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

BRIEF OF APPELLANTS GILA RIVER INDIAN COMMUNITY AND SAN CARLOS APACHE TRIBE

Joe P. Sparks
Julia Rowen Kolsrud
THE SPARKS LAW FIRM, P.C.
7503 First Street
Scottsdale, AZ 85251
480-949-1339

Attorneys for the San Carlos Apache Tribe

Pratik A. Shah
Merrill C. Godfrey
Hyland Hunt
Z.W. Julius Chen
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
202-887-4000

Linus Everling
Thomas L. Murphy
GILA RIVER INDIAN COMMUNITY
PIMA MARICOPA TRIBE LAW OFFICE
P.O. Box 97
Sacaton, AZ 85247-0400

Attorneys for the Gila River Indian Community

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

STATEMENT OF JURISDICTION

The district court entered its final judgment on September 4, 2014. ER 1. The Gila River Indian Community timely filed its notice of appeal on October 3, 2014, ER 137, and the San Carlos Apache Tribe timely filed its notice of appeal on October 6, 2014, ER 248. *See* FED. R. APP. P. 4(a)(1)(B). Because the district court's judgment "resolve[d] all of the issues in the post-judgment proceedings" related to the sever-and-transfer applications, this Court has jurisdiction under 28 U.S.C. § 1291. *Cordoza v. Pacific States Steel Corp.*, 320 F.3d 989, 996 (9th Cir. 2003) (applying § 1291 in the context of post-judgment proceedings).

STATEMENT OF THE ISSUES

1. Whether Arizona's forfeiture statute, ARIZ. REV. STAT. § 45-141(C), which extinguishes a surface water right following five years of non-use, applies to rights vested prior to the 1919 enactment of that statute, insofar as the non-use at issue occurred decades after the statute's enactment.

2. Whether Arizona law permits a finding of abandonment of water rights when the land was incompatible with irrigation, there had been no beneficial water use on the parcels to which the water rights are appurtenant under the Decree for at least 17 years, and the water rights holder made no effort within a reasonable time to sever and transfer the rights under the Decree to more suitable land.

STATEMENT OF THE CASE

This case arises out of a proceeding to enforce water rights governed by a 1935 consent decree, known as the Globe Equity Decree. The Decree governs the rights to water of the Gila River mainstream in New Mexico and Arizona held by the Gila River Indian Community ("Community"), the San Carlos Apache Tribe ("Tribe"), the United States as trustee for the Community and the Tribe (collectively, "Appellants"), landowners in the Upper Gila River Valley, and others. *United States v. Gila Valley Irrigation Dist.*, 31 F.3d 1428, 1431 (9th Cir. 1994) (*Gila Valley V*). The district court retained jurisdiction to implement the Decree. Decree Article XIII (ER 498).

The Decree authorizes the severance and transfer of a party's existing Decree water rights to new land, provided that the application complies with the Decree and applicable law and that the transfer would not injure the rights of other parties to the Decree. Decree Article XI (ER 497). In 1993, as part of its administration and enforcement of the Decree, the district court adopted the "Change in Use Rule," which establishes procedures governing the transfer of Decree water rights. ER 197, 209-214. The Change in Use Rule bars the transfer of a water right that has been forfeited or abandoned. Change in Use Rule § IV(1)(H)(1) (ER 211).

This appeal challenges the district court's August 2010 Order, which denied all but one of Appellants' forfeiture and abandonment counterclaims in the context of the court's denial of ten sever-and-transfer applications filed by Freeport-McMoRan Corporation ("Freeport").

A. Arizona Water Law

Under longstanding Arizona law, rights to surface water are governed by the doctrine of prior appropriation. *See Slosser v. Salt River Valley Canal Co.*, 65 P. 332 (Ariz. 1901). Under that doctrine, a water user gains a right to use water by appropriating it—that is, by applying the water to a beneficial use on a particular parcel of land. *Id.* at 335-336. Earlier appropriators have priority as against later ones. *Id.* at 337; *see* Howell Code, ch. LV, § 17 (1864) ("[O]wners of fields shall have precedence of the water for irrigation, according to the dates of their respective titles or their occupation of the lands either by themselves or their grantors. The oldest titles shall have precedence always.").

The water right is "attached to the land, and become[s], in a sense, appurtenant thereto." *Slosser*, 65 P. at 337. It "cannot be made to do duty to other land." *Id.*; *see also Gillespie Land & Irrigation Co. v. Buckeye Irrigation Co.*, 257 P.2d 393, 398 (Ariz. 1953) (any water right that arises is appurtenant to that particular parcel of land and may not be used elsewhere). Because "beneficial use" of the water gives rise to the water right, the amount of water that may be used is

the amount that may be put to beneficial use on the appurtenant parcel, even if that amount is less than the maximum amount of the appropriation right. *See Salt River Valley Water Users' Ass'n v. Kovacovich*, 411 P.2d 201, 203 (Ariz. Ct. App. 1966); Laws of Ariz., ch. 164, § 1 (1919) ("Beneficial use shall be the basis and the measure and the limit to the use of water in the State[.]"); *see also Gila Valley V*, 31 F.3d at 1439 (considering *Salt River Valley* "instructive of how Arizona employs the beneficial use doctrine").

Surface water rights are not permanent. They "remain[] secure" only "[s]o long as utilization continues." *In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source*, 35 P.3d 68, 71 (Ariz. 2001) (en banc). The laws of forfeiture and abandonment govern whether water rights have been lost on account of non-use.

Arizona law provides for the forfeiture of water rights by statute. ARIZ. REV. STAT. § 45-141(C). The only relevant question under the statute is whether there has been five years of non-use. *Id.* Intent is irrelevant. *Gila Water Co. v. Green*, 241 P. 307, 308 (Ariz. 1925) (*Green II*). As enacted in 1919, the forfeiture statute contained a "savings clause," which provided that "nothing herein contained shall be so construed as to take away or impair the vested rights which any person, firm, corporation or association may have to any water at the time of

passage of this act." Laws of Ariz., ch. 164, § 1 (1919). In 1928, that savings clause was removed from the statute. *See* ARIZ. REV. CODE § 3280 (1928).

