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

District Court Nos.
4:31-cv-0059-SRB, 4:31-cv-0061-SRB

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,

SAN CARLOS APACHE TRIBE OF ARIZONA,

Intervenor/Plaintiff,

GILA RIVER INDIAN COMMUNITY

Intervenor/Plaintiff/Appellant

v.

GILA VALLEY IRRIGATION DISTRICT, *et al.*

Defendants/Appellees,

FREEPORT MCMORAN CORPORATION

Defendant/Appellee.

BRIEF OF APPELLEES GILA VALLEY IRRIGATION DISTRICT, FRANKLIN IRRIGATION DISTRICT, LARRY W. BARNEY; VIRI VIVA LUNT REVOCABLE TRUST; TRP FAMILY TRUST; RONALD HOWARD; JANICE HOWARD; MYRNA CURTIS; JOE B. TATUM; JUDY L. TATUM; HARRINGTON RANCH AND FARM; S&R DALEY, LP, and STEVE DALEY, Its Partner; ROSS AND FAWN BRYCE FAMILY TRUST; HOUSEHOLDER FAMILY LIMITED PARTNERSHIP; and KENNETH CLARIDGE

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CORPORATE DISCLOSURE STATEMENT

The Gila Valley Irrigation District and the Franklin Irrigation District are Arizona municipal corporations. The Gila Valley Irrigation District and the Franklin Irrigation District have no parent corporation(s), and no publicly held corporation owns 10% or more of the stock in either irrigation district.

S&R Daly, LP is a family limited partnership. As a limited partnership, it has no parent corporation(s) and because it issues no stock, no publicly held corporation owns 10% or more of its stock.

JURISDICTIONAL STATEMENT

For the reasons stated below, appellees contest this Court's jurisdiction to consider the appeals presented by the United States, the Gila River Indian Community and the San Carlos Apache Tribe pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether this Court possesses jurisdiction to consider an appeal from a partial judgment of the District Court that lacks the certification required by Federal Rule of Civil Procedure 54(b).

2. Whether the District Court's determinations regarding the appealed issues of forfeiture and abandonment should be affirmed or otherwise explicitly limited to the narrow confines of the litigation concerning Freeport McMoRan Corporation on the sub-docket CV31-0061-TUC-SRB.

STATEMENT OF THE CASE

Appellees the Gila Valley Irrigation District and Franklin Irrigation District (collectively, the "Irrigation Districts"), and Larry W. Barney; Viri Viva Lunt Revocable Trust; TRP Family Trust; Ronald Howard; Janice Howard; Myrna Curtis; Joe B. Tatum; Judy L. Tatum; Harrington Ranch and Farm; S&R Daley, LP, and Steve Daley, Its Partner; Ross and Fawn Bryce Family Trust; Householder Family Limited Partnership; and Kenneth Claridge (collectively, "farmer appellees"), were sued in 1925 by the United States, on behalf of the Gila River Indian Community, the San Carlos Apache Tribe, and the San Carlos Project, along with hundreds of additional individual farmers in the Upper Gila River Valleys, or their predecessors in interest. [Docket in No. 4:31-cv-0059-SRB] To resolve that litigation, the Globe Equity Decree (the "Decree") was entered in 1935 defining the rights of various parties to divert water from the Gila River. [ER 254]

In 1993, the prior District Court judge created procedural rules for the "severance and transfer" ("S&T") of water rights. [ER 197] Under the Decree, water rights are appurtenant to particular parcels of land, and a transfer of water rights from one parcel of land to another must go through a S&T process. [ER 254:22-24] Under the procedural rules, to accomplish the S&T of a water right:

> (1) the party must file an application with the court-appointed Water Commissioner;

> (2) the Water Commissioner must review the application to ensure it complies with the S&T rules;
>
> (3) if the Water Commissioner determines that the application complies with the S&T rules, s/he must mail a copy of the application to certain parties and cause notice of the application to be published in local newspapers for three successive weeks;
>
> (4) any party who objects to the application must file an objection with the Water Commissioner within 90 days after the date of the last publication; and
>
> (5) if an objection is filed, upon request, the Court shall set a hearing to determine whether the S&T should be granted.

[ER 212-214]

In 2008, 419 S&T applications were filed with the Water Commissioner pursuant to a settlement agreement called the Upper Valley Forbearance Agreement ("UVFA"), which required the applications to be filed by June 14, 2008, six months after the UVFA became enforceable.[1] [ER 393, ¶11.0] After

[1] [ER 406—07] *See also,* Pub. L. 108-451, 118 Stat. 3478 (2004) (Arizona Water Settlements Act). The United States, in its statement of the case, oversimplifies and misstates key provisions of both the UVFA and the Decree. For example, the United States asserts that the UVFA requires the Upper Valley Defendants ("UVDs") to permanently reduce the number of acres they irrigate by 1,000 [Brief for the United States, p. 8], where in reality, the UVDs are required to reduce the number of acres they irrigate by 3,000. [ER 358-361] The United States also incorrectly suggests that the Gila River Indian Community and the San Carlos Apache Tribe have absolute rights to divert 210,000 and 6,000 acre-feet of water respectively, but that the UVDs may only divert up to 6 acre-feet of water at a diversion rate not to exceed 1/80 cubic feet per second for each acre then being irrigated. [Brief for the United States, p. 8] The 6 acre-feet limitation and 1/80 cubic feet per second limitation, however, also apply to the Gila River Indian

reviewing the applications for sufficiency, the Water Commissioner caused hundreds of notices to be published in the local newspapers. [SER0291] The Gila River Indian Community ("GRIC"), the United States, and the San Carlos Apache Tribe ("SCAT") objected to virtually every application on multiple grounds. [*See, e.g.*, SER1007, SER0997, SER0972, SER0947, SER0878, SER0797, SER0733, SER0721, SER0710, SER0699, SER0688, SER0608, SER0524, SER0454, SER0440] The District Court transferred 59 of those contested applications, concerning water rights owned by Freeport McMoRan Corporation ("Freeport"), to a "sub-docket" (the "Freeport Litigation"). [Docket in CV31-0061-TUC-SRB ("DII") 1] The balance of the applications, primarily filed *pro se* by individual farmers, remained as part of the main docket in the case.

The District Court elected to decide the Freeport applications on the sub-docket first. [ER 5:15-17] The District Court stayed any further objections to or

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Community and the San Carlos Apache Tribe. [ER 406-07]; *see also, United States v. Gila Valley Irrigation Dist.*, 920 F. Supp. 144, 1472-73 (D. Ariz. 1996). The United States also misleadingly states that the San Carlos Apache Tribe is entitled to divert from the natural flows of the Gila River. [Brief for the United States, p. 6] The District Court has held, however, that the San Carlos Apache Tribe is not entitled to a live stream, *United States v. Gila Valley Irrigation Dist.*, 804 F. Supp. 1, 7 (D. Ariz. 1992), and the District Court has also held that the Apache Tribe's water may be delivered, at least in part, through the Gila Valley Irrigation District's canal system. [SER1020—1021] While these misstatements do not bear directly on resolving the issues appealed to this Court, it is important that the Court understand the hotly-contested nature of the underlying litigation and the potential scope any decision issued by this Court will have on that litigation.

approvals of the S&T applications remaining on the main docket because "the objections were redundant from Application to Application and . . . the Court's resolution of the issues presented to date would inform future objections" [ER 6:1-3], but nevertheless acknowledged that decisions in the Freeport Litigation would not be binding on the individual farmer applicants. [SER0334] After reviewing the 59 pending applications and objections in the Freeport Litigation, the District Court elected to conduct an evidentiary hearing on ten "test" applications and denied all ten applications based on a variety of defects. [ER 75-78] The individual *pro se* farmer applicants were given no notice of the Freeport Litigation or the issues raised there and did not participate in any of the proceedings in the sub-docket or main docket.[2] [*See, e.g.,* SER0328; SER0304]

One of the defects in the S&T applications filed by Freeport cited by the District Court was the failure of the applications to properly describe the locations of the water rights that were being severed and transferred. [ER 68-70] All ten applications described both the sever and transfer parcels within a quarter-quarter section, as described in the Decree. [ER 68-69] The District Court determined that the quarter-quarter section descriptions used in the Decree were insufficient and that the legal descriptions must correspond with maps prepared by the State

[2] There were hundreds of applications and hundreds of additional *pro se* parties who had entered appearances on the main docket who were not given notice of the Freeport Litigation. *Compare*, Fed.R.Civ.P. 5.

