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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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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.

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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)

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# ANSWERING BRIEF FOR THE UNITED STATES AS CROSS-APPELLEE AND REPLY BRIEF FOR THE UNITED STATES AS APPELLANT

Of Counsel:

SCOTT BERGSTROM
ANDREW ENGEL
*Office of the Solicitor*
*United States Department of the Interior*

JOHN C. CRUDEN
*Assistant Attorney General*
KATHERINE J. BARTON
F. PATRICK BARRY
YOSEF NEGOSE
JOHN L. SMELTZER
*Environment & Natural Resources Division*
*U.S. Department of Justice*
*Washington, D.C. 20044*
*(202) 305-0343*
john.smeltzer@usdoj.gov

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## SUPPLEMENTAL STATEMENT OF JURISDICTION

The United States, the Gila River Indian Community (the "Community"), and the San Carlos Apache Tribe (the "Tribe") filed appeals from a September 4, 2014, final judgment that resolved a set of contested applications to change the place of use of water rights under the Globe Equity Decree. *See* ER[1] 1 (final judgment); *see also* ER 126, 137, 248 (notices of appeal). The Freeport Minerals Corporation ("Freeport") filed a cross-appeal from the same final judgment. ER 134. This Court has jurisdiction over the appeals and cross-appeal under 28 U.S.C. § 1291. *See* U.S. Opening Br. at 1-4.

Two Upper Valley irrigation districts, the Gila Valley Irrigation District and Franklin Irrigation District, and a group of farmers, Larry W. Barney *et al.*, also filed notices of appeal from the September 4, 2014 judgment, ER 129, 131, but have not pursued their appeals.[2] Instead, the irrigation districts and farmers (collectively, "GVID") filed a joint appellee brief in which they contend, inter alia, that the September 4, 2014 judgment is not final for appeal purposes because it

[1] "ER" refers to the Appellants' Joint Excerpts of Record, volumes 1-4 (February 25, 2015) and volumes 5-6 (June 12, 2015). "FSER" refers to Freeport's Supplemental Excerpts (April 16, 2015).

[2] The irrigation districts and farmers also submitted a proposed amicus brief on the issues that they could have pursued in their abandoned cross-appeal. *See* GVID Proposed Amicus Brief (April 27, 2015) (GVID Am. Br.). Their motion to file as amicus was referred to the merits panel. *See* Order (May 13, 2015).

allegedly does not resolve all pending claims. *See* GVID Br. at 13-21. That argument lacks merit for reasons addressed *infra* (pp. 19-24).

## STATEMENT OF THE ISSUES

In its opening brief, the United States and co-appellants the Community and Tribe raised the following 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 rights to irrigate lands long lost to river erosion does not support a finding of abandonment.

As appellee, GVID raises the following issue:

3. Whether this Court has appellate jurisdiction over the present consolidated appeals; and

As cross-appellant, Freeport raises the following issues:

4. Whether the district court properly declined to consider revised "sever" and "transfer" parcels proffered by Freeport in support of its applications to change the place of use of decreed water rights, where the revised parcels descriptions effected material changes without notice to all Globe Equity Decree parties; and

5. Whether the district court properly held that Freeport failed to make a prima facie case of no injury to the Tribe and other water users in connection with its proposed changes in the place of use of Decree water rights.

## SUPPLEMENTAL STATEMENT OF THE CASE[3]

### A. Introduction

Freeport sought to sever certain Globe Equity Decree water rights from the lands to which they are appurtenant and transfer those rights to other irrigable lands.[4] The United States, the Community, and the Tribe – collectively, the "Objecting Parties" – opposed Freeport's applications on the grounds, *inter alia*, that the subject water rights had been forfeited and/or abandoned. The United States and the Tribe also objected on the grounds that that Freeport failed to demonstrate that the proposed transfers would not injure the Tribe's rights.

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[3] *See also* U.S. Opening Br. at 4-20.

[4] Freeport filed 59 applications. *See* U.S. Opening Br. at 10-12. After the district court denied ten "test" applications (*see* ER 2-79), Freeport decided not to pursue 42 of its applications, including seven of the test cases. Freeport elected to include the water rights in these 42 applications in a covenant not to irrigate, which Freeport entered pursuant to a requirement of the Upper Valley Forbearance Agreement ("UVFA") unrelated to the transfer of rights. *See* ER 255; *see also* U.S. Opening Br. at 8. Freeport appeals the denial of the 17 remaining applications, three that were denied in the order on the ten test applications, and 14 that were denied by stipulation thereafter. ER 257-58.

By Freeport's admission, the subject water rights had not been used, and had been practicably unusable, for a decade or longer. Because the water rights were perfected before enactment of Arizona's 1919 Water Code, however, the district court held that they were not (and are not) subject to statutory forfeiture. ER 42. The district court also found that Freeport's failure to use some of the water rights – those that are appurtenant to irrigation lands lost to river erosion – does not give rise to an inference of abandonment. ER 46-50, 75-79. The district court nonetheless denied all of Freeport's applications due to material errors in Freeport's legal descriptions of the proposed sever and transfer parcels, and Freeport's failure to make a prima facie case of no injury to other Decree parties. ER 53-73, 75-79.

In its cross-appeal, Freeport contends that the district court: (1) abused its discretion when refusing to consider revised (corrected) parcel descriptions proffered as late amendments to the change-in-use applications, (2) erred in holding that Freeport failed to make a prima facie case of no injury to other Decree parties, and (3) misapplied Circuit precedent when finding an abandonment of the water right appurtenant to a 1.4-acre parcel that has long been used for a road and ditch. For reasons explained *infra*, these arguments lack merit. *See* pp. 41-47. 49-59. As also explained *infra* and in the United States' opening brief, however, the district court erred in holding: (1) that pre-1919 water rights are not subject to

forfeiture, and (2) that the nonuse of a water right appurtenant to lands lost to river erosion constitutes mere nonuse (fallowing) for abandonment purposes. *See* pp. 24-40, 47-48.

### B. Freeport's Amended Applications

#### *1. Decree Maps*

In Arizona, water rights are perfected by the "application . . . of public water to a beneficial use." *Gould v. Maricopa Canal Co.*, 8 Ariz. 429, 447, 76 P. 598, 600 (Ariz. Terr. 1904). When water is diverted for the irrigation of crops, the water right "attaches" to the lands being irrigated "and becomes appurtenant thereto," with a priority date matching the date of appropriation. *Gillespie Land & Irr. Co. v. Buckeye Irr. Co.*, 75 Ariz. 377, 384, 257 P.2d 393, 398 (Ariz. 1953).

Before 1919, Arizona had no administrative mechanism for recording private rights acquired via beneficial use of public waters or for administering priority among users. *See* U.S. Opening Br. at 35. In 1919, the Arizona Legislature adopted a comprehensive water code to provide such mechanisms. *See Stuart v. Norviel*, 26 Ariz. 493, 498-501, 226 P. 908, 909-911 (Ariz. 1924) (describing statute). Among other things, the Code authorized the State Water Commissioner to "investigat[e] . . . the facts and conditions" regarding the "relative rights or the various claimants to the waters of [any] stream" and to "make a determination of the . . . rights of the various claimants." 1919 Ariz. Sess.

Laws, ch. 164, § 16. This authority included the "duty" to make "a map or plat . . . showing with substantial accuracy the course of [the] stream, the location of [any] 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." *Id.*, § 25. The Code directed the Commissioner to submit certified maps and other evidence to a State Court for the entry of a decree "affirming or modifying" the Commissioner's determinations. *Id.* §§ 25-33.

Around 1920, shortly after the enactment of the 1919 Water Code, the State Water Commissioner began a determination of rights on the Gila River. ER 1026. As part of this determination, the State Water Commissioner prepared maps of irrigated lands based on an existing survey completed by the Indian Service in 1913-1914 and supplemental surveys. ER 1021-1036. The State Water Commissioner submitted these "1920 maps" and associated determinations to Superior Court judges in Graham County (Judge Jenckes) and Greenlee County (Judge Ling). ER 1033-35. Both courts entered decrees confirming the mapped rights. ER 1023, 1033-36.

The "Jenckes Decree" and "Ling Decree" addressed the same upper valley water rights that were addressed just a few years later in the 1935 Globe Equity Decree. ER 1074. The first Gila Water Commissioner obtained copies of the 1920 maps for use in administering the Decree, ER 1036-37, and has since maintained

the maps (as modified) to record changes to Decree rights. ER 1039-1043; *see also* ER 7-8 (¶¶ 1-12) (findings of the district court).

*2. Change-in-Use Rule*

The Globe Equity Decree states that parties may change the place of use of a Decree right "in accord with applicable laws and legal principles," if the change can be made "without injury of the rights of other parties." ER 497. Between 1935 and 1993, the Gila Water Commissioner administered approximately 240 changes, without district court oversight. ER 1084. In 1993, as part of litigation initiated by the Tribe for enforcement of the Decree, the district court adopted a "Change-in-Use Rule" that prohibits changes without notice to Decree parties and an opportunity to be heard.[5] *See* ER 209-214. Under the rule, any party seeking to change a point of diversion or place of use must file an application, on a "form . . . prescribed by the [Gila River] Commissioner," containing, inter alia, a "legal description and map/survey" of the "existing point of diversion or place of use" and a "legal description and map/survey" of the "proposed new point of diversion [or] place of use." ER 210. Upon receipt of any application, the Gila Water

[5] These requirements mirror Arizona law. See Ariz. Rev. Stat. § 45-172(A)(7). The district court determined that the State requirements are preempted by the Globe Equity Decree. *United States v. Gila Valley Irrigation District*, 804 F. Supp. 1, 11-12 (D. Ariz. 1992); *rev'd on other grounds United States v. Gila Valley Irrigation District*, 31 F.3d 1428 (9th Cir. 1994).

Commissioner must mail copies to specified parties (including the United States, the Tribe, and the Community) and publish notice in a newspaper of general circulation in the relevant county or counties. ER 211.

