Arizona Journal of Environmental Law & Policy
Volume 8 Summer 2018 Issue 3

United States v. Gila Valley Irrigation District: The Application of Statutory Forfeiture to Pre-1919 Water Rights in Arizona, and its Potential Ramifications

Mark A. McGinnis & R. Jeffrey Heilman[1]

ABSTRACT

On June 13, 2017, the Ninth Circuit Court of Appeals issued an opinion in the federal court proceedings relating to the continuing enforcement of the 1935 *Globe Equity* Decree. That opinion held, among other things, that appropriative surface water rights that vested prior to enactment of the 1919 Arizona water code were subject to statutory forfeiture under Arizona law based upon a period of five or more years of non-use, without the necessity of showing intent to surrender the right. The Ninth Circuit's opinion is not binding precedent on the Arizona state courts. Its potential application to water rights within the jurisdiction of the *Globe Equity* court or to claims for pre-1919 water rights within the jurisdiction of the ongoing general stream adjudications in the state courts has far-reaching implications for surface water rights in Arizona. Until the Arizona Supreme Court addresses the issue, there is a tremendous amount of legal uncertainty for the vast quantity of claimants with pre-1919 surface water rights.

The article begins with a brief introduction to the legal doctrine of prior appropriation as it evolved in the American West and continues with a history of the development of the doctrine in Arizona. Next, it traces the history of statutory forfeiture as it applies to surface water rights in Arizona as well as the statutory and legal context in which it arose and was later amended. The article also provides a close reading of both the trial court orders and their subsequent appeal that gave rise to the Arizona Supreme Court's 1999 opinion in *San Carlos Apache Tribe v. Superior Court* and the Ninth Circuit's 2017 opinion in *United States v. Gila Valley Irrigation District*. The article posits that, contrary to the Ninth Circuit's opinion, the Arizona Supreme Court has yet to resolve whether statutory forfeiture applies to pre-1919 surface water rights. It also surveys how similar issues have been treated in other jurisdictions. Finally, it explores questions raised by the Ninth Circuit opinion and its application to surface water rights in Arizona's stream adjudications if the Arizona Supreme Court adopts the Ninth Circuit's holding.

[1] The authors are attorneys with Salmon, Lewis & Weldon, P.L.C., in Phoenix, Arizona. The firm represents parties actively involved in the Gila and Little Colorado River General Stream Adjudications in the Arizona state courts and filed amicus briefs in the federal district court and the Ninth Circuit Court of Appeals in *United States v. Gila Valley Irr. Dist.*, 859 F.3d 789 (9th Cir. 2017). *See infra* note 130.

INTRODUCTION

On June 13, 2017, the Ninth Circuit Court of Appeals issued an opinion in the federal court proceedings relating to the continuing enforcement of the 1935 *Globe Equity* Decree.[2] That opinion held, among other things, that appropriative surface water rights that vested prior to enactment of the 1919 Arizona water code were subject to statutory forfeiture under Arizona law based upon a period of five or more years of non-use, without the necessity of showing intent to surrender the right.[3] The Ninth Circuit's opinion is not binding precedent on Arizona state courts. Its potential application to water rights within the jurisdiction of the *Globe Equity* court or to claims for pre-1919 water rights within the jurisdiction of the ongoing general stream adjudications in the state courts has far-reaching implications for surface water rights in Arizona.[4] This article examines the Ninth Circuit's 2017 *Globe Equity* opinion, discusses prior decisions of the Arizona Supreme Court and courts in other states on related issues, and examines the potential impacts that may occur if the Arizona Supreme Court adopts the Ninth Circuit's treatment of statutory forfeiture as applied to pre-1919 water rights.

I. A BRIEF INTRODUCTION TO PRIOR APPROPRIATION LAW

Two basic legal doctrines apply to surface water in the United States. In the East and the Midwest, where water is abundant, states generally apply the doctrine of riparian rights—a common law doctrine inherited from England.[5] Under the riparian doctrine, a person owning land adjacent to a body of water has the right to make "reasonable use" of the water of the stream simply by virtue of land ownership. Thus, rights to divert and use water from a stream are dependent upon the ownership of land abutting the stream, and there is no "priority" among right holders based upon the date of first use.[6]

As European settlers began to colonize the American West, the arid conditions and scarcity of water made the riparian doctrine unworkable.[7] As compared to the eastern states, usable land abutting bodies of surface water in the West was sparse.[8] The aridity of the region required the use of irrigation to grow crops. The location of ore bodies for mining and fertile soils for irrigation that were not in close proximity to the

---

[2] *See Gila Valley Irr. Dist.*, 859 F.3d at 789. The ongoing enforcement proceedings in *Gila Valley Irrigation District* are commonly referred to as "*Globe Equity*" or "*GE59*" because the lawsuit was initially filed in Globe, Arizona, and was Case No. 59 in the "equity" proceedings before that court. A separate sub-docket was recently created in the *Globe Equity* proceedings, which is commonly referred to as "*GE61"* (No 4:31-cv-00061-SRB). *See Gila Valley Irr. Dist.*, 859 F.3d at 795.

[3] *Gila Valley Irr. Dist.*, 859 F.3d at 805-07.

[4] For a detailed discussion of the history of the general stream adjudications in Arizona, *see* Joseph M. Feller, *The Adjudication that Ate Arizona Water Law*, 49 ARIZ. L. REV. 405 (2007).

[5] *See* Clough v. Wing, 17 P. 453, 455 (Ariz. 1888) ("These [riparian rights] cases state a doctrine very different from the [western] common law. That [riparian] law had its origin in the island of Great Britain, under conditions of climate peculiar to its position, in the path of the Gulf stream, in an atmosphere laden with moisture, which is precipitated with lavish profusion upon that favored spot.").

[6] Sharon Megdal et al., *The Forgotten Sector: Arizona Water Law and the Environment*, 1 ARIZ. J. ENVTL. L. & POL'Y 243, 265 (2011).

[7] In some western states, remnants of the riparian doctrine remain a part of surface water law. *See generally, e.g.*, *In re* Waters of Long Valley Creek Stream System, 599 P.2d 656 (Cal. 1979).

[8] *See* Megdal et al., *supra* note 6, at 265.

stream caused individuals and entities to desire to divert, transport, and use water at locations that were not adjacent to the banks of the stream.[9] In that setting, the amorphous concept of "reasonable use" could not serve to efficiently allocate the limited stream water that was physically available.

The settlers in this arid part of the country, including what later would become the State of Arizona, developed an entirely new water law doctrine—prior appropriation.[10] The doctrine initially developed primarily as the result of mining practices during the California Gold Rush in the mid-1800s.[11] Miners needed water for sluicing, and mining sites were often a considerable distance from the nearest body of water. As a result, miners created diversion structures on streams and used canals and ditches to transport water over great distances. This need for off-stream water use created what remains one of the fundamental differences between the riparian and prior appropriation doctrines: Under prior appropriation, a water user can obtain a water right for land that does not border a stream or other body of water.