Water Commissioner in 1920 ("1920 Maps"), which were not incorporated into, or even mentioned, in the Decree.[3] [ER 37] The District Court ruled that the descriptions in the 1920 Maps would be used to evaluate not only the ten Freeport applications, but also the S&T applications of individual farmers remaining on the main docket. [ER 37:14-17] Freeport attempted to amend its existing applications by submitting descriptions of the sever and transfer parcels that complied with the 1920 Maps, but the District Court determined that the revised legal descriptions constituted impermissible "material" changes to the applications. [SER0151-0152]

As to the applications remaining on the main docket, the Court permitted the applicants to submit amended applications to the Water Commissioner that would comply with the 1920 Maps, but instructed the Water Commissioner to recommend denial of the attempts to amend unless the proposed amendments were "minor." [SER0037:5-8] Several farmers challenged this process. [SER0264, SER0257, SER0250] And despite ruling that the Federal Rules of Civil Procedure applied to the Freeport applications and the objections to the applications (deemed

[3] The S&T applications had to be filed by June 14, 2008. [ER 393, ¶ 11.0; SER1017] Over a year *after* the deadline, on August 26, 2009, the District Court decided in an unrelated matter that water rights must be described with greater particularity than the descriptions contained in the Decree. [SER0072—0076] The decision was the subject of a fully-briefed motion for reconsideration [SER0405] that was denied on April 2, 2010. [SER0063] Of course, when the S&T applications were filed in 2008, the applicants could not have known that the District Court, over a year later, would overrule its previous decision that the Decree descriptions were sufficient.

"counterclaims"), [ER 300, Section A.] the District Court determined that Federal Rule of Civil Procedure 15 did not apply to the process of amending the remaining applications. [SER0026:21-25] The farmer applicants, recognizing that their applications did not comply with the Court's standards for describing water rights according to the 1920 Maps (and which could not be fixed with "minor" amendments), eventually withdrew their applications. None of the applications filed in 2008 and left on the main docket are currently pending.

In 2010 Freeport filed a protective appeal regarding the ten test applications, but it was dismissed by this Court due to a lack of appellate jurisdiction. *United States v. Sunset Ditch Co.*, 472 F. App'x 472 (9th Cir. 2012). Freeport eventually withdrew 22 of its pending applications and the District Court denied the remainder on September 15, 2011. [SER0080] All that remained at that point were "counterclaims" filed by the objecting parties, which were ultimately resolved by a stipulation filed on September 25, 2012 in which the parties did "not request that the Court enter a final judgment . . . and [did] not request certification pursuant to Rule 54(b)." [SER1038:23-24]

The Irrigation Districts are active participants in various current proceedings related to administration of the Globe Equity Decree on the main docket, but were not named "parties" in any of the 419 S&T applications filed in 2008. They did, however, participate by filing briefs on the process whereby the S&Ts (including

amendments) would be handled. [*See, e.g.,* SER0425; SER0387; SER0310; SER0277; SER0272] On July 31, 2014—four years after the ten Freeport applications were tried—the District Court entered an order requesting that GRIC, SCAT and the United States lodge a form of judgment, [SER0003] which they did on August 14, 2014. [SER0183] The form of judgment did not contain the findings or certification required for finality under Rule 54(b), Fed.R.Civ.P.

On September 4, 2014, the District Court—without making the findings or certification required for finality under Rule 54(b), Fed.R.Civ.P.—signed the form of "judgment" (the "Purported Judgment") that provides as follows:

> Pursuant to Fed.R.Civ.P. 58(a), the Court now enters final judgment with respect to, and in accordance with, all the Court's orders and proceedings on the 419 applications to sever and transfer Decree water rights filed with the Water Commissioner in 2008 and all objections to those applications. This judgment includes all orders and proceedings on the main docket in CV31-0059-TUC-SRB with respect to these applications and objections, as well as all orders and proceedings on the subdocket CV31-0061-TUCSRB.[4]

[4] The order requesting the form of judgment, the form of judgment, and the Purported Judgment were not mailed or otherwise served on either the *pro se* farmer applicants or other *pro se* parties who were not on the District Court's ECF system. The Irrigation Districts did not understand the judgment to be a final appealable order because it did not contain the findings and certification required by Rule 54(b), so the Irrigation Districts did not object to the form of judgment. The Irrigation Districts would have objected if the form of judgment had proposed Rule 54(b) findings and certification regarding the interlocutory orders in the main docket, which were made in connection with the applications that were subsequently withdrawn, for the reasons stated in below. The Irrigation Districts

[ER 1] At the time the District Court entered its Purported Judgment, the Court's supervision of the Globe Equity Decree continued and a number of matters remained unresolved before the District Court, including (1) three new S&T applications [SER0160, SER0001] and (2) a disputed means for describing the locations of water rights. [SER0007-0008; SER0180]

Between June 13, 2008 (when most of the S&T applications were filed with the Water Commissioner) and September 4, 2014 (when the Purported Judgment was entered), a review of the main docket reveals that four hearings (plus the trial in the Freeport Litigation) were held and 133 documents styled as "orders" were entered by the District Court. After the entry of the Purported Judgment, a flurry of appeals, cross-appeals, and conditional cross-appeals followed. For their part, the Irrigation Districts contest the Ninth Circuit's jurisdiction and, alternatively, urge this Court to affirm the holdings of the District Court regarding the issues of forfeiture and abandonment. If this Court determines that a reversal of the District Court's rulings on abandonment is appropriate, though, that reversal should be narrowly tailored to apply only to the Freeport applications and not to the

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did not immediately move to dismiss the appeal in part because it was not clear what issues would be raised by the Federal Parties, and certain limited issues do not require Rule 54(b) findings and certification. *See* 28 U.S.C. § 1292(a)(1). The Federal Parties in their opening briefs, however, did not rely on 28 U.S.C. § 1292(a)(1) and the issues raised by the Federal Parties in their briefs do not fall within the limited ambit of 28 U.S.C. § 1292(a)(1).

individual applicants because they had no meaningful opportunity to participate in the Freeport Litigation.

SUMMARY OF ARGUMENT

These appeals arise out of one small part of complex water rights litigation that has gone on for nearly ninety years. The District Court below supervises the Globe Equity Decree, which is no small task; at present, the docket in the case contains more than 7,800 entries.

The parties are before this Court—a place they have been nine times before—because of a "judgment" entered by the District Court on September 4, 2014. As set forth below, the District Court's "judgment" lacks a certification pursuant to Rule 54(b), Fed.R.Civ.P., and is hopelessly vague as it potentially reaches hundreds of orders entered over a period of six years. It is thus an unappealable order, and because "[a] strong policy in favor of certainty as to the district court's intention to give its decision final-judgment status underlies [Rule 54(b)'s] procedure," 10 FED. PRAC. & PROC. CIV. § 2660 (3d ed.), this appeal should be dismissed for lack of jurisdiction, and the case remanded to the District Court for further proceedings.

Alternatively, should the Court accept jurisdiction, the District Court's determinations regarding both the forfeiture and abandonment issues should be affirmed. Any such decision made on the merits of the issue of abandonment,

though, that does not constitute an unqualified affirmance, should be narrowly tailored to the Freeport Litigation and Freeport applications on the sub-docket CV31-0061-TUC-SRB given that the individual *pro se* farmer applicants and other *pro se* parties did not have an opportunity to participate in that litigation. While the appealed issue of whether specific water rights could be forfeited is largely a legal question, whether water rights have been abandoned owned by a single UVD, Freeport, is fact-driven. A ruling on abandonment that applies outside the contested Freeport applications would present serious due process concerns for the other farmer defendants on the main docket who have not yet presented evidence on either issue.