*3. Original Applications*

In 2008, Freeport filed 59 applications to change the place of use of, and thereby revive, "inactive" Decree rights.[6] ER 290-91; U.S Opening Br. at 10-12. Freeport identified these rights using its "TBI" reports, which showed, per quarter-quarter section, total water-righted acres "then being irrigated" in relation to total water-righted acres. *Id*. In each of its applications, Freeport represented that the water right proposed for transfer no longer practicably could be used within the relevant quarter-quarter section. ER 11 (¶ 32); ER 310.

For example, in Application No. 2008-162, Freeport sought to sever and transfer the water rights appurtenant to 8.40 acres within a specified quarter-quarter section in Graham County[7] (and the Gila Valley Irrigation District). FSER 710, 722. Freeport represented that it possessed rights to irrigate 20.70 acres within the named quarter-quarter section, FSER 710, but that it had "not been

[6] Freeport's applications were prompted by the 2006 Upper Valley Forbearance Agreement ("UFVA"), which provided incentives for transferring Decree rights to specified "Hot Lands" being irrigated by pumped water. *See* U.S. Opening Br. at 7-9.

[7] SE ¼ of SW ¼ of Section 9, Township 7S, Range 27E

practicable" for at least the previous ten years to irrigate 8.40 acres of this land. FSER 712. Accordingly, Freeport proposed to sever and transfer an 8.40-acre right, in three parts, to three separate parcels (totaling 8.40 acres) that lie in three different quarter-quarter sections[8] of Greenlee County (and the Franklin Irrigation District). FSER 715, 724-26.

In accordance with the Change-in-Use Rule, Freeport included, in each application, a map and a legal description of the proposed sever parcel(s) (lands from which existing water rights were to be severed) and a map and legal description of a proposed transfer parcel(s) (lands to which the subject water rights were to be made appurtenant). *See*, *e.g.*, ER 318, 320-321 (No. 2008-147); FSER 722, 724-26 (No. 2008-162). Instead of referring to the historic Decree maps, however, Freeport created maps based on then-current use and other information.[9] *See* ER 293-98. In accordance with the Change-in-Use Rule, the Gila Water Commissioner published notice of Freeport's applications, referencing the quarter-

[8] NE ¼ of NW ¼ of Section 20, Township 8S, Range 32E; SW ¼ or NE ¼ of Section 20, Township 8S, Range 32E; and SE ¼ of NE ¼ of Section 20, Township 8S, Range 32E

[9] Freeport also maintained that each Decree water right was appurtenant to all lands within the referenced quarter-quarter section. Under this view, *e.g.*, a Decree right to irrigate 21.70 acres could be varyingly used on any 21.70 acres within the quarter-quarter section where the right was perfected. The district court rejected this view as inconsistent with Arizona law. ER 68-69 (citing prior rulings).

quarter sections containing the proposed sever and transfer parcels, but without the maps or legal descriptions.[10] *See e.g.* ER 307, FER 646, 674, 708.

*4. Proposed Application Amendments*

In their objections to Freeport's applications, the Objecting Parties developed expert evidence to demonstrate, *inter alia*, that Freeport's proposed sever and transfer parcels – as mapped and legally described – were inconsistent with the Decree maps; *i.e.*, proposed transfer parcels included lands without Decree water rights and/or proposed sever parcels included lands that already possessed Decree rights. *See* ER 16-36 (findings). During discovery, Freeport developed new maps and legal descriptions, which Freeport disclosed and presented at trial in addition to its original maps and legal descriptions. ER 6, 17. At the close of evidence, Freeport asked the district court to consider the revised parcels pursuant to Fed. R. Civ. P. 15(b). FSER 642-43.

*5. District Court Ruling*

In its August 2010 ruling on the ten test applications, the district court used the mapping data developed by the Community's expert (a.k.a., the "Community's Database") to identify, per the historic Decree maps, the water-righted lands within

[10] The Change-in-Use rule does not expressly require publication of the "legal description and map/survey." *Compare* ER 212 (requirements of notice) *with* ER 210 (requirements of application).

the quarter-quarter sections named in Freeport's applications. *See* ER 18, n. 14. The district court then made findings of fact as to whether the original and revised proposed sever and transfer parcels in the ten Freeport applications conformed to the Decree maps. ER 16-36.

In its ultimate decision, however, the district court ruled only on the original applications. *See* ER 69-73, 75-78. The district court found that Freeport's revised parcels made material changes to all ten of Freeport's applications and that change-in-use applications are designed to "provide[] notice to the Commissioner, other Decree parties, and the Court," who are entitled to "depend on the accuracy of the information provided." ER 71. The court explained that, to allow "material change[s] to an application" – as opposed to requiring a new application and new notice – would "upset[]" the "review and approval process" dictated by the Change in Use Rule." ER 71.

### C. Potential Injury to Tribe's Rights

#### *1. Freeport's Proffer on Lack of Injury*

The Change-in-Use Rule provides that, in any hearing on a contested 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 there would be no change to "priorities, volumes . . . and

acreage" associated with the subject rights. ER 11-12 (¶ 35); *see also, e.g.*, ER 313. At trial, Freeport presented no affirmative evidence on absence of injury. ER 12 (¶ 37).

*2. Potential Impacts on Flow Quantity, Quality, and Timing*

In contrast, the Tribe presented expert evidence that changes in the place of use of Upper Valley water rights can impair the quantity and quality of downstream flows. *See* ER 12-14 (¶¶ 38-57); ER 941-978. First, because irrigation uses have associated return flows that vary depending upon field distance to the river and area soils and hydrology, any change in the location of use potentially can diminish return flows and increase consumptive use. ER 856-859.

Second, in three of its ten applications (Nos. 2008-122, 2008-151, and 2008-162), Freeport proposed to change from surface diversions (*via* canal) to well pumping. ER 65. Pumping from wells creates a "cone of depression" that intersects the river's subflow zone and has a time-lagged (non-instantaneous) depletive effect on surface flows. ER 963-966. Associated river depletions do not cease when pumping stops, but continue until subsurface waters are replenished. *Id.* This impacts the timing of downstream flows, if not the amount. *Id.*

Third, in the same three applications, Freeport proposed to transfer water from the Safford Valley (Gila Valley Irrigation District) to the Duncan-Virden Valleys (Franklin Irrigation District). ER 63. A special provision of the Globe

Equity Decree permits parties in the Duncan-Virden Valleys to divert, by agreement, in disregard of senior rights in the Safford Valley, whenever the river runs dry at Cosper's Crossing (the point between the valleys). ER 828-832. This provision was predicated on the assumption that when Cosper's Crossing runs dry, water not diverted in the Duncan-Virden Valleys will not reach downstream users and will be wasted. ER 831-32. Subsequent studies have demonstrated that the river continues to flow (as subflow) when the surface is dry and that Duncan-Virden rights used "in disregard" of Safford rights might otherwise reach downstream users. ER 835. Accordingly, a transfer of rights from the Safford to the Duncan-Virden Valleys could augment the depletive effect on the river system. ER 974-976; 987-990.

*3. Potential Injury to Tribe's Right*

Although the Tribe has the most senior water right on the Gila River when Upper Valley users are diverting on apportionment (in disregard of the Community's "time immemorial" right), ER 818-827,840-41, the Tribe diverts its water at the point farthest downstream on the river's free-flowing segment (above the San Carlos Reservoir). In prior proceedings, the district court determined that Upper Valley farming practices – including the periodic diversion of the entire natural flow of the River, the heavy use of pumped water from wells, and the recycling of return flows – have caused a "dramatic increase" in salt load and

salinity at the San Carlos Reservation, to the point of "prevent[ing] the successful cultivation" of crops important to the Tribe, including "alfalfa, pinto beans, squash, corn, melons, and garden vegetables." ER 797, 812. The court found an "unequivocal[]" inverse relationship between flow rates and salinity: *i.e.*, "the lower the flow rate, the poorer the quality of the water." ER 797.

To enable the Tribe to receive "the quality of water necessary to cultivate moderately salt-sensitive crops," the district court issued a "Water Quality Injunction," which requires the Gila Water Commissioner to monitor salinity and take specified actions when salinity rates reach designated levels. FSER 891-905. Among other things, the Commissioner must direct Safford Valley users to allow an "additional" 5, 10, 15, or 20 cubic feet per second ("cfs") of water to pass downstream – above the amount otherwise required to meet the Tribe's call – when salinity levels exceed and/or remain above the targets. FSER 895-900. These actions are progressive; *e.g.*, Safford Valley users must let an additional 15 cfs pass, only if five days of continuous monitoring show that salinity levels remain above the level triggering an additional 10 cfs. *Id.* If all specified actions fail to reduce salinity below the absolute "maximum," the Commissioner must report a failure to the court. FSER 900.

The Gila Water Commissioner testified that, except at the very beginning of the irrigation season, the salinity levels at the San Carlos Reservation invariably

require some action under the Water Quality Injunction and that there have been a "number of times" when the Commissioner has been unable to reduce salinity below the absolute maximum, despite taking all of the progressive steps. ER 1075-1077. The Commissioner also testified that there have been times when he has been unable to meet the Tribe's call per its Decree right, even after closing all head gates in the Upper Valley. ER 1075, 1091.

*4. Freeport's Rebuttal Expert*

Although Freeport presented no affirmative evidence on absence of injury, Freeport did call an expert in rebuttal. ER 12 (¶ 39). Freeport's expert agreed with the Tribe's expert on the hydrologic factors pertinent to reviewing change applications and that Freeport's applications "raised concerns." *See* ER 12 (¶¶ 39-40), 13-15 (¶¶ 48-49, 55, 57), 857-858, 904-911, 941-978. Freeport's expert opined that each of Freeport's proposed changes was too small to cause "measurable" harm, (FSER 641), but he also conceded that he had done no site-specific analysis, had not quantified impacts, and had not considered potential cumulative harm from Freeport's applications as a group. ER 856-873, 891-892, 910-911; *see also* ER 15 (¶ 57).

