

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

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

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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*

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**APPELLANT SAN CARLOS APACHE TRIBE'S  
RESPONSE AND REPLY BRIEF**

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## STATEMENT OF THE ISSUES

Whether the district court properly denied Freeport's applications to change the place of use of certain decreed water rights, given Freeport's failure to present a *prima facie case* that the proposed changes would not injure the rights of other parties.

## STANDARD OF REVIEW

This Court reviews *de novo* the district court's order granting judgment as a matter of law based on Freeport's failure to prove a *prima facie case* of no injury, *Byrd v. Maricopa County Sheriff's Dept.*, 629 F.3d 1135,1138 (9th Cir. 2011). This Court reviews factual findings for clear error. Fed. R. Civ. P. 52 (a) (6).

## **INTRODUCTION**

Pursuant to Fed. R. App. P. 28(i) the San Carlos Apache Tribe (“Tribe”) incorporates by reference the brief filed by the United States on June 12, 2015 and the brief filed by the Gila Indian River Community (“Community”) on June 12, 2015, and will not present duplicative argument here. The Tribe will instead make additional and separate points in answer to Freeport Minerals Corporation’s and the Gila Valley Irrigation District’s Cross Appeals, below.

## **SUMMARY OF ARGUMENT**

In 1935 the district court entered the Globe Equity No. 59 Decree (“Decree”) -- a consent Decree which adjudicates the relative rights to use the water of the Gila River. For each water right under the Decree, the Decree lists the water right holder and describes the specific quantity of water, the quality of water, the location of the parcel to which the right is appurtenant, the place and manner of diversion, and the priority of the right. The Decree also establishes the equitable rules for parties requesting relief from the Court to amend the Decree.

To change any description of a water right under the Decree is to amend the entire Decree. No party is entitled to have the Court amend the terms of the Decree unless it can prove such relief conforms to the principles of equity and the no injury rule under Article XI of the Decree (“Article XI”). Article XI clearly

conditions any proposed changes to a water right on proof that those changes will not cause injury to the rights of others under the Decree (“others” or “other parties”). ER 470. Article XI places the burden on the shoulders of any party requesting relief (“Applicant”), and Section 4(B) of the Change in Use Rule established the *prima facie* standard that is required to meet the initial burden.

Freeport Minerals Corporation (“Freeport”) argues that the district court should have granted its 59 Applications, and thereby amended the Decree, without requiring Freeport to meet the requirements of Article XI, or the Change in Use Rule. Freeport does not want to be required to show functional *prima facie* evidence to support its argument because Freeport knows that any good-faith injury analysis would not support Freeport’s position. Freeport jumps back and forth between two theories, both of which defy hydrologic reality; first that none of its changes would impact the River, and second even if the changes do impact the River the Tribe is immune from any injuries those impacts may cause. Freeport took this ‘immune from injury’ argument to the district court and the district court correctly ruled that Freeport's approach disregards the equitable protections afforded to all parties under the Decree. Equity demands that Freeport prove how its specific changes will impact the wet water of the River, and if those impacts will cause injury to other parties.



Contrary to Freeport's argument, the district court did not create a new evidentiary burden for Freeport. The district court simply abided by the equitable rule of Article XI, and the Change in Use Rule and its denial of Freeport's Application should be affirmed ("Applications").

Freeport did not correctly, completely, or accurately provide the information required by the court's form of application, did not provide any evidence regarding injury in its Applications, did not disclose any evidence regarding injury during the discovery phase of the case, and did not introduce any such evidence during its case-in-chief. ER 58. Freeport provided only "generalized conclusory statements" in rebuttal to the evidence of potential injury introduced by the United States and the Tribe. ER 62.

Freeport argues that it does not have to show how its Applications if granted would change the operation of the river, because no matter what would happen to the river, the senior priority of the Tribe in the Decree and the 1996 Water Quality Injunction afford the Tribe significant protections that make injury to the Tribe's rights impossible. Freeport at 62. A recital of the senior Apache priority under the Decree is not an evaluation of the actual impact Freeport's changes will have on the river, and therefore on the "wet" water of other parties. Additionally, there is ample evidence that Freeport and other water users have rendered the "paper"

protections afforded by the Water Quality Injunction and the Decree meaningless as a result of their farming practices. *Infra* at 13-16.

After careful review of the Decree, Article XI, and the Change in Use Rule presented by Freeport, the United States, the Gila River Indian Community (“Community”), and the Tribe the district court ruled that Freeport’s “interpretation does not take into account the realities of irrigation or the geography of the Gila Watershed. Freeport’s interpretation would also render the Change in Use Rule’s requirement for *prima facie* evidence of no injury to other Decree parties meaningless.” ER at 59.

Freeport also argues that the district court’s concern with further deterioration of the conditions of the river at Cospers Crossing is irrelevant to the issues of injury. Freeport at 61. The Tribe disagrees. The conditions at Cospers Crossing only exist because of material reductions in River flow and water quality by water users upstream from Cospers Crossing. Freeport is proposing to transfer water rights and its point of diversion from a canal miles below Cospers Crossing to well diversions miles above Cospers Crossing. Such change would likely exacerbate the period of time Cospers Crossing is dry<sup>1</sup>. ER 63, 973-975. The longer Cospers Crossing is dry, the longer the Tribe will suffer a lack of water.

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<sup>1</sup> United States v. Gila Valley Irr. Dist., 920 F. Supp. 1444, 1456 (D. Ariz. 1996) aff’d sub nom. United States v. Gila Valley Irrigation Dist., 117 F.3d 425 (9th Cir. 1997)

The district court correctly determined that “any Applicant whose proposals may exacerbate the situation at Cosper’s Crossing must address the effect of the stream depletion at Cosper’s Crossing...” ER 63.