ARGUMENT

I. THE NINTH CIRCUIT LACKS APPELLATE JURISDICTION TO CONSIDER ANY OF THE APPEALS ARISING FROM THE PURPORTED JUDGMENT BECAUSE THE PURPORTED JUDGMENT, WHICH DOES NOT RESOLVE ALL CLAIMS PENDING IN THE DISTRICT COURT, LACKS THE CERTIFICATION REQUIRED BY RULE 54(B).

A. The Ninth Circuit Lacks Jurisdiction to Consider Appeals From Judgments That Resolve Fewer Than All the Claims Pending in District Court Where There Has Been No Rule 54(b) Certification.

The threshold issue that the Ninth Circuit must decide before it considers the merits of any of the appeals pending before it is whether it has jurisdiction. *Couch v. Telescope, Inc.,* 611 F.3d 629, 632 (9th Cir. 2010) ("We have a special obligation to satisfy ourselves of our jurisdiction even where, as here, the parties

do not contest it."); *Symantec Corp. v. Global Impact, Inc.*, 559 F.3d 922, 923 (9th Cir. 2009) ("Although neither party raised the issue of our jurisdiction to entertain this appeal, we have a duty to consider it *sua sponte*."); *Special Invs., Inc. v. Aero Air, Inc.*, 360 F.3d 989, 992-93 (9th Cir. 2004) ("At the outset, we must decide whether we have jurisdiction to resolve the merits of the . . . decision of the district court. Because this case presents no final, appealable order, we hold that we do not have jurisdiction . . ."). The Ninth Circuit has jurisdiction only over final orders from the district court. 28 U.S.C. § 1291.

The language of Federal Rule of Civil Procedure 54(b) is absolute. It provides that

> [w]hen an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties *only if the court expressly determines that there is no just reason for delay*." (Emphasis added).

An order, therefore, that resolves fewer than all of the claims or the claims against fewer than all of the parties pending in the district court "is not a final, appealable order, absent an 'express determination that there is no just reason for delay and . . . an express direction for the entry of judgment.'" *Special Invs., Inc.*, 360 F.3d at 993. Even if it appears that an order in a multiple-party or multiple-claim action adjudicates a separable portion of the controversy, it is still considered interlocutory, and thus generally non-appealable, absent the certification mandated

in Rule 54(b). 10 FED. PRAC. & PROC. CIV. § 2654 (3d ed.). As Wright and Miller explain, "[f]inality is achieved only if the court takes *each of two steps*—it must make an 'express determination that there is no just reason for delay' and it must make 'an express direction for the entry of judgment.'" 15A FED. PRAC. & PROC. JURIS. § 3914.7 (2d ed.) (emphasis added). Without such a certification, the Ninth Circuit lacks jurisdiction to consider this appeal.

B. The Purported Judgment, Which Resolves Fewer Than All of the Claims Pending in the District Court, Lacks the 54(b) Findings and Certification Required to Make It Appealable.

The Purported Judgment, with astounding breadth and imprecision, purports to be a "final judgment" for "all orders and proceedings" related to the 419 S&T applications filed in 2008 on both the main docket and Freeport Litigation subdocket. [ER 1] But it is unclear how the Purported Judgment could be such a final judgment when a number of issues, including issues related to the S&T applications on the main docket, remain unresolved and it is unclear what orders, if any, from the main docket are encompassed within the Purported Judgment.

For example, the pivotal threshold question of how to describe the locations of water rights remains in dispute and the District Court has not yet heard from most individual farmers on the matter. [SER0007-0008; SER0180] On August 26, 2009, the District Court ruled that motions to abandon decreed rights must describe those rights with greater particularity than the descriptions used in the Decree.

[SER0072—0076] The Irrigation Districts moved for reconsideration and the District Court ordered full briefing. [SER0064—0065] The District Court denied the motion for reconsideration on April 2, 2010. [SER0063] On March 21, 2014, the Irrigation Districts filed a motion arguing that claim preclusion prevented the court from ordering that the parties must describe their rights according to the 1920 Maps. [SER0223, SER0186—0192] The District Court denied the motion and ordered technical representatives of certain parties to prepare new descriptions, based on the 1920 Maps, to describe lands that will be irrigated pursuant to the Decree. [SER0011:14-25] The technical representatives have not finished their work and many parties who will be affected by that work have not yet had the opportunity to object. [SER0180-0181] *See also, infra* n.11. The District Court stated that it would conduct a hearing regarding the technical representatives' work [SER0011-0012], but that hearing has not yet been set, let alone been held.

In addition, all of the S&T applications on the main docket were withdrawn. While there were interlocutory orders that preceded the withdrawals [*see, e.g.,* SER0039 (denying farmers' demand for jury trial to adjudicate S&T application)], none of the orders resulted in the adjudication of any claim because the persons asserting the claims—the individual farmer applicants—withdrew their claims. Nonetheless, on its face the Purported Judgment encompasses these interim orders

as it reaches "all orders and proceedings on the main docket . . . with respect to these applications and objections. . . ." [ER 1]

The overbreadth of the Purported Judgment is particularly troublesome because some of the interlocutory orders in the main docket are at least arguably inconsistent with "final" determinations made in the Freeport Litigation. For example, in the Freeport Litigation, the District Court held that applications were defective if they did not contain the assessor parcel numbers of the affected parcels of land. [ER 67] Later, in an interlocutory order on the main docket, the District Court ruled that assessor parcel numbers could be added by amendment. [SER0020:26-0021:2] Similarly, the District Court appears to have found that the Freeport applications on the sub-docket were deficient because they did not allege sufficient facts to establish a *prima facie* case of no injury [SER1037], but in an interlocutory order entered by the District Court on the main docket, the court ruled that such allegations were unnecessary and that the applicants only had to make a *prima facie* showing of no injury when there was a "legitimate" claim of injury by another party. [SER0018:26-27]

The statements of jurisdiction in the briefs of the United States, GRIC and SCAT neither address the lack of Rule 54(b) findings or certification nor explain how this Court has jurisdiction over interlocutory orders on claims that were ultimately withdrawn. Instead, without analysis or explanation, they claim that this

Court has jurisdiction over the Purported Judgment, including presumably all the interlocutory decisions that preceded the voluntary withdrawals. [Brief of GRIC and SCAT, p. 1; Brief for the United States, p. 1] But this Court does not have appellate jurisdiction over *any* of these interlocutory decisions, or over the withdrawal of the applications. The withdrawal of those applications was akin to a voluntary dismissal without prejudice, from which no appeal can be taken. *See Concha v. London*, 62 F.3d 1493, 1507 (9th Cir. 1995) ("A voluntary dismissal without prejudice is ordinarily *not* a final judgment from which the plaintiff may appeal."). As noted previously, the District Court made numerous rulings on a variety of issues during the pendency of these S&T proceedings, many of which are still contested. The imprecise language of the Purported Judgment presents serious questions regarding what exactly is, and is not, within the scope of the Purported Judgment and what is therefore considered "final."

By its plain terms the Purported Judgment is a final judgment for not only matters arising out of the Freeport Litigation sub-docket (which, depending on the findings and certification required by Rule 54(b), might eventually be ripe for adjudication by this Court), but also for those issues related to the 360 S&T applications that remained on the main docket. As is evident, however, a number of issues unrelated to the 360 S&T applications are still pending on the main docket. For example, three new S&T applications have been filed since 2008 that

have not yet been adjudicated. [*See, e.g.*, SER0160, SER0001] It is unclear to what extent those new S&T applications are effected by the numerous orders and proceedings related to the 360 applications that remained on the main docket. Rule 54(b) findings and certification are therefore needed to, at the very least, clearly delineate the scope of the Purported Judgment and the extent to which it affects the underlying Globe Equity litigation.