Boiled down to its essence, the prior appropriation doctrine may best be expressed by the maxim: "First in time, first in right."[12] The first person to use the waters of a stream has a better or "senior" right as compared to those of subsequent users.[13] During times of shortage, holders of senior rights can enforce those rights against other users with rights that have later priority dates.[14] This is the second fundamental difference between prior appropriation and the riparian doctrine: priority based on time does not apply under the riparian doctrine. The departure from the riparian doctrine served to encourage pioneers to develop land throughout the American West that otherwise would have been uninhabitable under the riparian doctrine. The departure also allowed them to protect their investment, in sweat or equity, in those lands.

II. DEVELOPMENT OF PRIOR APPROPRIATION IN ARIZONA

The Constitution of the State of Arizona, enacted upon statehood in 1912, expressly rejected the doctrine of riparian rights.[15] Even prior to statehood, however, the Territory of Arizona had adopted the prior appropriation doctrine dating back to the first territorial water code, known as the "Howell Code," in 1864.[16]

---

[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *See* W. Maricopa Combine, Inc. v. Arizona Dep't of Water Res., 26 P.3d 1171, 1180 (Ariz. Ct. App. 2001), *review denied* (Ariz. March 19, 2002).
[13] *Id.*
[14] *Id.*
[15] *See* ARIZ. CONST. art. XVII, § 1 ("The common law doctrine of riparian water rights shall not obtain or be of any force or effect in the state."); *see also W. Maricopa Combine*, 26 P.3d at 1178 ("Arizona has always followed the prior appropriation doctrine in an attempt to deal with the scarcity of water.").
[16] *See* Maricopa Cty. Mun. Water Cons. Dist. No. 1 v. Sw. Cotton Co. (*Southwest Cotton*), 4 P.2d 369, 373-74 (Ariz. 1931), *modified and reh'g denied*, 7 P.2d 254 (Ariz. 1932)

Arizona law divides water into two primary categories—percolating groundwater and appropriable water.[17] The threshold question is whether a particular water source constitutes appropriable water, which is subject to appropriation under the Public Water Code,[18] or percolating groundwater, which is governed by a different set of statutory requirements set forth in the Arizona Groundwater Code.[19]

The 1864 Howell Code provided:

> Section 1. All rivers, creeks and streams of running water in the Territory of Arizona are hereby declared public, and applicable to the purposes of irrigation and mining, as hereinafter provided.
>
> Section 2. All rights in acequias, or irrigating canals heretofore established shall not be disturbed, nor shall the course of such acequias be changed without the consent of the proprietors of such established rights.
>
> Section 3. All the inhabitants of this Territory, who own or possess arable and irrigable lands, shall have the right to construct public or private acequias, and obtain the necessary water for the same any convenient river, creek or stream of running water.[20]

Thus, since the enactment of the territory's first water code in 1864, Arizona surface water use has been subject to the prior appropriation doctrine.[21]

Water subject to appropriation in Arizona is currently defined by statute to include "waters of all sources, flowing in streams, canyons, ravines or other natural channels, or in definite underground channels, whether perennial or intermittent, flood, waste or surplus water, and of lakes, ponds and springs on the surface . . . ."[22]

Percolating groundwater is notably absent from the Arizona statutory definition of "appropriable water." In 1931, the Arizona Supreme Court in *Southwest Cotton* interpreted the definition of appropriable water as encompassing the "underflow, subflow or

---

[17] *See generally* John D. Leshy & James Belanger, *Arizona Law Where Ground and Surface Water Meet*, 20 ARIZ. ST. L.J. 657 (1988). The Arizona Supreme Court effectively created a "third" class of water, effluent derived from municipal wastewater treatment plants, in 1989. *See* Arizona Pub. Serv. Co. v. Long, 773 P.2d 988 (Ariz. 1989); *see also generally* Mark A. McGinnis, *Creating a "New" Class of Water—Regulation of Municipal Effluent, Arizona Public Service Co. v. Long, 160 Ariz. 429, 773 P.2d 988 (1989)*, 22 ARIZ. ST. L.J. 987 (1990).

[18] ARIZ. REV. STAT. ANN. §§ 45-141 to -193 (2018). "Appropriable" water includes water on the surface and underground "subflow" that is so closely connected with the surface stream that it is subject to the prior appropriation doctrine. *See Southwest Cotton*, 4 P.2d at 369. For purposes of this article, "surface water" and "appropriable water" are used interchangeably, without differentiating between water on the surface and underground subflow.

[19] ARIZ. REV. STAT. ANN. §§ 45-401 to -704 (2018).

[20] *See Southwest Cotton*, 4 P.2d at 373-74 (citing Territory of Arizona Bill of Rights, art. 22, Comp. Laws 1864-1871, at 25; Howell's Code, ch. 55, §§ 1-3).

[21] *Id.*

[22] ARIZ. REV. STAT. ANN. § 45-141(A) (2018).

undercurrent . . . of a surface stream . . . ."[23] The Court defined "subflow" in narrative terms as "those waters which slowly find their way through the sand and gravel constituting the bed of the stream, or the lands under or immediately adjacent to the stream, and are themselves a part of the surface stream."[24] In 2000, the Arizona Supreme Court adopted a more specific test for determining whether water is appropriable subflow.[25] Pursuant to that opinion, the "subflow zone" along a stream is defined as the "saturated floodplain Holocene alluvium," a geological unit.[26] As a result, Arizona has a bifurcated system of water law that differentiates between appropriable water and percolating groundwater.[27]

Under the Arizona statutes, water may be appropriated for irrigation, domestic, municipal, water power, stock watering, artificial groundwater recharge, mining, recreation, and wildlife uses.[28] Such appropriation may be for personal use by the appropriator or for delivery to consumers.[29] The legal standard for quantifying an appropriative right under Arizona law is governed by the doctrine of beneficial use.[30] More specifically, Arizona statutes provide:

> . . . An appropriator of water is entitled to beneficially use all of the water appropriated on less than all of the land to which the water right is appurtenant, and this beneficial use of the water appropriated does not result in the abandonment or forfeiture of all or any portion of the right.[31]

The exact definition of "beneficial use" and the precise standards for quantifying appropriative rights continue to be litigated in the Gila and Little Colorado River General Stream Adjudications to this day.

Several different legal processes for acquiring appropriative rights have existed over the course of the history of Arizona. Under the common law prior to 1893, Arizona applied the general rule of capture.[32] The common law required a prospective appropriator to manifest its intent to appropriate a given quantity of water from a given source.[33] Two general methods of appropriation existed at that time.[34] The appropriator could either (1) simply apply water to a beneficial use or (2) post a notice and then apply water to a beneficial use. Prior to 1893, Arizona law prescribed no particular form of

---

[23] *Southwest Cotton*, 4 P.2d at 380.
[24] *Id.*
[25] *In re* Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source, 9 P.3d 1069, 1076 (2000), *cert. denied sub nom.* Phelps Dodge Corp. v. United States, 533 U.S. 941 (2001).
[26] *Id.* at 1073.
[27] *See generally* Leshy & Belanger, *supra* note 17.
[28] ARIZ. REV. STAT. ANN. § 45-151(A) (2018).
[29] *Id.*
[30] *Id.* § 45-141(B).
[31] *Id.*
[32] *See* WELLS A. HUTCHINS, WATER RIGHTS IN THE NINETEEN WESTERN STATES 386 (Harold H. Ellis & J. Peter DeBraal eds., 1972).
[33] *Id.*
[34] *Id.*

notice of such intent.[35] Notice at that time included the filing a written document with some governmental office, or even posting a notice to a tree or other structure in a conspicuous location. All that was required of the notice was that its terms were "sufficient to put a reasonably prudent man on inquiry."[36]