Freeport also argues that the district court's ruling requiring Freeport to provide a cumulative impact analysis of how its 59 Applications if granted would impact the River and the rights of others was both “improper and prejudicial.” Freeport at 64. The Tribe disagrees. One transfer will result in some changes to the timing, flow, and water quality of the River. The question is whether the changes will injure the rights of other parties. The changes in the River will be magnified when multiple simultaneous transfers occur. Equity and common sense dictate that multiple simultaneous changes must be evaluated cumulatively to fulfill the equitable standard and purpose of Article XI, and the Change in Use Rule.

Freeport also claims that the district court erred in denying its motion to amend its application under Federal Rule of Civil Procedure 15(b). Not only did Freeport fail to move the Court to amend its Application under Rule 15, Freeport never took a clear position on whether it wanted the court to rule on its original Application, or some form of revised legal descriptions and maps, Freeport is therefore without basis to claim that the court denied a Rule 15 motion, much less to assert that the district court abused its discretion in doing so.

## ARGUMENT

**I. THE DISTRICT COURT DID NOT CREATE A NEW EVIDENTIARY STANDARD TO REQUIRE FREEPORT TO INTRODUCE EVIDENCE ADEQUATE TO MEET THE REQUIREMENTS OF A PRIMA FACIE CASE THAT IS REQUIRED TO AMEND ITS WATER RIGHTS UNDER THE DECREE, IF GRANTED WOULD NOT RESULT IN INJURIES TO THE WATER RIGHTS OF OTHER PARTIES TO THE DECREE.**

**A. The Rule of Equity Under Art. XI of the Decree Allows a Party to Request Equitable Relief to Amend the Decree So Long as The Proposed Changes Does Not Injure the Rights of Other Parties Under the Decree.**

The district court did not “create a new evidentiary standard” when it ruled that Freeport failed to provide evidence adequate to make a *prima facie case* that its proposed transfers would not cause injury to the rights of other parties under the Decree. Freeport Minerals Corporation Principal and Response Brief (“Freeport at”) at 57-58.

Rather, Freeport's burden is an equitable requirement under Article XI. Article XI conditions the right to sever and transfer a water right on the Court finding that no injury will result to the water right of others.

Article XI states in part:

[A]ny of the parties to whom rights to water have been decreed herein 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 are so entitled or of any part thereof, so far as they may do *so without injury to the rights of other parties as the same are defined herein.*

ER 497 (emphasis added).

This mandatory burden is clearly on the Applicant to show that its proposed changes will not injure the rights of others. The district court simply enforced the burden established by the Decree. ER 57-58. Freeport's argument that the district court created this burden is refuted by the plain language of Article XI.

**B. The Change In Use Rule Places The Burden On The Applicant To Establish A Prima Facie Case Of No Injury To The Water Rights Of Others Under Article XI Of The Decree.**

Although Freeport argues that the district court erred in requiring Freeport to prove a *prima facie* case to meet its initial burden under Article XI, Freeport 57-58, the Change in Use Rule clearly sets forth the *prima facie* standard that Freeport is trying to avoid.

Under Section 4(B) of the Change in Use Rule:

The applicant shall have the burden of establishing a prima facie case of no injury to the rights of other parties under the Gila Decree and a right to transfer. Upon making such a prima facie showing, the burden of proof of proof will shift from the applicant to the objecting party to demonstrate that injury will result from the proposed change or that the Applicant has not right to the proposed transfer.

ER 214.

The burden to prove "no injury" is on the Applicant under Article XI of the Decree. The Change in Use Rule simply establishes the critical evidentiary standard that the Applicant must meet. ER 209-15. Only after the *prima facie*

burden is met does the burden of proof switch to the objecting party to introduce evidence of the potential injury. ER 214. The district court simply followed the Change in Use Rule which established the *prima facie* standard. ER 58.

The requirement of proving no-injury to other parties is not a burden created by the district court for Freeport. Burden of Proof is established by Article XI of the Decree in equity. It applies to all parties who seek equitable relief from the Court to amend their rights under the Decree. ER 497.

The district court correctly ruled that Freeport failed to meet its *prima facie* burden.

**C. Freeport's Recital Of The 1846 Apache Priority Under The Decree Is Not Evidence Adequate To Establish A Prima Facie Case Of No Injury To The Rights Of Others, And Does Not Satisfy Freeport's Burden.**

The district court did not err when it ruled that Freeport's recital of the Apaches' 1846 priority right under the Decree was not evidence adequate to establish a *prima facie* case that Freeport's proposed changes would not injure to the rights of others, including the Tribe. ER 58-59. Any party requesting equitable relief to amend the Decree by changing their water right is required to prove that the proposed changes will not result in injury to the rights of others. ER 57-58. This is an equitable Rule for the protection of all parties to the Decree.

Freeport argues that the district court failed to consider Freeport's recital of the Apache 1846 senior priority in the Decree, and the significant protections for the Tribe under the Water Quality Injunction as evidence adequate to establish a *prima facie* case that its proposed changes would cause no injury to the Tribe. Freeport at 58 n.17.

First, the district court carefully considered the language of the Decree and Freeport's significant protections argument. In fact the district court repeated Freeport's argument in its decision and stated that:

Freeport contends that the Decree's priority system ensures that no party can be injured as a result of a water right transfer... as both experts from Freeport and the Tribe pointed out, this interpretation does not take into account the realities of irrigation or the geography of the Gila watershed. Freeport's interpretation would also render the Change in Use Rule's requirement for *prima facie* evidence of no injury meaningless."

ER 59.