Rule 54(b) requires that the Purported Judgment contain both an "express determination that there is no just reason for delay" and "an express direction for the entry of judgment." The Purported Judgment contains neither.[5] Under these circumstances, the proper remedy is the dismissal of the appeals arising out of the Purported Judgment and a remand to the District Court to allow the District Court to consider whether Rule 54(b) certification is appropriate. *Rollins v. Mortg. Elec. Registration Sys., Inc.*, 737 F.3d 1250, 1253-54 (9th Cir. 2013) ("We find that neither party would be prejudiced by a Rule 54(b) certification entered on limited remand.") (citations omitted); *Nat'l Ass'n of Home Builders v. Norton*, 325 F.3d 1165, 1168 (9th Cir. 2003) ("This matter is therefore remanded to the district court for the limited purpose of its granting or denying plaintiffs' motion for a Rule 54(b) certification."); *Am. States Ins. Co. v. Dastar Corp.*, 318 F.3d 881, 889 (9th

[5] While the Purported Judgment is styled as a "final judgment," this is not synonymous with the requirement that the District Court expressly direct an entry of judgment pursuant to Rule 54(b).

Cir. 2003) ("[A] Rule 54(b) determination eliminates improper appeals of non-final judgments while permitting prompt appeals when necessary."); 10 FED. PRAC. & PROC. CIV. § 2660 (3d ed.) ("A strong policy in favor of *certainty as to the district court's intention* to give its decision final-judgment status underlies [Rule 54(b)'s] procedure.") (emphasis added).[6] Remand is especially appropriate in light of the multitude of District Court orders that may (or may not) be encompassed within the Purported Judgment's scope. Whether such certification is appropriate is a question best answered in the first instance by the District Court, which must consider that "sound judicial administration does not require that Rule 54(b) requests be granted routinely." *Curtiss-Wright Corp. v. General Elec. Co.*, 446 U.S. 1, 11 (1980); *see also Frank Briscoe Co. v. Morrison-Knudsen Co.*, 776 F.2d 1414, 1416 (9th Cir. 1985) ("Judgments under Rule 54(b) must be reserved for the unusual case in which the costs and risks of multiplying the number of proceedings and of overcrowding the appellate docket are outbalanced by pressing needs of the litigants for an early and separate judgment as to some claims or parties. The trial

[6] *See also* 10 FED. PRAC. & PROC. CIV. § 2660 (3d ed.) ("[I]t must be remembered that Rule 54(b) certification was intended to provide certainty so that parties would not inadvertently lose a right to appeal."); 15A FED. PRAC. & PROC. JURIS. § 3914.7 (2d ed.) ("The second and complementary goal is to establish a clear rule, reducing as far as possible any doubts as to finality. As in any other setting, ***uncertainty as to finality*** can both encourage undesirable attempts to appeal the unappealable and cause forfeiture of review by failure to appeal the appealable.") (emphasis added).

court should not direct entry of judgment under Rule 54(b) unless it has made specific findings setting forth the reasons for its order.").

II. ALTERNATIVELY, THE DISTRICT COURT'S INTERPRETATION OF ARIZONA LAW REGARDING BOTH FORFEITURE AND ABANDONMENT SHOULD BE AFFIRMED.

A. Pre-1919 Water Rights Cannot Be Forfeited Under a Proper Reading of the 1919 Arizona Water Code.

If this Court reaches the merits of the forfeiture and abandonment appeals presented by the United States, GRIC and SCAT (collectively, the "Federal Parties"), it should affirm the decision of the District Court on both issues. In a well-reasoned opinion, the District Court held that the Savings Clause in the 1919 Water Code created blanket protection from forfeiture for water rights that had vested prior to the date the 1919 Water Code was enacted. [ER 38—42] Neither of the Federal Parties' briefs has presented a persuasive argument that the District Court's decision was erroneous. This Court reviews the District Court's interpretation of state law *de novo*. *In re Kirkland*, 915 F.2d 1236, 1238 (9th Cir. 1990).

Arizona statutory law provides that forfeiture occurs "when the owner of a right to the use of water ceases or fails to use the water appropriated for five successive years." A.R.S. § 45-141(C). The burden to show that a particular decreed water right has been forfeited is on the Federal Parties as parties asserting a counterclaim. *See generally* Fed.R.Civ.P. 13.

Forfeiture was first adopted into Arizona's Water Code in 1919. The Code provided that

> [b]eneficial 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 Ariz., ch. 164, § 1 (1919) (amended 1921) (emphasis added). The District Court held that under the reasoning of a Nevada case, *In re Manse Spring & Its Tributaries, Nye County*, 108 P.2d 311 (Nev. 1940), pre-1919 vested water rights were not subject to forfeiture. [ER 40] In *Manse Spring*, the Nevada Supreme Court considered whether the forfeiture provision in the 1913 Nevada Water Code applied to surface water rights that vested before 1913.

The Nevada 1913 Water Code contained a forfeiture provision similar to Arizona's 1919 provision, though it did not contain an explicit savings clause. It read:

> [a]nd in the case the owner or owners of any such ditch, canal or reservoir shall fail to use the water therefrom for beneficial purposes for which right exists during any five successive years, the right to use shall be considered as having been abandoned, and they shall forfeit all water rights, easements and privileges appurtenant thereto, and the water formerly appropriated by them may be again appropriated for beneficial use, the same as if such ditch, canal or reservoir had never been constructed.

In re Manse Spring, 108 P.2d at 314. The court noted that prior to adoption of the 1913 Water Code, water rights could only be lost through abandonment, which required an examination of intent. *Id.* at 315. The forfeiture provision presented "a much stricter and more absolute procedure than loss by abandonment" because forfeiture required no showing of intent. *Id.* at 314-16. The court accordingly determined that pre-1913 vested water rights could only be lost in accordance with the law that existed prior to 1913, meaning rights could only be abandoned. *Id.* at 316. Subsequent Ninth Circuit decisions that have considered whether forfeiture applies to pre-1913 Nevada water rights have consistently cited *Manse Spring* for the proposition that Nevada's 1913 Water Code barred application of the doctrine of forfeiture to pre-1913 water rights. *See, e.g., U.S. v. Alpine Land & Reservoir Co.,* 510 F.3d 1035, 1039 (9th Cir. 2007); *U.S. v. Orr Water Ditch Co.*, 256 F.3d 935, 941-42 (9th Cir. 2001).

The Federal Parties argue that the District Court's reliance on *Manse Spring* and its progeny to determine that pre-1919 water rights cannot be forfeited in Arizona is erroneous for two primary reasons. The Federal Parties contend that first, pre-1919 Arizona water law provided for the loss of water rights through forfeiture for non-use, making reliance on Nevada law unnecessary, and second, that the Arizona Supreme Court case *San Carlos Apache Tribe v. Superior Court*

ex rel. Cnty. of Maricopa, 972 P.2d 179 (Ariz. 1999), established that pre-1919 water rights are subject to forfeiture for non-use. Neither argument has merit.

The United States asserts that unlike Nevada, Arizona law had already recognized that water rights could be forfeited for non-use when the 1919 Water Code was adopted and that therefore rights could only "vest" under the 1919 Code if they had not already been forfeited. [Brief for the United States, p. 27] To support its theory, the United States relies on an inaccurate reading of the "spirit and purpose" of Arizona water law and how the State's water law developed such that forfeiture for non-use was contemplated in the 1919 Water Code. [Brief for the United States, p. 28-42] None of that discussion, however, supports a conclusion that forfeiture for non-use, as codified in the 1919 Water Code, was a recognized mechanism through which vested water rights could be lost by non-use.

The United States contends that forfeiture for non-use was recognized by pre-1919 water law because an 1893 posting act provided that an inchoate water right could be forfeited if construction of diversion works and notice of the water appropriation did not occur within a reasonable time.[7] [Brief for the United States,

[7] The Federal Parties did not raise this argument at the District Court level, as shown in their Excerpts of Record. Ordinarily, this Court will decline to consider arguments raised for the first time on appeal, to ensure, among other reasons, that this Court has the "benefit of the district court's prior analysis." *Dream Palace v. Cnty. of Maricopa*, 384 F.3d 990, 1005 (9th Cir. 2003). While this Court has the discretion to consider arguments not raised below when the arguments raise pure issues of law, this Court should not do so in this case. The analysis of the District

p. 34] But that provision does not reflect any similarities to the forfeiture law that was adopted in 1919. The 1893 act concerned the effect of failing to post a notice of water appropriation and to construct improvements necessary for the diversion of water; it did not provide or suggest that the failure to use the water sometime after the notice was posted and the construction completed would result in forfeiture. *See* 1893 Ariz. Sess. Laws No. 86. No mention is made in the 1893 posting act of the five-year requirement later adopted in the 1919 Water Code. And the time element in the 1893 forfeiture provision certainly was not tied to non-use of the water itself. The mere use of the word forfeiture in the 1893 act does not lead to the conclusion that forfeiture for non-use was an established doctrine in Arizona water law before the 1919 Water Code.

