO EVIDENCE OF INTENT TO RESUME IRRIGATION, ESTABLISHES ABANDONMENT .....22

A. The Decree Limits Use Of Water To The Parcel To Which The Water Right Is Appurtenant Notwithstanding Any Purported Prior Practice .....22

*1. Appurtenancy is a principle of Arizona law embodied in the terms of the Decree.* ..... 22

*2. Any prior practice inconsistent with the Decree and Arizona law does not excuse non-use of water outside the terms of the Decree.* ..... 24

B. The District Court Correctly Found That Seventeen Years Of Non-Use And Construction Of A Permanent Facility Inconsistent With Irrigation Establishes Abandonment ..... 33

C. The District Court's Finding Of Seventeen Years Of Non-Use On River Bottom Land Establishes Abandonment ..... 36

D. The Irrigation Districts' Concerns About Future Application Of Precedent Are Misplaced ..... 39

IV. FREEPORT'S CROSS-APPEAL AS TO THE DENIAL OF LEAVE TO MAKE MATERIAL AMENDMENTS TO ITS APPLICATIONS IS MERITLESS ..... 42

A. Freeport's Cross-Appeal Is Futile ..... 43

B. The District Court Did Not Abuse Its Discretion In Refusing To Allow Material Amendments ..... 45

*1. The district court reasonably administered the Change In Use Rule and Decree to provide the requisite notice* ..... 46

*2. Freeport never requested an opportunity to make minor amendments to its admittedly defective applications* ..... 48

CONCLUSION ..... 50

CERTIFICATE OF COMPLIANCE ..... 51

# TABLE OF AUTHORITIES

**CASES:**

*Adams v. Salt River Valley Water Users' Ass'n*,
89 P.2d 1060 (Ariz. 1939) .....22

*Contested Case No. W1-100 Special Action Proceedings*, Nos. W-1, W-2,
W-3, W-4 (Ariz. Sup. Ct. Aug. 30, 1996) .....18

*Cordoza v. Pacific States Steel Corp.*,
320 F.3d 989 (9th Cir. 2003) .....7, 9

*England v. Ally Ong Hing*,
459 P.2d 498 (Ariz. 1969) .....21

*Firestone Tire & Rubber Co. v. Risjord*,
449 U.S. 368 (1981).....8

*FTC v. Network Servs. Depot, Inc.*,
617 F.3d 1127 (9th Cir. 2010) .....44

*Gila Water Co. v. Green*,
232 P. 1016 (Ariz. 1925) .....35, 37

*Gould v. Maricopa Canal Co.*,
76 P. 598 (Ariz. 1904) .....30

*Grand v. Nacchio*,
236 P.3d 398 (Ariz. 2010) .....19

*Hall v. A.N.R. Freight Sys., Inc.*,
717 P.2d 434 (Ariz. 1986) .....17, 20

*Hall v. City of Los Angeles*,
697 F.3d 1059 (9th Cir. 2012) .....11

*In re Kirkland*,
915 F.2d 1236 (9th Cir. 1990) .....37

*In re Manse Spring & Its Tributaries*,
108 P.2d 311 (Nev. 1940).....20

*James v. Price Stern Sloan, Inc.*,
283 F.3d 1064 (9th Cir. 2002) .....10, 12, 13

*Jeff D. v. Kempthorne*,
365 F.3d 844 (9th Cir. 2004) .....7

*Landers v. Joerger*,
140 P. 209 (Ariz. 1914) .....34

*Nelson v. City of Irvine*,
143 F.3d 1196 (9th Cir. 1998) .....20

*Platt Elec. Supply, Inc. v. EOFF Elec., Inc.*,
522 F.3d 1049 (9th Cir. 2008) .....45

*Rosenbaum v. City & Cnty. of San Francisco*,
484 F.3d 1142 (9th Cir. 2007) .....46

*Salt River Valley Water Users' Ass'n v. Kovacovich*,
411 P.2d 201 (Ariz. Ct. App. 1966).....23

*San Carlos Apache Tribe v. Superior Court*,
972 P.2d 179 (Ariz. 1999) .....*passim*

*ScottTrade, Inc. v. Gibbons*,
590 F. App'x 657 (9th Cir. 2014).....45, 46

*Slosser v. Salt River Valley Canal Co.*,
65 P. 332 (Ariz. 1901) .....23

*Solis v. Current Dev. Corp.*,
557 F.3d 772 (7th Cir. 2009) .....7, 14

*Strawberry Water Co. v. Paulsen*,
207 P.3d 654 (Ariz. Ct. App. 2008).....38

*Tattersfield v. Putnam*,
41 P.2d 228 (Ariz. 1935) .....44

*Thomas v. Blue Cross & Blue Shield Ass'n*,
594 F.3d 823 (11th Cir. 2010) .....7

*United States v. Alpine Land & Reservoir Co.*,
697 F.2d 851 (9th Cir. 1983) (*Alpine I*).....31
878 F.2d 1217 (9th Cir. 1989) (*Alpine II*) .....*passim*
291 F.3d 1062 (9th Cir. 2002) (*Alpine V*).....31, 32, 33
340 F.3d 903 (9th Cir. 2003) (*Alpine VI*) .....29, 34
510 F.3d 1035 (9th Cir. 2007) (*Alpine VII*).....14, 38, 39

*United States v. Andersen*,
736 F.2d 1358 (9th Cir. 1984) .....21, 22

*United States v. Gila Valley Irrigation Dist.*,
804 F. Supp. 1 (D. Ariz. 1992) .....29
31 F.3d 1428 (9th Cir. 1994) (*Gila Valley V*).....*passim*

*United States v. Orr Water Ditch Co.*,
256 F.3d 935 (9th Cir. 2001) .....37, 39

*United States v. Sunset Ditch Co.*,
472 F. App'x 472 (9th Cir. 2012).....10

*United States v. W.R. Grace*,
526 F.3d 499 (9th Cir. 2008) .....7, 8

*United States v. Washington*,
653 F.3d 1057 (9th Cir. 2011) .....49

*United States v. Washington*,
761 F.2d 1404 (9th Cir. 1985) .....8

*Walsh v. Nevada Dep't of Human Res.*,
471 F.3d 1033 (9th Cir. 2006) .....49

**CONSTITUTION, STATUTES, AND RULES:**

ARIZ. CONST. Article XVII § 2 (1913).....19

28 U.S.C. § 1291.....7

ARIZ. REV. STAT. § 45-141.....3

Laws of Ariz. ch. § 1 (1919).....21

FED. R. CIV. P. 54(b) .....8, 9

## STATEMENT OF CROSS-APPEAL ISSUES

1. Whether the district court properly applied settled Arizona law in ruling that Freeport had abandoned the water rights appurtenant to a 1.4 acre parcel that lacked irrigation for at least 17 years and that had been improved in a manner incompatible with irrigation, where Freeport made no effort to sever and transfer its Decree rights to irrigable land.

2. Whether the district court's denial of Freeport's transfer applications was reasonable and thus should be affirmed, either because Freeport failed to appeal any of the independent bases for denial of the applications relied on by the district court, or because granting leave to Freeport to submit materially revised transfer applications after the time period for objection had elapsed would risk depriving other parties to the Decree of proper notice and orderly process.

## INTRODUCTION

Appellees do not seriously defend the district court's reliance on the original 1919 savings clause, which had been excised from the Arizona forfeiture statute decades before the forfeitures at issue. Instead, they rely principally on the "general" savings clause in the 1919 Water Code (nowhere cited in the decision below) and on cases applying *Nevada* law. But neither of those grounds can overcome the Arizona Supreme Court's determination in *San Carlos Apache Tribe v. Superior Court* that a 1995 amendment eliminating "forfeiture for rights initiated before June 12, 1919"—the very rule Appellees seek to apply here—"create[d] a *new* and unconstitutional protection for pre-1919 water rights that may have been forfeited" under existing *Arizona* law. 972 P.2d 179, 190 (Ariz. 1999) (en banc) (emphasis added). Not only does Appellees' reliance on the general savings clause ignore that determination essential to the Arizona Supreme Court's retroactivity holding, but it assumes that the Arizona legislature not once (in 1919) but twice (again in 1995) enacted entirely superfluous protections of pre-1919 rights to allow future non-use without forfeiture for all time.

This Court plainly has jurisdiction to correct the district court's misinterpretation of the Arizona forfeiture statute, and reversing on forfeiture would obviate any need to reach the abandonment claims (which should be analyzed, if necessary, under the legal principles articulated below). Moreover,

Freeport's cross-appeal as to the denial of its transfer applications fails on each of several independent grounds.

## SUMMARY OF ARGUMENT

I. This Court has appellate jurisdiction to review the district court's order concluding the post-judgment proceeding concerning 419 sever-and-transfer applications filed during the sixth-month period specified in Section 11 of the Upper Valley Forbearance Agreement. It is undisputed that none of those applications remains pending before the district court. The Irrigation Districts and Farmers' insistence that finality in a consent decree case requires a certification under Federal Rule of Civil Procedure 54(b), or the resolution of all other unrelated transfer applications (including those filed after the notice of appeal and those yet to be filed) or the completion of other independent post-judgment proceedings, contravenes this Court's practical approach to post-judgment proceeding review.