Water rights have been subject to abandonment since prior to Arizona's statehood in 1912. *See generally* CLESSON S. KINNEY, A TREATISE ON THE LAW OF IRRIGATION §§ 253-259, at 405-417 (1894) (discussing principles of abandonment in the arid regions of the United States). Abandonment of a water right occurs only when "the holder intends to abandon the right and a period of non-use occurs." *Phelps Dodge Corp. v. Arizona Dep't of Water Res.*, 118 P.3d 1110, 1115 (Ariz. Ct. App. 2005). Intent to abandon a water right "may be evidenced by the declaration of the party, or *** fairly inferred from his acts." *Gould v. Maricopa Canal Co.*, 76 P. 598, 601 (Ariz. 1904). Cessation of beneficial use of water on the land to which the right is appurtenant for a long period is "very strong evidence of an intention to abandon." *Gila Water Co. v. Green*, 232 P. 1016, 1019 (Ariz. 1925) (*Green I*).

B. The 1935 Globe Equity Decree

1. The declaration of Gila River water rights

The Gila River runs generally in a westerly direction across Arizona from its source in New Mexico until it joins the Colorado River. The River runs through semi-arid lands that require irrigation for successful agriculture. The upstream portion of the River in eastern Arizona is known as the Upper Valleys. From the

Upper Valleys, the River runs through the San Carlos Apache Reservation, into the San Carlos Reservoir formed by the Coolidge Dam, and then on to the Gila River Indian Community's Reservation, which is south of Phoenix. *Gila Valley V*, 31 F.3d at 1431.

Members of the Community and the Tribe have practiced irrigated agriculture in the Gila River valley for centuries. *See* Complaint ¶ 3(c) (ER 229). By the beginning of the twentieth century, however, extensive upstream usage of the Gila River's water by recently arrived non-Indian settlers had left the Community and Tribe "without an adequate supply of water" for irrigation. Act of June 7, 1924, ch. 288, 43 Stat. 475.

In 1925, the United States, in its capacity as trustee for affected Indian tribes, filed suit against all non-Indian users of the Gila River's water seeking a declaration of the parties' respective water rights. *Gila Valley V*, 31 F.3d at 1430. That case, known as Globe Equity 59, resulted in a consent decree entered by the district court in 1935 that determined all parties' rights to draw water from the Gila River. ER 400.

2. The Decree's schedule of rights and priorities

Article V of the Decree sets out a Schedule of Rights and Priorities that lists the water rights owned by each party. *E.g.*, ER 408-413. The Decree provides for the appointment of a Water Commissioner to administer and enforce this system of

water rights. Decree Article VII (ER 490). The Community holds the most senior right on the River; the Tribe holds the next most senior right. ER 408.

For most of the water rights, the right is listed in the Schedule of Rights and Priorities by reference to a quarter-quarter section in the Public Land Survey System and a specific number of acres within that quarter.[1] *See* ER 406 ("[S]aid waters are carried to the lands through the irrigation of which said right has been acquired[.]"). Maps showing the boundaries of parcels with Decree rights were made by the Water Commissioner during the early administration of the Decree (the "Decree Maps"). ER 8, ¶ 10. The Decree Maps are based on a 1920 map created by the Arizona State Water Commissioner, *id.*, that "indicated the boundary lines of each parcel of land with rights to Gila River water," ER 7, ¶ 4. The 1920 map was verified by the water users in the Upper Valleys and judicially reviewed at the time. ER 7, ¶ 6. Since the entry of the Decree, the Decree Maps have been updated by the Commissioner to record approved changes in the location of Decree rights. ER 8, ¶ 12.

Arizona law governs application of the Decree to listed water rights secured in Arizona by prior appropriation. *Gila Valley V*, 31 F.3d at 1442 n.12 ("[T]he compromise struck by the Decree was based in part on prior appropriation law as it

[1] A quarter-quarter section is generally a 40-acre area.

was applied in Arizona at the time, [so] it is proper that we consider Arizona law" in interpreting the Decree).

3. Sever and transfer of water rights under the Decree

Changes in the location where Decree water is used, through the formal transfer of water rights from one parcel to another, have been an enduring feature of the Decree. Article XI of the Decree provides that parties with water rights "shall be entitled, in accord with applicable laws and legal principles, to change the point of diversion and the places, means, manner or purpose of the use of the waters" to which they have rights "so far as they may do so without injury to the rights of other parties." Decree Article XI (ER 497).

In 1993, the district court adopted the "Change in Use Rule" to govern the severance and transfer of water rights, including the applications at issue here. ER ER 197, 209-214. That Rule continued the Water Commissioner's historical practice of requiring applicants to identify, among other things, the particular parcel from which the appurtenant water right is to be severed as well as the particular parcel to which the right will be transferred. Change in Use Rule §§ IV(1)(C)(2) & (3) (ER 210). The Rule further prohibits transfers "with respect to any decreed right to water which, under applicable law, has been forfeited or abandoned." *Id.* § IV(1)(H)(1) (ER 211).

The Commissioner must provide notice of the application to other parties to

the Decree, who then have 90 days in which to file objections. Change in Use Rule §§ IV(2) & (3)(B) (ER 212-213). Regardless of any objection, the party seeking to transfer a water right has "the burden of establishing a prima facie case of no injury to the rights of other parties under the Gila Decree and a right to transfer." *Id.* § IV(4)(B) (ER 214).

C. The Upper Valley Forbearance Agreement

In 2007, the district court approved the Upper Valley Forbearance Agreement ("Agreement" or "Forbearance Agreement"), which settled certain claims brought by the Community and others against Upper Valley landowners for unlawfully pumping Gila River water onto their lands. ER 3-4. The Agreement established a six-month period for landowners to transfer via the Decree's sever-and-transfer process valid Decree rights to certain defined lands—so-called "Hot Lands"—that had no Decree rights but had been illegally irrigated during a certain period. The Agreement provided that the Community or the United States on its behalf would not raise certain objections to the transfer applications if the following conditions were satisfied: (1) the sever-and-transfer application was filed within six months of the Agreement's enforceability date, (2) the application sought to transfer a valid Decree water right to a parcel of "Hot Lands" as defined in the Agreement, (3) the application complied "with all applicable requirements" of the Decree's Change in Use Rule, and (4) the landowners used "best efforts" to

pursue its application and accomplish the sever and transfer. Forbearance Agreement §§ 11.1-11.2 (ER 393).

