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# United States v. Gila Valley Irrigation District

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**United States v. Gila Valley Irrigation Dist., ___ F. 3d ___, 2017 U.S. App. LEXIS 10477, 2017 WL 2541042 (9th Cir. 2017)**

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Attempts to alter water use agreements, especially those spanning back decades or even centuries, elicit intense scrutiny from water rights holders. In *United States v. Gila Valley Irrigation Dist.*[1], the Ninth Circuit upheld application of a 1935 Decree apportioning water among various regional entities, including two Indian tribes, to bar a mineral company from transferring water rights between properties within the Gila River drainage.

## I. INTRODUCTION

From its New Mexico headwaters, the Gila River flows roughly 500 miles west across Arizona before intersecting with the Colorado River near Yuma.[2] Most of its water, however, does not make it that far, with the stream often running dry halfway through its drainage.[3] The Gila's water woes are not an anomaly in the southwest, where high temperatures, limited precipitation, and burgeoning demand stress virtually all regional water sources. Moreover, competition among users, whether individuals, industries, or entire municipalities and even states, can be fierce.

The Gila highlights this; water controversies have recently arisen between New Mexico and Arizona[4], Phoenix and the Gila River Indian Tribe[5], and a mineral company and two regional Indian communities. This case concerns that last conflict, involving the Gila River Indian Community ("Community"), the San Carlos Apache Tribe ("Tribe"), and various other water rights holders in the drainage.[6] Most notable of that last group is Freeport Minerals Corporation ("Freeport"), which began purchasing area farms in 1997 primarily for their water rights.[7]

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1. *United States v. Gila Valley Irrigation Dist.*, ___ F.3d ___, 2017 WL 2541042 (9th Cir. 2017).
2. American Rivers, *Gila River*, Americanrivers.org, https://www.americanrivers.org/river/gila-river/ (last visited June 22, 2017).
3. *Id*.
4. Lauren Villagran, *Nature Conservancy puts hold on Gila River diversion project*, ABQJournal.com, https://www.abqjournal.com/1016106/nature-conservancy-puts-hold-on-gila-river-diversion-project.html (June 11, 2017).
5. Alden Woods, *Gila River Indian Community agrees to water-storage deal with Phoenix that will restore flow to Gila River*, AZCentral.com, http://www.azcentral.com/story/news/local/arizona-water/2017/03/21/gila-river-indian-community-agrees-water-storage-deal-phoenix-restore-flow-gila-river/9927413/ (March 21, 2017).
6. *Gila Valley Irrigation Dist.*, 2017 WL 2541042 at *1.
7. *Id*.

This case grew out of litigation beginning nearly a century ago when, in 1925, the United States first brought suit on behalf of the Tribe and Community seeking better Gila River management.[8] Those efforts culminated in the 1935 Globe Equity Decree ("Decree"), regulating water among the Community, Tribe, and other stakeholders.[9] The decree granted the Community and Tribe senior-most water rights, established that users could divert water for "beneficial use" and "irrigation," and granted that users may "change the point of diversion and the places, means, manner or purpose of the use of the waters to which they are so entitled or any part thereof, *so far as they may do so without injury to the rights of other parties.*"[10] These proceedings hinge on that final point.

## II. FACTUAL & PROCEDURAL BACKGROUND

In 1993, the district court implemented a "Change in Use Rule" specifying how water rights could be severed from one piece of property and transferred to another. Doing so required filing a "sever and transfer application," public notice and comment opportunity, and possibly a district court hearing.[11] At any hearing, the applicant would bear "the burden of establishing a *prima facie* case of no injury to the rights of other parties under the Gila Decree."[12]

In 1996, the district court entered a Water Quality Injunction directing the Water Commissioner to limit diversions of upstream water rights holders should water quality reaching the Tribe fall below certain benchmarks.[13] Then, in 2001, groups including the Tribe and Community filed a complaint against several thousand landowners (collectively, the "Upper Valley Defendants" or "UVDs") allegedly exceeding decreed rights via well pumping.[14] That led to the Upper Valley Forbearance Agreement ("UVFA"), wherein plaintiffs voluntarily dismissed the complaint in return for the UVD agreeing to reduce irrigation entitlements by 1,000 acres.[15] The UVFA also included a provision allowing UVDs to sever and transfer water rights from decreed lands to "Hot Lands" not previously covered by the decree.[16]

In 2008, the United States, Tribe, and Community filed objections to 419 sever-and-transfer applications filed under the UVFA, fifty-nine of which came from Freeport.[17] The district court created a sub-docket