*5. District Court's Ruling*

In its August 3, 2010, memorandum opinion, the district court found that Freeport's applications "raise[d] potential issues of water quality deterioration and

water quality diminution," ER 59, and that Freeport had failed to present sufficient facts to enable a finding on the extent of the impacts. ER 12-13 (¶ 41 & n. 10); ER 58. The court stated that Freeport needed to present evidence to address legitimate issues raised by the Tribe's objections, ER 59-65, including the potential cumulative effects of the proposed multiple transfers. ER 66-67.

## SUMMARY OF ARGUMENT

### A. Appellate Jurisdiction

GVID is mistaken in its argument that decisions by the non-Freeport farmers to voluntarily withdraw their sever-and-transfer applications prevents final judgment on the Freeport applications. Because the district court never joined the non-Freeport applications with the Freeport applications, Fed. R. Civ. P. 54(b) is not implicated. And even if the district court had joined all applications, the voluntary withdrawal by some parties does not preclude final judgment as to the claims of the remaining parties. GVID relies on precedent involving a single party's voluntary withdrawal of claims in order to create jurisdiction over an adverse partial judgment against that party. That precedent is inapposite.

### B. Forfeiture

The United States' argument on forfeiture is summarized in the United States' opening brief at pages 21-24. In response, Freeport and GVID argue

(1) that the United States failed to show a recognized rule of forfeiture for nonuse prior to the 1919 Water Code and (2) that, in the absence of a preexisting rule, construing the statutory forfeiture provision as applying to pre-1919 water rights necessarily would impair pre-1919 rights contrary to the statutory savings clause. This argument erroneously presumes that any legislative change in a developing area of law impairs vested rights. Here, the doctrine of beneficial use, a preexisting 1893 forfeiture statute, and the preexisting rule of adverse use, all contributed to a preexisting expectation that the nonuse of water rights would result in their loss to adverse claimants. The 1919 Water Code, including the forfeiture provision, merely clarified the duty of beneficial use, without fundamentally altering the nature of preexisting water rights.

### C. Abandonment

As summarized in the United States' opening brief at pages 24-25, the district court erred in its abandonment analysis when equating river-bottom lands with fallowed lands. Contrary to Freeport's appeal, however, the district court did not err in finding a 1.4-acre water right abandoned (notwithstanding the payment of annual assessments), given the longstanding nonuse of the water right coupled with use of the land for structures (a road and ditch) incompatible with irrigation. The district court followed clear precedent from this Court in the Nevada *Alpine*

case and correctly disregarded evidence proffered by Freeport that was not probative of Freeport's or its predecessors' intent with respect to the 1.4 acres.

**D. Application Amendments**

The district court also did not abuse its discretion in declining to permit Freeport, at the evidentiary hearing, to amend its sever-and-transfer applications with materially different parcel descriptions. The district court was not bound by Fed. R. Civ. P. 15(b), which does not apply to post-judgment transfer applications, and the district court reasonably adopted a rule requiring re-application for material changes, to protect the interests of all Decree parties.

**E. Injury to Others**

Finally, the district court did not err in holding that Freeport failed to make a prima facie case of no injury to others. Freeport presented no affirmative case of absence of injury, despite legitimate concerns raised in the objections by the Tribe and the United States with respect to flows and water quality. Although Freeport's rebuttal expert opined that the impacts of Freeport's transfers would be too small to significantly affect flows and/or water quality, the district court reasonably rejected this opinion due to the expert's admitted failure to quantify impacts or consider potential cumulative effects. On appeal, Freeport does not challenge that finding *per se*, but argues that the Tribe cannot possibly be injured, given the seniority of its water right and the Water Quality Injunction, and that cumulative effects

lawfully cannot be considered. Those arguments are unsupported and contrary to the expert evidence of record.

## STANDARDS OF REVIEW (CROSS APPEAL)[11]

This Court reviews *de novo* the district court's order granting judgment as a matter of law based on Freeport's failure to prove a prima facie case of no injury. *Byrd v. Maricopa County Sheriff's Dept.*, 629 F.3d 1135, 1138 (9th Cir. 2011). This Court reviews for abuse of discretion the district court's order denying Freeport's motion to amend its Change-in-Use Applications under Fed. R. Civ. P. 15(b). *See Campbell v. Board of Trustees of Leland Stanford Junior*, 817 F.2d 499, 506 (9th Cir. 1987).

## ARGUMENT

### I. THE SEPTEMBER 4, 2014 JUDGMENT IS FINAL

This Court has jurisdiction, under 28 U.S.C. § 1291, over any order that finally resolves all matters in a post-judgment proceeding. *See generally Armstrong v. Schwarzenegger*, 622 F.3d 1058, 1065-66 (9th Cir. 2010); *United States v. Ray*, 375 F.3d 980, 985-86 (9th Cir. 2004). Because the district court's September 4, 2014 judgment terminated all proceedings on the 419 sever-and-

[11] *See also* U.S. Opening Br. at 25-26.

transfer applications that were filed in the Globe Equity Decree proceedings in 2008, in response to incentives provided in the Upper Valley Forbearance Agreement ("UVFA"),[12] *see* U.S. Opening Br. 1-4, the September 4, 2014 judgment is final and appealable for matters determined in those proceedings. *See Armstrong*, 375 F.3d at 985-86.

This is not to say that the district court's final judgment resolved all sever-and-transfer issues. Among other things, the district court's order does not preclude Freeport from filing new applications consistent with the legal standards imposed via the present final judgment. Nonetheless, Freeport now must file new applications (should it wish to pursue transfer) and the district court gave no indication that it intends to revisit its legal rulings, including rulings adverse to the Objecting Parties on forfeiture and abandonment. Accordingly, the standard for "practical" finality has been met. *See Armstrong*, 622 F.3d at 1065.

GVID contends (GVID Br. at 13-21) that the September 4, 2014 judgment is not final because the non-Freeport applicants withdrew their applications without prejudice[13] and because issues relating to their potential future applications also

[12] The UVFA settled disputes between certain Decree parties over the pumping of water for irrigation in the Gila River's upper valley. *See* U.S. Opening Br. at 8-9.

[13] Under the Change-in-Use rule, applications are filed with the Gila Water Commissioner and objections are filed in district court. Because there is no formal procedure for voluntary dismissal of change applications, *cf.* Fed. R. Civ. P. 41(a)

remain to be resolved. GVID relies on: (1) Fed. R. Civ. P. 54(b), for the proposition that a judgment resolving the claims of fewer than all parties to an action is not final absent certification from the district court, *see* GVID Br. at 14, 18-20; and (2) precedent from this Court for the proposition that a "voluntary dismissal without prejudice is ordinarily not a final judgment from which the plaintiff may appeal." GVID Br. at 18 (quoting *Concha v. London*, 62 F.3d 1493, 1507 (9th Cir. 1995)). GVID supposes that because the non-Freeport applications were voluntarily withdrawn – and not adjudicated in the manner of the Freeport applications – no party can appeal from the final rulings on the Freeport applications. This result is untenable for two reasons.

First, GVID fails to show that the 360 non-Freeport applications were joined with the 59 Freeport applications. The district court ordered proceedings on the non-Freeport applications to be stayed pending the adjudication of Freeport's applications. ER 153. And the district court subsequently withheld final judgment in the Freeport proceedings, pending the resolution of the remaining non-Freeport applications. ER 253. But the district court did not formally join all 419 contested applications for adjudication. *See* ER 300 (creating subdocket only for Freeport

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(procedures for voluntary dismissal of complaint), there are no orders of dismissal in the district court record. There is no dispute, however, that all non-Freeport applications were withdrawn without judgment. *See* GVID Br. at 16 ("[A]ll of the [sever-and-transfer applications] on the main docket were withdrawn.")

applications). Nor did the district court need to join the proceedings on the contested applications to coordinate their consideration and resolution. *See generally Landis v. North America Co.*, 299 U.S. 248, 254-55 (1936); *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066 (9th Cir. 2007). Absent joinder, Rule 54(b) is inapposite.

Second, even if the 419 applications somehow were joined into a single post-judgment action within the meaning of Rule 54(b), the subsequent decisions of the non-Freeport applicants to voluntarily withdraw their applications cannot be deemed a bar to appeals by Freeport and the Objecting parties as to final decisions on Freeport's applications. When a plaintiff voluntarily dismisses an action without prejudice, the plaintiff ordinarily may not appeal because the dismissal is "not *adverse* to the plaintiff's interests." *Concha*, 62 F.3d at 1507 (emphasis added); *see also Seidman v. City of Beverly Hills*, 785 F.2d 1447, 1448 (9th Cir. 1986) (voluntary dismissal without prejudice does not constitute "adverse judgment"). This Court also has held that a plaintiff who suffers an adverse partial judgment, *i.e.*, an adverse ruling on some but not all claims, may not voluntarily dismiss his/her remaining claims *without prejudice*,[14] solely to avoid the

[14] A plaintiff who, in response to an adverse ruling or partial judgment, voluntarily dismisses remaining claims *with prejudice* may appeal but risks losing the claims if the appeal is unsuccessful. *See, e.g., Berger v. Home Depot USA, Inc.*, 741 F.3d 1061, 1065 (9th Cir. 2014).

requirements of Rule 54(b) and manufacture appellate jurisdiction. *See American States Ins. Co. v. Dastar Corp.*, 318 F.3d 881, 885-86 (9th Cir. 2003).

But these considerations do not apply to the voluntary dismissal of claims by persons not appellants. The farmers within GVID and all other non-Freeport applicants plainly did not voluntarily withdraw their sever-and-transfer applications in order to manufacture finality and *enable* an appeal by Freeport and the Objecting Parties. To the contrary, the farmers voluntarily withdrew their sever-and-transfer applications for their own reasons, and now contend that their independent decisions preclude appeals by Freeport and the Objecting Parties.