D. Procedural History

1. Sever-and-transfer applications

During the six-month period following the enforceability date for the Forbearance Agreement, 419 sever-and-transfer applications were filed with the Water Commissioner. ER 5. Applications filed with the Commissioner must identify, *inter alia*, (i) the water right proposed for transfer as originally described in the Decree, including the date of priority; (ii) the land from which the applicant seeks to sever the appurtenant Decree right (the "sever parcel"); and (iii) the land to which the applicant seeks to attach that Decree right (the "transfer parcel"). ER 15-16, 67-70. The United States, the Tribe, and the Community filed objections. ER 5.[2]

As relevant here, the district court treated as counterclaims Appellants' objections that a water right appurtenant to the sever parcel or a portion thereof had been forfeited or abandoned. ER 52. Those objections thus survive the withdrawal or denial of the transfer application that spurred them. *See* ER 257 (noting that the

[2] Some of the objections filed by the Tribe and the United States on its behalf were broader than those filed by the Community because the Tribe is not a party to the Forbearance Agreement. ER 5 n.6. The district court determined that the Community's objections were proper under the Agreement. ER 74-75.

court's orders "provide[] for the preservation and adjudication of counterclaims following the resolution of the associated Application").

Freeport filed 59 of the applications. ER 5. Noting the commonality of the objections among the 419 applications, the district court decided to resolve a subset of Freeport's applications first and stayed the processing of the other applications pending resolution of Freeport's. ER 5-6. At the court's direction, the objecting parties (Appellants here) and Freeport selected ten Freeport applications to be adjudicated in a subproceeding denominated Globe Equity 61. ER 6.

2. The district court's order on ten Freeport applications

Following a bench trial, the district court in its August 2010 Order denied Freeport's ten applications and extinguished 1.4 acres of Freeport's water rights as abandoned. ER 2, 78-79. Rejecting Appellants' remaining counterclaims, the district court declined to hold that any of the water rights had been forfeited and declined to extinguish another 20.67 acres as abandoned. ER 75-78.

a. Forfeiture determination

Relying on the statute's original savings clause, the district court held categorically that Arizona's forfeiture statute did not apply to pre-1919 water rights. ER 38-42. The court acknowledged that, in 1995, the Arizona legislature amended the forfeiture statute to "provide[] protection for pre-1919 water rights that may have already been forfeited before 1995" by "explicitly exempting pre-

1919 water rights from forfeiture." ER 39. The court also recognized that the Arizona Supreme Court invalidated that amendment as unconstitutionally retroactive. *Id.* (citing *San Carlos Apache Tribe v. Superior Court ex rel. Cnty. of Maricopa*, 972 P.2d 179 (Ariz. 1999)). The court nevertheless concluded that the Arizona Supreme Court's precedent did not resolve "whether the terms of the 1919 Water Code actually permitted the five-year forfeiture provision to be applied to pre-1919 water rights in the first place." *Id.*

The district court then looked to the interpretation of Nevada's separate forfeiture statute and savings clause by Nevada state and federal courts, and held on "the same reasoning as the Nevada Supreme Court" that "Arizona's forfeiture provision does not apply to pre-1919 water rights." ER 40-41. Because "[a]ll ten of Freeport's applications involve water rights that vested before 1919," the court concluded, "none of these rights is subject to Arizona's law of forfeiture." ER 42.

b. Abandonment determination

The court held that Appellants must prove abandonment by clear and convincing evidence, and, applying that standard, found that Freeport had abandoned the water right appurtenant to 1.4 acres of sever parcel 147. ER 42, 49-50. The court relied on the facts that a structure incompatible with irrigation—there, a road and canal—had existed for a long period of time (since at least 1991); that there had been no beneficial use on those acres since at least that time; and that

Freeport had made no effort to transfer its water right to a more suitable parcel until after the Forbearance Agreement, at least 17 years after the last water use. ER 49-50. The court extinguished that 1.4 acre abandoned water right from the Decree. ER 50.

The district court, however, adopted a different legal rule for river bottom land. Despite no dispute that a river bottom is just as incompatible with irrigation as a canal, and despite the court's finding that the parcels for which severance was sought in Freeport's applications involved 20.67 acres of Decree acreage that was river bottom that had not been irrigated since at least 1991, ER 21, 30-33, the court declined to apply a presumption of abandonment. Rather, the court found that Appellants did not demonstrate by clear and convincing evidence an intent to abandon by Freeport. In its analysis, the court recognized Freeport's payment of water assessments and costs for the Decree parcels containing the river bottom lands, and evidence that Freeport purchased the land for the Decree water rights. The court denied the counterclaims to have those acres declared abandoned. ER 46-47.[3]

[3] The 20.67 acres includes: the 9.8 Decree acres of river bottom at issue in Application 122, ER 21, 88; the 5.3 Decree acres of river bottom from sever parcel 1 at issue in Application 151, ER 30; the 2.75 Decree acres of river bottom from sever parcel 2 at issue in Application 151, ER 30-31; and the 2.82 Decree acres of river bottom at issue in Application 162, ER 32-33. Two other sever parcels were found to include river bottom: sever parcel 147 has 12.7 acres, ER 26-27, and sever parcel 150 has 4.05 acres, ER 28-29. Because the latter two parcels are not

c. Denial of applications

The district court then denied all of Freeport's applications, noting numerous ways in which the applications failed to meet the requirements of the Decree or the Change in Use Rule, ER 75-78, such as: (i) some of the sever parcels included portions that had no appurtenant Decree water rights to transfer, ER 53-54; (ii) some of the transfer parcels could not be used to grow crops of value, ER 55-56; (iii) some of the transfer parcels already had Decree water rights and therefore could not have additional Decree rights attached to them, ER 57; (iv) Freeport had failed to establish a *prima facie* case that its transfers would not injure the rights of other Decree parties, ER 57-67; and (v) Freeport had failed to provide certain information required to be included in the transfer applications. ER 67-70.