Second, if the recital of relative priorities was enough to meet the requirement of Article XI and the *prima facie* case standard of the Change of Use Rule, both Article XI and the Rule would say so. Instead, both anticipate that the Applicant will provide functional proof of the changes to the real operation of the River, and the impact of any such changes that would have on the rights of other parties. ER 213-214, 497.

Freeport did not argue at trial or in its Opening Brief that its Applications would not result in changes to the River, its flow, timing, or water quality. Instead Freeport assumes adverse impact to the River, when it states:

If changes in points of diversion result in a time-lag effect impacting flows at a different time or for a longer time, this simply means that the Tribe's call may occur at a different time or for a longer time. The Tribe is not injured, however, because it can make its call for water whenever depletions occur and for however long.

Freeport at 61-62, ER 58.

Freeport attempts to avoid the point. It knows that it is already very difficult and often impossible for the Tribe to receive the water for which it has a right. If Freeport's Applications would result in further reduction, frequency or timing of flow, or further degradation of water quality, in reality, the Tribe's rights would be injured by making it more difficult to get its full water right in the amount, quality and at the time the Tribe makes its calls. Freeport's Applications would result in injury to the Tribe's rights.

A simple recital of the Decree must be separated from the reality that upstream water users and farming practices interfere with the operation of the Decree and its paper protection. When surface water is unavailable under the Decree, UVD's simply pump all the water they want. The courts have repeatedly recognized that upstream practices degrade water quality and diminish stream flow



reaching the Reservation – at times to the point that no stream flow reaches the Reservation.<sup>2</sup>

The irony of Freeport’s recital of the Apache’s senior right under the Decree as its *prima facie* case of no injury shows at least Freeport's indifference, if not a complete disregard for the reality of the River, where the Tribe rarely, if ever receives the water to which it has a right to under the Decree. *Infra* at 16-17.

**D. Freeport’s Recital of the Protections Afforded To The Tribe Under The Water Quality Injunction Is Not Evidence Adequate To Establish A Prima Facie Case Of No Injury To The Rights Of Others And Does Not Satisfy Freeport’s Burden.**

Freeport argues that the existence of the Water Quality Injunction is evidence adequate to establish a *prima facie* case of no injury. Freeport argues that because its “proposed transfers *cannot* affect the requirements of the Water Quality Injunction,” its proposed changes to its water rights cannot injure the Tribe. Freeport at 61-62 (emphasis added). Freeport simply asserts that, “the Tribe will not be injured because the Tribe enjoys extensive legal protections under the Decree and the Water Quality Injunction.” Freeport at 58 n.17. Freeport also argues that any injuries caused by its proposed changes are irrelevant because these

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<sup>2</sup> *Infra* at 14-16 citing *United States v. Gila Valley Irrigation Dist.*, 920 F. Supp. 1444 (D. Ariz. 1996).

types of injuries “cannot affect the requirements of the Water Quality Injunction” and therefore will not injure the Tribe. Freeport at 61-62.

Essentially, Freeport argues that all the Tribe has to do is call for its water and the established protections in the Water Quality Injunction will protect the Tribe’s water rights from any injury that may result from the change in its water rights requested in its Application. ER 58

However, the necessity the court found to enter the Water Quality Injunction is evidence of the fact that the district court has found Upper Valley farming practices defeat the protection of the senior priority of the Tribe under the Decree.

United States v. Gila Valley Irr. Dist., 920 F. Supp. 1444 (D. Ariz. 1996).

In 1992, the District Court entered an order finding that the Tribe was entitled to water of adequate quality to grow moderately salt sensitive crops. *United States, et. al. v. Gila Valley Irrig. Dist., et. al.*, 804 F. Supp. 1 (1992).

In 1996, the District Court issued a Water Quality Injunction in an effort to protect the Tribe’s Decree right.

*Id.*

In 1996 the District Court found:

For the reasons expressed below, the Court finds (1) that the water reaching the San Carlos Reservation is of significantly lower quality than the water in the upper valleys, (2) that UVDs are responsible to a significant degree for the degradation of the water reaching the reservation boundary, and (3) that equity requires that certain measures be adopted to protect the Tribe’s water right.

*Id.* at 1447.

The Gila River once supported irrigation from its surface flow in regions extending from above the New Mexico border to the confluence of the Gila and the Salt River. The river is now overdeveloped and overallocated. In the upper valleys, surface flow is heavily augmented with water pumped from wells. Further, the growers in the upper valleys on occasion divert the entire flow of the stream into irrigation canals to serve the acreage they farm. The return flows from diversions are often recycled, diverted again and applied to other fields. The effects of these and other practices contribute to a dramatic increase in both the salt load and the salinity of the Gila River. The salt load is increased, in part, by pumping groundwater that is higher in salt content than the surface flow and mixing it with the stream. Salinity increases as the river flows through the Safford Valley due to the diversion of the entire stream and the consumptive use of the water, but not the salt, by irrigated crops and other plants. By the time the flow, if any remains, reaches the San Carlos Reservation boundary, the water is degraded to such a degree that the Apache Tribe may be unable to grow the types of vegetables and grain crops that were once raised there.

*Id.* at 1448.

There are two primary causes of the increased salinity and salt load in the river: pumping from the ground water and diverting the entire natural flow of the stream.

Pumping from groundwater: The effect of pumping on the salt load and salinity is difficult to overstate. The amount of water pumped prior to the entry of the Decree was apparently quite small. By 1938, there were about 30 wells in the upper valleys. In each of the years 1937, '38 and '39, about 20,000 acre feet (AF) were pumped from the groundwater. The number of wells and the amount of water pumped steadily increased.