Because the appealing parties did not act to manufacture finality, there is no bar to appeal. *See James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1070 (9th Cir. 2002) (voluntary dismissal of remaining claims following "adverse partial judgment" is final for appeal purposes unless "the record reveals evidence of intent to manipulate . . . appellate jurisdiction"); *accord American States Ins.*, 318 F.3d at 885. Moreover, imposing such a bar in this case could leave Freeport and the Objecting Parties without any appeal rights. Because the non-Freeport applicants are under no obligation to file new sever-and-transfer applications, there is no certain prospect of a future final judgment from which Freeport or the Objecting Parties could appeal.

Nor is it relevant, as GVID argues (GVID Br. at 18-19), that three new sever-and-transfer applications recently were filed by parties not presently before the Court. *Id.* GVID points to no district court order joining those three applications with Freeport's applications, nor any rule compelling (or permitting) such joinder. *See generally* Fed. R. Civ. P. 19, Fed. R. Civ. P. 20 (joinder of parties). In the ongoing administration of the Globe Equity Decree, there always will be the prospect of new change-in-use applications, as well as the prospect that their adjudication might be impacted by legal decisions on applications that came before. These circumstances (present in nearly all litigation) do not alter the finality, for appeal purposes, of the district's rulings on Freeport's applications.

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

Freeport filed its change-in-use applications as part of a concerted effort to revitalize "inactive" rights that, at the time of the applications, had been unused by Freeport and/or its predecessors in interest for at least a decade. *See* pp. 9-11, *supra*; *see also* U.S. Opening Br. at 10-11. While the district court correctly denied the applications due to legal errors and failure of proof, *see* pp. 49-59, *infra*, the district court did not need to reach those questions. Because Freeport and/or its predecessors had failed to use the subject water rights for many years beyond the five-year period, the rights had been forfeited under Arizona law and were not

available for transfer. The district court overlooked this forfeiture on the view that Arizona's forfeiture statute, first enacted under the 1919 Water Code, did not (and does not) apply to rights perfected before the Water Code's enactment. ER 37-42.

As explained in the United States' opening brief (U.S. Opening Br. at 26-50), the district court's construction of the forfeiture statute is incorrect. The 1919 Water Code did not contain a blanket exemption from forfeiture for pre-1919 rights. *See* Laws of Ariz., ch. 164, § 1 (1919). Instead, the 1919 Water Code contained a savings clause stating that nothing in the Code, inclusive of the new forfeiture provision, shall be construed to take away or impair vested rights. *Id.* The savings clause provides a narrow exemption, aimed at ensuring that the Water Code would not be applied to contravene constitutional limits on the taking of private property interests. *See* U.S. Opening Br. at 28-31, 46; *see also In re Manse Spring & Its Tributaries*, 108 P.2d 311, 315 (Nev. 1940).

Applying the 1919 forfeiture statute prospectively – *i.e.*, to the nonuse of pre-1919 water rights after enactment of the 1919 Water Code – does not take away or impair vested rights contrary to constitutional protections, because pre-1919 water users had no expectation under pre-1919 law that their water rights would endure in perpetuity without use. Rather, pre-1919 water rights always were subject to the condition of beneficial use and could be forfeited for nonuse

through the rule of adverse use and a preexisting 1893 statute. Appellees GVID and Freeport fail to demonstrate otherwise.[15]

### A. The Enactment of the 1919 Forfeiture Provision Did not Impair Vested Rights

Freeport and GVID argue (Freeport Br. at 43-44; GVID Br. at 21-31) that applying the forfeiture statute to pre-1919 water rights necessarily would impair vested rights – and thus must be deemed foreclosed by the statutory savings clause – because the rule of forfeiture codified in the 1919 Water Code was not expressly recognized in earlier statutes or precedent. But the United States never argued that pre-1919 Arizona law contained a forfeiture rule *identical* to the provisions of the 1919 Water Code. Instead, the United States explained that a property right is not "vested" and thus protected from legislative change, unless there is a pre-existing "certainty of expectation[]" in the ability to exercise the alleged right. *See* U.S. Opening Br. at 46 (citing *Bowers v. Whitman*, 671 F.3d 905, 913 (9th Cir. 2012)). A survey of pre-1919 Arizona law demonstrates that water users then had no settled expectation that they could retain water rights in perpetuity without

[15] In addition to its substantive claims, GVID argues (GVID Br. at 36-37) that Arizona law provides no "private right of action" for forfeiture. GVID did not raise this argument below and, in any event, the absence of a private right of action in Arizona courts would not preclude the district court from exercising jurisdiction to consider the forfeiture of Globe Equity Decree rights, including in the context of applications to change their place of use.

beneficial use. *See* U.S. Opening Br. at 31-47. Viewed in this context, the arguments of GVID and Freeport all fall by the wayside.

*1. Pre-1919 Water Rights Were Conditioned on Beneficial Use*

To begin with, while GVID accuses the United States of misreading the "spirit and purpose" of Arizona water law (GVID Br. at 24), GVID never disputes the cited proposition that "the spirit and purpose of Arizona water law is" – and always was – "to promote the beneficial use of water and to eliminate waste of this precious resource." *See* U.S. Opening Br. at 29 (quoting *Arizona Pub. Serv. Co. v. Long*, 160 Ariz. 429, 438, 773 P.2d 988, 997 (Ariz. 1989)). Nor does GVID refute the point that a claimed right of nonuse – *i.e.*, a right to retain priority of use, in perpetuity, without any actual use – is incompatible with beneficial use. *See* U.S. Opening Br. at 28-30. This is a critical oversight. GVID and Freeport suppose that the absence of a pre-1919 statute or judicial precedent expressly imposing forfeiture for nonuse means that pre-1919 water rights endured in perpetuity, regardless of use, unless intentionally abandoned. Yet neither identifies any legal source for a water right not dependent on beneficial use.

There is none. Because the common law of riparian rights never held sway in Arizona, *Boquillas Land & Cattle Co. v. Curtis*, 11 Ariz. 128, 136-140, 89 P. 504, 506-508 (Ariz. Terr. 1907); *Boquillas Land & Cattle Co. v. Curtis*, 213 U.S. 339, 345-47 (1909), no Arizona land owner ever possessed, via deed or grant, a

common law water right that endures in perpetuity without regard to use, *e.g.*, as part of an estate in fee. Rather, in the 1864 Territorial Bill of Rights, the Territorial Legislature declared Arizona surface waters to be "public property" not subject to appropriation for private use except "under such equitable regulations and restrictions as the Legislature shall provide . . . " *Boquillas*, 11 Ariz. at 133; 89 P. at 505. Through the 1864 Howell Code and subsequent legislation, the Arizona Legislature adopted customary law founded on the principles of beneficial use and prior appropriation. *See generally Boquillas*, 11 Ariz. at 136-140, 89 P. at 506-508. While these early statutes did not expressly articulate a rule of forfeiture for nonuse, they granted residents the right to appropriate Arizona public waters only for beneficial use. *See Clough v. Wing*, 2 Ariz. 371, 378-79, 17 P. 453, 455 (Ariz. 1888); 1893 Ariz. Sess. Laws No. 86, § 1. Persons who acquire usufructory rights in a publicly owned resource on condition of beneficial use cannot reasonably expect to retain such rights without use. *See generally Texas Water Rights Comm'n v. Wright*, 464 S.W.2d 642, 647-48 (1971).

GVID's reliance on the Arizona constitution (GVID Br. at 36) is unavailing. GVID cites no authority for its claim that, upon ratification, the 1912 constitution "froze" then-vested water rights from any and all legislative changes in the administration of water rights. The constitution declares only that "existing rights to the use of any of the waters in the state *for all useful or beneficial purposes* are

hereby recognized and confirmed." Ariz. Const. art. 17, § 2. As the emphasized text reflects, all water rights existing in 1912 were water rights appropriated in accordance with and limited by the principle of beneficial use.

For its part, Freeport baldly asserts (Freeport Br. at 44) that the doctrine of beneficial use limits only the amount of water an appropriator may divert, and "does not operate to terminate vested water rights that are not exercised for some period of time." This is an ipse dixit. Freeport concedes that beneficial use is "the basis, measure and limit to the use of water." *See* Freeport Br. at 44 (quoting Ariz. Rev. Stat. § 45-141(B). Yet Freeport claims that its pre-1919 water rights are endowed with an attribute – perpetual duration notwithstanding indefinite nonuse – incompatible with beneficial use. Freeport cites no deed, grant, or other legal source that provides any "basis" for this alleged right. A legislatively granted right to beneficially use State waters cannot be the "basis" for an alleged right of nonuse. *Texas Water Rights Comm'n*, 464 S.W.2d at 642.

In an attempt to blunt this point, Freeport notes (Freeport Br. at 43) that, within the priority system, junior appropriators lawfully may make beneficial use of water that a senior appropriator chooses not to use. But when a senior appropriator retains priority and the associated right to call on any junior appropriator's use (notwithstanding the senior appropriator's indefinite nonuse),

the subject water is generally unavailable for new appropriations[16] and junior appropriators cannot rely on the availability of the water for purposes of long-term investments. For these reasons, allowing senior users to tie up water rights *indefinitely* without use works against the "spirit and purpose of Arizona water law . . . to promote beneficial use and . . . eliminate waste." *Arizona Pub. Serv. Co.*, 160 Ariz. at 438, 773 P.2d at 997. Neither Freeport nor GVID show otherwise.

*2. The 1893 Act Reflects the Duty of Diligence in Use*

GVID and Freeport also miscomprehend the significance of the forfeiture provision in the 1893 Act. As noted (GVID Br. at 25, Freeport Br. at 30, n. 11), the 1893 Act required prospective appropriators to post notice of their intention to construct improvements for the diversion of State waters and granted priority of use upon posting, provided that the appropriator acted to construct the specified structures "within a reasonable time" and "use[d] reasonable diligence" thereafter to "maintain" such structures. 1893 Ariz. Sess. Laws No. 86, § 2. The Act stated that a failure to act with diligence in constructing and maintaining structures would result in a "forfeiture" of the associated water right. *Id.* The Act did not set out an express rule of forfeiture for nonuse. *Id.*

[16] New appropriations require "unappropriated" flows; *i.e.*, flows above and beyond those needed to meet the rights of existing appropriators. *See* Ariz. Rev. Stat. 45-141(A); *McClellan v. Jantzen*, 26 Ariz. App. 223, 226, 547 P.2d 494, 497 (Ariz. Ct. App. 1976).