The United States supports its superficial argument that forfeiture for non-use was recognized by pre-1919 water law by observing that water rights could be lost by adverse use prior to the adoption of the Water Code. [Brief for the United States, p. 36] This observation is inapposite. The doctrine of adverse use provided

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Court Judge, Susan Bolton, would have been invaluable. Judge Bolton was the Arizona Superior Court judge charged with adjudicating the water rights of the Gila and Salt Rivers. *San Carlos Apache Tribe v. Hon. Susan R. Bolton*, 977 P.2d 790 (1999). Judge Bolton subsequently was appointed to the federal bench and assigned the case below. To say she is well-versed in Arizona's forfeiture laws is an understatement. This Court should not consider such a novel and untested argument on such an important issue to the citizens of Arizona without the benefit of her analysis.

only that water could be lost if, for five years (the applicable statute of limitations), a junior appropriator used the water rights of a senior appropriator and that use was directly adverse to the senior appropriator. *Egan v. Estrada*, 56 P. 721, 722 (Ariz. 1899). In other words, the adverse possession doctrine was triggered only "when there was sufficient scarcity of supply such that the taking of water by a new appropriator necessarily constituted the taking of water 'which by priority belongs to another appropriator.'" [Brief for the United States, p. 37 (quoting *Egan*, 56 P. at 722)]

But loss of a water right through adverse use or possession is a fundamentally different concept than loss of a water right through forfeiture under the 1919 Water Code. In order to lose a right through adverse use, that use must "be continuous, notorious, and under a claim of right, with knowledge of the owner and adverse, for the whole statutory period, in the exact sense that the possession of land must be so as to warrant the application of the statute of limitations in an action of ejectment." KINNEY, IRRIGATION AND WATER RIGHTS, § 1044, p. 1870 (1912). Forfeiture is a far more unforgiving doctrine, as it is triggered through mere non-use of a water right. There is no requirement that another appropriator "notoriously" use the water under a claimed right or that the owner know of the adverse use. The applicability of the adverse use doctrine in 1919 therefore says nothing about the concept of forfeiture as established in the 1919 Water Code.

The United States attempts to overcome the obvious deficiencies in its argument by making the unsupported assertion that adverse use eventually became synonymous with forfeiture for non-use because "as the demand on Arizona's water sources intensified and streams became more fully appropriated, adverse claims on available water became an increasing certainty. Thus, any senior water user who stopped using all or part of a perfected and developed water right for the five-year period of the statute of limitations would be at substantial risk of losing priority to subsequent junior appropriators, who, as a consequence of the senior appropriator's nonuse, were able to appropriate and beneficially use water that otherwise would have served the senior right." [Brief for the United States, p. 37] The United States' assertions are nothing but conjecture. There is simply no support for the proposition that adverse use equated to forfeiture for non-use by the time the 1919 Water Code was adopted.

Additionally, had forfeiture for non-use been a recognized concept in Arizona prior to 1919, the leading water commentator of the time, Clesson S. Kinney, presumably would have recognized its applicability in his 1912 treatise. In his treatise, Kinney stated that a water right would be forfeited if the owner did not perfect by posting and constructing improvements, citing the laws of many western states, including Arizona. KINNEY, IRRIGATION AND WATER RIGHTS, § 1119, p. 2022 (1912). Kinney also recognized that several western states

expressly provided that water rights could be forfeited for non-use; notably, Arizona was not one of those states. *Id.,* p. 2022-24. The statutes for those states that recognized forfeiture for non-use were enacted between 1887 and 1905. *Id.* If the Arizona legislature had intended to provide for forfeiture for non-use when it drafted the 1893 Act like the legislatures of other western states, it would have expressly provided for it.

Despite the fact that Kinney cautioned that forfeiture statutes should be strictly construed, *id.* § 1120, p. 2026-27, the United States urges this Court to infer that by providing for forfeiture for failure to perfect by posting, the 1893 Act also impliedly provided for forfeiture for non-use after perfection. [Brief of the United States, p. 40] The United States does not explain why the Arizona legislature would choose to do this by implication when Arizona's sister states addressed the matter expressly.

The United States similarly reads too much into section 16 of the 1919 Act, which required the State Water Commissioner to honor court decrees. [Brief of the United States, p. 41] The section contained its own mini-savings clause that said the act should not be construed to "revive" water rights that had already been lost by abandonment, forfeiture or non-use. The clause was merely intended to ensure that water rights listed in previous decrees remained superior to other water rights. The clause did not explain whether the water "rights" that could not be "revived"

had been lost because of failure to perfect, because the alleged water right was never used (so the water right never vested), or (as the United States appears to claim) because a vested water right had not been used for some unknown statutory period. It would certainly be remarkable if Arizona's legislature, by this one oblique clause, intended to provide for forfeiture of pre-1919 vested water rights for non-use, especially when (a) the savings clause in section 1 expressly qualifies the forfeiture provision in the 1919 Act so that they would not apply to pre-1919 vested rights, and (b) the broader savings clause in section 56 made clear that the 1919 Act should not be construed to impair or affect appropriations initiated prior to 1919 "in compliance with laws then existing." *See* 1919 Ariz. Laws, 4th. Legis., ch. 164 § 56. The United States has been unable to point to any pre-1919 Arizona law that provided for the forfeiture for non-use of a vested water right. A vested water right that could not be forfeited for non-use before 1919 would certainly be affected or impaired if, after 1919, it could be forfeited for non-use.

In short, there is nothing to suggest that water rights could be forfeited in the manner provided for in the 1919 Water Code prior to its adoption. It follows that the District Court's analysis of Nevada case law, which examined the exact question presented here and an analogous forfeiture provision, should be affirmed. Because forfeiture for non-use was not a recognized doctrine in Arizona prior to the adoption of the 1919 Water Code, the reasoning of *Manse Spring*—that rights

could only vest and be lost according to the law at the time the water code was adopted—applies with full force here. The holding of *Manse Spring* is further reinforced by the Savings Clause contained in the 1919 Water Code that explicitly provided that nothing "shall be so construed as to take away or impair the vested rights which [anyone] may have to any water at the time of passage of this act."

Adopting the Federal Parties' approach would ignore the statutory structure of the 1919 Water Code that explicitly included the Savings Clause. The 1919 Savings Clause immediately followed the forfeiture clause and began with the word "but," which means that the Savings Clause is a limitation or qualification of the forfeiture provision immediately preceding it.[8] Laws of Ariz., ch. 164, § 1 (1919). The United States blatantly ignores the obvious statutory language in favor of drawing twisted, inapplicable analogies. The language of the statute itself

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[8] The full text of the 1919 Arizona forfeiture provision provides:

> [b]eneficial 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 Ariz., ch. 164, § 1 (1919) (amended 1921) (emphasis added).

therefore further supports the notion that Arizona's forfeiture provision does not apply to pre-1919 water rights.

The GRIC and SCAT suggest that this could not have been the case because the 1919 forfeiture Savings Clause only existed until it was removed in 1928.[9] [Brief of GRIC and SCAT, p. 19] The Federal Parties fail to acknowledge, though, that a more general disclaimer originally contained in Section 56 of the 1919 Water Code that also protected pre-1919 rights has always existed and continues to do so today. The 1919 version provided that

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

1919 Ariz. See. Laws, 4th. Legis., ch. 164 § 56. The text of the 1919 provision is substantively similar to A.R.S. § 45-171:

> 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

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[9] The 1928 Water Code has long been recognized as a reorganization of the 1919 Water Code, rather than a substantive revision. *See Washington v. Maricopa Cnty., Ariz.*, 152 F.2d 556, 559 (Ariz. 1945), *cert. denied*, 327 U.S. 799 (9th Cir. 1946) ("[T]he purpose of the 1928 code was to condense language and avoid redundancy. The presumption has been indulged that when a word, a phrase or a paragraph from the 1913 code is omitted from the code of 1928, the intent is rather to simplify the language without changing the meaning, than to make a material alteration in the substance of the law itself.").