II. Appellees have no answer to the Arizona Supreme Court's explicit acknowledgment in *San Carlos Apache Tribe* that pre-1919 vested water rights were subject to forfeiture before the legislature (unconstitutionally) enacted a "new" exemption in 1995 that retroactively provided that "forfeiture by nonuse shall not apply to a water right initiated before June 12, 1919." 972 P.2d at 204 (quoting 1995 amendment to ARIZ. REV. STAT. § 45-141(C)). That authoritative and binding statement of Arizona law directly refutes Appellees' contention that

such rights had already been insulated against forfeiture in perpetuity by the 1919 Water Code. Neither the other Arizona authorities relied upon by Appellees nor the Nevada Supreme Court's interpretation of Nevada law surmounts *San Carlos Apache Tribe*.

In any event, Freeport does not claim to be a vested-rights-holder as of 1919. Freeport instead argues that its rights, acquired beginning in 1997, can never be forfeited through the chain of title because the original rights-holders conveyed the permanent right of non-use of the water. The Decree and Arizona law, however, recognize and protect only the right to *use* water, not perpetual *non*-use.

III. In finding that Freeport abandoned its water rights in the parcel at issue in Freeport's cross-appeal, the district court properly considered the fact that Freeport had failed to use water on that parcel for at least seventeen years. Freeport's argument that such consideration was impermissibly retroactive flows from the faulty premise that the Decree had previously permitted water rights to be used anywhere in a quarter-quarter section. On the contrary, Arizona law, the Decree's plain terms, and the district court's factual findings regarding the Decree's administration all confirm that Decree rights have always been appurtenant to, and may be used only on, a particular parcel of land "through the irrigation of which said right has been acquired." ER 406. And this Court's

precedents establish that reliance on any contrary past practice of the Water Commissioner cannot save water rights from abandonment.

Considering Freeport's extended non-use of water on the appurtenant land, the district court correctly held that Freeport intended to abandon the use of water on a parcel covered by a road and canal. It found that those improvements were incompatible with irrigation; that there had in fact been no irrigation for at least seventeen years; and that Freeport had made no reasonable attempt to transfer the water right. Freeport presents no reason to overturn the court's fact-laden balancing of the evidence.

The only error made by the district court was to draw an artificial distinction between land that was rendered permanently incompatible with irrigation due to an improvement, which the district court properly held was abandoned, and land that was non-irrigable because it had become river bottom. When the correct presumptions and burdens under Arizona (rather than Nevada) law are applied, the evidence establishes that Freeport intended to abandon the use of water on the river bottom parcels, too, given the prolonged non-use, permanent incompatibility with irrigation, and failure to timely seek a transfer.

IV. Freeport's cross-appeal challenging the district court's denial of its transfer applications and related amendments should be denied. As a threshold matter, the district court's denial of Freeport's applications rests on sufficient and

independent grounds that Freeport does not appeal—in particular, the incorrect notion underlying all of Freeport's applications that water rights float within a 40-acre quarter-quarter section. Those grounds render the applications deficient even if the amendments had been allowed. In any event, the district court was also well within its discretion to deny Freeport leave to make material amendments to its applications after the applications had been reviewed and published by the Commissioner, had been objected to, and were in the process of being adjudicated pursuant to the district court's prior orders—including the Change In Use Rule.

## ARGUMENT

### I. THIS COURT HAS JURISDICTION

The Irrigation Districts and Farmers (hereinafter "Irrigation Districts" or "UVID") acknowledge (Br. 5) that this appeal concerns "419 [sever-and-transfer] applications *** filed with the Water Commissioner pursuant to a settlement agreement *** , which required the applications to be filed by June 14, 2008." They further acknowledge (Br. 9) that "[n]one of [those 419] applications filed in 2008 *** are currently pending" before the district court. The Irrigation Districts (but not Freeport) nonetheless challenge this Court's jurisdiction over the district court's "final judgment *** on the 419 applications to sever and transfer Decree water rights filed with the Water Commissioner in 2008 and all objections to those applications." ER 1. That challenge fails.

### A. Section 1291 Finality In Consent Decree Cases Turns On The Specific Post-Judgment Proceeding

This Court has "jurisdiction of appeals from all final decisions of the district courts." 28 U.S.C. § 1291. Consent decree cases, like this one, often involve multiple, distinct post-judgment proceedings. In the context of a specific post-judgment proceeding, a "final decision[]" is one that "resolve[s] all of the issues in th[at] post-judgment proceeding[]." *Cordoza v. Pacific States Steel Corp.*, 320 F.3d 989, 996 & n.3 (9th Cir. 2003).

That standard for appealable finality does not require all the separate post-judgment proceedings in a consent decree case to be concluded. Because "the proceedings necessarily follow a final judgment," *Thomas v. Blue Cross & Blue Shield Ass'n*, 594 F.3d 823, 829 (11th Cir. 2010); *see also Jeff D. v. Kempthorne*, 365 F.3d 844, 850 (9th Cir. 2004) ("consent decrees are considered final judgments"), finality turns on whether "an order *** addresses all the issues raised in the motion that sparked the postjudgment proceeding[]," *Solis v. Current Dev. Corp.*, 557 F.3d 772, 776 (7th Cir. 2009). In that sense, each post-judgment proceeding is "treat[ed] *** as a free-standing litigation" in which "the final judgment [is] the first rather than the last order in the case." *Thomas*, 594 F.3d at 829 (citation and quotation marks omitted).

The district court has discretion to batch claims in managing a post-judgment proceeding. *See United States v. W.R. Grace*, 526 F.3d 499, 509 (9th

Cir. 2008) (en banc) ("[D]istrict courts have inherent power to control their dockets.") (citation and quotation marks omitted). Once all those claims (here, applications and counterclaims) are resolved, it can enter (as it did below) an appealable "final decision" within the meaning of Section 1291. The Supreme Court has recognized a longstanding "tradition of giving § 1291 a practical rather than a technical construction," *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 375 (1981) (citation and internal quotation marks omitted), and that recognition has particular force "when post-judgment orders are involved," *United States v. Washington*, 761 F.2d 1404, 1406 (9th Cir. 1985). As applied in *Washington*, for example, the Court exercised Section 1291 jurisdiction over a district court's post-decree decision resolving legal issues in the apportionment of fishing rights but "leaving *** factual determinations regarding yearly implementation to be determined." *Id*. at 1407. This Court did so even though "[t]he district court adopted the *** plan by order without certifying its order appealable under Fed.R.Civ.P. 54(b)." *Id*. at 1406.

For that reason, contrary to the Irrigation Districts' assertion (Br. 13-14), certification under Federal Rule of Civil Procedure 54(b) is not a prerequisite to appellate review of a particular post-judgment proceeding. Entry of judgment under Rule 54(b) is required for finality only if the judgment would otherwise resolve "fewer than all" claims with respect to the "action" at issue. FED. R. CIV.

P. 54(b). As discussed next, the "action" at issue here comprises the 419 applications (and related counterclaims)—all of which were confirmed to be resolved by the final decision now on appeal.

### B. The District Court's Order Resolves All 419 Applications In The Post-Judgment Proceeding

The district court's final judgment order here "resolve[s] all of the issues in the post-judgment proceeding[]." *Cordoza*, 320 F.3d at 996. The Upper Valley Forbearance Agreement established a limited six-month procedure under which landowners filed 419 applications to sever and transfer Decree rights to certain defined lands, *see* ER 393, Opening Br. 9-10, and it is undisputed that the district court's order concludes the "freestanding litigation" as to that discrete and clearly defined set of 419 applications. The district court consistently treated all 419 applications as a single proceeding throughout the adjudication below,[1] and it was well within its discretion to do so. It follows that the district court was likewise within its discretion to treat those 419 applications as a distinct proceeding and enter "final judgment." ER 1.

[1] For example, the district court monitored the progress of the 419 applications as a group by requiring comprehensive reports on the group from the Water Commissioner and by holding hearings on the status of all pending applications in the group. The court also structured the trial proceedings on the ten Freeport applications so as to guide resolution of the other applications in the group, all of which were stayed pending the outcome of the trial.

In rejecting jurisdiction over Freeport's prior appeal in this case *before* all 419 applications were resolved, this Court held that "[t]he abandonment ruling *** can be effectually challenged at a later stage of the litigation, after the district court decides the remaining sever-and-transfer applications." *United States v. Sunset Ditch Co.*, 472 F. App'x 472, 474 (9th Cir. 2012). In contrast to the pending status of the applications during that appeal challenging the resolution of "only 10 of the applications," *id.* at 473 ("The district court still must resolve issues related to Freeport's other applications, as well as issues related to other applicants."), none of the 419 applications remains pending before the district court, *see* Opening Br. 15-16 (detailing resolution or withdrawal of applications). The district court thus did exactly what this Court suggested was necessary to make the case appealable. No further district court action could make the disposition of the 419 applications any more final.