In 1893, the Legislature of the Territory of Arizona passed Act No. 86, which took effect on April 13, 1893.[37] The 1893 statute specified the form of notice that was required under the alternative notice method, requiring that the prospective appropriator file a Notice of Intent to Appropriate Water in the County Recorder's Office, followed by beneficial use of the water claimed by the notice.[38] The mere application of water to beneficial use perfected an appropriative right with a priority date as of the date that the water was diverted from the stream and applied to beneficial use.[39] The file-and-posting method allowed the water user to claim a priority date based on the date the notice was filed, so long as the water user exercised reasonable diligence in applying that water to beneficial use.[40]

On June 12, 1919, the Arizona State Legislature enacted the state's first comprehensive Public Water Code ("1919 Code"), which instituted several new requirements for acquiring an appropriative right. Since 1919, a person or entity that desires to appropriate water has been required to file an Application to Appropriate with the designated State agency.[41] This mechanism remains the only way that new users can obtain an appropriative water right without purchasing or otherwise acquiring someone else's existing right. If an individual or entity desires to appropriate water for a new use, it must file an application with the Arizona Department of Water Resources ("ADWR").[42] If ADWR approves the application, it will issue a permit to the applicant to construct any necessary storage or diversion works.[43] The applicant then may proceed to perfect the application by constructing the necessary works and applying the water to a beneficial use as described in the permit.[44] Once the appropriative right has been perfected, ADWR issues a Certificate of Water Right to the applicant.[45] The certificate

---

[35] *See* JOHN N. POMEROY & HENRY C. BLACK, A TREATISE ON THE LAW OF WATER RIGHTS § 52, at 83 (1893).
[36] *Id.*
[37] *See* 1893 Ariz. Sess. Laws, 17th Legis., ch. 86.
[38] Parker v. McIntyre, 56 P.2d 1337, 1339-40 (Ariz. 1936); HUTCHINS, *supra* note 32, at 386-87.
[39] *See Parker*, 56 P.2d at 1339-40; HUTCHINS, *supra* note 32, at 386-88.
[40] *See Parker*, 56 P.2d at 1339-40; HUTCHINS, *supra* note 32, at 386-88. The 1893 statute provided that, if the person or entity did not proceed to construct its works with "reasonable diligence" and complete such construction "within a reasonable time," that lack of diligence would "be held to work a forfeiture of such rights to the water or waters attempted to be appropriated." *See* 1893 Ariz. Sess. Laws, 17th Legis., ch. 86, § 2. The 1893 statute, however, contained no provision relating to "forfeiture" once the works had been completed and the right had been perfected. *See generally id.*
[41] The designated State agency has varied over time. Under the 1919 Code, applications were filed with the State Water Commissioner. The administrative responsibility was subsequently transferred to the State Land Department, then to the Arizona Water Commission, and in 1980 to the Arizona Department of Water Resources ("ADWR"). *See* ARIZ. REV. STAT. ANN. § 45-152(A) (2018).
[42] *See* ARIZ. REV. STAT. ANN. § 45-152(A) (2018).
[43] *Id.* § 45-153(C).
[44] *Id.* § 45-158.
[45] *Id.* § 45-162(A).

sets forth the name and address of the appropriator, along with the date of priority, extent, and purpose of the appropriation.[46]

III. ABANDONMENT AND FORFEITURE

The current controversy surrounding the Ninth Circuit's 2017 *Globe Equity* opinion relates to the ways in which a person or entity can lose an appropriative water right that was perfected under Arizona law prior to 1919. Another common maxim of the prior appropriation doctrine is "use it or lose it." A fundamental purpose of establishment of the doctrine was to ensure that as much water as possible was being put to beneficial use and to prevent waste of water and speculation in water rights. Because beneficial use governs the nature and extent of an appropriative right under prior appropriation, ongoing and continuous use is required. The non-use of a water right can subject the right holder to the loss of the right in a number of ways, which depend, in part, upon when the right was perfected and when the period of non-use occurs.

Prior to enactment of the 1919 Code, an appropriative right could be lost in Arizona only by common law abandonment, which requires a showing of the right holder's intent to abandon.[47] Abandonment requires the non-use of water coupled with the intent to surrender the right, as evidenced by declaration or inferred by the actions of the appropriator.[48]

The 1919 Code created a new way to lose a water right, in the form of statutory forfeiture. Unlike abandonment, statutory forfeiture does not require a showing of intent and allows for the relinquishment of a water right simply by non-use as a condition imposed by statute.[49] The 1919 Code[50] included a provision that is now codified as Section 45-141(C) of the Arizona Revised Statutes,[51] which provides for the loss of a water right, without proof of intent, "[w]hen the owner of a right to the use of water ceases or fails to use the water appropriated for five years."[52] The statute provides that, at the conclusion of the five-year period, "the rights to the use shall cease, and the water shall revert to the public and shall again be subject to appropriation."[53] Immediately

---

[46] *Id.*

[47] *See* Gould v. Maricopa Canal Co., 76 P. 598, 601 (Ariz. 1904), *appeal dismissed*, 195 U.S. 639 (1904) ("[A right of appropriation] may be lost by abandonment, or it may be lost, or it may be lost to another by adverse user on the part of the other continued for the period of the statute of limitations, and in no other way.").

[48] *Id.* ("Abandonment is a matter of intent as such intent may be evidenced by the declaration of the party, or as may be inferred from his acts."); Gila Water Co. v. Green, 241 P. 307, 308 (Ariz. 1925) ("While to create an abandonment there must necessarily be an intention to abandon, yet such an intention is not [an] essential element [of] forfeiture in that there can be a forfeiture against and contrary to the intention of the party alleged to have forfeited.").

[49] A. DAN TARLOCK, LAW OF WATER RIGHTS & RESOURCES § 5:92 Loss of water rights–Forfeiture (West July 2017).

[50] *See* 1919 Ariz. Sess. Laws, ch. 164, § 1.

[51] *See* ARIZ. REV. STAT. ANN. § 45-141(C) (2018). Section 45-141(C) of the Arizona Revised Statutes is central to the issues discussed in this article. Due to its repetitive use herein, it is referred to throughout as "Section 45-141(C)."

[52] *Id.*

[53] *Id.*

following similar language in the 1919 Code was a second sentence: "But nothing herein contained shall be construed as to take away or impair the vested rights which any person, firm, corporation or association may have to any water at the time of passage of this act."[54]

A separate "vested rights" disclaimer also was included in the 1919 Code, as Section 56.[55] This provision remains in the current version of the code in substantively the same form, as A.R.S. § 45-171. It read as follows:

> Nothing in this act contained, shall impair the vested rights of any person association or corporation to the use of water.
>
> Nor shall the rights of any person, association or corporation to take and use water be impaired or affected by any of the provisions of this act where appropriations have been initiated prior to the filing of this act in compliance with laws then existing.