The district court also rejected Freeport's attempt to submit revised applications during discovery. The court found that the revisions were material—in some cases setting forth locations entirely different from those in the original applications—and thus could not be implemented without the notice procedures prescribed by the Change in Use Rule. ER 72-73. The court further stated that it would have denied all of the revised applications for "numerous reasons,"

---

entirely river bottom and they include some non-Decree acreage, however, the district court's findings of fact do not conclusively establish how much of the river bottom overlaps with Decree acreage. Appellants therefore do not challenge the district court's rulings as to those two parcels.

indicating that the revised applications suffered from several of the same procedural and substantive defects as the original applications. ER 73 n.47.

3. Resolution of the remaining applications

On September 2, 2010, Freeport filed a notice of appeal from the district court's August 2010 Order denying its ten applications. This Court dismissed that appeal for lack of jurisdiction because the district court's August 2010 Order addressed only ten of the applications and therefore was not a final judgment under 28 U.S.C. § 1291. *United States v. Sunset Ditch Co.*, 472 F. App'x 472 (9th Cir. 2012).

While the appeal was pending and in the years following it, the district court completed processing the remaining change-in-use applications that had been filed. All of the remaining applications were either denied for the same reasons as given in the August 2010 Order, *see, e.g.*, ER 257-258 (denying 20 Freeport applications on 4 grounds from the August 2010 Order), or withdrawn, *see, e.g.*, ER 144-151 (status report indicating the imminent withdrawal of the last remaining applications). Except for the counterclaims adjudicated with respect to the first ten Freeport applications—which are at issue in this appeal—and those that were settled, Appellants dismissed their counterclaims without prejudice for the applications that had been denied or withdrawn. ER 140-143 (objecting parties' joint notice of voluntary dismissal without prejudice). After all of the applications

had been either denied or withdrawn, and all of the counterclaims had been adjudicated or dismissed without prejudice, the district court entered a final judgment disposing of all 419 applications and concluding the post-judgment proceeding. ER 1.

SUMMARY OF ARGUMENT

The district court erred in denying Appellants' forfeiture counterclaims as to all ten Freeport applications and in denying Appellants' abandonment counterclaims as to 20.67 acres of various parcels at issue in applications 122, 151, and 162.

1. The district court relied on the forfeiture statute's original savings clause—absent from the statute since 1928—to deem pre-1919 vested water rights exempt from forfeiture in perpetuity, even for non-use occurring after 1919. The Arizona Supreme Court's en banc decision in *San Carlos Apache Tribe*, which invalidated as impermissibly retroactive a 1995 amendment expressly exempting pre-1919 water rights from forfeiture, forecloses the district court's conclusion. The Arizona Supreme Court's retroactivity rationale is premised on its explicit recognition that, under pre-1995 Arizona law, pre-1919 water rights could be forfeited and therefore could have become vested in others. Had the forfeiture statute already provided such protection (through the long-discarded 1919 savings clause or otherwise), as the district court concluded, the 1995 amendment would

have been superfluous but not impermissibly retroactive. Accordingly, there was no basis for the district court to look to the *Nevada* Supreme Court instead of the controlling decision from the *Arizona* Supreme Court.

Even if the district court's construction of the forfeiture statute were correct, the court misapplied it to the record below. By its plain terms, the original savings clause (whatever its scope) applied only to a right vested and held at the time of the clause's enactment in 1919. But Freeport did not hold the rights at issue in the ten applications in 1919; it acquired those rights between 1997 and 2006. Nothing in the forfeiture statute affords Freeport the same protection extended to "any person, firm, corporation or association" who "ha[d]" a vested right "to any water at the time of passage of this act"—especially given that the statute no longer contained the original savings clause at the time Freeport acquired its rights.

2. The district court's determination that Freeport did not abandon water rights appurtenant to river bottom land also rests on an erroneous interpretation of Arizona law. Departing from the law of every western state except Nevada, and from the Arizona Supreme Court's guidance in *Green I* that prolonged non-use alone is "very strong evidence of an intention to abandon," the district court declined to apply a presumption of abandonment despite Freeport's undisputed 17 years of non-use. That decision is doubly incorrect because the non-use involved land that is incompatible with irrigation and because Freeport made no attempt

during that period to transfer those water rights to an appropriate parcel. Finding Freeport's water rights viable under those circumstances, based primarily on the payment of assessments and costs, contravenes Arizona law.

STANDARD OF REVIEW

This Court reviews the district court's interpretation of state law *de novo*. *In re Kirkland*, 915 F.2d 1236, 1238 (9th Cir. 1990). The decisions of the highest state court in Arizona control, and where there is no decision of the Arizona Supreme Court precisely on point, this Court "must predict how the highest state court would decide the issue." *Id.* at 1238-1239.

ARGUMENT

I. FREEPORT FORFEITED ITS WATER RIGHTS UNDER ARIZONA LAW

Enacted in 1919, Arizona's forfeiture statute provided that surface water rights could be forfeited by operation of law through non-use for five years, irrespective of the reason:

> whenever hereafter the owner of a perfected and developed right shall cease or fail to use the water appropriated for a period of five (5) successive years the right to use shall thereupon cease and revert to the public and become again subject to appropriation in the manner herein provided.

Laws of Ariz., ch. 164, § 1 (1919). That remains the law today. *See* ARIZ. REV. STAT. § 45-141(C), *invalidated in part by San Carlos Apache Tribe v. Superior*

Court ex rel. Cnty. of Maricopa, 972 P.2d 179, 190, 204 (Ariz. 1999) (en banc) (striking down, in pertinent part, 1995 amendment to the forfeiture statute).

From 1919 to 1928, the forfeiture statute contained a savings clause stating that "nothing herein contained shall be so construed as to take away or impair the vested rights which any person, firm, corporation or association may have to any water at the time of passage of this act [on June 12, 1919]." Laws of Ariz., ch. 164, § 1 (1919); *see* ARIZ. REV. CODE § 3280 (1928). Based on its view that the original savings clause—which appears nowhere in the operative forfeiture statute—forever insulates pre-1919 water rights from forfeiture by non-use, the district court held that none of the water rights at issue in the ten Freeport applications "is subject to Arizona's law of forfeiture." ER 41-42. That holding both misreads the law and misapplies it to the undisputed factual record.