Accordingly, a remand in this case "to the district court for a reissuance of the judgment pursuant to [Rule 54(b)] would serve no useful purpose." *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1069 (9th Cir. 2002). Notwithstanding the Irrigation Districts' contention that the district court's judgment has "astounding breadth and imprecision" or otherwise fails to reflect "certainty as to the district court's intention," UVID Br. 15, 20 (emphasis omitted), the scope of this appeal is clear. By its terms, the district court's judgment concerns only "419 applications,"

all of which were "filed with the Water Commissioner in 2008." ER 1. Consistent with the established rule that "[o]nce a district court enters final judgment and a party appeals, *** earlier, non-final orders become reviewable," *Hall v. City of Los Angeles*, 697 F.3d 1059, 1070 (9th Cir. 2012), the district court also specified that its judgment encompassed "all orders and proceedings on the main docket in CV31-0059-TUC-SRB *with respect to these applications and objections*." ER 1 (emphasis added). It also covered "all orders and proceedings on the subdocket CV31-0061-TUC-SRB," which was devoted exclusively to Freeport's 59 applications (out of the total 419). *Id.*[2]

### C. The Irrigation Districts' Other Arguments Against Jurisdiction Fail As A Matter Of Fact And Law

The Irrigation Districts' principal motivation for objecting to this Court's jurisdiction (Br. 18-19) appears to be that a decision may serve as precedent for the resolution of future applications. That concern, however, is not relevant to the issue of appealability under Section 1291. Whether and to what degree a particular

[2] The alleged "inconsistencies" between the August 2010 Order and the interlocutory orders identified in the Irrigation Districts' Brief (at 17) are illusory. With respect to assessor parcel numbers, the district court confirmed its view that such information was required, and only thereafter added that it would consider an amendment to an application specifying the assessor parcel number to be minor. UVID SER 20-21. With respect to the requirement that an applicant establish a *prima facie* case of no injury, the court noted that the August 2010 Order represented an "example of this procedure in action" and provided further clarification of the legal framework for evaluating injury "[t]o avoid any possible confusion." *Id.* at 18-19.

circuit decision governs any subsequent application is a question for the district court to confront in the first instance.

The fact that some of the 419 applications were withdrawn (rather than denied) also does not sow the confusion that the Irrigation Districts suggest (Br. 16-18) or otherwise affect appealability. As a factual matter, no party has made the withdrawn or settled applications—or related orders, such as the order that denied the Farmers' request for a jury trial on applications subsequently withdrawn, *see* UVID Br. 16—the subject of this appeal. As a legal matter, withdrawn claims cannot defeat finality. By analogy, the voluntary dismissal without prejudice of one count of a complaint does not divest this Court of jurisdiction to review a final judgment as to other counts of the same complaint. *See James*, 283 F.3d at 1070 (allowing appeal under Section 1291 where "party that has suffered an adverse partial judgment subsequently dismisses remaining claims without prejudice with the approval of the district court"). It follows that the withdrawal of some of the 419 applications does not preclude the exercise of appellate jurisdiction over other adjudicated applications from the same set. Critically, the Irrigation Districts do not claim that applications were withdrawn in order to manufacture appellate jurisdiction. *See id.* at 1066 ("We have always

regarded evidence of such manipulation as the necessary condition for disallowing an appeal where a party dismissed its claims without prejudice.").[3]

It also makes no difference that there are three other sever-and-transfer applications pending in the Globe Equity 59 proceeding that were filed at least six years after the 419 applications at issue. None of the three applications "filed since 2008" (UVID Br. 11, 18-19) makes the set of 419 applications or their resolution any less complete.[4] The district court's decision to treat the initial 419 applications filed under a specific provision of the Upper Valley Forbearance Agreement together as a single post-judicial proceeding is consistent with this Court's precedent. *See United States v. Alpine Land & Reservoir Co.*, 878 F.2d 1217 (9th

[3] All of the Farmers listed on the Irrigation Districts' brief "eventually withdrew their applications." UVID Br. 9. The Gila River Indian Community ("Community"), the San Carlos Apache Tribe ("Tribe"), and the United States likewise voluntarily dismissed all counterclaims related to those applications. ER 141. That raises serious doubts about the Farmers' status as proper parties—as they themselves acknowledge. *See, e.g.*, ECF No. 58-1 (conditional motion to have appellee brief treated as *amicus* brief). Because the Farmers prevented any adjudication on specific objections to their applications, they are understandably unable to identify any ruling of the district court on *their* applications to appeal. The Irrigation Districts' lack of party status is even clearer: they have no Decree rights, are "not named 'parties' in any of the 419 S&T applications filed in 2008," and do not represent the Farmers. UVID Br. 9; UVID SER 311 ("The Irrigation Districts do not represent the decreed right holders in the Upper Valleys ('UVDs') on any presently pending issues[.]"). As they conceded in the prior appeal, they should be treated as *amici* only.

[4] Two applications were filed in February 2014, ER 663 (docket entries 7806 and 7807), and the remaining application was filed in February 2015 following the initiation of this appeal, *see* UVID SER 160. In addition, as a practical matter, there may be any number of future applications to sever and transfer under Article XI of the Decree and the Change In Use Rule.

Cir. 1989) (*Alpine II*) (reviewing first 129 transfer applications in post-decree proceedings under Section 1291); *United States v. Alpine Land & Reservoir Co.*, 510 F.3d 1035 (9th Cir. 2007) (*Alpine VII*) (reviewing ten separate transfer applications under Section 1291). In addition, separately adjudicating the three new applications makes particular sense here because, by the Irrigation Districts' own admission (Br. 18), those applications may raise "unrelated" issues.

The finality of the judgment on the 419 applications is also unaffected by any ongoing technical work that will govern only *future* Decree disputes. In response to a "Motion for a Declaration of Rights" filed by the Irrigation Districts in March 2014—after all 419 sever-and-transfer applications had been denied or withdrawn—the district court held that "it [was] time to harmonize the Decree by creating one standard for identifying land and Decree rights for all purposes" going forward. UVID SER 10; *see Solis*, 557 F.3d at 776 (distinct post-judgment cases can be identified by "the motion that sparked the postjudgment proceeding[]"). The court required the Globe Equity Technical Committee to identify issues for future implementation of an identification system based on the maps created by the first Water Commissioner to identify the location of Decree rights (the "Decree Maps"), as reflected in the Community's database. UVID SER 11. As the Irrigation Districts note (Br. 16), the technical work is still ongoing. That work,

however, does not defeat final-judgment jurisdiction here more than any other newly filed motion seeking a prospective rule for administering the Decree would.[5]

At bottom, under the Irrigation Districts' unduly narrow conception of post-judgment proceeding finality, it is unclear when (if ever) parties may challenge decisions on applications. But the reality is that litigation over the 419 sever-and-transfer applications filed in 2008—none of which remains pending—is complete. Accordingly, there is no barrier to the exercise of appellate jurisdiction over the district court's final decision on that front.

[5] The Irrigation Districts also mention (Br. 15-16) orders entered by the district court in 2009 and 2010 reiterating the principle that Decree rights are appurtenant to specific parcels of land. Those orders were entered as part of the district court's enforcement of Section 5.2 of the Upper Valley Forbearance Agreement, a provision distinct in purpose and operation from the Section 11 sever-and-transfer provision related to these appeals. *See* UVID SER 67 (district court's August 26, 2009 order explaining that Section 5.2 requires "Upper Valley Defendants" to "cause the reduction of the total number of TBI Eligible Acres in the UV, in perpetuity, by one thousand (1,000) acres"); UVID SER 47 (recounting same background in April 2, 2010 order denying motion for reconsideration). The Irrigation Districts do not claim any ongoing dispute regarding those orders. For good reason: the district court definitively resolved all remaining issues in the Section 5.2 dispute in July 2014. *See* ER 706-711 (granting the motion for abandonment of 1,000 acres of water rights in accordance with Section 5.2 of the Agreement). That distinct post-judgment proceeding did not concern any of the 419 applications filed in 2008, and thus falls outside the judgment appealed here.

## II. PRE-1919 WATER RIGHTS ARE NOT FOREVER IMMUNE FROM FORFEITURE

### A. The Arizona Supreme Court Has Recognized That Pre-1919 Water Rights May Be Forfeited

In *San Carlos Apache Tribe*, the Supreme Court of Arizona determined that a 1995 amendment to the Arizona forfeiture statute—that "forfeiture by nonuse shall not apply to a [pre-1919] water right"—"creates a *new* and *unconstitutional* protection for pre-1919 water rights that may have been forfeited and vested in others under the law existing prior to 1995." 972 P.2d at 190, 204 (emphasis added) (citation omitted). According to Appellees, echoing the district court, that determination is irrelevant to the question of whether water rights vested before the 1919 enactment of the Arizona Water Code may be forfeited for non-use occurring after 1919. Rather, they prefer to look to the forfeiture statute's long-rescinded savings clause, other provisions of Arizona law, and the Nevada Supreme Court's interpretation of Nevada law. None of those grounds survives scrutiny or permits this Court to disregard the Arizona Supreme Court's authoritative interpretation.