Nonetheless, it does not follow, as GVID asserts (GVID Br. at 28), that the 1893 Act is inconsistent with a broader duty of diligence in the use of water rights. The 1893 Act is not a comprehensive water code that covers all aspects of water use. *See* CLESSON S. KINNEY, IRRIGATION AND WATER RIGHTS, § 1714, pp. 3158-59 (1912) (noting absence of Arizona water code). Rather, the Arizona legislature codified a duty of "reasonable diligence" that corresponded to the new (1893) posting requirement and reflected the duty of reasonable diligence already present in Arizona law. *See Clough*, 2 Ariz. at 383, 17 P. at 457 (describing duty of "reasonable diligence") (quoting *Larimer Co. v. People*, 9. P. 794, 796 (Colo. 1886)); *see also Hagerman Irrigation Co. v. McMurry*, 113 P. 823, 824-25 (N.M. 1911) (describing customary duty of reasonable diligence).

The 1893 Act is significant because it reflects and confirms this broader duty. As previously explained (U.S. Opening Br. at 40-41), a water user charged with the duty of using reasonable diligence to maintain structures necessary for beneficial use cannot reasonably believe that the duty ends with maintenance.[17] There is no cause for requiring diligence in maintaining diversion structures except to ensure beneficial use, and no basis in equity for treating a lack of diligence in

[17] GVID ignores the duty to maintain (GVID Br. at 25), while Freeport fails to connect such duty with continuing use (Freeport Br. at 30, n. 11).

maintaining diversion structures differently from a lack of diligence in the overall exercise of the water right.

*3. The 1919 Forfeiture Provision Replaced the Doctrine of Adverse Use*

GVID and Freeport also mistake the significance of pre-1919 law on adverse use. As GVID observes (GVID Br. at 26), adverse use is a *different* legal doctrine from forfeiture for nonuse. But GVID and Freeport concede that Arizona water rights, prior to the 1919 Water Code, could be forfeited via adverse use. *See* GVID Br. at 26, Freeport Br. at 35-36. And the practical differences are not great. For example, under the 1893 Act, any person could appropriate water "under a claim of right" and with constructive "knowledge of others" by posting notice and commencing a diversion. *See generally* 1893 Ariz. Sess. Laws No. 86, § 1; *see also* KINNEY, IRRIGATION AND WATER RIGHTS, § 1044 (1912) (elements of adverse use). Given the established rule of adverse use, it is not mere "conjecture," as GVID argues (GVID Br. at 27), to suppose that senior appropriators faced a substantial risk of losing priority in the face of such new appropriations, if the senior appropriators failed to make use of their rights for the 5-year statutory period. *See Gould v. Maricopa Canal Co.*, 8 Ariz. 429, 448, 76 P. 598, 601 (Ariz. 1904); *Egan v. Estrada*, 6 Ariz. 248, 254-55, 56 P. 721, 722 (Ariz. 1899)*; Dalton v. Rentaria*, 15 P. 37, 40 (1887).

Nor is it conjecture to suppose that increasing demands on Arizona's streams and the absence of any mechanism for recognizing and protecting senior rights – other than private suits by adverse claimants – prompted the Arizona Legislature to enact the 1919 Water Code. As part of a "criticism of Arizona law" in his 1912 treatise, Kinney noted that Arizona then lacked any water code or "special statutes" for the "adjudication of existing rights," leaving this subject "entirely to the equity side of the courts." KINNEY, IRRIGATION AND WATER RIGHTS, § 1714, pp. 3158-59 (1912). Shortly thereafter, Arizona enacted the 1919 Water Code to provide an administrative mechanism for determining and recording existing rights and a pre-approval requirement for new appropriations. *See Stuart v. Norviel*, 26 Ariz. 493, 498-501, 226 P. 908, 909-911 (Ariz. 1924) (describing statute).

GVID and Freeport completely disregard this history and the fact that statutory forfeiture replaced the rule of adverse use. Freeport recites the district court's declaration that "pre-1919 water rights can only be lost in accordance with the law . . . in place . . . before 1919," that is, "the law of abandonment *and adverse possession*." *See* Freeport Br. at 35-36 (quoting ER 41) (emphasis added). But Freeport (like the district court) fails to make sense of this assertion. As a result of the legal regime ushered in by the 1919 Water Code, pre-1919 water rights *cannot* be lost by adverse possession. *See* U.S. Opening Br. at 38-39 & n. 15. This is true for two reasons. First, under the 1919 Code (and present law), any prospective

new appropriator must obtain a permit before diverting State waters, and the State Water Commissioner must deny any permit request found to be "in conflict" with a senior right. *See* Ariz. Sess. Laws, ch. 164, §§ 5, 7 (1919). Second, under the 1919 Water Code (and present law), a senior appropriator with a certified and decreed right cannot lose priority to a newly approved adverse use. If a conflict arises, the senior user can assert his/her decreed senior right.

Because the 1919 Water Code thus eliminated the possibility that pre-1919 vested rights could be lost to adverse use, the district court's holding that pre-1919 water rights are exempt from statutory forfeiture is tantamount to a determination that the Arizona Legislature intended to *augment* pre-enactment rights and make them *more permanent* than before. This result cannot be squared with the Legislature's stated intention merely to avoid "tak[ing] away or impair[ing]" vested rights. 1919 Ariz. Sess. Laws, ch. 164, § 1. As previously explained (U.S. Opening Br. at 39-40, 46-47), prospective application of forfeiture for nonuse mimics the preexisting rule of adverse use and clarifies the duty of diligence inherent to the doctrine of beneficial use that always had governed Arizona water rights. Because such construction of the statue does not thwart any settled expectation of water users under pre-1919 law, it cannot be deemed to impair any vested right.

*4. The 1919 Water Code Recognizes That Vested Rights Can Be Lost By Forfeiture or Non-User*

As previously explained (U.S. Opening Br. at 41), the 1919 Arizona Legislature also expressly acknowledged that then-vested water rights could be lost by "forfeiture or non-user." Specifically, in Section 16 of the 1919 Water Code – which directed the State Water Commissioner to credit water rights as determined in pre-enactment judicial decrees – the Arizona Legislature declared that "nothing in this act shall be so construed as to revive any rights . . . which have been lost by abandonment, *forfeiture or non-user*." 1919 Ariz. Sess. Laws, ch. 164, § 16 (1919) (emphasis added).

In response, GVID surmises (GVID Br. at 28-29) that this provision might not refer to vested rights, but could refer instead to "alleged water right[s]" that never were perfected "because . . . never used." But this interpretation conflicts with the statute's plain language. The text refers to the "forfeiture or non-user" of a water right as to which "the date[] of appropriation of water . . . *ha[d] been determined in a judgment or decree*." 1919 Ariz. Sess. Laws, ch. 164, § 16 (emphasis added). No court would "determine," in a final "judgment or decree," the appropriation date of a water right that had never been perfected. If there is no

perfected right, there is no appropriation date to be adjudicated.[18] Accordingly, Section 16 can only be construed as referring to rights that vested as a result of appropriation and beneficial use, were determined in a judgment or decree, and subsequently lost to "forfeiture or non-user."

GVID's contention (GVID Br. at 29) that the Arizona Legislature could not have "intended [Section 16] to provide for [the] forfeiture of pre-1919 . . . rights" misses the point. Section One of the 1919 Water Code provided the rule of forfeiture and expressly applied to "vested" water rights, except to the extent such application would "take away or impair vested rights." 1919 Ariz. Rev. Sess. Laws, ch. 164, § 1. Section 16 is relevant to show that the Arizona Legislature did not intend the savings clause to operate as a blanket exemption for vested rights. Specifically, because the Arizona Legislature understood pre-1919 rights to be subject to loss by "forfeiture" or "non-user," *id.*, § 16, the Arizona Legislature could not have believed that the newly codified forfeiture provision *necessarily* would impair vested rights. Instead, as previously explained (U.S. Opening Br. at 46), the Legislature included the savings clause out of an apparent concern that the newly codified forfeiture provision might be applied in a manner that *could* impair

[18] Under pre-1919 law, when an appropriator posted notice of intent to divert prior to diverting, the date of appropriation, for priority purposes, related back to the date of posting. *Parker v. McIntyre*, 47 Ariz. 484, 489, 56 P.2d 1337, 1339 (Ariz. 1936). But the date of posting became a "date of the appropriation" only upon a successful diversion for beneficial use. *Id.*

vested rights; *e.g.*, retroactively without sufficient notice. Because prospective application of the 1919 forfeiture statute does not raise such concerns, the statute need not be (and should not be) "construed" to impair vested rights.

### B. *Manse Spring* is Not Persuasive Authority for Interpreting the Savings Clause in the Arizona Forfeiture Statute

Freeport devotes most of its argument on forfeiture to the contention (Freeport Br. at 31-36) that this Court should construe Arizona's forfeiture statute in accordance with the Nevada Supreme Court's construction of a similar Nevada statute and this Court's precedent applying Nevada law. As previously explained (U.S. Opening Br. at 44-45), the Nevada decision – *In re Manse Spring & Its Tributaries, Nye County*, 108 P.2d 311 (Nev. 1940) – is an outlier and not persuasive authority for two reasons.

First, *Manse Spring* is predicated on the assumption that, before the adoption of the Nevada Water Code and forfeiture provision, Nevada water rights could be lost *only by abandonment*. *Id.* at 316. As just discussed, this was not the law of Arizona, where pre-Water Code water rights could be lost also by adverse use, *Gould v. Maricopa Canal Co.*, 8 Ariz. 429, 448, 76 P. 598, 601 (Ariz. 1904), and forfeiture under the 1893 Act. 1893 Ariz. Sess. Laws No. 86, § 2.