In 1928, the Arizona Legislature deleted the vested rights disclaimer in the forfeiture statue, leaving only the general disclaimer. The reasons for this deletion are not well documented in the legislative record. Among other things, the 1928 Legislature might have determined that, in light of the general disclaimer contained in A.R.S. § 45-171, a more specific disclaimer was not necessary.[56] Regardless, the remaining sentence in Section 45-141(C) was left intact, without amendment, until 1995.

It is generally agreed within the Arizona water bar that appropriative rights which were initiated under Arizona law after the effective date of the 1919 Code can be lost through either common law abandonment or statutory forfeiture. Less consensus exists, however, with regard to whether the forfeiture provisions of the 1919 Code can apply to rights that were initiated prior to enactment of that code. Although the Ninth Circuit (in its 2017 *Globe Equity* opinion) construed Arizona law as applying statutory forfeiture to pre-1919 rights, a different reading of the "vested rights" provision of the 1919 Code supports a conclusion that pre-1919 rights can be lost only through common law abandonment. Because the distinction between forfeiture and abandonment determines (among other things) whether a showing of intent is required, this is an important question of Arizona law on which the Ninth Circuit opinion is not binding precedent.

---

[54] 1919 Ariz. Sess. Laws, ch. 164, § 1.

[55] *Id.* § 56.

[56] The 1928 revisions were part of a comprehensive recodification of the Arizona statutes. *See* 1928 ARIZ. REV. CODE § 3280. Substantial authority exists for the proposition that the 1928 code revisions were not intended to repeal or amend any existing substantive law. *See* Washington v. Maricopa Cty., 152 F.2d 556, 559 n.5 (9th Cir. 1945), *cert. denied*, 327 U.S. 799 (1945) ("[T]he purpose of the 1928 code was to condense language and avoid redundancy. The presumption has been indulged that when a word, a phrase, or a paragraph from the 1913 code is omitted from the code of 1928, the intent is rather to simplify the language without changing the meaning, than to make a material alteration in the substance of the law itself."); State v. Glenn, 131 P.2d 363, 366 (Ariz. 1942) ("[U]nless a change in the language of the 1928 code clearly shows that the legislature intended to make a change in the meaning of a previous law, it will be presumed that the change was in form only and that the substance of the previous law was still in effect.").

IV. THE 1935 *GLOBE EQUITY* DECREE

Interpretation of the Ninth Circuit's 2017 *Globe Equity* opinion requires an understanding of the procedural and jurisdictional background of that federal court litigation. In 1925, on behalf of the San Carlos Apache Tribe (SCAT), the Gila River Indian Community (GRIC), and the beneficiaries of the San Carlos Irrigation Project (SCIP), the United States filed suit in the United States District Court for the District of Arizona to adjudicate the rights of parties to divert and use water from the mainstem of the Gila River in an area stretching from just east of the Arizona/New Mexico state line to just upstream from the confluence of the Gila and Salt Rivers southwest of Phoenix.[57] The parties eventually settled after years of litigation and, on June 29, 1935, the court entered a decree (Decree), declaring the rights of those parties to divert and use those Gila River mainstem waters.[58] Although the United States and the tribal entities claimed (among other things) rights to water under federal law, the water rights for the upstream non-Indian parties were, as a general matter, adjudicated and decreed pursuant to Arizona law.[59]

After entry of the 1935 Decree, the federal district court retained continuing jurisdiction to enforce the Decree. Various enforcement issues have been litigated in that court, on a virtually continuous basis, for the more than eight decades since the Decree was entered.[60] In 1993, the district court entered an order enacting a "Change in Use Rule" that provided a procedure for severing water rights from one piece of property subject to the Decree and transferring it to another.[61] In 2001, GRIC, SCAT, the United States, and the San Carlos Irrigation and Drainage District[62] filed a post-judgment complaint asking the court to enforce the Decree against individual landowners who they alleged were pumping underground sub-flow of the Gila River and were, as a result, exceeding their allocation under the Decree.[63] In 2007, the parties to the case entered into the Upper Valley Forbearance Agreement (UVFA), which included a provision that individual landowners could sever and transfer water rights from decreed lands to lands that were not subject to the Decree.[64] Pursuant to the UVFA, a number of landowners

---

[57] *Gila Valley Irr. Dist.*, 859 F.3d at 794.
[58] *Id.*
[59] *Id.*
[60] *See, e.g.*, Gila Valley Irr. Dist. v. United States, 118 F.2d 507 (9th Cir. 1941); United States v. Gila Valley Irr. Dist., 454 F.2d 219 (9th Cir. 1972); United States v. Gila Valley Irr. Dist., 804 F. Supp. 1 (D. Ariz. 1992), *aff'd in part, vacated in part*, 31 F.3d 1428 (9th Cir. 1994); United States v. Gila Valley Irr. Dist., 961 F.2d 1432 (9th Cir. 1992); United States v. Gila Valley Irr. Dist., 920 F. Supp. 1444 (D. Ariz. 1996), *aff'd*, 117 F.3d 425 (9th Cir. 1997); San Carlos Apache Tribe v. United States, 272 F. Supp. 2d 860 (D. Ariz. 2003), *aff'd*, 417 F.3d 1091 (9th Cir. 2005).
[61] *Gila Valley Irr. Dist.*, 859 F.3d at 794-95.
[62] The San Carlos Irrigation and Drainage District is a non-Indian irrigation district established under Arizona state law that holds certain rights to store and divert water from the Gila River mainstem as part of SCIP. *See* Brophy v. United States, 231 F.2d 437, 437-38 (9th Cir. 1956), *cert. denied*, 351 U.S. 927 (1956).
[63] *Gila Valley Irr. Dist.*, 859 F.3d at 795.
[64] *Id.*

filed severance and transfer applications with the district court.[65] The United States, GRIC, and SCAT (United States and Tribes) filed objections to many of the severance and transfer applications, which raised the issue of whether statutory forfeiture applied to pre-1919 water rights under Arizona law.[66] The district court determined that statutory forfeiture did not apply to those rights. The United States and Tribes took an appeal to the Ninth Circuit Court of Appeals, which resulted in the 2017 *Globe Equity* opinion.[67]

V. THE ARIZONA SUPREME COURT'S 1995 *SAN CARLOS* OPINION

The Ninth Circuit's 2017 *Globe Equity* opinion relies upon a prior decision by the Arizona Supreme Court on a related issue. In 1995, the Arizona Legislature enacted numerous amendments to the Public Water Code. One of those amendments added new language to Section 45-141(C), as reflected in the bolded text below:

> **Except as otherwise provided in this title or in title 48,** when the owner of a right to the use of water ceases or fails to use the water appropriated for five successive years, the right to the use shall cease, and the water shall revert to the public and shall again be subject to appropriation. **This subsection or any other statutory forfeiture by nonuse shall not apply to a water right initiated before June 12, 1919.**[68]

SCAT and other Apache Tribes filed a special action directly with the Arizona Supreme Court, challenging the 1995 amendments on various grounds.[69] The Supreme Court accepted jurisdiction and remanded the issues to the Maricopa County Superior Court for hearing and decision.[70] The Supreme Court reviewed and affirmed the superior court's decision in its 1999 *San Carlos* opinion.[71]

