No. 14-17185 (14-16942, 14-16943, 14-16944, 14-17047, 14-17048)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee, and

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

v.

GILA VALLEY IRRIGATION DISTRICT, *et al.*
Defendants, and

FREEPORT MCMORAN CORPORATION,
Defendant-Appellant.

On Appeal from the United States District Court for the District of Arizona
(D. Ct. Nos. 4:31-cv-00059-SRB, 4:31-cv-00061-SRB)

OPENING BRIEF FOR THE UNITED STATES AS APPELLANT

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STATEMENT OF JURISDICTION

This appeal by the United States (No. 14-17185) – along with appeals by the San Carlos Apache Tribe of Arizona (the "Tribe") (No. 14-16943) and the Gila River Indian Community (the "Community") (No. 14-16942) and cross-appeals by Freeport Minerals Corporation ("Freeport") (No. 14-16944), Larry W. Barney et al. (No. 14-17047), and the Gila Valley Irrigation District ("GVID") (No. 14-17048) – arise from post-judgment proceedings in a water-rights adjudication initiated by the United States as plaintiff in 1925. *See United States v. Gila Valley Irrigation District*, 31 F.3d 1428, 1430-32 (9th Cir. 1994) ("*GVID IV*") (describing litigation).[1] The district court had jurisdiction over the original adjudication under 28 U.S.C. §§ 1331 and 1345, and entered a consent decree (the "Globe Equity Decree" or "Decree") in 1935. *Id.* at 1430. The Tribe and Community are plaintiffs by intervention. *Id.* at 1432. The district court has continuing jurisdiction to interpret and enforce the Decree. *Id.* at 1431.

[1]This Court has issued seven prior decisions in these proceedings: (1) *United States v. Gila Valley Irrigation District,*118 F.2d 507 (9th Cir. 1941) ("*GVID I*"); (2) *United States v. Gila Valley Irrigation District*, 454 F.2d 219 (9th Cir. 1972) ("*GVID II*"); (3) *United States v. Gila Valley Irrigation District*, 961 F.2d 1432 (9th Cir. 1992) ("*GVID III*"); (4) *GVID IV*, 31 F.3d 1428 (9th Cir. 1994); (5) *United States v. Gila Valley Irrigation District*, 117 F.3d 425 (9th Cir. 1997) ("*GVID V*"); and *United States v. Gila Valley Irrigation District*, 345 Fed. Appx. 281, 2009 WL 2877432 (9th Cir. 2009); and (7) *United States v. Sunset Ditch Co.*, 472 Fed. Appx. 472, 2012 WL 902902 (9th Cir. 2012).

In 2008, numerous "upper valley defendants" ("UVDs") – including Appellee/Cross-Appellant Freeport – filed a total of 419 applications to sever decreed irrigation rights from water-righted lands and transfer those rights to irrigable lands without decreed rights. ER 5. The United States, the Tribe, and the Community objected to the applications and asserted, as counterclaims, that many of the rights proposed for transfer had been forfeited or abandoned. *Id.* To expedite review, the district court grouped Freeport's 59 applications under a new docket number,[2] ER 300, and held a trial on a subgroup of ten Freeport applications. ER 6. On August 3, 2010, the district court issued an opinion and order denying all ten applications but also denying relief on the objectors' counterclaims (with the exception of an order declaring the water rights appurtenant to one 1.4-acre parcel to have been abandoned). ER 79.

Freeport timely appealed from the August 3, 2010 order, but this Court held that it lacked appellate jurisdiction because the order "deal[t] with only 10" of Freeport's 59 applications and because "issues related to Freeport's other applications, as well as issues related to other applicants" remained to be resolved.

[2] The original water-rights adjudication was filed in district court in Globe, Arizona and docketed as "Globe Equity No. 59." Post judgment proceedings have continued on that docket, now designated No. 4:31-cv-00059-SRB (D. Ariz). The district grouped the 59 Freeport applications under new Docket No. 4:31-cv-00061-SRB (D. Ariz.). ER 300.

United States v. Sunset Ditch Co., 9th No. 10-16968, Mem. Op. at 3 (Mar. 19, 2012), *published at* 472 Fed. Apx. 472, 2012 WL 902902. Thereafter, Freeport moved the district court to deny its remaining applications on the grounds that dismissal was mandated by the law of the case established in the August 2010 Order.[3] ER 254. The district court granted Freeport's motion, ER 258, and, in October 2012, entered a similar stipulated order resolving the objectors' related counterclaims. ER 251. The order stated, however, that the orders on Freeport's applications and related counterclaims would not be "final" until resolution of all 419 sever-and-transfer applications filed in 2008. ER 253.

On September 4, 2014, following notice that all remaining transfer applications and counterclaims had been withdrawn, the district court entered final judgment, pursuant to Fed. R. Civ. P. 58(a), "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." ER 1. Timely notices of appeal were filed by the Community, ER 137 (Oct. 3, 2014), the Tribe, ER 248 (Oct. 6, 2014), Larry W. Barney et al., ER 131 (Oct. 16, 2014), Freeport, ER 134 (Oct. 6, 2014), GVID, ER

[3] Freeport also voluntarily withdrew 29 applications. ER 255.

129 (Oct. 17, 2014), and the United States. ER 126 (Oct. 31, 2014). This court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the district court erred in holding that Arizona water rights vested prior to 1919 are not subject to forfeiture under the Arizona Water Code; and
2. Whether the district court erred when holding that the prolonged nonuse of irrigation water rights on lands long lost to river erosion does not support a finding of abandonment.

PERTINENT STATUTES

Pertinent statutes are set out in the statutory addendum to this brief.

STATEMENT OF THE CASE

A. Introduction

Freeport seeks to sever and transfer specified Globe Equity Decree water rights or portions thereof, which Freeport concedes have long been unused and cannot practicably be used for irrigation at the decreed place of use. The United States, the Tribe and the Community variously objected to Freeport's change-in-use applications and counterclaimed that the subject rights have been forfeited and/or abandoned under Arizona law. The district court correctly found Freeport's applications to be fatally deficient on several grounds, but denied relief on most of

the objectors' counterclaims, holding, inter alia (1) that water rights that vested before the enactment of Arizona's 1919 Water Code are not subject to forfeiture, and (2) that the prolonged nonuse of irrigation water rights on lands that have become "river bottom" or "active river channel" does not support a finding of abandonment. For the reasons explained *infra* (pp. 26-55), those holdings are in error.

B. Background

1. Globe Equity Decree

The Gila River originates in western New Mexico and flows westerly across Arizona to a confluence with the Colorado River near the California border. *GVID II*, 454 F.2d at 220. In 1924, Congress authorized construction of the San Carlos Project – including the Coolidge Dam and San Carlos Reservoir – to impound and store Gila River water for the beneficial use of the Community and designated non-Indian beneficiaries, now organized as the San Carlos Irrigation and Drainage District ("SCIDD"). *Id.*; *see also GVID I*, 118 F.2d at 508. At the time, farmers in the Safford and Duncan-Virden valleys already were making substantial use of Gila River waters upstream from the Project area to the detriment of downstream tribes. *See* Act of June 7, 1924, c. 288, 43 Stat. 475. The United States initiated the Globe Equity Decree proceedings to obtain – as against these "upper valley defendants" ("UVDs") and others whose water use was impairing or threatening

Project and tribal rights – a declaration of preexisting water rights held on behalf of the Community and Tribe as well as a declaration of water rights in the Project. *Id.*

The final Globe Equity Decree determined the relative rights of all water users on the Gila River mainstem from the point where the Salt River joins the Gila River (at the Gila River Indian Reservation) to a point upstream ten miles east of the Arizona-New Mexico border. *See In re General Adjudication of All Rights to Use Water in the Gila River System and Source*, 212 Ariz. 64, 73, 127 P.3d 882, 891 (Ariz. 2006). The Decree established a permanent officer – the Gila Water Commissioner – to "carry out and enforce" the Decree's provisions under the supervision of the district court. *See GVID III*, 961 F.2d at 1433.

Under Article VI of the Decree, the United States possesses (1) the right to divert, from the natural flows of the Gila River above the San Carlos Reservoir, 6,000 acre feet per year for the benefit of the Tribe, with a priority date of 1846, (2) the right to divert, from the natural flow of the Gila River, 210,000 acre feet per year for the benefit of the Community with a priority date of "time immemorial," and (3) additional rights to store and use water in the San Carlos Reservoir on behalf of the Community and SCIDD with priority dates of 1916 and 1924. ER 490.

Under Article V of the Decree, UVDs possess, in accordance with a "schedule of rights and priorities," the right to divert "and apply to beneficial use .

. . for the irrigation" of specified lands, "a total amount of water not exceeding 6 acre feet per . . . acre" at a diversion rate not to exceed "one-eightieth (1/80) of a cubic foot per second for each acre . . . for the area then being irrigated." ER 406. The schedule of rights lists, for each party, the priority date of the party's right, the name of the "diverting and/or carrying structure," the point of diversion, and the "lands for which [the] right [was] acquired," described in terms of the "number of acres," and the township, range, section, and subdivision (*i.e.*, quarter-quarter section) within which the water-righted acres lie. *See*, *e.g.*, ER 408-413.

2. Pumping Complaint and Upper Valley Forbearance Agreement ("UVFA")

Article XIII of the Decree enjoins all parties from asserting rights in the Gila River not specified in the Decree, and from "diverting, taking or interfering . . . with the waters of the Gila River . . . in any manner to prevent or interfere with the diversion, use or enjoyment of said waters by the owners of prior or superior rights." ER 498. In 2001, the Community, the Tribe, SCIDD, and the United States filed a post-judgment complaint (the "Pumping Complaint") asking the district court to enforce Article XIII against Upper Valley irrigation districts and thousands of individual UVDs who are operating wells to pump irrigation water in addition to their decreed rights. ER 170-180. The district court held that the Globe Equity Decree "governs pumping by the parties to the Decree when those parties'

wells are pumping subflow" of the Gila River[4] (ER 176), and that it is "likely" that "many" UVD wells are pumping subflow. ER 164. Whether specific UVD wells are pumping subflow, however, remains to be litigated. ER 160, 165.

In 2006, the Community, SCIDD, and the United States – but not the Tribe or the United States as owner of water rights held in trust for the Tribe[5] – entered the Upper Valley Forbearance Agreement or UVFA,[6] in which the settling plaintiffs agreed to dismiss their claims in the Pumping Complaint, without prejudice, in exchange for agreements by the UVDs to permanently reduce, by 1,000 acres, the number of Upper Valley acres that may be irrigated and to otherwise limit the use of pumped water in the Upper Valley. *See* ER 161-65, 358-379. Under the UVFA, any lands within a specified "UV Impact Zone" that do not have Decree rights but were irrigated at any time between 1997 and 2001 are deemed "Hot Lands." ER 339 (¶ 2.15). The UVFA provides that any owner of

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[4] Under Arizona law, "subflow" is part of a stream for purposes of prior appropriation. *In re the General Adjudication of All Rights to Use Water In the Gila River System and Source*, 175 Ariz. 382, 386-389, 857 P.2d 1236, 1240-43 (Ariz. 1991). *See also In re the General Adjudication of All Rights to Use Water in the Gila River System and Source*, 198 Ariz. 330, 343, 9 P.3d 1069, 1072-73 (Ariz. 2000) (defining subflow).

[5] *See* ER 349-350 (¶ 2.40), 356 (¶ 4.13.3), and 357 (¶ 4.26.2)] (excluding claims of the Tribe and the United States on behalf of the Tribe).

[6] The UVFA was part of a Congressionally-approved settlement of the water rights of the Community. *See* Pub. L. 108-451, 118 Stat. 3478 (2004) (Arizona Water Settlements Act).

Hot Lands who "makes or made a good faith application" to transfer Decree rights to such lands, and who abides by other conditions, may continue to irrigate the lands with up to 4.5 acre feet per acre of pumped water, notwithstanding the absence of a Decree right. ER 347 (¶ 2.32) and 380 (¶ 6.3).

The Settling Plaintiffs agreed that UVDs could file such applications any time within six months of the UVFA's enforceability date (December 14, 2007), ER 393 (¶ 1.1), and that the Settling Plaintiffs would not object to applications that were timely filed and in compliance with the district court's 1993 Change-in-Use Rule. *Id*. (¶11.2). These provisions prompted the 419 change-in-use applications referenced above (p. 2), including the Freeport applications addressed by the district court in its August 2010 order. *See* pp. 13-20, *infra.*

3. Change-In-Use Rule

The Globe Equity Decree states that any party "shall be entitled . . . to change the point of diversion and the places . . . of use" of any decreed right, if such change is done "in accord with applicable laws and legal principles" and "without injury to the rights of other parties." ER 497 (Article XI); *see also* Ariz. Rev. Stat. 45-172 (Arizona statute regarding transfer of water rights). In 1993, the district court issued an order to govern change requests under the Decree. ER 209. This "Change-in-Use Rule" provides that any party seeking to change the use of a decreed water right must file, with the Gila Water Commissioner, a change-in-use

application containing specified information. ER 210-211. The Commissioner must publish notice of the receipt of any change-in-use application. ER 212. Any party may then object to the requested change-in-use, and any objector is entitled to an evidentiary hearing before the district court. ER 213. No change in use can take effect without a court order. ER 214.

C. Freeport's Transfer Applications

1. Proposed Transfers

In 1997, Freeport began purchasing farms in the upper valley of the Gila River as part of a program to acquire water rights for potential future use in the company's mining operations. ER 262-63, 269-70, 288. The farms include approximately 4,500 acres with decreed water rights. ER 286. Freeport leased the farms under terms requiring the farmer/lessees to maintain water rights. ER 268. Freeport has paid annual assessments on Decree water rights, ER 11, which the district court imposes on a per-Decree-acre-owned basis, to fund the office of the Gila Water Commissioner. ER 52.

In 2008, prompted by the terms of the UVFA (*supra*), Freeport undertook a concerted effort to identify any "inactive" Decree rights and to transfer those rights to its Hot Lands. ER 291-92. Freeport identified potential rights for transfer using so-called "TBI" reports. ER 291. Until 1992, the Gila Water Commissioner permitted canal operators to divert amounts determined by the total number of

Decree acres within a service area, without regard to whether individual farmers were irrigating or could irrigate all such acres. *See GVID IV*, 31 F.3d at 1431-32. In 1992, the district court held that the Decree limits diversions to acres "then being irrigated" – "TBI " – and this Court affirmed. *Id.* at 1438-1440. To enforce compliance with the TBI ruling, the Commissioner requires parties to submit TBI reports that identify, per quarter-quarter section, total Decree acres, total TBI acres (Decree lands), and total acres irrigated without a Decree right. *See* ER 191-195.

From these reports, Freeport created an inventory (a) of its quarter-quarter sections with Decree acres not being irrigated and (b) of its quarter-quarter sections being irrigated without Decree rights. ER 291. Freeport then matched comparably-sized acreages across the two lists to "populate" 59 separate transfer applications. ER 276-77. Freeport attempted to match sever (water-righted) acres with transfer (proposed use) acres within the same canal service area. ER 292. However, where such matches were not possible or not the best fit, Freeport matched sever and transfer acres across canal service areas or irrigation districts, proposals made possible by Freeport's "large portfolio" of upper valley properties. *Id.* Altogether, Freeport sought to transfer water rights appurtenant to 250 to 300 acres. ER 273-74. In each of its applications, Freeport self-reported that it was "not practicable" to use the subject water right (or the portion proposed for

transfer) at the existing place of use and that there had been no use for at least ten years. ER 11 (¶ 32); *see also, e.g.*, ER 310.