Second, *Manse Spring* fails to properly account for the doctrine of beneficial use. The Nevada Supreme Court stated that it did not "wish to be understood as

holding" that persons with pre-Code water rights possess the "right to the use of such water indefinitely, without regard to placing it to beneficial use." *Manse Spring*, 108 P.2d at 316. But that is precisely the court's ruling, despite the court's protestation that the rule of abandonment might also check a "wanton and willful waste" of water. *Id.* There is nothing in the rule of abandonment that necessarily would preclude a water user from not using and thus reserving a water right *indefinitely*, as long as the user declares annually an intent to retain the right (*e.g.*, through the payment of associated fees). *See United States v. Alpine Land & Reservoir Co.*, 510 F.3d 1035, 1039 (9th Cir. 2007) ("*Alpine VII*"); *United States v. Orr Water Ditch Co.*, 256 F.3d 935, 946 (9th Cir. 2001) ("*Orr Ditch*").

More importantly, as already discussed (pp.27-30, *supra*), when a water right is acquired by use under a legislative grant permitting acquisition for beneficial use, there is no basis for assuming that the right survives upon extended and continuous nonuse.[19] Because a right of nonuse cannot be derived from the doctrine of beneficial use, other western State courts correctly have held that the codification of a rule of forfeiture for nonuse does not fundamentally alter the nature of water rights. *See Texas Water Rights Comm'n*, 464 S.W.2d 642, 650

[19] For example, other Arizona property interests acquired by use are lost by nonuse. *See Furrh v. Rothschild*, 118 Ariz. 251, 256, 575 P.2d 1277, 1282 (Ariz. 1978) (prescriptive easement "may be lost by mere nonuse . . . for the prescriptive period").

(Tex. 1971); *Kersenbrock v. Boyes*, 145 N.W. 837, 838-39 (Neb. 1914); *Hagerman Irrigation Co. v. McMurry*, 113 P. 823, 825 (N.M. 1911). The district court erred in following *Manse Spring* because it is not true to the historic and legal context of Arizona's 1919 Water Code.

### C. Exempting Pre-1919 Water Rights from Forfeiture is Contrary to *San Carlos Apache*

As the United States explained (U.S. Opening Br. at 48-50), the district court's ruling on forfeiture also is incompatible with the Arizona Supreme Court's ruling in *San Carlos Apache Tribe v. Superior Court*, 193 Ariz. 195, 972 P.2d 179 (Ariz. 1999). In that decision, the Arizona Supreme Court struck down a 1995 statutory amendment that declared pre-1919 water rights to be exempt from forfeiture. *Id.*, 193 Ariz. at 206, 217-218, 972 P.2d at 190, 201-202. If the 1919 forfeiture statute is construed, in accordance with *Manse Spring*, as exempting all pre-1919 rights from forfeiture, the 1995 exemption merely codified existing law and the Arizona Supreme Court's order invalidating the 1995 exemption would be rendered a nullity.

To be sure, as GVID and Freeport note (GVID Br. at 34, Freeport Br. at 36-37), the Arizona Supreme Court did not expressly construe the 1919 forfeiture statute and savings clause. Nonetheless, the Arizona Supreme Court generally rejected the notion that the 1995 forfeiture exemption and other amendments were

clarifications of existing law, *San Carlos Apache*, 193 Ariz. at 204, 209-210, 972 P.2d at 188, 193-94, and 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).

If the Arizona Supreme Court believed the 1995 forfeiture exemption merely stated existing law, there obviously would have been no constitutional issue to address. But, in stark contrast to the 1919 statute (as then codified) – which merely precluded the courts from construing the forfeiture statute as "impair[ing]" pre-1919 "vested" rights, 1919 Ariz. Sess. Laws, ch. 164, § 1; Ariz. Rev. Stat. § 45-171 – the 1995 exemption flatly declared that "statutory forfeiture by nonuse shall not apply" to such rights. Ariz. Rev. Stat. § 45-141(C). Recognizing that the "retrospective" application of this blanket exemption would revive and "protect[] . . . pre-1919 water rights that may have been forfeited and vested in others under [the 1919 Water Code]," the Arizona Supreme Court declared the 1995 exemption unconstitutional, *San Carlos Apache*, 193 Ariz. at 206-207; 972 P.2d at 190-191, leaving the 1919 rule of forfeiture for nonuse to govern Freeport's water rights. This Court should hold accordingly.

## III. EVIDENCE OF PROLONGED NONUSE OF WATER RIGHTS AS TO LANDS THAT CANNOT BE IRRIGATED IS SUFFICIENT TO SHOW ABANDONMENT

Whether or not Freeport's water rights were (and remain) subject to forfeiture for nonuse, they were subject to abandonment. *Landers v. Joerger*, 15 Ariz. 480, 483, 140 P. 209, 210 (Ariz. 1914). As previously explained (U.S. Opening Br. at 50-55), the district court (1) correctly determined that Freeport (or its predecessors) had abandoned the water right appurtenant to a 1.4-acre parcel permanently dedicated to a road and ditch; but (2) incorrectly held that nonuse resulting from a change in the river channel and permanent loss of irrigable lands does not give rise to a similar inference of abandonment.

### A. The District Court Did Not Err When Finding the 1.4-Acre Water Right Abandoned

Although Freeport concedes that the 1.4-acre water-right declared abandoned by the district court is appurtenant to lands that long have been used in a manner incompatible with irrigation (Freeport Br. at 51), and that clear-error review applies to the court's abandonment finding (*id.* at 45), Freeport contends (Freeport Br. at 49-56) that the district court committed legal errors in its articulation and application of abandonment law. This contention lacks merit.

*1. The District Court Correctly Applied Circuit Precedent*

Freeport begins by arguing (Freeport Br. at 51-52) that the district court "created a presumption of abandonment" contrary to this Court's rulings in the "*Alpine* cases," a series of cases involving efforts to transfer water rights in the Newlands Reclamation Project. *See Alpine VII*, 510 F.3d at 1037 & n. 2 (citing cases). In the *Alpine* cases, this Court determined that prolonged nonuse of water on water-righted lands gives rise to an inference of abandonment, *Orr Ditch*, 256 F.3d at 945, and this Court articulated a set of rules describing the evidence a transfer applicant "must present," to defeat a finding of abandonment, once an objector shows a "substantial period of nonuse" or other evidence sufficient to show abandonment. *Alpine VII*, 510 F.3d at 1038-39 & n. 5. In its decision, the district court expressly followed the *Alpine* rules. ER 44-46.

To the extent Freeport is now arguing that the district court erroneously "created a presumption of abandonment" for Arizona by following the *Alpine* rules, that argument is readily dismissed. In the *Alpine* cases, this Court expressly disavowed creating a rebuttable presumption, *see* ER 44, n. 21 (citing *Orr Ditch*, 256 F.3d at 945), and, in any event, there is no reason to believe Arizona would not follow the law of "nearly all western states," which does "presume an intention to abandon upon a showing of a prolonged period of nonuse." *See Orr Ditch*, 256 F.3d at 945.

Nor is Freeport correct in arguing that the district court misapplied the *Alpine* rules. As explained (U.S. Opening Br. at 19, 52-53), in *Alpine VII and Orr Ditch*, this Court held, inter alia, that "where there is evidence of . . . a substantial period of nonuse [and] an improvement . . . inconsistent with irrigation, the payment of taxes or assessments *alone* will not defeat a claim of abandonment." *See Orr Ditch*, 256 F.3d at 946 (emphasis added); *accord Alpine VII*, 510 F.3d at 1039. The district court repeated this rule nearly verbatim. *See* ER 45 ("[I]f there is evidence of both a period of non-use and construction of a[n] . . . improvement inconsistent with irrigation, then evidence of payment of taxes or assessments *alone* will not defeat a finding of abandonment") (emphasis added).

Freeport faults the district court (Freeport Br. at 52) for allegedly disregarding the term "alone" and thus failing to consider evidence in addition to the payment of assessments. But Freeport concedes (Freeport Br. at 52) that the district court acknowledged its additional evidence. *See* ER 46-48 & n. 26. And that evidence is not probative of Freeport's (or its predecessors) intentions with respect to the subject 1.4-acre water right. To begin with, evidence that Freeport purchased its farmlands to acquire water rights and required its lessees to use and thus protect water rights, FSER 540, says nothing about water rights abandoned *prior* to Freeport's purchase, or Freeport's intentions, post-purchase, as to water-rights that practicably could not be used. Similarly, Freeport's status as defendant

on the Pumping Complaint and its participation in the negotiation of the UVFA has nothing to do with lands rendered non-irrigable by permanent improvements. *Cf.* ER 47-48 n. 26 (noting lack of connection between litigation and water rights at issue). Finally, Freeport's present efforts to transfer long-inactive rights say nothing about whether such efforts were timely; *i.e.*, commenced before abandonment. At bottom, the district court did not err in failing to specifically address evidence that has no evident probative value.

*2. The District Court Did Not Err in Considering "Pre-1997 Evidence" or the Historic Decree Maps*

Nor is there any merit to Freeport's argument that the district court erred in relying on historic Decree maps and pre-1997 evidence to determine nonuse. As explained (pp. 5-7, *supra*), the water-righted parcels for upper valley farmlands are specific lands within the quarter-quarter sections where the water was first beneficially used, as shown on historic Decree maps. Because an irrigation water right is used only when water is applied to the lands to which the right is appurtenant, *see United States v. Alpine Land & Reservoir Co.*, 291 F.3d 1062, 1075-76 (9th Cir. 2002) ("*Alpine V*"), the historic use of Decree rights can be determined only by evaluating evidence of use in relation to maps of water-righted parcels. Freeport does not argue otherwise.

Freeport contends, however, that no inference of *intent* to abandon water rights can be derived from such evidence because: (1) before 1997, farmers were permitted to divert the entirety of their water right whether or not they were irrigating all water-righted lands (Freeport Br. at 53-54), and (2) until more recently, farmers were permitted to use the water right associated with a quarter-quarter section anywhere within the quarter-quarter section (*id.* at 55-56). Neither argument holds.