> 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.

As Arizona courts previously have recognized the redundancy between the two provisions, it stands to reason that the 1919 Savings Clause was never removed from the Water Code. *See Salt River Valley Water Users' Ass'n. v. Norveil*, 241 P. 503, 507 (1925), *reh'g denied*, 242 P. 1013 (1926) (stating that the "vested rights" provisions of sections 1 and 56 were "of similar import").

The Federal Parties premise much of their argument that forfeiture applies to pre-1919 water rights on *San Carlos*. [Brief of GRIC and SCAT, p. 23; Brief for the United States, p. 48] In so arguing, the appellants contend that the Arizona Supreme Court implicitly held that pre-1919 rights are subject to forfeiture because several 1995 amendments to the Water Code were invalidated. But the Federal Parties make much of a case that does not answer the key question on appeal here, which is whether the 1919 Water Code provided categorical protection from forfeiture for pre-1919 water rights. In *San Carlos*, the Arizona Supreme Court affirmed in full the decision of Judge Bolton (the District Judge in the underlying litigation here) that the absolute protection from forfeiture for pre-1919 water was

unconstitutionally retroactive. The state parties contended that the various amendments were "clarifications of previously ambiguous law" and that all substantive changes were prospective only. 972 P.2d at 204. The court rejected the state parties' contentions and held that A.R.S. § 45-141(C) was one among many unconstitutional amendments to the Water Code.[10] *Id.* at 206.

The Federal Parties argue that the court's invalidation of the 1995 Savings Clause indicates that pre-1919 water rights have always been subject to forfeiture. The United States contends that "[t]he Arizona Supreme Court acknowledged and rejected . . . the argument that the 1995 exemption and other changes were 'clarification[s]' of previous law. If the 1995 exemption was a mere restatement of the (alleged) exemption provided in the 1919 savings clause, there would have been no constitutional issue. . . ." [Brief for the United States, p. 49 (citations omitted)]

But in making this argument, the United States reads too much into a very narrow decision. In determining that the 1995 Savings Clause was

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[10] For ease of reference, we provide the full text of the amended statute, A.R.S. § 45-141(C), below:

> 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.

unconstitutional, the Arizona Supreme Court summarily determined that "[*i*]*f applied retrospectively,* [A.R.S. § 45-141(C)] 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 206. The court made no attempt to discern the intent of the original 1919 Savings Code and what, if any, effect the 1995 amendments had on the original 1919 Water Code. *Id.* at 209 ("[T]o suggest that the 1995 Legislature knows and can clarify what the 1919 or 1974 Legislatures intended carries us past the boundary of reality and into the world of speculation.").

The *San Carlos* court held only that the 1995 Savings Clause was one of a number of provisions that *could* be applied retroactively. But the court specifically noted that if it engaged in a piecemeal adjudication of the various challenged revisions, some of the individual statutes could be constitutional and applied prospectively. *Id.* at 205. It is notable that in identifying those statutes that could *not* sensibly be applied only prospectively, the court did not identify § 45-141(C). *Id.* (noting that A.R.S. §§ 45-187 and 45-188(A) and (B) could not be applied only prospectively). Had the Supreme Court made individualized determinations on the prospective application of various statutes, it is sheer speculation whether the Arizona Supreme Court would have found the 1995 Savings Clause an unconstitutional alteration of the 1919 Savings Clause. *San Carlos* is therefore far

from a determination that the 1919 Water Code allowed for the forfeiture of pre-1919 water rights.

The GRIC and SCAT argue that regardless of whether the District Court interpreted *San Carlos* correctly, Freeport is not entitled to protection under the 1919 Savings Clause because the 1919 Savings Clause, if it exists, only applies to those parties who physically perfected their water rights prior to 1919 and not their successors. [Brief of GRIC and SCAT, p. 26] This is a nonsensical assertion, as it would mean that successors in interest to water rights do not stand in the shoes of their predecessors. This simply is not the law. To begin with, the terms of the Decree itself explicitly apply to successors in interest. [*See, e.g.,* SER1042; SER1048] More generally, a successor in interest is "[s]omeone who follows another in ownership or control of property. *A successor in interest retains the same rights as the original owner*, *with no change in substance*." Black's Law Dictionary 1473 (10th ed. 2014) (emphasis added). As water rights are interests in real property, *Wiechens v. U.S.*, 228 F. Supp. 2d 1080, 1082 (D. Ariz. 2002), GRIC and SCAT's proposition is meritorious only if they also assert that parties cannot succeed to water rights perfected by others. The case law does not support that notion. *See, e.g., In re Gen. Adjudication of All Rights To Use Water In the Gila River Sys. & Source*, 224 P.3d 178, 191 (Ariz. 2010) (the specified users that were a party to a settlement agreement's safe harbor provisions regarding water rights

were "persons, entities, corporations, or municipal corporations [and their successors]"); *England v. Ally Ong Hing*, 459 P.2d 498, 503 (Ariz. 1969) (quoting Kentucky case for the proposition that "[w]here water rights have been adjudicated a successor in interest of one of the parties is bound by the judgment and by an injunction forming part of it."). The District Court's determination regarding forfeiture is therefore correct as a matter of law.

Two points further support that pre-1919 water rights are not subject to forfeiture in this matter. First, the Federal Parties ignore Article 17, Section 2 of the Arizona Constitution that essentially froze water rights existing in 1912. The section reads: "All existing rights to the use of any of the waters in the state for all useful or beneficial purposes are hereby recognized and confirmed." ARIZ. CONST. art. 2, § 17. There is no case law interpreting this provision, but the language itself leaves no question that water rights existing in 1912 could not be abrogated or impaired by later legislation, such as the 1919 Water Code.

Second, there is nothing in the Arizona forfeiture statute, A.R.S. § 45-189, that allows for a private right of action. The statute provides that only the director of water resources is permitted to determine whether a water right has been forfeited or abandoned. A.R.S. § 45-189(A). While no Arizona court has decided whether that section precludes a private right of action for forfeiture, Arizona law holds generally that where an administrative procedure exists for the resolution of

a statutory right, no private right of action can exist absent contrary legislative intent. *Guibault v. Pima Cnty.*, 778 P.2d 1342, 1344-45 (Ariz. Ct. App. 1989) (holding that no private right of action existed for an individual who had been denied state AHCCCS benefits because an administrative review procedure existed).

Furthermore, under A.R.S. § 45-189(13), a water right may not be deemed forfeited by the director if the nonuse occurred during one of the specific situations that justify a finding of sufficient cause including, among other things, drought, or other unavailability of water, and "[a]ny other reason that a court of competent jurisdiction deems would warrant nonuse." There is nothing in the record indicating that the statutory procedures for forfeiture have been followed.

B. The District Court Correctly Determined That Freeport Had Not Abandoned Its Water Rights in Multiple S&T Applications That Concerned River Bottom Land.

The Federal Parties' briefs contest the District Court's determination that water rights have not been abandoned in three separate Freeport S&T applications where river bottom land was left fallow. In so contending, the appellants attempt to introduce ambiguity and confusion to a relatively straightforward question.

Under Arizona law, a water right may be lost by abandonment only when one "intentionally abandons" that right. A.R.S. § 45-188(A), (B). "[S]uch intent 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. Terr. 1904). Whether a water right has been abandoned therefore "depends upon the facts and circumstances surrounding each particular case." *Landers v. Joerger*, 140 P. 209, 210 (Ariz. 1914) (citations omitted). The facts and circumstances surrounding each particular case matter only to the extent, though, that they clarify the intent to abandon, as the intent to abandon remains "the paramount object of inquiry." *Gila Water Co. v. Green*, 232 P. 1016, 1019 (Ariz. 1925) (*Green I*). As this Court observed in *Orr Water Ditch*, trying to discern intent, a subjective inquiry, is difficult and requires consideration not only of direct evidence, but also "indirect and circumstantial evidence," which "must almost always be used to show abandonment." *Orr*, 256 F.3d at 945.