In reviewing the superior court's decision, the Supreme Court considered whether the last sentence of Section 45-141(C), as amended, was unconstitutionally retroactive. In analyzing the possible retroactive application of Section 45-141(C) and amendments to several other provisions of the water code, the court began with the proposition that "the Legislature may not . . . change the legal consequence of events completed before the statute's enactment."[72] In particular, the Legislature "cannot revive rights that have been lost or terminated under the law as it existed at the time of an event and that have vested in otherwise junior appropriators."[73] On that basis, the Supreme Court found that "those provisions of [the 1995 amendments] that retroactively alter vested substantive rights violate the due process clause, article II, section 4 of the Arizona Constitution."[74]

---

[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] 1995 Ariz. Sess. Laws 18, ch. 9, § 4. (emphasis added.)
[69] *See* San Carlos Apache Tribe v. Superior Court, 972 P.2d 179, 187, 204 (Ariz. 1999) (en banc).
[70] *Id.*
[71] *Id.*
[72] *Id.* at 205-06.
[73] *Id.*
[74] *Id.*

The Supreme Court then analyzed each of the 1995 amendments, including amendments to Section 45-141(C), "for true retrospective effect."[75] Regarding Section 45-141(C), the court found that the last sentence of the amended statute "eliminate[d] any possibility of forfeiture for rights initiated before June 12, 1919."[76] As a consequence, the court found that the last sentence of Section 45-141(C) "create[d] a new and unconstitutional protection for pre-1919 water rights that may have been forfeited and vested in others under the law existing prior to 1995."[77]

The court made no finding regarding the bolded language in the first sentence of Section 45-141(C), which states: "Except as otherwise provided in this title or in title 48 . . . ."[78] Thus, the court did not discuss the general "vested rights" provision in A.R.S. § 45-171. The *San Carlos* court also engaged in no substantive analysis of forfeiture or abandonment of pre-1919 water rights under Arizona law as it existed prior to 1995.

VI. THE NINTH CIRCUIT'S 2017 *GLOBE EQUITY* OPINION

The Ninth Circuit issued its opinion on the appeal in the *Globe Equity* case in June 2017.[79] The court reviewed the decision by a federal district judge (Hon. Susan R. Bolton),[80] who had determined that Section 45-141(C), as passed by the Legislature in 1919 and independent of the 1995 amendments, did not apply to appropriative rights that vested before the statute's 1919 enactment.[81] The district court found that, under Arizona law, statutory forfeiture did not apply to pre-1919 vested rights.[82] The Ninth Circuit characterized the district court decision as follows:

> The district court decided to conduct an independent analysis to determine whether Arizona's 1919 water code permitted the application of statutory forfeiture (which was created by the code) to water rights which vested before the passage of the code in 1919. In other words, the district court asked whether Arizona's water law provided an alternative source for the rule contained in the offending clause of § 45-141(C).
>
> Based on a savings clause in the 1919 code, and Nevada cases interpreting a similar clause in Nevada's water code of 1913, the district court concluded that water rights which vested prior to 1919 could not be lost through statutory forfeiture See Laws of Ariz., Ch. 164, § 1 (1919); *United States v. Orr Water Ditch Co.*, 256 F.3d 935, 941-43 (9th Cir.

[75] *Id.* at 206.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Gila Valley Irr. Dist.*, 859 F.3d at 805-07.
[80] Judge Bolton was previously a Maricopa County (Arizona) Superior Court Judge and later became a Judge of the United States District Court in and for the District of Arizona. She was the state trial judge at the time of the Arizona Supreme Court's 1999 *San Carlos* decision. *See* discussion in Section V, *supra*.
[81] *See Gila Valley Irr. Dist.*, 859 F.3d at 805-07.
[82] *Id.*

> 2001); *In re Manse Spring & Its Tributaries*, 108 P.2d 311, 315-16 (Nev. 1940). Thus, the district court held that Arizona water law contained an almost identical rule prior to the 1995 amendment.[83]

On appeal, the Ninth Circuit rejected the district court's interpretation of Arizona law, finding that it "was foreclosed . . . by the Arizona Supreme Court's holding in *San Carlos Apache Tribe.*"[84] According to the Ninth Circuit, "by finding § 45-141(C) unconstitutionally retroactive, the Arizona Supreme Court necessarily held that the 1995 amendment constituted a change in the law."[85]

The Ninth Circuit noted the language of the *San Carlos* opinion analyzing Section 45-141(C), specifically the court's finding that the statute "created a new and unconstitutional protection for pre-1919 water rights that may have been forfeited and vested in others under the law existing prior to 1995."[86] The Ninth Circuit then concluded:

> In order for this "new" provision to be unconstitutionally retroactive, it must have changed the law, prior to this point, water rights which vested before 1919 were subject to statutory forfeiture.
>
> Thus, the district court erred. There was no need to evaluate further the 1919 water code. The Arizona Supreme Court is the final arbiter of Arizona law, and it has already found that statutory forfeiture applies to pre-1919 water rights.[87]

The Ninth Circuit itself acknowledged that the question before it was an issue of Arizona law.[88] Thus, the Ninth Circuit's opinion constitutes a federal court's interpretation of a state court's prior decision, in an attempt to determine how that state court would rule on an issue of state law.

VII. REVIEW OF JUDGE BOLTON'S DECISIONS IN *SAN CARLOS* AND *GLOBE EQUITY*

A comparative review of Judge Bolton's decisions in *San Carlos* and *Globe Equity* yields interesting results. Judge Bolton was the state superior court judge assigned to the Gila River General Stream Adjudication when the *San Carlos* case first arose in the 1990s and later became the federal district court judge to which the *Globe Equity* case was assigned in the 2000s. Having presided over the two largest water rights cases in recent Arizona history, Judge Bolton has substantial experience and expertise in dealing with these matters. She issued the 1996 state superior court decision that was upheld in

[83] *Id.*
[84] *Id.*
[85] *Id.* at 806 (citing *San Carlos*, 972 P.2d at 189-90).
[86] *Id.* at 807 (citing *San Carlos*, 972 P.2d at 206).
[87] *Id.*
[88] *Id.*

San Carlos[89] and the 2010 federal district court decision that was overturned in *Globe Equity*.[90] Although lawyers can (and likely will) argue about the analyses by the two different appellate courts in *San Carlos* and *Globe Equity*, Judge Bolton's trial court decisions in the two cases provide unique insight into the differences between the issues that were before the two appellate courts.