2. Proceedings on Transfer Applications

Freeport filed its applications with the Gila Water Commissioner on June 13, 2008. ER 17; *see also, e.g.*, ER 308-322. The Commissioner designated the applications Nos. 2008-113 through 2008-171 (ER 300) and served and published notice on September 2, 2008. *See e.g.* ER 305-07. Over the next several months, the United States, the Tribe, and the Community (the "Objecting Parties") filed separate objections to the applications in the district court. ER 5. The United States, the Tribe, and the Community likewise began to file objections to the other 360 change-in-use applications filed by other parties. *See generally* ER 583-622.

On May 20, 2009, after soliciting proposals from all interested parties on the best method for adjudicating the large number of contested applications, the court determined "in its discretion" to begin with Freeport's applications and, pending resolution of those applications, to stay proceedings on the others.[7] ER 152-53. Per the district court's order, the parties designated ten applications – Nos. 115, 118, 122, 133, 138, 147, 150, 151, 162, and 166 – for initial adjudication. ER 6.

[7] As noted (p. 2, n. 2, *supra*), for administrative purposes, the court created a new docket number – 4:31-cv-00061 – for filings in the proceedings on Freeport's applications. ER 300.

The district court held a trial on these applications between February 9 and February 25, 2010. ER 2, 6.

C. District Court Decision

The district court issued findings of fact, conclusions of law, and decisions on the 10 Freeport applications in a memorandum opinion issued in August 2010. ER 2-79. The district court denied all 10 applications for multiple reasons, ER 78, but also ruled against the objectors on their forfeiture and abandonment counterclaims. ER 38-50. 76. The court reasoned as follows.

1. Deficiencies in Sever and Transfer Parcels

Each of Freeport's applications contained a legal description of a proposed "sever parcel" (the land to which the subject water right was allegedly appurtenant) and a proposed "transfer parcel" (the proposed new place of use), as well as a map depicting these parcels as shaded polygons within the relevant quarter-quarter sections. *See*, *e.g.*, ER 318-321 (Application 2008-147). Freeport mapped and described the parcels without referencing historic Decree maps.[8] ER 293-98. To evaluate Freeport's applications, the United States and the Community retained

[8] Upon taking office, the Gila Water Commissioner obtained maps of water-righted lands that had been prepared in the 1920s by the State Water Commissioner, as part of the State Water Commissioner's official duties under Arizona's 1919 Water Code. *See* ER 7-8; *see also* 1919 Ariz. Sess. Laws, Ch. 164, § 25 (duty to prepare maps of water-righted lands to standard of "substantial accuracy").

experts who obtained the historic Decree maps and used public land-survey records to "georectify" the maps in relation to Freeport's application maps, and aerial photos taken between 1953 and 2003. ER 7-10, 36-37. The analysis revealed that all but one of Freeport's applications (No. 2008-115) described a sever parcel that was, at least in part, "outside the named Decree acreage" (*i.e.*, on lands without Decree rights) and/or a transfer parcel that already possessed Decree rights or contained roads, canals, or other areas where "crops of value" cannot be grown. ER 17-36, 75-78 (district court findings); ER 80-125 (trial exhibits).

After the United States and the Community disclosed these discrepancies during pretrial discovery, Freeport prepared revised maps and legal descriptions, which Freeport introduced at trial, in addition to the maps and descriptions in Freeport's applications. ER 6. In many cases, the revised sever or transfer parcels were "completely different" from those in the "original legal descriptions." See ER 17-36, 70-73 (district court finding).

In its post-trial ruling, the district court declined Freeport's request to consider the revised applications as amended pleadings, per Fed. R. Civ. P. 15. The court determined that the revisions made "material" changes to all ten applications, ER 72-73, and that such changes could not be adjudicated without new change-in-use applications, to ensure adequate notice to Decree parties. ER 71-73. Having thus determined that it could not "redline the maps or revise the

legal descriptions to correct [the] deficiencies," the court denied each affected application. ER 75. The court also denied all ten applications for: (1) incorrectly containing "language indicating that the Decree water right may float within a quarter-quarter section,"[9] (2) failing to provide a map and legal description of the relevant points of diversion, and (3) failing to provide Assessor Parcel Numbers, as required in the Change-in-Use Rule. *Id.*

2. Failure to Make Prima Facie Case of No Injury

The Change-in-Use Rule provides that, in any trial on a contested Change-in-Use Application, "[t]he applicant shall have the burden of establishing a prima facie case of no injury to the rights of other parties under the Gila Decree." ER 214. In each of its applications, Freeport asserted that the proposed transfer would not affect other users because the only change would be to the "location [of use] and associated point of diversion" and not to "priorities, volumes . . . and acreage." ER 11-12 (¶ 35); *see also, e.g.,* ER 313. At trial, Freeport presented no affirmative evidence on absence of injury. ER 12 (¶ 37). The United States and the Tribe

[9] In its applications, Freeport assumed that its irrigation rights were each appurtenant to the entire quarter-quarter section(s) listed in the Decree's schedule of rights and priorities and that precise parcel maps and descriptions were unnecessary. ER 69. Citing its own earlier rulings, the district court held that Decree water rights do not "float" within quarter-quarter sections, but are "appurtenant to . . . specific tract[s] of land through the irrigation of which the right[s] [were] acquired." *Id.*

argued that changes in the place of use of water rights can impact stream conditions and water quality to the detriment of other rights, even if the priorities, volumes, and acreage of the subject rights do not change. The Tribe also presented expert testimony demonstrating that the Freeport's transfers could diminish the quantity and quality of downstream flows available to the Tribe. ER 12-14 (¶¶ 38-57).

The district court agreed that Freeport's applications "raise[d] potential issues of water quality deterioration and water quality diminution," and that Freeport had failed to make out a *prima facie* case of no injury. ER 59. The court held that Freeport needed to present evidence to address the specific issues raised by the Tribe, ER 65, and that Freeport needed to address the potential cumulative effects of its multiple applications. ER 66-67.

3. Forfeiture

In 1919, the Arizona Legislature enacted the State's first comprehensive water code, which, for the first time, required permits for the appropriation of State waters. *See* Laws of Arizona, ch. 164 (1919); *see also Stuart v. Norviel*, 26 Ariz. 493, 498-501, 226 P. 908, 909-911 (Ariz. 1924) (describing statute). In Section One of the 1919 Water Code, the Arizona Legislature codified the rule of "beneficial use" and a related rule of forfeiture for nonuse, declaring 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.

Ariz. Sess. Laws, ch. 164, § 1 (1919); *see also* Ariz. Rev. Stat. 45-141(B)-(C) (1994) (beneficial use and forfeiture provisions codified).

Section One of the 1919 Water Code also contained a savings clause stating:

> 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.

Id.; *see also id.* § 56 ("Nothing in this Act contained, shall impair the vested rights of any person, association, or corporation to the use of water"); Ariz. Rev. Stat. § 45-171 (current code) ("Nothing in this chapter shall impair vested rights to the use of water . . .")

In 1995, as part of a series of amendments to the Arizona Water Code, the Arizona Legislature declared that "statutory forfeiture by nonuse shall not apply to a water right initiated before June 12, 1919," *i.e.*, the date the 1919 Water Code was enacted. *See San Carlos Apache Tribe v. Superior Court, County of Maricopa*, 193 Ariz. 195, 220, 972 P.2d 179, 204 (Ariz. 1999) (quoting amended Ariz. Rev. Stat. 45-141(C)). Upon review, the Arizona Supreme Court invalidated this amendment, finding it to be an unconstitutional retroactive change in

substantive law. *Id.* at 190. This ruling left the forfeiture statute, without the exemption for rights perfected prior to the 1919 Water Code, as governing law.[10] *See id.*, 193 Ariz. at 217-218, 972 P.2d at 201-202.

Despite the Arizona Supreme Court's ruling in *San Carlos Apache Tribe*, however, the district court declined to apply the rule of forfeiture to the water rights at issue in this case. Finding that *San Carlos Apache Tribe* had not interpreted the 1919 Water Code, the district court proceeded to construe the 1919 savings clause as compelling the same exemption that the Arizona Legislature attempted to provide in the 1995 amendment: *viz.*, a perpetual categorical exemption from statutory forfeiture for all rights perfected prior to the Code's enactment (hereinafter "pre-1919 rights"). ER 38-42. The court reasoned that, if forfeiture is applied to pre-1919 rights – in addition to common law abandonment – such rights would be more difficult to maintain and would be "impair[ed]" contrary to legislative intent. ER 40. The district court followed *In re Manse Springs & Its Tributaries, Nye County*, 108 P.2d 311 (Nev. 1940), a Nevada Supreme Court opinion interpreting a similarly worded Nevada statute. *Id.*

[10] The Arizona Supreme Court also invalidated other forfeiture exemptions added in 1995. *See San Carolos Apache Tribe*, 193 Ariz. at 207-208, 972 P.2d at 191-92 (addressing Ariz. Rev. Stat. 45-189(E)). Forfeiture exemptions added in 1974 remain in effect. *See id.*, 193 Ariz. at 207-208, 210-211, 972 P.2d at 226-27; Ariz. Rev. Stat. 45-189.

Because all ten Freeport applications involved pre-1919 rights, the court determined that forfeiture did not apply to those rights. ER 42.

4. Abandonment

Citing Arizona law and precedent from this Court (applying Nevada law), the district court determined that evidence showing prolonged nonuse, while not resulting in the forfeiture of pre-1919 rights, gives rise to an inference of abandonment. ER 43-45. The court determined that an owner can defeat a finding of abandonment by offering proof of the payment of water fees, but that such evidence is not sufficient in all cases. ER 45. Specifically, the court determined that, where a landowner makes use of a water right impossible by constructing a permanent structure (road, canal, or building) on water-righted lands and takes no steps, within a reasonable time, to transfer the appurtenant water right, the payment of water fees is not sufficient to defeat a finding of abandonment. *Id.* On the other hand, the court determined that where an owner pays water fees on lands left "fallow," evidence of prolonged nonuse is not sufficient to show abandonment. ER 46-47.

Applying these rules to Freeport applications, the district court concluded that Freeport (or a predecessor in interest) had abandoned the water right appurtenant to a 1.4-acre portion of the sever parcel in Application 147, because the 1.4 acres "have been [used for a] road and canal since at least 1991." ER 49-

50.[11] But the court declined to find an abandonment of the water rights appurtenant to other proposed sever parcels (or portions thereof) that had not been irrigated for at least as long due to erosion and/or movement of the river, namely: (1) 15.0 acres of mostly "river bottom" in application 122; (2) 12.24 acres of "active river channel and river bottom" in application 147; (3) 3.08 acres of "river bottom" in application 150; (4) 5.94 acres of "river bottom" in Application 151; and (6) 2.91 acres of "river bottom" in application 162.[12] ER 21-36, 46-57, 75-78.

[11] The court also observed that the water rights proposed for transfer in Applications 138 and 150 also appeared to be abandoned in part, but that the extent of abandonment was "inconclusive." *Id.* at 75-76.

[12] These acreage amounts reflect the district court's findings with respect to proposed sever parcels in Freeport's revised applications, which better reflect actual water-righted acres than Freeport's original applications. *See* ER 17. Although the district court determined that the revised applications were not properly before the court (because not presented in new applications with new public notice), ER 73, the objectors' counterclaims on abandonment do not depend on whether the revised parcels were properly noticed for transfer purposes.

SUMMARY OF ARGUMENT

A. Forfeiture

The district court determined that applying Arizona's forfeiture statute to pre-1919 rights would "impair" such rights – contrary to the terms of the 1919 savings clause – by taking away a "stick" from the "bundle of sticks" that Arizona water users acquired when appropriating water for beneficial use under pre-1919 law. This determination rests on the false premise that, at the moment a pre-1919 Arizona water user appropriated water to a beneficial use and thereby acquired a vested right of use, the user simultaneously acquired a vested right of non-use; *i.e.*, the freedom thereafter to cease water use indefinitely, without losing any priority of right, as long as the user manifested an intention to retain the right.

For at least three reasons, no such vested interest can be found in pre-1919 Arizona law. First, Arizona water rights always have been subject to equitable regulation by the Arizona legislature and the limitation of beneficial use. Because the prolonged nonuse of a water right is not beneficial use by the owner and effectively precludes appropriation by others (as long as the owner retains the right), the duty to "use or lose" a water right was implied in pre-1919 Arizona water law. Second, prior to the 1919 Code, prospective water users were free to appropriate any apparently available water and any water rights not being exercised were subject to loss as a result of appropriation and use by others. Thus,

any senior water user who failed to use a developed and perfected right and thereby facilitated appropriation and use by others for the five-year statutory limitations period would risk forfeiture under the doctrine of adverse use. Third, Arizona already had a forfeiture statute that was enacted in 1893 as part of a law requiring prospective users to post notice of intent to appropriate water. Although this predecessor statute was directed toward the failure to timely construct diversion structures or to use reasonable diligence to maintain such structures after posting notice of an intention to appropriate water, the statute reflected the broader duty to exercise diligence in all aspects of use of Arizona waters, and allowed forfeiture for nonuse occasioned by a lack of diligence, whether or not the nonuse reached five years.

When enacting the 1919 Water Code and permit requirement, the Arizona Legislature eliminated acquisition (and loss) or water rights via adverse use and replaced the statutory rule of forfeiture for lack of reasonable diligence with the rule of forfeiture for five years' nonuse. By replacing a hodgepodge of judge-made principles and a limited statutory forfeiture rule of somewhat uncertain application with a clear uniform rule of forfeiture for five years' nonuse, the Arizona Legislature did not fundamentally alter or impair water rights. Rather, the Legislature simply clarified the pre-existing duty of beneficial use and the consequences of noncompliance. If the newly codified rule were construed to

apply retroactively to pre-enactment periods of nonuse, it could have taken away or impaired vested rights that remained extant despite prolonged nonuse, *e.g.*, where forfeiture by adverse use or due to lack of diligence had not been adjudicated and remained uncertain. The Arizona Legislature evidently adopted the savings clause to eliminate concerns about lack of fair notice and due process that might arise from such retrospective application. But construing the statute to apply prospectively only, *i.e.*, solely to post-enactment nonuse of pre-enactment rights, raises no fair notice concerns.

Nor does prospective application of the statute raise any concerns under the Takings clause of the federal or State constitutions. Legislatures are free to develop new rules to govern land use as long as they do not eliminate vested property interests. An interest is vested only if there is a certainty of expectation in the interest. Because pre-1919 Arizona law gave water users no certainty of expectation in the ability to retain water rights upon prolonged nonuse, this interest was not an attribute of pre-1919 rights protected by the 1919 statutory savings clause.

In *San Carlos Apache Tribe*, the Arizona Supreme Court implicitly adopted this interpretation of the 1919 forfeiture statute and savings clause when holding that the 1995 amendment – which would have retroactively protected pre-1919 rights from forfeiture – violated the principle against retroactive alteration of

substantive rights. The district court erred by failing to defer to the Arizona Supreme Court's interpretation of Arizona law, and by failing to construe the 1919 savings clause narrowly, in accordance with its terms, historical context, and the broader statutory purpose.