Appellees assert that *San Carlos Apache Tribe* does not bear on the question presented here. In their view, the Arizona Supreme Court considered only the retroactivity of the 1995 amendment to the forfeiture statute, not whether pre-1919 water rights could be forfeited in the absence of that amendment. *See* Freeport Br. 36-37; UVID Br. 34. But the precise reason the Arizona Supreme Court declared

the amendment impermissibly retroactive is its determination that pre-1919 water rights had been subject to forfeiture "under the law existing prior to 1995." 972 P.2d at 190. That determination not only bears on the forfeiture claims at issue, but resolves them in Appellants' favor.

If, as Appellees contend, pre-1919 water rights had been insulated in perpetuity from the forfeiture statute under existing law—*i.e.*, the 1919 Water Code or any other provision of Arizona law—the 1995 amendment could not have "*eliminate[d]* any possibility of forfeiture for rights initiated before June 12, 1919." 972 P.2d at 190 (emphasis added). Nor could the amendment have been found unconstitutionally retroactive if it merely reiterated or clarified existing law, as opposed to providing "new" protection that "*chang[ed]* the law that applies to completed events." *Id.* at 189-190 (emphasis added); *see also* Opening Br. 22-23. The Arizona Supreme Court "do[es] not lightly conclude" that statutes are unconstitutional, *San Carlos Apache Tribe*, 972 P.2d at 188, and "suppl[ies] a constitutional construction if at all possible," *Hall v. A.N.R. Freight Sys., Inc.*, 717 P.2d 434, 441 (Ariz. 1986) (en banc). Accordingly, it is plain that the Arizona Supreme Court "evaluate[d] whether the retroactive amendment actually altered the existing law that applies to pre-1919 rights," Freeport Br. 37, and "discern[ed] *** what, if any, effect the 1995 amendments had on the original 1919 Water Code," UVID Br. 34. Its conclusion—that the amendment's insulation of pre-1919

rights from forfeiture would "change" the law—forecloses the district court's interpretation.

The Irrigation Districts further contend that *San Carlos Apache Tribe* would be relevant only if the court "attempt[ed] to discern the intent of the original 1919 Saving [Clause]." UVID Br. 34; *see also* Salt River *Amici* Br. 14-15 (arguing that *San Carlos Apache Tribe* did not "explore the parameters of the law of abandonment and forfeiture before enactment of the 1919 Water Code"). But the meaning of the original (since excised) savings clause or pre-1919 water law need not be addressed. Appellants' forfeiture counterclaims are based on non-use of water rights that occurred within the last twenty years, *see* Opening Br. 26, and *San Carlos Apache Tribe* makes clear that "[f]orfeiture and resultant changes in priority must be determined under the law as it existed at the time of the event alleged to have caused the forfeiture," 972 P.2d at 190. That is precisely the law—"the law existing prior to 1995," *id.*—that the Arizona Supreme Court interpreted.[6]

[6] The fact that Judge Bolton presided over the trial-court proceedings in both *San Carlos Apache Tribe* and this case does not help Appellees. *Contra* Freeport Br. 37-38; UVID Br. 32. To the contrary, as discussed above, the Arizona Supreme Court definitively rejected Judge Bolton's apparent view in *San Carlos Apache Tribe* (repeated in the opinion below) that the amendments might simply be a clarification of the pre-1995 forfeiture law. *See Contested Case No. W1-100 Special Action Proceedings*, Nos. W-1, W-2, W-3, W-4, at 8-10 (Ariz. Sup. Ct. Aug. 30, 1996) ("Whether the substantive law changes are clarifications to previously ambiguous areas of the law must be decided when and if those issues are presented in a specific case in this adjudication"), *available at*

Appellees' invocation of the 1919 Water Code's general savings clause (Freeport Br. 38-39; UVID Br. 31-32) makes no difference for the same reasons. Even assuming *arguendo* the general savings clause had exactly the same effect as the rescinded forfeiture-specific savings clause (thereby rendering the latter redundant), *San Carlos Apache Tribe* does not permit a reading of those clauses—either in their historic or current forms—that shields pre-1919 water rights from forfeiture in perpetuity. As Appellees construe the 1995 amendment, the Arizona Legislature enacted a redundant savings clause not only as part of the forfeiture statute in 1919 (deleting it in 1928) but again in 1995. That is not how statutes should be construed. *See Grand v. Nacchio*, 236 P.3d 398, 402-403 (Ariz. 2010) (en banc) (canon against superfluity). Consistent with the Arizona Supreme Court's decision (and its direction to apply "the law as it existed at the time of the event alleged to have caused the forfeiture," 972 P.2d at 190, the general savings clause is more sensibly read to provide pre-1919 water rights holders protection against forfeiture claims for non-use before 1919—and nothing more. *See* Opening Br. 21-22.[7]

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http://www.superiorcourt.maricopa.gov/SuperiorCourt/GeneralStream Adjudication/docs/gila-gilabolt.pdf.

[7] Appellees contend in passing that the 1912 Arizona Constitution either froze water law as it existed in 1912 or protected existing water rights from any legislative encroachment in providing that "all existing rights to use of any of the water in the state *** are hereby recognized and confirmed." ARIZ. CONST. Article XVII, § 2 (1913); *see* Freeport Br. 35 n.13; UVID Br. 36; *see also* Salt River *Amici*

Looking beyond Arizona law, Appellees insist that the district court was right to rely on *In re Manse Spring & Its Tributaries*, 108 P.2d 311 (Nev. 1940). *See* Freeport Br. 31-36; UVID Br. 29-30; *see also* Salt River *Amici* Br. 16-17. For all the purported parallels that Appellees attempt to draw between the Arizona Water Code of 1919 and the Nevada Water Code of 1913, Nevada law does not govern this case. Appellees' approach flies in the face of the Arizona Supreme Court's admonition that "sister states' decisions"—including those that address the same case confronting the court—"are not particularly relevant." *Hall*, 717 P.2d at 447; Opening Br. 23-26. The inapplicability of Nevada law is particularly evident here, where the Arizona Supreme Court has recognized that Arizona law subjects pre-1919 water rights to forfeiture for post-1919 non-use. The Nevada Supreme Court is certainly entitled to come to a different conclusion regarding its own forfeiture provision, but this Court must apply the Arizona Supreme Court's interpretation of Arizona law. *See Nelson v. City of Irvine*, 143 F.3d 1196, 1206-1207 (9th Cir. 1998) ("When interpreting state law, federal courts are bound by decisions of the state's highest court.").

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Br. 18. That novel and sweeping statement lacks any precedential support and is refuted by the reasoning of *San Carlos Apache Tribe*.

### B. Freeport Does Not Stand In The Shoes Of Appropriators Who Held Water Rights In 1919

To the extent pre-1919 water rights may never be forfeited, Freeport does not hold any such rights. *See* Opening Br. 26-28. Appellees do not and cannot dispute that Freeport, which acquired its water rights beginning in 1997, is not a "person, firm, corporation or association" who "may have" a "vested right[]" to "any water at the time of passage of this act," as specified in the 1919 forfeiture provision's savings clause. Laws of Ariz., ch. § 1 (1919).

Appellees nonetheless argue that a party that acquires water rights derivative through chain of title from a party with rights vested before 1919 may forever claim the benefit of the 1919 savings clause. *See* Freeport Br. 40-43; UVID Br. 35-36. Contrary to Appellees' suggestion (UVID Br. 36), that conclusion does not follow from the fact that the Decree binds successors in interest. *See England v. Ally Ong Hing*, 459 P.2d 498, 503 (Ariz. 1969) (en banc). Although the Decree protects "grantees, assigns or successors in interest" from "provisions of this Decree," Freeport SER 881, it does not make Arizona laws disfavoring non-use of water inapplicable.

Moreover, *United States v. Andersen*, 736 F.2d 1358 (9th Cir. 1984), does *not* hold 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." Freeport Br. 41. Rather, *Andersen* recognized the far more

limited "basic tenet of western water law" (not at issue here) that appurtenant water rights "generally pass" with "a priority date as of their original application to beneficial use." 736 F.2d at 1363. At any rate, Freeport's argument based on its reading of *Andersen* incorrectly assumes that a right to *use* water includes a right of *non*-use. Arizona law, however, is to the contrary. *See Adams v. Salt River Valley Water Users' Ass'n*, 89 P.2d 1060, 1066 (Ariz. 1939) ("Such vested right [to appropriated water] is not in the water but in its use.").

## III. FREEPORT'S PROLONGED PERIOD OF NON-USE OF WATER ON LAND INCOMPATIBLE WITH IRRIGATION, COUPLED WITH NO EVIDENCE OF INTENT TO RESUME IRRIGATION, ESTABLISHES ABANDONMENT

If the Court agrees with Appellants on the proper interpretation of Arizona forfeiture law, it need not reach the abandonment claims (since the water rights at issue would be forfeited anyway). But if the Court reaches the abandonment claims, it should follow the established principles of Arizona law articulated below.