First, if irrigation districts historically diverted amounts of water associated with all water-righted lands within the districts, whether or not all acres were "then being irrigated," this practice was contrary to the terms of the Globe Equity Decree and says nothing about the use of Decree rights or any individual farmers' intentions as to water-righted lands not being irrigated. If, for example, a farmer with a ten-acre right diverted sufficient water to irrigate all ten acres but only irrigated eight of those acres (*e.g.*, because the remaining two acres are used for a road and ditch), the farmer did not beneficially use the entire ten-acre right. The farmer used the water right appurtenant to the eight acres, did not use the water right appurtenant to the two acres, and wasted the water diverted for the non-irrigated lands.

Second, although the beneficial use of water on land that is not water-righted, combined with other factors, might defeat a finding of abandonment, *see*,

*e.g.*, *Alpine VII*, 510 F.3d at 1038-39 (beneficial use on a different parcel coupled with an attempt to transfer), that issue is not presented in Freeport's applications. Contrary to Freeport's suggestion (Freeport Br. at 55-56), none of its applications raised the issue whether Freeport intended to abandon water rights by farming/irrigating outside of the parcels identified on the historic Decree maps. [20] Rather, in every one of its applications, Freeport represented that it had not used and could not practicably use the subject water right *anywhere* within the relevant quarter-quarter section,[21] ER 11 (¶ 32); ER 310, and thus sought to transfer the right to a *different* quarter-quarter section.

This includes the 1.4-acre water right the district court declared abandoned. Freeport could not use that right because Freeport or its predecessors built a road and ditch on the land. By its own admission, Freeport did not use the associated water anywhere within the relevant quarter-quarter section because it could not

[20] As amicus, GVID similarly argues (GVID Amicus Br. at 14-22) that a farmer's use of water within a quarter-quarter section but not in conformity with Decree maps cannot be deemed evidence of an intention to abandon. This Court has rejected similar arguments by farmers who made informal "intrafarm" transfers within the Newlands Project. *See Alpine V*, 291 F.3d at 1076 (farmers who change the place of use of water rights within their own farms do so "at their own risk"). Contrary to GVID's suggestion, however, the district court's decision does not preclude GVID farmers from raising such arguments in future cases.

[21] Freeport asserted that use of each subject right was "not practicable," ER 310, notwithstanding its professed ability to use the right anywhere within the relevant quarter-quarter section. *See* ER 316; *see also* ER 68-69.

practicably do so. And Freeport only belatedly sought to transfer the water right (after more than ten years of nonuse). The district court committed no legal error or clear error of fact in finding abandonment on this evidence.

### B. The District Court Erred in Treating Non-Irrigable Lands as the Equivalent of Fallowed Lands

As previously explained, however, the district court did err when it equated lands lost to the river with "fallowed" lands for purposes of the abandonment analysis. *See* U.S. Opening Br. at 53-55. Contrary to Freeport's response (Freeport Br. at 46), the United States does not contend that "prolonged nonuse *alone* is enough to demonstrate an intent to abandon" (emphasis added). Rather, the United States contends that, in this case, there was proof of nonuse *plus* (a) evidence that the relevant water rights practicably could not be used due to the condition of the lands, and (b) evidence that Freeport took no action to restore the lands or transfer the water rights. A longstanding failure to use an irrigation right on land that cannot be irrigated due to river encroachment/erosion is not the same as mere fallowing (nonuse), and is akin (for purposes of inferring an intent to abandon) to the failure to use an irrigation right on land that cannot be irrigated due to the erection of a structure incompatible with irrigation. *See* U.S. Opening Br. at 54-55. Freeport has no answer to this point.

Instead, Freeport proffers additional evidence (Freeport Br. at 47-48), which Freeport claims shows its intent not to abandon the water right appurtenant to lands long lost to the river. But the proffered additional evidence (*id.*) is the *same* evidence (pp. 43-44, *supra*) that the district court correctly disregarded as not probative with respect to lands made non-irrigable by permanent structures or improvements. For the reasons already stated (*supra*), this evidence is not probative of Freeport's intention (or that of its predecessors) with respect lands that Freeport's lessees practicably could not irrigate.

This Court also should not countenance GVID's unsupported argument (GVID Br. at 42) that the lands in question might become suitable for irrigation at some future time because "whatever the river takes, it also eventually gives back." Freeport offered no evidence that its delay in seeking transfer arose from a belief that the relevant lands remained practicably irrigable or would become so again. If the farmers within GVID wish to present such evidence in some future proceeding to show their own intent not to abandon water rights, they may do so. The contested Freeport applications must be resolved on the evidence presented on those applications.

## IV. THE DISTRICT COURT REASONABLY DECLINED TO PERMIT MATERIAL AMENDMENTS

In its cross-appeal, Freeport does not challenge the district court's decision to deny its applications as presented; *i.e.*, with maps and legal descriptions that do not conform to historic Decree maps. *See* pp 8-10, *supra*; U.S. Opening Br. at 13-14. Instead, Freeport argues (Freeport Br. at 65-68) that the district court abused its discretion in not allowing Freeport to substitute new maps and legal descriptions. Freeport relies on Fed. R. Civ. P. 15(b), which directs district courts to "freely permit" parties to amend their "pleadings" during trial, when necessary to conform to trial evidence that otherwise would be outside the pleadings, unless an objecting party can show the evidence would prejudice the objector's "action or defense on the merits." *See* Freeport Br. at 65 (quoting Fed. R. Civ. P 15(b)).

Rule 15, however, does not control. An application under the Change-in-Use Rule is not a "pleading" under the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 7(a) (describing "pleadings allowed"). Just as the district court was free to adopt the Change-in-Use Rule to govern material changes in the use of Decree rights, the district court was free to adopt procedures to govern post-notice amendments to applications under the Change-in-Use Rule. Significantly, Freeport does not contend that the district court's rule for amendments – requiring a new application for any "material change" – is contrary to the Globe Equity Decree.

Moreover, Freeport has failed to show an abuse of discretion, even if Rule 15(b) applies. When an appurtenant water right is severed and transferred to a new place of use, the transfer alters property rights in the affected parcels and has the potential to impair the water rights of any number of the thousands of individual Decree parties. Although a transfer applicant, per the Change-in-Use Rule, need not serve all Decree parties personally, all parties are entitled to notice via publication, ER 212-213, and all parties have the right to object based on the information provided in a change application. ER 213. If an applicant materially amends an application during pretrial or trial proceedings – *e.g.*, to reference a different sever or transfer parcel, *see* ER 72-73 (describing Freeport's changes) – the amendment could raise new issues, including new ownership disputes, that could prejudice parties who chose not to participate in the proceedings in reliance on the information within the original application.

In this regard, proceedings on change applications are analogous to proceedings *in rem* to determine rights in real property. This Court has held that Rule 15(b) does not permit an amendment to "cure" a failure to verify a complaint *in rem*, and need not be granted where the amendment implicates "prejudice[] by lack of notice." *Madeja v. Olympic Packers, LLC.*, 310 F.3d 628, 636 (9th Cir. 2002). Similarly, while the Federal Rules permit amendments to complaints in condemnation "at any time before . . . trial on compensation," any such amendment

must be served "on every affected party who has not [already] appeared," including by publication on affected "unknown owners." Fed. R. Civ. P. 71.1(d)(3), (f).

Contrary to Freeport's argument (Freeport Br. at 67), the alleged absence of prejudice to the Objecting Parties in this case is not determinative. Given the nature of change applications, the district court reasonably adopted a rule that protects the procedural rights of all Decree parties. Nor was it error for the district court to consider potential prejudice to parties not present. Freeport argues (*id.* at 67, n. 18) that its revised parcel descriptions would not have altered the published notice, because the notices identified sever and transfer locations by quarter-quarter section only, which Freeport did not change. Parties who receive published notice of proposed transfers, however, are entitled to review the actual Change-in-Use Applications and to make decisions based on the maps and legal descriptions therein. Thus, when there are material changes to a sever-and-transfer application, there are grounds for requiring notice of the availability of the revised application, even if the contents of the notice do not change.

At bottom, by requiring Freeport to file new change-in-use applications for its revised proposed transfers, the district court did not preclude Freeport from

seeking to transfer inactive Decree rights.[22] Rather, the district court merely required Freeport to follow procedures reasonably designed to protect the rights of all Decree parties. This was not an abuse of discretion.

## V. THE DISTRICT COURT CORRECTLY HELD THAT FREEPORT FAILED TO MAKE A PRIMA FACIE CASE OF NO INJURY

Under the Globe Equity Decree, a party may change the place of use of a water right only if the change is "without injury" to other Decree rights. ER 497 (Article XI); *see also* Ariz. Rev. Stat. § 45-172 (Arizona statute regarding transfer of water rights). As noted *supra*, under the Change-in-Use Rule, in any hearing on a contested application, the applicant bears the initial burden of "establishing a prima facie case of no injury to the rights of other parties." ER 214. Contrary to Freeport's argument (Freeport Br. at 57-62), the district court correctly concluded that Freeport failed to meet this burden.

### A. Freeport Failed to Present Evidence to Address Impacts on Water Quality and Flow

At the evidentiary hearing on the ten test applications, Freeport presented no evidence on absence of injury in its case-in-chief, but rested instead on the statements in its applications that the proposed changes would not alter "priorities,

[22] Whether the need to file new applications impacts Freeport's rights under the UVFA, *see* U.S. Opening Br. at 8-9 (describing benefits conditioned upon the timely filing of "good faith application[]s"), is a contract issue not before the Court. Freeport's substantive rights under the Globe Equity Decree are unaffected.

volumes of water use and acreage." *See* ER 11 (¶¶ 35, 37) (district court findings). After the Tribe's expert explained that changes in the place of use and manner of diversion can diminish flows, alter flow timing, and impair water quality to the potential detriment of downstream users, *see* pp. 12-15, *supra*, Freeport called a rebuttal expert (Eric Harmon), *who agreed that such impacts can occur*, but opined that the impacts from Freeport's proposed transfers would be too "small" to create measurable harm. FSER 626-27, 636, 641; ER 866-869, 910-911; *see also* ER 11-15 (¶¶ 34-57) (district court findings). Mr. Harmon performed no site-specific analyses, however, and did not attempt to quantify impacts to flow or water quality to support his opinion. ER 868, 892, 910-911. The district court concluded that Freeport had not presented sufficient evidence to support a no-significance finding. ER 12-13 (¶ 41 & n. 10).