*Id.* at 1449 (Citations omitted).

Gookin Engineers estimates that there were 900 wells in the Safford Valley by 1958. In recent years, the amount of groundwater pumped in the Safford Valley has varied between 214,000 AF (1977) and 62,400 AF (1986). In general, UVDs pump greater amounts of water

in dry years, when the surface flow is low, and lesser amounts in wet years, when there is more surface flow to meet their irrigation needs.

*Id.* at 1444, 1450. (Citation omitted).

The district court explained the major factors which impact water quality:

First, some of the wells in Safford Valley tap into very high salinity water sources.

*Id.* at 1449.

Second, . . . groundwater is higher in salts than undiverted surface flows. Pumping from the groundwater adds salt to the surface flow of the Gila River. . . . pumping during the summer months places the lower quality water in the stream at the time when natural flows are at their lowest and demand on the stream is at its highest.

*Id.* at 1449.

Third, groundwater pumping contributes to a decline in the water table, leading to a “losing stream” phenomenon in which the river loses water to the groundwater. Surface flow may be seriously depleted or eliminated due to nearby pumping. Also, a losing stream condition can exacerbate the salinity problem to the extent that surface flows of higher quality, such as from precipitation and sudden freshets, go to recharging the alluvial aquifer, rather than remaining on the surface.

*Id.* at 1450.

Fourth, excessive pumping alters the relationship between the alluvial aquifer, immediately underlying the riverbed, and the basin-fill aquifer, which is an older geologic formation up to a hundred feet below the surface. Water in the basin-fill aquifer is at a higher pressure than that in the alluvial aquifer. When large amounts of water are pumped from the alluvium, the piezometric relationship between these two aquifers seeps upward into the alluvial aquifer.

Because the basin-fill aquifer is much higher in salts than the alluvial aquifer, this seepage increases salts in the alluvium and in the river.

*Id.* at 1450.

“... UVDs on occasion divert the entire flow of the stream at various canal headings. The water arriving back at the river consists largely of irrigation return flows that have absorbed salts from the soils to which the water was applied. This cycle is repeated when the entire flow is diverted at canal headings downstream. Thus, the river becomes an “agricultural drain” carrying salts from the soils of the cultivated acreage. Also, diversion of the entire flow of the river exacerbates the deleterious conditions created by pumping, including the losing stream phenomenon and the upward seepage from the basin-fill aquifer into the alluvial aquifer.

*Id.* at 1451.

The Water Quality Injunction exists only as a result of the Upper Valley farming practices, including those used by Freeport, which create conditions which subordinate the protection of the senior priority of the Tribe under the Decree.

Freeport also argues that any injury caused by its proposed changes “simply means that the Tribe’s call may occur at a different time or a longer time.” Freeport at 61. In essence, the Water Commissioner would simply follow the mechanisms of the Water Quality Injunction and the Tribe cannot be injured.

The problem is that when the Water Commissioner orders the UVD’s to curtail or cease surface diversions under the Water Quality Injunction, they simply switch to greater pumping from the wells which exacerbate the problem. *Supra* at 12-15.

The Water Commissioner testified during the trial and made it clear that neither the Decree nor the Water Quality Injunction has ever protected the Tribe's water right as Freeport suggests.

Q: In the period of time that you've been working with the Water Quality Injunction, has the Water Commissioner's officer ever been able to deliver water of the quality required in the Water Quality Injunction to the San Carlos Apache Tribe?

A: About the only times it ever met the requirements is right at the first of irrigation season. But after it gets into the irrigation season, we haven't been able to.

Q: Ever?

A: Not that I can think of right off the top of my head.  
ER 1076.

The attorneys for the Water Commissioner made it clear that the requirements of the Water Quality Injunction cited by Freeport have not worked:

And let's [not] kid ourselves. Every year the Water Quality Injunction doesn't work and there's going to have to be ultimately another solution to the problem . . . but the Water Commissioner is doing everything that he can, including shutting down all diversions in the Duncan, Safford, and Virden Valleys to ensure that the San Carlos Apache Tribe receives its call. [The Tribe] may not receive the quality of water that it's gotten, but the Water Commissioner does everything he's permitted to do under the Water Quality Injunction.

ER 937.

Even Freeport's own expert admitted during Freeport's rebuttal case to the potential time-lagged depletive effect on the surface water of the Gila River resulting from the types of well-diversions proposed in certain of the Freeport's

Applications. ER 854-855. Injuries to water rights occur when upstream conduct alters the timing, quantity or quality of flows. Timing of irrigation is critical to meeting crop needs. Crop demands are not flexible. The water is needed when it is needed. Water delivered at a different time or which is not delivered timely in response to a call, causes injury to the Tribe's crops resulting directly in injuries to its rights. See Kansas v. Colorado, No. 105, ORIGINAL, 1994 WL 16189353, at 140-43 (U.S. Oct. 3, 1994).

The district court considered the realities of the Apache senior priority under the Decree, the protections of the Water Quality Injunction and Freeport's argument when it ruled that the Water Quality Injunction is not evidence adequate to establish a *prima facie* case that the Freeport's proposed changes will not result in injury to other parties under the Decree. ER 60. The district court should be affirmed.