B. Abandonment

Whether or not prolonged nonuse results in the forfeiture of pre-1919 water rights, prolonged nonuse is strong evidence of intention to abandon. In a series of cases applying Nevada law, this Court held that evidence of the prolonged nonuse of an irrigation water-right, coupled with evidence of land use incompatible with irrigation (*e.g.*, use of water-righted lands for roads, ditches, or other permanent structures), constitutes clear and convincing evidence of abandonment, even where water assessments are paid. The district court correctly followed this precedent to find and declare the abandonment of the portion of a water right appurtenant to a 1.4-acre parcel of land that Freeport and its predecessors have long used for a road and canal.

The district court declined to find an inference of abandonment, however, with respect to the water rights appurtenant to a number of larger parcels (or portions of water-righted parcels) that have long been lost to the Gila river channel as a result of avulsion or erosion. The district court reasoned that the non-irrigation of lands constituting "river bottom" or "active river channel" is akin to

the decision not to irrigate "fallowed" lands and thus constitutes nothing more than nonuse. But lands constituting river bottom or active river channel are not like fallowed lands. Such lands cannot practicably be irrigated and thus are more akin to lands with permanent improvements incompatible with irrigation. When irrigation water rights are rendered practicably unusable by movement of the river and loss of water-righted lands and the owner fails, within a reasonable time, to take steps to restore the lands or transfer the water rights, a strong inference of abandonment can be drawn. The district court erred in failing to apply this strong inference.

STANDARDS OF REVIEW

Whether Arizona's 1919 forfeiture statute applies to the post-enactment nonuse of State water rights that vested before the statute's enactment is a question of statutory construction that this Court reviews de novo, giving deference to any definitive interpretation issued by the Arizona Supreme Court. *See Nevada Power Co. v. Monsanto Co.*, 955 F.2d 1304, 1306 (9th Cir. 1992); *Matter of McLinn* 739 F.2d 1395, 1397-98 (9th Cir. 1984) (en banc). Whether a water right has been abandoned is a question of fact. *Landers v. Joerger*, 15 Ariz. 480, 482-83, 140 P. 209, 210 (Ariz. 1914). This Court reviews a district court's factual findings for clear error. Fed. R. Civ. P. 52(a)(6). The district court's determination of the legal

standards applicable to abandonment are reviewed *de novo*. *See generally United States v. Alpine Land & Reservoir Co.*, 983 F.2d 1487, 1494-5 (9th Cir. 1992).

ARGUMENT

I. PRE-1919 RIGHTS ARE SUBJECT TO FORFEITURE FOR NONUSE

In determining that the savings clause in the Arizona Water Code exempts pre-1919 water rights from statutory forfeiture, the district court incorrectly followed *Manse Spring*, a Nevada Supreme Court decision that interpreted a similar savings clause under Nevada's 1913 water code. *See* ER 40. *Manse Spring* turned on the distinction between abandonment and forfeiture. *See* 108 P.2d at 316. Abandonment is the loss of a water right via intentional relinquishment. *Gila Water Co. v. Green*, 29 Ariz. 304, 306, 241 P. 307, 308 (Ariz. 1925) ("*Green II*"). Forfeiture is the loss of a property due to neglect or the failure to perform an act required by law. *Id.* Unlike abandonment, forfeiture can operate "against and contrary to the intention" of the property owner. *Green II*, 29 Ariz. at 306, 241 P. at 308; *see also* 2 Kinney, Irrigation and Water Rights, § 1118 (1912). *Id.*

Citing this distinction, the Nevada Supreme Court concluded that Nevada's forfeiture statute would "impair" vested rights if construed to apply thereto: (a) because the law prior to statutory amendment "said that water users . . . would

have and hold the use of [state] waters unless . . . abandoned," and (b) because forfeiture provides a "much stricter and more absolute procedure than loss by abandonment." *Manse Spring*, 108 P.2d at 316. In a more recent decision articulating the logic of *Manse Spring*, this Court explained that the 1913 Nevada forfeiture statute "made water rights more precarious" because "[p]rior to [the statute's] passage, water rights could be lost only through abandonment; now they could also be lost through forfeiture." *United States v. Orr Water Ditch Co.*, 256 F.3d 935, 941-42 (9th Cir. 2001).

Whether or not this analysis correctly portrayed Nevada law, it was not true for Arizona law in 1919. As explained *infra*, under Arizona law prior to the 1919 Water Code, water users could forfeit unused water rights to adverse use and, under prevailing legal principles, had no expectation that they could "have and hold" unused water rights in perpetuity. Thus, pre-1919 water users held no "vested" right of nonuse. *See Texas Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 647-48 (1971) (construing similar Texas law); *see also Hagerman Irr. Dist. v. McMurry*, 113 P. 823, 824-25 (N.M. 1911) (1907 New Mexico forfeiture statute was "merely declaratory" of customary rule requiring reasonable diligence).

Properly construed in this historical context, and in light of provisions of the 1919 Water Code that strengthened pre-existing rights, the 1919 forfeiture provision cannot be seen to have made vested Arizona rights "more precarious."

Cf. Orr Water Ditch Co., 256 F.3d at 942. When enacting the 1919 Water Code, the Arizona Legislature expressly acknowledged that pre-enactment rights could be lost by forfeiture or nonuser in addition to abandonment. *See* Laws of Ariz., ch. 164, § 16 (1919) (addressed at p. 41, *infra*). The new forfeiture provision merely clarified the prior longstanding duties of beneficial use and the legal consequences of nonuse. Because this clarification did not "take away or impair" any vested water rights, the savings clause should not be construed as exempting pre-1919 rights from statutory forfeiture for post-enactment nonuse.

A. The Savings Clause in the 1919 Water Code Should Be Narrowly Construed

In Section One of the 1919 Water Code, the Arizona Legislature made two declarations: first, that "[b]eneficial use shall be the basis and the measure and the limit" to the use of State waters; and second, that, if any owner of a "perfected and developed right" thereafter "sh[ould] cease or fail to use the water appropriated for a period of five (5) successive years," the right would "thereupon cease and revert to the public and become again subject to appropriation." Laws of Ariz., ch. 164, § 1 (1919); *see also* Ariz. Rev. Stat. § 45-141 (1994) (currently applicable codification).[13] The latter declaration is an exposition of the former. Prolonged

[13] The Arizona Supreme Court invalidated amendments adopted in 1995. *See San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 206, 972 P.2d 179, 190 (Ariz. 1999); *see infra*, pp. 48-50.

nonuse of an appropriated water right is not beneficial use by the owner, and, as long as the right remains the property of the owner, the nonuse effectively precludes appropriation and beneficial use by others. Thus, the rule of forfeiture for nonuse – *i.e.*, the duty to "use or lose" an appropriated water right – is a limit inherent to and derived from the obligation of beneficial use. *See Texas Water Rights Comm'n*, 464 S.W.2d at 647; *Hagerman Irr. Co.*, 113 P. at 824.

"The spirit and purpose of Arizona water law is to promote the beneficial use of water and to eliminate waste of this precious resource." *Arizona Pub. Serv. Co. v. Long*, 160 Ariz. 429, 438, 773 P.2d 988, 997 (Ariz. 1989). Because any exemption from the rule of forfeiture for nonuse would be contrary to this "spirit and purpose," such exemption must not be lightly implied. The Arizona Supreme Court has long applied a canon of strict construction for exemptions from tax statutes, because they "violate the policy that all taxpayers should share the common burden of taxation." *State ex rel. Ariz. Dep't of Revenue v. Capitol Castings, Inc.*, 207 Ariz. 445, 447, 88 P.3d 159, 161 (Ariz. 2004); *see also Conrad v. Maricopa County*, 40 Ariz. 390, 393, 12 P.2d 613, 614 (Ariz. 1932) (citing *Philadelphia, Wilmington, & Baltimore R. Co. v. Maryland*, 51 U.S. 376, 393 (1850)). Under this canon, "[t]he presumption is against the [alleged] exemption, and every ambiguity in the statute will be construed against it." *Conrad*, 40 Ariz. at 393, 12 P.2d at 614; *accord University Physicians, Inc. v. Pima County*, 206

Ariz. 63, 67, 75 P.3d 153, 157 (Ariz. App. Div. 1, 2003). Because a shared obligation to beneficially use State waters is at the heart of Arizona water law, *Arizona Pub. Serv. Co.*, 160 Ariz. at 438, 773 P.2d at 997, a canon of strict construction likewise should apply to the interpretation of alleged exemptions from the rule of forfeiture for nonuse.

Instead of following this canon, the district court incorrectly interpreted the savings clause in the 1919 Water Code in the broadest manner possible; *i.e.*, as providing a perpetual categorical exemption from forfeiture for nonuse for all pre-enactment rights. Such interpretation is not compelled by the statutory text. The savings clause does not declare an "exemption" from forfeiture or state that forfeiture for nonuse "shall not apply" to pre-enactment rights. Laws of Ariz., ch. 164, § 1 (1919).[14] Rather, the Arizona Legislature declared in 1919 that "nothing" in the new Water Code "shall be . . . construed as to *take away or impair . . . vested rights*" (emphasis added); *see also* Ariz. Rev. State 45-171 ("Nothing in this chapter shall impair vested rights to the use of water . . ."). This begs the question whether the 1919 Arizona Legislature understood that the prospective application of the forfeiture provision would "take away or impair . . . vested rights." *See*

[14] In this regard, the 1919 savings clause stands in stark contrast to the 1995 statutory amendment that declared "statutory forfeiture by nonuse shall not apply" to pre-1919 rights. *See* Ariz. Rev. Stat. § 45-141(C); *see also* pp. __-__, *infra*.

Tracy v. Superior Court of Maricopa County, 168 Ariz. 23, 45, 810 P.2d 1030, 1052 (Ariz. 1991) ("When construing a statute, we must ascertain the legislature's true intent *at the time it enacted the statute*") (emphasis added). For reasons that follow, there is no basis for such an inference.

B. The 1919 Forfeiture Statute Must Be Construed in Historical Context

1. Beneficial Use Always Has Been the Measure of Arizona Water Rights

Any interpretation of the Arizona Legislature's intent when enacting the 1919 savings clause must begin with an understanding of preexisting law. Arizona became a U.S. territory in 1864. *See Boquillas Land & Cattle Co. v. Curtis*, 11 Ariz. 128, 133, 89 P. 504, 505 (1907). In that year, the Territorial Legislature adopted a legal code ("Howell Code") and "Bill of Rights," which declared all "streams, lakes, and ponds . . . capable of being used for . . . irrigation" to be "public property," and which prohibited the appropriation of such waters to "private use," "except under such equitable regulations and restrictions as the Legislature shall provide for that purpose." *Id.* The Howell Code then recognized previously established "rights in acequias" (communal irrigation canals established under the law of the Mexican State of Sonora), *id.*, and granted all inhabitants of "arable and irrigable lands" the "right to construct public or private acequias" for

obtaining "water . . . from any convenient river, creek or stream of running water." *Id.* (quoting Howell Code).

But the Howell Code also adopted the "common law of England" as the "rule of decision" for territorial courts, except where inconsistent with federal or Territorial law. *Id.* This left some uncertainty as to the whether the common law of riparian rights would apply in Arizona. *Id.*, 89 P. at 506; *see also Boquillas Land & Cattle Co. v. Curtis*, 213 U.S. 339, 345 (1909). Under the common law, all riparian owners, as part of their legal title, possess the right to the continued natural flow of water across their lands, and there is no recognized right to divert and appropriate waters. *See Boquillas*, 11 Ariz. at 135, 89 P. at 506. Because these principles are not suited to arid climates where lands cannot be cultivated without irrigation, Western States, "by custom and by state legislation," largely adopted a "different rule," recognizing the right to appropriate State waters for irrigation and other beneficial uses on a first-in-time basis. *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 704 (1899).

In 1887, the Arizona Legislature amended the Howell Code to formally declare that "[t]he common law doctrine of riparian water rights shall not obtain or be of any force or effect in [the Arizona] territory." *Boquillas*, 11 Ariz. at 136, 89 P. at 506 (quoting Ariz. Rev. Stat. 1887, § 3198). The Arizona Supreme Court subsequently held that this declaration clarified existing law; *i.e.*, that common law

riparian rights had never become Territorial law, because inconsistent with the Sonoran law carried forward in the Howell Code. *Id.*, 11 Ariz. at 136-140, 89 P. at 506-508; *see also Clough v. Wing*, 2 Ariz. 371, 378-79, 17 P. 453, 455 (Ariz. 1888). Upon writ of certiorari, the United States Supreme Court affirmed. *Boquillas*, 213 U.S. at 345-47.

These authorities demonstrate that the customary law of prior appropriation has been the central feature of Arizona water law since before the time Arizona became a U.S. territory. *Id.* In 1888, the Arizona Supreme Court likewise observed that "[t]he law which recognizes the vested rights of prior appropriators has *always* confined such rights within reasonable limits." *Clough v. Wing*, 2 Ariz. at 378, 17 P. at 455 (quoting *Barnes v. Sabron*, 10 Nev. 217, 244 (Nev. 1875) (emphasis added)). In the same opinion the Court embraced the following "settled" rules: (1) that a right of appropriation vests whenever an individual "by some open, physical demonstration, indicates an intent to take for a valuable or beneficial use . . . and succeeds in applying the water to the use designed," *id.* (quoting *McDonald v. Bear River Co.*, 13 Cal. 220, 232-233 (1859)); (2) that a subsequent appropriator may take and "acquire a right" to the use of any water "not needed or used" by a prior appropriator, *id.* (quoting *Barnes*, 10 Nev. 217, 245) (emphasis added); and (3) that "an appropriation" is made, "in legal contemplation, . . . when the act evidencing the intent [to appropriate is

performed]," if the "initial act [is] followed up with reasonable diligence, and the purpose [is] consummated without unnecessary delay." 2 Ariz. at 383, 17 P. at 457 (quoting *Larimer Co. v. People*, 9. P. 794, 796 (Colo. 1886)).

In 1893, the Arizona Legislature codified these rules and added a posting requirement. *See* 1893 Ariz. Sess. Laws No. 86. Echoing *Clough*, the 1893 Act provided that any "person, company or corporation" could appropriate any unappropriated surface or flood waters of the territory for "milling, irrigation, mechanical, domestic, stock, or other beneficial purposes," and declared that persons "first appropriating water" for such purposes "shall always have the better right to the same." *Id.*, § 1. The 1893 Act added that any persons "who shall desire to appropriate any of the waters of this Territory" for beneficial use "shall first post at the place of diversion," and file with the County Recorder, a notice of intent to divert water, specifying the amount to be appropriated and the associated dam(s), canal(s), reservoir(s) or other diversion structure. *Id.* § 2.

The 1893 Act also contained a forfeiture provision related to the posting requirement. *Id.* The Act provided that a "failure . . . to act within a reasonable time" to complete construction after posting notice of an intent to appropriate waters, or "to use reasonable diligence after such construction to maintain" the stated improvements, "shall be held to work a forfeiture of such right to the water or waters attempted to be appropriated." *Id.* When Arizona became a State in

1913, these provisions were carried forward into State law. *See* Ariz. Rev. Stat. §§ 5337, 5338 (1913); *see also Gila Water Co. v. Green*, 27 Ariz. 318, 325, 232 P. 1016, 1018 (Ariz. 1925) ("*Green I*").