The Federal Parties assert that Freeport abandoned its water rights in three S&T applications because neither it nor its lessees used water to irrigate river bottom land for 17 years, during which time the land was incompatible with agriculture. [Brief of GRIC and SCAT, p. 30; Brief for the United States, p. 54] In advancing this argument, the Federal Parties contend that a prolonged period of non-use alone indicates an intent to abandon. This is a fundamental misreading of the law in Arizona and other states that have analogous laws.

As the District Court recognized in its decision in the Freeport Litigation, "Arizona courts have rarely had the opportunity to elaborate on the types of acts by

a water right holder that imply abandonment. . . ." [ER 43] Arizona courts have previously held that a prolonged period of non-use is "very strong evidence of an intention to abandon" if otherwise unexplained. *Green I*, 232 P. at 1016. This comports with the observation in *Orr* that "nearly all western states presume an intent to abandon upon a showing of a prolonged period of non-use." *Orr*, 256 F.3d at 945 (citing cases from six other states that hold that a prolonged period of non-use indicates an intent to abandon). It is worth noting, however, that Arizona has never explicitly adopted the presumption noted in *Orr*. In Arizona, a period of non-use must still be coupled with an intent to abandon before a finding of abandonment is appropriate. *See, e.g., Phelps Dodge Corp. v. Arizona Dept. of Water Res.,* 211 Ariz. 146, 151 (Ariz. Ct. App. 2005) ("A water right is deemed abandoned if the holder intends to abandon the right and a period of non-use occurs."); *Gould*, 76 P. at 601 (Ariz. Terr. 1904) ("Abandonment is a matter of intent as such intent may be evidenced by the declaration of the party, or as may be fairly inferred from his acts. It cannot be fairly inferred that Gould, by abandoning the use of the ditch. . . intended thereby to abandon his right of appropriation."). Thus, when a period of non-use can be reasonably explained, something more must be shown for abandonment.

Given the dearth of Arizona case law on the issue, guidance provided by the Nevada federal courts is especially instructive, as those courts have been called on

repeatedly to determine what must be shown for abandonment. *State v. Patterson*, 218 P.3d 1031, 1037 (Ariz. Ct. App. 2009) (discussing court's inherent authority to evaluate case law from other jurisdictions in absence of controlling Arizona law). Nevada's case law regarding abandonment is well-developed because its courts have been called on in a series of cases to resolve objections filed by the Pyramid Lake Paiute Tribe of Indians ("Paiute Tribe") and the United States to proposed transfers of water rights by holders of water rights to the Carson and Truckee River. *See, e.g., Orr Water Ditch*, 256 F.3d at 938; *Alpine Land & Reservoir Co.*, 510 F.3d at 1037. Both the Paiute Tribe and the United States contended that the proposed transfers were impermissible because the rights had been either abandoned or forfeited. *Alpine*, 510 F.3d at 1037.

Like Arizona law, Nevada "does not presume abandonment of a water right from nonuse alone" and "claims of abandonment must be decided after consideration of all of the surrounding circumstances." *Alpine*, 510 F.3d at 1038. Nevada adopts an informal burden-shifting scheme in proving abandonment. After some evidence of abandonment is shown, such as a prolonged period of non-use, the opposing party (who in the *Alpine* cases was the party requesting a S&T of water rights) must present evidence that either: (1) the water was beneficially used on the parcel to which the rights were attached, (2) there was no intent to abandon because there has been a continuous use of the water on another parcel and the

applicant presented evidence of an unsuccessful attempt to transfer water rights, or at least inquired about the possibility of the transfer, (3) there was no intent to abandon because the taxes and assessments were paid during the period of non-use and there were no improvements inconsistent with irrigation on the land to which the rights were attached, or (4) there was no intent to abandon because the previous owner actually sold the water rights in question before an abandonment would otherwise be found and the new owner presented evidence of a lack of intent to abandon the water rights. *Id.* at 1038-39.

The third scenario discussed in *Alpine* directly answers whether Freeport intended to abandon its water rights. As the opening brief of GRIC and SCAT admits, Freeport continued to pay both the water assessments and the costs to maintain the ditches on the parcels subject to the appeal, despite the fact that it had not irrigated the land for 17 years. [Brief of GRIC and SCAT, p. 30] Additionally, Freeport made no improvements to the land at all. *Alpine* holds that any presumption of abandonment created by a prolonged period of non-use is rebutted upon a showing that taxes and assessments were paid during the period of non-use and no improvements inconsistent with irrigation were constructed on the land.

Additionally, as *Green I* notes, a prolonged period of non-use is relevant in informing the intent to abandon only if it remains unexplained. Here, the explanation for non-use is simple, as the land has been left fallow because natural

forces have rendered it incompatible for agricultural use for the time being. The land in the Freeport applications could not be used for irrigation for a period because of the uncontrolled movement of the river. But rivers can and do change course, and river bottom land that could not be used one year, may be suitable for use the next year or many years later. This is a fundamentally different situation than where the owner or lessee of a parcel with appurtenant water rights intentionally manipulates the parcel to make it incompatible with irrigation. Surely the law cannot be that water rights appurtenant to a piece of river bottom land are forever lost due to no fault of the parcel's owner. The Gila River in the Upper Valley is particularly erratic, routinely washing out agricultural fields in one year and then moving again to gradually permit irrigation. To put it simply, whatever the river takes, it also eventually gives back. The notion that water bodies change their location is recognized in the established doctrines of avulsion and accretion. *See, e.g., State v. Jacobs*, 380 P.2d 998, 1000 (Ariz. 1963) ("Accretion is the gradual, imperceptible addition to land forming the banks of a stream by the deposit of waterborne solids or by the gradual recession of water which exposes previously submerged terrain. . . . Where, however, . . . the stream changes its course suddenly or in such a manner as not to destroy the identity of the land between the old and new channels, the change is termed an avulsion.") (citations omitted).

The Federal Parties attempt to discredit the District Court's decision by raising three objections, all of which are red herrings that distract from the key intent inquiry. The GRIC and SCAT first argue that the District Court erred in refusing to apply a presumption to abandon based on a prolonged period of non-use. [Brief of GRIC and SCAT, p. 31] But as discussed above, while Arizona courts have held that non-use is "very strong evidence" of an intent to abandon, no court has held that such a presumption exists. On the contrary, Arizona courts continue to maintain that a period of non-use must be accompanied by an independent showing of an intent to abandon. *See, e.g., Phelps Dodge Corp.,* 211 Ariz. at 151.

Second, Federal Parties suggest that attempts to prove abandonment were denied because they did not prove abandonment by clear and convincing evidence. [Brief of GRIC and SCAT, p. 32] Whether the District Court improperly applied the clear and convincing standard is irrelevant because the appellants only basis for proving intent to abandon was a prolonged period of non-use. Under both the law of Arizona and the guidance provided by Nevada decisions, a period of non-use hardly constitutes a preponderance of evidence, much less clear and convincing evidence.

Third, Federal Parties cite *Orr Water Ditch* for the proposition that if there is 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. [Brief of GRIC and SCAT, p. 33] But the rule in *Orr Water Ditch* was later refined in *Alpine*, where the court held that to overcome a suggestion of an intent to abandon due to non-use, the owner must pay the required taxes and assessments and there must be "no *improvements* inconsistent with irrigation on the land." *Alpine*, 510 F.3d at 1038-39 (emphasis added). Here, Freeport has made no improvements to the parcels in question; the land has been rendered temporarily incompatible with irrigation because of natural forces. The Federal Parties have therefore presented no compelling arguments to suggest that the District Court's interpretation and application of Ninth Circuit law regarding abandonment was incorrect.