**E. The Situation At Cosper's Crossing Already Causes Injury To The Tribe's Water Rights And Freeport Must Show Evidence That Its Change Will Not Exacerbate The Cosper's Crossing Condition.**

The district court did not err when it ruled that the existing condition at Cosper's Crossing must be taken into consideration in Freeport's injury analysis. Freeport argues that the district court's concern over the condition at Cosper's Crossing is a "red herring." Freeport at 61. The Tribe Disagrees. The reality of Cosper's Crossing is simple; the Cosper's Crossing Agreement provides that when

the location known as Cospers Crossing goes dry the provisions in Article VIII of the Decree go into effect. Article VIII allows for the water users in the Duncan Virden Valley above Cospers Crossing to divert water from the Gila River in disregard of the senior rights downstream. ER 13, 1004-1005. Thus, changes to a water right that take water out of the River upstream from Cospers Crossing may cause Cospers Crossing to become dry more often and for longer periods of time. The longer Cospers Crossing is dry, the longer a downstream senior rights holder may suffer a lack of water. ER 63.

Freeport argues that the Tribe is immune from any injury because “the Cospers Crossing Agreement cannot operate to the Tribe’s detriment... the Tribes rights are protected because if the Tribe places a call, the Water Commissioner must cease *all diversions in the Upper Valleys as necessary*, including those in the Duncan-Virden Valleys that might otherwise be permitted by the Cospers Crossing Agreement.” Freeport at 61.

One of Freeport’s Applications requires the Court to amend the Decree to change its point of diversion and place of use for certain water rights from a canal several miles below Cospers Crossing, to wells and land above Cospers Crossing. For this reason the district court ruled that “an Applicant proposing such a transfer has the burden to show that the resulting stream depletion will not cause Cospers’s



Crossing to be dry for such a period of time that downstream senior right holders are injured.” ER 63.

Freeport argues that even “[i]f changes in points of diversion result in a time-lag effect impacting flows at a different time or for a longer time, this simply means that the Tribe’s call may occur at a different time or for a longer time. The Tribe is not injured however, because it can make its call for water whenever depletions occur and for however long.” Freeport at 61-62.

This argument was refuted by the Water Commissioner when he testified that ceasing diversion in the Upper Valleys has never resulted in the Tribe receiving its water rights. ER 1076. It also ignores the fact that when diversions of the visible surface flow are unavailable, the Upper Valley Users simply switch to pumps which further reduce river flow and degrade water quality *Supra* at 13-16. Even Freeport’s rebuttal expert testified that the changes requested in Freeport’s Applications “could cause Cosper’s Crossing to go dry at different times, for longer periods...” ER 62-63, 974-975.

Freeport ignores the testimony of its own rebuttal expert and the Water Commissioner, and instead argues that any injuries caused at Cosper’s Crossing by Freeport are simply irrelevant to the real issues at hand. Freeport at 61.

The real issue is whether injury to the rights of parties to the Decree would result from approval of Freeport’s Applications. Freeport’s proposed changes

would cause Cospers Crossing to go dry earlier, more often and for longer periods of time. When Cospers Crossing is dry, Duncan-Virden Valley diverts all of the visible surface flow of the River. The restoration of surface flow below Cospers Crossing would be further delayed by the creation of a losing stream which would result from diversion by Freeport's proposed new wells above Cospers Crossing. The River in the Duncan Verde Valley above Cospers Crossing would have to recover before it could restore flows over Cospers Crossing to reestablish flow in the River to meet the Tribe's call for water many miles downstream.

Freeport's proposed wells may exacerbate an already precarious hydrologic condition. ER at 63. The district court has previously found the water from wells is higher in salt than in undiverted surface water. *Supra.* at 14. Freeport's wells will increase the salt load in the River downstream. Freeport's proposed changes would also injure the rights of other parties to the Decree whose Decree lands are upstream from Freeport's present surface diversion, and who therefore have an upstream advantage on Freeport, and parties who are above Cospers Crossing but downstream from Freeport's proposed diversion by wells. Freeport's proposed wells would give it an upstream advantage over such parties

Based on a careful review of the injury evidence introduced, the district court correctly ruled that Freeport's changes "...would create a lag time for recovery of the stream if Freeport was required to stop pumping to meet the

Apache call. ER 62-63; ER 898-899. Therefore, Freeport "... must address whether the Cospers Crossing will become dry at a later time and if so, whether this change will have a harmful effect on downstream Decree right holders." ER 65. The district court ruled that proposed transfers above Cospers Crossing must have an injury analysis that specially addresses the impact on Cospers Crossing. The district court's ruling should be affirmed.

**F. Freeport Must Introduce Evidence Of The Cumulative Impact Of The 59 Sever And Transfer Applications Of 2,066.34 Acre-Feet Of Decree Rights To More Than 60 Separate Proposed Places Of Use As A Matter of Logic And Equity.**

The district court did not err when it ruled that "Freeport must introduce evidence that the cumulative impacts of the proposed transfers do not cause injury to other water right holders under the Decree." ER 66. Freeport filed 59 of the 419 applications to sever and transfer filed by UVDs in June 2008. Freeport Applications call for the sever and transfer of 2,066.34 acre feet of the total UVD applications to transfer over 10,000 acre-feet of water. ER 5. These filings were an extraordinary occurrence under the Decree. Previously, but a few sever and transfer applications had been filed since the entry of the Decree in 1935 and the promulgation of requirements for sever and transfer set out by Commissioner Firth on December 13, 1936. ER 761. The district court recognized that "[t]he simultaneous transfer of multiple Decree water rights is an unusual circumstance,

and it raises the issue of the cumulative impacts of the water right transfers. It cannot be denied that, while a single water right transfer may have small impacts, the cumulative impacts of multiple water right transfers may be significant.” ER 66.

The cumulative impact of the Freeport applications alone called for the transfer of 2,066.34 acre-feet of water to land with no Decree rights. The 2,066.34 acre-feet proposed to be transferred under the Freeport applications is one-third of the entire 6,000 acre-feet senior right of the Tribe.