2. Before 1919, Appropriative Rights Were Subject To Loss by Adverse Use

As first codified and applied by Arizona courts, the law of prior appropriation created a relative free-for-all. Any person with the ability to beneficially use Arizona water could obtain a "vested" right by being first to physically appropriate available water for such use. *Clough*, 2 Ariz. at 378, 17 P. at 455. But there was no legal mechanism, short of filing suit against an adverse claimant, for quantifying and recording vested rights. Nor were there any legal mechanisms for determining whether a water source contained surplus available for appropriation. Under the principle of beneficial use, "[w]henever an appropriator . . . cease[d] to use for a beneficial purpose any water which has its source in a public stream, his power or authority to control the same cease[d]." *Slosser v. Salt River Val. Canal Co.*, 7 Ariz. 376, 390-91, 65 P. 332, 336 (Ariz. 1901). This left other prospective users free to appropriate any apparently available water, including water "not needed *or used* by" a prior appropriator. *Clough*, 2 Ariz. at 378, 17 P. at 455 (emphasis added).

Although there are no pre-1919 Arizona cases specifically holding that the prolonged nonuse of a developed water right made the water available for appropriation by others, Arizona courts have acknowledged common law forfeiture for other usufructory rights (rights to use property owned by others) acquired by use alone. For example, while easements acquired by *grant* cannot be lost my mere nonuse, *see Squaw Peak Community Covenant Church of Phoenix v. Arizona Development, Inc.*, 149 Ariz. 409, 414, 719 P.2d 295, 300 (Ariz. App. 1986), "[a]n easement created by prescription may be lost by mere nonuse . . . for the prescriptive period." *Furrh v. Rothschild*, 118 Ariz. 251, 256, 575 P.2d 1277, 1282 (Ariz. 1978) (citing *Zimmer v. Dykstra*, 39 Cal.App.3d 422, 114 Cal.Rptr. 380 (1974)).

Moreover, by 1919, it was clear under Arizona law that developed water rights could be lost to adverse use for the prescriptive period. *See Gould v. Maricopa Canal Co.*, 8 Ariz. 429, 448, 76 P. 598, 601 (Ariz. 1904) (water right "may be lost to another by adverse user on the part of the other continued for the period of the statute of limitations"); *see also Egan v. Estrada,* 56 P. 721, 722 (Ariz. 1899); *Dalton v. Rentaria,* 15 P. 37, 40 (1887). To be sure, under the rule of adverse use, senior appropriators were not at risk of losing their rights upon every subsequent appropriation from a common source. Rather, the statute of limitations on the right to object to another water use "commence[d] to run" only upon an

"*adverse* use . . . of the water," *i.e.*, 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." *Egan*, 56 P. at 722 (emphasis added).

However, as the demand on Arizona's water sources intensified and streams became 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. *Cf. Dalton*, 15 P. 40-42.

3. The 1919 Water Code Added Regulatory Protections for Vested Rights While Retaining the Obligation of Beneficial Use

When enacting the 1919 Water Code, the Arizona Legislature established new protections for developed and perfected rights. No longer could prospective users acquire water rights – to the potential detriment of existing users – merely by posting notice and physically diverting, to some beneficial use, water apparently unused and available for appropriation. Rather, the Code required any new user to apply for a permit from the State Water Commissioner before taking any act of

appropriation, *see* Ariz. Sess. Laws, ch. 164, § 5 (1919), and directed the Commissioner to "reject[]" any application for a proposed use in "conflict[] with vested rights." *Id.*, § 7.

In addition, the Code directed the State Water Commissioner, upon the Commissioner's initiative or at the request of any water user on a stream, to determine the existing water rights in such source, and provided a procedure for confirming such rights by judicial decree. *Id.* § 16. The Code directed the Commissioner to issue and record certificates to document any rights so determined, *id.*, § 27, and to issue and record similar certificates for new applicants, but only upon proof that the applicant had appropriated and perfected a water right in accordance with the terms of an approved permit. *Id.*, § 13.

By providing for the formal quantification and recording of vested rights and the establishment of priorities of use, and by simultaneously eliminating the prospect that such rights could be taken by (or lost to) adverse use by others,[15] the

[15] Consistent with the view that the 1919 Water Code eliminated acquisition by adverse use, the Arizona Legislature stated, in a 1974 revision of the Water Code, that:

> [n]o rights to the use of public waters of the state may be acquired by adverse use or adverse possession as between the person and the state, or as between one or more persons asserting the water right; *but nothing contained herein shall be deemed to diminish or enhance the validity of a claim filed under this article originating prior to the*

1919 Water Code increased the security of existing rights. At the same time, however, the Arizona Legislature declared that beneficial use would remain "the basis and the measure and the limit" of Arizona water rights and adopted a uniform rule of forfeiture for the nonuse of such rights. The five-year forfeiture period: (a) matched the prescriptive period for adverse use, *see Egan*, 56 P. at 722, (b) mimicked the operation of the existing law of adverse use, *see id.*; *Dalton v. Rentaria,* 15 P. at 40-42, and (c) codified, for water rights, the same rule of forfeiture for nonuse applicable to prescriptive easements. *See Furrh v. Rothschild*, 118 Ariz. at 256, 575 P.2d at 1282. This demonstrates the Legislature's intent to provide regulatory order and greater certainty to the law

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> *effective date of Chapter 164 of the Laws of 1919* [*i.e.*, the 1919 Water Code].

See 1974 Ariz. Sess. Laws, ch. 122, § 2 (adding Ariz. Rev. Stat. § 45-188 (1974)); *see also* Ariz. Rev. Stat. § 45-187 (1994). Although there is one subsequent Arizona decision suggesting that "[a] water right [could] be obtained by adverse possession" after 1919, *Gibbons v. Globe Dev., Nev., Inc.*, 113 Ariz. 324, 325, 553 P.2d 1198, 1199 (1976)), that decision does not address the 1919 Water Code or 1974 revision, the statement was made in dicta, and the court cited a decision addressing percolating groundwater. *Id.* (citing *Gross v. MacCormack*, 75 Ariz. 243, 255 P.2d 183 (1953)); *see also Gross*, 75 Ariz. at 248, 256 P.2d at 186-187 ("right to take *percolating waters* may be acquired by prescription"). The rules of prior appropriation only apply to groundwater that is part of the of the "subflow" of a stream. *See In re the General Adjudication of All Rights to Use Water In the Gila River System and Source*, 175 Ariz. at 386-389, 857 P.2d at 1240-43.

governing the appropriation and use of State waters, without altering the fundamental nature of State water rights and limitations attendant to beneficial use.

When adding the new forfeiture provision, the Arizona Legislature also replaced the more limited and less-certain forfeiture provision of the 1893 Act. As noted *supra*, the 1893 provision was directed toward a person's failure "to act within a reasonable time" to construct necessary improvements after posting notice of the intent to appropriate, and to the failure "to use reasonable diligence . . . to maintain" such improvements thereafter. *See* 1893 Ariz. Sess. Laws No. 86, § 2. Although this provision did not address nonuse *per se*, any nonuse of a vested right occasioned (or accompanied) by a failure to "maintain" diversion works could lead to forfeiture upon a finding of the lack of "reasonable diligence," without the need to show the passage of five years or any other specific amount of time. *Id.* The 1919 Code replaced the uncertainty of this provision with a full five years within which any water user could correct any condition causing nonuse.

Further, the duty to use "reasonable diligence" in perfecting water rights preexisted the 1893 Act, *Clough*, 2 Ariz. at 383, 17 P. at 457; (citing *Larimer Co.*, 9. P. 794, 796 (Colo. 1886)), and is part of the broader duty to exercise reasonable diligence in all aspects of use, which derives from the principle of beneficial use. Significantly, there is no basis in equity for distinguishing a lack of reasonable diligence in maintaining necessary diversion structures and a lack of reasonable

diligence in addressing other factors preventing the beneficial use of a previously developed water right. For these reasons, in 1911, the New Mexico Supreme Court declared that a 1907 New Mexico statute establishing forfeiture for four-years' nonuse was "merely declaratory" of the customary rule requiring reasonable diligence in the exercise of water rights. *Hagerman Irr. Dist.*, 113 P. at 824-25.

The Arizona Legislature adopted the 1919 forfeiture statute just a few years later. Like the Arizona statutes of 1887 and 1893, which codified concepts developed in customary law (*see* pp. 32-34, *supra*), the 1919 forfeiture statute was declaratory of the equitable principles of beneficial use and reasonable diligence that were inherent in the customary law of prior appropriation.

Indeed, when adopting the 1919 Water Code, the Arizona Legislature expressly acknowledged that vested water rights could be lost by "forfeiture" or "nonuser" under pre-existing law. Specifically, as part of the provision enabling water users to demand an administrative determination of rights and priorities to a particular stream or source, the Legislature declared that the Commissioner must "accept dates of appropriation as found or fixed" in prior judicial decrees, provided that "[a]bandonment *or other loss* of right of any appropriation awarded in any such decree may be affirmatively shown," and provided that "nothing in this act shall be so construed as to revive any rights to the used water which have been lost by abandonment, *forfeiture or non-user*." Laws of Ariz., ch. 164, § 16 (1919)

(emphasis added). These references to the potential loss of water rights by "forfeiture" or "non-user" *before the adoption of the 1919 Water Code*, belie the assumption in *Manse Spring*, upon which the district court's interpretation of the 1919 savings clause is based, *viz.*, the assumption that pre-1919 water rights were subject to loss *only* by abandonment.[16] *See Manse Spring*, 108 P.2d at 316.

C. Construing the 1919 Forfeiture Statute as Applying to Post-Enactment Nonuse of Pre-Enactment Rights Does Not Take Away or Impair Vested Rights

In this context, the prospective application of the 1919 forfeiture statute to preexisting rights – *i.e.*, in regard to post-enactment periods of nonuse – cannot fairly be interpreted as "tak[ing] away or impair[ing]" vested rights, within the meaning of the 1919 savings clause. *See* 1919 Ariz. Sess. Laws, Ch. 164, §1; *see also* Ariz. Rev. Stat. 45-171. The 1919 Water Code put water users on notice that, from the date of enactment forward, any continuous period of five years' nonuse of a water right would result in the forfeiture of such right. This declaration of potential *future* forfeiture for *future* neglect left existing water users with all rights

[16] Although the district court concluded that "pre-1919 water rights can only be lost in accordance with the law that was in place in Arizona before 1919 – the law of abandonment and *adverse possession*," ER 41 (emphasis added), the district court did not consider the preexisting rule of adverse use when interpreting the 1919 savings clause. *Id.* at 40-41.

of use – in terms of quantity, priority, and type of use – attendant to their vested water rights.

The adoption of this forward-looking forfeiture rule did not take any attribute or "stick" from the "bundle of sticks" comprising a pre-1919 water right. *Cf. Orr Water Ditch Co.*, 256 F.3d at 942. From the establishment of the Arizona Territory and adoption of the 1864 Bill of Rights, Arizona water users were on notice that water rights acquired by appropriation were subject to "equitable regulations and restrictions as the Legislature shall provide." *See Boquillas*, 11 Ariz. at 133, 89 P. at 505 (quoting Bill of Rights). The Arizona legislature adopted the customary law of prior appropriation, *see Boquillas*, 213 U.S. at 346, which always had been limited by the principle of beneficial use. *Clough*, 2 Ariz. at 378, 17 P. at 455. As the Texas Supreme Court explained, water rights acquired by appropriation do not include a vested right of nonuse. *See Texas Water Rights Comm'n*, 464 S.W.2d at 647-50.

In *Texas Water Rights Comm'n*, the Texas Supreme Court addressed a 1957 statute that authorized the Texas Water Commission to cancel Texas water permits upon proof that the water rights granted therein had not been used for ten years. *Id.* at 644. The Texas Supreme Court held that that the Water Commission could exercise this authority against preexisting permits, without violating constitutional protections applicable to vested rights. *Id.* at 648-50. Citing the principle of

beneficial use, the court reasoned that the permits were subject to an "implied condition subsequent that the waters would be beneficially used" and thus did not grant a "right of non-use of the water for an indefinite period of time." *Id.* at 648-49. Rather, by providing for the cancellation of water permits upon 10-years' nonuse, the 1957 statute merely established a "reasonable remedy" for enforcement of the implied preexisting permit condition. *Id.*

The Texas Supreme Court followed other western States that had similarly applied forfeiture statutes *retroactively* to void water rights that were never perfected due to a lack of diligence. *Id.* at 649-650 (citing cases); *see also Kersenbrock v. Boyes*, 145 N.W. 837, 838-39 (Neb. 1914); *Hagerman*, 113 P. at 825 (N.M. 1911). As already noted, just a few years before the Arizona Legislature enacted the 1919 Water Code and forfeiture provision, the New Mexico Supreme Court declared New Mexico's 1907 forfeiture statute to be "merely declaratory of the law as it had already been established." *Hagerman*, 113 P. at 824.

In the face of these opinions, the Nevada Supreme Court's ruling in *Manse Spring* is the outlier. *See Texas Water Rights Comm'n*, 464 S.W.2d at 650 (rejecting *Manse Spring*). The 1913 Nevada statute addressed in *Manse Spring* contained a savings clause similar to the savings clause in the 1919 Arizona Water Code, *see Manse Spring*, 108 P.2d at 315-16, while the Texas statute addressed in

Texas Water Rights Comm'n did not. *See Texas Water Rights Comm'n*, 464 S.W.2d at 645-646. Nonetheless, this does not make *Manse Spring* the more persuasive authority for interpreting the Arizona statute. In *Texas Water Rights Comm'n*, the Texas Supreme Court faced two issues: (a) the application of the 1957 statute to pre-enactment water permits, and (b) the application of the 1957 statute to pre-enactment nonuse. *Id.* at 648. The Texas Supreme Court upheld the application of the 1957 in *both* contexts. *Id.* at 648-50.

If the 1919 forfeiture statute were construed to apply *retroactively* to cause the forfeiture of pre-existing rights or use based on *pre-enactment* nonuse of such rights, the statute might be seen to "take away" or "impair" vested rights. Although any vested rights not in use at the time of the 1919 enactment already might have been lost or at significant risk of loss under preexisting law (*see* pp. 35-37, *supra*), the legal status of such rights – if not already adjudicated – would have been uncertain. Accordingly, to legislatively declare such rights forfeited or at near forfeiture due to pre-enactment nonuse would have "take[n] away" or "impair[ed]" such rights without advance notice or hearing, raising due process concerns. *See San Carlos Apache Tribe*, 972 P.2d at 189 (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 270 (1994)) ("A statute may not 'attach[] new legal consequences to events completed before its enactment.")

The Arizona Legislature evidently adopted the savings clause in the 1919 Water Code to avoid such constitutional concerns. *Cf. Manse Spring*, 108 P.2d at 315 (the "apparent" purpose of the Nevada savings clause was to "refrain from infringing upon rights which had accrued at that time, so as to avoid any question of the constitutionality of the act"). Prospective application of the 1919 Water Code, however, did not implicate the same constitutional concerns. "It is well established that there is 'no federal Constitutional right to be free from changes in the land use laws.'" *See Bowers v. Whitman*, 671 F.3d 905, 915-916 (9th Cir. 2012) (quoting *Lakeview Dev. Corp. v. City of S. Lake Tahoe,* 915 F.2d 1290, 1295 (9th Cir.1990)). Statutes that impose new future obligations on property owners or future restrictions on property use generally do not raise fair notice concerns. *San Carlos Apache Tribe*, 972 P.2d at 189 ("The Legislature may certainly enact laws that apply [prospectively] to rights vested before the date of the statute.")