### A. The Decree Limits Use Of Water To The Parcel To Which The Water Right Is Appurtenant Notwithstanding Any Purported Prior Practice

#### *1. Appurtenancy is a principle of Arizona law embodied in the terms of the Decree.*

As the Community and the Tribe explained in the Opening Brief (at 3-4), and Appellees do not dispute, an Arizona water user acquires under the prior-appropriation doctrine a permanent right to use water on a particular parcel of land

by applying the water to a beneficial use on that parcel. *Slosser v. Salt River Valley Canal Co.*, 65 P. 332, 335-336 (Ariz. 1901). The water right is appurtenant to the parcel of land to which the water was originally applied, and it "cannot be made to do duty to other land." *Id.* at 337. An appropriator cannot "apply *** water saved to immediately adjacent lands" because water cannot be applied "to lands other than those to which the original appropriation was appurtenant." *United States v. Gila Valley Irrigation Dist.*, 31 F.3d 1428, 1439 (9th Cir. 1994) (*Gila Valley V*). Relatedly, the right is limited to "the amount of water *** as may be beneficially used in any given year upon the land to which the water is appurtenant," even if that amount is less than the maximum amount of the appropriation right. *Salt River Valley Water Users' Ass'n v. Kovacovich*, 411 P.2d 201, 203 (Ariz. Ct. App. 1966).

The Decree did not change the nature of the water rights that it recognized. Rather, it adopted both principles outlined above. *First*, the water rights listed in Article V of the Decree are described as "carried to the lands through the irrigation of which said right has been acquired." ER 406. The Decree thus incorporates the principle of appurtenancy: the water may be used on only the specific parcels of land that were originally irrigated to obtain the water right—not on any land that happens to be in the same 40-acre quarter-quarter section. *See Gila Valley V*, 31 F.3d at 1439. *Second*, the Decree incorporates the "beneficial use" doctrine (in

two separate places) where it specifies that "water may be diverted from the Gila river only for lands 'then being irrigated,'" *id.* at 1438 (quoting Decree Articles V and XI), and "only in such amounts as may be required," ER 497.[8]

*2. Any prior practice inconsistent with the Decree and Arizona law does not excuse non-use of water outside the terms of the Decree.*

Because water rights under the Decree are appurtenant to a particular parcel of land, a party intends to abandon a Decree right when it intends to abandon use of the water on the appurtenant parcel. Freeport contends it could not have intended to abandon *any* Decree right because Freeport's predecessors "exercised the full extent of their rights"—*i.e.*, used the water *somewhere*—even though they did not use (nor had any intent to use) the water on the appurtenant parcels. Based on that incorrect view, Freeport cross-appeals the district court's finding that Freeport abandoned the water right appurtenant to a non-irrigable parcel covered by a road and canal (while supporting the court's finding of no abandonment as to the river bottom parcels).

In particular, Freeport objects to the court's supposedly "retroactive" enforcement of the rules that (i) water rights listed in Article V are "appurtenant to the specific tract of land through the irrigation of which the right was acquired,"

[8] The rights for the Community and the Tribe are different under the terms of the Decree. Article VI permits the Community and the Tribe to reclaim land, *i.e.*, to irrigate new land that had not been irrigated, including land acquired after the Decree was entered. *See* ER 470.

ER 69; and (ii) the Decree allows diversion of water only to, and in the volume and rate authorized for, the acres that are "then being irrigated," *Gila Valley V*, 31 F.3d at 1438. But critically, Freeport does not contest the correctness of either rule as a valid interpretation of the Decree's language or settled Arizona law. Freeport complains (Br. 55) only that these "change[s] in administration of the Decree" cannot be used to find that Freeport intended to abandon inactive acres during a period of time when the Water Commissioner allegedly administered the decree differently. The district court's factual findings, as well as settled precedent enforcing the Decree's plain terms, defeat that argument.

*a.* Freeport does not dispute that under the Decree "[e]ach water right is appurtenant to a specific tract of land." ER 69; *see also* Freeport SER 296-300; UVID SER 51-62. Based on trial evidence, the district court found that specific parcels with Decree rights are—and have always been—documented on the Decree Maps. ER 8. Accordingly, in evaluating Freeport's (non-)use of water on the relevant parcel, the district court used a database created by the Community that combines the Decree Maps, aerial imagery reflecting use of water, "and a wealth of other relevant information." ER 37.

Freeport does not contest the accuracy of the Decree Maps with respect to the location of the relevant parcels, nor does it contest the accuracy of the database with respect to imagery showing non-use of water. Instead, Freeport argues (Br. 8-

13, 56) that the Water Commissioner allowed parties to use their water rights anywhere within a quarter-quarter section. The district court's unrebutted factual findings, however, contradict that premise.

The early administration of the Decree confirms that Decree rights are appurtenant to the specific parcel of land that was irrigated to obtain the right, and not to entire quarter-quarter sections. Although Article V described the rights imprecisely in identifying only the quarter-quarter section, the district court found that "one year after the Decree was entered, the first Gila Water Commissioner" stated that it was "'essential that maps be made showing the locations of various tracts that were given rights.'" ER 8 (quoting First Annual Report of the Water Commissioner); *see also* UVID SER 57 (quoting First Annual Report) ("Maps are now being made in convenient form showing the decreed lands in each section under each canal."). For that purpose, the Water Commissioner created the Decree Maps, *i.e.*, "maps of parcels with Decree water rights." ER 8. And "[s]ince the Decree was entered in 1935, the Gila Water Commissioners have updated the Decree Maps to record property right changes to Article V Decree water rights such as the severance and transfer of one of these water rights from an existing place of use to a new place of use." *Id.*

Freeport cites testimony from the Water Commissioner for the proposition that "the Decree had always been administered according to the quarter-quarter"

section. Br. 55; *see also* Br. 12. But that testimony does not support such a proposition; it relates only to the practices of then-Commissioner Allred, who did not purport to speak for all prior Commissioners. Moreover, after hearing that testimony, the district court made findings directly contrary to Freeport's revisionist history. *See* ER 8. Freeport does not contend that the fact-finding was clearly erroneous, nor could it: substantial evidence, as noted above, showed that the first Water Commissioner created the maps to document the precise locations of the parcels within quarter-quarter sections to which water rights were appurtenant.[9]

The district court's finding is also consistent with the very first transfer rule adopted in 1936: like the now-governing Change In Use Rule adopted in 1993, the 1936 rule required rights holders to "[o]btain [a] legal description of the tract of land you wish to sever the right from" and to identify that parcel by "metes and bounds description from which the rights are to be severed." UVID SER 58-59 (quoting Water Commissioner's 1936 memorandum titled "Severance of Water

[9] *See also, e.g.*, ER 1036 (Tr. Feb. 23, 2010, at 1120 (testimony of A. Gookin)) (State Water Commissioner maps had been "updated by the Gila Water Commission with the various severs and transfers that have occurred over some time"); ER 1041 (Tr. Feb. 23, 2010, at 1125) (Gila Water Commissioner "conformed the map from the 1920 [State] Water Commissioner to what he found in the Decree" by "ma[king] specific notations that a certain parcel shown on the *** State Water Commissioner's map did not get a decreed right"); ER 1162-1228 (Commissioner transfer orders from the 1930s establishing that water right transfers were administered by reference to specific parcels described by metes and bounds); ER 1229-1232 (excerpt from First Annual Report).

Rights in Upper Gila Valley, under Federal Court Decree"); *see also* ER 210 (Change In Use Rule § IV(1)(C)(2)) (requiring applicants to identify the "[l]ocation of existing *** place of use (legal description and map/survey)").

*b*. Freeport similarly relies on the Water Commissioner's past practice—invalidated in 1992—permitting diversion of the full water right even if a party was irrigating fewer than its total Decree acres, despite the Decree's "then being irrigated" limitation. Article V entitles each right-holder, during each irrigation season, to up to six acre-feet of water per acre "then being irrigated." ER 406; *see also* ER 497 (same limitation in Article XI). Freeport asserts it was using all of the water for which it had a right *somewhere*—itself an unsupported, not "uncontested" (Br. 54), assertion—and therefore contends (Br. 47, 53-54) that the failure to use water on a particular Decree parcel does not establish abandonment of that parcel's water right.[10]

Freeport gets the analysis backwards. The abandonment inquiry asks whether a party intends to abandon the use of water on the appurtenant parcel. Use of the water somewhere else would support rather than undermine the district

[10] Not only has Freeport left unsupported its assertion that it continuously used water elsewhere in the quarter-quarter section, there is a significant argument that it conceded in its applications that the use of water was impracticable anywhere within the quarter-quarter section. If so, Freeport's argument that the Water Commissioner permitted Decree rights to be used anywhere in the quarter-quarter fails for the additional reasons argued in the response brief for the United States.

court's finding of abandonment. *See* ER 46 ("evidence of an intent to abandon other than non-use of the water right" includes "use of the water on land to which the water right is not appurtenant") (citing *United States v. Alpine Land & Reservoir Co.*, 340 F.3d 903, 917 (9th Cir. 2003) (*Alpine VI*)). A contrary rule would also reward persistent violations of the Decree and Arizona law.