The district court grasped the reality of the condition and geography of the river, and the potential impact of these 59 applications on the rights of others under the Decree. ER 59. The district court ruled that Freeport’s “interpretation does not take into account the realities of irrigation or the geography of the Gila watershed.” ER 58. Clearly this change of place of use and points of diversion of 2,066.34 acre-feet will affect the timing, volume and quality of flows at various locations on the River.

The district court presides as a Court in Equity over this Decree. It cannot ignore or avoid facts which clearly impact the water supply of the River, which is the Court’s subject matter jurisdiction. The district court properly ruled that Freeport failed to provide the court with facts essential to the proper consideration of the Freeport application under Article XI and which are also necessary for the

administration, interpretation and enforcement of the Decree under its continuing jurisdiction under Article XIII. (ER 498). As this Court has said, “. . . in an equitable proceeding such as this, all such evidence is relevant to making an informed decision.” United States v. Gila Valley Irrigation District., 31 F.3d 1428, 1433 (9th Cir. 1994).

The district court has encountered the cumulative impact of the UVD practices in the past, such as the diversion of water for Decree lands which had been permanently removed from irrigation, or fallowed, and used on other Decree lands; the diversion of water for uses other than to grow “crops of value”; and the diversion of water under apportionment in disregard of the Tribe’s right. Each individual action by itself was a violation of the Decree. Each violation was one cut of ten thousand cuts, which cumulatively depleted the flow and degraded the water quality necessary to satisfy the Tribe’s right.

In 1996 the District Court found:

The courts of the western states generally agree that a prior appropriator of water is entitled to protection, including injunctive relief, against material degradation of the quality of the water by junior appropriators upstream. *See, e.g., Phoenix Water Co. v. Fletcher*, 23 Cal. 481, 487 (1863); *Salt Lake City v. Boundary Springs Water Users Ass’n*, 2 Utah 2d 141, 270 P.2d. 453 (1954). Further, the Supreme Court has held: “What diminution of quantity, or deterioration of quality, will constitute an invasion of the right of the first appropriator will depend on the special circumstances of each case, considered with reference to which the water is applied.”

*United States v Gila Valley Irrigation Dist.*, 920 F. Supp. 1444 (D Ariz. 1996) (quoting *Atchison v. Peterson*, 81 U.S. 507, 514-15 (1974)).

The district court is not obliged, as Freeport suggests, to disregard to the *actual* impact of Freeport's multiple and simultaneous transfers just because the Change In Use Rule requires the filing of a separate application for each proposed transfer. Freeport at 63-64. The protections of the Decree and the practical consequences of water right transfers sensibly do not turn on such procedural niceties.

It was not error for the district court in analogizing to *Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Department of Interior*, 608 F.3d 592, 602-607 (9th Cir. 2010), where this Court determined that the agency conducted a deficient cumulative adverse impact analysis. Freeport's complaint (Br. 64-65) is that *Te-Moak Tribe* concerned the National Environmental Policy Act ("NEPA"), not the Decree. Freeport at 64-65. True enough, but as the district court explained, "[w]hile the case before this Court does not arise under NEPA, the rationale behind requiring a cumulative impact analysis"—namely, that "[s]ometimes the total impact from a set of actions may be greater than the sum of its parts"—"is the same." ER 66 (citation and quotation marks omitted). Freeport does not challenge that basic rationale here.

The district court's decision to require a cumulative impact analysis of all of Freeport's applications on the rights of others under Article XI of the Decree was proper, well reasoned and within the equitable powers of the district court under Article XI and XIII, and should be affirmed.

**II. THE DISTRICT COURT CORRECTLY RULED THAT FREEPORT FAILED TO INTRODUCE EVIDENCE TO PROVE THAT ITS CHANGES WOULD NOT CAUSE INJURY TO OTHER PARTIES UNDER THE DECREE**

**A. Freeport's Analysis Of The Prima Facie Standard Is Not Supported By Its Own Argument, Article XI Or The Change In Use Rule.**

Freeport cites to a number of cases to define and support its interpretation of the *prima facie* standard without any argument or discussion of those cases. Freeport at 59. Freeport does not explain why these cases are relevant or how they help the Court. These cases do not support Freeport's position that it has met its burden of proof under Article XI and the Change in Use Rule to establish a *prima facie* case of no injury resulting from its proposed changes.

Freeport incorrectly cites and misquotes the definition of a *prima facie* case in *[Nolte] v. Winstanley*. Freeport at 59 citing *[Nolte] v. Winstanley*, 145 P. 246 (Ariz. 1914). The case actually states that, "a prima facie case is one which is established by sufficient evidence and can be overthrown only by rebutting evidence adduced on the other side." Abbott's Law Dic. vol. 2, 312. 'A prima facie case is that which is received or continues until the contrary is shown.' 22 Am. &

Eng. Ency. L. (2d Ed.) p. 1294. *Id.* at 332. First, Article XI clearly puts the initial burden on Freeport to prove that its changes will not injure other parties, including the Tribe. The *Nolte* case and the Change in Use Rule confirm that the Tribe was under no obligation to introduce any evidence of injury unless and until Freeport had met its burden to "establish a *prima facie* case". ER 214. Freeport failed to meet its burden when it failed to introduce evidence on the topic of injury adequate to establish a *prima facie* case during its case-in-chief. ER 7, 62.

Sufficient evidence is "[e]vidence that is sufficient to satisfy an unprejudiced mind seeking the *truth*." Evidence, Black's Law Dictionary (7th ed. 1999) (emphasis added). The truth here is that the changes requested by Freeport's 59 Applications will impact the River in multiple ways. Neither the Decree nor the Water Quality Injunction can stop those changes from affecting the rights of other parties. Whether those changes are injurious to the Tribe's water rights and other parties can only be determined through a factual good-faith injury analysis.