Rather, such statutes infringe upon constitutional protections only if they result in the taking of property without just compensation. *See generally Bowers*, 671 F.3d at 912. "To determine whether a property interest has vested for Takings Clause purposes, 'the relevant inquiry is the certainty of one's expectations in the property interest at issue.'" *Bowers*, 671 F.3d at 913 (quoting *Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 1002 (9th Cir. 2007)). Moreover, "an interest in a

particular land use does not constitute a vested property interest, unless the interest has vested in equity based on principles of detrimental reliance." *Id.* at 916.

Arizona water users in 1919 had no "certainty" of expectation in the ability to retain vested water rights in the face of prolonged and indefinite nonuse. Nor could any water user, at that time, claim to have detrimentally relied on a promise that water rights acquired by appropriation could be retained indefinitely without use. This is so because Arizona water rights were never a permanent attribute of riparian lands, were always subject to beneficial use, and were always subject to equitable regulation by the State. *See Boquillas*, 213 U.S. at 346; *see also* pp. 31-35, *supra*.

In short, construing the 1919 forfeiture statute to apply to post-enactment nonuse of vested water rights would not "take away" vested rights, nor would it "impair" those rights by destroying a protected property interest that Arizona water users had in such rights. Under preexisting law, water users had no expectation that they could retain rights to water that they did not beneficially use. Because prospective application of the 1919 forfeiture statute to pre-1919 water rights does not offend the terms of the savings clause, the savings clause cannot fairly be construed as providing an exemption from forfeiture for those rights.

D. The Arizona Supreme Court Has Implicitly Held that Pre-1919 Rights Are Subject to Forfeiture under the 1919 Water Code

As noted *supra*, in 1995, after the initiation of a general adjudication to determine all rights and priorities to the waters of the Gila River system and source, the Arizona Legislature enacted a series of amendments to the Water Code, including amendments to the statutory forfeiture provision. *See San Carlos Apache Tribe*, 193 Ariz. at 972 P.2d at 186-87. The amendments declared, for the first time, that "statutory forfeiture by nonuse shall not apply to a water right initiated before June 12, 1919," *id.*, 193 Ariz. at 220, 972 P.2d at 204 (quoting 1995 Ariz. Sess. Laws, ch. 9, § 3, amending Ariz. Rev. Stat., § 45-141(C)), and that any such rights would be subject to loss only by abandonment. *See id.*, 193 Ariz. at 225, 972 P.2d at 209 (quoting 1995 Ariz. Sess. Laws, ch. 9, § 12, amending Ariz. Rev. Stat., § 45-188(B)). The United States, the San Carlos Apache Tribe, and other Arizona tribes challenged the constitutionality of these amendments, arguing that they would retroactively impair vested property rights in violation of the State and federal constitutions. *Id.* at 188.

The Arizona Supreme Court agreed. *Id.* at 190. The Court observed that if amendments exempting pre-1919 rights from the rule of forfeiture (hereinafter, the "1995 exemption") was applied "retrospectively" to events prior to enactment, the exemption would improperly "protect" and revive "pre-1919 water rights that may

have been forfeited and vested in others under the law existing prior to 1995." *Id.* (addressing changes to Ariz. Rev. Stat. § 45-141(C)); *accord id.* at 191 (addressing Ariz. Rev. Stat. § 45-188). The Court also determined that there was no evidence the Arizona Legislature intended the 1995 exemption to apply prospectively only; *i.e.*, to eliminate statutory forfeiture for pre-1919 rights only as to nonuse beginning in 1995 or thereafter. *Id.* at 188-89, 193. Accordingly, the Court invalidated the 1995 exemption in all applications, *id.* at 201-202, leaving the 1919 forfeiture statute (as previously amended and codified) as the governing law. *See* Ariz. Rev. Stat. § 45-141(C) (1994).

The district court's interpretation of the 1919 savings clause – as exempting pre-1919 water rights from statutory forfeiture – is irreconcilable with *San Carlos Apache Tribe.* As the district court observed, *San Carlos Apache Tribe* did not expressly construe the 1919 Water Code or expressly determine whether the 1919 savings clause "permitted the five-year forfeiture provision to be applied to pre-1919 water rights." ER 39. The Arizona Supreme Court acknowledged and rejected, however, the argument that the 1995 exemption and other changes were "clarification[s]" of previous law. *Id.* at 188, 193-194. 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, and the Arizona Supreme Court would have had no grounds for invalidating the 1995 exemption.

The Arizona Supreme Court "construe[s] statutes, when possible, to avoid constitutional difficulties." *State ex rel. Montgomery v. Harris*, 234 Ariz. 343, 346 n.3, 322 P.3d 160, 163 n.3 (Ariz. 2014); *Hayes v. Cont'l Ins. Co.*, 178 Ariz. 264, 272, 872 P.2d 668, 676 (1994). When invalidating the 1995 exemption, the Arizona Supreme Court evidently determined that constitutional avoidance was *impossible* because – consistent with the above analysis (pp. 26-47) – the 1919 Water Code and savings clause did not provide a perpetual and categorical exemption, from statutory forfeiture, for pre-1919 rights. To affirm the district court's interpretation of the 1919 Water Code would render the Arizona Supreme Court's ruling in *San Carlos Apache Tribe* meaningless. Such a construction is not consistent with the deference due to the Arizona Supreme Court on matters of Arizona law. *See generally Albano v. Shea Homes Ltd. Partnership*, 634 F.3d 524, 530 (9th Cir. 2011).

II. PROLONGED NON-USE OF IRRIGATION RIGHTS DUE TO A PERMANENT LOSS OF IRRIGATION LANDS IS EVIDENCE OF INTENT TO ABANDON

Whether or not pre-1919 water rights are subject to statutory forfeiture, all Arizona water rights, whenever perfected, are subject to common law abandonment. *See Landers v. Joerger*, 15 Ariz. 480, 483, 140 P. 209, 210 (Ariz. 1914); *Landers*, 14 Ariz. at 483, 140 P. 209 at 158 (1914); *Gould v. Maricopa*

Canal Co., 8 Ariz. 429, 448, 76 P. 598, 601 (Ariz. Terr. 1904). A party's "intention is the paramount object of [an abandonment] inquiry." *Green I*, 27 Ariz. at 328, 232 P. at 1019. Nonetheless, abandonment need not be "evidenced by [a party's] declaration," but "may be fairly inferred from [a party's] acts." *Gould*, 8 Ariz. at 448, 76 P. at 601.

To "ease the burden upon the challenger and . . . increase the likelihood that water will be put to beneficial use," "nearly all western states presume an intent to abandon upon a showing of a prolonged period of nonuse." *Orr Water Ditch Co.*, 256 F.3d at 945. Under this rule, "long periods of nonuse raise a rebuttable presumption of intent to abandon, thus shifting the burden of proof to the holder of the water right to explain reasons for the nonuse." *Okanogan Wilderness League, Inc. v. Town of Twisp*, 133 Wash. 2d 769, 739 (Wash. 1997); *accord State ex rel. Reynolds v. South Springs Co.*, 452 P.2d 478, 482 (N.M. 1969) ("After a long period of nonuse, the burden of proof shifts to the holder of the right to show the reasons for nonuse.")

Although Arizona courts have not had occasion specifically to adopt a rebuttable presumption of abandonment upon prolonged nonuse of a water right, there is reason to believe that Arizona courts would follow the majority rule. The Arizona Supreme has declared that prolonged unexplained nonuse provides "very strong evidence of an intention to abandon." *Green I*, 232 P. at 1019. When a

challenger presents "very strong evidence" of an intention to abandon – *i.e.*, more than sufficient evidence to make a *prima facie* case of abandonment – the burden necessarily shifts to the water-rights claimant to present evidence to the contrary. *See generally Echols v. Beauty Built Homes, Inc.*, 647 P.2d 629, 631 (Ariz. 1982) ("Once a prima facie showing for summary judgment has been made, the burden shifts to the [opposing] party to show that . . . evidence exists to justify a trial.")

In any event, even if Arizona law does not include a rebuttable presumption, prolonged nonuse is sufficient to support an inference of abandonment and the difference is "only a matter of degree." *Orr Water Ditch Co.*, 256 F.3d at 945. Although this Court has not found a rebuttable presumption of abandonment in Nevada law, *id.* (citing *United States v. Alpine Land & Reservoir Co.*, 983 F.2d 1487, 1494 n. 8 (9th Cir. 1992) ("*Alpine III*")), this Court has interpreted Nevada law as effectively compelling a finding of abandonment in circumstances where there is a "substantial period of nonuse, combined with evidence of an improvement which is inconsistent with irrigation." *Orr Water Ditch Co.*, 256 F.3d at 946 (quoting district court opinion).

Indeed, this Court has held that evidence of prolonged nonuse accompanied by a use inconsistent with irrigation constitutes clear and convincing evidence of an intent to abandon the water right, even when taxes and assessments on the water rights are paid. *Id.*; *accord United States v. Alpine Land & Reservoir Co.*, 510

F.3d 1035, 1038-39 (9th Cir. 2007) ("*Alpine VII*"). In *Alpine VII*, this Court addressed an application to transfer a water right where the record showed, in relevant part, that "there [was] a drain ditch in the middle of the existing place of use" (proposed sever parcel) "occupying 1.0 acres of land." *Id.* at 1042. Given this longstanding "inconsistent" use, this Court held that it was error for the Nevada State Engineer *not* to find abandonment of the portion of the water right appurtenant to the 1.0 acres, despite the fact that the owner had paid taxes and assessments on the water right as a whole. *Id.*, *Alpine VII*, 510 F.3d at 1042.

In the proceedings below, the district court correctly followed *Alpine VII* and *Orr Water Ditch Co.* to find the abandonment of a water right with respect to a portion of water-righted lands that long had been used for a road and canal. ER 44-50. The district court erred, however, when declining to extend this rule to the nonuse of water rights caused by the erosion of water-righted lands into the river channel. ER 45-56. The district court reasoned that water-right lands lost to the river are analogous to lands left "fallow[]."[17] ER 46. But this analogy is inapt. Like water-righted lands used for permanent structures (roads, canals, or buildings), water-righted lands lost to the river cannot practicably be used for the

[17] It is undisputed that the lands were not actually fallowed lands. For each of its transfer applications, Freeport conceded that the relevant water rights could not practicably be used on the lands as to which the rights were appurtenant. ER 11 (¶ 32). This could not be said of lands capable of irrigation but left fallow.

growing of crops. In both situations, the appurtenant water rights are practicably *unusable* for the decreed purpose of irrigation, absent a major alteration of the land (removal of the structure or land restoration) or a severance and transfer of the water right to other lands. Where the owner of a water right fails to make any effort to make the subject lands irrigable or to sever and transfer the water right within a reasonable time of the event that renders the land non-irrigable, an intention to abandon the water right reasonably can be inferred. This is so even when the triggering event (rendering the land non-irrigable) is a natural event beyond the owner's control.

In the proceedings below, the objecting parties presented evidence that dozens of the water rights Freeport sought to transfer were appurtenant to lands that for decades have been part of the "river bottom" or "active river channel." ER 21-33. The district court dismissed this evidence as amounting to nothing more than evidence of "prolonged nonuse." ER 46-47. This ignores the uncontroverted evidence that Freeport and/or its successors for decades have been *unable* to use the water rights, and that Freeport and/or its successors for decades (prior to the present transfer applications) did nothing to correct the circumstances precluding use. This evidence makes Freeport's nonuse of the subject rights akin to the nonuse of water rights on lands that Freeport and/or its successors intentionally made non-irrigable through the construction of permanent structures.

When irrigation water rights are rendered practicably unusable by movement of the river and loss of water-righted lands and the owner fails, within a reasonable time, to take steps to restore the lands or transfer the water rights, a strong inference of abandonment can be drawn. The district court erred in failing to apply this strong inference. This Court should remand the matter to the district court with instructions to reconsider the objectors' counterclaims of abandonment in this light.

CONCLUSION

For the foregoing reasons, this Court should *reverse* the judgment of the district court dismissing the objecting parties' counterclaims, and hold: (1) that Globe Equity Decree rights vested before the enactment of 1919 Water Code are subject to statutory forfeiture; and (2) that the failure, within a reasonable period, to restore irrigation lands that have become "river bottom" or "active river channel," or to seek the severance and transfer of appurtenant water rights, is sufficient to show an intention to abandon such rights, notwithstanding the payment of water fees.

Respectfully submitted,

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D.J. No. 90-6-2-6

STATEMENT OF RELATED CASES

Counsel is not aware of any related case currently pending before this Court, as that term is defined in Circuit Rule 28-2.6.

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CERTIFICATE OF COMPLIANCE
Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1
For Case No. 10-16968

I certify that:

√ Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is

- proportionally spaced, has a typeface of 14 points of more and contains **13,360** words (exclusive of the table of contents, table of authorities, statement of related cases, statement regarding oral argument, and certificates of counsel).

February 25, 2015 s/ *John L. Smeltzer*

Date John L. Smeltzer

STATUTORY ADDENDUM

Ariz. Rev. Stat. § 45-141 (1994)* 1

Ariz. Rev. Stat. § 45-171 1

Ariz. Rev. Stat. § 45-188 (1994)* 2

Ariz. Rev. Stat. § 45-189 (1994)* 2

1919 Ariz. Sess. Laws, Ch. 164 4

1893 Ariz. Sess. Laws, No. 86 27

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* The Arizona Supreme Court invalidated 1995 amendments to these provisions. *See San Carlos Apache Tribe v. Superior Court, County of Maricopa*, 193 Ariz. 195, 217-218, 972 P.2d 179, 201-202 (Ariz. 1999)

Ariz. Rev. Stat. § 45-141 (1994)

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

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

B. Beneficial use shall be the basis, measure and limit to the use of water.

C. 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.

D. Underground water storage, pursuant to chapter 3.1 of this title,1 for future beneficial use of waters appropriated pursuant to this chapter does not constitute an abandonment or forfeiture.

E. Exchanging surface water for groundwater, effluent or another source of surface water pursuant to chapter 4 of this title 2 or substituting poor quality groundwater, effluent or another source of surface water for surface water does not constitute abandonment or forfeiture of any right to use surface water.

Ariz. Rev. Stat. § 45-171

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

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

Ariz. Rev. Stat. § 45-188 (1994)

§ 45-188. Future rights acquired through appropriation

Any person entitled to divert or withdraw public waters of the state through an appropriation authorized under § 45-151, court decree, previous possession or continued beneficial use who abandons the use thereof, or who voluntarily fails, without sufficient cause, to beneficially use all or any part of the right to withdraw for any period of five successive years shall relinquish such right or portion thereof. The rights relinquished shall revert to the state, and the waters affected by such rights shall become available for appropriation to the extent they are not lawfully claimed or used by existing appropriators.

Ariz. Rev. Stat. § 45-189 (1994)

§ 45-188. Reversion of rights due to nonuse; notice; hearing; order; exception

A. When it appears to the director that a person entitled to the use of water has not beneficially used all or a portion of the water right for a period of five or more consecutive years, and it appears that the right has or may have reverted to the state because of such nonuse, as provided by § 45-141, the director shall notify such person to show cause at a hearing before the director why his right or portion of the right should not be declared relinquished.