In her 1996 superior court decision, Judge Bolton struck down the 1995 amendments to Section 45-141(C) as unconstitutionally retroactive.[91] She described the 1995 amendments as "add[ing] language making forfeiture for non-use inapplicable to rights initiated before June 12, 1919."[92] In examining the retroactive effect of the 1995 amendments, Judge Bolton relied upon prior Arizona precedent on retroactive changes in statutes:

> In *Hall v. ANR Freight System, Inc.*, 149 Ariz. 130, 717 P.2d 434 (1986), the Arizona Supreme Court had the opportunity to consider the issue of retroactivity as it applied to the Uniform Contribution Among Tortfeasors Act, A.R.S. § 12-2501 *et seq.* The Court found that the legislature intended that the Act apply retroactively to accidents occurring before the effective date of the statute based on the following language contained in Section 3 of the act, 'The provisions . . . only apply to actions filed on or after the effective date of this act.' Noting the general rule of statutory construction, "that the language of a statue is best and more reliable index of its meaning, and where language is clear and unequivocal, it is determinative of its construction,'" *Id.* at 137, 717 P.2d at 441 (quoting *Arizona Security Center, Inc. v. Arizona*, 142 Ariz. 242, 244, 689 P.2d 185, 187 (App 1984)), the Court found that the language in that statute admits of no ambiguity and was intend to apply retroactively to accidents occurring before the effective date of the act. Similarly in this case, although the word "retroactive" is not used in Section 24, the language of this statute admits of no ambiguity and unequivocally attempts to apply the statutory changes to the pending adjudications and to water rights existing before the date of the statutory enactment.
>
> In *Hall*, the Court noted that the recognition that the statue was retroactive and intended to reach events occurring prior to the act's effective date was not dispositive of whether the statutory change was constitutionally permissible. The application of a statutory amendment which is merely procedural may be applied to a pending case or substantive rights. Statutes which retroactively affect substantive rights are prohibited when those substantive rights are vested. The issue then in the *Hall* case was

[89] *See* Order, *In re* Gen. Adjudication of All Rights to Use Water in the Gila River Sys. & Source, Nos. W-1, W-2, W-3, W-4 (Consolidated) (Ariz. Super. Ct. Maricopa Cty. Aug. 30, 1996) [hereinafter 1996 Bolton Decision].
[90] *See* Order, United States v. Gila Valley Irr. Dist., Case No. CV 30-0061-TUC-SRB (D. Ariz. Aug. 30, 2010) [hereinafter 2010 Bolton Decision].
[91] *See* 1996 Bolton Decision, *supra* note 89, at 8-15.
[92] *Id.* at 2.

> whether the substantive right to assert contributory negligence of a plaintiff as a complete defense to a case alleging the defendant's negligence is vested before a lawsuit is filed. The Supreme Court held that it was not. "Clearly, the mere fact that the Act applies to prior accidents does not make the Act retroactive in effect. Nor does the fact that the Act affects a substantive legal right render it retroactive. The critical inquiry in retroactivity analysis is not whether a statute affects a substantive right but whether a statute affects a *vested* right." *Id.* at 139, 717 P.2d at 443 (emphasis in original)
>
> The rule is that legislation may not retroactively disturb vested rights. The Supreme Court defined vested rights as follows, '[A] right vests only when it is actually assertable as a legal cause of action or defense or is so substantially relied upon that retroactive divestiture would be manifestly unjust.' *Id.* at 140, 717 P.2d at 444.
>
> The rights of the parties in the Gila and Little Colorado general stream adjudication are substantive vested rights. The purpose of the general stream adjudications is to quantify and prioritize already existing property rights to appropriable water and reserved water. That these rights exist and are property rights is not questioned. The purpose of the adjudication is to document in a Court decree the rights already existing and the priority in which they exist in relation to others' rights. **Neither the federal reserved rights nor the state-law based water rights that existed on March 17, 1995, can be changed by HB 2276. Therefore, despite the clear expression of retroactivity contained in Section 24, any amendments contained in HB 2276 that change the substantive law existing prior to March 17, 1995, are an unconstitutional attempt to affect substantive vested rights to water.**[93]

Based upon this analysis, Judge Bolton in her 1996 decision determined that the 1995 statutory amendments could have no legal effect on the Arizona law as it existed prior to 1995.[94] Specifically with respect to Section 45-141(C), however, she also stated: "When a future controversy arises on these issues, the Court will review and apply the law as it existed when the parties in the case perfected their rights to water. If the state law parties are correct[,] that law may be the law now codified in [the 1995 amendments]."[95] Thus, in her 1996 decision, Judge Bolton did not reach the separate question of whether the forfeiture provisions under the 1919 Code could be applied to appropriative rights that were initiated prior to 1919. Rather, she found that, whatever the law was before 1995, the Arizona Legislature could not retroactively amend it in 1995.

---

[93] *Id.* at 9-11 (emphasis added).
[94] *Id.*
[95] *Id.* at 15.

In her 2010 decision in the *Globe Equity* case, conversely, Judge Bolton addressed the substantive Arizona law as it applied prior to the 1995 amendments.[96] In that decision, she reviewed the Arizona Supreme Court's 1999 *San Carlos* opinion.[97] She stated that the *San Carlos* court had

> [C]oncluded that, by explicitly exempting pre-1919 water rights from forfeiture in 1995, the Legislature provided protection for pre-1919 water rights that may have already been forfeited before 1995 to the detriment of junior water right appropriators that had acquired rights as of the result of the possible forfeitures. . . . In other words, the 1995 amendments had possibly changed the legal consequences of events completed before 1995 and thereby affected junior appropriators' vested property rights. The court therefore concluded that, by their language, the 1995 amendments were invalid.[98]

Judge Bolton viewed the question before her in *Globe Equity* in 2010 as different from the retroactivity question before the Arizona courts in *San Carlos* in 1996:

> The question that is relevant to the case before this Court and **that the Supreme Court did not consider in *San Carlos Apache Tribe*, or any other case**, is whether the terms of the 1919 Water Code actually permitted the five-year forfeiture provision to be applied to pre-1919 water rights in the first place, notwithstanding the Legislature's 1995 amendments. The answer to that question is no.[99]

Upon considering the "vested rights" clauses of the 1919 Code and decisions from courts in other states with similar statutes,[100] Judge Bolton held that "Arizona's forfeiture decision does not apply to pre-1919 water rights by the terms of the 1919 Water Code; pre-1919 rights can be lost only in accordance with the law that was in place in Arizona before 1919—the law of abandonment and adverse possession."[101]

The Ninth Circuit disagreed with Judge Bolton's 2010 conclusion with regard to whether the Arizona Supreme Court had decided the question of the forfeiture of pre-1919 rights (and not just the retroactivity of the 1995 amendments) in *San Carlos*.[102] The Ninth Circuit found that the Arizona Supreme Court, in ruling on the 1995 amendments, also necessarily decided that pre-1919 rights were subject to forfeiture under Arizona law as it existed prior to those 1995 amendments.[103] Having found that the Arizona Supreme Court decided that issue in *San Carlos*, the Ninth Circuit determined that such decision

---

[96] *See* 2010 Bolton Decision, *supra* note 90, at 37-41.
[97] *Id.* at 38.
[98] *Id.*
[99] *Id.* (emphasis added).
[100] *See* discussion in Section VIII, *infra*.
[101] *See* 2010 Bolton Decision, *supra* note 90, at 40.
[102] *Gila Valley Irr. Dist.*, 859 F.3d at 807.
[103] *Id.*

precluded Judge Bolton (as a federal district judge) from reaching the contrary result.[104] Therefore, the Ninth Circuit overturned Judge Bolton's 2010 decision and never reached the substantive issue on its merits.[105]

A federal circuit court of appeals overturning a decision of a federal district judge on an issue of state law based upon a prior decision of a state supreme court is perhaps not surprising. The present context, however, where the district judge also previously served as the state court water judge presiding over the case from which the prior state supreme court decision arose (and whose decision the state supreme court affirmed),[106] lends additional credence to Judge Bolton's analysis of the substantive issues, especially when the Ninth Circuit found that it was precluded by the Arizona Supreme Court decision and never itself reached that issue.