*U.S. v. Parks*, cited by Freeport is inapplicable to this case. Freeport at 59 citing *United States v. Parks*, 421 U.S. 658 (1975) ("Parks"). *Parks* discusses the elements and factual allegations which are necessary for the United States to meet its *prima facie* burden when prosecuting corporate employees who have violated certain provisions of the Federal Food, Drug and Cosmetic Act ("Act") relating to



food contamination. *Id.* at 673-674. The elements of these allegations are set out in the Act.

Freeport also cites *City of Glendale v. Farmers Ins. Exchange*, 126 Ariz. 118 (Ariz. 1980) (Glendale). In that case, Glendale sued Farmers Ins. Exchange (“Farmers”) for breach of duty of good-faith. *Id.* at 119. Glendale had been sued for failure to properly warn of a hazard resulting in a car crash with severe injuries. *Id.* Farmer’s insured Glendale with a maximum coverage for liability of \$100,000. *Id.* After a good faith investigation predicted a successful defense, Farmers offered the plaintiffs \$25,000 of the City’s \$100,000 policy to settle the claims. *Id.* at 119. As trial approached, Glendale, concerned with the possibility of a verdict exceeding its \$100,000, coverage sent Farmer’s a written “demand letter” instructing Farmers to offer the policy limits in settlement. *Id.* at 120. Farmers nevertheless relied upon its previous evaluation and declined to offer the policy limits in settlement. *Id.* At trial the plaintiffs were awarded \$280,000. *Id.* Glendale sued Farmers for breach of its duty of good faith. *Id.* The Court ruled that in order to avoid a directed verdict the non-movant must provide a *prima facie* case. “In other words, there must be evidence sufficient to justify, although not necessarily compel, an inference of liability.” *Id.*

As its *prima facie* evidence, Glendale introduced testimony of three persons who each testified regarding their familiarity with the suit and their evaluation that

the case was one with a high likelihood of recover in excess of policy limits. *Id.* at 120. The Court ruled that the Glendale's testimony by its "experts" about their familiarity and general knowledge of the case was not *prima facie* evidence. *Id.*

Glendale also introduced its “demand letter” to Farmers in which it instructed Farmers to offer the full \$100,000. *Id.* at 121. The Court ruled that “the city’s reliance upon its ‘demand letter’ is misplaced. Although we agree that, under ordinary circumstances, an attorney should abide by the specific mandate of his or her client, as this opinion has indicated, the liability insurers obligation is one of equal consideration.... For example, the fact of a demand alone should not be sufficient cause to require a \$100,000 offer when a diligent, good-faith investigation reveals a settlement value of only \$25,000.” *Id.* at 121.

*Glendale* does not help Freeport here. Freeport’s rebuttal expert testified that he had not done the analysis necessary to determine whether Freeport’s proposed changes would injure the water rights of the Tribe or other parties. ER 993-994. Freeport’s reliance on the “paper” protections afforded to the Tribe under the Decree and the Water Quality Injunction are misplaced. Here, previous evaluation by the district court that the senior priority of the Tribe under the Decree have historically been inadequate to protect the rights of the Tribe. *Supra* at 18-19.

Freeport had the initial burden to establish a *prima facie* case under the Change in use Rule and Article XI. Freeport failed to introduce evidence adequate to establish a *prima facie* case. The generalized testimony by Freeport's rebuttal expert is not adequate to establish a *prima facie* case, and Freeport's recital of "paper" protections of the Decree and Water Quality Injunction do not satisfy the evidentiary requirements to establish a *prima facie* case.

The district court correctly interpreted the *prima facie* standard when it ruled that Freeport's evidence was not *prima facie* evidence.

The district court's ruling should be affirmed.

**B. Freeport Never Introduced Evidence To Show That Its Changes Would Not Cause Injury To The Tribe.**

At the close of Freeport's case-in-chief, the Apache Tribe made a standing motion for Summary Judgment as a Matter of Law, asserting that Freeport failed to meet its *prima facie* burden. ER 58, 1092, 1046. The Court took the Motion under advisement.

The district court then proceeded to take evidence on the objections of the Tribe, the United States and the Community.

The United States and the Tribe introduced evidence on examples of the potential injury to others which could result from the proposed changes. ER 57. The expert for the United States and the Tribe testified that the Applications, if granted, could result in injury to the rights of the Tribe. ER 59. The Tribe

introduced evidence that the location of use, point and type of diversion matter and that the proposed changes would have the potential of causing injury to the rights of the Tribe. ER 58. In rebuttal, Freeport's expert testified that he had not performed the detailed analysis necessary to evaluate the injury impacts. ER 57, 855-860, 866-867.

Freeport provided no other evidence in or appended to its Applications to show that its proposed changes would not cause injury to the rights of the Tribe. ER 57. Part 26 of the Application form asks the Applicant to state its opinion of whether "the change in point of diversion, place, means, manner or purpose of use [will] affect any other users," and to explain why. *See, e.g.*, ER 313, 1100, 1139; SER 672:9; SER 706:11. Freeport marked its Applications to indicate that there would be no effect on any other user. To explain why Freeport's changes would have zero effect on other users Freeport inserted the following statement in *all* 59 applications:

All that will be changed as a result of this application will be the location of decreed rights and associated point of diversion under the Globe Equity No. 59 Decree. The priorities, volumes of water use and acreage will not change. There will be no net increase or decrease in decreed rights as a result of this proposed severance and transfer.

ER 57, ER 313.