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8. *Id*.
9. *United States v. Gila Valley Irrigation Dist.*, 31 F.3d 1428, 1430 (9th Cir. 1994).
10. *Gila Valley Irrigation Dist.*, 2017 WL 2541042 at *1-2 (emphasis added).
11. *Id*. at *2.
12. *Id*.
13. *Id*. at *3.
14. *Id*.
15. *Id*.
16. *Id*.
17. *Id*.

exclusively for Freeport's applications, from which it chose ten to begin review. Initially, the district court ruled Freeport described parcels with inadequate specificity, holding that they must state the "precise locations of the parcels."[18] Freeport subsequently created more detailed maps and descriptions of relevant lands, which it disclosed during discovery in November 2009.[19]

After an evidentiary hearing, the district court granted the Tribe's motion for judgment as a matter of law in August 2010, denying all Freeport's initially reviewed applications.[20] It concluded (1) Freeport did not present a *prima facie* case showing no injury to Decree parties, (2) Arizona's statutory forfeiture law did not apply, (3) Freeport partially abandoned water rights in one of its parcels, and (4) Freeport would not be allowed to update applications with revised maps.[21]

Freeport's first appeal of the district court order failed, as the Ninth Circuit deemed it "neither a partial nor a final judgment" and thus declined jurisdiction.[22] On September 4, 2014, the district court entered "final judgment with respect to, and in accordance with, all the Court's orders and proceedings on the 419 applications to sever and transfer Decree water rights filed with the Water Commissioner in 2008." Thereafter, the United States, the Community, the Tribe, Freeport, and several other landowners timely filed appeals and cross-appeals.

## III. ANALYSIS

The Ninth Circuit Panel began by addressing jurisdictional questions.[23] After determining the court could only properly claim jurisdiction over select applications on appeal, the Panel took up the merits of Appellant's arguments.[24]

The Panel first considered which applications, if any, were appealable.[25] At the district court, all 2008 sever-and-transfer applications filed by non-Freeport parties were either dismissed without prejudice or voluntarily withdrawn.[26] "The general rule in [the Ninth C]ircuit" states "voluntary dismissals without prejudice do not create appealable, final judgments."[27] Likewise, a withdrawn application does not create an appealable, final judgment.[28] Because "Article III's case-or-controversy requirement precludes federal courts from deciding questions that cannot

18. *Id*.
19. *Id*.
20. *Id*. at *4.
21. *Id*.
22. *Id*.
23. *Id.*
24. *Id.* at *7-*8.
25. *Id*. at *4-*6.
26. *Id*. at *5.
27. *Id*. at *4 (*quoting Romoland Sch. Dist. v. Inland Empire Energy Ctr., LLC*, 548 F.3d 738, 748 (9th Cir. 2008)).
28. *Id*. at *5.

affect the rights of litigants in the case before them,"[29] the Panel determined it lacked jurisdiction over non-Freeport applications.[30] The Court further justified that holding via Federal Rule of Civil Procedure 54(b), which requires that a court expressly direct entry of judgment to achieve finality in a ruling.[31]

Having confined jurisdiction to Freeport, the Court then evaluated that firm's fifty-nine applications.[32] Ultimately, it accepted three covered by the August 2010 order but not involving restrictive covenants, one in which the district court ruled Freeport abandoned its water right,[33] and fourteen of the twenty denied by the district court in its August 2010 order.[34] Thus, from several hundred options, the Court took up only eighteen Freeport applications.

With jurisdiction addressed, the Court moved on to merits. Freeport alleged four issues on appeal. First, the district court erred in granting judgment as a matter of law to Plaintiffs.[35] Second, the district court erroneously denied Freeport's motion to amend applications with revised maps.[36] Third, Arizona's law of statutory forfeiture was improperly applied.[37] And fourth, the district court erred in finding Freeport abandoned water rights on 1.4 acres of one application.[38]

Regarding judgment as a matter of law, Freeport disputed the district court's holding that it had not presented a *prima facie* case of no injury to other Decree parties.[39] To fulfill this burden, Freeport included a generic statement in all applications:

> All that will be changed as a result of this application will be the location of decreed rights and associated point of diversion under the Globe Equity No. 59 Decree. The priorities, volumes of water use and acreage will not change. There will be no net increase or decrease in decreed rights as a result of this proposed severance and transfer.[40]

Freeport provided no further evidence regarding absence of injury, and the district court deemed the vague, generalized statement insufficient to meet the required burden of proof.[41]

This Court not only agreed with the district court, but also highlighted possible injuries arising from proposed transfers.[42] First, the

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29. *Id*. at *4 (*quoting Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 834 (9th Cir. 2014) (internal quotations omitted)).
30. *Id*. at *5.
31. *Id*.
32. *Id*. at *6.
33. *Id*. at *7.
34. *Id*.
35. *Id*. at *8.
36. *Id*. at *10.
37. *Id*. at *12.
38. *Id*. at *14.
39. *Id*. at *8.
40. *Id*.
41. *Id*.
42. *Id*. at *9.