III. IF THE DISTRICT COURT'S RULING ON ABANDONMENT IS OVERRULED, ANY NINTH CIRCUIT RULING ON THIS ISSUE SHOULD BE NARROWLY TAILORED TO THE UNIQUE FACTS OF THE FREEPORT LITIGATION BECAUSE COUNTLESS UPPER VALLEY DEFENDANTS WHO WERE NOT PARTIES TO THE FREEPORT LITIGATION WERE NOT AFFORDED DUE PROCESS TO CREATE A RECORD ON THAT ISSUE.

A. The Upper Valley Defendants Who Were Not A Party to the Freeport Litigation Were Not Afforded the Opportunity to Make Any Record On The Issue Of Abandonment Presented In This Appeal.

Should the Ninth Circuit determine that appellate jurisdiction is appropriate and reverse the District Court's determination regarding abandonment, the scope of any ruling should be explicitly limited to the Freeport S&T applications in the sub-docket CV31-0061-TUC-SRB. The appeal before this Court arises from the

litigation on the sub-docket that adjudicated the S&T applications of only a single UVD, Freeport. Accordingly, no other UVDs, including the farmer appellees and the many other farmers whose S&T applications remained pending on the main docket, were given the opportunity to participate in the Freeport Litigation. [SER0315] As individual farmers, most of the UVDs prepared the S&T applications themselves and were not represented by counsel; they were therefore not part of the District Court's ECF system and not given notice of the Freeport Litigation as a test case. [SER0315] None of the individual *pro se* UVDs was either involved in the Freeport Litigation, or served with any of the motions, responses and other papers filed in the case, or orders issued by the District Court. [SER0316] The individual *pro se* UVDs were not aware of the issues being litigated or the fact that the court may be deciding issues relevant to their applications. While the Irrigation Districts requested that a status conference be set before the Freeport Litigation began to establish the effect the Freeport Litigation would have on administration of the Globe Equity Decree, the District Court did not rule on the request until *after* the trial was completed. [SER0387; SER0044] The individual *pro se* UVDs simply had no notice of any of the issues in the Freeport Litigation, some of which are now being appealed, and were deprived of the opportunity to create any record on those matters.

B. A Reversal on the Substantive Issue of Abandonment Should Be Narrowly Tailored to the Unique Facts of the Freeport Litigation, As a Broader Ruling Would Deprive Individual UVDs of Due Process.

Because the individual farmer appellees and other farmer UVDs had no notice of the issues being litigated in the Freeport Litigation, it would be fundamentally unfair to apply any decision that reverses the District Court's ruling on abandonment to those UVDs. Such a holding potentially would strip the farmer appellees and other farmer UVDs of rights they have always possessed and continue to possess under the District Court's current ruling. If this Court were to hold otherwise, it would transform Freeport into a de facto class representative for the farmers. But this would overlook the stunningly obvious fact that Freeport's interests and motivation for litigating the issues on appeal as a mining company are vastly different than the interests and motivations of farmers seeking to protect the water supplies necessary to their farming. As questions of abandonment are fact-intensive inquiries, the genuine differences between the Freeport applications on the sub-docket and farmer UVD applications on the main docket cannot be overstated. It may be one thing to determine that Freeport, a multinational mining company, intended to abandon its rights when it did not attempt to reclaim river bottom lands. But a farmer of limited means, who knows from experience that what the river takes, it may later give back, may have an entirely different intent. Reversing the District Court's finding on a factual record created by Freeport

should not be used to create a presumption about what a farmer, who has different needs, financial limitations and experience, might intend under similar circumstances.

Yet decisions made in the Freeport Litigation previously have impacted administration of the Globe Equity Decree. For example, a contested issue in the Freeport Litigation was the location of Decree water rights. The District Court determined that such water rights would be defined according to the 1920 Maps as georectified in the Gila River Indian Community Database ("Community Database"). [ER 37] The court then determined that it was "satisfied that the maps and other data in the Community Database are sufficiently accurate for purposes of evaluating the ten Freeport Applications under consideration *and* Application to sever and transfer a Decree water right generally."[11] [ER 37:14-17 (emphasis in original)]

Similarly, the District Court determined in the Freeport Litigation that the construction of a vaguely described "road" combined with non-use of a water right is sufficient for finding that abandonment of water rights has occurred for rights

[11] Even though the Court was satisfied with the accuracy of the Community Database in the Freeport Litigation, numerous errors have since been recognized in that Database, and in response to the technical representatives of other parties, GRIC has revised its Database several times and is continuing to do so. Nothing better demonstrates the dynamic nature of this litigation and the fact that many issues are yet to be decided than the continuing revisions to the Community Database.

appurtenant to the land on which the road is constructed. [ER 48] In determining that the road was a "structure or improvement" incompatible with irrigation, the District Court did not distinguish between a truly permanent road and dirt roads that farmers frequently use for prolonged periods of time that never make the land on which the road is constructed incompatible for irrigation. The District Court's determination that a road, which can be read to mean any road, is a "structure or improvement" incompatible with irrigation, paints with too broad a brush and may have far-reaching unintended consequences in administering the Globe Equity Decree generally.

The danger that a ruling resulting from this appeal may have an unintended effect on litigation related to future S&T applications is especially acute given how the Federal Parties' briefs appeal the District Court's determination regarding abandonment. While the briefs profess to present narrow issues related to only a subset of Freeport applications, the Federal Parties call for the Ninth Circuit to make categorical determinations regarding water rights. Both briefs ask the Ninth Circuit to create an unqualified rule that decreed water rights appurtenant to lands left fallow because of the uncontrolled movement of a water body constitutes abandonment.

To reverse and apply that reversal to the individual *pro se* farmer UVDs who were not parties to the Freeport Litigation would be a fundamental violation of due

process. The individual *pro se* farmer UVDs were deprived of notice and did not have a chance to be heard on the issue of abandonment. The Ninth Circuit noted in *Harris v. Cnty. of Riverside*, 904 F.2d 497, 503 (9th Cir. 1990), that "[t]he fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" (citation omitted). The individual *pro se* farmer UVDs have had no such opportunity. Similarly, Freeport cannot be said to have "virtually represented" the interests of the farmers in its litigation on the subdocket. The Supreme Court held in 2008 that such "virtual representation" violates the due process of a non-party in a proceeding unless "*at minimum*: (1) the interests of the nonparty and her representative are aligned and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty, [and] . . . sometimes . . . (3) notice of the original suit to the persons alleged to have been represented." *Taylor v. Sturgell*, 553 U.S. 880, 900 (2008) (emphasis added). None of those criteria were met here. A decision by this Court that has a far-reaching effect on the overall administration of the Globe Equity Decree would impact the farmers most directly, not the mining company that created the current record, contravening the due process protections otherwise guaranteed to the farmers.

CONCLUSION

As demonstrated aptly by the Purported Judgment, Rule 54(b) certification serves an important purpose when other matters remain pending before the District Court. Both this Court and the parties are entitled to certainty as to the District Court's intentions, a certainty not provided here by the Purported Judgment. Accordingly, these appeals should be dismissed, and the case remanded to the District Court for further proceedings. If this Court asserts jurisdiction, then the District Court's determinations regarding the appealed issues of forfeiture and abandonment should be affirmed. Alternatively, a reversal of the District Court decision regarding abandonment should be narrowly applied to only the Freeport applications located on the sub-docket CV31-0061-TUC-SRB.

Respectfully submitted on this 15th day of April, 2015.

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Statement of Related Cases

Pursuant to Ninth Circuit Rule 28-2.6, Appellants represent that they are not aware of any related case pending in this Court.

Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). The brief contains 12,163 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), according to the word processing program used to prepare it.

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). The brief has been prepared in a proportionally spaced typeface using Microsoft® Word 2010 in Times New Roman 14-point type.

Dated: April 16, 2015

/s/ Paul F. Eckstein
Paul E. Eckstein

Certificate of Service

I hereby certify that I electronically filed the foregoing BRIEF and EXCERPTS OF RECORD VOLS. 1-5 with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 15, 2015. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: April 15, 2015

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