In addition, although regulations governing the reporting of acreage "then being irrigated" were not established until 1997 (Freeport Br. 13), in 1992 the district court first declared that the practice of diverting water in disregard of the acreage actually being irrigated violated the Decree. *United States v. Gila Valley Irrigation Dist.*, 804 F. Supp. 1, 16 (D. Ariz. 1992). That had long been the law in Arizona. Because the Decree was "unambiguous" on this point, *Gila Valley V*, 31 F.3d at 1439, Freeport had notice of this law from the entry of the Decree. Certainly it had notice of the correct and governing rule of law by 1992—thereby covering almost all of the seventeen-year period of non-use considered by the district court. *See Alpine II*, 878 F.2d at 1223 (district court's 1973 ruling "put the parties on notice long before [Ninth Circuit decision in] 1983 that landowners irrigating 'non water rights land' were doing so without judicial approval").

The district court's 1992 decision, moreover, did not establish a new rule of law; it merely gave effect to the plain terms of the Decree put in place in 1935. Indeed, this Court affirmed that the Decree always has "unambiguous[ly]"

restricted diversions based on the Decree acres "then being irrigated" and that "an owner of land with a water appropriation right *** could not apply such water to lands other than those to which the original appropriation was appurtenant." *Gila Valley V*, 31 F.3d at 1439. Freeport disregarded that unambiguous directive at its own risk, and it is not improper to find intent to abandon premised on the operation of that settled law.[11]

*c.* In any event, this Court's precedent compels rejection of Freeport's reliance on the purported practices of the Water Commissioner to save its water rights from abandonment. Twice this Court has ruled that the acquiescence of water administrators in particular irrigation practices, in contravention of a decree or statute, does not negate the evidentiary force of non-use of water in an abandonment inquiry.

In *Alpine II*, this Court addressed a decree adjudicating the rights of all parties to water from the Carson River. 878 F.2d at 1220. As in this case, several landowners had filed applications seeking "the transfer of water rights from Project properties that generally are not under irrigation to properties lacking water rights

[11] *Gould v. Maricopa Canal Co.*, 76 P. 598 (Ariz. 1904), upon which Freeport relies (Br. 54), bears no resemblance to this case. In *Gould*, the Arizona Supreme Court held that it would be unfair to hold that a landowner abandoned his water appropriation just because he had switched his method of diversion when the original irrigation ditch became useless. *Id.* at 601. Unlike here, however, there was no long period of non-use of water on the land in *Gould*. To the contrary, Gould had continuously irrigated the parcel. *Id.*

but which long have been irrigated with Project water." *Id.* at 1219. The Pyramid Lake Paiute Tribe objected on the ground that some landowners had abandoned or forfeited their water rights under Nevada law. *Id.* at 1221.

The landowners advanced the same grounds advanced by Freeport here: that, from 1929 to 1969, they had engaged in "informal transfers" with "the apparent acquiescence" of the entity administering the Project. *Alpine II*, 878 F.2d at 1222. For that reason, the district court ruled that enforcing a decision of this Court from 1983 holding that Nevada abandonment law governed would be impermissibly "retroactive." *Id.* (citing *United States v. Alpine Land & Reservoir Co.*, 697 F.2d 851 (9th Cir. 1983) (*Alpine I*)). It thus rejected the abandonment claim.

This Court reversed. *Alpine II*, 878 F.2d 1217. The Court explained that a statute had established the applicability of Nevada law to the water rights, and this Court's 1983 decision had simply enforced that statute. *Id.* at 1223. "If landowners disregarded this express congressional directive, they did so at their own risk." *Id.*

The Court again rejected such retroactivity arguments in *United States v. Alpine Land & Reservoir Co.*, 291 F.3d 1062 (9th Cir. 2002) (*Alpine V*). On remand, the district court recognized under governing Nevada law that "a prolonged period of non-use of water on a particular parcel combined with an

improvement that precludes irrigation would demonstrate abandonment." *Id*. at 1070. But the district court held as a matter of equity that transfers of water rights "to a proposed place of use within the same farm unit" were exempt "from the operation of Nevada's forfeiture and abandonment laws," because "for a number of years the farmers who had the right to irrigate their land pursuant to a water right contract were not always irrigating the particular land described in the contract." *Id*. at 1073-1074. During that time, the irrigation district that administered the Project acquiesced in this irrigation practice. *Id*. at 1074.

This Court again reversed. *Alpine V*, *supra*. The Court held that, notwithstanding the Project administrator's approval of the past practice, there was nothing inequitable about finding intent to abandon from the failure to use water on the land that contained the improvement. 291 F.3d at 1075. If "the transfer applicants moved water within their farm without complying with state transfer requirements," the Court reiterated, "they did so 'at their own risk.'" *Id*. at 1076 (quoting *Alpine II*, 878 F.2d at 1223).

This Court also rejected the argument that, because the "water rights contracts do not identify a specific place of use within a particular property," there is no "particular water righted area from which a landowner could transfer rights to a different location." *Alpine V*, 291 F.3d at 1075 n.18. This Court explained that the argument is precluded by both federal and state law, under which "a water right

is appurtenant to the land irrigated." *Id.* Much like here, "the water rights in question attached to the specific parcel to which water was beneficially applied, rather than the entire property under contract." *Id.*[12]

Accordingly, in all respects, this Court's *Alpine* decisions foreclose Freeport's reliance on alleged Water Commissioner practices—in conflict with the plain terms of the Decree and Arizona law—to escape its non-use of water on the appurtenant parcels.[13]

### B. The District Court Correctly Found That Seventeen Years Of Non-Use And Construction Of A Permanent Facility Inconsistent With Irrigation Establishes Abandonment

Extensive evidence supports the district court's finding that Freeport intended to abandon the use of water on 1.4 acres of Sever Parcel 147. For at least seventeen years prior to the 2008 sever-and-transfer application (since 1991), (i) there was no irrigation of the acreage; (ii) a road and canal, "structure[s] or

[12] The Court did note that, if landowners attempted a transfer but were thwarted by the Project administration, that would "most likely demonstrate their lack of intent to abandon" the water right. *Alpine V*, 291 F.3d at 1077. That does not help Freeport, which did not attempt a transfer until 2008, which was at least seventeen years after stopping water use and the construction of a permanent improvement on the 1.4 acres incompatible with irrigation.

[13] The Irrigation Districts, as *amici* in support of Freeport, allude to one additional argument that they "are not prepared to argue *** in this brief" (Br. 21) and that Freeport does not raise: that claim preclusion somehow bars use of the Decree Maps to identify the location of Decree rights or evaluate the use of water. The district court has thoroughly rejected that argument in an order that is part of a distinct post-judgment proceeding, and it is not at issue (or even properly raised) here. *See* UVID *Amicus* Br. 20-21; p. 14, *supra*.

improvement[s] incompatible with irrigation," covered those acres; and (iii) Freeport made no prior attempt to transfer the water right to irrigable land. ER 49-50. The court further found that Freeport's mere payment of water fees and costs was not enough to overcome that strong evidence of intent to abandon the use of water on those 1.4 acres. *Id.* The court's fact-laden balancing was not clear error.

Freeport argues (Br. 50) that a presumption of intent to abandon should not apply just because the "decreed right holder fails to file a transfer application within five years of the construction of an improvement inconsistent with irrigation." The district court, however, did not apply any such presumption in this case. Quite the opposite, the court (erroneously) concluded that, as in Nevada, a prolonged period of non-use does *not* create a presumption of intent to abandon. ER 44 n.21. The court looked to the "facts and circumstances surrounding [the] *** case" in their totality, ER 42 (quoting *Landers v. Joerger*, 140 P. 209, 210 (Ariz. 1914)), "guided" by the general proposition that a period of non-use in excess of five years may be unreasonable in light of Arizona law's five-year period for forfeiture, *Alpine VI*, 340 F.3d at 917. ER 49 n.30. In any event, Freeport's delay before attempting to transfer the water right exceeded that five-year period three times over.

Freeport's factual arguments are equally unavailing. As the district court noted, Freeport's litigation activity was nothing like the conduct held sufficient to overcome abandonment in *Gila Water Co. v. Green*, 232 P. 1016 (Ariz. 1925) ("*Green I*"); it did not involve the associated water rights at issue here, nor did it cause Freeport to delay actions it otherwise would have taken with respect to those rights. ER 47-48 & n.26; *see* Opening Br. 31. That Freeport requires its lessees to maintain the water rights is meaningless if, as here, Freeport knows that the lessees are not actually irrigating Decree land—indeed, cannot irrigate the land—and takes no action. *See* ER 11 (quoting Freeport's answer to Question 14 on its applications, made under oath, that "[t]o the best of Applicant's knowledge, use of the water right (or portion thereof) being transferred under this application to irrigate the associated farmland is not currently practicable and has not been practicable during this time frame" of the prior 10 years); *see also* ER 1098, 1137 (application examples).

The Irrigation Districts, as *amici*, suggest (Br. 22) that the roads or canals should be considered "temporary." To be sure, the district court can consider evidence that a structure incompatible with irrigation is temporary, not permanent, and therefore does not support a finding of intent to abandon irrigation on the parcel. Nevertheless, as the Irrigation Districts acknowledge, no such evidence existed here.