A. The Forfeiture Statute Applies To Pre-1919 Water Rights

1. Binding Arizona authority establishes that the forfeiture statute does not exempt non-use occurring after 1919.

Appellants' forfeiture counterclaims are based exclusively on Freeport's *post*-1919 acquisition of Decree land and non-use of Decree water rights. *See* ER 11, ¶ 32 (finding that Freeport stated on all ten applications that "use of water right (or portion thereof) *** is not currently practicable and has not been practicable during [the last ten years]"). The forfeiture statute's original savings clause (or any other Water Code provision) does not obviate Appellants' forfeiture counterclaims.

Even assuming that clause were still somehow operative (notwithstanding its elimination from the forfeiture provision as of 1928), the Arizona Supreme Court's en banc decision in *San Carlos Apache Tribe* forecloses the district court's wholesale exemption from forfeiture for rights perfected by original rights holders before 1919.

Notwithstanding the district court's view that *San Carlos Apache Tribe* sheds no light on "whether the terms of the 1919 Water Code actually permitted the five-year forfeiture provision to be applied to pre-1919 water rights," ER 39, *San Carlos Apache Tribe* resolves the question. *See Ring v. Arizona*, 536 U.S. 584, 603 (2002) (Arizona Supreme Court's "construction of the State's own law is authoritative"); *Arizona v. Johnson*, 351 F.3d 988, 1001 (9th Cir. 2003) (same). In *San Carlos Apache Tribe*, the Arizona Supreme Court confronted statutory amendments enacted in 1995 that "revised numerous statutes dealing with water rights and the general adjudication process," including the forfeiture statute. 972 P.2d at 187. In pertinent part, an amendment to Section 45-141(C) "eliminate[d] any possibility of forfeiture for rights initiated before June 12, 1919." *Id.* at 190. The Arizona Supreme Court invalidated that amendment (among others) as impermissibly retroactive. *See id.* at 190.

Critically, the Arizona Supreme Court's retroactivity holding was predicated on its understanding that the statutory amendment "create[d] *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." *San Carlos Apache Tribe*, 972 P.2d at 190 (emphasis added). The Arizona Supreme Court's holding could have flowed only from one of the two following conclusions: (1) the original savings clause (or any other similar clause) allowed water rights vested prior to 1919 to be forfeited based on post-1919 non-use, *or* (2) the subsequent removal of that clause in 1928 eliminated any categorical exemption it might have afforded such rights. In other words, the Arizona Supreme Court could not have found the 1995 amendment to impose an unconstitutional retroactive effect unless it concluded that the forfeiture statute had previously allowed forfeiture of pre-1919 water rights. The district court's contrary determination that water rights originally vested before 1919 remain perpetually unaffected by the forfeiture statute—without the "new" protection conferred by the 1995 amendment struck down in *San Carlos Apache Tribe*—cannot be squared with the clear and controlling rationale in *San Carlos Apache Tribe*.

A narrower reading of the original savings clause, moreover, accords with Arizona's restrained application of retroactivity principles and leaves that clause (assuming it were still operative) with an important—albeit limited—constitutional function. Because "[t]he Legislature may not *** change the legal consequence of events completed before the statute's enactment," *San Carlos Apache Tribe*, 972

P.2d at 189, it was necessary for the forfeiture statute to contain a savings clause that prevented its retroactive application to non-use that occurred *prior to* 1919. It was not necessary, however, for the legislature to insulate such rights from forfeiture by "effectively freez[ing] the law." *Id*. As the Arizona Supreme Court emphasized, "the Legislature may certainly enact laws that apply to rights vested before the date of the statute" so long as the laws "only change the legal consequences of *future* events." *Id.* (citing *Tower Plaza Invs. v. DeWitt*, 508 P. 2d 324, 327-328 (Ariz. 1973), for example in which law permissibly "tax[ed] future rents in leases made prior to enactment of statute"); *see Hall v. A.N.R. Freight Sys., Inc.*, 717 P.2d 434, 443 (Ariz. 1986) (en banc) ("In Arizona, it is conclusively settled that laws are not retroactive simply because they relate to past events."). By contrast, the district court's overbroad reading results in a disproportionate incursion on the Decree that the parties would not have intended because so many of the rights listed in the Decree have pre-1919 priority dates.

Notably, had the forfeiture statute continued to protect pre-1919 vested-rights-holders from forfeiture in perpetuity—as the district court found—there would have been no reason for the Arizona legislature to enact a superfluous amendment in 1995 "eliminating any possibility of forfeiture for rights initiated before June 12, 1919." *San Carlos Apache Tribe*, 972 P.2d at 201; *see Grand v. Nacchio*, 236 P.3d 398, 402-403 (Ariz. 2010) (en banc) (presumption against

superfluity). As the Arizona Supreme Court concluded, the amendment was "more akin to a change than a clarification." *San Carlos Apache Tribe*, 972 P.2d at 194; *see also Finch v. State Dep't of Pub. Welfare*, 295 P.2d 846, 848 (Ariz. 1956) ("[T]here is a duty on the courts to give effect to statutory amendments since it is presumed that the legislature by amending a statute intends to make a change in existing law.") (citation and internal quotation marks omitted). Otherwise, as discussed above (pp. 20-21, *supra*), the Arizona Supreme Court would not have invalidated the "new" savings clause as impermissibly retroactive.[4]

2. The district court had no reason to rely on Nevada law.

Rather than read the Arizona forfeiture statute as it existed at the time of the non-use at issue, or defer to *San Carlos Apache Tribe*'s interpretation thereof, the district court looked to *Nevada's* forfeiture statute and the *Nevada* Supreme Court's interpretation of that statute. *See* ER 40-41 (discussing *In re Manse Spring*

[4] Apart from the savings clause originally included in the 1919 forfeiture statute, the 1919 Water Code included a general savings clause in Section 56 (unmentioned by the district court) that has remained part of the Code. Laws of Ariz., ch. 164, § 56 (1919) ("Nothing in this act contained, shall impair the vested rights of any person, association or corporation to the use of water.") (current version at ARIZ. REV. STAT. § 45-171). Even if the general savings clause could be read to cover forfeiture—rendering the forfeiture-specific savings clauses superfluous when enacted in 1919 and again in 1995, *see Grand*, 236 P.3d at 402-403—*San Carlos Apache Tribe*'s controlling interpretation of Arizona law necessarily rejects the premise that the general savings clause precluded forfeiture of pre-1919 water rights based on post-1919 non-use.