B. The notice shall contain:

   1. The time and place of the hearing as determined by the director.

   2. A description of the water right, including the approximate location of the point of diversion, the general description of the lands or places where such waters were used, the water source, the amount involved, the purpose of use, and the apparent authority upon which the right is based.

   3. A statement that unless sufficient cause is shown the water right will be declared relinquished.

C. The notice shall be served by sending the notice by registered or certified mail to the last known address of the person and shall be mailed at least thirty days before the hearing.

D. The director shall, as soon as practicable after such hearing, make an order determining whether such water right has been relinquished and give notice to each party of the order by serving such persons by registered or certified mail at their last known addresses.

E. For the purposes of this section and § 45-188 the following reasons shall be sufficient cause for nonuse:

1. Drought, or other unavailability of water.

2. Active service in the armed forces of the United States during military crisis.

3. Nonvoluntary service in the armed forces of the United States.

4. The operation of legal proceedings.

5. Federal, state or local laws imposing land or water use restrictions, or acreage limitations, or production quotas.

6. Compliance with an applicable conservation requirement established by the director pursuant to chapter 2, article 9 of this title.

7. With respect to a water right appropriated for an irrigation use, either of the following:

   (a) Pendency of a proceeding before a court or the director to change the permitted use from irrigation to municipal or other uses pursuant to a court decree or § 45-156 or to sever the right from the land to which it is appurtenant and transfer it for municipal use pursuant to § 45-172.

   (b) After a change in the permitted use from irrigation to municipal pursuant to a court decree or § 45-156 or 45-172, insufficient demand for the water by the municipal users.

8. Any other reason that a court of competent jurisdiction deems would warrant nonuse.

CHAPTER 164.

(House Bill No. 126.)

AN ACT

Pertaining to the Use of Water, and to Regulate the Appropriation of the Natural Waters of Arizona; Protecting the Rights of Prior Appropriations; Creating a State Water Commissioner, Defining and Limiting His Powers and Duties; Regulating the Manner of Making Appropriations and the Purposes for Which Water May be Appropriated; Giving to the Water Commissioner Control Over Dams, Gates and Wiers; Empowering the Water Commissioner to Measure the Flow of Streams, and to Investigate Water Resources; Providing for the Division of the State Into Water Districts, and for the Distribution of the Water to Those Entitled to its Use; Providing for the Determination of Existing Water Rights, Providing for the Method of Hearings in Contested Appropriations and Rules for Determining a Preference as Between Conflicting Appropriations; And Providing for Public Hearings, Limiting the Value to be Placed on Water Rights in Certain Cases; Providing for Appeals From Decisions of the Water Commissioner; Defining Certain Duties of Superior Courts, the Attorney General and County Officers; Providing the Manner in Which Reservoirs May be Located, and Defining and Limiting the Purposes for Which They May be Located; Providing Penalties for the Violations of the Provisions of This Act, and Giving Power to Enforce Decrees and Findings; Appropriating Moneys for the Purposes of This Act; And Repealing all Acts and Parts of Acts in Conflict With the Provisions of This Act.

Be it Enacted by the Legislature of the State of Arizona:

Section 1. The water of all natural streams, or flowing in any canyon, ravine or other natural channel, or in definite underground channel, and of springs and lakes, belongs to the public, and is subject to beneficial use as herein provided. Beneficial use shall be the basis and the measure and the limit to the use of water in the State and whenever hereafter the owner of a perfected and developed right shall cease or fail to use the water appropriated for a period of five (5) successive years the right to use shall thereupon cease and revert to the public and become again subject to appropriation in

the manner herein provided. But nothing herein contained shall be so construed as to take away or impair the vested rights which any person, firm, corporation or association may have to any water at the time of passage of this act.

Section 2. The office of State Water Commissioner is hereby created. The State Water Commissioner who shall hereafter in this act be designated and referred to as the Commissioner, shall be appointed by the Governor to hold office for a period of six years and until his successor is appointed and qualified. He may be removed by the governor for cause. He shall be familiar with water law, with hydraulics and with irrigation practice. He shall have office quarters at the State Capitol. The Commissioner shall have general control and supervision of the waters of the State of Arizona and of the appropriation and of the distribution thereof, excepting such distribution as is hereinafter reserved to Water Commissioners appointed by the courts under existing decrees. He shall receive a salary of Four Thousand Dollars ($4,000.00) and his traveling expenses when away from his office, to be paid from the State Water Fund.

Section 3. In order to promote the best and fullest use of the waters of the State of Arizona, the Commissioner is hereby authorized and empowered to make such surveys, investigations and compilations of the water resources and their development in the State as shall in his judgment be for the best interests of the State and to make co-operative arrangements for such purposes with the National Government; and the Commissioner is hereby directed upon the passage of this act to at once begin the establishment of a permanent, safe and convenient public depository in the State Capitol Building for existing and future records of stream flow and all other data relating to the water resources of the State.

Section 4. The Commissioner is authorized subject to the provisions herein contained to formulate and pass such necessary rules and regulations concerning the appropriation and distribution of the waters of the State as he may deem advisable, and is further authorized to employ such expert technical and clerical assistants and labor and upon such terms as may be deemed necessary and proper, not exceeding the funds appropriated for these purposes. The Commissioner shall have an official seal bearing the words, "Arizona State Water Commissioner" which shall be affixed to

papers, maps, plans and other instruments issued from his office.

Section 5. Any person, association or corporation, municipality or the State of Arizona or the United States of America hereafter intending to acquire the right to the beneficial use of any waters shall, before commencing the construction, enlargement or extension of any dam, ditch, canal or other distributing or controlling works, or performing any work in connection with said construction, or proposed appropriation, make an application to the Commissioner for a permit to make such appropriation.

Section 6. Each application for a permit to appropriate water shall set forth the name and postoffice address of the applicant, the source of water supply, the nature and amount of the proposed use, the location and description of the proposed ditch, canal, or other work; the time within which it is proposed to begin construction, the time required for the completion of the construction, and the time for the complete application of the water to the proposed use. If for agricultural purposes, it shall give the legal subdivisions of the land and the acreage to be irrigated as near as may be. If for power purposes, it shall give the nature of the works by means of which the power is to be developed, the pressure head and amount of water to be utilized, the points of diversion and release of the water, and the uses to which the power is to be applied. If for the construction of a reservoir, it shall give the height of dam, the capacity of the reservoir, and the uses to be made of the impounded waters. If for municipal water supply, it shall give the present population to be served, and, as near as may be the future requirements of the city. If for mining purposes, it shall give the location and the nature of the mines to be served, and the methods of supplying and utilizing the waters. All applications shall be accompanied by such maps and drawings, and such other data as may hereafter be prescribed by the Commissioner, and such accompanying data shall be considered as a part of the application.

Section 7. Upon receipt of an application, it shall be the duty of the Commissioner to make an endorsement thereon of the date of its receipt and to keep a record of the same. If upon examination the application is found to be defective it shall be returned for correction or completion, and the date of and reasons for the return thereof shall be endorsed thereon and made of record in his office. No application shall lose

its priority of filing on account of such defects, provided acceptable maps and drawings and data are filed in the office of the Commissioner within sixty days from the date of said return to the applicant. All applications which shall comply with the provisions of this act shall be recorded in a suitable book kept for that purpose, and it shall be the duty of the Commissioner to approve all applications made in proper form which contemplate the application of water to a beneficial use, when the provisions of this act are complied with; but when the proposed use conflicts with vested rights, or is a menace to the safety or against the interests and welfare of the public, the application shall be rejected.

An application may be approved for a less amount of water than that applied for, if there exists substantial reasons therefor, and in any event shall not be approved for more water than can be applied to a beneficial use. Applications for municipal water supplies may be approved to the exclusion of all subsequent appropriations, if the exigencies of the case demand, upon consideration and order by the Commissioner. As between two or more conflicting applications under consideration of the Commissioner at the same time, for the use of any water from a given stream, lake, or other source of water supply where the capacity of the supply is not sufficient for all applications and for which no permit has been granted, preference shall be given by the Commissioner according to the relative values to the public of the proposed uses to which the water is supplied. The said relative values to the public shall be taken by the Commissioner for this purpose in the following order of importance:

First: Domestic and municipal uses.

Domestic use shall be construed to include gardens not exceeding ½ acre to each family.

Second: Irrigation and stock watering.

Third. Water power and mining uses.

Section 8. The approval or rejection of an application shall be endorsed thereon, and a record made of such endorsement in the Commissioner's office. The application so endorsed shall be returned immediately to the applicant in person or by mail. If approved, the applicant shall be authorized, on receipt thereof, to proceed with the construction of the necessary works and to take all steps required to apply the water to a beneficial use, and to perfect the proposed appropriation. If the application is refused, the applicant shall take no steps

toward the construction of the proposed work or the diversion and the use of water so long as such refusal shall continue in force.

Section 9. Any permit to appropriate water may be assigned, subject to the conditions of the permit, but no such assignment shall be binding, except upon the parties thereto, unless approved by and filed for record with the Commissioner; and every permittee, under the provisions of this act, if he accepts such permit, shall accept the same under the conditions precedent, that no value whatsoever in excess of the actual amount paid to the State therefor shall at any time be assigned to or claimed for any permit granted under the provisions of this act, or for any rights granted or acquired under the provisions of this act; in respect to the regulation by any competent public authority of the services to be rendered by any permittee, his heirs, successors or assigns; or in respect to any valuation for purposes of sale to, or purchase whether through condemnation proceedings or otherwise by, the State or any city, county, municipal water district, irrigation district, or any political subdivision of the State, of the rights and property of any permittee, or the possessor of any rights granted or acquired under the provisions of this act.

Section 10. Actual construction work, except under applications by municipal corporations for municipal uses or purposes shall begin within one year from the date of approval of the application, and the construction on any proposed irrigation or other work shall thereafter be prosecuted with reasonable diligence and be completed within a reasonable time, as fixed in the permit, not to exceed five years from the date of such approval. The commissioner shall, for a good cause shown, order and allow an extension of time, including an extension beyond the five year limitation, and in determining such extension, shall give due weight to the magnitude, physical difficulties and cost of the proposed work.

Section 11. An applicant may appeal to the court hereinafter specified for relief, which may modify the decisions of the Commissioner if it shall appear that he has abused the authority reposed in him by law. Such appeal shall be taken within sixty days from the date of such decision by the Commissioner and shall be perfected when the applicant shall have filed with the court a copy of the order appealed from, together with a petition setting forth the appellant's reason for appeal, and such appeal shall be heard and determined upon

such competent proof as shall be adduced by the applicant, and such like proofs as shall be adduced by the commissioner.

Section 12. All applications for reservoir permits shall be subject to the provisions of the foregoing sections except that an enumeration of any lands proposed to be irrigated under this act shall not be required in the primary permit. But the party or parties proposing to apply to a beneficial use the water stored in any such reservoir shall file an application for permit, to be known herein as the secondary permit, in compliance with the provisions of the foregoing sections. Said application shall refer to such reservoir for a supply of water and shall show by documentary evidence that an agreement has been entered into with the owners of the reservoir for a permanent and sufficient interest in said reservoir to impound enough water for the purposes set forth in said application. When beneficial use has been completed and perfected under the secondary permit, the Commissioner shall take the proof of the water user under such permit and the final certificate of appropriation shall refer to both the ditch described in the secondary permit and the reservoir described in the primary permit. If at any time it shall appear to the Commissioner after a hearing of the parties interested and on investigation that the holder of the said appropriation will not or cannot within a reasonable period develop the streams then the Commissioner in his discretion may permit the joint occupancy and use with the holder of the appropriation by any and all applicants qualified under the provisions of this act and applying for such joint occupancy to the extent deemed advisable by the Commissioner provided that the applicant or applicants shall be required to pay to the party owning such works a pro-rata portion of the total cost of the old and the new works, such pro-rata cost to be based on the proportion of water used by the original and the additional users of such works.

Section 13. Upon it being made to appear to the satisfaction of the Commissioner that any appropriation has been perfected in accordance with the provisions of this act, it shall be his duty to issue to the applicant a certificate of the same character as that described in Section 27. Said certificate shall be recorded and transmitted to the applicant as provided in said section. Certificates issued for rights to the use of water for power development acquired under the provisions of this act shall limit the right or franchise to a period of forty years from the date of application, subject to a preference

right of renewal under the laws existing at the date of expiration of such franchise or right.

Section 14. The right acquired by such appropriation shall date from the filing of the application in the office of the Commissioner.

Section 15. No permit for the appropriation of water shall be denied because of the fact that the point of diversion described in the application for such permit, or any portion of the works in such application described and to be constructed for the purpose of storing, conserving, diverting or distributing such water, or the place of intended use or the lands to be irrigated by means of such water, or any part thereof, may be situated in some other State; but in all such cases where either the point of diversion or any of such works or the place of intended use, or the lands, or part of the lands, to be irrigated by means of such water, are situated within the State of Arizona, the permit shall issue as in other cases; provided, however, that the Commissioner may in his discretion, decline to issue a permit where the point of diversion described in the application is within the State of Arizona but the place of beneficial use in some other State, unless under the laws of such State water may be lawfully diverted within such State for beneficial use in the State of Arizona.

Section 16. Upon the initiative of the Commissioner or upon a petition to him signed by one or more water users upon any stream, requesting the determination of the relative rights of the various claimants to the waters of that stream, it shall be his duty, if, upon investigation he finds the facts and conditions are such as to justify, to make a determination of the said rights, fixing a time for beginning the taking of testimony and the making of such examination as will enable him to determine the rights of the various claimants. In case suit has been brought in any State Court for the determination of rights to the use of water, the case may, in the discretion of the Court be transferred to the Commissioner for determination as in this act provided. But in such case, no proceedings shall be had by the Commissioner until such transfer is made. Provided, that in the determination of water rights on any water shed or any part thereof or upon any other source of supply where the dates of appropriation of water on all or any part of such water shed shall have been determined in a judgment or decree of any court in any action or proceeding concluded prior to or pending at the date of the taking effect of this act, the Commissioner shall accept such dates of appropriation as found or

fixed in such decree or judgment as correct and nothing herein shall be held or construed to require the owner of any appropriation which shall have been adjudicated in such decree or judgment, to appear in or for any purpose take notice of, any of the proceedings, investigations or hearings authorized by this act. Abandonment or other loss of any right of any appropriation awarded in any such decree may be affirmatively shown, but nothing in this act shall be so construed as to revive any rights to the used water which have been lost by abandonment, forfeiture or non-user.

Section 17. The Commissioner shall prepare a notice, setting forth a date when he will begin an investigation of the flow of the stream and of the ditches diverting water therefrom, and a place and a time certain when he will begin the taking of testimony as to the rights of the parties claiming water therefrom. Said notice shall be published in two issues of one or more newspapers having general circulation in the counties in which such streams is situated, the last publication of said notice to be at least thirty days prior to the beginning of taking testimony. The Commissioner shall have the power to adjourn the taking of testimony from time to time and from place to place, to suit the convenience of those interested.

Section 18. It shall be the duty of the Commissioner to send by registered mail to each person, firm or corporation, or municipality hereinafter to be designated as claimant, claiming the right to the use of any of the water of said stream, in so far as such claimants can reasonably be ascertained a similar notice setting forth the date when the Commissioner will begin the examination of the stream and the ditches diverting the waters therefrom, and also the date when he will take testimony as to the rights to the water of said stream. Said notice must be mailed at least thirty days prior to the date set therein for making the examination of the stream or the taking of testimony.