VIII. PRECEDENT FROM OTHER STATE COURTS

The federal district court in *Globe Equity*, in addition to analyzing the language of Arizona's 1919 Code, also relied upon precedent from other state courts.[107] Nevada's surface water code, for instance, was first enacted in 1913.[108] Like Arizona's 1919 Code, Nevada's 1913 Code included a strict statutory forfeiture provision that applied after non-use for a period of five years and did not require a showing of intent.[109] The Nevada Supreme Court interpreted that 1913 Code in its 1940 *Manse Spring* decision.[110] There, Joseph Yount had begun diverting waters from a spring in 1877 for irrigation and domestic purposes.[111] The water was put to beneficial use continuously until 1929, when Yount's successor-in-interest passed away.[112] For seven years, the subject water right was not put to beneficial use. A junior water user brought suit and argued, among other things, that the water right had been forfeited under the forfeiture provision of Nevada's 1913 Code.[113] Nevada's 1913 Code included a savings clause that was nearly identical to Arizona's, and it provided that the 1913 Code could not impair or affect water rights that had vested prior to enactment of the code.[114] By virtue of that savings clause, the Nevada Supreme Court in 1940 held that the statutory forfeiture provision in the 1913 Code could not apply to pre-code water rights.[115] In 1992, the Ninth Circuit revisited the *Manse*

---

[104] *Id.*
[105] *Id.*
[106] *See San Carlos*, 972 P.2d at 202 ("For the most part, we agree and affirm."). The *San Carlos* court used language regarding the unconstitutional retroactivity of Section 45-141(C) that was similar to that used by Judge Bolton in her 1996 decision and reached the same result that Judge Bolton had reached. *Compare San Carlos*, 972 P.2d at 190, *with* 1996 Bolton Decision, *supra* note 89, at 25.
[107] *See* 2010 Bolton Decision, *supra* note 90, at 39-40.
[108] 1913 NEV. STAT. 140, § 8 [hereinafter Nevada 1913 Code].
[109] *See In re* Manse Spring and Its Tributaries, Nye Cty., 108 P.2d 311, 314 (Nev. 1940) (quoting 1913 NEV. STAT. 140, § 8).
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.* at 315-16.
[115] *Id.* at 316 ("Prior to 1913 the law said that the water users of that day would have and hold the use of such water until the same should be abandoned, and, as we have seen, in abandonment the intent of the

Spring decision and affirmed the pre-code/post-code distinction: "[A] water right that can be lost through mere non-use is something less than a water right that may be lost only through intentional abandonment. The Nevada legislature did not want to diminish the pre-1913 rights."[116] Thus, the Nevada precedent, as confirmed by the Ninth Circuit in its own 1992 *Alpine* decision, is arguably inconsistent with the Ninth Circuit's 2017 *Globe Equity* opinion with respect to the similar Arizona statutes.

Other states have applied statutory forfeiture provisions to pre-water code appropriative rights.[117] For instance, the Nebraska Supreme Court has applied its forfeiture statute to water rights that pre-date the statute itself.[118] The Nebraska court justified this decision by citing pre-code statutes requiring continuing beneficial use of an appropriative right.[119] The Nebraska court did not, however, consider a statutory "vested rights" provision, nor did it specifically examine the differences between abandonment and forfeiture.[120] The Washington Supreme Court has found that Washington's five-year statutory forfeiture provision applies to pre-statute water rights and that the application of that statute does not constitute an unconstitutional taking of a private property right.[121] Texas has adopted a somewhat similar approach.[122] In addition, the California Supreme Court found that a 1895 statute regarding abandonment was actually a forfeiture statute and thus applied a five-year non-use period to an 1862 water right.[123]

The rationale for many of these cases applying statutory forfeiture to pre-code water rights is that forfeiture is merely a codification of either beneficial use or abandonment.[124] The more reasoned legal conclusion under Arizona law, however, is that forfeiture and abandonment are distinct doctrines and that forfeiture statutes are not simply the codification of common law abandonment. As discussed above, Arizona courts have consistently treated forfeiture and abandonment as separate mechanisms for the loss of a water right due to non-use.[125] No Arizona precedent exists for the proposition that an appropriative right could be lost solely through non-use, without a showing of intent, prior to enactment of the 1919 Code.

---

water user is controlling. To substitute and enlarge upon that by saying that the water user shall lose the water by failure to use for a period of five years, irrespective of the intent, certainly takes away much of the stability and security of the right to the continued use of such water.").

[116] United States v. Alpine Land & Reservoir Co., 983 F.2d 1487, 1496 (9th Cir. 1992).

[117] *See* Janet C. Neuman & Keith Hirokawa, *How Good Is an Old Water Right? The Application of Statutory Forfeiture Provisions to Pre-Code Water Rights*, 4 U. DENV. WATER L. REV. 1, 18 (2000) (discussing the treatment of pre-water code appropriative rights in various states with regard to statutory forfeiture provisions).

[118] *In re* Birdwood Irr. Dist. Water Div. No. 1-A, 46 N.W.2d 884, 887-88 (Neb. 1941).

[119] *Id.* The Nebraska Supreme Court revisited and upheld that decision in *In re* Water Appropriation No. 442A, 313 N.W.2d 271, 274 (Neb. 1981).

[120] *See generally Birdwood Irr. Dist.*, 46 N.W.2d at 884.

[121] State Dep't of Ecology v. Grimes, 852 P.2d 1044, 1055 (Wash. 1993).

[122] Texas Water Rights Comm'n v. Wright, 464 S.W.2d 642, 644 (Tex. 1971). The water rights at issue in that Texas case, however, were permitted under a previous code rather than pre-code rights. *Id.*

[123] Smith v. Hawkins, 42 P. 453, 453 (Cal. 1895).

[124] *See generally* Peter R. Anderson & Aaron J. Kraft, *Why Does Idaho's Water Law Regime Provide for Forfeiture of Water Rights?*, 48 IDAHO L. REV. 419, 445 (2012).

[125] *See* Section III, *supra*.

IX. REMAINING QUESTIONS

The Ninth Circuit's 2017 *Globe Equity* opinion interprets important provisions of Arizona water law. As the Ninth Circuit acknowledged, however, "[t]he Arizona Supreme Court is the final arbiter of Arizona law."[126] Ninth Circuit opinions are only persuasive authority in Arizona courts and do not constitute binding precedent for those state courts on issues of state law.[127] Consequently, if and when the identical issue is raised to the Arizona Supreme Court and if that court finds that statutory forfeiture under the 1919 Code does not apply to appropriative rights initiated prior to 1919, the Ninth Circuit's 2017 treatment of statutory forfeiture's application to pre-1919 water rights would have no binding effect on Arizona law.[128]

Taken together, the Gila and Little Colorado River General Stream Adjudications pending in the Arizona state courts include tens of thousands of parties and tens of thousands of water rights claims.[129] The procedure prescribed by statute allows parties to file objections to ADWR's analyses of each of those claims.[130] Thus, it is reasonable to assume that at least thousands of objections have been or will be filed to the claims in those Adjudications. Therefore, it is virtually inevitable that the Arizona courts (and likely the Arizona Supreme Court) eventually will need to determine whether the forfeiture provisions in the 1919 Code apply to appropriative rights that were initiated before June 12, 1919.[131]

The Arizona courts' resolution of that issue remains uncertain at this time, especially given the Ninth Circuit's 2017 *Globe Equity* opinion. Perhaps the Arizona courts will find, as the Ninth Circuit did, that the issue was conclusively decided in *San Carlos* and that the 1919 forfeiture provision applies to pre-1919 rights. Or perhaps the courts will find, as Judge Bolton did in her 2010 decision, that *San Carlos* did not decide the issue. If the issue was left unresolved as a matter of Arizona law after *San Carlos*, some future Arizona court will need to examine the merits of that question (as Judge Bolton did in 2010) and decide it definitively for purposes of Arizona law.