Court discussed a unique Gila River feature—"Cosper's Crossing"—where the river frequently runs dry above ground.[43] When that occurs, upstream users can legally divert the entire river before it reaches that point.[44] Because at least one of Freeport's applications proposed transferring an allotment from downstream of Cosper's Crossing to upstream, the Court noted that change could have broad effects.[45] Specifically, moving an allotment from below to above Cosper's Crossing could cause the crossing to run dry earlier, triggering the provision allowing upstream users to divert the entire river earlier as well.[46]

The Court then discussed how changed locations could impact return flows, and examined transferring a water allotment from a parcel used near the river to one used further away.[47] Though they *take* identical amounts, those may *return* different amounts to the river due to evaporation, soil consumption, or even movement outside the Gila subflow zone.[48] Lastly, the Court highlighted an application that would turn a ground-level diversion into a well. Such a change could impact river salinity, potentially harming downstream users like the Tribe.[49] For those reasons, plus Freeport's failure to address potential cumulative effects of its many applications, the Court held that Freeport did not show its applications would not harm others and thus the district court did not err in rejecting the applications on those grounds.[50]

Freeport next contested the district court's denial of its motion to amend applications with revised maps.[51] The Court, however, found it was unclear whether Freeport ever sought leave to amend those applications.[52] While generally construed liberally to allow amendments, the Court noted Rule 15(b) of the Federal Rules of Civil Procedure was not mandatory.[53] Additionally, because the amended maps constituted "material changes," the Court held allowing Freeport to amend would have prejudiced some parties (and may have prejudiced others).[54]

Arizona's law of statutory forfeiture provided the court's next topic, one on which Freeport finally prevailed. The district court conducted its own analysis of Arizona's forfeiture code, which this Court deemed erroneous because the Arizona Supreme Court had established controlling precedent.[55] The Panel thus held "[t]here was no need to

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43. *Id*.
44. *Id*. (*See United States v. Gila Valley Irrigation Dist.*, 920 F. Supp 1444, 1462-66 (D. Ariz. 1996)).
45. *Id*. at *9.
46. *Id*.
47. *Id.*
48. *Id*.
49. *Id*. at *10.
50. *Id*.
51. *Id*.
52. *Id*.
53. *Id*. at *11.
54. *Id*. at *11-12.
55. *Id*. at *13 (*See San Carlos Apache Tribe v. Superior Court ex rel. Cty. of Maricopa*, 193 Ariz. 195 (1999) (en banc)).

evaluate further the 1919 water code. The Arizona Supreme Court is the final arbiter of Arizona law, and it had already found that statutory forfeiture applies to pre-1919 water rights."[56] Consequently, this Court instructed the district court to reconsider statutory forfeiture on remand.[57]

Finally, the Panel addressed Freeport's appeal denying it abandoned 1.4 acres of water rights in one application.[58] This Court held that while Freeport made some showings contradicting abandonment (its overarching purpose in acquiring lands for water rights, its maintenance of water-related facilities, its paying of related taxes and fees), those did not overcome the countervailing evidence.[59] In particular, because Freeport also made improvements suggesting it no longer wanted or needed the right in question, and because the district court narrowly tailored its finding to 1.4 acres of the 15.5-acre parcel, that ruling was not in error.[60]

## IV. CONCLUSION & IMPLICATIONS

Overall, this case highlights the complexities of water law and related litigation. Between the diverse stakeholders, near-century of prior agreements and proceedings, threshold jurisdictional questions, and multiple issues on appeal, parsing relevant facts and law from this decision to explain its outcomes—including all of affirm, dismiss, reverse, and remand—is challenging.

The Court's most notable decision here was affirming denial of Freeport's sever-and-transfer applications due to noncompliance with the eighty-year-old Decree. That marked a victory for the Community and Tribe, senior-most water rights holders whose downstream location puts the quantity and quality of their available water at particular risk. As this case reinforced, while those groups have legal mechanisms to address upstream conflicts when they occur, the Decree still requires other users to *prevent* such problems in the first place when possible.[61]

56. *Id*.
57. *Id*. at *14.
58. *Id*.
59. *Id*. at *14-17.
60. *Id*. at *17.
61. *Id*. at *9.