& Its Tributaries, 108 P.2d 311 (Nev. 1940)). That reasoning subverts *Arizona* law and public policy.

With limited exceptions, the Arizona Supreme Court has given little weight to decisions from other states, even where another state's statute was the "most similar to that adopted in Arizona" and the state's highest tribunal had "consider[ed] the case now before [the Arizona Supreme Court]." *Hall*, 717 P.2d at 447. The Arizona Supreme Court generally has rejected the district court's analytical method of finding the (purportedly) most analogous state statute and applying that rule. *See id.* ("The canvass of *** sister states' decisions, while informative, amply demonstrates why they are not particularly relevant to our own decision, which must be shaped by Arizona's unique constitutional and statutory calculus."). And at times it has declined to rely on other states' jurisprudence to resolve water rights disputes specifically. *See Slosser*, 65 P. at 334-335 (explaining that "the law as declared by *** the courts of last resort of other states and territories having a dissimilar history, or whose water laws have grown out of the local customs of miners, as in California and Nevada" is "not controlling [or] even authoritative in the decision of questions which arise, as in this instance, wholly and entirely under our own peculiar statutes").

The Arizona Supreme Court's guarded approach to co-opting the reasoning of decisions from other states makes particular sense here. As an initial matter, the

Nevada savings clause, unlike the original Arizona savings clause, remains a part of the operative forfeiture statutes today. NEV. REV. STAT. § 533.085; *see* pp. 4-5, *supra*. The Nevada Supreme Court, moreover, acknowledged that "there is nothing to prevent the [Nevada] Legislature from enacting that the right to the use of water may be lost and forfeited by five years of continuous non-use *** in relation to rights acquired *prior to* such an enactment, providing such prior and vested rights are not thereby impaired." *In re Manse Spring & Its Tributaries*, 108 P.2d at 315 (emphasis added). Such an enactment would permit pre-1913 Nevada water rights to be affected by events occurring after, but not before, the statute's enactment—precisely the construction of the Arizona forfeiture statute acknowledged in *San Carlos Apache Tribe* and advanced by Appellants here. To be sure, the Nevada Supreme Court rejected that construction of Nevada's savings clause in favor of a broader one, but only because that court found "apparent" legislative intent to adopt a broader rule. *Id.*

It makes no difference to the interpretation of Arizona law that this Court "has had several occasions to apply Nevada law to the question of forfeiture of a pre-1913 Nevada surface water right." ER 40. In *United States v. Orr Water Ditch Co.*—as in the *Alpine Land & Reservoir Co.* line of cases relied upon by the district court, *see* ER 41—this Court made clear that it was applying "Nevada law" and the "Nevada forfeiture statute." 256 F.3d 935, 941-942 (9th Cir. 2001). Just

as it gave dispositive weight to how the "Nevada legislature alleviated concerns about unfairness and unconstitutionality," *id.* at 942, this Court should accept the recognition of the Arizona Supreme Court and Arizona legislature that Arizona's forfeiture statute—notwithstanding its long-discarded savings clause—does not preclude forfeiture of water rights vested prior to 1919, at least insofar as the non-use occurred after that date.

B. The District Court Misapplied Its Erroneous Legal Rule

Beyond the district court's flawed construction of Arizona's forfeiture statute, its denial of Appellants' forfeiture counterclaims is subject to reversal on an independent ground: the court misapplied its (erroneous) legal rule. In the court's view, "none of [Freeport's] rights is subject to Arizona's law of forfeiture" because "[a]ll ten of Freeport's Applications involve water rights that vested before 1919." ER 42. But whether Freeport's applications "involve" such rights is irrelevant because Freeport itself did not hold these vested water rights as of 1919.

According to the testimony offered at trial by Freeport's witness who assisted in the preparation of applications, all ten of the applications at issue concerned water rights purchased between 1997 and 2006. *See* ER 279-290; *see also* ER 265-270. Although the district court's reasoning is not explicit, it apparently took the view that because Freeport's recently acquired water rights

were derivative of those vested before 1919, they came under the protection of the original savings clause. That reasoning does not withstanding scrutiny.

The savings clause referred to a "person, firm, or corporation" who "may have" a "vested right[]" to "any water at the time of passage of this act," and provides that the forfeiture statute shall not "take away or impair" such rights. Laws of Ariz., ch. 164, § 1 (1919). Freeport falls outside of that category by 78 years or more, depending on the application at issue, because in 1919 it did not "have" a vested right to the use of water in question here that the forfeiture statute could "take away or impair." Under any conception of vested rights, *Freeport* had no vested rights until 1997 at the earliest. *See San Carlos Apache Tribe*, 973 P.2d at 189 ("A vested right 'is actually assertable as a legal cause of action or defense or is so substantially relied upon that retroactive divestiture would be manifestly unjust.'") (quoting *Hall*, 717 P.2d at 443); *Steinfeld v. Neilsen*, 139 P. 879, 896 (Ariz. 1913) ("They are vested, when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest."). The district court recognized as much in stating that Freeport's applications merely "*involve* water rights that vested before 1919." ER 42 (emphasis added).

The fact that Freeport purchased water rights once held by appropriators with a pre-1919 priority date cannot override the statutory text. Whether a

legislative protection for water rights conveys to a subsequent purchaser is a matter of legislative intent. *Cf. Colville Confederated Tribes v. Walton*, 647 F.2d 42, 51 (9th Cir. 1981) (holding that Congress would not have intended for protections against abandonment of water rights to convey to subsequent purchasers). Here, nothing in the forfeiture statute—including the original savings clause—indicates that Arizona intended to extend special protection to water rights purchasers (like Freeport) who obtained water rights decades after the legislature enacted the forfeiture statute.