### C. The District Court's Finding Of Seventeen Years Of Non-Use On River Bottom Land Establishes Abandonment

As the prior section demonstrates, the Community agrees with most of the district court's abandonment analysis. The Community appeals only the district court's holding that an extended period of non-use of water on a parcel incompatible with irrigation, coupled with no attempt to transfer a water right, is legally insufficient to find abandonment when the land is made permanently non-irrigable *due to natural forces rather than the construction of a permanent structure*. It makes no legal difference to a right-holder's intent whether the permanent incompatibility with irrigation is man-made rather than natural. In either situation, the landowner has the ability to transfer a water right to a parcel suitable for irrigation; neither is "outside of a landowner's control" (Freeport Br. 6). Neither Freeport nor the Irrigation Districts offer a credible defense of the district court's failure to follow established abandonment principles with respect to river bottom land.

*First*, no Appellee can explain the district court's failure to follow the rule of Arizona law presuming intent to abandon from a prolonged period of non-use of water on the appurtenant parcel. Freeport's contention that the district court did apply such a presumption (Br. 50) contradicts the court's plain statement, ER 44 n.21. Freeport contends (Br. 46-47) that under *Green I* a prolonged period of non-use "does not end the inquiry" and that Arizona law does not permit a finding of

abandonment when "countervailing evidence" established its lack of intent. But that suggests only that the presumption may be rebutted—which the Community does not dispute—not that it is proper under Arizona law to decline to apply the presumption in the first place, as the district court did here.

For their part, the Irrigation Districts acknowledge that *Green I*'s statement that prolonged non-use is "very strong evidence of an intention to abandon," 232 P. at 1019, "comports with the observation *** that 'nearly all western states presume an intent to abandon upon a showing of a prolonged period of non-use.'" UVID Br. 39 (quoting *United States v. Orr Water Ditch Co.*, 256 F.3d 935, 945 (9th Cir. 2001)). They nevertheless say (meekly) that Arizona courts have "never explicitly adopted the presumption." UVID Br. 39; *see also id.* at 43 ("no court has held that such a presumption exists"). Even if that were true, that is not the question before this Court. Rather, this Court must "predict how the highest state court would decide the issue." *In re Kirkland*, 915 F.2d 1236, 1238-1239 (9th Cir. 1990). Every indication is that Arizona law contains the presumption shared by other Western states, and does not follow Nevada's outlier position. *See* Opening Br. 30-32.

*Second*, appellees likewise offer no justification for the district court's adoption of a clear-and-convincing standard. The Irrigation Districts simply contend (Br. 43) that the standard of proof is irrelevant. Freeport relies (Br. 46)—

again—on (particularly stringent) Nevada water law. Like the district court, Freeport cites *Strawberry Water Co. v. Paulsen*, 207 P.3d 654 (Ariz. Ct. App. 2008), which is inapposite because it addresses personal property rights. *See* Opening Br. 33. Appellees offer no response.

*Third*, Freeport argues (Br. 47) that the only evidence of intent to abandon was non-use of water. But Freeport's own contention that its predecessors used the water somewhere else provides additional evidence of such intent. As discussed above (*see* pp. 28-29, *supra*), "use of the water on land to which the water right is not appurtenant" is evidence of an intent to abandon that is distinct from non-use of the water. ER 46. Indeed, this Court has recognized that where (like here) non-use is coupled with continuous use of the water elsewhere, abandonment can be overcome only by "evidence of an unsuccessful attempt to transfer the water rights." *Alpine VII*, 510 F.3d at 1038.

The other evidence cited by Freeport—fees, acquisition of land for rights, lessee requirements, and litigation activity—does not indicate any intent on Freeport's part to resume irrigation on the river bottom parcels that, by their nature, are incompatible with irrigation.[14] *See* p. 35, *supra*. Save perhaps for the payment

[14] The Irrigation Districts contend (Br. 42, 44) that the river moves, and therefore the land's status as river bottom land might be incompatible with irrigation only "temporarily." That rank speculation not only lacks any basis in the record, but the river bottom at issue has been in place for at least 17 years with no indication it will move.

of the fees, none of that activity (unsurprisingly) is directed at resuming irrigation *on the river bottom* land. Even under Nevada's high bar for abandonment, the payment of fees is not enough.[15] Under a correct legal analysis, including the presumption of abandonment and a proper evidentiary burden, the evidence found by the district court establishes as a matter of law that Freeport intended to abandon the use of water on the river bottom parcels.

### D. The Irrigation Districts' Concerns About Future Application Of Precedent Are Misplaced

The Irrigation Districts argue (Br. 44-49) that any ruling by this Court on abandonment should be "explicitly limited" to Freeport's applications because no other applicants were given the opportunity to participate in the trial on Freeport's applications. The Irrigation Districts' concerns are misplaced.

The Irrigation Districts give an incomplete picture of the district court's carefully planned process for adjudicating the 419 applications. It is true that no other applicants participated in Freeport's trial on the first ten applications, but that trial involved only Freeport's applications. First, the Irrigation Districts made no

[15] The Irrigation Districts contend (Br. 41, 44) that the Nevada-law taxonomy in *Alpine VII* compels the holding that payment of fees defeats abandonment when there is no "improvement[]" inconsistent with irrigation. But this Court did not announce in *Alpine VII* that it was promulgating an exhaustive list. *See* 510 F.3d at 1039. The same reasoning for adopting the improvement rule applies to river bottom land. *See Orr Water Ditch Co.*, 256 F.3d at 946 (adopting rule related to improvements based on Nevada statute specifying that "[w]hen the necessity for the use of water does not exist, the right to divert it ceases") (citation and quotation marks omitted).

motion to participate, and there is nothing unusual or unfair about limiting a trial to the party whose claims are directly at stake. The district court also made plain that its rulings on Freeport's ten test applications were subject to revision based on the record created by other parties. *See* ER 849 (denying certification under Rule 54(b) prior to adjudicating all 419 applications because "the Court cannot conclude that the individual farmers will not bring new facts or novel arguments *** in the adjudication of their Applications based on their unique positions and experience").

After entering the order on Freeport's ten test applications, the district court adopted a procedure that required each applicant to decide whether to proceed with their applications as submitted, to make amendments, or to withdraw their applications. UVID SER 37. The Water Commissioner then made a determination whether any amendment was minor, in which case adjudication of the application would proceed, or major, in which case the Commissioner recommended denial. *Id*. Notice of this process and the Freeport order was sent to every applicant, whether represented or not. *See* ER 718-748.

In a subsequent scheduling order, the district court set a deadline for any party to file objections to the Commissioner's determination that an amendment was major and to give notice whether the party intended to "proceed with the original application as filed if the objection is not sustained and the amendment is

rejected." ER 716. This order was likewise mailed by the clerk to all unrepresented parties. ER 717.

The district court thereafter ruled on any objections filed with respect to amendments, and was prepared to adjudicate any farmer's applications on a fresh evidentiary record, *see* UVID SER 22 (directing the parties to propose "a schedule for any necessary discovery, additional briefing, and evidentiary hearing" on applications from Appellee the Householder Family Limited Partnership). No farmers ultimately availed themselves of the opportunity to build an evidentiary record or to raise any distinct arguments during this litigation.

Relatedly, the only abandonment claims before this Court concern Freeport's rights. Because Appellee Farmers voluntarily withdrew or dismissed their applications without prejudice, and Appellants likewise voluntarily dismissed their counterclaims, there are no other adjudicated counterclaims on abandonment. It goes without saying that this Court's judgment therefore will be limited to Freeport's applications. Appellants do not contend that Freeport was the "virtual representative" of the other applicants or that issue preclusion prohibits any other applicant from contesting the issues decided in the Freeport order with respect to their own rights. The Irrigation Districts' arguments against collateral estoppel (Br. 49) are thus beside the point.

The Farmers will have an opportunity to build an evidentiary record on any "fact-intensive" (UVID Br. 46) questions of abandonment that might arise with respect to their water rights in the future. If that evidentiary record demands a different result than the one built by Freeport, then the district court would be free to reach a different result. For example, a decision in this case will not bind the district court from treating a temporary dirt road "that never make[s] the land *** incompatible for irrigation" differently from a road that *does* render the land non-irrigable. *Id*. at 49.

Nor is it "fundamentally unfair" to apply the *legal* rules governing abandonment, as relevant, to applicants in future cases. There is no due process right, of course, to be free of the weight of precedential opinions establishing governing principles of law developed by other litigants. The effect of this decision in future cases is a question for the future case, not this one. The Irrigation Districts' arguments present no basis for carving out this case from the general rules governing law of the circuit.