On appeal, Freeport does not dispute this determination *per se*. Rather, Freeport makes the broader claim (Freeport Br. at 59-62) that the Tribe is protected from <u>*any*</u> potential injury from changes in use, given the Gila River call system and the seniority of the Tribe's right. Because upstream junior rights "must always cede as necessary to satisfy the Tribe's call," Freeport contends (*id.* at 60) – without citation or authority – that there is no possibility of injury.

Contrary to Freeport's suggestion, this proposition is not self-evident. It is "axiomatic in water law that [an] appropriator, *be he junior or be he senior*, always

has the burden of establishing that a change in his diversion or in his use of water has not affected the rights of other appropriators." *Zannaras v. Bagdad Copper Corp.*, 260 F.2d 575, 577 (9th Cir. 1958) (emphasis added). While a senior user's ability to call upon upstream junior rights can help protect the senior user from a loss of water that otherwise might occur from a change in use that places greater demands on the river, it does not follow that a call system is a failsafe against injury to the senior user's rights.

For example, as explained *supra* (pp. 12-13), in three of the ten sever-and-transfer applications considered at trial, Freeport proposed to convert irrigation rights to divert by canal in the Safford Valley, into irrigation rights to divert via well pumping in the Duncan-Virden Valleys. ER 14 (¶ 50 & n. 11). Unlike canal diversions, pumping diversions are not instantaneous; there is a time lag between the start of pumping and depletion in river flows, and a similar time lag between the cessation of pumping and the end of depletion. FSER 632. In addition, because geological conditions and irrigation practices cause the Gila River to run dry at Cosper's Crossing (between the Duncan-Virden Valleys and Safford Valley) for a portion of the irrigation season, there is also a potential time lag between the cessation of diversions in the Duncan-Virden Valleys (*e.g.*, in response to a call by the Tribe) and the resumption of downstream flows, given the need to recharge the underlying alluvium. ER 974-76, 986-87, 989-990.

Freeport argues (Freeport Br. at 61) that if time-lagged depletions occur, the Tribe can simply call for its water "at a different time or for a longer time." But Freeport offered no evidence to quantify the time lag associated with its proposed changes in use. Nor did Freeport explain how the Tribe can make an anticipatory call on Freeport's rights (*e.g.*, when there is sufficient water in the river to satisfy all rights) to ensure the absence of adverse impacts later in a growing season when the Tribe might make a call. The Gila River Commissioner is already occasionally unable to meet the Tribe's calls for water, even after closing all head gates on canals in the Upper Valley. ER 1091. Because Freeport's proposed transfers necessarily would diminish flows at Cosper's Crossing, *see* ER 14 (¶ 50 & n. 11) (district court findings),[23] the transfers can only exacerbate this problem, with potential adverse impacts on the availability and quality of downstream flows.

[23] The district correctly court found that the transfer of water rights from the Safford Valley to the Duncan-Virden Valley could *increase* the period in which Cosper's Crossing is dry, to the potential detriment of downstream users. *See* ER 14, 63. The district court did not find, as Freeport states (Freeport Br. at 61), that the "lag-time effect may cause the Gila River to become dry at Cosper's Crossing at a later time." As suggested by Freeport's expert, a change in the form of diversion of Duncan-Virden Valleys rights – *i.e.*, a change from canal diversion in the Duncan-Virden Valleys to well pumping in the same valleys – could "shift" the Cosper's Crossing condition (period when the crossing is dry) to "a time after the irrigation season is completed," a presumed benefit to downstream users. FSER 633. But Freeport did not propose to change existing Duncan-Virden Valley diversions. Freeport proposed to transfer water rights from the Safford Valley to the Duncan-Virden Valley, adding new diversions above Cosper's Crossing. This

As noted (pp. 13-14, *supra*), due to Upper Valley farming practices, the Tribe experiences significant problems with water quality, even when the Tribe's full water right is delivered. The district court issued the Water Quality Injunction precisely because the call system (which responds to the Tribe's right to demand its decreed amount) is insufficient to protect the Tribe's right to water that can be used for irrigation. *Id.* When rejecting Freeport's proffer regarding the alleged lack of harm to the Tribe, the district court correctly determined, *inter alia*, that Freeport failed to address the Water Quality Injunction and whether the proposed transfers would prevent the water quality (salinity) targets from being met. ER 60.

Freeport argues (Freeport Br. at 62) that its proposed transfers cannot affect the Water Quality Injunction or the quality of the Tribe's water, "even assuming . . . that the transfers [otherwise would] cause a lower water quality," because, once the salinity thresholds are triggered, the Gila Water Commission must curtail Upper Valley diversions "as necessary to protect the Tribe." But the Water Quality Injunction provides only staggered (delayed) responses to exceedences of the salinity targets, *see* FSER 891-905, and the Gila Water Commissioner occasionally is unable to deliver water below the maximum (least stringent) target, even after taking all of the provided actions. ER 1075-77. Further, as Freeport

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could only put a greater demand on the Gila River above Cosper's Crossing. ER 14 (¶ 50 & n. 11).

acknowledges (Freeport Br. at 14, n. 6), the Injunction does not apply to users in the Duncan-Virden Valleys. A transfer of water rights from the Safford Valley to the Duncan-Virden Valleys would leave fewer water rights to call upon for purposes of the remedies in the Water Quality Injunction, potentially rendering those remedies less effective.

In short, given the potential impact of Freeport's proposed transfers on downstream water flows and water quality, the district court properly charged Freeport with the burden of evaluating such impacts and demonstrating that there will be no injury to the Tribe or other decree parties. Freeport did not make that case. Instead, Freeport now asserts that its proposed transfers could not injure the Tribe's rights – regardless of the extent of impacts on river flow and water quality – given the seniority of the Tribe's rights and the call system. That assertion is tantamount to declaring that the Tribe's seniority makes injury a legal impossibility. This claim is belied by the district court's unchallenged factual findings. *See generally* ER 11-15 (¶¶ 34-57).

### B. The District Court Correctly Determined That Cumulative Impacts Are Relevant

Finally, the district court did not err in its assessment (ER 66) that Freeport's transfer applications could have cumulative impacts that should be considered. As the district court determined, Freeport's multiple applications were an "unusual

circumstance," *id.*, made possible by Freeport's large land holdings, ER 292, and by its concerted effort to reclaim "inactive" Decree rights on all of its lands. ER 291-293. Nothing in the Globe Equity Decree or Arizona water law mandates a piecemeal approach to injury analysis when an appropriator proposes multiple simultaneous changes in the place of use of its Decree rights. And the evidence demonstrated that Freeport's proposed transfers might cause a cumulatively significant injury, even if the effects of each transfer alone would be insignificant. ER 15 (¶56).

Disregarding this evidence, Freeport contends (*Brief* at 33-35) that the cumulative injury from multiple transfers must be ignored: (1) because the Change-in-Use Rule dictates that each proposed change is to be considered "individually" and (2) because this case does not arise under the National Environmental Policy Act ("NEPA"). Neither objection has any merit.

First, although the Change-in-Use Rule provides that "[a] separate application must be filed for each water right affected by the proposed change or changes," (ER 211), this *procedural* requirement – which facilitates notice and Decree administration when separately named rights are proposed for transfer – does not limit the *substantive* injury analysis required by the Decree. The district court has broad discretion in construing its own rules and did not abuse its

discretion in declining to read the Change-in-Use Rule as limiting the injury analysis for each Freeport application to each application standing alone.

Second, because the district court cited NEPA case law not as controlling precedent but by way of analogy (ER 66), it is not enough for Freeport to argue (Freeport Br. at 65) that its applications "do not arise under NEPA." Freeport must explain why the analogy is inapt. For reasons stated, the requirement to address potential cumulative impacts is properly imposed upon a party who submits multiple simultaneous change applications.

## CONCLUSION

For the foregoing reasons, this Court should *affirm* the judgment of the district court denying Freeport's change-in-use applications, but *reverse* the judgment of the district court dismissing the objecting parties' counterclaims, to the extent that the district court held: (1) that Globe Equity Decree rights vested before the enactment of 1919 Water Code are *not* subject to statutory forfeiture; and (2) that, for purposes of determining a parties' intent to abandon, prolonged nonuse of Decree water rights on farmlands that cannot practicably be irrigated because they are "river bottom" or "active river channel" is the equivalent of nonuse as part of a fallowing program.

Respectfully submitted,

JOHN C. CRUDEN
*Assistant Attorney General*

*/s/ John L. Smeltzer*

KATHERINE J. BARTON
F. PATRICK BARRY
YOSEF NEGOSE
JOHN L. SMELTZER
*Attorneys, Department of Justice*
*Environment & Natural Resources Division*
*P.O. Box 7415*
*Washington, D.C. 20044*
*(202) 305-0343*
john.smeltzer@usdoj.gov

*Of Counsel:*

SCOTT BERGSTROM
ANDREW ENGEL
*Attorneys,*
*Office of the Solicitor*
*United States Department of the Interior*

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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 13,997 words (exclusive of the table of contents, table of authorities, statement of related cases, statement regarding oral argument, and certificates of counsel).

*June 12, 2015*
Date

s/ *John L. Smeltzer*
John L. Smeltzer

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*/s/ John L. Smeltzer*

John L. Smeltzer
Attorney
United States Department of Justice
(202) 305-0343
john.smeltzer@usdoj.gov