If the Arizona courts decide that the 1919 forfeiture provision, on its face, applies to rights initiated before June 12, 1919, the courts then likely will need to determine

---

[126] *Gila Valley Irr. Dist.*, 859 F.3d at 807.

[127] *See* Planning Group of Scottsdale, L.L.C. v. Lake Mathews Mineral Props., Ltd., 246 P.3d 343, 348 (Ariz. 2011) (citations omitted).

[128] *See id.* Furthermore, because the Ninth Circuit opinion was ruling on an issue of Arizona state law, such a decision by the Arizona Supreme Court could be grounds for a subsequent reversal of that decision with regard to the application of Arizona law on that issue in the *Globe Equity* proceeding itself. *See id.* at 348-49.

[129] *See* Feller, *supra* note 4, at 439.

[130] *See* ARIZ. REV. STAT. ANN. § 45-256 (2018).

[131] The authors, on behalf of the Salt River Project Agricultural Improvement and Power District and Salt River Valley Water Users' Association, filed a motion in the Gila River General Stream Adjudication in December 2017, requesting that the superior court address this legal issue. *See* Salt River Project's Motion to Initiate Contested Case and Designate Issue of Broad Legal Importance Regarding Forfeiture of Pre-1919 Rights, Maricopa County Superior Court, Cases Nos. W-1 through W-4 (December 17, 2017). That motion remains pending as of the date of this publication.

whether constitutional protections of vested private property rights preclude that application. If statutory forfeiture did not exist prior to June 1919, can a person or entity that possessed a vested right before that date have its rights affected by that substantive legislative enactment? That question raises a constitutional issue that is, in some ways, similar to (but perhaps in the reverse of) the arguments presented regarding the retroactive effect of the 1995 amendments in *San Carlos*.[132]

If the Arizona courts find that the 1919 forfeiture provision can apply to pre-1919 rights *at all*, they then likely will need to consider when the period of non-use occurred. Although a pre-1919 right perhaps can be forfeited based upon five years of non-use that occurred after the effective date of the 1919 Code, a different issue arguably arises with respect to non-use that occurred prior to the 1919 Code. Could the Arizona Legislature constitutionally enact a statute in 1919 that created a forfeiture of a pre-1919 water right based upon non-use that occurred before 1919?

Additional, but related, questions arise with respect to the exceptions to forfeiture under the 1919 Code. That code provided that parties may present evidence for an exception to the application of the terms of the 1919 code before a court in equity..[133] No court has yet determined whether and how such exceptions apply to rights in specific instances. Those legal questions are likely to be raised in the context of litigating the tens of thousands of individual claims that remain at issue in the two general stream adjudications.

X. FUTURE IMPLICATIONS

Given the sheer number of appropriative water rights claims that remain unresolved in Arizona, substantial legal uncertainty exists with regard to application of the forfeiture provisions of the 1919 Code to rights that were initiated before its June 12, 1919 effective date. Resolution of the issue will have significant impacts on individual water rights claimants, regardless of how the courts decide it. Because the essence of prior appropriation rests on the *relative priority* of one's water rights, issues that affect the existence or priority date of any party's rights necessarily have an impact on the priority and certainty of all other rights. The 1935 Decree in *Globe Equity* consists of multiple pages of tables that list the decreed rights in descending priority order from the oldest to the most recent. The final decree in each of the two pending general stream adjudications, if and when completed, is likely to have a similar format. Thus, the priority and certainty of a person or entity's water right depends not only on the court's decisions with respect to that right, but also on the decisions with regard to the rights of any person or entity whose water rights appear above (i.e., are "senior to") that right in the decree tables.

Additional uncertainty also arises with regard to the legal distinction between forfeiture and abandonment and the allocation of the burden of proof in both instances. Because many of the claims to appropriative rights in Arizona are based upon water uses

[132] *See* discussion in Section V, *supra*.

[133] *See* 1919 Ariz. Sess. Laws, ch. 164, § 28.

that first occurred before and soon after the start of the twentieth century, historical records necessary to support such claims are often sparse. Records of annual amounts of water diverted and used over the course of the last century or more are often non-existent. That relative dearth of historical records has important ramifications for proving up the existence or loss of a water right. Depending on how the burden of proof is allocated, the difference between abandonment (which requires a showing of intent) and forfeiture (which requires mere evidence of non-use or lack of evidence of use) can be determinative as to some claims.

As a practical matter, the importance of *relative priority* for appropriative rights also can have strategic implications for what position various parties might decide to take on the legal question of whether forfeiture under the 1919 Code applies to rights initiated prior to June 12, 1919. Water rights for federal Indian reservations and other federal enclaves are often based upon federal law, and it is generally considered that such rights are not subject to forfeiture or abandonment under state law. Thus, those parties generally take the position that state appropriative rights are subject to statutory forfeiture, regardless of whether they were initiated before or after June 12, 1919. For parties whose claims are based primarily upon Arizona law, however, the answer is much less clear, and the impacts of a legal ruling on this issue (one way or the other) are much more difficult to predict. Depending upon where a state law right holder believes its rights will fall on the priority table in the final decree and what portion of its rights it believes might be subject to statutory forfeiture if the 1919 Code applies to pre-1919 rights, the Ninth Circuit's treatment may be beneficial or detrimental. A party might fare better (1) if forfeiture does not apply pre-1919 rights, thereby preserving the pre-1919 rights of that party and every other party, or (2) if forfeiture applies to pre-1919 rights, thereby perhaps resulting in the forfeiture of a portion of that party's pre-1919 rights but also resulting in the forfeiture of a greater proportion of the rights of those parties with more senior priority dates, thus effectively moving the remaining portion of that party's pre-1919 rights further up the priority table.

Parties cannot know the answer to any of these questions unless and until the Arizona courts make a final decision on whether, as a matter of law, forfeiture under the 1919 Code applies to rights initiated prior to June 12, 1919.

CONCLUSION

The general stream adjudications in Arizona began in the 1970s. During the intervening decades, the courts have addressed and resolved many significant issues of Arizona water law. The Ninth Circuit's 2017 *Globe Equity* decision highlights an important issue that remains to be finally resolved. Unless and until the Arizona courts definitively address and resolve the legal question of whether forfeiture under the 1919 Code applies to pre-1919 rights, substantial uncertainty will remain with regard to the priority and certainty of thousands of water rights claims in the state.