Nor does Freeport stand in the shoes of the original pre-1919 appropriators with respect to the critical factor favoring protection of pre-1919 rights: notice. Freeport not only acquired its rights under the 1935 Decree "with notice of the 1919 Water Code," ER 42, but it also knew (or should have known) that the forfeiture statute no longer contained the original savings clause. *See* pp. 4-5, *supra*. Because "[f]orfeiture *** must be determined under the law as it existed at the time of the event alleged to have caused the forfeiture," *San Carlos Apache Tribe*, 972 P.2d at 190, it would be doubly improper to apply a non-existent provision of Arizona law to the present dispute.

II. THE PROLONGED PERIOD OF NON-USE AND INCOMPATIBILITY WITH IRRIGATION ESTABLISH ABANDONMENT UNDER ARIZONA LAW

Under Arizona law at the time of the Decree (and now), "a water right is attached to the land on which it is beneficially used and becomes appurtenant thereto," and "is in no sense a floating right." *Gillespie*, 257 P.2d at 397-398; *see also Slosser*, 65 P. at 337 ("A water right *** must be attached to the land, and become, in a sense, appurtenant thereto. It follows, therefore, so long as such water right is attached to a particular tract of land it cannot be made to do duty to other land."). The plain language of the Decree incorporates that state law rule. Decree Article V (ER 406) (specifying, in defining "the right or rights" listed in Article V of the Decree, that diverted "waters are carried *to the lands through the irrigation of which said right has been acquired*") (emphasis added).

Accordingly, if "a period of non-use occurs" on the parcel to which the right is appurtenant, and "the holder intends to abandon the right," a water right is extinguished by abandonment under Arizona law. *Phelps Dodge Corp.*, 118 P.3d at 1115; *see also* ARIZ. REV. STAT. § 45-188(B). Intent can be demonstrated by acts, including the non-use of water, and a prolonged lack of use alone is "very strong evidence of an intention to abandon." *Green I*, 232 P. at 1019. The case for abandonment is particularly strong when such non-use is coupled with evidence

that the appurtenant land is incompatible with beneficial use of the water. *See Orr Water Ditch Co.*, 256 F.3d at 946 (applying Nevada law); *see also* ER 44-45.

Although the question of intent to abandon is a factual one, *see Landers v. Joerger*, 140 P. 209, 210 (Ariz. 1914), all the material facts are undisputed here: (1) neither Freeport nor its lessees have used water to irrigate river bottom land—the type of land at issue (p. 13 & n.3, *supra*)—for at least 17 years; (2) the river bottom is incompatible with agriculture, such that beneficial use of water could be made only through a transfer to a more suitable parcel;[5] (3) Freeport made no attempt to transfer the water rights until at least 17 years after the last use of water on the land; and (4) the only action Freeport took with respect to the water rights since acquiring them was to pay the water assessments and costs for maintaining ditches. *See* ER 46-47. Because those undisputed facts show that Freeport did not and could not have intended to exercise its water right on the river bottom lands at issue, they establish an intent to abandon under Arizona law.

The district court's conclusion to the contrary rests on three legal errors: *First*, contrary to Arizona law, the district court declined to apply a presumption of

[5] Freeport itself presented undisputed evidence that it specifically chose river bottom lands for its applications and that river bottom is incompatible with irrigation. *See, e.g.*, ER 272A, 278A (testimony of Freeport's witness that Application 122 involved land where "the river washed out something that might have been irrigated previously and is no longer farmable because of the changes in the river" and, discussing Application 151, river bottom land "couldn't have been farmed"); *see also* ER 272B-272C (Application 162 land is "clearly within the river bottom").

intent to abandon based on the prolonged period of non-use. ER 44 n.21. The district court's reliance on *Green I* is misplaced. As noted above (p. 29, *supra*), that case expressly recognizes that an unexplained extended period of non-use constitutes "very strong evidence of an intention to abandon." *Green I*, 232 P. at 1019. The court's conclusion in *Green I* that the water rights holder had overcome that "very strong" evidentiary presumption of abandonment was specific to the unique facts of that case: the court credited the water rights holder's explanation for the prolonged non-use, *i.e.*, that he was litigating his right to build a new dam to replace one that had washed out. *Id.*

No such grounds for rebuttal exist here. Although Freeport had defended against a prior complaint of illegally using Gila River water, the district court noted that Freeport's defense neither provided justification for the delayed beneficial use of the water nor necessarily involved the specific water rights at issue. ER 47-48 & n.26. Even Freeport's payment of fees and maintenance costs was often for entire Decree parcels that included irrigated farmland, negating any inference that such payment established specific intent to maintain water rights on river bottom land wholly incompatible with irrigation. *See id.* (holding that Freeport's payment of water fees for an entire parcel that included irrigated farmland did not establish intent to maintain water rights on the part of the parcel that was incompatible with irrigation due to existence of a road).

The district court otherwise relies on Nevada law (again), but—as this Court has recognized—Nevada's failure to apply a presumption to extended periods of non-use is anomalous. "Nevada appears to be the only western state that maintains th[at] position," and indeed "nearly all [other] western states presume an intent to abandon upon a showing of a prolonged period of non-use." *Orr Water Ditch Co.*, 256 F.3d at 945 (citing laws of six states). As described above (p. 24, *supra*), the Arizona Supreme Court has recognized that Nevada's water law grew out of dissimilar customs, while New Mexico's water law often developed in tandem with Arizona's. *See Slosser*, 65 P. at 334-335. New Mexico does apply a presumption of intent to abandon. *Orr Water Ditch Co.*, 256 F.3d at 945 (citing *State ex rel. Reynolds v. South Springs Co.*, 452 P.2d 478, 482-483 (N.M. 1969)). Had the district court applied that same presumption under Arizona law, the burden would have shifted to Freeport to establish that it did *not* intend to abandon its water right when it ceased beneficial use and took no action for at least 17 years to transfer that right from land that could not be used for irrigated agriculture.