## IV. FREEPORT'S CROSS-APPEAL AS TO THE DENIAL OF LEAVE TO MAKE MATERIAL AMENDMENTS TO ITS APPLICATIONS IS MERITLESS

The district court dismissed several Freeport applications for a host of deficiencies, including (i) failure to address adequately whether the proposed water right transfers will injure other Decree parties, (ii) failure to identify the relevant

tax assessor parcel numbers, (iii) failure to identify the locations of the diversion points with a map and legal description, (iv) failure to provide maps and legal descriptions of sever-and-transfer parcels consistent with the location of Decree water rights and other data, and (v) indicating incorrectly that the Decree water right may float within a quarter-quarter section. ER 75, 256-257. On cross-appeal, Freeport claims that the district court should have permitted amendment of its applications to include revised legal descriptions (point iv, Br. 65-70). The Court need not reach that argument, which is meritless in any event.[16]

### A. Freeport's Cross-Appeal Is Futile

Freeport's amendment argument fails at the outset because Freeport has not appealed the independently sufficient grounds for denying its applications. Even if Freeport were granted leave to amend its legal descriptions of the sever-and-transfer parcels, its applications would still be dismissed on unchallenged grounds that are not before this Court and require affirmance. *See* ER 73 n.47 ("[E]ven if the revised legal descriptions were properly before the Court, each of the Applicants would still have been denied for numerous reasons."). Accordingly, the

[16] Freeport also contends that the district court erred in concluding that Freeport made an insufficient showing of no injury to other parties (point i, Br. 56-65). Pursuant to Section 11.2 of the Forbearance Agreement, ER 393, in the district court the Community joined the United States' and Tribe's claims of injury only with respect to the portions of the applications that did not seek to transfer valid Decree water rights to lands identified in the Upper Valley Forbearance Agreement as "Hot Lands." Accordingly, Appellants San Carlos Apache Tribe and the United States separately address that aspect of Freeport's cross-appeal.

Court need not and should not reach the amendment issue. *See FTC v. Network Servs. Depot, Inc.*, 617 F.3d 1127, 1137 n.7 (9th Cir. 2010); *see also Gila Valley V*, 31 F.3d at 1435 n.8 ("Because we find that the district court's ruling can be upheld on the three reasons which the UVDs do not dispute, we make no comment at this time as to the merit of the UVDs' argument [regarding] the other three reasons given by the district court[.]").

In particular, although Freeport provided maps and legal descriptions purportedly depicting approximate locations of the current and proposed water uses, Freeport's position "[i]n essence" was that "its Decree water rights may be moved around, or 'float,' within a 40 acre quarter-quarter section." ER 69. As described above (pp. 25-28, *supra*), that contention was squarely foreclosed by settled law of the case (unchallenged here) holding that "an Article V Decree water right belonging to a UV Defendant is appurtenant to the specific tract of land through the irrigation of which the right was acquired." ER 69; *see* UVID SER 51-56 (denying motion for reconsideration); *see also Gila Valley V*, 31 F.3d at 1439 (water cannot be applied "to lands other than those to which the original appropriation was appurtenant"); *Tattersfield v. Putnam*, 41 P.2d 228, 234 (Ariz. 1935) (appropriation of water right "once made attaches permanently to such land [and] none other"). The district court accordingly denied Freeport's applications for violation of the specific appurtenancy requirement. *E.g.*, ER 75 (denying ten

"test" applications because they "include language indicating that the Decree water right may float within a quarter-quarter section, which is incorrect"); *id.* at 256 (denying twenty additional applications). Freeport has not appealed that portion of the district court's decisions.[17]

In the end, Freeport's cross-appeal of the court's denial of leave to amend confronts only portions of the district court's *opinion*, but does not call into question the correctness of the court's *judgment*. Because "[c]ourts review judgments, not statements in opinions," however, Freeport's appeal can provide no relief. *Platt Elec. Supply, Inc. v. EOFF Elec., Inc.*, 522 F.3d 1049, 1059 n.3 (9th Cir. 2008).

### B. The District Court Did Not Abuse Its Discretion In Refusing To Allow Material Amendments

Freeport contends (Br. 65-70) that the district court erred in denying Freeport's motion to submit revised legal descriptions for its applications in the middle of the discovery process, after the applications had been reviewed by the Commissioner, published, and objected to. ER 71-73. This Court will disturb a district court's ruling on procedural motions, such as leave to amend, only for an abuse of discretion. *See ScottTrade, Inc. v. Gibbons*, 590 F. App'x 657, 659 (9th

[17] Freeport argues (Br. 55-56) that the specific appurtenancy rule cannot be retroactively applied to conduct evidencing intent to abandon the 1.4 acres of Decree water rights on Application 147. *See* pp. 24-25, *supra*. But that is different from an argument that the applications contained the requisite information or that the specific appurtenancy rule is incorrect.

Cir. 2014); *cf. Rosenbaum v. City & Cnty. of San Francisco*, 484 F.3d 1142, 1151 (9th Cir. 2007). Here, the district court acted well within its discretion in holding that the Change In Use Rule requires parties to file a new application with the Water Commissioner, a process which provides adequate notice to others when material changes are made to transfer applications.

*1. The district court reasonably administered the Change In Use Rule and Decree to provide the requisite notice.*

Freeport's primary contention (Br. 65-68) is that the district court's refusal to allow late-stage amendment of Freeport's legal descriptions violated Federal Rule of Civil Procedure 15(b). Although the court stated generally in a scheduling order that the Federal Rules of Civil Procedure would apply to pretrial proceedings and trial (ER 300-301), an unremarkable proposition, the court did not state that pending applications would in all respects and without exception be treated as complaints (which, of course, they are not). Nor did it purport to displace the Change In Use Rule, which heavily informed the district court's adoption of a materiality analysis in evaluating amendments. The district court had inherent authority to give precedence to the procedural and notice concerns underlying the Change In Use Rule, where Rule 15 could be applicable if at all only by analogy. The court's order, which the court was in the best position to interpret and apply, did not displace the concerns of fair notice and orderly process relied on by the

district court for denial of leave to amend. In any event, those same concerns would support denial under Rule 15(b).

The district court reasonably interpreted the Change In Use Rule—and, by extension, the Decree—to require a party to file a new application if it seeks to make a material amendment. ER 71 ("Applications proceed through a review and approval process as detailed in the Change in Use Rule, and any material change to an application upsets that process."); *see* ER 209-214; Opening Br. 8. A transfer application "provides notice to the Commissioner, other Decree parties and the Court" of the substance of a transfer application. ER 71. The parties rely on that notice and its accuracy in determining whether to file objections. *See* ER 212-213 (Change In Use Rule § IV(2)). Preparation of objections is often labor-intensive and technical, and represents a significant commitment of time and resources. It would be unfair to allow applicants to alter their applications without refiling. Requiring that materially altered applications be submitted anew, notice be provided, and the objection period reopened is the only way—and at least a reasonable way—to provide interested parties the necessary notice and opportunity to object.

In addition, the applications undergo review by the Water Commissioner prior to being filed with the Court. ER 71. Allowing mid-discovery material amendments would deprive the court the benefit of that administrative review

process. It would significantly undercut the Commissioner's review process if applicants could, after the fact, materially amend their applications to, as here, "set forth completely different locations than the original legal descriptions." *Id*. at 72; *see, e.g.*, *id*. at 106 (comparing transfer parcel 147-1 with revised transfer parcel 147-1); *id*. at 111 (comparing transfer parcel 150 with revised transfer parcel 150).

This concern for orderly process does not disappear just because, as Freeport argues (Br. 67 n.18), the Commissioner's published notices would be the same for both Freeport's original applications and the revised legal descriptions. Any party who requests it also receives notice through a mailed copy of the full application, including specifically its metes and bounds descriptions. *See* ER 212 (Change In Use Rule § IV(2)(B)). Furthermore, a party who saw the original notice and inquired with the Commissioner's office for more information would have been provided the specifics of the filed application, not the materially changed application that Freeport sought to adjudicate in district court. The deprivation of notice caused by material amendments thus has real consequences.

*2. Freeport never requested an opportunity to make minor amendments to its admittedly defective applications.*

Freeport also asserts (Br. 68-70) that the district court should have permitted amendment as to other information, such as tax assessor parcel numbers, more specific locations of diversion points, and historical use of water rights. But there is no "denial of amendment [to be] reversed." *Id.* at 70. Freeport never attempted

to amend the applications in that way, and thus the district court's ruling addressed only the revised legal descriptions. ER 6, 72-73. Absent a motion and ruling in the district court, the propriety of amendment regarding other information "is not a matter on which an appeal can be taken." *United States v. Washington*, 653 F.3d 1057, 1062 n.5 (9th Cir. 2011)*; see also Walsh v. Nevada Dep't of Human Res.*, 471 F.3d 1033, 1037 (9th Cir. 2006) ("Issues not presented to a district court generally cannot be heard on appeal.").

## CONCLUSION

The district court's rulings declining to apply the forfeiture statute to water rights vested before 1919 and declining to extinguish as abandoned Freeport's Decree rights in 20.67 acres related to Applications 122, 151, and 162 should be reversed. The district court order should be affirmed in all other respects.

Respectfully submitted.

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June 12, 2015

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(A) because this brief contains 12,075 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

/s/Pratik A. Shah
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June 12, 2015

**CERTIFICATE OF SERVICE**

I hereby certify that, on June 12, 2015, I electronically filed the foregoing Response and Reply Brief with the Clerk of the court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served via the CM/ECF system.

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June 12, 2015