Section 19. The Commissioner shall, in addition, enclose with said notice a blank form on which said claimant or owner shall present in writing all the particulars necessary for the determination of his right to the waters of the stream to which he lays claim, the said statement to include the following: The name and postoffice address of the claimant; the nature of the right or use on which the claim is based; the time of initiation of such (right and) or the commencement of such use, and if distributing works are required; the date of beginning of construction; the date when completed; date of begin-

ning and completion of enlargements; the dimensions of the ditch as originally constructed and as enlarged; the date when water was first used for irrigation or other beneficial purposes, and if used for irrigation, the amount of land reclaimed the first year, the amount in subsequent years, with the date of reclamation, and the amount and general location of the land such ditch is intended to irrigate; the character of the soil and the kind of crops cultivated and such other facts as will show a compliance with the law in acquiring the right.

Section 20. Each claimant or owner shall be required to certify to his statements under oath and the Commissioner and those deputized by him are hereby authorized to administer such oaths, which shall be done without charge, as also shall be the furnishing of blank forms for said statement.

Section 21. At the time of the submission of proof of appropriation, or at the time of the taking of testimony for the determination of rights to water, the Commissioner shall collect from each of the claimants or owners a fee of two dollars ($2.00) for the purpose of recording the water right certificate, when issued, in the office of the county recorder together with the additional fee of twelve cents for each acre of irrigated lands up to and including one hundred acres, and ten cents per acre for each acre in excess of one hundred acres; also twenty-five cents for each theoretical horsepower up to and including one hundred horsepower, and fifteen cents for each horsepower in excess of one hundred up to and including one thousand horsepower, and five cents for each horsepower in excess of one thousand horsepower up to and including two thousand horsepower, and two cents for each horsepower in excess of two thousand horsepower as set forth in such proof, the minimum fee, however, for any claimant or owner in such cases to be $2.50; also a fee of $5.00 for any other character of claim to water. All fees collected by the Commissioner shall be paid into the State Treasury to become a part of a fund to be known as the State Water Fund; which fund shall be kept separately from all other state funds by the State Treasurer and used by him to the extent of its resources and in preference to the use of any other appropriation of the State funds, for the payment of the duly authorized expenses of the Commissioner.

Section 22. Upon the completion of the taking of testimony the Commissioner shall at once give notice by registered mail to the various claimants that at a time and place named in the notice not less than ten days thereafter, all of said evidence shall be open to inspection of the various claimants or

owners, and said Commissioner shall keep said evidence open to inspection at said places not less than thirty days, and such other time as fixed in the notice.

Section 23. Should any person, corporation or association owning or operating any irrigation works, or claiming any interest in the stream or streams involved in the determination, desire to contest any of the rights of the persons, corporations or associations who have submitted their evidence to the Commissioner as aforesaid, such persons, corporations or associations shall within five days after the expiration of the period as fixed in the notice for public inspection, notify the Commissioner in writing, stating with reasonable certainty the grounds of their proposed contest, which statement shall be verified by the affidavit of the contestant, his agent or attorney, and the said Commissioner shall notify the said contestant and the person, corporation or association, whose rights are contested, to appear before him at such convenient place as he shall designate in said notice.

Section 24. The Commissioner shall fix the time and place for the hearing of said contest, which date shall not be less than thirty days nor more than sixty days from the date the notice is served on the party, association or corporation, which notice and returns thereof shall be made in the same manner as summons are served in civil actions in the Superior Courts of this State. The Commissioner shall have power to adjourn hearings from time to time upon reasonable notice to all the parties interested, and to issue subpoenas and compel the attendance of witnesses to testify upon such hearings, which shall be served in the same manner as subpoenas issued out of the Superior Courts of the State, and shall have the power to compel such witnesses so subpoenaed to testify and give evidence in said matter, and shall have the power to order the taking of depositions and to issue commissions therefor in such manner as he may provide by rule, and said witnesses shall receive fees as in civil cases, the costs to be taxed in the same manner as are costs in suits in equity. The evidence in such proceedings shall be confined to the subjects enumerated in the notice of contest.

Section 25. It shall be the duty of the Commissioner to make an examination of said stream and the works diverting water therefrom, said examination to include a study of the discharge of said stream from existing data and from additional measurements and of the carrying capacity to the various ditches and canals, examination of the irrigated lands, and a

substantially accurate measurement of the lands irrigated or susceptible of irrigation from the various ditches and canals; and to take such other steps and gather such other data and information as may be essential to the proper understanding of the relative rights of the parties interested; which said investigations shall be reduced to writing and made a matter of record in this office and such records and data shall be made conveniently accessible to the public. It shall be the duty of the Commissioner to make or cause to be made a map or plat on a scale of not less than one inch to the mile, showing with substantial accuracy the course of said stream, the location of such ditch or canal diverting water therefrom, and the legal subdivisions of lands which have been irrigated or which are susceptible of irrigation from the ditches and canals already constructed.

Section 26. As soon as practicable after the compilation of said data and the filing of said evidence in the office of the Commissioner he shall make and cause to be entered of record in his office, findings of fact and an order of determination determining and establishing the several rights to the waters of said stream. The original evidence filed with the Commissioner and certified copies of the observations and measurements and maps of record in his office, in connection with such determination, together with a copy of the order of determination and findings of the Commissioner, as the same appears of record in his office, shall be certified to and filed with the clerk of the Superior Court in the county in which reside the greatest number of water users whose rights are determined by such order of determination; and such court, subject to the provisions of law for change of venue and change of judge, shall be the court in which determination of the water rights shall be made, and is referred to in this act as the court. It shall become the duty of the judge or judges of said court to hear the determination and to enter a decision and decree and all expenses of the court in connection therewith not chargeable as costs shall be paid out of the State Water Fund. A certified copy of such order of determination and findings shall be filed in every county in which such stream, or any portion of a tributary, is situated with the county recorder. Upon the filing of such evidence and order with the Court the Commissioner shall procure an order from said Court or any judge thereof, fixing the time at which the determination shall be heard in said court, which hearing shall be at least forty days subsequent to the date of such order. The clerk of said court shall, upon the making of such order, forthwith deliver a certified copy thereof, to the Commissioner and said Com-

missioner shall immediately upon receipt thereof notify each claimant or owner who has appeared in the proceeding, of the time and place for such hearing. Service of such notice shall be deemed complete upon depositing such notice in the postoffice as registered mail, addressed to such claimant or owner at his postoffice address, as set forth in his proof, theretofore filed in the proceedings. Proof of such service shall be made and filed with the Court by the Commissioner as soon as possible after the mailing of such notices. The determination of the Commissioner shall be in full force and effect from the date of its entry in the records of his office.

Section 27. Upon the final determination of the rights to the waters of any stream, it shall be the duty of the Commissioner to issue to each person, association or corporation represented in such determination a certificate to be signed by the Commissioner and attested under his seal, setting forth the name and postoffice address of the owner of the right; the priority of date and the extent and purpose of such right; and if such water be for irrigation purposes, a description of the legal subdivisions of land to which said water is appurtenant, such certificate shall be transmitted by the Commissioner in person or by registered mail to the County recorder of the county in which such right is located, and it shall be the duty of the county recorder upon receipt of the recording fee of $2.00 collected as hereinbefore provided, to record the same in a book especially prepared and kept for that purpose, and thereupon immediately transmit the certificates to the respective owners.

Section 28. From and after the filing of the evidence and order of determination in the Court, the proceedings shall be as near as may be like those in a suit in equity, except that any proceedings, including the entry of a decree, may be had in vacation with the same force and effect as in term time. At any time prior to the hearing provided for, any party, or parties jointly interested, may file exceptions in writing to such findings and order of determination, or any part or parts thereof, which exceptions shall state with a reasonable degree of certainty the grounds of the exceptions and shall specify the particular paragraphs or parts of such findings and order excepted to. A copy of such exceptions, verified by such exceptor, or certified to by his attorney, shall be served upon such claimant, who was an adverse party to any contest or contests wherein such exceptor was party in the proceedings prior to such hearing. Such service shall be made by the exceptor or his attorney upon each of such adverse parties in person, or upon the

attorney of such party if he has appeared by attorney, or upon his agent, and if such adverse party is a nonresident of the State, such service may be made by mailing such copy to such adverse party by registered mail, addressed to his place of residence, as set forth in his proof filed in the proceedings. If no exceptions are filed, the Court shall on the day set for the hearing enter a decree affirming the determination of the Commissioner. If exceptions are filed upon the day set for the hearing the Court shall fix a time not less than thirty days (30) thereafter, unless for good cause shown such time be extended by the Court, at which time a hearing will be had upon such exceptions. All parties may be heard upon the consideration of the exceptions, and the Commissioner may appear on behalf of the State either in person or by the Attorney General. The Court may, if necessary, remand the case to the Commissioner for such further testimony as it may direct, and upon the completion of such testimony, said Commissioner may be required to make a further order of determination. After final hearing the Court shall enter a decree affirming or modifying the order of the Commissioner and may assess such costs as it may deem just. The clerk of the Court, immediately upon the entry of any decree by the said Court shall transmit a certified copy of said decree to the Commissioner, who shall immediately enter the same upon the record of his office.

Section 29. During the time the hearing of the order of the Commissioner is pending in the Court, and until a certified copy of the judgment, order or decree of the Court is transmitted to the Commissioner, the division of water from the stream involved in such appeal shall be made in accordance with the order of the Commissioner.

Section 30. Within six months from the date of the decree of the Court determining the rights upon any stream, the Commissioner or any party interested may apply to the Court for a rehearing upon grounds to be stated in the application. Thereupon, if in the discretion of the court it shall appear that there are good grounds for rehearing, the Court shall make an order fixing a time when such application shall be heard. The clerk of the Court shall, at the expense of the petitioner, forthwith mail written notice of said application to the Commissioner and to every party interested, and state in such notice the time and place when such application will be heard.

Section 31. The Determination of the Commissioner as confirmed or modified as provided by this act in proceedings shall be conclusive as to all prior rights and the rights of all

existing claimants upon the stream or other body of water lawfully embraced in the determination.

Section 32. Whenever proceedings shall be instituted for the determination of the rights to the use of any water, it shall be the duty of all claimants interested therein to appear and submit proof of their respective claims at the time and in the manner required by law; and any such claimant who shall fail to appear in such proceedings and submit proof of his claims shall be barred and estopped from subsequently asserting any right theretofore acquired upon the stream or other body of water embraced in such proceedings, and shall be held to have forfeited all rights to the use of said water theretofore claimed by him. Any person, association or corporation interested in the water of any stream upon whom or which no service of notice shall have been had of the pendency of proceedings for the determination of the rights to the use of the water of said stream, and who or which shall have no actual knowledge or notice of the pendency of said proceedings, may at any time prior to the expiration of one year after the entry of the determination of the Commissioner file a petition to intervene in said proceedings. Such petition shall contain, among other things, all matters required by this act, of claimants who have been duly served with notice of said proceedings and also a statement that the intervenor had not actual knowledge or notice of the pendency of said proceedings. Upon the filing of said petition in intervention, the petitioner shall be allowed to intervene upon such terms as may be equitable and thereafter shall have all rights vouchsafed by this act to claimants who have been duly served.

Section 33. Whenever the rights to the waters of any stream have been determined as herein provided, and it shall appear by the record of such determination that it had not been at one and the same proceeding, then in such case the Commissioner may open to public inspection, all proofs and evidence of rights to the water, and his finding in relation thereto in the manner provided in Section 22; and any person, corporation, or association who may desire to contest the claims or rights of other persons, corporations or associations, as set forth in the proofs or established by the Commissioner shall proceed in the manner provided for in Sections 23 and 24; provided, that contests may not be entered into and shall not be maintained except between claimants who were not parties to the same adjudication proceedings in the original hearings.

Section 34. The Commissioner shall divide the State into water districts with due preference to drainage watersheds, said water districts to be so constituted as to secure the best protection to the claimants for water and the most economical supervision on the part of the State; said water districts shall not be created until a necessity therefor shall arise but shall be created from time to time as the claims thereof from the streams of the State shall be determined.

Section 35. There shall be appointed by the Commissioner one water superintendent for each water district. Each water superintendent shall take and subscribe to an oath to support the provisions of this act and to fulfil the orders of the Commissioner. He shall hold his office until his successor is appointed and qualifies, and the Commissioner shall by like selection and appointment fill all vacancies which shall occur in the office of water superintendent. Each water superintendent shall receive such compensation as the Commissioner shall direct, such compensation to be paid by the water users in the respective districts. Each water superintendent shall keep a true and just account of the time spent by him and his assistants in the duties of each county respectively in which his duties may extend and he shall present a true copy thereof verified by oath to the Superior Court of each county at the end of each month, whereupon the judge of the Superior Court shall order the same paid, according to such a distribution of the amount among the water users as the judge shall deem equitable.

Section 36. It shall be the duty of each said water Superintendent to divide the water of the natural streams or other sources of supply of his district among the several ditches and reservoirs taking water therefrom, and among the laterals and ditches according to the rights of each respectively in whole or in part, and to shut and fasten, or cause to be shut and fastened, the head gates of ditches, and shall regulate or cause to be regulated, the controlling works of reservoirs, in time of scarcity of water, as may be necessary by reason of the rights existing from said streams of his district. The water superintendent shall have authority to regulate the distribution of water among the various users under any partnership ditch or reservoir where rights have been determined, in accordance with existing decrees. Whenever, in this pursuance of his duties, the water superintendent regulates a head gate to a ditch or the controlling works of reservoirs, it shall be his duty to attach to such head gate or controlling works, a

written notice properly dated and signed, setting forth the facts that such head gate or controlling works has been properly regulated and is wholly under his control, and such notice shall be legal notice to all parties interested in the division and distribution of the water of such ditch or reservoir. It shall be the duty of the county attorney to appear for or on behalf of the water superintendent in any case which may arise in the pursuance of the official duties of any such officer within the jurisdiction of said County Attorney.

Section 37. Said Water Superintendents shall, as near as may be, divide, regulate and control the use of the water of all streams within their districts by such closing or partially closing of the head gates as will prevent the waste of water, or its use in excess of the volume to which the owner of the right is lawfully entitled, and any person who may be injured by the action of any water superintendent shall have the right to appeal to the Superior Court of the county for an injunction. Such injunction shall only be issued in case it can be shown at the hearing that the water superintendent has failed to carry into effect the order of the Commissioner or decrees of the Court determining the existing rights to the use of water.

Section 38. Said water superintendent shall have power, in case of need, to employ suitable assistants to aid him in the discharge of his duties. Such assistants shall take the same oath as the water superintendent, and shall obey his instructions, and each shall be entitled to such compensation per diem as the Commissioner shall have fixed for such cases. Payment for such services is to be made upon certificates of the superintendent in the same manner as provided for the payment of the water superintendent himself.

Section 39. Any person who shall wilfully open, close, change or interfere with any lawfully established head gate, measuring device, or water box without authority, or who shall wilfully use water or conduct water into or through his ditch which has been lawfully denied him by the water superintendent or other competent authority, shall be deemed guilty of a misdemeanor. The possession or use of water when the same shall have been lawfully denied by the water superintendent of other competent authority, shall be prima facie evidence of the guilt of the person using it.

Section 40. The water superintendent or his assistants within his district, shall have power to arrest any person or persons violating any of the provisions of this act and turn

them over to the Sheriff or other competent police officer within the county; and upon delivering any such person so arrested into the custody of the sheriff it shall be the duty of the water superintendent or assistant making such arrest to immediately, in writing and upon oath, make complaint before the proper justice of the peace against the person so arrested.