Freeport's statement in the Application is not evidence of how Freeport's proposed changes will affect other parties to the Decree. ER 58-59. Freeport is

attempting to avoid the physical reality of its proposed changes by arguing that the words which describe the Apache priority in the Decree make it impossible for the Tribe to be harmed.

During discovery, Freeport disclosed no evidence, or intent to introduce evidence to meet its *prima facie* burden. As the close of discovery neared, Freeport disclosed the identity of Eric Harmon as a rebuttal witness to any evidence concerning injury that United States or the Tribe may introduce. However, during its case-in-chief, Freeport offered no evidence to meet its *prima facie* burden. ER 58.

After careful review of Freeport's argument and the "paper" protections that Freeport recited as its *prima facie* evidence, the district court determined that "[i]n essence, Freeport contends that a change to the location of use of a Decree water right or point or type of diversion are immaterial to the injury inquiry, so long as the right priorities, volumes and acreage remain unchanged." ER 58. This argument is not based in reality. Freeport refers to the existing "protections afforded to the Tribe" under the Decree and Water Quality Injunction, but it cites to no specific protections in either document. Freeport cites to nothing in the Decree which would support its argument that protections in the Decree allow the Applicant or the district court to disregard the equitable requirement of "no injury" under Article XI. Freeport's argument is misleading.

There is no question that Freeport failed to introduce any evidence regarding potential injury, in its Applications, during discovery, at trial or during rebuttal. ER 58. The district court correctly ruled that Freeport failed to meet its burden. ER 61.

Article XI conditions any changes to a water right on proof by the applicant and a finding by the Court that there will be no injury to the right of other parties. The district court's ruling should be affirmed.

### **III. FREEPORT DID NOT MOVE TO AMEND ITS APPLICATIONS TO CONFORM TO THE EVIDENCE**

Freeport argues that the district court abused its discretion when it denied Freeport's request to amend its applications to conform to the evidence presented at Trial. Freeport at 65. Freeport is mistaken because it neither filed a written motion nor made a standing motion to amend under Federal Rule of Civil Procedure 15, during or at the end of this trial.

In fact, during Freeport's closing argument, the district court squarely addressed that while Freeport had disclosed revised legal descriptions and maps during discovery, and entered these legal descriptions and maps as exhibits during the hearing, it had not taken any action to actually amend its applications. The court stated:

“Freeport has not made a motion, filed an amendment, changed their application with respect to any of these ten sever or transfer parcels. And it seems to me that you have to take a position about it. All I

have are exhibits without Freeport saying what these exhibits are, other than calling them “revised legal descriptions.”

ER 918-919.

Freeport’s Counsel responded to the Courts inquiry: “[a]nd part of our hope here is under Rule 15 where you hear the evidence at trial you can amend them back.” *Id.* The Court was clear in its response, stating, “But you haven’t asked me to.” *Id.* Counsel for Freeport replied, “Well, and I guess that’s the point. We’re not going to ask . . . .” *Id.*

Instead of clearly moving the Court to amend its applications, or filing amended applications with the Gila Water Commissioner, Freeport only raised the possibility of amendment as a sort of back up alternative to which it was not willing to commit. As counsel for the Community stated:

... what I have heard them describe today is more like, “let’s make a deal” than “We have an application pending. We would like you to consider it on the four corners document and this is what it is.”

Instead they have said, “Well, if you think it’s this, we’ll go with that. And if you think it’s that, we’ll go in that direction.”

But we’re not quite sure what we’re supposed to take aim at. We don’t know, are we talking about the new legal descriptions when we go through the applications and try to present to you our final closing argument or are we talking about the original applications as they originally presented them and we prepared very copious expert reports to address.

Now, we believe that’s a matter of critical process not just a matter of whether these particular applications are considered. And as we’ve seen it, as you pointed out, we’ve never had the benefit of a motion to address in terms of amendment. We’ve never had any specific commitment to a particular set of applications.

And as I said, they seem to be wanting to proceed with two sets of applications at the same time, hoping that one set would possibly get through the process. And it doesn't really matter which one, as long as they get to the other end.

ER 931-932.

Not only did Freeport fail to move the Court for an amendment under Rule 15, Freeport never took a clear position on how it wanted to characterize its revised legal descriptions and maps.

Freeport disclosed revised legal descriptions and maps during the discovery process, and discussed with the court the possibility of the court accepting the revisions under certain conditions, but it did not move the court to file amended applications with the Gila Water Commissioner's office, and it did not move the court to amend under Rule 15.<sup>3</sup> Freeport is therefore without basis to claim that the court denied such a motion, much less to assert that the court abused its discretion in doing so.

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<sup>3</sup> See Trial Transcript pages 1466 – 1474 (ER 918-926) for discussion between the court and Freeport's counsel regarding the possibility of amendment.



## CONCLUSION

The district court's ruling that Freeport failed to meet its burden under Article XI of the Decree and the Change in Use Rule should be affirmed. The district court's ruling that the Decree and the Water Quality Injunction are not *prima facie* evidence that Freeport's proposed changes will not injure the Tribe or other parties should be affirmed. The district court's ruling that Freeport must provide an injury analysis at the Cospers's Crossing Location and a Cumulative injury analysis for its 59 proposed changes should be affirmed.

The San Carlos Apache Tribe respectfully requests the Court to affirm the order of the district court.

Respectfully Submitted on this 12<sup>th</sup> of June, 2015

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## CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief is in 14-point Times New Roman proportional font and contains 8,717 words, and thus complies with the type-volume limitation set forth in Rule 28.1(e)(2)(A) of the Federal Rules of Appellate Procedure.

RESPECTFULLY SUBMITTED: June 12, 2015

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**CERTIFICATE OF SERVICE**

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

By: Joe P. Sparks