Second, presumptions aside, the district court improperly imposed a burden on Appellants to prove Freeport's intent to abandon the water rights at issue by "clear and convincing" evidence. ER 42. None of the Arizona cases suggests that the abandonment inquiry governing surface water rights is subject to that heightened standard. *See, e.g.*, *Landers*, 140 P. at 210 (finding sufficient evidence

of intent to abandon without reference to "clear and convincing" standard); *Gould*, 76 P. at 601 (stating that intent to abandon may be "fairly inferred from [property owner's] acts" without reference to "clear and convincing" standard).

The district court relied on *Strawberry Water Co. v. Paulsen*, 207 P.3d 654 (Ariz. Ct. App. 2008). That case held that once groundwater is "reduced to possession and control within pipes," the water itself transforms into personal property, and therefore the rule that abandonment of personal property must be proved by clear and convincing evidence applies. *Id.* at 660-661 (footnote omitted). But *Strawberry Water Co.* reiterates that water rights such as those at issue here—the right to use surface water—are *real property* interests, not *personal property* rights. *Id.* at 659-660 & n.4. Accordingly, it provides no support for the application of a clear and convincing evidence standard.

Third, even under the more lenient rules for non-use that prevail under Nevada law, it is plain that if there is *both* a substantial period of non-use *and* the land is incompatible with irrigation, then payment of fees or taxes alone cannot defeat a finding of abandonment. *See Orr Water Ditch Co.*, 256 F.3d at 946. The district court correctly applied that rule to find abandonment where a road and canal had been built on the relevant parcel. ER 49-50. Although the court declined to apply it with respect to river bottom land, such land is equally—if not

more—incompatible with irrigation use: an improvement can be torn down far more readily than river bottom can be made suitable for agriculture.

In any event, Freeport had failed not only to use the water on the land for at least 17 years, but also to attempt to transfer the water rights to a parcel where the water could be put to beneficial use. As the district court recognized, it is presumptively unreasonable to take more than five years to initiate a transfer from land that has become categorically incompatible with irrigation—whether through the construction of an improvement or the movement of the river. ER 49 n.30. Freeport's delay before initiating a transfer was more than three times that presumptively unreasonable period, and such a "belated request will not do." *United States v. Alpine Land & Reservoir Co.*, 510 F.3d 1035, 1043 (9th Cir. 2007) (*Alpine VII*) (applying Nevada law and holding that where "use of the land was inconsistent with irrigation," "[o]n no theory that we have accepted could it be said that the water rights had not been abandoned during that twenty-five-year period before any *** attempt [to transfer] was made").

When the correct legal standards are applied under Arizona law, the record establishes that Freeport abandoned the portion of water rights appurtenant to the river bottom lands at issue when it made no efforts to use or transfer them for at least 17 years.

CONCLUSION

For the foregoing reasons, the district court's order 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.

Respectfully submitted.

Joe P. Sparks
Julia Rowen Kolsrud
THE SPARKS LAW FIRM, P.C.
7503 First Street
Scottsdale, AZ 85251
480-949-1339

Attorneys for the San Carlos Apache Tribe

/s/Pratik A. Shah
Pratik A. Shah
Merrill C. Godfrey
Hyland Hunt
Z.W. Julius Chen
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, D.C. 20036
202-887-4000

Linus Everling
Thomas L. Murphy
GILA RIVER INDIAN COMMUNITY
PIMA MARICOPA TRIBE LAW OFFICE
P.O. Box 97
Sacaton, AZ 85247-0400

Attorneys for the Gila River Indian Community

Pursuant to Circuit Rule 25-5(f), I attest that Appellant San Carlos Apache Tribe concurs in the content of this filing.

February 25, 2015

STATEMENT OF RELATED CASES

Appellant Gila River Indian Community is not aware of any pending related cases within the meaning of Circuit Rule 28-2.6.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,303 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

/s/Pratik A. Shah
Pratik A. Shah

February 25, 2015

CERTIFICATE OF SERVICE

I hereby certify that, on February 25, 2015, I electronically filed the foregoing Opening Brief with the Clerk of the court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served via the CM/ECF system.

/s/Pratik A. Shah
Pratik A. Shah

February 25, 2015

ADDENDUM

TABLE OF CONTENTS

Arizona Revised Statutes

Title 45. Waters.

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

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

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

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

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

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

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

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

Arizona Revised Statutes

Title 45. Waters.

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

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

Arizona Revised Code of 1928

Chapter 81. Water, irrigation, drainage and improvement districts.

Article 1. State water code.

§ 3280. Waters of state public, and subject to beneficial use.

The water of all sources, flowing in streams, canyons, ravines or other natural channels, or in definite underground channels, whether perennial or intermittent, flood, waste or surplus water, and of lakes, ponds and springs on the surface, belongs to the public, and is subject to appropriation and beneficial use, as herein provided. Beneficial use shall be the basis, measure and limit to the use of water. Whenever the owner of a right to the use of water shall cease or fail to use the water appropriated for five successive years, the right to the use shall cease, and the water shall revert to the public and be again subject to appropriation.

Laws of Arizona (1919)

Chapter 164.

§ 1.

The water of all natural streams, or flowing in any canyon, ravine or other natural channel, or in definite underground channel, and of springs and lakes, belongs to the public, and is subject to beneficial use as herein provided. Beneficial use shall be the basis and the measure and the limit to the use of water in the State and whenever hereafter the owner of a perfected and developed right shall cease or fail to use the water appropriated for a period of five (5) successive years the right to use shall thereupon cease and revert to the public and become again subject to appropriation in the manner herein provided. But nothing herein contained shall be so construed as to take away or impair the vested rights which any person, firm, corporation or association may have to any water at the time of passage of this act.

Laws of Arizona (1919)

Chapter 164.

§ 56.

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

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

Nor shall the right of any person, association or corporation to take and use water be impaired or affected by any of the provisions of this act where appropriations have been initiated prior to the filing of this act in compliance with laws then existing, and such appropriators, their heirs, successors or assigns shall, in good faith and in compliance with the laws existing at the time of the filing of this act in the office of the Secretary of State, commence the construction of works for the application of the water so appropriated to a beneficial use and thereafter prosecute such work diligently and continuously to completion, but all such rights shall be adjudicated in the manner provided in this act.