Section 41. The owner or owners of any ditch or canal shall maintain a substantial head gate at the point where the water is diverted, which shall be of such construction that it can be locked and kept closed by the water superintendent; and such owners shall construct and maintain when required by the Commissioner suitable measuring devices at such points along such ditch as may be necessary for the purpose of assisting the water superintendent in determining the amount of water that is to be diverted into said ditch from the stream, or taken away from it by the various users. Any and every owner of manager of a reservoir, located across or upon the bed of a natural stream, shall be required to construct and maintain, when required by the Commissioner, a measuring device of a plan to be approved by the Commissioner below such reservoir, and a measuring device above such reservoir on each or every stream or source of supply discharging into such reservoir, for the purpose of assisting the water superintendent in determining the amount of water to which appropriators are entitled and thereafter diverting it for such appropriator's use. When it may be necessary for the protection of other water users, the Commissioner may require flumes to be installed along the line of any ditch. If any such owner or owners of irrigation works shall refuse or neglect to construct and put in such head gates, flumes, or measuring devices after twenty days notice, the Commissioner may close such ditch and the same shall not be opened or any water diverted from the source of supply, under the penalties prescribed by law for the opening of head gates lawfully closed until the requirements of the Commissioner as to such head gate, flumes or measuring device have been complied with, and if any owner or manager of a reservoir located across the bed of a natural stream shall neglect to put in such measuring device after twenty days' notice, the said Commissioner may open the sluice gate or outlet of such reservoir and the same shall not be closed under penalties of the law for changing or interfering with head gates, until such measuring devices are installed.

Section 42. The Commissioner shall approve the plans for and examine any dam, authorized under the provisions of this

act or any ditch, canal, obstruction, diversion, or other work, and shall have authority to examine and inspect said dam or other work during construction; and at the time of such examination or inspection, or thereafter the Commissioner shall notify in writing the parties constructing such dam or other works, of any addition or alteration which he considers necessary for the security of the work or the safety of the public or of any person or persons residing on or owning land in the vicinity or below such works, or for the safety of their property.

Section 43. Should any person or persons residing on or owning land in the neighborhood of any irrigation works after completion, or in the course of construction, apply to the Commissioner in writing desiring an inspection of such works the Commissioner may order an inspection thereof Before doing so he may require the applicant for such inspection to make a deposit of a sum of money sufficient to pay the expenses of an inspection, and in case the application appears to said Commissioner not to have been justified, he may cause the whole or part of such expense to be paid out of such deposit. In case the application appears to the Commissioner to have been justified, he may require the owner of the works to pay the whole or any part of the expenses of the inspection, and the same shall constitute a valid lien against the works, which may be enforced in the same manner as provided for the enforcement of mechanics' liens.

Section 44. Whenever the owner, manager or lessee of a reservoir, constructed under the provisions of this act, shall desire to use the bed of a stream, or other watercourse, for the purpose of carrying stored or impounded water from the reservoir to the consumer thereof, he shall in writing, notify the water superintendent of the district in which the stored or impounded waters are to be used, giving the date when it is desired to discharge water from such reservoir, its volume, and the names of all persons and ditches entitled to its use. It shall then be the duty of such water superintendent to supervise the opening of such reservoir gates and to close or to so adjust the head gates of all ditches from the stream of water courses, not entitled to the use of such stored water, as will enable those having the right to secure the volume to which they are entitled.

Section 45. Whenever any water users from any ditch or reservoir, are unable to agree relative to the distribution or division of water through or from said ditch or reservoir, it shall be lawful for such water users to apply to the water super-

intendent of the district in which said ditch or reservoir is located, by written notice, setting forth such facts, asking the water superintendent to regulate such ditch or reservoir for the purpose of making a just division or distribution of water from the same to the parties entitled to the use thereof. The judge of any Superior Court may also direct the water superintendent of the district to take charge of and enforce any decree relative to water rights made under the jurisdiction of said Court pending a determination of all the water rights of the watershed. Upon receiving such order, the said water superintendent shall regulate such ditch or reservoir for the purpose of dividing or distributing the water therefrom in accordance with the established rights continuing the said work until the necessity therefor shall cease to exist. Said rights shall be deemed to have been established when the same have been determined by the Commissioner, by any decree of any Superior Court of this State or by contract or other written agreement.

Section 46. To bring about a more economical use of the available water supply, it shall be lawful for water users owning lands which have attached water rights, to rotate in the use of supply to which they may be collectively entitled, and whenever two or more water users shall notify the water superintendent that they desire to use the water by rotation and shall present a written agreement as to the manner of such rotation, the water superintendent shall distribute the water in accordance with such written agreement.

Section 47. In suits for injunction affecting the use of water from streams upon which the rights to use water have been determined, no restraining order shall be granted before hearing had after at least ten days' notice thereof served upon all persons defendant. All suits for injunction involving the use of water shall be heard, either in term time or during vacation, not later than fifteen days after issues joined, unless for good cause shown further time be allowed.

Section 48. All water used in this State for irrigation purposes shall remain appurtenant to the land upon which it is used; provided, that if for any natural cause beyond control of the owners it should at any time become impracticable to be beneficially or economically use water for irrigation of any land to which water is appurtenant, said right may be severed from said land, and simultaneously transferred and become appurtenant to other land, without losing priority of right theretofore established, if such change can be made without

detriment to existing rights, on the approval of an application of the owner to the Commissioner. Before the approval of such transfer an inspection shall be made by the Commissioner or persons deputized by him, and the Commissioner shall approve or disapprove such transfer and prescribe the conditions therefor. Such order shall be subject to appeal as in this act provided.

Section 49. The unauthorized use of water to which another person is entitled, or the unauthorized diversion of water from a stream, or the wilful waste of water to the detriment of another, or the diversion of a stream to the injury or threatened injury of the lands of another shall be a misdemeanor and the possession or such use of water shall be prima facie evidence of the guilt of the person using it. It shall also be a misdemeanor to use, store, or divert any water until after the issuance of permit to appropriate such waters.

Section 50. Whenever any appropriator of water has the lawful right of way for the storage, diversion or carriage of water, it shall be unlawful to place or maintain any obstruction that shall interfere with the use of the works, or prevent convenient access thereto. Any violation of the provisions of this Section shall be a misdemeanor.

Section 51. The following fees shall be collected by the Commissioner in advance and be paid by him into the State Water Fund of the State Treasury on the last day of each month.

1. For examining an application for permit to appropriate water, $3.00.

2. For filing and recording permit to appropriate water for irrigation purposes, twelve cents per acre for each acre to be irrigated up to and including one hundred acres, and ten cents per acre for each acre in excess of one hundred acres, or in case the application is for power purposes, twenty-five cents for each theoretical **jorsepower** to be developed up to and including one hundred, and ten cents for each horsepower in excess of one hundred and up to and including one thousand, and five cents for each horse power in excess of one thousand; or in case the application is for any other purpose. $5.00 for filing and recording each permit.

3. For filing or recording any other water right instrument. $1.00 for the first hundred words and ten cents for each additional hundred words or fraction thereof.

4. For making copy of any document recorded or filed in his office, ten cents for each hundred words or fraction thereof;

but where the amount exceeds $5.00, then only the actual cost in excess of that amount shall be charged.

5. For certifying copies, documents, records, or maps, $1.00 for each certificate.

6. For blue print copy of any map or drawing, ten cents per square foot or fraction thereof. For such other work as may be required of his office, actual cost of the work.

Section 52. The decisions of the Commissioner shall be subject to appeal to the Court, as heretofore prescribed, which appeal shall be governed by the practice of suits in equity, unless otherwise provided herein.

Section 53. The Commissioner may administer oaths, certify official acts, subpoena witnesses, books, papers, drawings and documents, in the manner and with like powers as those provided for the corporation commission in the performance of their official duties.

Section 54. There is hereby appropriated out of any moneys in the general fund of the State Treasury not otherwise appropriated, the sum of $15,000.00 annually, or so much thereof as may be necessary for the payment of the salaries and expenses incurred under the provisions of this act. And there is hereby appropriated out of the General Fund of the State Treasury for the year 1919-20 a special fund of $10,000.00 for the purpose of collecting data for the adjudication of the Gila River, exclusive of the Salt River, such sum to be the basis of a revolving fund to be used consecutively in the adjudication of the water sheds of the State. These moneys shall be paid into the State Water Fund.

Section 55. The Attorney General shall be the legal advisor of the Commissioner in all matters appertaining to the operation of this act, and shall perform any and all legal duties necessary in connection with this work without other compensation than his salary as fixed by law.

Section 56. Nothing in this act contained, shall impair the vested rights of any person, association or corporation to the use of water.

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

Nor shall the right of any person, association or corporation to take and use water be impaired or affected by any of

the provisions of this act where appropriations have been initiated prior to the filing of this act in compliance with laws then existing, and such appropriators, their heirs, successors or assigns shall, in good faith and in compliance with the laws existing at the time of the filing of this act in the office of the Secretary of State, commence the construction of works for the application of the water so appropriated to a beneficial use and thereafter prosecute such work diligently and continuously to completion, but all such rights shall be adjudicated in the manner provided in this act.

Section 57. All violations of the provisions of this act, declared herein to be misdemeanors, shall be punished by a fine not exceeding $250.00 nor less than $10.00, or by imprisonment in the county jail, not exceeding six months, or by both such fine and imprisonment.

Section 58. Nothing herein contained shall be construed to deprive the State or any City, municipal water district, irrigation district, or political subdivision of the State or any person, company or corporation, of any rights which under the law of this State they may have, to acquire property by or through eminent domain proceedings.

Section 59. The Commissioner shal prepare and render to the Governor, biennially, and oftener if required, full and true reports of his work relating to the matters and duties devolving upon him by virtue of his office, which biennial report shall be delivered to the Governor, on or before the 31st day of December of the year preceding the regular sessions of the Legislature. In these reports he shall include such suggestions as to the amendments of existing laws or the necessity for new laws as his information and experience in office shall suggest.

Section 60. All acts and parts of acts in conflict herewith are hereby repealed.

Section 61. If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional such decision shall not affect the validity of the remaining portions of this act.

Section 62. This act shall be known as the State Water Code Act.

"This Bill having remained with the Governor ten days, Sundays excluded, after the final adjournment of the legis-

lature, and not having been filed with his objections, has become a law this 26th day of March, 1919."

(Signed) MIT SIMMS,
Secretary of State.

CHAPTER 165.

(House Bill No. 52.)

AN ACT

To Conserve Public Health by Compelling all Smelters, Refineries, Foundaries, Engaged in the Reduction or Treatment of Ores and Metals and all Cement Mills and Ore Reduction Works in Which Oils, Acids, Quicksilver or Cyanide Is Used to Install Adequate Change Rooms, Water Closets, Wash-Rooms and Bath Rooms; Providing for the Enforcement of This Act and Providing a Penalty for the Violation Thereof.

Be it Enacted by the Legislature of the State of Arizona:

Section 1. Suitable and proper bath-rooms, wash-rooms and water closets shall be provided by the owner or operator of any Smelter, Refinery or Foundry engaged in the treatment or reduction of ores or metals, and all cement works, and ore reductions works using oils, cyanide, acids, quicksilver, and such water closets shall be properly screened and ventilated, and shall be kept at all times in a clean sanitary condition, with not less than one seat for each twenty-five persons, and one seat for each fraction thereof above ten, employed in such establishment. One shower bath shall be provided for every twenty-five men employed in such establishment with adequate additional wash-room facilities, and at all times they shall be kept in a clean and sanitary condition.

Section 2. Every such establishment enumerated above, shall provide, maintain and suitably equip a heated change room immediately contiguous to such establishment, which shall at all times be open to employees and shall at all times be kept in a clean and sanitary condition.

Section 3. The enforcement of the provisions of this act are declared necessary for the maintenance of the public health, and the Superintendent of the State Board of Health is charged with the enforcement of the provisions herein contained.

SEC. 5. This Act shall take effect and be in force from and after its passage.

Approved April 13, 1893.

No. 86. AN ACT

Relating to the Appropriation of Water and the Construction and Maintenance of Reservoirs, Dams and Canals.

Be it Enacted by the Legislative Assembly of the Territory of Arizona :

SECTION 1. That any person or persons, company or corporation shall have the right to appropriate any of the unappropriated waters or the surplus or flood waters in this Territory for delivery to consumers, rental, milling, irrigation, mechanical, domestic, stock or any other beneficial purpose, and such person or persons, company or corporation for the purpose of making such appropriation of waters as herein specified, shall have the right to construct and maintain reservoirs, dams, canals, ditches, flumes and any and all other necessary water ways. And the person or persons, company or corporation first appropriating water for the purposes herein mentioned shall always have the better right to the same.

SEC. 2. Every person or persons, company or corporation, who shall desire to appropriate any of the waters of this Territory for the uses and purposes mentioned in Section 1 of this Act shall first post at the place of diversion on the stream or streams as the case may be, a notice of his, their or its appropriation of the amount of water by it or them appropriated, and that they intend to build and maintain a dam at a certain place, in said notice to be designated, and in case of storage of water by reservoir that they intend to construct and maintain a reservoir at a place to be in said notice stated, and that they intend to construct and maintain a canal or canals, as the case may be, from the point of diversion of said water to some terminal point to be mentioned in said notice, a copy of which shall be filed and recorded in the office of the County Recorder in which said dam, reservoir and canal is contemplated to be constructed, and if said canal runs through more than one County, then such notices shall be filed and recorded in each County through which said canal is to be constructed, and a copy of said notice shall also be filed and recorded in the office of the Secretary of the Territory. That said person or persons, company or corporation after posting and filing their notice as herein provided, shall within a *reasonable time* thereafter construct their dam or dams, reservoir or reservoirs, canal or canals, as

the case may be, and shall after such construction use reasonable diligence to maintain the same for the purposes in such notices specified, and on failure to within a reasonable time after posting and filing of such notice or notices as herein provided to construct such reservoir, dam or canal as in such notice specified or to use reasonable diligence after such construction to maintain the same, shall be held to work a forfeiture of such right to the water or waters attempted to be appropriated.

SEC. 3. All Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed.

SEC. 4. This Act shall take effect and be in force from and after its passage.

Approved April 13, 1893.

No. 87. AN ACT

To Regulate the Fees and Salaries of Certain County Officers.

Be it Enacted by the Legislative Assembly of the Territory of Arizona:

SECTION 1. Clerks of the District Court shall receive the following fees in civil cases:

For copy of complaint with or without certificate and seal, each one hundred words	$ .15
Each writ of summons	1.00
Docketing each cause, to be charged but once	.25
Docketing each rule or motion	.25
Filing each paper	.10
Entering appearance of each party to a suit, to be charged but once	.25
Each continuance	.25
Swearing each witness	.20
Administering an oath or affirmation with certificate and seal	.50
Each subpœna issued	.25
Each additional name inserted in subpœna	.10
Approving bond, except bond for costs	.50
Swearing and empaneling a jury	.50
Receiving and recording verdict of jury	.50
Assessing damages in each case not tried by jury	.25
Each commission to take deposition	1.00
Taking deposition, each one hundred words	.25
Each order	.25
Each judgment or decree	1.00

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing *United States' Opening Brief* 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 **February 25, 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.

/s/ John L. Smeltzer

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